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FEDERAL MARITIME COMMISSION

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Washington, D.C.

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CONTENTS

	Page
Table of Cases Reported	v
Docket Numbers of Cases Reported	xii
Table of Cases Cited	xviii
Decisions of the Federal Maritime Commission	1
Table of Commodities	817
Index Digest	819

TABLE OF CASES REPORTED

	Page
Abbott Laboratories v. Venezuelan Line	426
Agreement No. 57–96, Pacific Westbound Conference—Extension of Authority for Intermodal Service	289
Agreement No. 8080–11, Amendment to the Atlantic and Gulf Indonesia Agreement, et al.	500
Agreements Nos. 9718–3 and 9731–5	351
Agreement No. 10116–1—Extension of Pooling Agreement in the Eastbound and Westbound Trades Between Japanese Ports and Ports in California, Oregon and Washington	595
Agreement Nos. T–1685 as Amended, and T–1685–6: Between the City of Anchorage and Sea-Land Service, Inc.; and Agreement No. T–3130: Between the City of Anchorage and Totem Ocean Trailer Express, Inc.	69, 440
Agreement No. T–2336—New York Shipping Association Cooperative Working Arrangement	248
Agreement No. T–2880, as Amended, et al.	680
Airlex Industries v. Lykes Bros. S/S Co., Inc.	16
Alfred Kubies Western Corp. v. Royal Netherlands Steamship Co.	633
American Cruise Lines, Inc.	420
American Export Lines, Inc., Household Goods Forwarders Association of America, Inc.	787
American Export Lines, Inc., et al.—Possible Violations of Section 18(b)(5) of the Shipping Act, 1916, in Connection with Rates on Military Cargo	391
American Gilsonite Co., Inc. v. Lykes Bros. Steamship Co., Inc.	747
American President Lines, Ltd., Dow Chemical International, Inc.	531
Anchorage, Alaska v. Sea-Land Service, Inc.	616
Andes Products Export-Import v. Prudential Lines, Inc.	244
Andrew Corp. International v. Atlantic Gulf Service	139
Atlantic Container Line, Ltd., National Starch & Chemical Corp. v.	393
Atlantic Gulf Service, Andrew Corp. International	139
Atlantic Lines, Ltd., GTE International, Inc. v.	764
Austasia Container Express—Possible Violations of Section 18(b)(1) and General Order 13	512
Aviva Enterprises, Inc. v. Y.S. Lines	613
Barber Steamship Lines, Inc., Collins & Aikman Export Corp.	709
Borden Interamerica, Inc. v. Venezuelan Line	777
Bristol-Myers Co. v. Sea-Land Service, Inc.	761
Brunswick Corp. v. Sea-Land Service, Inc.	801
Buckeye Cellulose Corp. v. Sea-Land Service, Inc.	170
Carborundum Co. v. Royal Netherlands Steamship Co.	431
Caterpillar Overseas, S.A. v. South African Marine Corp., Ltd.	315, 644

	Page
Caterpillar Overseas, S.A. v. Springbok Line, Ltd.	640
Caterpillar Overseas, S.A. v. Springbok Shipping Co., Ltd.	648
Caterpillar Tractor Co. v. United States Lines, Inc.	673
Celestial Mercantile Corp. v. M. Galodetz & Co., Inc.	404
Chilean Line, MSA International v.	478
Cities Service International, Inc. v. Lykes Bros. Steamship Co., Inc.	128
City of Anchorage, Alaska, Sea-Land Service, Inc. v.	616
Cleto Hernandez R. d/b/a Pan Inter—Freight Forwarder License	104
Collins & Aikman Export Corp. v. Barber Steamship Lines, Inc.	709
Columbus Lines, Inc., Refrigerated Express Lines (A/ASIA) Pty., Ltd. v.	581
Commercial Solvents Corp. International, Inc. v. Moore-McCormack Lines, Inc.	424
Commodity Credit Corp. v. Surinam Navigation Co., Ltd.	65
Concordia Line, Crestline Supply Corp. v.	207
Conditions Unfavorable to Shipping in the U.S. Foreign Trade	13
Consolidated Express, Inc. v. Sea-Land Service, Inc.	722
Consolidation Allowance Rules Published in the Freight Tariffs of Conferences, et al.	735
Crestline Supply Corp. v. Concordia Line	207
CSC International, Inc. v. Orient Overseas Container Line, Inc.	465
CSC International, Inc. v. Waterman Steamship Co.	332, 523
Cummins Engine Co., Inc. v. United States Lines, Inc. v.	100, 386
Delta Steamship Co., Inc., Goodyear Tire & Rubber Co. v.	174
Department of Defense v. Matson Navigation Co.	503
Douglas Material Co. v. Sea-Land Service, Inc.	328
Dow Chemical International, Inc. v. American President Lines, Ltd.	531
Dow Chemical International, Inc. v. Far Eastern Shipping Co.	604
Dual Rate Contract Systems—Currency Adjustment Surcharges	4
E.S.B., Inc. v. Moore-McCormack Lines, Inc.	480
European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc.	148
Ex Parte Communications	601
Far East Conference, Lykes Bros. Steamship Co., Inc.	589
Far Eastern Shipping Co., Dow Chemical International, Inc.	604
Federal Minister of Defense, Federal Republic of Germany v. Republic International Forwarding Co.	337, 569, 712
Footner and Co., Inc. v. Sea-Land Service, Inc.	718
Ford Motor Co. v. Sea-Land Service, Inc.	741
F. Powers Co., Inc. v. Orient Oversas Container Lines	219
Freight Forwarder Bids on Government Shipments at United States Ports	619
General Order 13	203
General Order 16	509, 601, 656
General Order 19	4
General Order 22	559
General Order 33	13
General Order 35	25
General Order 36	745
Goodyear Tire & Rubber Co. v. Delta Steamship Co., Inc.	174
GTE International, Inc. v. Atlantic Lines, Ltd.	764
Gulf United Kingdom Conference, International Paper Co. v.	652

	Page
Hapag-Lloyd A.G., Uniroyal, Inc. v.	1
Hobelmann International, Inc. v. Moore-McCormack Lines, Inc.	572
Homasote Co. v. United States Lines, Inc.	89
Household Goods Forwarders Association of America, Inc. v. American Export Lines, Inc.	787
Interconex, Inc. v. Sea-Land Service, Inc., et al.	714
International Freight Services, Ltd.—Freight Forwarder Application	224
International Paper Co. v. Gulf United Kingdom Conference	652
Iran Express Line, Union Engineering, Kuwait v.	93
Johnson and Johnson International v. Royal Netherlands Steamship Co.	678
Kohler International, Ltd. v. Sea-Land Service, Inc.	565
Konwal Co., Inc. v. Orient Overseas Container Line	58
Kraft Foods v. Moore-McCormack Lines, Inc.	407
Kuhne & Nagel v. Sea-Land Service, Inc.	727
Kurtin Wool Stock Corp. v. Sea-Land Service, Inc.	324
Lesco Packing Co., Inc.—Freight Forwarder Application	132
Letraset Consumer Products v. Lykes Bros. Steamship Co., Inc.	813
Lykes Bros. S/S Co., Inc., Airlex Industries v.	16
Lykes Bros. Steamship Co., Inc., American Gilsonite Co., Inc. v.	747
Lykes Bros. Steamship Co., Inc., Cities Service International, Inc. v.	128
Lykes Bros. Steamship Co., Inc. v. Far East Conference	589
Lykes Bros. Steamship Co., Inc., Letraset Consumer Products Inc. v.	813
Lykes Bros. Steamship Co., Inc., Perkins-Goodwin Co., Inc.	21
Lykes Bros. Steamship Co., Inc., Port of Houston Authority v.	192
Maersk Line, United Decorative Flower Co., Inc. v.	340
Matson Navigation Co.	462
Matson Navigation Co., Department of Defense v.	503
Matson Navigation Co., Real Fresh, Inc. v.	215
M. Golodetz & Co., Inc., Celestial Mercantile Corp. v.	404
Moore-McCormack Lines, Inc., Commercial Solvents Corp. International, Inc. v.	424
Moore-McCormack Lines, Inc., E.S.B., Inc. v.	480
Moore-McCormack Lines, Inc., Hobelmann International, Inc. v.	572
Moore-McCormack Lines, Inc., Kraft Foods v.	407
MSA International v. Chilean Line	478
National Starch & Chemical Corp. v. Atlantic Container Line, Ltd.	393
National Starch & Chemical Corp. v. Sea-Land Service, Inc.	799
New York Shipping Association, Inc., Transamerican Trailer Transport, Inc. v.	248, 739
North Atlantic French, Atlantic Freight Conference, et al.—Declaratory Order	660
Orient Overseas Container Line, Inc., CSC International, Inc. v.	465
Orient Overseas Container Lines, F. Powers Co., Inc. v.	219
Orient Overseas Container Line, Konwal Co., Inc. v.	58
Orient Overseas Container Lines, Vandor Imports v.	396
Pacific Westbound Conference, Phillips Petroleum Co. v.	143
Pan American Health Organization v. Prudential Lines, Inc.	412
Pan Inter—Freight Forwarder License	104
P.C. International, Inc. v. Sea-Land Service, Inc.	766
Perkins-Goodwin Co., Inc. v. Lykes Bros. Steamship Co., Inc.	21
Permanent Mission of Socialist Republic of Romania v. Prudential Lines	731

Page

Perry's Crane Service, Inc. v. Port of Houston Authority 548
Phillips Petroleum Co. v. Pacific Westbound Conference 143
Port Authority of New York and New Jersey, Pouch Terminal, Inc. v. 680
Port of Houston Authority v. Lykes Bros. Steamship Co., Inc. 192
Port of Houston Authority, Perry's Crane Service, Inc. 548
Possible Violations of Section 18(a) of the Shipping Act, 1916, and Section 2 of the Intercoastal Shipping Act Arising from Charging Higher Rates than Specified by Current Tariff 43
Pouch Terminal, Inc. v. Port Authority of New York and New Jersey 680
Prudential-Grace Lines, Inc., European Trade Specialists, Inc. v. 148
Prudential Lines, Inc., Andes Products Export-Import v. 244
Prudential Lines, Inc., Pan American Health Organization v. 412
Prudential Lines, Permanent Mission of Socialist Republic of Romania v. 731
Publication of Inactive Tariffs by Independent Carriers in the Foreign Commerce of the United States 774
Publication of Discriminatory Rates in the U.S. North Atlantic/Continental European Trade 477
Public Information 559
Raytheon Co., Inc. v. Sea-Land Service, Inc. 343, 347
Real Fresh, Inc. v. Matson Navigation Co. 215
Refrigerated Express Lines (A/ASIA) Pty., Ltd. v. Columbus Lines, Inc. 581
Republic International Forwarding Co., Federal Minister of Defense, Federal Republic of Germany v. 337, 569, 712
Riviana Foods v. Sea-Land Service, Inc. 320
Rohm and Haas Co. v. Venezuelan Line 9
Royal Netherlands Steamship Co., Alfred Kubies Western Corp. v. 633
Royal Netherlands Steamship Co., Carborundum Co. v. 431
Royal Entherlands Steamship Co., Johnson and Johnson International v. 678
Rules of Practice and Procedure—Amendments 509
SCM Corp. v. Seatrain International, S.A. 417
Sea-Land Service, Inc., Bristol-Myers Co. v. 761
Sea-Land Service, Inc., Brunswick Corp. v. 801
Sea-Land Service, Inc., Buckeye Cellulose Corp. v. 170
Sea-Land Service, Inc. v. City of Anchorage, Alaska 616
Sea-Land Service, Inc., Consolidated Express, Inc. v. 722
Sea-Land Service, Inc., Douglas Material Co. v. 328
Sea-Land Service, Inc., Footner and Co., Inc. v. 718
Sea-Land Service, Inc., Ford Motor Co. v. 741
Sea-Land Service, Inc., Interconex, Inc. v. 714
Sea-Land Service, Inc., Kohler International, Ltd. v. 565
Sea-Land Service, Inc., Kuhne & Nagel v. 727
Sea-Land Service, Inc., Kurtin Wool Stock Corp. v. 324
Sea-Land Service, Inc., National Starch & Chemical Corp. v. 799
Sea-Land Service, Inc., P.C. International, Inc. 766
Sea-Land Service, Inc., Shuman Plastics International, Ltd. v. 496
Sea-Land Service, Inc., Raytheon Co., Inc. v. 343, 347
Sea-Land Service, Inc., Riviana Foods v. 320
Sea-Land Service, Inc., Smith & Johnson Shipping, Inc. v. 805
Sea-Land Service, Inc., Stanislaus Imports, Inc. v. 757

Page

Sea-Land Service, Inc., ToeiKogyo Co., Ltd. v. 783
Sea-Land Service, Inc., Twin Express, Inc. v. 614
Sea-Land Service, Inc., Union Carbide Corp. v. 809
Sea-Land Service, Inc., United Forwarders Service, Inc. v. 636
Sea-Land Service, Inc., Universal Nolin UMC Industries, Inc. v. 779
Sea-Land Service, Inc., White-Westinghouse Int'l. Co. v. 770
Sea-Land Service, Inc., Wyandot Exporting Co. v. 178
Seatrain International, S.A., SCM Corp. v. 417
Section 15 Agreements Under the Shipping Act, 1916 547
Section 19 Regulations (1920 Act) 13
Sequoia Forwarders Co.—Freight Forwarder Application 182
Shuman Plastics International, Ltd. v. Sea-Land Service, Inc. 496
Smith & Johnson (Shipping) Inc. v. Sea-Land Service, Inc. 805
Soko Hardware v. Y.S. Lines 708
Solar International Shipping Agency, Inc., United States Mahogany Corp. v. 608
South African Marine Corp., Ltd., Caterpillar Overseas, S.A. v. 315, 644
South African Marine Corp. (N.Y.), Trane Co. v. 374
Springbok Line, Ltd., Caterpillar Overseas, S.A. v. 640
Springbok Shipping Co., Ltd., Caterpillar Overseas, S.A. v. 648
Stanislaus Imports, Inc. v. Sea-Land Service, Inc. 757
States Steamship Co. Far East/USA Household Goods Tariff No. 2, FMC–9 793
Surinam Navigation Co., Ltd., Commodity Credit Corp. v. 65
Tariff Circular 3 203
ToeiKogyo Co. Ltd. v. Sea-Land Service, Inc. 783
Trane Co. v. South African Marine Corp. (N.Y.) 374
Transamerican Trailer Transport, Inc. v. New York Shipping Association, Inc. 248, 739
Transconex, Inc.—Proposed General Rate Increase in the Virgin Islands Domestic Offshore Trade 492
Truck Detention at Port of New York 25
Twin Express, Inc. v. Sea-Land Service, Inc. 614
Union Carbide Inter-America, Inc. v. Venezuelan Line 85, 97, 125, 166
Union Engineering, Kuwait v. Iran Express Line 93
Union Carbide Corp. v. Sea-Land Service, Inc. 809
Uniroyal, Inc. v. Hapag-Lloyd A.G. 1
United Decorative Flower Co., Inc. v. Maersk Line 340
United Forwarders Service, Inc. v. Sea-Land Service, Inc. 636
United States Lines, Inc., Caterpillar Tractor Co. v. 673
United States Lines, Inc., Cummins Engine Co., Inc. v. 100, 386
United States Lines, Inc., Homasote Lines, Inc. v. 89
United States Lines, Inc., Wilmot Engineering Co. v. 403
United States Mahogany Corp. v. Solar International Shipping Agency, Inc. 608
Universal Nolin UMC Industries, Inc. v. Sea-Land Service, Inc. 779
U.S. Department of Agriculture v. Waterman Steamship Corp. 577
Vandor Imports v. Orient Overseas Container Lines 396
Venezuelan Line, Abbott Laboratories v. 426
Venezuelan Line, Borden Interamerica Inc. v. 777
Venezuelan Line, Rohm and Haas Co. v. 9
Venezuelan Line, Union Carbide Inter-America, Inc. v. 85, 97, 125, 166
Waterman Steamship Co., CSC International, Inc. v. 332, 523

	Page
Waterman Steamship Corp., U.S. Department of Agriculture v.	577
West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference Amended Tariff Rule Establishing an Allowance on Prepaid Freight	751
White-Westinghouse Int'l. Co. v. Sea-Land Service, Inc.	770
Wilmot Engineering Co. v. United States Lines, Inc.	403
Windjammer Cruises, Inc. and Windjammer Cruises, Ltd.	112
Wyandot Exporting Co. v. Sea-Land Service, Inc.	178
Yasutomo & Co. v. Y.S. Lines	612
Y.S. Lines, Aviva Enterprises, Inc. v.	613
Y.S. Lines, Soko Hardware v.	708
Y.S. Lines, Yasutomo & Co. v.	612

DOCKET NUMBERS OF CASES REPORTED

		Page
319(I)	Rohm and Haas Co. v. Venezuelan Line	9
324(I)	Caterpillar Tractor Co. v. United States Lines, Inc.	673
327(I)	Konwal Co., Inc. v. Orient Overseas Container Line	58
329(I)	Johnson and Johnson International v. Royal Netherlands Steamship Co.	678
330(I)	Cummins Engine Co., Inc. v. United States Lines, Inc.	100, 386
332(I)	F. Powers Co. Inc. v. Orient Overseas Container Lines	219
336(I)	Alfred Kubies Western Corp. v. Royal Netherlands Steamship Co.	633
337(I)	Union Carbide Inter-America, Inc. v. Venezuelan Line	125
338(I)	Union Carbide Inter-America, Inc. v. Venezuelan Line	85
339(I)	Union Carbide Inter-America, Inc. v. Venezuelan Line	166
341(I), 341(F)	Federal Minister of Defense, Federal Republic of Germany v. Republic International Forwarding Co.	337, 569, 712
342(I)	Celestial Mercantile Corp. v. M. Galodetz & Co., Inc.	404
343(I)	Uniroyal, Inc. v. Hapag-Lloyd A.G.	1
345(I)	Vandar Imports v. Orient Overseas Container Lines	396
347(I)	Wilmot Engineering Co. v. United States Lines, Inc.	403
350(I)	United Decorative Flower Co., Inc. v. Maersk Line	340
351(I)	Stanislaus Imports, Inc. v. Sea-Land Service, Inc.	757
352(I)	Andes Products Export-Import v. Prudential Lines, Inc.	244
355(I)	SCM Corp. v. Seatrain International, S.A.	417
356(I)	Hobermann International, Inc. v. Moore-McCormack Lines, Inc.	572
360(I)	National Starch & Chemical Corp. v. Atlantic Container Line, Ltd.	393
366(I)	Caterpillar Overseas, S.A. v. Springbok Shipping Co., Ltd.	648
367(I)	Caterpillar Overseas, S.A. v. Springbok Line, Ltd.	640
368(I)	Caterpillar Overseas, S.A. v. South African Marine Corp., Ltd.	644
371(I)	White-Westinghouse Int'l. Co. v. Sea-Land Service, Inc.	770
372(I)	Yasutomo & Co. v. Y.S. Lines	612
373(I)	Aviva Enterprises, Inc. v. Y.S. Lines	613
374(I)	Soko Hardware v. Y.S. Lines	708
375(I)	National Starch & Chemical Corp. v. Sea-Land Service, Inc.	799
383(I)	Bristol-Myers Co. v. Sea-Land Service, Inc.	761
386(I)	GTE International, Inc. v. Atlantic Lines, Ltd.	764
467	Union Engineering, Kuwait v. Iran Express Line	93
468	Real Fresh, Inc. v. Matson Navigation Co.	215
469	Perkins-Goodwin Co., Inc. v. Lykes Bros. Steamship Co., Inc.	21
470	Airlex Industries v. Lykes Bros. S/S Co., Inc.	16
471	Phillips Petroleum Co. v. Pacific Westbound Conference	143
472	Commodity Credit Corp. v. Surinam Navigation Co., Ltd.	65

		Page
473	Homasote Co. v. United States Lines, Inc.	89
474	Andrew Corp. International v. Atlantic Gulf Service	139
475	Goodyear Tire & Rubber Co. v. Delta Steamship Lines, Inc.	174
476	Riviana Foods v. Sea-Land Service, Inc.	320
477	Wyandot Exporting Co. v. Sea-Land Service, Inc.	178
478	Kurtin Wool Stock Corp. v. Sea-Land Service, Inc.	324
479	Buckeye Cellulose Corp. v. Sea-Land Service, Inc.	170
480	Douglas Material Co. v. Sea-Land Service, Inc.	328
481	Permanent Mission of Socialist Republic of Romania v. Prudential Lines	731
482	Raytheon Co., Inc. v. Sea-Land Service, Inc.	343
483	Raytheon Co., Inc. v. Sea-Land Service, Inc.	347
485	Ford Motor Co. v. Sea-Land Service, Inc.	741
486	P.C. International, Inc. v. Sea-Land Service, Inc.	766
487	U.S. Department of Agriculture v. Waterman Steamship Corp.	577
488	Collins — Aikman Export Corp. v. Barber Steamship Lines, Inc.	709
490	Footner and Co., Inc. v. Sea-Land Service, Inc.	718
492	Toei Kogyo Co. Ltd. v. Sea-Land Service, Inc.	783
494	Brunswick Corp. v. Sea-Land Service, Inc.	801
495	Universal Nolin UMC Industries, Inc. v. Sea-Land Service, Inc.	779
496	American Gilsonite Co., Inc. v. Lykes Bros. Steamship Co., Inc.	747
497	Smith & Johnson (Shipping) Inc. v. Sea-Land Service, Inc.	805
498	Union Carbide Corp. v. Sea-Land Service, Inc.	809
499	Letraset Consumer Products Inc. v. Lykes Bros. Steamship Co., Inc.	813
502	Kohler International, Ltd. v. Sea-Land Service, Inc.	565
503	Shuman Plastics International, Ltd. v. Sea-Land Service, Inc.	496
504	United States Mahogany Corp. v. Solar International Shipping Agency, Inc.	608
505	Kuhne & Nagel v. Sea-Land Service, Inc.	727
506	Dow Chemical International, Inc. v. Far Eastern Shipping Co.	604
507	United Forwarders Service, Inc. v. Sea-Land Service, Inc.	636
508	International Paper Co. v. Gulf United Kingdom Conference	652
67–57	General Order 36—Rate Base and Income Account Reports	745
69–57	Agreement No. T–2336—New York Shipping Association Cooperative Working Arrangement	248
71–2, 71–8, 71–26, 71–34	Transamerican Trailer Transport, Inc., et al. v. New York Shipping Association, Inc.	248, 739
72–40	Publication of Discriminatory Rates in The U.S. North Atlantic/Continental European Trade	477
72–41	Truck Detention at Port of New York	25
72–46	Agreement No. 57–96, Pacific Westbound Conference—Extension of Authority for International Service	289
72–62	Conditions Unfavorable to Shipping in the U.S. Foreign Trade	13
72–64, 72–65	American Export Lines, Inc., et al.—Possible Violations of Section 18(b)(5) of the Shipping Act, 1916, in Connection with Rates on Military Cargo	391
73–4	Tariff Circular 3; General Order 13	203

		Page
73–5	*Section 15 Agreements Under the Shipping Act, 1916*	547
73–27	Consolidated Express, Inc. v. Sea-Land Service, Inc.	722
73–44	Kraft Foods v. Moore-McCormack Lines, Inc.	407
73–53	Dual Rate Contract Systems—Currency Adjustment Surcharges	4
73–54	Windjammer Cruises, Inc. and Windjammer Cruises, Ltd.	112
73–66	Austasia Container Express—Possible Violations of Section 18(b)(1) and General Order 13	512
73–73	Port of Houston Authority v. Lykes Bros. Steamship Co., Inc.	192
73–79	Household Goods Forwarders Association of America, Inc. v. American Export Lines, Inc., et al.	787
74–8	European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc.	148
74–10	Freight Forwarder Bids on Government Shipments at United States Ports—Possible Violations of the Shipping Act, 1916, and General Order 4	619
74–14	Possible Violations of Section 18(a) of the Shipping Act, 1916 and Section 2 of the Intercoastal Shipping Act Arising from Charging Higher Rates than Specified by Current Tariff	43
74–18	Dow Chemical International, Inc. v. American President Lines, Ltd.	531
74–25	Twin Express, Inc. v. Sea-Land Service, Inc.	614
74–31	Lesco Packing Co., Inc.—Freight Forwarder Application	132
74–35	Agreement No. T–2880, as amended, et al.	680
74–42	Pouch Terminal, Inc. v. Port Authority of New York and New Jersey	680
75–4, 75–5	Department of Defense v. Matson Navigation Co.	503
75–11	Sequoia Forwarders Co.—Freight Forwarder Application	182
75–12	Crestline Supply Corp. v. Concordia Line	207
75–13	Petition of North Atlantic French Atlantic Freight Conference and North Atlantic Baltic Freight Conference for a Declaratory Order	660
75–15	Carborundum Co. v. Royal Netherlands Steamship Co.	431
75–17	Cleto Hernandez R. dba Pan Inter—Freight Forwarder License	104
75–24	Interconex, Inc. v. Sea-Land Service, Inc., et al.	714
75–27	Abbott Laboratories v. Venezuelan Line	426
75–30	Agreements Nos. 9718–3 and 9731–5	
75–31	CSC International, Inc. v. Waterman Steamship Co.	332, 523
75–35	Agreements Nos. T–1685 as Amended and T–1685–6: Between the City of Anchorage and Sea-Land Service, Inc.; and Agreement No. T–3130 Between the City of Anchorage and Totem Ocean Trailer Express, Inc.	69, 440
75–37	International Freight Services, Ltd.—Freight Forwarder Application	224
75–44	E.S.B. Inc. v. Moore-McCormack Lines, Inc.	480
75–48	Sea-Land Service, Inc. v. City of Anchorage, Alaska, et al.	616
75–50	Commercial Solvents Corp. International, Inc. v. Moore-McCormack Lines, Inc.	424
75–51	Perry's Crane Service, Inc. v. Port of Houston Authority	548
75–52	Cities Service International, Inc. v. Lykes Bros. Steamship Co., Inc.	128

		Page
75–53	Refrigerated Express Lines (A/ASIA) Pty., Ltd. v. Columbus Lines, Inc.	581
75–54	Union Carbide Inter-American, Inc. v. Venezuelan Line	97
76–1	CSC International, Inc. v. Orient Overseas Container Line, Inc.	465
76–2	Borden Interamerica Inc. v. Venezuelan Line	777
76–4	Anchorage, Alaska v. Sea-Land Service, Inc.	616
76–13	Lykes Bros. Steamship Co., Inc. v. Far East Conference	589
76–14	Agreement No. 10116–1—Extension of Pooling Agreement in the Eastbound and Westbound Trades Between Japanese Ports and Ports in California, Oregon and Washington	595
76–16	MSA International v. Chilean Line	478
76–23	Agreement No. 8080–11, Amendment to the Atlantic and Gulf/Indonesia Agreement; Agreement No. 8240–9, Amendment to the Atlantic and Gulf/Singapore, Malaya and Thailand Conference Agreement; Agreement No. 8080–13, Amendment to the Atlantic and Gulf/Indonesia Conference Agreement	500
76–25	Trane Co. v. South African Marine Corp. (N.Y.)	374
76–26	Transconex, Inc.—Proposed General Rate Increase in the Virgin Islands Domestic Offshore Trade	492
76–30	Pan American Health Organization v. Prudential Lines, Inc.	412
76–37	American Cruise Lines, Inc.	420
76–39	Caterpillar Overseas, S.A. v. South African Marine Corp.	315
76–49	Rules of Practice and Procedure—Amendments	509
76–51	West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference Amended Tariff Rule Establishing an Allowance on Prepaid Freight	751
76–54	Consolidation Allowance Rules Published in the Freight Tariffs of Conferences, et al.	735
76–55	Matson Navigation Co.	462
76–61	General Order 16—Miscellaneous Amendments	656
76–62	Publication of Inactive Tariffs by Independent Carriers in the Foreign Commerce of the United States	774
76–64	States Steamship Co. Far East/USA Household Goods Tariff No. 2 FMC–9	793
76–65	Public Information	559
76–66	General Order 16—Extraneous and Ex Parte Communications	601

TABLE OF CASES CITED

Page

Abbott Laboratories v. Alcoa Steamship Co., 18 FMC 376 ---- 59, 62
Abbott Laboratories v. Prudential-Grace Lines, 17 FMC 186 ---- 415, 435
Abbott Laboratories v. Venezuelan Line, 19 FMC 426 ---- 679
Ace Machinery Co. v. Hapag-Lloyd A.G., 16 SRR 1531 ---- 378, 585, 587, 724
Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc., 9 FMC 56 ---- 516
Aetna Forwarding Co., Inc., 8 FMC 545 ---- 111
Agreement No. 57–96—Pacific Westbound Conference—Intermodal Services, Dkt. No. 72–46 ---- 501
Agreement No. 57–96, 16 SRR 159 ---- 590, 591
Agreement Nos. 150–DR–7 and 3103–DR&, Dkt. No. 76–11 ---- 593
Agreement No. 6510, 1 USMC 775 ---- 445
Agreement No. 2423—Port of Seattle, 12 SRR 91, 221 ---- 501
Agreement No. 7620, 2 USMC 749 ---- 50
Agreement No. 8760–5—Modification of the West Coast, Etc. Rate Agreement, 17 FMC 61 ---- 299, 300
Agreement No. 8765—Gulf/Mediterranean Trade, 7 FMC 495 ---- 591
Agreement No. 8905—Port of Seattle and Alaska S.S. Co., 7 FMC 792 ---- 454
Agreements Nos. 9718–3 and 9731–5, 19 FMC 351 ---- 596, 597
Agreement No. 10116—Pooling Agreement, Dkt. 74–57 ---- 596
Agreement No. FF 71–7, 17 FMC 302 ---- 445
Agreements Nos. T–2108 and T–2108–A, 12 FMC 110 ---- 452, 454, 700
Agreement No. T–2227—San Francisco Port Authority and States Steamship Co., 14 FMC 233 ---- 700
Agreement No. T–2336—New York Shipping Association, 11 SRR 432 ---- 501
Agreement No. T–2336—New York Shipping Association, 11 SRR 571 ---- 699
Agreement No. T–2336—New York Shipping Association, 14 FMC 94 ---- 249, 261, 275, 276, 278, 283, 284
Agreement No. T–2336—New York Shipping Association, 15 FMC 259 249, 250, 253, 254, 256, 257, 260, 261, 266, 275–277, 282, 284, 739, 740
Agreement Nos. T–2455/T–2553, Dkt. No. 72–61 ---- 453, 454
Agreement Nos. T–2455/T–2553, 14 SRR 1317 ---- 557
Agreement No. T–2598, 17 FMC 286 ---- 454, 573
Agreement No. T–2635–2—Pacific Maritime Assn. Final Pay Guarantee Plan, 18 FMC 393 ---- 256
Agreement—Port Canaveral and Luckenbach S.S., 17 FMC 286 ---- 557
Alabama Great Southern R.R. Co. v. FMC, 379 F2d 100 ---- 422, 520–522
Alaskan Rates, 2 USMC 558, 639 ---- 752

Page

Aleutian Homes, Inc. v. Coastwise Line, 5 FMB 602 ---- 383, 574, 724
American Export Isbrandtsen Lines, Inc., 14 FMC 82 ---- 46, 584
American Export Isbrandtsen Lines, Inc. v. FMC, 409 F2d 1258 ---- 789, 791
American Export Isbrandtsen Lines, Inc. v. FMC, 444 F2d 824 ---- 265
American Tobacco Co. v. Cie. Generale Transatlantique, 1 USSB 53 ---- 752–754
American Warehousemen's Association v. Port of Portland, Dkt. No. 73–30 ---- 587
A. N. Deringer, Inc. v. United States, 40 Cust. Ct. 261 ---- 212
Anglo-Canadian Shipping Co., Ltd. v. Mitsui S.S. Co., Ltd., 4 FMB 535 ---- 158
Application for Freight Forwarding License, 9 FMC 72 ---- 109
A. P. St. Philip, Inc. v. Atlantic Land Improvement Co., 13 FMC 166 ---- 551, 554, 557
Armament Deppe, S.A. v. United States, 399 F2d 794 ---- 514
Atchison Leather Products Co. v. Atchison T & S.F. Ry. Co., 274 ICC 328 ---- 528
Atchison, T. & S.F. R. Co. v. Witchita Board of Trade, 412 US 800 ---- 554
Ballmill Lumber & Sales Corp. v. Port of New York Authority, 11 FMC 494 ---- 379
Baltimore & Ohio Ry. Co. v. United States, 305 US 507 ---- 702
Bank of Kentucky v. Adams Express Co., 93 US 174 ---- 52
Barre Granite Assn., Inc. Freight Forwarder Application, 265 ICC 637 ---- 52, 53
Beaumont Port Commission v. Seatrain Lines, 3 FMB 556 ---- 445
Bernard Ulmann Co., Inc. v. Porto Rican Express Co., 3 FMC 771 ---- 51, 52, 54, 56, 518
Bird v. United States, 187 US 118 ---- 519
Boise City Irr. & Land Co. v. Clark, 131 Fed 415 ---- 586
Bolton & Mitchell, Inc., 15 FMC 248, 16 FMC 284, aff'd 17 FMC 151, reconsideration den. 16 SRR 87 ---- 186, 188, 239
Bulkley Dunton Overseas, S.A. v. Blue Star Shipping Corp., 8 FMC 137 ---- 102, 389, 539
Bunker Fuel Surcharges, Violations of Section 14 Fourth, 16 First and 17, 15 FMC 92, 13 SRR 526 ---- 789
California v. United States, 320 US 577 ---- 622
California Stevedore & Ballast Co. v. Stockton Port District, 7 FMC 75 ---- 554, 557
California Stevedore & Ballast Co. v. Stockton Elevators, Inc., 8 FMC 97 ---- 554, 555
Capt. Foure (The), 10 F2d 950 ---- 491
Carborundum Co. v. Royal Netherlands S.S. Co., 19 FMC 431 ---- 428, 429, 677, 679
Carnation Co. v. Pacific Westbound Conference, 383 US 213 ---- 454, 587, 723, 724
Carolina Cotton & Woolen Mills Co. v. Southern Ry. Co., 195 ICC 654 ---- 384
Caterpillar Overseas, S.A. v. South African Marine Corp., Dkt. No. 76–39 ---- 382
Chicago, Etc. R. Co. v. Acme Fast Freight, 336 US 465 ---- 53, 55
Chr. Salveson & Co., Ltd. v. West Michigan D. & M. Corp., 9 SRR 1154 ---- 384
Chr. Salveson & Co., Ltd. v. West Michigan Dock and Market Corp., 12 FMC 135 ---- 551
Cie. Generale Transatlantique, Inc. v. American Tobacco Co., 34 F2d 663 ---- 514
City of Dunkirk, 10 F2d 609 ---- 54
City of Long Beach and Transocean Gateway Corp., 13 FMC 70 ---- 684
City of Los Angeles Agreements, 12 FMC 110 ---- 684
City of Portland v. Pacific Westbound Conference, 4 FMB 664, 5 FMB 118 ---- 520

Page

Clipper Carloading Co. v. Trans-Pacific Freight Conference of Japan, Dkt. No. 72–20 ---- 724
Colgate Palmolive Co. v. Grace Lines, Inc., 11 SRR 982 ---- 378
Colgate Palmolive Co. v. Grace Line, Dkt. No. 194(I) ---- 490
Colgate Palmolive Peet Co. v. United Fruit Co., 11 SRR 979 ---- 414
Colgate Palmolive Co. v. United Fruit Co., Dkt. No. 115(I) ---- 3, 11, 61, 87, 101, 126, 167, 388, 395, 770, 771
Collins v. Kingsberry Homes Corp., 243 F Supp 741, aff'd 347 F2d 351 ---- 537
Commercial Solvents Corp. International, Inc. v. Moore-McCormack Lines, Inc., 19 FMC 424 ---- 415, 526, 527, 528
Commodity Credit Corp. v. Delta Steamship Lines, Inc., 18 FMC 57 ---- 24, 91
Commonwealth of Puerto Rico v. FMC, 468 F2d 872 ---- 136
Consolidated International Corp. v. Concordia Line, 14 SRR 1259 ---- 570, 584
Consolo v. Flota Mercante Grancolombiana, 6 FMC 262 ---- 261
Consolo v. FMC, 383 US 607 ---- 261, 262
Consolo v. Grace Line, Inc., 4 FMB 293 ---- 50
Cont. Distribut'g Co., Inc. v. Cia. Nacional De Nav., 2 USMC 724 ---- 382
Contract Routing Restrictions, 2 USMC 220 ---- 592
Corn Products Co. v. Hamburg-Amerika Lines, 10 FMC 388 ---- 415, 435
CSC International, Inc. v. Waterman Steamship Corp., Dkt. No. 75–31 ---- 425
CSC International, Inc. v. Waterman Steamship Co., 16 SRR 1510 ---- 659
C.S. Greene & Co., Inc. v. North Atlantic Baltic Freight Conference, No. 76 Cir. 4118 (SDNY, Nov. 4, 1976) ---- 736
Davies, Turner & Co. v. Atlantic Lines, Ltd., 13 FMC 279 ---- 217
Davis v. Portland Seed Co., 264 US 403 ---- 797
Dayton Power and Light Co. v. FPC, 251 F2d 875 ---- 658
Delaware River Port Authority v. Puerto Rico Maritime Shipping Authority, 14 SRR 1509 ---- 584
Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 18 FMC 234, aff'd. 527 F2d 1368 ---- 199
Department of Defense v. Matson Navigation Co., 17 SRR 1 ---- 791
Determination of Common Carrier Status, 6 FMB 245 ---- 51, 56
Disposition of Container Marine Lines, 11 FMC 475 ---- 302, 517
Disposition of Container Marine Lines, 11 FMC 467 ---- 591, 592, 593
District of Columbia v. General Federation of Women's Clubs, 249 F2d 503 ---- 658
Dixie Forwarding Co., Inc., 8 FMC 109 ---- 109, 110, 232
Dual Rate Cases, 8 FMC 16 ---- 663, 664, 670, 671,672
East Asiatic Co., Inc., 9 FMC 169 ---- 217, 218
East Texas Motor Freight Lines v. Frozen Foods Express, 351 US 49 ---- 212
Embargo on Cargo, North Atlantic and Gulf Ports, 2 USMC 464 ---- 775
European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 19 FMC 148 ---- 379
Ex Parte 261, 351 ICC 490 ---- 519
Far East Conference v. United States, 342 US 570 ---- 622
Farley Terminal Co., Inc. v. Atchinson, Top. & S. Fe Ry. Co., 522 F2d 1095 ---- 212
Filing of Joint Rates and Through Routes, 11 SRR 574 ---- 51, 519
Flota Mercante Grancolombiana v. FMC, 342 F2d 924 ---- 261
Flota Mercante Grancolombiana v. FMC, 373 F2d 674 ---- 261, 379
FMC v. Ab Svenska Amerika Linien, 390 US 238 ---- 73, 297–300, 305

Page

FMC v. Australia/U.S. Atlantic Gulf Conference, 337 F Supp 1032 662
FMC v. Seatrain Lines, Inc., 411 US 726 453
Food Machinery Corp. v. Alton & S.R., 269 ICC 603 528
Free Time Practices—Port of San Diego, 9 FMC 525 .... 197, 525, 623, 684
Gelfand Mfg. Co. v. Bull S.S. Line, Inc., 1 USSB 169 539
General Rate Increase in the Domestic Guam Trade, 7 SRR 167 716
Gilbert Imported Hardwares v. 245 Packages of Guatamabu Square, 508 F2d 1116 797
Gillen's Sons Lighterage v. American Stevedores, 12 FMC 325, 10 SRR 195 383
Ghezzi Trucking, Inc.—Cancellation of Inactive Tariffs, 13 FMC 253 775
Greater Baton Rouge Port Commission v. United States, 287 F2d 86 .... 422, 454, 554
Guam v. FMC, 365 F2d 515 752
Gulf Intercoastal Rates to and from San Diego, 1 USSBB 600 515
Gulf Shipbuilding Corp. v. Southern Pac. Co., 286 ICC 153 527
Guy G. Sorrentino, 15 FMC 127 239
Guy F. Sorrentino, 15 FMC 130 111
Harry Kaufman, 16 FMC 256 232
Hawaiian Express Service, Inc. v. Pacific Hawaiian Terminals, Inc., 492 F2d 865 45
Heavy Lift Practices and Charges of Hapag-Lloyd A.G., Dkt. No. 76-42 588
Hellenic Lines, Ltd.—Section 16 (First) and 17 Violations, 7 FMC 673 382
Heterochemical Corp. v. Port Line, Ltd., 12 SRR 223 383
Hong Kong Tonnage Ceiling Agreement, 10 FMC 134 .... 501, 502
Hopke Freight Forwarder Application, 285 ICC 61 54
Hugo Zanelli & Co., 18 FMC 60, aff'd 524 F2d 1000 184-188
ICC v. Jersey City, 322 US 503 579
ICC v. Weldon, 90 F Supp 873, aff'd 188 F2d 367 211
IML Sea Transit, Ltd. v. United States, 343 F Supp 32, aff'd 409 US 1002 .... 45, 519
Imposition of Surcharge by the Far East Conference at Searsport, Maine, 9 FMC 129 .... 518, 520
Inter-American Freight Conference—Cargo Pooling Agreements, 14 FMC 58 501
Interchange of Freight at Boston Terminals, 2 USMC 671 197
Intercoastal Investigation, 1 USSBB 400 .... 198, 199, 515, 775
Intercoastal Schedules of Hammond Shipping Co., Ltd., 1 USSB 606 775
Isbrandtsen Co., Inc., 3 FMB 543 723
Isbrandtsen Co. v. North Atlantic Continental Freight Conference, 3 FMB 235 591
Isbrandtsen Co., Inc. v. United States, 211 F2d 51 301
Isbrandtsen Co., Inc. v. United States, 96 F Supp 883 .... 379, 676
Isthmian S.S. Co. v. United States, 53 F2d 251 378
J. Kinderman & Sons v. Nippon Yusen Kaisha Lines, 322 F Supp 939 490
Johns Manville Products Corp., 13 FMC 194 389
Johnson & Johnson International v. Prudential Grace Lines, Inc., Dkts Nos. 303(F), 304(F) 678
Johnson & Johnson International v. Venezuelan Lines, 16 FMC 87 414
Joint Agreement—Far East Conference and Pacific Westbound Conference, 8 FMC 553 592
Kam Koon Wan v. E. E. Black, Ltd., 75 F Supp 553, aff'd 188 F2d 558 385
Ken Royce, Inc. v. Pacific Transport Line, Inc., 3 USMC 183 212

Page

Konwal Co., Inc. v. Orient Overseas Container Line, 19 FMC 58 220, 398
Kraft Foods v. FMC, 538 F2d 445 407, 408, 409, 434, 574, 657
Kraft Foods v. Moore-McCormack Lines, Inc., Dkt. No. 73–44 62
Kraft Foods v. Moore-McCormack Lines, Inc., 17 FMC 320 433
Kraft Foods v. Moore-McCormack Lines, Inc., 19 FMC 407 575
Lake Charles Harbor and Terminal District v. Port of Beaumont Navigation District, 12 FMC 244 199, 200
Link v. Wabash R.R. Co., 370 US 626 723
Liverpool Steam Co. v. Phenix Ins. Co., 129 US 397 55
Louis Applebaum, 8 FMC 306 109
Louisville & N.R.R. Co. v. Maxwell, 237 US 94 24, 92
L.T.C. Air Cargo, Inc., 13 FMC 269 232
Ludwig Mueller Co. v. Peralta Shipping Corp., 8 FMC 361 92, 96, 218, 247, 415
Mackey v. United States, 197 F2d 241 200
Madeplac S.A. Industria de Madeiras v. Figueiredo Navegacao, Dkt. No. 74–5 579
Maritime Fruit Carriers Co., Ltd., Dkt. No. 71–80 311
Massachusetts Port Authority v. Container Marine Lines, 11 SRR 37 584
Matson Navigation Co.—General Increase in Rates, 16 FMC 96 683
Matson Navigation Co.—Proposed Rate Increase, Dkt. No. 75–57 586, 587
Matson Navigation Co.—Reduced Rates in Flour, 10 FMC 145 683
Mediterranean Pools Investigation, 9 FMC 264 699
Merck, Sharp & Dohme v. Atlantic Lines, 17 FMC 244 570, 584
Merck, Sharp & Dohme v. Flota Mercante Grancolombiana, 18 FMC 384 20
Misclassification and Misbilling of Glass Articles, 6 FMB 155 211
Mississippi Valley Barge Line Co. v. United States, 252 F Supp 162 797
Modern Intermodal Traf. Corp.—Investigation, 344 ICC 557 54
Modification of Article, Agreement No. 3302—Association of West Coast Steamship Cos., Dkt. No. 73–74 305
Modification of Article 8, Agreement No. 5850—North Atlantic Westbound Freight Association, Dpt. No. 70–16 305
Nader v. Nuclear Regulatory Corp., 513 F2d 1045 797
National Cable and Metal Co. v. American Hawaiian S.S. Co., 2 USMC 471 102, 389
National Petroleum Refiners Association v. FTC, 482 F2d 672 520
New York Freight Bureau (Hong Kong), 10 FMC 165 501
New York Foreign Freight Forwarders and Brokers Association v. FMC, 337 F2d 289 521, 623
New York Shipping Association, 16 FMC 381 260
New York Shipping Association v. FMC, 495 F2d 1215 259, 260, 262
Nigara (The) v. Cordes, 62 US 7 50
Non-Vessel Operating Common Carriers in the Domestic Offshore Trades, Dkt. No. 73–56 46, 50
Norman G. Jensen, Inc. v. FMC, 497 F2d 1053 187–189
North American Van Lines, 14 FMC 1 189
North American Van Lines, 14 FMC 215 108, 109
Oakland Motor Car Co. v. Great Lakes Transit Corp., 1 USSBB 308 378, 383, 481
Ocean Freight Consultants, Inc. v. Bank Line Ltd., 5 SRR 609, 829 384
Ocean Freight Consultants v. Bank Line Ltd., 9 FMC 211 378, 415

Page

Ocean Freight Consultants v. Italpacific Line, 15 FMC 314 ---- 428, 435, 491
Ocean Freight Consultants v. Royal Netherlands S.S. Co., Dkt. No. 72–39 ---- 435, 675, 673, 678
Ocean Rate Structures, 12 FMC 34 ---- 752, 753
Outward Continental North Pacific Conference v. FMC, 385 F2d 981 ---- 521
Oppenheimer International Corp. v. Moore-McCormack Lines, Inc., 15 FMC 49 17, 22
Overland/OCP Rates and Absorptions, 12 FMC 184 ---- 199, 292, 592, 594
Oxenberg Bros., Inc. v. United States, 3 FMB 583 ---- 217
Pacific-Atlantic/Guam Trade—Rate Increases, 8 FMC 498 ---- 752
Pacific Coast European Conference v. FMC, 350 F2d 197 ---- 521
Pacific Coast European Conference—Payment of Brokerage, 5 FMB 65 ---- 81
Pacific Far East Lines v. United States, 246 F2d 711 ---- 520
Pacific Lumber & Shipping Co. v. Pacific-Atlantic S.S. Co., 1 USMC 624 ---- 212
Pacific Maritime Association v. FMC, 543 F2d 395 ---- 259
Pacific Molasses Co. v. FTC, 356 F2d 386 ---- 797
Pacific Seafarers, Inc. v. AGAFBO, 8 FMC 461 ---- 514
Pacific Seafarers, Inc. v. PFEL, Inc., 404 F2d 804 ---- 518
Passenger Travel Agents, 10 FMC 27 ---- 297, 298, 300, 305
Pan Inter, 19 FMC 104 ---- 189
Peter Bratti Associates, Inc. v. Prudential Lines, Ltd., 8 FMC 375 ---- 62
Phila. Ocean Traffic Bureau v. Export S.S. Corp., 1 USBB 538 ---- 199, 200
Philippine Merchants Steamship Co., Inc. v. Cargill, 9 FMC 153 ---- 263
Pittston Stevedoring Corp. v. New Haven Terminal Inc., 13 FMC 33 ---- 551, 557
P.P.G. Industries, Inc. v. Royal Netherlands Steamship Co., Dkt. No. 290(I) ---- 59, 62
Practices of San Francisco Bay Area Terminals, 2 USMC 588, aff'd 320 US 577 197, 684
Puerto Rico Maritime Shipping Authority Rates on Government Cargo, Dkt. No. 75–20 ---- 506
Puget Sound Tug & Barge v. Foss Launch and Tug Co., 7 FMC 43 ---- 51
Quickie Transport Co. v. United States, 169 F Supp 826 ---- 136
Railroad Co. v. Lockwood, 84 US 357 ---- 55
Rates of General Atlantic S.S. Co., 2 USMC 681 ---- 517
Rates in the Hong Kong-United States Atlantic and Gulf Trades, 11 FMC 168 46, 586
Rates on U.S. Government Cargoes, 11 FMC 263 ---- 586
Raytheon Co., Inc. v. Sea-Land Service, Inc., 19 FMC 348 ---- 349
Reliance Motor Car Co. v. Great Lakes Transit Corp., 1 USMC 794 ---- 383, 574
Rohm & Haas Co. v. Seatrain Lines, Inc., Dkt. No. 51 ---- 574
R.T.C. Term. Corp. Freight Forwarder Application, 265 ICC 641 ---- 54
Rubber Development Corp. v. Booth S.S. Co., Ltd., 2 USMC 746 ---- 212, 539
Rules of Practice and Procedure, 14 SRR 923 ---- 723
Rules of Practice and Procedure, 16 SRR 1387 ---- 384
Scenic Hudson Preservation Conf. v. FPC, 354 F2d 608 ---- 379
Scott Paper Co. v. Puerto Rico Maritime Shipping Authority, 14 SRR 1616 ---- 506
Sea-Land Service, Inc.—Cancellation of Rates, 11 FMC 137 ---- 515
Sea-Land Service, Inc.—General Increases in Rates in the U.S. West Coast/ Puerto Rico Trade, Dkt. 74–30 ---- 587
Sherwood Bros. v. District of Columbia, 113 F2d 162 ---- 658
Sonken-Galamba Corp. v. Union Pac. R. Co., 145 F2d 808 ---- 528

Page

Southern Pacific Terminal Co. v. ICC, 219 US 498 ---- 586
Speed Freight, Inc., 44 FMC 1 ---- 109
Standard Oil Co. of California v. United States, 337 US 293 ---- 555
Star Forwarders, Inc. v. Hawaii Freight Lines, Inc., ICC, Dkt. No. FF-C-33 45, 53
States Marine Corp.—Subsidy Tricontinent, Etc. Services, 5 FMB 537 ---- 593
Stockton Port District v. Pacific Westbound Conference, 9 FMC 12, aff'd 369 F2d 380 ---- 199
Storage Charges Under Agreements 6205 and 6215, 2 USMC 48 ---- 197
Storage of Import Property, 1 USMC 676 ---- 197
Storage Practices at Longview, Wash., 6 FMB 178 ---- 543
Stromeyer & Arpe v. American Lines S.S. Corp., 97 F2d 360 ---- 200
Sugar From Virgin Islands to the United States, 1 USMC 695 ---- 775
Surcharges at U.S. Atlantic and Gulf Ports, 10 FMC 13 ---- 663, 671
Swift & Co. v. Gulf & South Atlantic Havana Conference, 6 FMB 215 ---- 592
Syracuse Broadcasting Corp. v. Newhouse, 271 F2d 910 ---- 724
Tagit Co. v. Luckenbach S.S. Co., Inc., 1 USSBB 519 ---- 723
Tariff Filing Practices, 7 FMC 305 ---- 51, 52
Tariff Filing Practices, Etc. of Containerships, Inc., 9 FMC 56 ---- 50, 51, 54, 56
Terminal Taxicab Co. v. District of Columbia, 241 US 252 ---- 52
Texas & Pacific Ry. v. Mugg, 202 US 242 ---- 212
Texas v. Seatrain International, S.A., 518 F2d 176 ---- 591
Thomas G. Crowe v. Southern S.S. Co., 1 USSB 145 ---- 539, 543
Tilton Textile Corp. v. Thai Lines, Inc., 9 FMC 145 ---- 92, 96
Time Limit on Filing Overcharge Claims, 12 FMC 298 ---- 3, 87, 395, 574
Toei Kogyo Co. v. Sea-Land Service, Inc., 19 FMC 784 ---- 781
Towne Services Household Goods Transportation Co. v. United States, 329 F Supp 815 ---- 136
Transamerican Trailer Transport, Inc. v. FMC, 492 F2d 617 ---- 249, 275, 739, 740
Transpacific Freight Conference of Japan v. FMC, 314 F2d 928 ---- 518
Transportation-U.S. Pacific Coast and Hawaii, 3 USMC 190 ---- 52, 54
Transshipment Agreement Between S. Thailand and United States, 10 FMC 199 515, 516
Transshipment Agreement Indonesia/United States, 10 FMC 183 ---- 515, 516, 518, 521
Truck and Lighter Loading and Unloading Practices, 12 FMC 166 ---- 25, 27
Trumbull-Vanderpool Co. v. Luckenbach Co., 1 USSB 126 ---- 212
Twine and Crude Rubber—Emery Transportation Co., 311 ICC 226 ---- 212
Union Carbide Inter-America v. Venezuelan Lines, 17 FMC 181 ---- 415, 436
Union National Bank v. Lamb, 337 US 38 ---- 658
United Nations Childrens Fund v. Blue Sea Line, 15 FMC 206 ---- 102, 389
Union Pacific R. Co. v. United States, 313 US 450 ---- 701, 702
United Church of Christ v. FCC, 425 F2d 543 ---- 136
United States v. Blasius, 397 F2d 203 ---- 519
United States v. Brooklyn Terminal, 249 US 296 ---- 52
United States v. California, 297 US 175 ---- 52, 554
United States v. Cooper Corp., 312 US 600 ---- 622
United States v. E. I. DuPont de Nemours and Co., 351 US 377 ---- 357

Page

United States v. Farrell Lines, Inc., 13 SRR 199 162
United States v. Gulf Refining Co., 268 US 542 169
United States v. Hellenic Lines, Ltd., 14 FMC 258 .... 59, 212, 424
United States v. International Paint Co., 35 CC PA 87 212
United States v. Loews, Inc., 371 US 38 555
United States v. Pan American Mail Line, Inc., 359 F Supp 728 797
United States v. Stephen Bros. Line, 384 F2d 118 517
Universal Nolin UMC Industries v. Sea-Land Service, Inc., 19 FMC 779 785
Universal Transcontinental Corp. Freight Forwarder Application, 260 ICC 521 53, 54
U.S. Borax & Ghem. Corp. v. Pacific Coast European Conference, 11 FMC 451 383, 724
U.S. Navigation Co. v. Cunard S.S. Co., 284 US 474 24
United Stevedoring Corp. v. Boston Shipping Association, 16 FMC 7 260
Valley Evaporating Co. v. Grace Lines,
14 FMC 16 .... 152, 153, 154, 623
Verheam v. United States, 154 F Supp 431 519
Violations of Sections 14 Fourth, Etc. Nonassessment of Fuel Surcharges on
MSC Rates, 15 FMC 92 623
Volkswagenwerk v. FMC, 390 US 261 .... 164, 262
Walling v. Mutual Wholesale Food & Supply Co., 141 F2d 331 586
Western Publishing Co., Inc. v. Hapag-Lloyd A.G., Dkt. No. 283(I) 101, 410
Western Publishing Co., Inc. v. Hapag-Lloyd
A.G., 13 SRR 16 .... 20, 162, 246, 388, 410,
414, 415, 481, 490, 575
West Indies Fruit Co. v. Flota Mercante Grancolombiana, 7 FMC 66 378
Wilson v. Southern Ry. Co., 147 F2d 165 658
Wm. V. Cady, 8 FMC 352 189
Yankee Shippers Agent, Inc. Investigation,
326 ICC 328 .... 52, 53, 54
Yolo Port District v. Fred F. Noonan Co., Inc., 9 FMC 551 212
York Shipping Corp., 9 FMC 72 189

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 343(I)

UNIROYAL, INC.

v.

HAPAG-LLOYD AKTIENGESELLSCHAFT

NOTICE OF DETERMINATION NOT TO REVIEW

April 15, 1975

Notice is hereby given that the Commission on April 15, 1976, has determined not to review the decision of the Settlement Officer in this proceeding served April 8, 1976.

In the first sentence of page two of the Settlement Officer's decision the reference to the weight of the shipment as "3,260 pounds" should read "3,620 pounds".

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 343(I)

UNIROYAL, INC.

v.

HAPAG-LLOYD AKTIENGESELLSCHAFT

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER*

By complaint filed March 5, 1976, Uniroyal, Inc. (complainant) alleges that Hapag-Lloyd Aktiengesellschaft (carrier) assessed ocean freight charges on a shipment of industrial tires which were in excess of those lawfully applicable at the time of the transportation in violation of Section 18(b)(3) of the Shipping Act, 1916.

The carrier denied the involved claim solely on the basis of Clause 8 on Page 11 of North Atlantic Continental Freight Conference Tariff FMC-4, which time-bars claims for adjustments of freight charges not received by the carrier within six months after date of shipment.

In support of its claim, the claimant furnished a copy of the bill of lading and the carrier's denial of the claim.

The claim involves a shipment of 220 industrial tires weighing 3,260 pounds and measuring 168 cubic feet from New York to Antwerp, Belgium on October 4, 1974. The shipment was rated as 168 cubic feet at $159.00 per 40 cubic feet, which produced ocean freight revenue of $667.80.

Eleventh Revised Page 186 of the aforementioned conference tariff, which was in effect at the time of the shipment, provides a weight rate on the subject commodity of $159.000 per long ton.* Properly rated, the shipment would have produced ocean freight revenue of $256.95 (1.616 w.t. × $159.00). Accordingly, the complainant was overcharged in the amount of $410.85 ($667.80 less $256.95).

The carrier, in its response to the instant complaint admitted that the

*Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

*This rate includes an Emergency Surcharge of $9.50 applicable to all weight based rates (14th Revise Title Page effective October 1, 1974).

involved claim was denied solely in accordance with its published tariff provision, which reads in pertinent part: "... claims for adjustment of freight charges must be presented to the member line in writing within six months after date of shipment." The carrier also admitted in its response that it did not and could not contest the amount of the overcharge claimed.

The Commission, in Informal Docket No. 115(I), *Colgate Palmolive Company* v. *United Fruit Company* reiterated what is specifically stated in *Proposed Rules—Time Limit on Filing Overcharge Claims* 12 F.M.C. 298,308 (1969) that:

"... once a claim has finally been denied by a carrier the shipper may still seek and in a proper case recover reparation before the Commission at any time within two years of the alleged injury, and this is true whether the claim has been denied on the merits or on the basis of a time limitation rule."

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to charge, demand, collect or receive a greater compensation than the rates or charges which are specified in its tariff.

The filing of a timely complaint with this Commission effectively overrides any tariff technicality under which an overcharge claim legally may be denied by a water carrier subject to our jurisdiction during the two-year statutory period for recovering reparation set forth in Section 22 of the Shipping Act, 1916. A proper case for the recovery of reparation having been made, a refund in the amount of $410.85 is due the claimant; and it is so ordered.

(S) WALDO R. PUTNAM,
Settlement Officer.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[DOCKET NO. 73-53; GENERAL ORDER 19, AMDT. 1]

Part 538—Dual Rate Contract Systems in the Foreign Commerce of the United States

PROMULGATION OF PROCEDURES AND REQUIREMENTS FOR IMPOSING AND ALTERING CURRENCY ADJUSTMENT SURCHARGES IN THE EVENT OF A CHANGE IN THE EXCHANGE RATE OF THE TARIFF CURRENCY

July 1, 1975

The purpose of this regulation is to provide a nonexclusive procedure by which a conference of carriers operating in the foreign commerce of the United States and under an approved dual rate system may justify and impose uniformly applied currency surcharges on all rates within the scope of its dual rate contract on less than 90-day notice when necessary because of depreciation of the conference's tariff currency. This regulation amends Subpart A of Part 538 of the Commission's regulations by: (1) the addition of a new section 538.4 titled "Procedures and Requirements for Imposing and Altering Currency Adjustment Surcharges in the Event of a Change in the Exchange Rate of the Tariff Currency"; and (2) the addition of a new paragraph 14(d) to the Uniform Merchant's Contract currently set forth in section 538.10 of Subpart B of Part 538.

By Notice published in August 1973 (38 F.R. 22495, August 21, 1973), the Commission issued its proposed rule regarding short notice contract rate currency surcharges based upon tariff currency depreciation. The original rule was divided into two lengthy subsections which provided for surcharge imposition and removal or modification, respectively. Comments to the proposed rule were filed by 11 parties representing the views of 30 conferences and the Committee of European Shipowners (now called Council of European & Japanese Shipowners' Association).

While no party commenting raised objection to the policy expressed in the proposed rule, many of the parties objected to various specific provisions of the rule as being complex and burdensome to a degree which made the proposed relief provisions virtually illusory. In response to such comments, and following thorough review and analysis of the parties' views, Hearing Counsel filed its Reply to Comments of the parties.

Based on its exhaustive review of the Comments filed, Hearing Counsel viewed the originally proposed rule as requiring sweeping modification in order to incorporate the comments of the parties, to streamline the proposed rule, and to make the rule workable. Hearing Counsel's Reply to Comments, therefore, consisted of a major revision of the original rule and provides the fundamental scheme of the final rule promulgated here.

Following Hearing Counsel's filing of its revised rule (Reply to Comments), eight parties filed Answers which consisted of comments upon the revision of the rules as proposed by Hearing Counsel. While the revised rule proposed by Hearing Counsel still contained minor points requiring clarification in the opinion of the commenting parties, the majority of those parties filing comments endorsed the revision suggested by Hearing Counsel and generally urged its adoption while reserving certain minor objections.

The rule in this proceeding in its revised form then came before the Commission and the Commission members, as well, raised certain questions which they felt required clarification. By Order of Reopening served on December 31, 1974, the Commission reopened the proceeding for the limited purpose of allowing Hearing Counsel to respond to the questions of the Commission and affording interested parties the opportunity to comment further upon any issues raised thereby. Hearing Counsel thereafter submitted its responses, and nine interested parties filed comments. The rule herein promulgated is derived from the revision proposed by Hearing Counsel and conforms closely to that revision. As such, the discussion of comments is limited to issues raised in comments to that revision and considered by the Commission.

As revised by Hearing Counsel, the rule here promulgated consists of a system by which tariff currency depreciation may serve as a basis on which an adjustment to rates by surcharge may be justified. The computation and justification is founded upon a calculation of "major operating currencies" and the percentage of expenses incurred by a conference and its members in those currencies. The percentage of expenses information is to be maintained up to date by the conferences and those figures submitted to the Commission on a quarterly basis. The relative values of major operating currencies and the tariff currency are then compared to a base date specified in the dual rate contract and, if fluctuations when weighted by percentage of expenses so indicate, a currency adjustment surcharge may be imposed on short notice.

One of the major, continuing objections to this rule raised by commenting parties has been the alleged burden upon the conferences which compilation of these quarterly statements entails. The Commission has thoroughly considered this allegation and is unable to agree that the burden is such as to warrant elimination of these expense reports. It has been the experience of the Commission in the past that conferences have been able rapidly to provide such data when requested to do so by the Commission in particular instances. It is the Commission's opinion that such information is reasonably available on a quarterly basis and is maintained in the normal course of business by the member carriers of a conference. This being so, the importance of the data received renders unavoidable the slight burden which may be imposed by this quarterly reporting requirement. Therefore, the requirement of the filing of a quarterly statement of percentage of expense in various major operating currencies has been maintained.

A second recurring objection to these rules pertains to the requirement in the rule that currency surcharges imposed must similarly be removed or reduced when the tariff currency appreciates in relation to other major operating currencies. The Commission has considered the suggested omission of the requirement but is unable to accept the proposal. There would appear to be an overwhelming inequity involved in any rule which would permit an increase in rates by surcharge when the tariff currency depreciates, but no removal or reduction of such imposed surcharge when the tariff currency appreciates.

Additional comments have raised the suggestion that the base date used to compare relative currency values should not be "the day this provision was adopted" as proposed by Hearing Counsel. Rather, it has been suggested that a more flexible approach be taken allowing the base date to be the date when the clause in the contract was adopted by a conference, the date on which the last previous surcharge was imposed or some other date. The Commission has reviewed these suggestions and has determined that more flexibility should be allowed in the fixing of a base date. Therefore, the rule as adopted provides for the conference to select its own base date which it shall specify in its dual rate contract. However, in order to preclude the retroactive recovery of currency losses and consequent large surcharges the Commission makes it clear that no base date may be chosen which antedates the day on which the amended contract is submitted to the Commission for approval.

A further issue arose from questions posed by the Commission to Hearing Counsel which merits discussion. As a part of the revision suggested by Hearing Counsel, it was recommended that surcharges justified by the computations in the rule be permitted to be made applicable to the conference trade as a whole or to particular trades or segments of trades covered by the terms of the dual rate contract and the tariff of the conference involved. This recommendation has been adopted in the final rule. However, it is imperative that these terms be clearly understood as they relate to this rule. For purposes of this rule, the terms "trade" or "trade segment", to which a currency surcharge may be applied, are used to mean the following:

"Trade" means those ports within the scope of a dual rate contract and which are included in or are based upon a simple rate group.

"Trade segment" means any port or combination of ports which comprise a portion or segment of a "trade".

A further modification has been adopted which was previously implicit in the proposed rule but which has now been made explicit. Except as otherwise provided specifically in the rule, any surcharge imposed pursuant to this rule must be kept completely separate from the general rate structure of the conference. This requirement has been included to ward off the obvious regulatory quagmire which the Commission would face in attempting to ascertain the justifiability of a surcharge which had been incorporated into the general rate structure of a conference in the foreign commerce of the United States. Without such a separation of general rates and surcharges, the equitable requirement of reduction in surcharges would have been gutted. Such a lack of enforceability of reductions would have been a disservice to the industry and its shippers and would have resulted in a steady upward spiral of rates. Such an impetus has been determined not to be in the best interest of the public.

One final modification to the rule has been accomplished with respect to the requirement that any currency adjustment surcharge be implemented in certain increments. As proposed, the incremental requirement provided: "Each such surcharge shall take place in increments of not less than two percent." It is the opinion of the Commission that such a provision might be improperly construed as requiring a conference which could justify a three percent surcharge to impose no more than the two percent increment. This would force the conference to absorb the remaining one percent until such time as a four percent surcharge would have justified imposing the next two percent increment. To avoid this possible confusion the rule has been amended by changing the provision quoted above to read "Each such surcharge imposed shall take place in increments of two percent or more."

In the course of the lengthy proceeding, many other issues have been raised pertaining to specific portions of this rule which have not been discussed here. In the main they have not been discussed because they were considered and incorporated in the rule. A limited number of suggestions raised in the many comments, however, have not been reflected in this rule. Any such suggestions have been thoroughly reviewed by the staff and the Commission itself and have not been adopted only after such review and detailed consideration. To list each comment raised would be more confusing than explanatory and they have therefore not been discussed.

Therefore, pursuant to sections 3 and 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 14b and 43 of the Shipping Act, 1916 (46 U.S.C. 813a and 841a) Part 538 of Title 46 CFR is hereby amended by the addition of a new section 538.4.*

*46 CFR 538.4.

Effective date: This amendment shall become effective 30 days after the date of publication in the *Federal Register*.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 319(I)

ROHM AND HAAS COMPANY

v.

VENEZUELAN LINE

NOTICE OF DETERMINATION NOT TO REVIEW

July 2, 1975

Notice is hereby given that the Commission determined not to review the decision of the Settlement Officer in this proceeding served June 17, 1975.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 319(I)

ROHM AND HAAS COMPANY

v.

VENEZUELAN LINE

Reparation Awarded.

DECISION OF CAREY R. BRADY, SETTLEMENT OFFICER[1]

Complainant seeks reparation in the amount of $357.40 from respondent, claiming a freight overcharge on a shipment from New York, New York to Puerto Cabello, Venezuela carried aboard respondent's vessel LA GUAIRA, a bill of lading dated February 23, 1973. The shipment consisted of 31 pallets said to contain 620 bags of synthetic resin paraloid. The gross weight of the shipment was 27,725 lbs. and measured 1,625 cubic feet. The shipment was rated on the basis of $50.50 per 40 cubic feet, which was the applicable rate for "Resins, Synthetic, N.O.S. in other packing:[2] actual value not over $300 per freight ton" according to Item No. 495 of the respondent's tariff in effect at that time.[3] Total charges were assessed in the amount of $1,654.94 which included a $2.50 measurement ton rate discount pallet allowance plus surcharge and packing charge. The shipment, according to complainant, should have been rated on the basis of $100.50 per 2,000 lbs., the applicable rate for "Resins, Synthetic, viz: N.O.S., in bulk in bags: Actual value over $650 but not over $1,000 per 2,000 lbs.," Class rate 1 W.[4] In addition, complainant alleged the shipment was entitled to two allowances on prepalletized shipments, the first on the weight of the shipment and the second on the rate as provided in Items 26(f) and 26(i) of the respondent's tariff.

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission Rules of Practice and Procedure (46 CFR 502.301), this decision shall be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] The other packing is packing other than that described on the line below the generic heading of Resins, Synthetic. The packing described on the line below Resins, Synthetic is "In bulk in bags, in bags, in cartons or in fiber drums".

[3] U.S. Atlantic and Gulf-Venezuela and Netherlands Antilles Conference, Freight Tariff FMC No. 2, S.B. Ven. – 11, 16th Rev. Page 12.

[4] Ibid, Item No. 1000, 4th Rev. Page 122-A and Item No. 999, 5th Rev. Page 68.

Respondent denied the claim solely on the provisions of tariff Item No. 11 which requires that claims be filed within six months after the date of shipment. The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits.[5] The bill of lading is dated February 23, 1973 and the claim was filed with the carrier in November, 1973 and with the Commission on March 14, 1974. The claim has been filed within the two year statutory limit and thus will be treated on the merits.

Respondent does not challenge any of the contentions of the complainant, in fact by letter dated September 30, 1974, respondent so stated, and in addition pointed out that had "the refund been requested within the six month period provided for in the tariff there is no question that it would have been honored".

While the Commission has ruled that a rule similar to the one on which respondent is denying relief cannot be used to defeat a claim properly filed with the Commission the complainant nevertheless has a heavy burden of proof once the shipment has left the custody of the carrier.[6]

The two rates in question are both rated under Resins, Synthetic, N.O.S. The $50.50 per 40 cubic ft. commodity rate requires that the shipment be in packing other than "in bulk in bags, in bags, in cartons or in fiber drums" (actual value not over 300 per freight ton). The Class 1 W rate, $100.50 per 2,000 lbs., requires the shipment to be packed "in bulk in bags" (actual value over $650 but not over $1,000 per 2,000 lbs.). The bill of lading and supporting shipping documentation clearly show the synthetic resins to be packed in bags as required by tariff Item No. 1000. In addition by mathematical computation from the value and weights given on the bill of lading and the commercial invoice the value of the shipment per 2,000 lbs. can be readily determined. The supporting documentation shows 3 pallets of the synthetic resins weighed 3,225 lbs. with a value of $1,590 and 28 pallets of synthetic resins weighed 24,500 lbs. with a value of $8,064. Dividing the 3,225 lbs. and 24,500 lbs. by 2,000 lbs. converts the shipment into weight tons of 1.6125 tons and 12.25 tons, respectively. Dividing the stated values by the calculated weight tons ($1,590 by 1.6125 and $8,064 by 12.25) the actual value of the shipment per 2,000 lbs. is determined to be $986.05 and $658.29, respectively. Clearly, within the value range of over $650 but not over $1,000 per 2,000 lbs. as prescribed by the Class 1W rate of $100.50. Therefore, the shipment should be assessed at that rate.

In regard to the allowances of prepalletized shipments the relevant tariff items provide in pertinent part as follows:

Item 26(f)

. . . When cargo is freighted on a weight basis the actual weight of the pallet shall be deducted but not in excess of 10% of the gross weight of the cargo and pallet. . . .

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[5] Colgate Palmolive Company v. United Fruit Company, Informal Docket No. 115(I), 1970.

[6] Ibid.

Item 26(i)

Provided, prepalletized cargo complies in all respects with the rules set forth herein, the carrier(s) will allow a discount of $2.50 per ton weight or measurement, on the same basis as cargo is being freighted.

The respondent does not dispute that the cargo was properly palletized and complied with all the rules set forth in Item 26. The respondent's bill of lading clearly shows the weight of the 31 pallets to be 63 lbs. each as does the complainant's supporting shipping documents. Therefore, it is found that the complainant has furnished the necessary information at the time of shipment to determine the weight of the pallets as required by Items 26(f) and (i) and has otherwise met the requirements of Item 26. Hence, complainant is entitled to a pallet weight allowance of 1,953 lbs (63 lbs. × 31 pallets) and a rate discount of $2.50 per 2,000 lbs.

Complainant having met his burden of proof, reparation is awarded in the amount of $357.40, the difference between the charges assessed of $1,654.94 and the correct charges of $1,297.54 (25,772 lbs. at $100.50 per 2,000 lbs. less $2.50 rate discount plus surcharge and packing charge).

(S) CAREY R. BRADY,
Settlement Officer.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER A—GENERAL PROVISIONS

[GENERAL ORDER NO. 33; DOCKET NO. 72–62]

July 3, 1975

Part 506—Regulations to Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Trade of the United States

General Order No. 33 was published by the Commission on November 1, 1974 and was to become effective on November 31, 1974. However, since General Order No. 33 prompted numerous requests to delay the effective date and extend the time for filing petitions for reconsideration, the Commission on November 21, 1974 stayed the effective date of the rule and invited interested parties to file their views and arguments regarding the reconsideration thereof.

Comments on reconsideration have been submitted by or on behalf of a number and variety of interested parties including Hearing Counsel. The Commission has carefully considered the position of all the parties and the final rules promulgated herein have been drafted with the parties' comments and arguments in mind. The bulk of the comments submitted concern themselves with matters which have been argued before the Commission in this proceeding before and which have already been fully considered and properly disposed of by the Commission. We will not address ourselves to those matters further. We are limiting our discussion here to those comments and arguments which have prompted changes in the final rules promulgated herein. A section by section discussion of these changes is therefore appropriate.

Section 506.1 Purpose

The word "may" has been substituted for "will" in the last sentence of this section to make it clear that Commission action under these section 19 regulations is discretionary.

506.2 Scope

This section was likewise revised to indicate the discretion of the Commission in invoking these regulations. A change was also made in the wording to make this section consistent with the wording of the Merchant Marine Act, 1920.

506.3 Findings—Conditions unfavorable to shipping in the foreign trade of the United States

Paragraph (c) of this section was amended to indicate that the Commission was not concerned with mere differences in treatment to the vessels in the foreign trade of the United States but is concerned with the effect those differences and treatments have upon the foreign trade of the United States. One party wished the Commission to add to this section and other sections explicit provisions relating to the use of rebates in the foreign trade. Since rebating is covered in section 18(b)(3) of the Shipping Act, 1916 and may be covered under the general terms of these regulations, the Commission does not think it necessary to make any such amendment. The wording of the first sentence of this section has been changed to make it clear that these regulations are to apply to the acts of foreign governments or of foreign owners, operators, agents, or masters.

506.4 Petitions for section 19 relief—General—Who may file

The wording of this section has been changed to indicate that the Commission is not, in any way, limiting the application of this section by specifically naming some of the persons who may file petitions.

506.8 Initial action to meet apparent conditions unfavorable—Resolution through diplomatic channels

This section was changed to give foreign countries notice that the Commission will notify the Secretary of State when conditions unfavorable to shipping in the foreign trade of the United States apparently exist and that it *may* request that he seek resolution of the matter through diplomatic channels.

506.9 Actions to meet conditions unfavorable to shipping in the foreign trade of the United States

Commentators to this section asserted that tariff suspension would not be a lawful exercise of section 19 powers. While it is true that sections 18(b)(4) and (5) set out the circumstances when the Commission may suspend tariffs under the Shipping Act, 1916, the powers of the Commission under section 19 of the Merchant Marine Act of 1920 are much broader. Therefore, this section remains unchanged.

506.11 Production of information

Paragraphs (b) and (c) of this section were changed to make it clear that the Commission was not restricting the scope of information to be produced by listing some of the types of information which could be ordered to be produced.

506.12 Production of information—Failure to produce

Objection was directed to section 506.12 because it required the Commission to find conditions unfavorable to shipping in the foreign trade of the United States when there was a failure to produce any information ordered by the Commission to be produced under section 506.11. There was an apparent conflict with the wording of this section and the explanation which was given to it in the preamble to the regulations published on November 1, 1974. In the preamble, the Commission stated that this section would not necessarily apply to situations where there was a bona fide effort to comply. This explanation was in conflict with the clear wording of this section. Many parties asserted that the word "will" should be changed to "may". Such a change has been in order to make this section consistent with the intent of the Commission. This section has also been amended so that appropriate findings of fact may be made when there is a failure to produce as well as the option of a deemed admission.

Other nonsubstantive changes were made to these final rules to conform with the amendments discussed herein. This discussion has not dealt with those comments which we viewed as being either irrelevant or immaterial to the matters at issue.

As a final matter, we would point out for the edification of all concerned,—and lest there be any misunderstanding, that the rule promulgated herein is not to be construed in any way whatsoever as a substitute vehicle by which agreements approved by the Commission under Section 15 of the Shipping Act, 1916, might be contested. Likewise, the new rule is not intended in any way to replace, modify, or limit the traditional criteria considered in connection with applications under section 15.

Therefore, pursuant to the authority of section 19 (1)(b) of the Merchant Marine Act, 1920 (46 U.S.C. § 876 (1)(b)), section 4 of the Administrative Procedure Act (5 U.S.C. § 553), sections 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 820, 841(a)), and Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. § 483(a)) and Reorganization Plan No. 7 of 1961 (75 stat. 840), Part 506 of Title 46 CFR is hereby revised.*

Effective date. The provisions of this Part 506 will become effective 30 days after publication in the *Federal Register*.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*The text of the amendment appears in 46 CFR 506.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 470

AIRLEX INDUSTRIES
RELIABLE CARGO SHIPPING A/C

v.

LYKES BROS. S/S CO., INC.

Authority to refund a portion of freight charges denied..

REPORT

October 14, 1975

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

Lykes Bros. Steamship Co., Inc. (Lykes) applied for permission to refund a portion of the freight charges collected on a shipment described in the bill of lading as Industrial Cooling Towers, carried by Lykes from Baltimore to Haifa, Israel, under bill of lading dated December 2, 1974.

Lykes collected $17,703.33 in freight charges and is seeking permission to refund $4,764.70 thereof. Lykes asserts there was an error in the description of the shipment. Lykes maintains that had it known the true nature of the cargo it would have filed a rate lower than the rate it filed for this particular shipment.

The Presiding Officer issued an initial decision denying the application on the ground that Lykes' error was not an error in a tariff of a clerical or administrative nature or an error due to an inadvertent failure to file an intended rate, as contemplated in P.L. 90–298, which amended section 18(b)(3) of the Shipping Act, 1916 (the Act).

Complainant excepted to the denial of the application.*

We concur in the Presiding Officer's denial of Lykes' application. However, our reason for denying the application is, simply stated, that Lykes failed to comply with a specific statutory prerequisite. Under section 18(b)(3) of the Act, the Commission may, in certain circumstances,

*In view of our disposition of this case we need not discuss Complainant's arguments on exceptions.

at its discretion and for good cause permit a common carrier by water in foreign commerce to refund or waive collection of a portion of freight charges,

> *Provided* . . . That the common carrier . . . has, prior to applying for authority to make a refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based:. . . .
> *And provided further.* That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. 46 U.S.C. 817(b)(3).

Respondent has not, prior to applying for permission to refund a portion of freight charges, filed with the Commission a tariff setting forth the rate upon which the refund would be based. The application must therefore be denied. *Oppenheimer International Corp. v. Moore-McCormack Lines, Inc.*, 15 F.M.C. 49 (1971). Since more than 180 days have elapsed from the date of shipment, it is now too late for the carrier to file a new tariff and thereafter refile the application. No relief, therefore, can be granted under the "special docket" procedure set forth in section 18(b)(3) of the Act as implemented by Rule 6(b) of the Commission's Rules of Practice and Procedure. 46 CFR 502.92(a).

This does not preclude, however, Complainant's filing a complaint under section 22 of the Act, alleging the violation of any section of the Act, such as sections 16 or 17 and asking reparation for any injury caused by such alleged violation.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 470

AIRLEX INDUSTRIES
RELIABLE CARGO SIPPING A/C

v.

LYKES BROS. S/S CO., INC.

Application denied.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed March 12, 1975, Lykes Bros. Steamship Co., Inc., requests authority to refund a portion of the freight charges applied to a shipment of Industrial Cooling Towers weighing 56,832 pounds and measuring 6,572 cubic feet, carried per bill of lading dated December 2, 1974, on Lykes vessel *Margaret Lykes* from Baltimore, to Haifa, Israel. The consignor, seeking a breakbulk rate on an American carrier for this particular shipment, requested Lykes to file a $107.75/40 cft. rate for Air Conditioning Machinery. Lykes accordingly filed the rate under Special Permission procedure.[2] After filing and after the cargo was loaded and en route, it was discovered that the lading was Industrial Cooling Towers and not Air Conditioning Machinery. Although the lading was described as Industrial Cooling Towers, nevertheless the basis for the rate charged was Machinery, Air Conditioning. The lower rate sought to be applied is that for Industrial Cooling Towers, allegedly $78.50 W/M.[3]

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

[1] This decision became the decision of the Commission October 14, 1975.

[2] Lykes Bros. Steamship Co., Inc., Gulf & South Atlantic/North Spain, Portuguese & Canary Islands Tariff No. 4 (FMC–63), Original Page 43, effective date November 26, 1974.

[3] The application is imperfect in this regard because the new tariff which sets forth the rate on which such refund would be based has not been filed as required prior to application. In view of the disposition of this proceeding, however, such infirmity is inconsequential. Nevertheless it is necessary if a formal complaint is filed seeking return of the overcharge by way of an award of reparation.

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally, the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of Public Law 90–298 elaborates on the rationale that carriers would be authorized to make voluntary refunds or authorized to waive the collection of a portion of their freight charges for bona fide mistake. The nature of that mistake is particularly described:[4]

. . . Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understands the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the higher rate.

Another example would be where a reissued tariff page contains a typographical error changing the rate, for example, republishing a rate in error as $73 per ton rather than continuing it on the page as $37 per ton. In such a situation under section 18(b)(3) of the Shipping Act, a carrier can charge only the published rate, and the Commission cannot permit an adjustment in the intended rate.

The Senate Report[5] states in the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of the freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting the intended rate.

Applied to the facts, it appears that Lykes has relied upon an inapplicable section of the Shipping Act for its remedy. Public Law 90–298, amending section 18(b)(3) of the Shipping Act, is concerned with mistakes made by common carriers by water in the foreign commerce of the United States. The application requests the carrier be allowed to charge a lower rate for the arcane reason that this is ". . . the rate which Lykes would have theretofore filed had the true nature of the commodity to be shipped been known at the time of filing." The carrier applied the rate for Air Conditioning Machinery which, it is alleged, was not the correct rate as the cargo actually shipped was Industrial Cooling Towers. On the other hand the consignor requested a lower rate for something other than it actually intended to ship. Whatever the carrier's error may have been, it was not an error in a tariff of a clerical or administrative

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[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9437] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[5] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9437] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges.*

nature or an error due to inadvertence in failing to file a new tariff that the exemption in Public Law 90–298 contemplates.

Where the mistake is other than that stipulated by Public Law 90–298, then the remedy lies in a formal complaint seeking reparation under section 22 of the Shipping Act perhaps using the shortened procedure contemplated by Subpart K of the Commission's Rules of Practice and Procedure (46 CFR 502.181). Claims for reparation based on misclassification may be proved by evidence of what was actually shipped, even though the actual shipment may be other than that described on the bill of lading.[6]

Accordingly, the application of Lykes Bros. Steamship Co., Inc., for authority to refund a portion of the freight charges on a shipment of Industrial Cooling Towers must be denied without prejudice to the filing of a formal complaint seeking return of the overcharge by way of an award of reparation subject to the caveat in footnote three.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
June 3, 1975.

[6] Docket No. 74–2, *Merck Sharp & Dohme v. Flota Mercante Grancolombiana*, ____F.M.C.____, 14 SRR 1626 (1975), citing Informal Docket No. 283(I), *Western Publishing Company, Incorporated v. Hapag Lloyd, A.G.*, ____F.M.C.____, ____SRR____ (1972).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 469

PERKINS-GOODWIN CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Authority to waive collection of a portion of freight charges denied..

REPORT

OCTOBER 14, 1975

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

This proceeding is before the Commission on exceptions filed by Complainant Perkins-Goodwin Co., Inc., to the Initial Decision served June 6, 1975, denying Lykes Bros. Steamship Co., Inc. (Lykes) permission to waive collection of a portion of the freight charges assessed on a shipment of 894,244 pounds or 37,700 cubic feet of paperboard, carried from New Orleans to Mombasa, East Africa, under bills of lading dated September 12, 1974.

Lykes collected $53,040.87 in freight charges. Claiming that it had made a technical error in the quotation of the applicable rate, Lykes requested permission to waive collection of $34,656.48 of the freight charges assessed on the shipment.

The Presiding Officer issued an initial decision denying the application on the ground that Lykes' error was not an error in a tariff of a clerical or administrative nature or an error due to an inadvertent failure to file an intended rate, as contemplated in P.L. 90–298, which amended section 18(b)(3) of the Shipping Act, 1916 (the Act).

Complainant excepted to the denial of the application.*

We concur in the Presiding Officer's denial of Lykes' application. However, our reason for denying the application is, simply stated, that Lykes failed to comply with a specific statutory prerequisite. Under

*In view of our disposition of this case we need not discuss Complainant's arguments on exceptions.

section 18(b)(3) of the Act, the Commission may, in certain circumstances, at its discretion and for good cause permit a common carrier by water in foreign commerce to refund or waive collection of a portion of freight charges,

> *Provided* . . . That the common carrier . . . has, prior to applying for authority to make a refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based:. . . .
> *And provided further,* that application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment. 46 U.S.C. 817(b)(3).

Respondent has not, prior to applying for permission to waive collection of a portion of freight charges, filed with the Commission a tariff setting forth the rate upon which the waiver would be based. The application must therefore be denied. *Oppenheimer International Corp. v. Moore-McCormack Lines, Inc.*, 15 F.M.C. 49 (1971). Since more than 180 days have elapsed from the date of shipment, it is now too late for the carrier to file a new tariff and thereafter refile the application. No relief, therefore, can be granted under the "special docket" procedure set forth in section 18(b)(3) of the Act as implemented by Rule 6(b) of the Commission's Rules of Practice and Procedure. 46 CFR 502.92(a).

This does not preclude, however, Complainant's filing a complaint under section 22 of the Act, alleging the violation of any section of the Act, such as sections 16 or 17 and asking reparation for any injury caused by such alleged violation.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 469

PERKINS-GOODWIN CO., INC.

v.

LYKES BROS. STEAMSHIP CO., INC.

Application denied..

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed March 6, 1975, Lykes Bros. Steamship Co., Inc. requests authority to waive collection of a portion of the freight charges applied to a shipment of 374 rolls of paperboard weighing 894,244 pounds and measuring 32,700 cubic feet carried per bill of lading dated September 12, 1974, on Lykes vessel *Christopher Lykes* from New Orleans to Mombasa, East Africa. When the shipment was booked on June 28, 1974, a rate of $100.75/2240 pounds was quoted.[2] However, at the time of shipment, the applicable rate, effective August 15, 1974, was $78.50 W/M.[3] Accordingly, the shipment was rated on a measurement basis which resulted in a higher charge than if it had been rated on the weight basis set forth in the earlier tariff of rates.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based.

[1] This decision became the decision of the Commission October 14, 1975.

[2] South and East Africa Conference, South Bound Freight Tariff No. 1, FMC No. 2, Fifth Revised Page 161, Cancelling Fourth Revised Page 161, Effective Date May 15, 1974, Item No. 430.

[3] South and East Africa Conference, South Bound Freight Tariff No. 1, FMC No. 2, Sixth Revised Page 161, Cancelling Fifth Revised Page 161, Effective Date July 19, 1974, Item No. 430.

The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

Applied to the facts it appears that these requirements have not been met. Whatever the carrier's error may have been, it was not an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff that the exemption in Public Law 90–298 contemplates. Misquotation of rates is not a ground for relief thereunder.[4] Since the exemption embodied in Public Law 90–298 is inapplicable, then the rule in *Louisville & N.R.R. Co. v. Maxwell*[5] by direction of *Cunard*[6] obtains:

> Ignorance . . . of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

Accordingly, the application of Lykes Bros. Steamship Co., Inc., for authority to waive collection of a portion of the freight charges on a shipment of 374 rolls of paperboard must be denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
June 6, 1975..

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[4] Special Docket No. 462, *Commodity Credit Corp. v. Delta Steamship Lines Inc.*, ____F.M.C.____, 14 SRR 1207 (1974).

[5] 237 U.S. 94, 97 (1915).

[6] *U.S. Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932).

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

[DOCKET NO. 72–41; GENERAL ORDER 35]

November 4, 1975

Part 551—Truck Detention at the Port of New York

By Notice of Proposed Rulemaking published in the *Federal Register* on August 23, 1972, the Commission served notice that it intended to promulgate certain rules and regulations to implement an equitable solution to the delays in the handling and interchange of freight between ocean and motor carriers experienced at the Port of New York. Comments from interested parties were solicited. These proposed rules are intended to supersede the truck detention rules promulgated by the Commission in Docket No. 1153, *Truck and Lighter Loading and Unloading Practices,* 12 F.M.C. 166 (1969). Following publication, and in response to a petition filed by Middle Atlantic Conference, the Commission issued an Amended Notice of Proposed Rulemaking providing for filing of responses to comments. Eighteen comments were submitted in this proceeding by, or on behalf of, a wide range of interested parties. Replies to these comments have been filed by Hearing Counsel and 11 answers to Hearing Counsel's replies have also been submitted. Subsequent to the submission of these answers, Hearing Counsel petitioned the Commission to take testimony limited to the factual issues surrounding section 551.2(a)(i) [section B(1)(a)]* which precludes prelodging of delivery orders and dock receipts at marine terminal facilities at the Port of New York on the grounds that there appeared to be disputes of fact concerning the present practice of prelodging documents, operational and procedural problems caused by such prelodging, and acceptable alternatives to the prelodging rule. The Commission, noting that with the exception of those comments filed pertaining to the prelodging rule it had

*The provisions promulgated herein have been renumbered to conform to established Commission numbering system and *Federal Register* procedures. We have made reference, as exhibited in brackets, to the corresponding section as originally proposed.

sufficient information to promulgate a final rule, granted Hearing Counsel's request and directed that the Administrative Law Judge issue a recommended decision thereon.

Administrative Law Judge Charles E. Morgan issued his Initial Decision on the prelodging issue to which exceptions and replies thereto were filed. The positions of the various parties on the prelodging of delivery orders and dock receipt are discussed herein. Also, because of the many and varied revisions incorporated into our final rule, we have discussed below certain other portions of the rule and the comments submitted with respect thereto. Our final rules promulgated herein have been drafted with careful consideration given the parties. Comments and arguments not specifically discussed or reflected herein have been nevertheless considered and found not relevant nor material.

Section 551.1(b) [section A2] defines a terminal operator. One commentator urges us not to exclude from that definition "marine terminal facilities operated or controlled by the Department of Defense." We find such a request to be inconsistent both with the provisions of 46 CFR 533.3 and with the policy of avoiding conflict between agencies of the U.S. government which might result from an attempt by one such agency to regulate the activities of another. However, in order to make clear the scope of these regulations, we have limited the applicability of the "terminal operator" definition to the "purposes of this Part."

While no specific comments were directed to section 551.1(c) [section A3], which identifies the type of entities which will be subject to the tariffs of terminal operators, we have, for the sake of clarity and consistent with the suggestion of Hearing Counsel, amended section 551.1(c) by inserting the word "including" between the terms "terminal operators" and "steamship companies acting as terminal operator."

Section 551.1(d) [section A4], which identifies the types of persons who "shall be entitled to receive remuneration in accordance with the provisions of this Rule," has been amended to clarify who is to ultimately benefit from charges collected pursuant to these rules.

Several parties commented on section 551.1(g) [section A7], which sets forth the conditions under which "a terminal" operator would not be assessed a penalty under these rules "if receipt or delivery of cargo . . . is prevented or delayed." In addition to strikes, work stoppage, and several unusual weather conditions, we are asked to include "acts of God," "fires," "serious accidents," "work slowdowns," and "congestion in anticipation of a strike of longshoremen or following the termination of such a strike." One party who opposes this suggestion sees no reason why the terminal operator should be excused from compliance with the rules, and therefore, rather than expanding the proposed exceptions would limit the existing exception to those instances where the "strike" or "work stoppage" is not the result of a violation of the collective bargaining agreement between the terminal operator and its employees.

While we sympathize with those parties who want to add "congestion" and "work slowdown" to the list of exceptions, we are nevertheless in full agreement with the position of Hearing Counsel that terminal operators cannot absolve themselves of all of their responsibilities under this rule. The objective behind this provision is to incorporate the distinction previously drawn by the Commission between work slowdowns and insufficient equipment which tends to delay operations, *and* strikes, work stoppages, or unusual weather conditions or other such causes which terminate operations. The former is the responsibility of the terminal operator; the latter is beyond his control, relieving him of detention payments. See *Truck and Lighter Loading and Unloading Practices, supra,* at 170, notes 170. Thus, since it is our intention that terminal operators be free from liability for situations over which they have no control, we have expanded section 551.1(g) to include acts of God, fires, and serious accidents as causes absolving the terminal operator. The question of whether or not a particular condition is so severe as to exonerate the person against whom a claim is made is the subject of section 551.1(j) [section A10].

Section 551.1(h) [section A8] sets out other conditions under which a terminal operator will not be liable for delay. One commentator suggests that this section be amended to make it clear that the existing trade practice whereby the terminal operator is required to sort/separate shipments on a single bill of lading by marks will continue to be permitted. In response thereto, another party points out that this section does not prohibit receipt or delivery of cargo by marks and numbers or any other service requiring the sorting of cargo, other than by bill of lading, at the request of the shipper, consignee or motor carrier, but merely excludes such shipments from the coverage of the proposed rule. The purpose of section 551.1(h) is to provide that the shipper-importer will be responsible for delays where the terminal operator is required to sort or separate shipments by marks. Additionally, and since, as was pointed out by one of the parties, terminal operators are required as part of their operations to segregate incoming/outgoing shipments by bills of lading, section 551.1(h) contemplates that as to a single motor carrier loading/unloading multiple LTL shipments, time, for purposes of this rule, shall not be computed separately for the loading/unloading of each shipment, as urged by one of the parties, but rather shall accrue during the entire time the vehicle is being loaded/unloaded. This, however, should not be confused with section 551.2(a)(2) [section B.1(b)], dealing with several vehicles picking up/delivering multiple shipments on a single delivery order/dock receipt, where time shall be computed separately for each vehicle loaded/unloaded on an open delivery order or dock receipt. Finally, section 551.1(h) has been amended to reflect Hearing Counsel's suggestion that terminal operators not be held liable for delays caused by U.S. government regulations.

We find merit in one party's observation that if procedures on the docks are to be sped up, it must be realized that delay is incurred by motor carriers with regard to empty as well as stuffed containers. Consequently, we have modified section 551.1(i) [section A9] by the addition of the following sentence: "For purposes of this Part, 'containers' shall include empty as well as stuffed containers."

Section 551.1(k) [section A 11] establishes procedures to be followed by terminal operators who elect to deliver breakbulk cargo to motor carriers prior to full discharge and is not concerned, as one of the commentators believes, with situations involving the stripping of containerized cargo. Moreover, this section does not require but merely permits the terminal operator to effect delivery before the vessel is discharged. Because section 551.4(i) [section D9] makes it the responsibility of the consignee or his agent (motor carrier) to determine when a cargo is available (at nonappointment piers) and section 551.3(b) [section C2] will not allow appointments unless the cargo is properly available, the terminal operator has to advise the motor carrier only when the cargo is so available. For example, until breakbulk shipments have been stripped from the container, there is nothing which obligates the terminal operator to make delivery as soon as the vessel discharged its unstripped containers.

Another party suggests that because the documents in the possession of the terminal operator do not always show the identity of the motor carrier that will pick up the cargo, language should be added to section 551.1(k) requiring the terminal operator to make a reasonable effort to ascertain the party to receive such notice and effect the same. We question the practical necessity of such a revision since it is only reasonable to presume that the terminal operator would, in the interest of sound business practice, make all reasonable efforts to contact the appropriate person in order to have cargo removed from the pier prior to full discharge. Common sense would likewise dictate that if this person cannot be ascertained, no notification would be issued. Nevertheless, in our final rule we have substituted "the consignee or its designated agent" for "motor carrier" as the person to be notified by the terminal operator. Lastly, we agree with the suggestion of one commentator that in order to avoid any question as to whether, in fact, authority was or was not given, section 551.1(k) should be modified to require that the terminal operator employee authorizing the delivery of cargo prior to the vessel being fully discharged be identified.

Section 551.1(l) [section A 12], in effect, allows the terminal operator the option of selecting the system under which it will operate. One party is of the opinion that the terminal operator will opt more often for the nonappointment system where detention time begins to run from the time validated on the gate pass as provided in § 551.6(b). In this regard, it is argued that this section should be amended to operate in harmony with ICC tariffs by deleting the nonappointment and combination procedures and keeping only the appointment system wherein truck detention time begins when the motor carrier arrives at the gate. We cannot agree. To implement such a suggestion would, in our opinion, deprive the terminal operator of the prerogative to institute a procedure that would best implement the objectives of the proposed rules. The proposed rules are geared toward the expeditious loading/unloading of cargo which of necessity entails a smooth procedure between the terminal operator and motor carriers and are not concerned with the relationship between motor carrier and shipper. Our final rule, however, reflects the suggestion of two of the parties that section 551.1(l) be modified to require that any change in the procedures at a given pier should only be made on thirty (30) days' notice and upon the filing of an appropriate tariff amendment effecting such change.

Section 551.2(a)(1) [section B1(a)], as originally proposed, prohibited the prelodging of delivery orders and dock receipts. Upon review of the record in this proceeding we remain convinced that prelodging of delivery orders causes not only delay and congestion but also sets the stage for what could become serious security problems at the Port. As concerns the former, we find merit on one party's observation that an incomplete prelodged delivery order causes not only delay to the motor carrier concerned while the receiving clerk perfects the delivery order or prepares a new one, but also hinders the progress of the other trucks who have the proper documentation but cannot proceed until the initial problem has been resolved.

Some commentators argue that not only will prelodging not unnecessarily impede the free movement of import cargo, but a prohibition of prelodging will result in additional expenses for shippers and consignees using the Port. In support thereof, it is contended that the prelodging of delivery orders is necessary because of the five-day limit on free time on imports. With fast container service and slow mails, it is submitted that the customhouse broker is occasionally delayed in processing the import, especially if the goods arrive in several containers, to the point where free time is about to expire and therefore must telephone the pickup order to the motor carrier and lodge the delivery order at the pier if the trucker is to get his goods before his free time expires. Also, it is argued that by prelodging the delivery order the clerk can verify, in advance of the arrival of the motor carrier, that the freight has been paid and the original bill of lading has been delivered to the ocean carrier, a procedure that allegedly can cut down on delays. Whatever the merits of these arguments, the fact remains, as the Administrative Law Judge found, that when a trucker does not have in his possession a full and complete delivery order upon arrival at the pier, delay *in fact,* occurs. The movement of cargo from the piers is appreciably slowed down while the terminal personnel are straightening out the problems created by an incomplete or lost prelodged delivery order. One of the purposes of this proposed rule is to better define the responsibilities of all parties involved at the Port for the expeditious interchange of cargo. We believe a prohibition on prelodging delivery orders is consistent with such purpose.

Except to the extent the Administrative Law Judge recommended that a $15 fee be levied for the handling of each prelodged dock receipt discussed in detail *infra,* we agree with his findings as they relate to the practice of prelodging such documents. Exceptions taken to the Administrative Law Judge's conclusion that the prelodging of dock receipts does not cause any significant truck detention at the Port reiterate the arguments supporting the prohibition of the prelodging of delivery orders, the essence of which is based on allegations of port congestion and delay in service. It is their position that it would be just as easy to hire a special messenger to deliver the dock receipt to the truck terminals within the Port area, as it is to deliver them to piers. We disagree. Such a procedure would be expensive for the shipper since the messenger would more often than not just "wait around" truck terminals to meet motor carriers. Moreover, and considering the traffic problem in and around the city, it would be most impractical to meet the motor carrier and/or "gypsy truckers", who has no truck terminal, at a predetermined place. In any event, there has been presented ample evidence that delay at the Port is not due primarily from the prelodging of dock receipts, which, as a matter of record, occurs only with a small percentage of export cargo, but instead is due to the prelodging of delivery orders.

Finally, there are those situations where prelodging of the dock receipt is the only practical solution if there is to be a prompt receipt of the export cargo in order that the motor carrier can unload as soon as it arrives at the piers. For instance, and as observed by the Administrative Law Judge, when the exporter wished to take advantage of infrequent sailings by utilizing overnight shipments (i.e., shipments which leave the point of origin the night before and arrive at the docks the following morning), the forwarder, of necessity, must prelodge the dock receipt at the marine terminal in lieu of delivering it to a truck terminal. Similarly, the prelodging of dock receipts at the pier is more desirable than to have to decide as to which of at least two carriers involved with long-haul shipments will be the recipient of the dock receipt; particularly, since truckers "swap" tractors and trailers, and may go directly to the pier or to a local delivery agent for pier delivery.

Additional support for the prelodging of dock receipts derives from the Administrative Law Judge's finding that "exporters frequently are unaware of exactly when goods will be ready for transportation to the Port of New York." This means that the forwarder is unable to obtain the "pro and con" numbers of the motor carrier transporting the goods until the last minute and it is only at this time that the forwarder is able to begin to estimate the transit time from the inland point to the docks. Moreover, and because terminal facilities are subject to the handling of the excessive amounts of import/export shipments and labor problems, there are times when the forwarder will not know until just before arrival of the vessel the specific pier for delivery.

We also find considerable merit in the Administrative Law Judge's observations that prohibiting prelodging of dock receipts would: (1) disrupt pre-reserved shipping space since, in many instances, the ocean carrier transporting the goods will insist on knowing, in advance, the size and amount of the shipment it has "booked"; and (2) be unwise because it could lead to the misuse of blank dock receipts which would have to be left at inland points if no prelodging is permitted. As long as the prelodging practice is not abused, we believe it will be to the advantage of the users of the Port to continue its use. In conclusion, therefore, while we do not deny that it would be more beneficial for the trucker to have the dock receipt in his hand when he arrives at the pier, the practicalities involved in the export of goods require, under certain situations, prelodging of dock receipts.

The Administrative Law Judge also recommended a $15 service charge for prelodging, noting that since the time and expense involved in handling prelodged dock receipts was for the convenience of the forwarder or exporter, the cost of such service should be borne by them and not by all who use the marine terminal operators' service (in the form of higher stevedoring rates). We do not agree. We agree with the position taken by those parties who oppose this $15 assessment fee on the ground that it will work only as a penalty by unreasonably burdening the shipper who is trying to export his product as quickly and cheaply as possible. Further, such a fee could well drive the small inland shipper out of business since he would not be able to absorb a $15 charge in his selling price of exported goods without running the risk of pricing his product out of the competitive market. As a result, a service charge might, under the circumstances, give rise to an unreasonable preference in favor of large volume exporters who obviously could absorb such a charge. Such a charge could also cause prospective exporters to avoid the Port as well as present exporters to divert their shipments to other less expensive ports, all to the financial disadvantage of the Port.

For the aforementioned reasons, we have modified the final version of section 551.2(a)(1) to reflect a prohibition of the prelodging of delivery orders but to allow the continuance of the practice of prelodging dock receipts without any service fee.

We have further modified section 551.2(a)(1) to permit time stamps and notations on gate passes and other arrival documents to be duplicated on the trucker's copy of the delivery order or dock receipt, instead of on a blank paper as originally proposed. The existence of a blank piece of paper is just another document that would be susceptible to being lost or stolen. We see no reason to further complicate the paperwork involved. Moreover, and as one party points out, the time stamp on a copy of the dock receipt or delivery order retained by the trucker would be helpful in the processing of future claims.

Section 551.2(a)(2) [section B1(b)] pertains to a motor carrier's use of the open delivery order/dock receipt. One party suggests that to allow a motor carrier to continue the established and accepted practice of presenting open documents on less than truckload (LTL) shipments will compound the problem of cargo security at breakbulk terminals. We disagree. Quite the contrary, by permitting a terminal operator to establish his own safeguards for the handling of LTL shipments, which he would do by filing the appropriate procedures in his tariff, security would, we feel, be improved. This conclusion is based on the fact that each procedure for physically handling cargo across the platform will, necessarily, take into account security considerations peculiar to that breakbulk terminal facility. In our final rules, we have adopted Hearing Counsel's suggestion that the terminal operator be required to establish procedures by which the motor carrier, subsequent to the receipt or delivery of the initial load, would have to exhibit satisfactory authorization before picking up or delivering the "remaining truckloads or shipments." The substitution of this language for the word "cargo", as originally proposed, will alleviate any confusion as to what the motor carrier has authority to pickup or deliver.

Several parties commented on section 551.2(b) [section B2] which sets forth the information to be included within a dock receipt. Comments addressed to this provision range from suggesting that the dock receipts requirements be "in exact conformity" with the U.S. Standard Master, to urging that the terminal operator be allowed complete discretion to determine the form or content of the dock receipt. We cannot accede to either suggestion.

While we are not opposed to a dock receipt in the form of the U.S. Standard Master, the party making such suggestion is not clear as to whether its contents will only include that as required by section 551.2(b) of our rules, or would supplement the existing information already present on the U.S. Master Standard. Further, any suggested change in this section that would dilute our requirements, such as one party's proposal that terminal operators be allowed to impose their own documentation requirements, would destroy the effectiveness of the rules by undermining our objective of standardizing documentation throughout the Port. As another commentator aptly pointed out the laxity and arbitrariness of documentation procedures have been *among* the major causes of truck delays and disputes between motor carriers and terminal operators. Consequently, in the interest of standardization and giving due regard to allowing terminal operators some flexibility, section 551.2(b) has been revised to provide a terminal operator the discretion to vary the format of a document while requiring him to embody information therein to be applicable portwide. In order that the dock receipt will reflect all pertinent information necessary to expedite the movement of cargo, we have revised the final section 551.2(b) to include certain substantive changes as suggested by the parties, which we believe would help further to eliminate haphazard documentation.

Section 551.2(c) [section B3], as originally proposed, required the use of a particular delivery order form containing certain specific information. At the outset, we would point out that all concerned would benefit from a standardized delivery order form since it would reduce paperwork and simplify the processing of such documents. However, with the introduction of Customs' new form 11–RC–450, both our proposed standardized form and another party's proposed replacement which would be aligned to the U.S. Standard Master have become incompatible with the purpose of the truck detention rules; i.e., requiring the motor carrier to have in his possession documents encompassing the information necessary to quickly gain access to the piers for the delivery or pickup of cargo. Without substantial modification, or at worst, separate preparation, of the aforementioned forms, it would become impossible for either of the forms to conform to the changes affected by this new Customs' form.

Nevertheless, the consensus of the parties hereto is that all that is needed for the proper delivery of cargo is a document containing information sufficient to properly identify the shipment to all parties concerned and to authorize its delivery. We agree. The use of such a document will not compromise the needs of the motor carriers, terminal operators, ocean carriers and others engaged in the interchange of cargo at the Port of New York. Therefore, for reasons of security, simplicity, and expedition, delivery orders to be used need only contain the information outlined in section 551.2(c) herein.

We have incorporated into our final rule suggestions regarding information required to be in the delivery order which would not have an adverse effect on cargo security and the control of cargo. The remaining comments have been found to be of minimal value towards the adoption of a practical and useful delivery order. Lastly, we would explain that the term "address of the terminal" as used in section 551.2(c)(2) [section B3(b)], refers to the terminal designation (i.e., Berth No., Port Elizabeth) and not the street address.

Because of the similarity of originally proposed sections B5 and B6 they will be discussed together. The combined effect of these two sections is to allow the terminal operator to refuse to complete or correct the documents necessary to effect the pickup or delivery of cargo. Three parties object to granting the terminal operator this option, arguing that the terminal operator would abuse his discretion to the extent of arbitrarily turning away the motor carrier. Therefore, we are asked that both provisions be modified to require the terminal operator to complete incomplete, or correct deficient documents with the charge for such service shifted to the shipper in lieu of the motor carrier as presently required by section 551.7(c) [section F3] of our rules.

In reply, Hearing Counsel point out that: (1) the efficacy of our truck detention rules is predicated upon the working relationship between motor carriers and terminal operators, not the shipper and terminal operator; and (2) any economic hardship that may befall the motor carrier effected by the terminal operator, is a direct result of its own action. Obviously, if the motor carrier does not request such services from the terminal operator, he will have to return to the pier after the documents are corrected or completed. More important, we consider the procedure as outlined in sections B5 and B6 as the fastest method of correcting inaccurate and/or incomplete documents which, as all parties agree, have been a continual source of delay, congestion and confusion at the Port.

In response to a suggestion advanced by Hearing Counsel, we have consolidated the language of sections B5 and B6 into one section, designated section 551.2(e) and redesignated proposed sections B7 and B8 as sections 551.2(f) and (g), respectively.

Section 551.2(f) [section B7] requires that a terminal operator provide a written statement to the motor carrier explaining the former's reason for rejecting documents. The purpose of this requirement is not to create additional paperwork, as suggested by one party, but rather to eliminate disputes and/or misunderstandings and allow the parties concerned to document delay and thereby attribute fault.

Section 551.2(g) [section B8], as originally proposed, required that any authorization for the delivery of cargo from one location to another in certain specific enumerated circumstances must have the written approval of the ocean carrier involved. This section further required that any delay occasioned thereby be excluded from computation of penalty time. Upon review of certain of the comments we agree with Hearing Counsel that since this section affects only the relationship between steamship companies and terminal operators, the final determination as to whether authorization should be oral or written should be left to the discretion of the parties concerned. We are not persuaded by the argument of one of the parties that this will put the terminal operator at a decided disadvantage where the steamship company claims the delivery of cargo was not authorized.

We do, however, find merit with one commentator's argument that because any delays caused by the changes described in this section are matters both within the control of and for the benefit of the steamship company or terminal operator, depending on the circumstances, neither should be absolved from liability. The shipping public should not be penalized because either of the persons in issue elect to make a change in their operations without adequate opportunity to correct documents to reflect the change.

In view of the above, section 551.2(g) has been revised to delete the "in writing" requirement and to provide that the delay occasioned in certain circumstances shall be chargeable to the party responsible for such change.

Sections 551.3, 551.4 and 551.5 [sections C, D, and E], generally set forth the various procedures to be employed at a terminal under the appointment system, nonappointment system, and a combination of both. Here it should be pointed out as a general matter that while the Port Adjudicator is authorized to settle disputes concerning specific claims submitted pursuant to this Part, this will in no way oust the Commission of jurisdiction under section 17 of the Act.

We have modified section 551.3(a)(2) [section C1(b)] to require the terminal operator to identify the terminal operator employee granting the appointment, in addition to listing the information already required by this section. In case of disputes, such additional information will make it easier for a person requesting an appointment to substantiate that an appointment was granted.

Section 551.3(b) [section C2] relates under what circumstances the terminal operator shall grant an appointment. In response to the comments of two of the parties, we have modified this section to make it clear that the term "freight release" means the notification by the steamship company to the terminal operator that conditions precedent to the release of the cargo have been satisfied.

As originally proposed, section 551.3(c)(1) [section C3(a)] required motor carriers to arrive 15 minutes prior to his scheduled appointment. Certain commentators argued that such a time requirement does nothing to enhance efficiency, particularly when service is provided at a predetermined time. We agree. Since under our rules the motor carrier will be required to have in his possession the necessary documentation to gain access to the piers prior to receiving a gate pass, the deletion of such a time requirement would be consistent with the purpose of avoiding delay. Consequently, we have amended our final rules to provide that a motor carrier need only arrive on time to proceed directly for pickup or delivery of cargo.

Section 551.3(d) [section C4], as proposed, establishes when the computation of time begins at an appointment terminal but excludes therefrom delays caused by the action/inaction of the Bureau of Customs or other governmental agency. Because of Customs' refusal to time-stamp or otherwise document the length of time consumed by Customs' clearance of documents, we concur with certain parties that the original section 551.3(d) should be revised as suggested by Hearing Counsel. By separately setting out when the gate pass for either a dock receipt or delivery order will be time stamped, we are able to avoid the problems incurred by the procedures of Customs. Thus, while a gate pass for a dock receipt will be stamped immediately by terminal personnel, the stamping of the gate pass for a delivery order will not be effected until the motor carrier has proceeded through Customs.

We have also incorporated into our final rules a new section 551.6 [section F] "Computation of Time". In effect, this new section will accomplish the same objectives as proposed section C4, that is, to establish a fixed point for the computation of time which takes into consideration delays as to which the terminal operator can demonstrate that he was not responsible.

Section 551.4(a) [section D1] requires that service periods be established for each business day at a terminal operating on a non-appointment system. One party proposed that this section should also include the requirement that the terminal operator publish in its tariff the daily capacity of each terminal facility and the number of vehicles to be scheduled in each service period. We do not agree. The purpose behind this section is to grant the terminal operator flexibility in determining capacity which can change from day to day, depending on numerous factors. To adopt the revision suggested would, we feel, stifle any effect that this section would have in alleviating congestion at the Port. Accordingly, we have adopted section D1 as proposed and redesignated it section 551.4(a).

Sections 551.4(c) and (d) establish the procedure for the issuance of a time-stamped gate pass which will institute free time for the motor carrier in delivering or picking up cargo. Before discussing specific objections hereto, we would point out that the dock receipt/delivery order, itself, constitutes the basis for the issuance of the gate pass which is merely being used as an internal control measure. Therefore, to clarify any misunderstanding, it should be pointed out that the dock receipt/delivery order is checked for form and authenticity prior to, and not after, the issuance of the gate pass. However, admission to the pier will not be conditioned upon the examination of the substantive contents of the document. Possession of the document is sufficient.

In commenting, one party suggests that the validation time, controlling entry to the pier for motor truckers with dock receipts/delivery orders, include not only the time stamp on the gate pass, but also the time entered in the terminal operator's security log as is presently being done at this party's terminal. In effect, we are asked to require motor carriers, upon receiving their time stamped gate pass, to proceed to the delivery/receiving clerk's office for the purpose of being time recorded in the terminal operator's security log. The benefit of such a procedure, we are told, is that it will discourage the motor carrier from taking a "break" en route from one point to another. We see little merit in this proposed additional requirement. To permit a terminal operator to record a different time in its own records for the commencement of free time is contrary to the very purpose of our validation and entry procedures under which the validation time on the gate pass constitutes the official time for the commencement of free time.

Comments were also directed to certain procedures of section 551.4(d) [section D4]. This section, in pertinent part, provides that Customs' processing would be initiated immediately upon admission to the terminal facility and that a Customs' time stamp would be issued at the completion of such processing. Thus, the time between the validation time on the gate pass and the time stamp of Customs would be excluded from the time allowances provided for loading without penalty. For various reasons, the substance of which need not be discussed, Customs has informed us that it will not issue time stamps. Because Customs' clearance is an integral and necessary step in the delivery of imports, any detention rule must be compatible with the procedures of Customs. Therefore, we have adopted in our final rules Hearing Counsel's revision of sections 551.4(c) and (d). These new provisions not only eliminate the requirement that Customs time stamp documents but also simplify the procedure by allowing the motor carrier, upon the validation of his gate pass on arrival at the pier, to proceed directly to Customs for the processing of his papers. Thereafter, the motor carrier's papers are presented to the delivery clerk of the terminal operator for the stamping of the gate pass, at which point, time for purposes of detention commences. Under the procedure for validation and computation of time in section 551.6 [section F], the time consumed (1) in obtaining Customs' clearance for delivery orders, and (2) between the issuance of the time stamped gate pass and the subsequent time stamping thereon by the receiving clerk for dock receipts, is excluded from the time for detention purposes.

Further, Hearing Counsel's substitutions are consistent with the purpose of the original sections 551.4(c) and (d); i.e., placing the responsibility on the shipper and motor carrier for preparation and presentation of correct documentation. As presently worded, sections 551.4(c) and (d) will stop the current practice of motor carriers being denied entry to the piers because of improper documentation.

Section 551.4(e) [section D5] allows the motor carrier to elect to receive a preference slip entitling the motor carrier to service on the next business day within 30 minutes after issuance of a gate pass. One party alleges that this procedure would be susceptible to abuse by the motor carriers. We do not agree. This section is intended to prevent favoritism toward certain motor carriers by terminal operators by assuring that all motor carriers will be treated equally. As pointed out by another commentator, preference slips are: (1) an integral part of the time slot or service period procedures which recognizes that every pier has a maximum capacity; and (2) they encourage orderly scheduling of nonappointment vehicles.

In adopting section 551.4(e) we point out that security problems will not be aggravated since the vehicle arriving for service under a preference slip must still possess a delivery order/dock receipt.

Section 551.4(f) [section D6] permits the terminal operator to turn away carriers when the capacity of a terminal facility has been reached but not before issuing these carriers preference slips for service on the next business day. This section will alleviate the problem of motor carriers being turned away without service after having waited in line for several hours.

One party asks that we delete section 551.4(f) in its entirety, urging that since all motor carriers have received notice that the cargo is ready, every vehicle which arrives at the pier should be served. We disagree. While the fear of abuse of discretion by the terminal operator may have some theoretical merit, the practicalities of the situation dictate that terminal operators will want cargo removed from their facilities as rapidly as possible. Therefore, it is doubtful that vehicles will be turned away capriciously if service of those vehicles is feasible. Moreover, a rule which would require a facility to exceed its capacity would not be workable.

Once the terminal has decided to turn away the motor carrier with a preference slip, there is nothing in the rules that requires the terminal operator to reconsider his decision. Therefore, a motor carrier cannot insist on being admitted and serviced to completion. This situation should allay the fears of one party who was concerned as to who would pay for the overtime incurred if a motor carrier could successfully insist on completed service.

Additionally, to complement the requirements of sections 551.2(a)(1) and 551.6, we have adopted, as part of our final rules, Hearing Counsel's proposed modification to the last sentence of section 551.4(f), to wit:

> . . . The preference slip shall be attached to the gate pass when said gate pass is issued and all notations recorded on the preference slip shall be duplicated on the motor carrier's copy of the delivery order or dock receipt.

Section 551.7(a) [section G1], as originally proposed, assessed a $15 penalty against a terminal operator for refusing service to a motor carrier possessing complete documentation. An unjustified refusal to serve a motor carrier results in confusion at the pier, loss of valuable time to the motor carrier, and a loss of revenue for everyone concerned. Consequently, the terminal operator must be given the incentive to minimize or avoid such confusion. Having reviewed the comments, we conclude that the avoidance of this confusion can best be achieved by increasing the penalty from $15 to $30 rather than by introducing a sliding scale of penalties up to $60 as suggested by one party. This rule does not contemplate that "penalties" be compensatory but rather that the charge will encourage accuracy and efficiency. Accordingly, our final rules provide a $30 penalty for denial of service due to the fault of the terminal operator.

Section 551.7(b) [section G2] assesses a $15 penalty against the motor carrier for failing to meet an appointment. We have rejected one party's suggestion that this section be amended to provide that a motor carrier be excused from any penalty for such failure if it is due to the reasons as provided in section 551.1(g). To do as this party urges would only cause endless dispute over the cause of the missed appointment. If the purpose of these rules is to be achieved, the motor carrier must act responsibly in its dealings on the pier.

However, we do find merit in another party's observation that section

551.7(b) should take into consideration the situation in which the motor carrier fails to meet an appointment and the terminal operator has furnished special equipment at the pier. Accordingly, we have added a second sentence to section 551.7(b), which reads: ". . . If, pursuant to section 551.3(b), a motor carrier is advised that special equipment will be required and the motor carrier fails to meet said appointment, the motor carrier shall be subject to a charge of $30." We conclude that the $30 penalty is sufficient incentive for the motor carrier to keep its appointment.

Section 551.7(c) [section G3] requires the terminal operator to charge the motor carrier a $15 penalty for completing or correcting deficient documents. Eight parties commented on this section. Three parties argue this penalty is unreasonably high and unwarranted unless every steamship company, terminal operator and exporter/importer is obligated to pay penalties for every mistake or clerical error made. It is further suggested that the $15 penalty will create an extremely unhealthy climate between the affected parties because the motor carrier does not prepare the documentation and disputes over minor corrections will be encouraged. An additional argument urges that, since this fee will be passed on, the result will be to discourage use of the Port.

Hearing Counsel defend the $15 as an appropriate charge encouraging more care in the preparation of the pertinent documents. We agree.

Notwithstanding fears expressed by certain parties regarding possible abuse of these penalty provisions, sound business practices would dictate wise use of discretion before assessing the $15 penalty.

Section 551.7(d) [section G4], as proposed, stated that if a motor carrier seeks and gets a schedule appointment prior to issuance of a freight release of the subject cargo, the motor carrier will be penalized $15. Upon review of the comments, we concur that the proper party to be assessed the penalty is the terminal operator. As certain parties pointed out, the freight release involves communication only between the steamship company and the terminal operator. Thereafter, the terminal operator then notifies the broker that the goods are ready for pickup, and the broker in turn calls the motor carrier to come and collect the cargo. Hence, the motor carrier does not know whether a freight release has been issued or not unless he is so informed by the terminal operator. Consequently, we do not believe that the motor carrier should be penalized for seeking a schedule appointment since it is unlikely that he would make a request for a schedule appointment unless the terminal operator had advised him (through the broker) that the freight release had been issued and the cargo was available.

We agree with Hearing Counsel that a $30 penalty, in lieu of $15 as proposed, is justified in view of time lost by the motor carrier when an error is made in notification.

Therefore, we have revised section 551.7(d) to provide for a $30 penalty assessed against the terminal operator.

Section 551.7(e) [section G5], as proposed, provides for the assessment of a $15 penalty against the terminal operator for wrongfully advising the motor carrier that cargo is ready and available. While four parties argue that a $15 penalty is inadequate, with one suggesting that it be increased to $65, a fifth party contends that any increase in penalty would tend to slow down the movement of cargo by encouraging over-zealous verification and reverification of simple facts. We cannot agree with the fifth party. Considering that the purpose of this section is to deter erroneous notification of available cargo and that, generally, considerable reliance is placed upon the terminal operator's word, we agree that an increase in penalty is appropriate. Consequently, the penalty provided in section 551.7(e) has been increased to $30.

It has also been suggested that this section require written verification that notification was made to facilitate motor carriers' proof that notification was given. Such a requirement, in our opinion, is an unnecessary burden on the terminal operator. It would not expedite movement of cargo but would merely reenforce any claims by motor carriers. Additionally, the fact that it is a costly operation for a motor carrier to make a second trip to the piers, creates a reasonable presumption that a motor carrier would not arrive at the piers without a prior notification to do so.

Section 551.7(f) [section G6] outlines the time allowances applicable to containers handled as a single unit and to noncontainerized cargo under an appointment/nonappointment system. Two parties argue that the allowances prescribed in this section should conform to those established by the ICC. Not to do so, they urge, will only serve to confuse shippers and to create unnecessary complications in billing for, and collection of, detention charges. Hearing Counsel argue that the ICC detention time provisions serve different objectives than those of this proposed rule. We agree.

The ICC rules permit reimbursement to the motor carrier for all delays at marine terminal facilities for which the motor carrier is not responsible. However, this reimbursement comes to the motor carrier from his principal who pays the charges. Our rules, which establish penalties for unreasonable delays for which the terminal operator is responsible, are designed to have the responsible terminal operator pay for the detention of the motor carrier. The key to our rule is the relationship of the trucker to the terminal operator and not of the trucker to its principal.

Further, we are persuaded that certain benefits will override any confusion that may occur from having two divergent detention charges. With the time-stamped gate pass, the trucker will be able accurately to compute the amount owed him by his principal. Further, that amount is subject to be offset in an amount equal to the detention charges collected from the terminal operator. This arrangement may also have the effect of encouraging importers/exporters to use the Port. Accordingly, we have incorporated section 551.7(f) as proposed, into our final rule.

Section 551.7(h)(1) [section G8(a)], as proposed, assesses a $65 penalty against the terminal operator who refuses service to a motor carrier holding an appointment when the refusal is due to a lack of manpower. Under this section it is no excuse, as noted by one party, that the terminal operator did not anticipate the needs of a particular cargo. We consider such a predicament to be preventable by foresight on the part of the terminal operator, and not a situation beyond his control. Implicit in this section is the obligation of the terminal operator to complete loading/unloading the motor carrier admitted to the terminal facility. A part of that obligation is the responsibility of the terminal operator to foresee labor problems which would tend to delay operations.

Additionally, because this section is designed to act as an inducement for orderly and efficient scheduling of motor carriers, we agree with Hearing Counsel that the penalty should be reduced to $30. A $30 penalty is consistent with other penalty sections of this Part. Therefore, we have adopted section 551.7(h)(1) as modified by the reduced penalty.

Comments on section 551.7(h)(2) were directed only to that portion which relieves the terminal operator of the $65 penalty if he refuses to service a nonappointment vehicle as a result of labor's refusal to work overtime. It is argued that because the terminal operator is responsible for its labor it should not be absolved from liability. Hearing Counsel reply that a refusal under the aforementioned circumstances is equivalent to a work stoppage, and under the theory of section 551.1(g) [section A7], the terminal operator should be relieved of any liability for the actions of labor under the circumstances. We agree.

Distinguishing this section from section 551.7(h)(1) wherein the terminal operator is liable for labor's refusal to work overtime, we would point out that a terminal operator has the time to anticipate the services that can be rendered with reference to motor carriers holding appointments while not so with nonappointments. Accordingly, we have adopted, as part of our final rule, section 551.7(h)(2) as proposed, except that for the same reasoning as employed in section 551.7(h)(i), *supra,* we have reduced the penalty to $30.

Section 551.8 [section H], in general, sets out the procedure for the submission of claims for penalties. Upon review of the comments, we find that many of the suggestions and rationale have considerable merit. Consequently in the final rule, section 551.8 has been revised to be more responsive to these constructive comments. This generally conforms to Hearing Counsel's proposal with certain minor modifications of our own.

We are in total agreement with those parties who submit that claim forms, as originally proposed, are unnecessary. For purposes of this rule, all that is necessary is a copy of the dock receipt/delivery order with its accompanying documentation supported by a brief explanation of the facts giving rise to the claim and the dollar amount of such claim. In accordance with section 551.2(a)(1), the necessary information will be duplicated on a copy of the appropriate document which the motor carrier will always have in his possession.

While we agree with the basis of Hearing Counsel's proposed extension of filing claims from 15 days to 60 days, we believe that a 45-day period would be more reasonable. A 45-day period is quite enough time to discourage any possible laxity in preparation for filing a claim and at the same time will not prejudice the parties concerned. Further, we agree with the suggestion of one party that all periods of 15 days, as proposed by Hearing Counsel, should be expanded to 20 days so as to be more realistic and to increase the likelihood of compliance.

One party noted that the original proposed section H did not cover the situations where steamship companies are responsible for delays of trucks. The example cited is the premature issuance of a freight release resulting in the motor carrier being notified that the shipments are available when, in fact, they are not. We are told that the terminal operator might under the circumstances reject a claim on the ground that the delay was caused by the steamship company. In order to cure this deficiency, we have amended section 551.8(e)(1) [section H5(a)] to include the following language: ". . . or otherwise denies a claim on the ground that the delay was caused by the steamship company."

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), and the Commission's authority under sections 17 and 43 of the Shipping Act, 1916 (46 U.S.C. 816, 841a), Title 46 CFR is hereby amended.*

Effective date: These rules and regulations shall become effective 30 days after publication in the *Federal Register*.

By order of the Federal Maritime Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

*The text of the amendment is reprinted in 46 CFR Part 551.

FEDERAL MARITIME COMMISSION

No. 74–14

POSSIBLE VIOLATIONS OF SECTION 18(a) OF THE SHIPPING ACT, 1916, AND SECTION 2 OF THE INTERCOASTAL SHIPPING ACT ARISING FROM CHARGING HIGHER RATES THAN SPECIFIED BY CURRENT TARIFF

NOTICE OF ADOPTION OF INITIAL DECISION

November 6, 1975

No exceptions having been taken to the initial decision 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 November 6, 1975.

In accordance with the conclusions reached in the initial decision and adopted hereby, it is ordered that Tariff FMC–F No. 1 of respondent Hawaii Freight Lines, Inc. is cancelled.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No.74–14

POSSIBLE VIOLATIONS OF SECTION 18(a) OF THE SHIPPING ACT, 1916, AND SECTION 2 OF THE INTERCOASTAL SHIPPING ACT ARISING FROM CHARGING HIGHER RATES THAN SPECIFIED BY CURRENT TARIFF

Adopted November 6, 1975

Respondent Hawaii Freight Lines, Inc. (HFL), found to have offered a transportation service between San Francisco and Los Angeles, California, and Hawaii during the period commencing on or about June 27, 1968, and ending in early 1974 and to have offered such service as a nonvessel operating common carrier (NVOCC) subject to the provisions of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933.

One such as HFL who held out to the general public to carry goods for hire so as to constitute a common carrier is not a shipper's agent although he may not own or operate transportation equipment.

One who operates as a common carrier will have liability for loss or damage to goods carried imposed upon him by law by virtue of his occupation and mere disclaimer of liability can have no bearing on the determination of his common carrier status.

A common carrier is such by what he does and how he operates and not by what designations he applies to himself.

HFL found to have violated section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, by charging rates higher than those specified in its tariff on file with the Federal Maritime Commission.

Since HFL has refused to respond to an order of the Commission to furnish information pursuant to section 21 of the Shipping Act, 1916, and has furthermore ceased operations, HFL's tariff is canceled.

William H. Dodd for respondent Hawaii Freight Lines, Inc.

Donald J. Brunner and *Joseph B. Slunt* as Hearing Counsel.

INITIAL DECISION OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE[1]

This proceeding was instituted by the Commission by means of an Order to Show Cause, served April 18, 1974. In this Order the Commission stated that respondent Hawaii Freight Lines, Inc. (HFL), had filed a tariff with the Commission on June 27, 1968, as a nonvessel operating common carrier (NVOCC) operating between San Francisco, California, and other West Coast ports to Hawaii. The Order recited furthermore that this tariff specified a rate for mixed freight (FAK) of 72¢

[1] This decision became the decision of the Commission November 6, 1975.

per cubic foot and also contained a clause (Item 200, Provision 4) limiting HFL's liability to damage occurring while cargo was in its personal possession and disclaiming liability for losses incurred during ocean transport unless the vessel was owned or demise chartered by HFL.

Although the Commission notified HFL that Provision 4 was inconsistent with its legal obligations as a common carrier and requested that an appropriate amendment be submitted, the Order stated that HFL did not submit such an amendment. Furthermore, on or about December 1, 1971, according to the Order, HFL began charging shippers an FAK rate of 78¢ per cubic foot without having submitted a revised tariff to the Commission and upon inquiry by the Commission, HLF stated that it was not a common carrier but rather a shipper's agent which could freely adjust its rates without filing tariffs with either this Commission or the Interstate Commerce Commission (I.C.C.) despite the fact that the I.C.C. had found HFL to be a common carrier under Part IV of the Interstate Commerce Act as to certain of its operations not under consideration here.[2] After the decision of the I.C.C. the Commission stated that HFL continued its operations by utilizing the underlying services of Matson Navigation Company (Matson).

Since it appeared to the Commission that HFL was holding itself out as an NVOCC, issuing through bills of lading in its own name, appearing on bills of lading issued by water carriers operating under the jurisdiction of the Commission as both shipper and consignee and not as agent, soliciting business as an NVOCC, etc., the Commission ordered HFL to show cause why it should not be found in violation of section 18(a) of the Shipping Act, 1916 (the Act), and section 2 of the Intercoastal Shipping Act, 1933, by charging higher rates than thos specified in its tariff. In addition to the foregoing, however, the Commission ordered an extensive examination into the operations of HFL from December 1, 1971, to establish whether HFL was an NVOCC subject to the cited provisions of law and to determine with particularly whether HFL had in fact violated these laws.

On October 23, 1974, the Commission ordered this proceeding to be enlarged to determine what if any sanctions should be applied to HFL.

[2] *Star Forwarders, Inc. v. Hawaii Freight Lines, Inc.*, Docket No. FF-C-33, Decision and Order served, October 14, 1970 (unreported). In the cited case the I.C.C. had found that HFL had been operating as a "freight forwarder" under part IV of the Interstate Commerce Act (i.e., as a common carrier) as to certain of its operations in which it directly employed motor carriers certificated under Part II of the Act. Some time after that decision HFL discontinued this type of service and at least in the San Francisco area utilized the services of Matson Navigation Company under Matson's tariff on file with this Commission. Under the decision in *IML SeaTransit Ltd. v. United States*, 343 F. Supp. 32 (N.D. Calif. 1972), affirmed 409 U.S. 1002 (1972, rehearing denied, 409 U.S. 1118 (1973), HFL's utilization of an FMC-regulated service renders HFL an NVOCC subject to FMC jurisdiction. In the Los Angeles area, HFL did not restrict its operations to FMC-regulated tariff services and on occasion HFL itself did provide pickup service. Therefore some portion of HFL's Los Angeles services constituted those of a Part IV "freight forwarder," not an NVOCC. *IML Seatransit*, cited above, at p. 42. Although there is no evidence in the record as to HFL's operations at the Hawaiian end of its service, its tariff shows that HFL maintained a terminal there and on request furnished delivery service to consignees. According to the court in *Hawaiian Express Service, Inc.* v. *Pacific Hawaiian Terminals, Inc.*, 492 F. 2d 865, 867 (9th Cir. 1974), however, the use of motor carriers in Hawaii would not convert HFL from an NVOCC into a Part IV Freight Forwarder.

Because of HFL's failure to respond to an order of the Commission issued under section 21 of the Act on February 1, 1973.[3]

Shortly after the commencement of this proceeding, counsel for HFL advised that HFL terminated its operations and was preparing to liquidate the company. Counsel advised furthermore that HFL would cooperate to bring the proceeding to a conclusion.[4] In view of the circumstances, an evidentiary hearing was not necessary. Hearing Counsel introduced evidence into the record without objection and partially on the basis of a stipulation to certain facts. The evidence consists essentially of facts deemed admitted under Rule 12(h), 46 CFR 502.208(a), the stipulation, letters to HFL's shippers by Hearing Counsel with responses, statements of Commission field investigators, HFL freight bills and manifests, bills of lading issued by Matson, and tariff pages of HFL, Matson, United States Lines, and Seatrain Lines, California. See Motions to Admit Evidence and Close the Record Granted, June 30, 1975. This body of evidence supports the following findings of fact as proposed by Hearing Counsel. References are to the exhibits and tariff pages or items.

FINDINGS OF FACT

1. From June 27, 1968, when its tariff filed with the Federal Maritime Commission until early 1974, Hawaii Freight Lines was engaged in the business of arranging for the transportation of cargo by water from the U. S. West Coast to Hawaii (Ex. 1, Para. 1; Ex. 2 B through 2 I, Ans. 9 and 12).

2. During the above period of time, HFL would receive various shipments from shippers, consolidate such shipments into containers, arrange for the ocean transportation and ultimate delivery to the consignee in Hawaii (Ex. 1, Para. 2; Ex. 2 B. Ans. 9 and 12; Ex. 3).

3. During the above period of time, HFL solicited cargo in its own name by means of direct advertising and use of sales personnel (Ex. 1, Para. 3; Ex. 2 B through 2 I, Ans. 1 and 2).

[3] HFL had been included as one of 51 NVOCC's which had filed tariffs with the Commission as to which the Commission was seeking information regarding current operations in Docket No. 73–56, *Non-Vessel Operating Common Carriers in the Domestic Offshore Trades*. Rather than cancel HFL's tariff in that proceeding for failure to respond, the Commission transferred disposition of this matter to the present proceeding. Docket No. 73–56, cited above, Order of Discontinuance, October 23, 1974.

[4] Although counsel for HFL has filed no objections in this proceeding, he also indicated puzzlement as to why the proceeding should continue. Despite my notice to the parties that a joint motion to discontinue seemed appropriate, no such motion was filed. See Cancellation of Prehearing Conference and Special Procedural Notice, May 10, 1974. Absent objection and considering the views of Hearing Counsel that continuance of the proceeding would serve a useful purpose, I granted Hearing Counsel's motion to admit evidence, close the record, and permit briefing. Despite HFL's financial predicament I am aware that its tariff has not yet been canceled. Theoretically if violations are found, shippers using HFL's services have a right to file complaints seeking reparation. Furthermore, the Commission has issued decisions in previous cases for precedential value despite the apparent mootness of the cases involved. See, e.g., *Rates, Hong Kong-United States Trade*, 11 F.M.C. 168, 173 (1967), *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82, 90 (1970). Therefore, despite HFL's demise, its previous denial of common carrier status and disclaimer of common carrier liability raise significant issues whose resolution should have precedential value with regard to other companies operating in a similar fashion.

4. During the above period of time, HFL accepted liability for loss or damage to cargo entrusted to it for transportation to Hawaii and in fact did pay claims presented by various shippers (Ex. 1, Para. 4; Ex. 2 B through 2 I, Ans. 6).

5. HFL made no oral representations to its shippers of its intention to disclaim liability for loss and/or damage to cargo (Ex. 1, Para. 5; Ex. 2 B through 2 I, Ans. 7).

6. HFL's still effective tariff on file with the FMC has continuously specified a rate from the U. S. West Coast to Hawaii of $.72 per cubic foot (Ex. 1, Para. 6; HFL Tariff FMC–F No. 1, Original Page 38).

7. During the above period of time, HFL charged shippers varying amounts ranging from $.72 to $.91 per cubic foot for transportation of FAK to Hawaii from the U. S. West Coast (Ex. 1, Para. 1; Ex. 2 B through 2 I, Ans. 10; Ex. 4, Para. 2).

8. During the above period of time, HFL selected the underlying carriers to be utilized for the water portion of the transportation to Hawaii and at no time did any shipper have a voice in that selection (Ex. 1, Para. 8; Ex. 2 B through 2 I, Ans. 14).

9. HFL's Tariff, FMC–F No. 1 contained a bill of lading provision which appears to disclaim HFL's liability for loss or damage to cargoes incurred during ocean transportation if the vessel utilized is not owned or demise chartered by HFL (HFL Tariff FMC–F No. 1, Provision 4, Item 200). However, as shown by the responses to a questionnaire contained in Ex. 2 B through 2 I, most of HFL's shippers were not aware of the existence of HFL's Tariff and they had not been informed that HFL was not liable for its shipments while they were not in HFL's possession (Ex. 2 B through 2 I, Ans. 6). In fact, HFL's shippers did consider HFL liable for its shipments (Ex. 2 B through 2 I, Ans. 6).

10. Starting in October, 1970, according to Mr. Kesley MacMeekin, the Manager of HFL's San Francisco Office, HFL would not arrange for the pick-up or delivery of shipments to HFL. Mr. MacMeekin advised the Commission's District Investigator, James A. Glugoski, that when he received an inquiry for a shipment to be consolidated, he advised the customer that HFL is only a consolidator and cannot legally arrange for the pick-up of the shipment. He informed the customer that the customer could arrange for trucking by any motor carrier or its could use Jim's Trucking Co. (Jim's) at whose terminal HFL is located. He would then give the customer the telephone number of Jim's Trucking Co. Jim's was HFL's San Francisco agent for stuffing containers (Ex. 3, Para. 2).

11. Mr. James Stewart, Operator of Jim's, advised District Investigator Glugoski that Jim's acted as HFL's agent only with respect to stuffing and loading containers, but not with respect to any pick-up and delivery

or hauling of full or empty containers to the carrier's container yard. He advised that when Mr. MacMeekin was away from the office, he or his employees would answer HFL's telephone (824-7049). He stated that Mr. MacMeekin had ordered him not to arrange for pick-up of cargo when speaking to shippers on HFL's telephone. His orders were to tell the caller that HFL could not pick up the shipments, but that the caller could provide his own trucker or telephone Jim's at another number on the same premises (863-1735). He advised that this was done to avoid being classified by the Interstate Commerce Commission as an unlicensed Part IV Interstate Commerce Commission Freight Forwarder. He advised that many times the caller would then call the number of Jim's and he or his employee would then arrange for pick-up service (Ex. 3, Para. 2).

12. Mr. Patrick Breslin, Terminal Manager, Shipper/Imperial Inc., and Shippers Encinal Express, Inc., confirmed with District Investigator James A. Glugoski that his company is an agent of Matson Navigation Company (Matson) and acts as its motor carrier of containers in the San Francisco Bay Area. He stated that he dispatched drivers to HFL at One Loomis Street, San Francisco, to pick-up full containers and leave empty containers. He stated that HFL and/or Jim's do not haul any full containers from HFL's terminal to Matson's container yard. He showed dispatch records and truck driver's logs to substantiate his statement that all trucking is performed by his company. He said that Jim's may have picked up a few empty containers from the container yard (Ex. 3, Para. 4).

13. HFL's manifests for the period from February, 1973 to April, 1974 show that except for one instance HFL utilized Matson as the underlying ocean carrier for all its shipments from San Francisco during this period (Ex. 4C, Pages 1 through 233).

14. HFL's shipments via Matson were carried pursuant to Matson's all-water tariff on file with the Federal Maritime Commission. This tariff provides for port zone pick-up and delivery service and the service is performed by a motor carrier acting as Matson's agent (Ex. 4, Para. 3; Ex. 4 B, Pages 1 through 52; original pages 26 through 31, first revised page 32, original page 33, and first revised page 146 of Matson Westbound Container Freight Tariff No. 14–B, FMC–F No. 146; original pages 29 through 36 and first revised page 186 of Matson Westbound Container Freight Tariff No. 14–C, FMC–F No. 150).

15. From Los Angeles, HFL also regularly utilized Seatrain Lines, California (Seatrain), and United States Lines, Inc. (U.S.L.) vessels (Ex. 4 D, Pages 1 through 242; Ex. 4, Para. 4). Seatrain's Container Freight Tariff did not provide pick-up service for FAK shipments at Los Angeles (Seatrain Lines, California Freight Tariff No. 1–A, FMC–F No. 4, original pages 22 and 46). U.S.L.'s Freight Tariff No. 1, FMC–F No. 53, provides for pick-up service for FAK shipments from both the San Francisco and

Los Angeles areas (Note 6, second revised page 20, original page 9, first revised page 10, original pages 11 through 18, first revised page 19, original page A–19, of U.S.L. Freight Tariff No. 1, FMC–F No. 53).

16. HFL's Tariff provided for delivery of cargo to HFL's terminal in Hawaii or, for an additional charge, delivery to consignee's premises if requested (HFL Tariff FMC–F No. 1, Items 300 and 330).

17. On February 1, 1973, the Commission issued an order pursuant to section 21 of the Shipping Act, 1916 (46 USC 820), requiring HFL to complete and return a questionnaire attached to the order (Ex. 2A, Para. 3).

18. HFL niether applied to the order nor responded to the questionnaire. The section 21 Order specifically warned the parties to which it was directed that a failure to furnish the information requested would result in the institution of a proceeding to determine whether their tariff should be cancelled as a result of their failure to respond (Ex. 2–A, Para. 5).

19. As a result of HFL's failure to answer the questionnaire or otherwise respond to the section 21 Order, an Order to Show Cause was issued by the Commission directed to HFL. However, HFL still failed to reply to the questionnaire or comply with the section 21 Order (Ex. 2–A, Para. 6).

20. HFL is no longer actively engaged in any business activity and does not intend to resume any activity in the future. The corporation is presently in the process of declaring bankruptcy pursuant to its being dissolved (Ex. 2, Para. 1). HFL has no objection to the cancellation of its tariff (Ex. 2, Para. 2).

Discussion and Conclusions

The three ultimate issues for decision in this proceeding are: (1) Do the operations of HFL shown on the record demonstrate that HFL's status was that of an NVOCC subject to the provisions of the Shipping Act, 1916 (the Act), and the Intercoastal Shipping Act, 1933 (the 1933 Act)? (2) If so, did HFL violate section 18(a) of the Act and section 2 of the 1933 Act by charging higher rates than those specified in its tariff filed with the Commission? (3) Should any sanctions be applied to HFL because of HFL's failure to respond to an order issued by the Commission pursuant to section 21 of the Act?

The difficulty of this case is not in deciding the latter two issues. The record demonstrates, as Hearing Counsel have shown, that HFL charged varying rates ranging from $.72 to $.91 per cubic foot while in business commencing on or about June 27, 1968, to early 1974 despite having a tariff on file with the Commission which specified an FAK (freight all kinds) rate of $.72 per cubic foot for transportation of goods from West

Coast ports to Hawaii. The refusal to respond to the section 21 Order is similarly a fact which is undisputed and the sanction to be applied is clear, i.e., cancellation of the tariff. *Non-Vessel Operating Common Carriers in the Domestic Offshore Trades*, Docket No. 73–56, Order to Show Cause, September 7, 1973.[5] The more difficult problem is to determine whether HFL's status under the law was that of an NVOCC despite contentions that it acted merely as shipper's agent and disclaimed liability for loss or damage incurred during ocean transportation if the vessel utilized was not owned or demise chartered by HFL. For the following reasons, I find that HFL did act as an NVOCC fully subject to the shipping acts cited above, rather than as shipper's agent, and that its disclaimer of liability had no effect as a matter of law on its status as a common carrier.

Although neither section 1 of the Act nor section 5 of the 1933 Act defines the term "common carrier,"[6] it has long been held that this term means the common carrier at common law. See *Tariff Filing Practices, Etc. of Containerships, Inc.*, 9 F.M.C. 56, 62 (1965), and numerous cases cited therein. There are several versions of the common-law definition, all essentially the same, such as the following:

> [one who] by a course of conduct holds himself out to accept goods from whomever offered to the extent of his ability to carry. *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at page 62.
>
> . . . one who undertakes for hire to transport the goods of those who may choose to employ him. *Agreement No. 7620*, 2 U.S.M.C. 749, 752 (1945).
>
> . . . one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. *The Niagara v. Cordes*, 62 U.S. 7, 22 (1858).
>
> The essential characteristics of the common carrier at common law are that he holds himself out to the world as such; that he undertakes generally and for all persons indifferently to carry goods for hire. . . *Philip R. Consolo v. Grace Line, Inc.*, 4 F.M.B. 293, 300 (1953).

The determination of common-carrier status can be made by reference to a number of indicia, e.g., variety of cargo carried, number of shippers, type of solicitation, regularity of service, port coverage, responsibility toward the cargo, issuance of bills of lading, etc. *Tariff Filing Practices, etc. of Containerships, Inc.*, cited above, at p. 65. It is not necessary; however, that a carrier's operations encompass every one of these factors. As the Commission stated:

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[5] The Commission's regulations also require the cancellation of HFL's tariff because it has ceased operations. 46 CFR 531.18(g).

[6] Section 1 of the Act merely defines "common carrier by water in interstate commerce" as "a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State . . . and any other State. . . ." Section 5 of the 1933 Act merely refers to section 1 of the 1916 Act. Significantly, in the legislative history to the 1916 Act there is a discussion of the distinction between a common carrier and tramp vessel in which reference is made to the common-law definition of common carrier quoted in *The Niagara v. Cordes*, 62 U.S. 7, 22 (1858), quoted in the body of this decision below. Hearings on H.R. 14337 before the Committee on the Merchant Marine and Fisheries, House of Representatives, 64th Cong., 1st Sess., April 13, 1916, pp. 10–11, 194.

The absence of one or more of these factors does not render the carrier noncommon, and common carriers may partake of some or all of these enumerated characteristics in varying combinations. *Id.*, p. 65.

The fact that a carrier such as HFL does not itself own or operate transportation equipment does not destroy its common-carrier status. The Commission has for some time recognized the so-called NVOCC, a common carrier publishing a tariff and offering a transportation service to the shipping public who neither owns nor operates vessels or motor vehicles. *Bernard Ulmann Company, Inc. v. Porto Rican Express Company*, 3 F.M.B. 771, 775 (1952); *Determination of Common Carrier Status*, 6 F.M.B. 245, 251–52, 256–57 (1961); *Puget Sound Tug & Barge v. Foss Launch and Tug Co.*, 7 F.M.C. 43, 49 (1962); General Order 4, 46 CFR 510.21(d). For purposes of tariff filing and other laws and regulations, the Commission does not generally distinguish between the vessel-operating and nonvessel operating common carrier. *Filing of Through Routes and Joint Rates*, 11 SRR 574, 578 (1970); *Determination of Common Carrier Status*, cited above, at pp. 252, 256–57.[7]

This, of course, is not the first case before this Commission in which a respondent carrier has contended that it is not subject to regulation by the Commission on one ground or another, usually purporting to show that the carrier is not a common carrier. Sometimes the carrier contended that its service was conducted pursuant to special contracts with shippers, or that it did not solicit or advertise or publish sailing schedules, or that it assumed no common-carrier liabilities, or that its service was limited to a small portion of the general public, or that it was a non-profit business, etc. See *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above; *Investigation of Tariff Filing Practices*, 7 F.M.C. 305 (1962). The Commission has uniformly rejected these contentions in order that the beneficial and remedial purposes inherent in tariff-filing and other provisions of the laws it administers will not be circumvented. In this regard the Commission has stated:

"[C]ommon carrier," however, is not a rigid and unyielding dictionary definition, but a regulatory concept sufficiently flexible to accommodate itself to efforts to secure the benefits of common carrier status while remaining free to operate independent of common carriers' burdens. *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at p. 65.

* * *

One of the purposes of the Shipping and Intercoastal Acts was to remedy various discriminatory practices prevalent in the shipping industry concerning establishment and maintenance of rates and fares. The acts, however, limit the Commission's regulatory jurisdiction in this matter to "common carriers." In order to effectuate the remedies intended by the enactment of a regulatory statute such as these, it is necessary to allow flexible and liberal interpretation of the statute. In this respect the court in (case citation

[7] Similarly both the Interstate Commerce Commission and Civil Aeronautics Board have for years dealt with "express companies" and "forwarders" as common carriers. See discussion on this point in 2 U.S. Code Congressional Service, 81st Congr.-2d Sess., relating to enactment of an amendment to Part IV of the Interstate Commerce Act by Public Law 81–881, pp. 4222–23.

omitted) . . . stated: "In determining the true nature of the transportation, it is necessary to have in mind the purpose of the Act (the Interstate Commerce Act). . . . In addition, the court should have in mind the fact that this legislation is remedial and should be liberally interpreted to effect its evident purpose and that exemption from the operation of the act should be limited to effect the remedy intended. *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at p. 69.

HFL's contentions that it acted merely as a shipper's agent and assumed no liability for loss or damage while goods were in the custody of the underlying ocean vessel must be evaluated in the above context.[8] If one thing can be clearly established, it is that it is not a carrier's self-declarations that determine its status under the law but rather how it operates. In *Transportation-U.S. Pacific Coast and Hawaii,* 3 U.S.M.C. 190, 196 (1950), the Commission stated:

Nor is a holding out as a common carrier negatived, as Mills contends it is, by the fact that the printed terms and conditions of the common-carrier form of bill of lading which he used were crossed out and the shipments covered by separate contracts. *Common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest.* (Case citations omitted.) (Emphasis added.)

In *Investigation of Tariff Filing Practices,* cited above, the Commission stated:

If it means that [the carrier] has not sought or willingly assumed common carrier obligations; this, while true, is of no aid to [the carrier]. *Common carrier status and obligations are results of a carrier's operations, not its desires.* 7 F.M.C. at p. 321. (Emphasis added.)

Again, in *Tariff Filing Practices, Etc., of Containerships, Inc.*, cited above, the Commission stated:

In *Bernard Ulmann Co., Inc. v. Porto Rican Express Co.*, 3 F.M.B. 771, 775 (1952), the Commission aptly stated that *a carrier's status is determined by the nature of its service offered to the public and not upon its own declarations.* A close look at its activities is necessary. 9 F.M.C. at p. 64. (Emphasis added.)[9]

Finally, in *United States v. California,* 297 U.S. 175, 181 (1936), the Supreme Court stated:

. . . whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does.

See also *Terminal Taxicab Co. v. Dist. of Columbia,* 241 U.S. 252, 254 (1916); *United States v. Brooklyn Terminal,* 249 U.S. 296 (1919).

Similarly, the Interstate Commerce Commission determines the status of the carriers it regulates on the basis of those carriers' operations, not the carriers' self-descriptions or self-designations. See *Yankee Shippers Agent, Inc., Investigation,* 326 I.C.C. 328 (1966); *Barre Granite Assn., Inc. Freight Forwarder Application,* 265 I.C.C. 637, 639 (1949).

[8] HFL has filed no brief and is not presently making these contentions. However, according to the Order which initiated this proceeding, these contentions were made while HFL was actively engaged in business upon inquiry by the Commission's staff. As explained earlier, resolution of issues raised by such contentions will have precedential value in case other companies are operating in similar fashion.

[9] The statement in the *Bernard Ulmann Co.* case actually appears on pp. 776–77 as follows:

But we deem that respondent's status depends upon the nature of the service offered to the public and not upon its own declarations. (Citing *Bank of Kentucky v. Adams Express Co.*, 93 U.S. 174, 180 (1876).

It is readily apparent from a review of the record that HFL conducted itself as a common carrier and not as a shipper's agent. HFL solicited cargo in its own name by means of advertising and use of sales personnel and provided a transportation service for an indefinite multitude of shippers utilizing the underlying services of water carriers. After surrendering their cargo to HFL, furthermore, the shippers exercised no further control in the selection of these underlying carriers. Even though HFL's tariff contained a disclaimer of liability, furthermore, HFL made no oral disclaimer to shippers and in fact did pay claims presented by various shippers. It is evident that HFL was offering to the general public a coordinated transportation service, including consolidation at its terminals, transportation by water, and distribution to consignees in Hawaii, and that the shippers utilizing HFL's service had no authority to alter the service.[10] The contention that HFL acted merely as shipper's agent is therefore totally without substance. That such an operation is that of a common carrier has been recognized for many years in the most closely analogous situation in transportation, i.e., the freight forwarder regulated under Part IV of the Interstate Commerce Act, 49 U.S.C. 1001 et seq. In *Chicago Etc. R. Co. v. Acme Fast Freight,* 336 U.S. 465, 484, 485 (1949), the Supreme Court discussed the difference between the "forwarder" who merely booked or dispatched cargo and the "forwarder" who operated like HFL, i.e., engaged essentially to deliver less-than-carload lots safely at ultimate destination while employing underlying equipment-operating carriers in the fulfillment of this service. The former type was recognized as a mere shipper's agent but the latter was held to be a common carrier with common-carrier liability. The Interstate Commerce Commission has not hesitated in finding the latter-type operator to be a common carrier pursuant to section 402(a)(5) of the Freight Forwarder Act, 49 U.S.C. 1002(a)(5). See *Yankee Shippers Agent, Inc., Investigation,* cited above; *Barre Granite Assn. Inc., Freight Forwarder Application,* cited above; *Star Forwarders, Inc. et al. v. Hawaii Freight Lines, Inc. et al.,* cited above; *Universal Transcontinental Corp. F.F. Application,* 260 I.C.C. 521, 522–23 (1945).

HFL's contention that disclaimer of liability in its tariff or bill of lading signifies that its service was not that of common carriage is similarly without substance. The fact is that HFL did honor some claims and shippers were not aware of the disclaimer. But even if HFL had fully implemented the disclaimer provision in its tariff, this fact alone has no legal significance in determining HFL's carrier status. Several of the previous cases discussed also stand for the proposition that one holding himself out to perform a transportation service in the manner of HFL will have liability imposed upon him by law by virtue of such an occupation

[10] Indeed, HFL's tariff specifically states:

Carrier does not agree to transport shipments on any particular vessel nor in time for any particular market . . . HFL, Inc. Tariff FMC–F No. 1, Item 90.

and this Commission has shown itself alert to counteract "efforts to secure the benefits of common carrier status while remaining free to operate independent of common carriers' burdens." *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at p. 65.

In *Yankee Shippers Agent, Inc., Investigation,* cited above, the Interstate Commerce Commission stated:

> Regardless of its [Yankee's] avowed disclaimer of responsibility for the safe transportation of property under its control as a freight forwarder, its service is held out to and performed for the general public and damage claims are handled by Yankee. Therefore, it must be held to have assumed all the burdens incidental to the complete transportation service which it proffers. (Case citation omitted.) Disclaiming responsibility does not change this fundamental fact, nor permit Yankee to escape regulation. *Universal Transcontinental Corp., F.F. Application,* 260 I.C.C. 521, 522–523. 326 I.C.C. at pp. 333–34.

In *Hopke Freight Forwarder Application,* 285 I.C.C. 61, 64 (1951) the Interstate Commerce Commission similarly stated:

> In (case citation omitted) we found that if a service, in all other respects that of a freight forwarder, is held out to and performed for the general public, the person providing such service must be held to have assumed the burdens incident thereto, among which the responsibility to the shipper for the safe transportation of its property. As Hopke's service is held out to and performed for the general public, we find that he is responsible to shippers for the transportation of their property.

For similar holdings see also *R.T.C. Term. Corp. Freight Forwarder Application,* 265 I.C.C. 641, 643 (1949); *Universal Transcontinental Corp. F.F. Application,* cited above, 260 I.C.C. at p. 523; *Modern Intermodal Traf. Corp.-Investigation,* 344 I.C.C. 557, 570 (1973).

Similarly, in *Transportation-U.S. Pacific Coast and Hawaii,* cited above, this Commission found a carrier to be engaged in common carriage despite its attempts to expunge the terms and conditions of the common-carrier bill of lading in favor of special contracts. This fact did not nullify the finding that the carrier had in other respects demonstrated that he was holding himself out "to transport goods for such as choose to employ him." 3 U.S.M.C. at pp. 196, 197.

In *The City of Dunkirk,* 10 F. 2d 609 (S.D.N.Y. 1925), the Court found the carrier to be a common carrier with common-carrier liability for short delivery and damage on a shipment of cocoanut oil despite a special exculpatory provision in the bill of lading. The Court stated:

> I see no ground whatever for holding, on the evidence, that the vessel was other than a common carrier. . . . The City of Dunkirk was a general ship taking cargo at various points from various shippers and issuing bills of lading to the several shippers. . . . 10 F. 2d at p. 611.

As we have seen above, the Commission has stated that the absence of any particular factor usually associated with common carriage does not render a carrier noncommon. *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at p. 65. In *Berhard Ulmann Co. Inc. v. Porto Rican Express Co.*, cited above, the Commission quoted with approval a definition derived from a standard treatise on carriers which set forth five characteristics which define the common carrier, not one of which was the assumption of liability for loss or damage. *Id.*, p. 776.[11]

The reason why assumption of liability need not be included in any definition of common carriage reduced to its essence, as can be seen from the previous cases discussed, is that once a person holds himself out generally to carry for hire for whomsoever wishes to employ him he has undertaken the occupation of a common carrier and liability will be imposed upon him as a matter of law. So strict is this doctrine that a common carrier's liability has been likened to that of an insurer. In *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397 (1889), the Supreme Court explained this ancient doctrine:

> By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coastal or in foreign commerce, is a common carrier, with all the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies. 129 U.S. at p. 437.
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> * * *
>
> The fundamental principle, upon which the law of common carriers was established, was to secure the utmost care and diligence in the performance of their duties. That end was effected in regard to goods, by charging the common carrier as an insurer, and in regard to passengers, by exacting the highest degree of carefulness and diligence. A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment. *Id.*, at p. 440.[12]

The exact delineations of common-carrier liability and permissible limitations of liability may have undergone some refinement since the *Liverpool* case was decided but the principle that he who acts as a common carrier is subjected to liability by virtue of his occupation is still valid. In a modern case the Supreme Court reiterated the basic doctrine enunciated in *Liverpool* as follows:

> If, on the other hand, the shipment has been entrusted to a forwarder of the second type—i.e., one who contracted to deliver the goods to the consignees at rates set by itself—the forwarder was subjected to common carrier liability for loss or damage whether it or an underlying carrier had been at fault. The fact that the forwarder did not own the carriers whose services it utilized was held to be immaterial. *Its undertaking was to deliver the shipment safely at the destination. Common carrier liability was the penalty for failure of fulfilment of that undertaking. Chicago, etc. R. Co. v. Acme Fast Freight,* cited above, 336 U.S. at p. 485. (Emphasis added.)

[11] The definition is contained in *Hutchinson on Carriers*, 3d Ed., vol. 1, sec. 48 as follows:

(1) He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. (2) He must undertake to carry goods of the kind to which his business is confined. (3) He must undertake to carry by the methods by which his business is conducted and over his established road. (4) The transportation must be for hire. (5) An action must lie against him, if he refuses without sufficient reason to carry such goods for those who are willing to comply with his terms.

[12] In another early case the Court similarly emphasized:

the common law subjects the common carrier to insurance of the goods carried. . . . And if by special agreement the carrier is exempted from . . . responsibilities it does not follow that the employment is changed . . . [W]hen a carrier has a regularly established business for carrying all or certain articles . . . it is a common carrier and a special contract about its responsibility does not divest it of the character.

Railroad Company v. Lockwood, 84 U.S. 357, 376–77 (1873).

For the foregoing reasons, I find that HFL has operated as a non-vessel operating common carrier (NVOCC) between San Francisco and to some extent, Los Angeles, California, and Hawaii subject to the provisions of the Shipping and Intercoastal Shipping Acts. I find furthermore that HFL's operations fit the definition set forth by the Commission in *Determination of Common Carrier Status*, cited above, 6 F.M.B. at p. 256 (1961), where the Commission stated:

> We conclude that a person or business association may be classified as a common carrier by water who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce, as defined in the Shipping Act, 1916; assumes responsibility or has liability imposed by law for the safe transportation of the shipments; and arranges in his own name with underlying water carriers for the performance of such transportation, whether or not controlling the means by which such transportation is effected, is a common carrier by water as defined in the Shipping Act, 1916.[13]

ULTIMATE CONCLUSIONS

From on or about June 27, 1968, to early 1974, respondent HFL offered to the general public a coordinated transportation service between San Francisco and Los Angeles, California, and Hawaii employing the services of vessel-operating carriers pursuant to tariffs filed with this Commission. As such, HFL was operating as an NVOCC subject to the provisions of section 18(a) of the Shipping Act, 1916, and section 2 of the Intercoastal Shipping Act, 1933, and not merely as the agent of shippers.

HFL did accept liability for loss or damage to cargo and paid claims although a provision in its tariff disclaimed liability while goods were in the custody of ocean carriers. Even had HFL refused to accept liability, however, such a disclaimer is a legal nullity since the law imposes liability on one operating a common carrier service.

At various times during the above period of time HFL violated the cited provisions of law by charging rates higher than those specified in its tariff on file with the Commission.

Since HFL has refused to respond to an order of the Commission for information duly issued pursuant to section 21 of the Shipping Act, 1916,

[13] Unlike the Part IV Freight Forwarder regulated by the I.C.C., the NVOCC is not defined by the statute. Rather it is a concept that has grown in case law, first in the *Bernhard Ulmann Co., Inc.* case cited above, and later in *Determination of Common Carrier Status*, cited above. As discussed previously, generally there is no distinction between the NVOCC and the vessel-operating carrier for regulatory purposes. Again, as discussed previously, the Commission has held that common carrier definitions should not be rigid and unyielding and a carrier may be common even if some of the usual characteristics of common carriage are absent. *Tariff Filing Practices, Etc. of Containerships, Inc.*, cited above, at p. 65. I agree with Hearing Counsel that certain language in *Determination of Common Carrier Status*, cited above, is confusing since it seems to suggest that an NVOCC must either assume liability or have liability imposed "by the courts," although the Commission also stated that "the assumption or attempted assumption of liability should not be the sole test of common carrier by water status." *Id.*, p. 256. As discussed above, there is no need to wait for courts to impose liability on one who performs a service such as HFL's since liability has long since been imposed by the courts on one who offers this type of service.

and has furthermore ceased operations, its tariff should be and hereby is canceled.

(S) NORMAN D. KLINE,
Administrative Law Judge.

WASHINGTON, D.C.,
October 16, 1975.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 327(I)

KONWAL CO., INC.

v.

ORIENT OVERSEAS CONTAINER LINE

PARTIAL ADOPTION OF DECISION

November 12, 1975

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

Konwal Co., Inc. (Konwal) filed its complaint before the Commission alleging improper charges by Orient Overseas Container Line (OOCL) and seeking reparation of the alleged improper charge. By consent of the parties the case was heard under Subpart S of the Commission's Rules of Practice and Procedure as an informal adjudication of a small claim.

Settlement Officer Juan E. Pine issued his decision awarding reparation. Thereafter, the Commission timely issued notice of its intention to review the proceeding.

FACTS

The claim here involved arose from the shipment by Konwal of eight cargoes on vessels of OOCL from Hong Kong to San Francisco, California. San Francisco was the specified port of discharge in each of the pertinent bills of lading. Notwithstanding the specifications of San Francisco as the port of discharge, each of the cargoes was, in fact, discharged at Oakland, California. OOCL then arranged, in each case, to have the cargoes transported by truck from Oakland to San Francisco and then to the point specified by the consignee. The charges for this truck transportation from Oakland to San Francisco were apparently paid by Konwal who now seeks repayment for those charges.

Konwal alleges that in so arranging truck transport, OOCL was acting under Rule 28 of the applicable tariff.* Rule 28 which Konwal claims controls this situation, provides:

> If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier may arrange, at its option, to move the shipment from actual port of discharge as follows: to the port of destination stated in the bill of lading, alternatively, the carrier may forward the cargo direct to a point designated by the consignee, provided, the consignee pays the cost which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading.

Konwal alleges that under this rule, if the carrier elects to arrange transportation from the actual port of discharge to the port of discharge specified in the bill of lading, the shipper/consignee is responsible for payment only of drayage charges within San Francisco—i.e., trucking charges for transportation of cargo from the port of San Francisco to a point specified by the consignee.

OOCL denied Konwal's claim on the basis that it had been their policy (which allegedly had been made clear to all consignees) that "equalization is not payable inasmuch as San Francisco, Oakland and/or Alameda are Bay Port areas." Therefore, implicitly, OOCL claims that tariff Rule 28 is not applicable and the consignee is responsible for the payment of any trucking charges involved. OOCL apparently equates the trucking charges from Oakland to San Francisco with drayage rates within San Francisco itself.

In his decision, Settlement Officer Pine did not specifically discuss the defense raised by OOCL. Rather, he awarded reparation on the basis of Rule 28 itself. Mr. Pine found Rule 28 to be discretionary and an ambiguous tariff provision. Settlement Officer Pine found that Rule 28 as a discretionary rule could not be relied upon by a carrier to defeat a claim raised under it citing our decisions in *Abbott Laboratories v. Alcoa Steamship Co.* (Informal Docket No. 321(I) served April 8, 1975) and *P.P.G. Industries, Inc. v. Royal Netherlands Steamship Co.* (Informal Docket No. 290(I) served April 8, 1975). Mr. Pine also found Rule 28 to be inherently ambiguous which therefore must be construed against the carrier who prepared the rule, citing *U.S. v. Hellenic Lines, Ltd.* (14 F.M.C. 255 (1971)). Attempted use of Rule 28 by OOCL was concluded to be in violation of section 18(b)(3) of the Shipping Act, 1916, as allowing OOCL to receive a greater compensation for the transportation of property than that specified in the tariff and thereafter failing to remit any portion of the overcharge. So concluding Settlement Officer Pine awarded reparation.

Discussion and Conclusions

We have reviewed this proceeding and concur in the award of reparation granted by Settlement Officer Pine. However, we do not agree

*Hong Kong Eastbound Pacific Coast Tariff No. 1 (FMC-1).

that determination of this claim should be founded on the reasoning adopted by Mr. Pine regarding the discretionary nature of Rule 28 and the ambiguity he found in the rule.

Notwithstanding the claimed "policy" of OOCL that Oakland and San Francisco are the same port for equalization purposes, we consider these to be two separate ports to which the provisions of Rule 28 apply. In the case of each cargo, OOCL discharged it at Oakland. The port of discharge specified in the bill of lading was San Francisco. It is clear therefore that OOCL had discharged its cargo at a discharge port other than that specified in the bill of lading. The carrier, then, had only two lawful options. Both of these options were provided by Rule 28. Under its terms the carrier could:

(1) move the cargo "to the port of discharge specified in the bill of lading"; or

(2) "forward the cargo direct to a point designated by the consignee. . . ."

From the record, the carrier apparently availed itself of both options with respect to the various shipments. It is our conclusion that having elected to act under Rule 28, the carrier became bound by the provisions thereof. The rule states, without ambiguity and without any discretion vested in the carrier, that the carrier may arrange ground transportation as he did here *provided* the consignee pays the cost of drayage from the port of discharge specified in the bill of lading to the point designated by the consignee. In short, once the carrier has elected to arrange ground transportation when it discharges cargo at a port other than that specified in the bill of lading, the consignee pays only the amount which it would have cost him to arrange transportation from the proper port to a point of destination.

We find no discretionary quality in the rule with regard to the collection of trucking charges. That collection is all that is at issue here. We take no position as to the discretion vested in the carrier regarding whether or not he decides to arrange transportation at all. That issue does not here arise. Further, we think this Rule 28 to be clear as to who bears the responsibility for ground transportation charges. We hold that the carrier is responsible for the cost of transportation from the actual port of discharge to the port of discharge specified in the bill of lading under the clear terms of its own tariff. We, therefore, concur in the award of reparation in the amount of $363.87 granted by Settlement Officer Pine and adopt his decision to that extent.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 327(I)

KONWAL CO., INC.

v.

ORIENT OVERSEAS CONTAINER LINE

Reparation awarded.

Decision of Juan E. Pine, Settlement Officer[1]

Konwal Co., Inc. (KONWAL) claims $380.37 as reparation from Orient Overseas Container Line (OOCL) for equalization with respect to eight different shipments of such varied commodities as plastic toys, plastic containers, rattan sticks, plastic flowers, mirrors and plastic dolls, transported from National Mercantile, Hong Kong to KONWAL, the bills of ladings fot which indicate that San Francisco, California is the port of discharge. The truck movements (U.E.P. Transports) from OOCL's port of delivery at Oakland to the consignee at San Francisco took place on April 6, April 26, July 20, August 16, October 2, October 19, November 5, and November 28, 1973. The claims were filed with the Commission on February 26, 1975, within two years from the date the cause of action arose and must be considered on their merits as ruled by the Commission in *Colgate Palmolive Company* v. *United Fruit Company,* Informal Docket No. 115(I), served September 30, 1970.

The equalization claims are based on the excess of the trucking rates from Oakland to San Francisco,[2] (paid by KONWAL) over the drayage rates within San Francisco. The rates are published in California Public Utility Commission Tariffs Nos. 2 and 19, respectively.

OOCL's Hong Kong Eastbound Pacific Coast Tariff No. 1 (FMC–1) contains rates from Honk Kong to United States Pacific Coast Ports, however, no ports are specifically named therein.

KONWAL's claim is based on Rule 28 of OOCL's tariff which provides:

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[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] KONWAL has submitted freight bills covering the truck movement of the subject shipments from OOCL in Oakland to KONWAL in San Francisco.

"If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier *may* arrange, at its option, to move the shipment from actual port of discharge as follows:

"To the port of destination stated in the bill of lading, alternatively the carrier *may* forward the cargo direct to a point designated by the consignee, provided, the consignee pays the costs which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading." (Underscoring provided.)

The above is a discretionary rule. In Informal Docket No. 321(I) served April 8, 1975—*Abott Laboratories* v. *Alcoa Steamship Company,* the Commission indicated that it believed that the discretionary nature of a tariff provision (Rule 11) being considered therein rendered it unenforceable. Rule 11 provided:

"Claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment. Adjustment of freight based on alleged error in description *may* be declined unless application is submitted in writing sufficiently in advance to permit verification of description, before the cargo leaves the carrier's possession." (Underscoring provided.)

The Commission also stated that in its order on remand in Informal Docket No. 290(I) served May 16, 1974—*P.P.G. Industries, Inc.* v. *Royal Netherlands Steamship Co.,* "we discussed at length the use of the word 'may' in a rule similar to that relied upon by Alcoa [Rule 11 above] and stated that such a discretionary rule was in effect '. . . no rule at all.' " The Commission further stated that it would not in the future, permit carrier reliance upon rules which allow for discretion in a carrier's consideration or denial of claims; that such rules will not in and of themselves be permitted to defeat a claim for overcharges. This logic follows the strict tariff adherence mandate set by the Commission in *Kraft Foods* v. *Moore McCormack Lines, Inc.,* in Docket No. 73-44 served March 26, 1974.

Rule 28 of OOCL's tariff is also ambiguous. Where a tariff is ambiguous or doubtful, it should be construed against the carrier who prepared it.[3]

Subsequent to a letter of August 22, 1974 from the Commission's staff that the above equalization rule was not specific, OOCL filed 16th Revised Page 35 to the subject tariff, with a published effective date of October 1, 1974, which amended Rule 28 by substituting the language "shall arrange at its expense" for "may arrange, at its option." By so modifying the rule, OOCL has now clarified that it shall equalize under the conditions as cited in revised Rule 28.

San Francisco is indicated as the port of discharge on all of the subject OOCL bills of lading. Had OOCL discharged the cargo at San Francisco, KONWAL would have had to pay only the drayage rate from point of rest on the dock to its place of business in San Francisco. As indicated above, if KONWAL's claims are settled as filed, KONWAL will be

[3] *United States of America* v. *Hellenic Lines, Limited,* 14 F.M.C. 260 (1971). See also *Peter Bratti Associates, Inc.* v. *Prudential Lines, Ltd.,* 8 F.M.C. 375 (1964).

paying only the drayage rate from point of rest on the dock to its place of business in San Francisco.

OOCL indicates in its tariff that it serves United States Pacific Coast Ports. The subject eight shipments were accepted by OOCL with San Francisco indicated as the port of discharge on the covering bills of lading, as requested by the shipper National Mercantile, during a six-month period. Hong Kong Export Lines, Ltd., agent for OOCL, prepared and issued the bills of lading.

As OOCL's agent accepted the subject bills of lading showing San Francisco as the port of discharge, and OOCL holds out in its tariff to serve United States Pacific Coast ports, it can not utilize the then discretionary equalization rule to discharge at another port, accepting no responsibility for the added transportation costs incurred by the receiver.

Based on the foregoing, below are the computations in KONWAL's claim for equalization reparation by OOCL.

Claim	*Local Freight Bill Date*	*Equalization*	*Weight*	*Rate*	*Transportation Charges*	
K–01	4–24–73	Oakland to S.F. --------	13,153#	$1.03	$135.48	
				surcharge	3.40	
					$138.88	
		S.F. to S.F.	13,153#	$ .67	88.13	
		Equalization ------------				$50.75
K–02	5– 4–73	Oakland to S.F. --------	7,544 as 10,000#	$1.03	$103.00	
				surcharge	3.40	
					$160.40	
		S.F. to S.F.	7,544#	$ .67	50.54	
		Equalization ------------				$55.86
K–03	7–20–73	Oakland to S.F. --------	3,702 as 5,000#	$1.43	$ 71.50	
				surcharge	3.40	
					$ 74.90	
		S.F. to S.F.	3,702 as 4,000#	$ .77	30.80	
		Equalization ------------				$44.10
K–04	8–23–73	Oakland to S.F. --------	2,830 as 5,000#	$1.20	$ 60.00	
				surcharge	2.50	
					$ 62.50	
		S.F. to S.F.	2,830#	$ .82	23.21	
		Equalization ------------				$39.29
K–05	10– 9–73	Oakland to S.F. --------	1,787#	$3.11	$ 55.58	
				surcharge	1.50	
					$ 57.08	

		S.F. to S.F.	1,787 as 2,000#	$ .79	15.80	
		Equalization				$41.28
		One container freight equalization $16.50[4]				
K–06	11– 6–73	Oakland to S.F.	1,933# as 5,000#	$1.50 surcharge	$ 75.00 1.50	
					$ 76.50	
		S.F. to S.F.	1,993# as 2,000#	$1.03	20.60	
		Equalization				$55.90
K–07	11–28–73	Oakland to S.F.	1,075#	$3.90 surcharge	$ 42.89 1.50	
					$ 44.39	
		S.F. to S.F.	1,075#		$ 44.39 18.03	
		Equalization				$26.36
K–08	10–19–73	Oakland to S.F.	2,638# as 5,000#	$1.50 surcharge	$ 75.00 2.50	
					$ 77.50	
		S.F. to S.F.	2,638#	$1.03	27.17	
		Equalization				$50.33

From the foregoing, OOCL is in violation of Section 18(b)(3) of the Shipping Act, 1916, for receiving a different compensation for the transportation of property or any service in connection therewith than the rates and charges specified in its tariffs, by its failure to remit in any manner any portion of the rates or charges so specified, in accordance with its tariff. Therefore, KONWAL is awarded reparations of $363.87 with interest at the rate of six percent per annum if not paid within 30 days of the date hereof. Reparation is denied with respect to the alleged $16.50 allowance to cover the one container load movement as provision for same is not made in OOCL's tariff, and any reparation thereon would result in the violation of Section 18(b)(3) of the Shipping Act, 1916.

(S) JUAN E. PINE,
Settlement Officer.

[4] Allegedly the policy of OOCL with respect to full container loads being delivered to San Francisco is to give $16.50 allowance per container to the consignee to cover the approximate cost of returning the empty container to OOCL's terminal in Oakland. Reparation of $16.50 is denied as the tariff contains no such allowance and payment of such allowance would violate Section 18(b) of the Shipping Act, 1916. KONWAL has agreed to cancel the $16.50 claim.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 472

COMMODITY CREDIT CORPORATION

v.

SURINAM NAVIGATION COMPANY, LTD.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

December 9, 1975

Notice is hereby given that the Commission on December 9, 1975, determined to adopt the initial decision in this proceeding subject to the following clarifications.

Whereas the initial decision broadly states that "there was an error due to inadvertence in failing to file the new rates, therefore waiver of collection of a portion of the freight may be allowed", it is silent on whether all other statutory requirements prerequisite to the grant of a waiver had been met.

Section 18(b)(3) of the Shipping Act, 1916 (the Act), empowers the Commission in certain circumstances, in its discretion and for good cause to permit a carrier by water in foreign commerce to refund a portion or waive collection of a portion of freight charges *provided:*

> That the common carrier . . . has prior to applying for authority to make a refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. *Provided further.* That the carrier . . . agree that if permission is granted by the . . . Commission, an appropriate notice will be published in the tariff, or such other steps taken as the . . . Commission may require, which gives notice of the rate on which said refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments. . . . *And provided further.* That application for refund or waiver must be filed with the Commission within one hundred eighty days from the date of shipment.

These provisions are not of a discretionary procedural nature. In order for the Commission to be vested with the authority to grant refunds or waivers it must first ascertain that all the requirements set forth in section 18(b)(3) of the Act have been complied with.

The record here shows that the on-board bill of lading covering the shipment of soybean salad oil is dated January 8, 1975; that the on-board bill of lading covering the shipment of corn meal is dated January 9, 1975; and that the application was filed on May 19, 1975, within 180 days of the dates of shipment. Prior to applying for a waiver, the applicant filed, on April 2, 1975, a new tariff setting forth the rates sought to be applied and also affirmed that it would charge the same rate to Churchworld Service, whose shipment of salad oil moved at the same time and on the same vessel as Commodity Credit Corporation's cargo.

Therefore, notwithstanding the lack of specific findings to that effect in the initial decision, we are satisfied that applicant has complied with the statutory requirements of section 18(b)(3) of the Act and for that reason adopt the initial decision.

It is Ordered, That applicant is authorized to waive collection of $860.55 of the charges previously assessed Commodity Credit Corporation for shipments described in Special Docket No. 472.

It is Further Ordered, That applicant shall 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. 472, that effective January 8, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from January 8, 1975 through April 2, 1975, from the Tampa, Florida/Brownsville, Texas range to Haiti, the rate on "Soybean salad oil" is $63.50 W and on "Corn meal" $41.50 W subject to all applicable rules, regulations, terms and conditions of said rates and this tariff.

It is Further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver or refund made pursuant to this Order, including, but not limited to, the waiver or refund to Churchworld Service.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 472

COMMODITY CREDIT CORPORATION

v.

SURINAM NAVIGATION COMPANY, LTD.

Waiver of collection of a portion of charges permitted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed May 19, 1975, Surinam Navigation Company Ltd. (Surinam) has applied for permission to waive collection of a portion of the freight on a double shipment from New Orleans to Port-Au-Prince, Haiti, carried on respondent's vessel *M. V. Suriname,* under bill of lading dated January 9, 1975. The shipment consisted of 1,509,447 pounds (754.7235 short tons) of corn meal, and 141,094 pounds (70.5470 short tons) of soybean salad oil. Both shipments were booked October 24, 1974, for lifting December 15–18, 1974. At the time of the booking negotiation, the carrier advised Commodity Credit Corporation (CCC), that it intended to file a general rate increase effective December 9, 1974. On the basis of this advice, CCC and Surinam negotiated rates of $41.50 per short ton for corn meal and $63.50 per short ton for soybean salad oil; both rates to be all inclusive. On November 6, 1974, Surinam filed a general rate increase of about 12% to be effective December 9, 1974. Surinam failed to file the negotiated rates, and also failed to file the negotiated rates in the new tariffs effective December 9, 1974. Accordingly the corn meal was rated on the basis of $42.50 per short ton and the soybean salad oil was rated on the basis of $65.00 per short ton. The freight for the corn meal was $32,075.75. The freight for the soybean salad oil was $4,585.56. The freight actually collected for the corn meal was $31,321.03. The freight actually collected for the soybean oil was $4,479.73. Permission is sought to waive collection of $754.72 in the case of the corn meal and $105.83 in the case of the soybean salad oil, for a total of $860.55.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by

[1] This decision became the decision of the Commission December 9, 1975.

Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

Applied to the facts it is found that there was an error due to inadvertence in failing to file the new rates. Therefore waiver of collection of a portion of the freight may be allowed. Accordingly, respondent Surinam Navigation Company, Ltd., is hereby allowed to waive collection of $860.55, which represents the total of the overcharge. A notice of waiver shall be published in Surinam's tariff.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
November 12, 1975.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–35

AGREEMENT NOS. T–1685 AS AMENDED AND T–1685–6: BETWEEN THE CITY OF ANCHORAGE AND SEA-LAND SERVICE, INC.; AND AGREEMENT NO. T–3130: BETWEEN THE CITY OF ANCHORAGE AND TOTEM OCEAN TRAILER EXPRESS, INC.

Agreement No. T–1685, as amended through T–1685–5 is disapproved effective February 5, 1976 unless the parties to that Agreement, prior to that date, file with the Federal Maritime Commission an amendment to Article 1(a) as prescribed herein.

Upon submission of the required amendment, the remaining provisions of Agreement No. T–1685 will continue as presently approved.

Peter J. Nickles and *John Michael Clear* for the City of Anchorage, respondent.

Gerald A. Malia and *Edward A. McDermott, Jr.,* for Sea-Land Service, Inc., respondent.

Stanley O. Sher and *David C. Shonka* for Totem Ocean Trailer Express, Inc., respondent.

James E. Wesner for Tesoro-Alaskan Petroleum Company, protestant.

Alan F. Wohlstetter and *Edward A. Ryan* for Coastal Barge Lines, Inc., protestant.

Donald J. Brunner and Joseph B. Slunt, Hearing Counsel.

INTERIM REPORT[1]

January 30, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey, James V. Day, *Commissioners*)

By Order of Investigation and Hearing dated September 15, 1975, the Commission instituted this proceeding to determine; (1) whether Terminal Agreement No. T–3130, between Totem Ocean Trailer Express, Inc. (Totem) and the City of Anchorage, Alaska (Anchorage), and Terminal Agreement Nos. T–1685 and T–1685–6, between Sea-Land Service, Inc. (Sea-Land) and Anchorage, are unjustly discriminatory or unfair as

[1] In view of the urgent need for Commission action on this matter prior to February 1, 1976 an Order was issued on January 30, 1976. This Report explains the basis for the Order which is attached and made a part hereof.

between carriers, shippers, exporters or importers, or operate to the detriment of the commerce of the United States, or are contrary to the public interest, or are otherwise in violation of the Shipping Act, 1916; (2) whether said agreements should be approved, disapproved or modified pursuant to section 15; and (3) whether section 15 has been violated by Totem and/or Anchorage by the construction of facilities provided for in Agreement No. T–3130 prior to the approval of said agreement by the Commission.

The Commission's Order of Investigation named Anchorage, Sea-Land and Totem as Respondents. Standard Oil Company of California, Western Operations Inc. (Standard); Coastal Barge Lines Inc. (Coastal); Puget Sound Tug and Barge Co. (Puget); Tesoro-Alaskan Petroleum Corporation (Tesoro); and Shell Oil Company (Shell) were made Petitioners in the proceeding.[2] Hearing Counsel also participated in the proceeding.

An evidentiary hearing was held in Washington in early December, 1975. These hearings consumed 11 days and produced 117 documentary exhibits and a transcript running to 1770 pages.

During the course of the hearings a problem arose which ultimately resulted in the Interim Initial Decision now before us on exceptions. Briefly stated, Sea-Land's present agreement with Anchorage (Agreement No. T–1685, as amended) grants it preferential berthing rights for its vessels at Terminal 1 commencing February 1, 1976. When a Sea-Land vessel is berthed at Terminal 1, Totem's vessel, the *Great Land,* will be precluded from berthing at the same facility and will instead be required to berth at Terminals 2 and 3 which provide the only alternative berthing location.[3] Totem claimed during the hearing that its vessel could not be safely berthed at Terminals 2 and 3 during severe winter icing conditions and that for that reason it would not call at Anchorage until improved weather conditions made it possible to utilize the alternative location without risk. This concern for the safety of Totem's vessel at Terminals 2 and 3 prompted the need for expeditious action and the interim proceeding which followed.

Thus, despite the expeditious manner in which the hearings were pursued, it became evident that in view of necessary briefing requirements, it would not be possible for the matter to be submitted to the Commission in time for it to render a decision on all the issues by February 1, 1976. It was determined therefore, that an interim decision of the Commission on or before February 1, 1976 might be possible whereby all of the rights of the parties might be preserved, service at Anchorage not jeopardized, and the public interest served, until such time as the

[2] Standard Oil subsequently withdrew its protest and was dismissed from the proceeding. Shell Oil did not actively participate in the hearing.

[3] Sea-Land has been offering common carrier service to the Port of Anchorage since 1964. Currently, the carrier has four vessels in regular service in the Anchorage trade.

Totem inaugurated service between Seattle and Anchorage in September, 1975. The carrier currently operates a single roll-on/roll-off vessel in direct competition with Sea-Land. All service to the Port is presently on a first-come-first-served basis.

Commission rendered a final decision. To this end, the Administrative Law Judge requested that the parties file proposed findings and conclusions addressed to the issue of whether temporary or conditional approval should be given to Agreement No. T–1685–6 granting Sea-Land preferential berthing rights at Terminal 2 for a sufficient period of time to enable the Commission to further consider whether such approval should be continued, modified or withdrawn.

Since Agreement T–1685–6 provides for a shift of Sea-Land's berth from Terminal 1 to Terminal 2 it was felt that the proposal for temporary conditional approval of T–1685–6 would make it possible to berth Totem's vessel at Terminal 1 until such time as the Commission decides the major issues raised herein.

In his Interim Initial Decision served December 29, 1975, Administrative Law Judge Stanley M. Levy concluded that:

(1) Temporary approval of T–1685–6 for 90 days is in the public interest and would serve a serious transportation need;

(2) Approval is on condition that during cement off-loading operations, Sea-Land will berth in a manner not to interfere with such operations; and

(3) If Sea-Land does not accept the temporary and conditional approval of preferential berthing rights at Terminal 2, previously approved preferential berthing rights for Sea-Land at Terminal 1 are rescinded.

Exceptions to this Interim Initial Decision were filed by Sea-Land and Tesoro. Replies to Exceptions were submitted by Anchorage, Hearing Counsel and Totem. Requests for oral argument were denied.

AGREEMENTS AND FACILITIES

Agreement No. T–1685–5 is the current agreement under which Sea-Land serves Anchorage. The agreement provides for Sea-Land enjoying preferential berthing rights at Terminal 1 for 104 calls per agreement year (February 1-January 31).

At the present time, Sea-Land is calling at the Port under the same conditions as Totem; i.e. on a first-come-first-served basis, Sea-Land having allegedly utilized its 104 preference calls for the agreement year 1975. However, effective February 1, 1976, Sea-Land will resume its preference at Terminal 1 and at its current rate of 3 calls per week will effectively utilize Terminal 1 most of the time.

Agreement No. T–1685–6, placed at issue in this proceeding, would shift Sea-Land's preferential berthing rights to Terminal 2. Sea-Land's preferential calls would also be increased from 104 to 156 calls per year. According to Sea-Land, Terminal 2 affords certain advantages over Terminal 1 due to its wider apron, improved traffic pattern, and the near proximity of its supervisory office. Sea-Land believes that it can achieve substantial cost reductions by operating at Terminal 2, in contrast to Terminal 1. In order to achieve these cost reductions, however, Sea-Land is of the view that certain modifications should be made to Agreement No. T-1685-6. These modifications are before Judge Levy in the proceeding.

Agreement No. T-3130 between Totem and Anchorage would, *inter alia*, grant Totem preferential berthing rights at Terminal 1 and the petroleum terminal for 52 calls per year.

The reasoning behind these various relocations at the port, lies in the physical layout of the facilities at Anchorage. Anchorage's port facilities consist of a single linear pier approximately 2200 feet in length divided into $3^1/_2$ cargo terminals. The petroleum facility at the southern end of the pier, and Terminal 1 adjoining it, both have petroleum headers to accommodate carriers transporting oil products. Terminal 1 is 600 feet long; Terminal 2 is 610 feet long and only one half of Terminal 3 is completed. Terminal 3's current length is 366 feet.[4] At Terminal 1, the width of the apron is 47 feet. At Terminal 2 the width is 69 feet.

Totem's vessel, the *Great Land*, has an overall length of 790 feet. Because of its length, the *Great Land* cannot berth at either Terminal 1 or Terminal 2, without some overlap onto the adjoining facilities. Agreement No. T-3130 will allow the *Great Land* to berth at Terminal 1 and extend onto the petroleum terminal (POL terminal) without any infringement of Terminal 2. Because of the design and length of the *Great Land*, unique problems are presented in mooring the vessel at Terminals 2 and 3. The great length of the vessel requires that it be moored with its stern flush with the end of Terminal 3. This results in a 90° angle of the mooring lines between the vessel and the dock which increases the tension on the line. Normal berthing practice would be to use a line to a mooring dolphin, or similar device, approximately 140° northward. However, at this time this does not appear to be possible at Anchorage.

Prior to the filing of Agreement No. T-3130, and in anticipation of service to Anchorage, Totem constructed with the Port's approval, permanent trestles at the POL-Terminal 1 site which would enable the *Great Land* to utilize three off-loading ramps at that facility. Because of limited facilities at Terminal 2 only one ramp can be utilized to off-load the *Great Land*.

INTERIM PROCEEDING

1. Position Of The Parties Before The Administrative Law Judge

In the proceedings before the Administrative Law Judge, all the parties with the exception of Sea-Land, favored some form of temporary approval of Agreement No. T-1685-6.

Totem, and the other parties filing briefs, focused primarily on the issue of whether it would be safe for the *Great Land* to berth at Terminals 2 and 3 during periods of severe icing. Totem explained that the mooring

[4] Terminal 3 is presently in the process of being lengthened an additional 325 feet 8 inches, with completion scheduled for October 1976.

problems are magnified during the winter months when ice conditions prevail, because the ice exerts great pressure on the flat stern of the vessel especially during ebb tides. As a result, Totem pointed out that there is the possibility that the ice and winter winds could cause the *Great Land* to become unmoored with the resultant risk of catastrophic damage. In view of this potential danger, Totem has advised that it would not utilize Terminals 2 and 3 during severe icing conditions.

Sea-Land on the other hand saw no "crisis" during the severe winter months which would preclude Totem from utilizing Terminals 2 and 3 and was of the opinion that Totem's mooring problems with the *Great Land* could be resolved without significant modification to the vessel. Also, Sea-Land opposed any temporary approval of Agreement No. T–1685–6, until the Commission resolves all of the issues raised by that agreement. According to Sea-Land, Anchorage has, since the commencement of this proceeding, announced new interpretations of language appearing in both the existing preferential agreement and the proposed amendment thereto which conflict with the historical interpretation by the parties and therefore create ambiguities in these agreements and the consequent need for clarification.

If certain modifications and clarifications are made in the agreement, as requested by Sea-Land, it would go along with conditional approval of Agreement No. T–1685–6. Sea-Land's counter-proposals, eight in number, are elaborate and involve a far-reaching amendment to Agreement No. T–1685–6 as now submitted.

The City of Anchorage, Hearing Counsel, and Tesoro all generally supported temporary approval of Agreement T–1685–6. All three parties also recommended that, if Sea-Land refused to go along with conditional approval at this time, the Commission should suspend Sea-Land's preferential berthing rights under T–1685–5.

2. Interim Initial Decision

Administrative Law Judge Levy concluded that temporary approval of Agreement T–1685–6 for 90 days is in the public interest and would serve a serious transportation need. *F.M.C. v. Svenska Amerika Line,* 390 U.S. 238 (1968). In this regard he found that continuing Sea-Land's preferential berthing rights at Terminal 1, subsequent to February 1, 1976, would effectively preclude Totem from operating at Terminal 1, and that requiring Totem to utilize Terminals 2 and 3 would result in severe economic disadvantages to Totem in view of the great reduction in off-loading efficiency at the latter facility.

Judge Levy found conflicting evidence on the issue of whether Totem's vessel could safely be berthed at Terminals 2 and 3 during heavy icing periods. However, Judge Levy found it unnecessary to resolve this issue in his decision, explaining that "whether the vessel is in danger by ice need not be determined since other considerations of public interest warrant a result which do not preclude berthing of the *Great Land* at POL—Terminal 1."

The "other considerations" cited were the reduction in off-loading efficiency at Terminal 2. Thus, he found that:

> Absent other overriding considerations, the requiring of less efficient operations when more efficient operations are possible, must result in poor service and would not be in the public interest.

Judge Levy considered Sea-Land's elaborate counter-proposals as "irrelevant to the present interim decision requirements," explaining that the issues raised by the counter-proposals could properly be considered by the Commission in its final resolution of the proceeding, and consideration of whether to grant temporary approval of Agreement T–1685–6, as submitted, would not ultimately, materially, or substantially, affect the rights of any party, including Sea-Land.

In order to accommodate Coastal's[5] bulk cement barge unloading operations at Terminal 2, Judge Levy conditioned approval on Sea-Land's agreeing that, during such time as bulk cement off-loading operations require barge utilization of facilities at Terminal 2, it would not interfere with such cement operations.

Finally, Judge Levy held that in the event that Sea-Land should refuse to accept such temporary and conditional approval of Agreement No. T–1685–6, approval of Agreement No. T–1685, as amended, would be rescinded.

3. *Exceptions and Replies*

Sea-Land filed lengthy exceptions to the Interim Initial Decision of Judge Levy. However, it did advise that it would, if the Commission so ordered, accept the 90-day approval of its Agreement No. T–1685–6, with the understanding that certain modifications to that Agreement were "imperative".

Briefly stated, Sea-Land excepts to the initial decision on the grounds that: (1) The decision is contrary to the Commission's order to expedite, and it prejudges issues which have yet to be briefed; (2) It falsely accuses Sea-Land of not cooperating whereas in reality, Sea-Land asserts that it has submitted three proposals (two of which were allegedly totally ignored) for resolution of the subject problem; (3) The Administrative Law Judge erroneously failed to find that there is no "crisis" or other conditions which would prevent the *Great Land* from adequately mooring at Terminals 2 and 3 during February and March; (4) The decision is incorrect in finding that Sea-Land would occupy the berth virtually 100% of the time, Sea-Land contending that the evidence shows that the carrier would occupy Berth 1 only about 50% of the time; (5) The finding in the decision that subsequent to February 1, 1976, Totem's only berthing site

[5] Coastal does not operate to Anchorage during the severe winter months but does resume service on or about April 1. The cement barge can only utilize Terminal 2 because the cement headers are located at Terminal 2.

at Anchorage will be Terminals 2 and 3, which Totem claims is unsafe and inefficient, is erroneous because it is not supported by the evidence; (6) The interim decision erroneously failed to find that Sea-Land's decision to agree to move to Terminal 2, was based on several factors, including Anchorage's commitment to lease Sea-Land lot 3–A and to make available transit area B; (7) The decision contains an incorrect finding that Sea-Land has completed its 104 preferential calls; and, (8) The Interim Initial Decision is in error, to the extent it finds that, unless T–1685–6 is conditionally approved, Sea-Land will be able to bar its only major competitor from berthing and thus retain its monopoly over general waterborne cargo into the Port of Anchorage.

In its brief in support of its exceptions, Sea-Land reiterates many of the arguments previously made by the parties concerning conditional approval of Agreement No. T–1685–6. However the major thrust of Sea-Land's contentions is directed at the findings of the Administrative Law Judge, regarding the relative efficiency of Totem's operation between the POL-Terminal 1 facility and Terminal 2.

Sea-Land also argues that the construction by Totem of trestles at the POL-Terminal 1 location, is one of the issues to be determined in the proceeding, and that until there is a decision as to whether the construction of such trestles constitutes a violation of section 15, Totem should not be rewarded by "artificially" increasing its ability to utilize that trestle system by calling at Terminal 1.

Tesoro, while initially supporting some form of temporary approval, now urges that the Interim Initial Decision be rejected because it has no foundation in the record, is contrary to the evidence, contradicts the rationale stated for temporary approval, and seriously prejudices the parties' rights to a fair hearing. In the alternative, Tesoro submits that, if the Commission determines to grant temporary approval of T–1685–6, it should do so solely on the safety issue, as briefed by the parties, and not on the grounds stated in the Interim Initial Decision. Moreover, it would limit such temporary approval to 60 days commencing February 1, 1976.

Tesoro further objects to the Interim Initial Decision on the same grounds cited by Sea-Land; namely, that while the supposed need for temporary approval revolved around the possibility that Totem would be unable to use Terminals 2 and 3 during certain months because of the possibility of severe icing, Judge Levy expressly declined to rule on the safety issue, but instead based his decision on other grounds.

Tesoro challenges Judge Levy's conclusion that Totem will be unable to continue in service at Anchorage, unless Sea-Land is moved to Terminal 2. According to Tesoro, this conclusion assumes a finding not made by Judge Levy in his decision, i.e. that the *Great Land* could not berth at Terminals 2 and 3 during the 90-day period in question. In this regard Tesoro points out that Judge Levy had an opportunity to base his decision on the one factor which would have precluded Totem from utilizing Terminals 2 and 3, namely, the severe weather conditions, but expressly declined to do so on the grounds that it was unnecessary. Absent a finding that Totem could not utilize Terminals 2 and 3, Tesoro submits that there is no justification for the conclusion that Totem would be unable to continue in service.

Tesoro next attacks Judge Levy's finding of relative efficiency between POL-Terminal 1 and Terminal 2. Tesoro argues that the record in the proceeding actually contradicts the finding that Totem's operations at Terminal 2 are less efficient than at Terminal 1. In support of this contention Tesoro points out that the record shows that during the period Totem has called at Anchorage on a first-come-first-served basis, its best off-loading time was accomplished at the "less efficient" Terminal 2.

The 90-day time period for interim approval is also subjected to strong criticism by Tesoro, on the basis that no explanation is provided in the opinion as to why the 90-day period was selected. If, as Judge Levy concludes, the *Great Land* must be berthed at POL-Terminal 1 in order to promote efficiency and to preserve its position as a competitor in the trade, Tesoro questions why the public interest ceases on May 1, 1976. While Tesoro believes that this period was arrived at because of Totem's claim that it could not berth at Terminal 2 during the winter months, Tesoro questions its soundness in fact, since the safety problem was not considered by the Administrative Law Judge, and the public interest considerations chosen as a basis for his decision, bear no rational relation to the period selected to measure the relief granted.

Finally, Tesoro argues that the Interim Initial Decision violates the parties' rights to a fair hearing, by prejudging the ultimate issues to be decided in the hearing, citing as an example, Judge Levy's finding that Totem is more efficient at POL-Terminal 1.

While initially favoring temporary approval of Agreement No. T-1685-6 as a safety matter, if there was a genuine risk to the *Great Land*, Tesoro now takes no position as to whether this finding should be made. However, Tesoro urges that the safety problem, if it exists at all, cannot be found to extend beyond the period when heavy ice conditions can reasonably be expected to be present at Anchorage.

Anchorage finds no merit in the exceptions, and reasons that Sea-Land's "heated opposition to approval of its own agreement is that it believes it will be able to impair Totem's ability to compete if it can stall the approval of its own agreement."[6]

With respect to exceptions raised by Tesoro, Anchorage argues that "they amount to no more than a claim that because it [Tesoro] misunderstood the scope of the interim approval issue, the Law Judge therefore impermissably [sic] made findings of fact which Tesoro does not consider directly relevant." Anchorage states that the parties did brief the "efficiency" issue and the Law Judge's findings respecting the

[6] *Sea-Land* filed a "*Motion to Strike*" this language and certain other argument contained in Anchorage's Reply. Since our decision herein does not stand or fall on the specific language and arguments objected to by Sea-Land the motion is denied.

improved efficiency at POL-Terminal 1 are, alone, sufficient to justify interim approval. Anchorage also urges rejection of Tesoro's request for 60-day approval, citing support in the record for 90 days.

Hearing Counsel agrees with the exceptions insofar, as they find that the Interim Initial Decision should not have been based on the question of the relative efficiencies of Totem's various berthing options. However, Hearing Counsel submits that the fact that the record does demonstrate that Totem has elected not to risk docking at Terminals 2 and 3 during severe winter ice conditions, is sufficient to find that Sea-Land's preferential agreement may force Totem out of the trade for several months. This finding, in turn, justifies a temporary approval of Agreement No. T-1685-6 for 90 days.

Totem is of the opinion that the interim decision is supportable on the grounds that the public interest warrants transferring Sea-Land to the site where its operations are most efficient; also, that Totem should not be forced to take the risk of berthing at Terminals 2 and 3 during periods of severe icing. Thus, Totem believes that, since the interim decision enables Totem to remain in the trade through the winter, it serves the public interest and should be affirmed.

Totem asserts that Tesoro's objections relate to the rationale—as opposed to the results—of the decision. On this point, Totem takes the position that since Judge Levy ruled that "the parties do not . . . waive any arguments they have previously made nor is such non-objection to be deemed in any way prejudicial to their rights otherwise" Tesoro should not be concerned over the "grounds" of the decision when it agrees with the result.

As an alternative basis for the decision, Totem supports Tesoro's argument that the Commission grant approval of Agreement No. T-1685-6, solely on the safety issue as briefed by the parties. Totem finds adequate support in the record for such a finding.

Finally, Totem disputes Tesoro's argument that only a 60-day approval of the agreement is required. According to Totem, the ice season in Alaska extends through the third week in April, and a 90-day approval would eliminate the possibility that the parties would have to return to the Commission for an extension of approval.

Discussion and Conclusions

The record is quite clear that the catalyst for the interim decision was a statement made by Mr. William B. Maling, President of Totem, during the course of the hearing, to the effect that Totem's vessel, the *Great Land* could not be safely berthed at Terminals 2 and 3 during conditions of severe icing. The resumption of preferential berthing rights of Sea-Land at Terminal 1, coupled with the use of the POL facility by other carriers, would preclude Totem from effectively utilizing any berth at Anchorage during the period that it was unsafe to berth at Terminals 2 and 3.

This problem precipitated several discussions among counsel and Judge Levy, culminating in a proposal by Anchorage and Totem that interim approval be given to Agreement No. T–1685–6, so that Terminal 1 would be available to Totem on a non-preferential basis. All parties with the exception of Sea-Land agreed to the proposal, and it was determined to submit briefs on this limited issue to be filed on an accelerated schedule so that an interim decision could be rendered prior to February 1, 1976.

Unfortunately, Judge Levy in his Interim Initial Decision declined to reach a determination on the safety issue, and, instead, based his approval of Agreement No. T–1685–6 on the relative efficiencies of POL-Terminal 1 and Terminals 2 and 3, as applied to Totem's operations. As such, his decision is based on issues that were not properly noticed by the Administrative Law Judge and thus not fully briefed by the parties, and ignores the one central issue which gave rise to the problem and on which the parties had concentrated their arguments. In so doing, the Presiding Officer erred.

Judge Levy's rationale in support of his decision is somewhat confusing. Striking at what he considered to be the heart of the problem presented in this *interim* proceeding, Judge Levy stated:

> Unless the berthing provision of Sea-Land's present preferential agreement is suspended, or Agreement No. T–1685–6 is conditionally approved for an interim period, Sea-Land will be able to bar its only major competition from berthing and thus will be able to retain its monopoly over general waterborne cargo into the Port of Anchorage.

Unanswered, however, is the question of how the relative efficiencies of POL-Terminal 1 and Terminals 2 and 3 would enable Sea-Land to "bar its only major competition."

While it is true that POL-Terminal 1 is more desirable to Totem, because of the three off-loading ramps, there is no evidence in the record to indicate that, *absent severe icing conditions,* continued use of Terminals 2 and 3 by Totem during interim period, would drive the carrier from the trade. The only sound basis for Judge Levy's unexplained observation would be that severe icing conditions at Terminals 2 and 3 would actually preclude Totem from utilizing that berth. In that event, Sea-Land's preferential use of Terminal 1 would lend credence to the statement. The safety issue was not, however, decided by Judge Levy.

We agree with Tesoro's argument that the 90-day period of temporary approval bears little relation to the basis upon which the Administrative Law Judge decided the case. Presumably, Judge Levy is anticipating a final decision by the Commission within 90 days. However, if that decision should not be forthcoming, the parties would have to request a further extension of the approval. Assuming the validity of Judge Levy's finding with respect to the carrier's relative efficiencies at the Anchorage facilities as a basis for his decision, it would appear to have been more logical to approve Agreement No. T–1685–6, until such time as the Commission rendered its final decision. Certainly, under Judge Levy's rationale the public interest consideration would not necessarily expire in

90 days. While a finding that limited approval based on the safety factor and the 2 to 3 month winter period is consistent with the record, Judge Levy's basis for limited approval lacks any foundation in the record and must be rejected.

Our decision herein is not meant to imply that the findings of Judge Levy with respect to operating efficiencies at Anchorage are necessarily erroneous. We have not reached a determination as to that issue, simply because we believe that the interim proceeding is not the proper forum for a resolution of this particular matter. As we see it, the need for an interim decision arose because of a very specific problem, i.e. the question of safety to Totem's vessel, the *Great Land,* if it was required to utilize Terminals 2 and 3 during periods of severe icing. We have confined our discussion and decision solely to that limited issue, to ensure that the contentions, positions, defenses and rights of each and every party with respect to other matters still pending before the Administrative Law Judge are not prejudiced.

Judge Levy declined to reach a decision on the safety issue, ostensibly because there were other considerations of the public interest which warranted the utilization of POL-Terminal 1 by Totem. Perhaps a more significant reason was "the conflicting evidence whether the *Great Land* can be safely berthed at Terminal 2-3 during the heavy icing period." We can sympathize with Judge Levy on this point. The testimony is conflicting as to whether icing conditions at Anchorage will become so severe as to preclude the *Great Land* from berthing at Terminals 2 and 3.

However, severe icing does occur at Anchorage, and there is the *real possibility* that the *Great Land* could be damaged because of the mooring situation and the weather conditions. Totem has indicated in the record that it will not berth at Terminals 2 and 3 during severe icing conditions, because of the risk to the vessel and her crew. If Totem cannot use POL-Terminal 1, even on a first-come-first-served basis, it may be forced to leave the trade, at least on a temporary basis.

While there exists a legitimate dispute over whether the *Great Land* could, in fact, safely berth at Terminals 2 and 3 during periods of severe icing, in Totem's estimation, the risk of damage to its vessel and injury to its crew is so real that it has served notice of its intention not to berth at Terminals 2 and 3 under such conditions. Based on all the available evidence before us, we find that Totem's refusal to use Terminals 2 and 3 under such conditions is reasonable and based in good faith on a fear of injury to the vessel and her crew. As a result, Totem's assertion that it would leave the trade rather than serve Anchorage under these conditions, is not an idle threat, but a responsible business decision which must be taken seriously.

From every indication at this time, the continuation of Totem's service to Anchorage is in the public interest and should be maintained if possible. The design of Totem's vessel enables her to carry outsized cargoes which Sea-Land cannot accommodate. Shippers have apparently recognized the benefits offered by Totem's service, as evidenced by *Great Land's* initial heavy load factors. Thus, Totem's operation to Anchorage provides a new, flexible service, and the benefits of competition, as well as increased revenues to Anchorage. Judge Levy considered Totem's contribution to the trade, recognized this public interest factor and, in fact, used it as the basis for his decision.

We believe that a decision substantially in conformity with Judge Levy's could be rendered on the record, but based solely on the safety issue. This alternative, however, would place Sea-Land in the position of accepting approval of Agreement No. T–1685–6, on conditions which it has indicated are not satisfactory to it at this time. In any event, we do not believe that we can properly determine the merits of these conditions inasmuch as the parties did not fully brief this aspect of the case for purposes of the Interim Initial Decision. In addition, this matter is still pending before the Administrative Law Judge and we are reluctant to take any action which could be construed as prejudging ultimate issues.

Approval of Agreement No. T–1685–6, as originally submitted to this Commission, would also allegedly present a number of problems for Sea-Land, and could adversely affect Sea-Land's operations at Terminal 2. For example, Sea-Land contends that approval, even on an interim basis, of Agreement No. T–1685–6 without providing for an adequate back-up area to Terminals 2 and 3 could increase congestion and inefficiency which would translate into increased costs. Also, under an approved preference at Terminal 2, Sea-Land would be locked into using that facility on a full-time basis even though Totem would call at Terminal 1 only about once a week. Sea-Land contends that to require it to use Terminal 2 even when Totem is not at Terminal 1 will impair Sea-Land's operating efficiency without any countervailing enhancement in the efficiency of Totem.

Sea-Land's arguments in this regard are persuasive. Accordingly, it is our opinion that approval of Agreement No. T–1685–6 at this time, could create more problems than it will solve, and is unnecessary since more viable alternatives are available.

It is our opinion that the continued use of Terminal 1 by Sea-Land on a preferential basis is contrary to the public interest in violation of section 15, Shipping Act, 1916, in that there is a real possibility that it will serve to effectively preclude Totem from offering a competitive common carrier service to the Port during periods of severe icing conditions. Therefore, Agreement No. T–1685, as amended through T–1685–5 will be disapproved, effective February 5, 1976, unless the parties to that agreement, prior to that date, file with the Federal Maritime Commission an amendment to Article 1(a) of the Agreement (the preferential berthing rights clause) inserting at the end thereof, the following clause:

. . . provided, however, that effective February 5, 1976, such preferential berthing rights shall not apply during the months of February, March and April 1976.

Disapproval of Sea-Land's preferential berthing rights during the winter months will place all parties serving Anchorage, on a first-come-first-served basis. This will maintain the status-quo under which Sea-Land and Totem are presently calling at Anchorage, and the record does not disclose that either carrier has suffered severe economic disadvantage under such an arrangement. While in the long run, a preferential berthing arrangement may prove to be more economically viable, service to Anchorage on a non-preferential basis for the interim period would not appear to significantly affect the operations of either carrier.

A number of parties, including Hearing Counsel, Tesoro, Anchorage and Totem, had recommended that the Commission *suspend* Agreement No. T–1685, pending the outcome of the proceeding, if Sea-Land refused to accept temporary approval of Agreement No. T–1685–6. This alternative of suspension is not open to the Commission under section 15. *Pacific Coast European Conference—Payment of Brokerage,* 5 F.M.B. 65, 69 (1956).

However, as proposed herein, the parties themselves may modify the agreement so as to suspend the effectiveness of Sea-Land's preferential berthing rights during the months of February, March, and April of 1976. In the event the parties file the prescribed amendment to Article 1(a), the remaining provisions of Agreement No. T–1685 would continue as presently approved. Failure to file such an amendment will of necessity result in disapproval of the complete agreement, inasmuch as Article 1(a) is included therein.

Our disposition of the matter in this manner is not only consistent with the record in this proceeding and in conformance with the law, but is the least disruptive to the parties involved, and avoids the problem encountered by Judge Levy of possibly prejudging ultimate issues in the proceeding. Moreover, it will enable all parties to serve Anchorage on equal terms, pending the outcome of the proceeding.

One final point should be mentioned. On January 19, and January 27, 1976, Sea-Land filed Petitions to Reopen pursuant to Rule 13(j) (46 CFR 502.230(d)), for the purpose of receiving additional and current evidence on the actual use during the winter ice season of Terminals 2 and 3 by Totem. Responses were filed in opposition by Anchorage and Totem. Tesoro filed a response supporting Sea-Land's petitions. Generally, the arguments, pro and con, relate to Totem's ability to utilize Terminals 2 and 3 during the months of November, December and January, and the possible implication this might have with respect to Totem's use of that facility in February, March and April.

We find that Totem's present ability to utilize Terminals 2 and 3 bears little relevance to its ability to call at the facility in the severe winter months of February and March. This is the very basis of our decision; namely, the *real possibility* of severe icing, and Totem's reasonable fear of injury to vessel and crew which warrant Totem's refusal to call at Terminals 2 and 3. Neither we, nor anyone else, can predict whether such conditions will occur. Sea-Land's submittal can provide no evidence to alter our conclusion, and the petitions are, therefore, denied.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–35

AGREEMENT NOS. T–1685 AS AMENDED AND T–1685–6: BETWEEN THE CITY OF ANCHORAGE AND SEA-LAND SERVICE, INC.; AND AGREEMENT NO. T–3130: BETWEEN THE CITY OF ANCHORAGE AND TOTEM OCEAN TRAILER EXPRESS, INC.

ORDER

This proceeding is before the Federal Maritime Commission on exceptions to the Interim Initial Decision of Administrative Law Judge Levy wherein he found that:

1. Temporary approval of Agreement T–1685–6 for 90 days is in the public interest and would serve a serious transportation need.
2. Approval is on condition that during cement off-loading operations Sea-Land will berth in a manner not to interfere with such operations.
3. If Sea-Land does not accept the temporary and conditional approval of preferential berthing rights at Terminal 2 then previously approved preferential berthing rights for Sea-Land at Terminal 1 are rescinded.

We have reviewed Judge Levy's decision and the various exceptions and responses filed in connection therewith and, in view of the urgent need for Commission action on this matter prior to February 1, 1976, we are issuing this Order at this time to be followed by our Report, fully explaining its basis, within a few days.*

THEREFORE, for reasons to be fully enumerated in our Report,

IT IS ORDERED, That the Interim Initial Decision of Administrative Law Judge Levy is hereby reversed on the grounds that the decision was based on issues not fully briefed by the parties, and that it ignored the one central issue which gave rise to the need for interim action.

IT IS FURTHER ORDERED, That because Sea-Land Service, Inc.'s preferential berthing right at Terminal 1 at the Port of Anchorage is contrary to the public interest in violation of section 15 of the Shipping Act, 1916, in that there is a real possibility that it will serve to effectively

*This Order is made without prejudice to the contentions, positions, defenses and rights of each and all of the parties hereto in the matters pending before the Administrative Law Judge.

preclude Totem Ocean Trailer Express Service, Inc. from offering a competitive common carrier service to the Port during periods of severe icing conditions, Agreement No. T–1685, as amended through T–1685–5, is hereby disapproved effective February 5, 1976, unless the parties to that Agreement, prior to that date, file with the Federal Maritime Commission an amendment to Article 1(a) thereof, inserting after the first sentence the following clause:

> . . . provided, however, that effective February 5, 1976, such preferential berthing rights shall not apply during the months of February, March and April 1976.

IT IS FURTHER ORDERED, That Sea-Land's Petition to Reopen are denied.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 338(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

NOTICE OF DETERMINATION NOT TO REVIEW

February 10, 1976

Notice is hereby given that the Commission on February 10, 1976 determined not to review the decision of the Settlement Officer in this proceeding served January 30, 1976.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 338(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

Reparation Awarded.

DECISION OF WALDO R. PUTNAM, SETTLEMENT OFFICER[1]

By complaint filed November 14, 1975, Union Carbide Inter-America, Inc. (complainant) alleges that Venezuelan Line (carrier) assessed ocean freight charges on two separate shipments which were in excess of those lawfully applicable at the time of the transportation. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be section 18(b)(3).

The carrier denied the involved claims solely on the basis of Rule 11, United States Atlantic & Gulf Venezuela and Netherlands Conference Tariff No. 2, S.B. VEN–11, which time-bars claims for adjustments not received by the carrier within six months from the sailing date of the vessel.

In support of its claims, the claimant furnished copies of its claims Nos. 1954 and 2002 accompanied by corresponding copies of the bills of lading; commercial invoices; export declarations; and relevant correspondence.

Claim No. 1954 involves a shipment of 73 fibre drums of Synthetic Resin Polyethylene from New York to Puerto Cabello on March 15, 1974, which was assessed total transportation charges of $1,622.06. The shipment weighed 23,214 pounds; contained 852 cubic feet; and had an actual value of $6,460.50 (between $500 and $700 per 2000 pounds). The shipment was rated as 852 cubic feet at $68.25 per 40 cubic feet,[2] which

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] $68.25 was the applicable W/M rate for Resin Synthetic, Viz: N.O.S. *in other packing*—actual value over $300 but not over $500 per freight ton.

produced ocean freight revenue of $1,453.73 plus accessorial charges assessed on a per cubic foot basis ($168.33).

Item 495 of the aforementioned Conference tariff provides a specific rate on Resins, Synthetic, in bags or fiber drums, Viz: Polyethylene, actual value over $500 but not over $700 *per 2000 pounds*. Rating the shipment under this specific tariff provision would have produced ocean freight revenue of $809.59 plus accessorial charges assessed on a weight basis ($92.72). Accordingly, the complainant was overcharged on this particular shipment in the amount of $719.75 ($1,622.06 less $902.31).

Claim No. 2002 involves a palletized shipment of 440 bags of Synthetic Resin Polyethylene from New York to La Guaira on August 16, 1974 which was assessed total transportation charges of $1,084.56. The shipment weighed 22,440 pounds, net; contained 571 cubic feet; and had an actual value of $7,480.00 (between $500 and $700 per 2000 pounds). The shipment was rated as 571 cubic feet at $69.75 per 40 cubic feet[3] which produced ocean revenue of $995.68 less pallet discount of $35.67 plus accessorial charges assessed on a per cubic foot basis ($124.55). This shipment also should have moved under the specific rate in Item 495 discussed above. When rated on a weight basis, the shipment produces ocean revenue of $782.60 less pallet discount of $28.05 plus accessorial charges of $100.72. Accordingly, the complainant was overcharged on this shipment in the amount of $229.29 ($1,084.56 less $855.27).

The involved claims were denied by the carrier solely in accordance with its published tariff provisions, which read in pertinent part that: "claims by shippers for adjustment of freight charges will be considered only when submitted in writing to the carrier within six months of date of shipment." The merits of the claims were not an issue in the denial thereof. The carrier, however, in responding to the served complaint, not only admitted that the shipments were incorrectly rated, but, requested that a ruling in favor of the complainant be issued.

The Commission, in Informal Docket No. 115(I), *Colgate Palmolive Company* v. *United Fruit Company* reiterated what is specifically stated in *Proposed Rules—Time Limit on Filing Overcharge Claims* 12 F.M.C. 298, 308 (1969) that:

> ". . . once a claim has finally been denied by a carrier the shipper may still seek and in a proper case recover reparation before the Commission at any time within 2 years of the alleged injury, and this is true whether the claim has been denied on the merits or on the basis of a time limitation rule."

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to charge, demand, collect or receive a greater compensation than the rates or charges which are specified in its tariff.

The filing of a timely complaint with this Commission effectively overrides any tariff technicality under which an overcharge claim legally

[3] $69.75 was the applicable W/M rate for Resin Synthetic, Viz: N.O.S. in other packing—actual value over $500 but not over $700 per freight ton.

may be denied by a water carrier subject to our jurisdiction during the 2-year statutory period for recovering reparation set forth in section 22 of the Shipping Act, 1916. A proper case for the recovery of reparation having been made, a refund in the amount of $949.04 is due the claimant; and it is so ordered.

(S) WALDO R. PUTNAM,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 473

HOMASOTE CO.

v.

UNITED STATES LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

February 17, 1976

The initial decision in this proceeding was served January 19, 1976, and no exceptions have been filed. Notice is hereby given that the Commission has determined to adopt the initial decision subject to the qualifications discussed herein.

The initial decision makes several references to the fact that applicant is seeking a "waiver" of charges in this proceeding. Any such references in the initial decision should be to "refund" of charges inasmuch as payment has already been made.

While relief under special docket procedures is denied herein, our review of the application and pertinent tariff matters discloses that Homasote Co. may have been charged a rate other than that which was applicable. The application states the applicable rate for advertising material was $143.75 WM. Our review of the tariff indicates that the rate for such commodity in fact was $108.75 WM.

Attention is called to the Commission's formal complaint procedures (46 CFR. 505.62) and informal docket procedures for claims of $5,000 or less (46 CFR. 502.301 et seq.) under which a claim for reparation on overcharges of ocean freight may be filed within two years from the date a cause of action accrues.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 473

HOMASOTE CO.

v.

UNITED STATES LINES, INC.

Adopted February 17, 1976

Application for permission to waive collection of a portion of the freight charges denied..

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application filed June 16, 1975, United States Lines (USL) has applied for permission to waive collection of a portion of the freight on a shipment of advertising material carried under bill of lading dated March 29, 1975, on the *American Ace* from Baltimore to Hamburg, Federal Republic of Germany. The rate applicable at the time of shipment is alleged to be Item 890.0001.001, Advertising Matter, including Samples and Metal Display Stands, N.E.S., Packed, $143.75 WM,[2] resulting in a charge of $6,748.57. The application states:

> This appears to have been an unfortunate situation where both Consignor and his forwarder shipped this cargo without first checking the rate. It would appear that the carrier's rate clerk applied the correct rate in effect at the time of shipment. However, had Consignor or his forwarder applied to the Conference for relief for a special rate for 30 days, the Conference would have at least given the benefit of Item 890001001 minimum rate of $50.50 WM. This especially in view of the extremely low value of the shipment.

The aggregate freight charges sought to be refunded are $4,377.77.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

[1] This decision became the decision of the Commission on February 17, 1976.

[2] North Atlantic CONTINENTAL *Freight Conference* Tariff No. (29) FMS 4, 10th Rev. Page 258, Effective Date February 9, 1975.

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[3] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[4] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

As observed before, refund or waiver of collection of a portion of the freight is permitted where "there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff." Misinterpretation of a tariff is not subject to rectification under P.L. 90–298. *Commodity Credit Corporation v. Delta Steamship Lines, Inc.,* 14 SRR 1207 (1974). The failure of the consignor or forwarder to check a rate prior to shipment is not the kind of circumstance for which section 18(b)(3) affords relief. Moreover, if the 11th revision of Page 258, Effective April 7, 1975, is taken as a new tariff filed prior to applying for authority to waive collection of a portion of the freight charges, it fails to set forth the rate on which such waiver would be based.

In the absence of exemptive authority, the Commission may not permit deviations from the rates on file. Accordingly waiver of collection of undercharges may not be granted and authorizations of refunds of

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[3] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[4] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

overcharges are unnecessary.[5] The application for permission to waive collection of a portion of the freight must therefore be denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
January 19, 1976..

[5] *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965), and *Tilton Textile Corp. v. Thai Lines, Ltd.*, 9 F.M.C. 145 (1965). See also *Louisville & N. R. R. Co. v. Maxwell*, 237 U.S. 94 (1915).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 467

UNION ENGINEERING, KUWAIT

v.

IRAN EXPRESS LINE

NOTICE OF ADOPTION OF INITIAL DECISION

February 12, 1976

The Commission by notice served February 12, 1976, declared its intention to review the initial decision of the Administrative Law Judge in this proceeding. Upon review of the record in this proceeding, the Commission has now determined that the decision of the Administrative Law Judge is proper and well founded. Accordingly, notice is hereby given that the initial decision became the decision of the Commission of February 18, 1976.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 467

UNION ENGINEERING, KUWAIT

v.

IRAN EXPRESS LINES

Adopted February 12, 1976

Application to waive collection of a portion of the freight charges denied.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

By application dated February 21, 1975, Iran Express Lines (IEL) has applied for permission to waive collection of a portion of the freight on a shipment of road building machinery under bill of lading dated December 11, 1974. IEL carried this shipment on the *M. V. Philippine President Garcia* from New York to Kuwait. The rate charged was lump sum $17,500.00. The rate applicable at the time of shipment was Item 700, $150.00 W/M plus $48.25 per 2240 pounds, heavy lift,[2] which would have resulted in a charge of $18,485.54. Permission is therefore requested to waive collection of the excess of $985.54. As grounds for the waiver the application offers only the statement, "Misfiling due to clerical error. All supporting documents attached." The supporting documents are copies of the bills of lading; copies of manifest correction sheets; copies of invoices setting forth docking charges; and a copy of one page from the tariff rules and regulations of IEL. The shipment was described on the two bills of lading as soil stabilizing machines and spare parts. On December 23, 1974, IEL filed a new rate on which the waiver would be based.[3] Instead of road building machinery or soil stabilizing machines and spare parts, the lump sum rate would be for Motorgraders.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special*

[1] This decision became the decision of the Commission February 12, 1976.

[2] Iran Express Lines—F.M.C. No. 1, Page 6, First Revised Page 5–A, Effective Date 8/20/74, Correction 75.

[3] Iran Express Lines—F.M.C. No. 1, MOTORGRADERS, About 57 M/Tons and 12 L/Tons each, one shipper, one receiver, one port of loading, one port of discharge, including all surcharges Lumpsum $17,500.00.

Docket Applications, Rules of Practice and procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[4] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[5] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

On the record presented, a determination cannot be made. As observed before, refund or waiver of collection of a portion of the freight is permitted where "there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff." The statement, "Misfiling due to clerical error. All supporting documents attached.", is in no way explanatory of the character of the error. The "supporting documents" do not achieve their intended purpose because they do not reveal what the clerical error was.

If freight charges are to be waived on the basis of this conclusory statement, the applicant for waiver becomes the arbiter of what constitutes clerical error—a function reserved to the Commission by the statute.

Since the exemptive clause is not applicable to the situation presented,

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[4] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[5] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

then the general rule of *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965), and *Tilton Textile Corp. v. Thai Lines, Ltd.*, 9 F.M.C. 145 (1965), is dispositive of this application. In the absence of exemptive authority, the Commission may not permit deviations from the rates on file. Accordingly, waivers of collections of undercharges may not be granted and authorizations of refunds are unnecessary. The law forbids the former and directs the latter. The application to waive collection of a portion of the freight charges is therefore denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
January 9, 1976..

FEDERAL MARITIME COMMISSION

No. 75–54

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

NOTICE OF ADOPTION OF INITIAL DECISION

February 18, 1976

No exceptions having been taken to the initial decision of the Administrative Law Judge 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 February 18, 1976.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 75–54

UNION CARBIDE INTER-AMERICA, INCORPORATED

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

Adopted February 18, 1976

Reparation awarded in the amount of $4,421.58.

Carrier incorrectly rated shipment.

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to charge, collect or receive a greater compensation than the rates which are specified in its staff.

Appearances:

Warren Wytzka, Manager-Liner Services, for complainant.

G. E. McNamara, Traffic Representative, for respondent.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

Complainant shipper seeks reparation in the amount of $4,421.58 claiming respondent carrier overcharged in that amount by wrongfully assessing a shipment of polyethylene synthetic resin in violation of section 18(b)(3) of the Shipping Act, 1916.

Complainant requested and respondent has agreed that the proceeding be conducted pursuant to the shortened procedure provided in Rule 11 of the Commission's Rules of Practice and Procedure, 46 CFR 502.181–187.

The shipment was classified by the carrier as "Synthetic Resin, N.O.S. in other packing. Actual value over $700.00 per freight ton." Pursuant to item 495, tariff no. 11 of the United States Atlantic and Gulf Venezuela and Netherlands Conference (27th revised page 62) the respondent charged a total of $7,630.60.

Complainant contends the shipment should have been described as Fibre Drums Polyethylene Synthetic Resin value over $700.00 but not over $1,000.00 per 2,000 lbs. As such it should have been rated at $86.75

[1] This decision became the decision of the Commission February 18, 1976.

per 2,000 lbs. rather than $111.00 per 40 cubic feet and the proper charge should have been only $3,209.02.

Complainant sought recovery of the difference from the carrier but the claim was rejected solely on the basis that the tariff's rule 11 barred claims for overcharge filed more than six months from the date of shipment.

Both the Union Carbide Invoice No. 8-60688-2 and the Venezuelan Line Bill of Lading No. 62, dated October 25, 1974, read: "220 FIBER DRUMS POLYETHYLENE SYNTHETIC RESIN." These documents clearly specify that the commodity was Polyethylene Synthetic Resin, and that it was shipped in drums. The governing or applicable Venezuelan Tariff No. 11, cited above, has a specific provision for RESINS, SYNTHETIC POLYETHYLENE in fiber drums, actual value over $700.00 but not over $1,000.00 per 2,000 lbs., at $83.75 per 2,000 lbs. The respondent had knowledge from the Bill of Lading that the shipment was made in drums. The respondent erred in selecting the Synthetic Resin, N.O.S. in other packing at a higher rate for the actual material shipped.

In its answer to the complaint respondent admits that the claim filed by the complainant is correct and that the Bill of Lading was rated in error.

The merits are established here by the attested facts given above which clearly show and affirm that an error did exist, that an overcharge was inadvertently made, and that this is a fully valid and supported claim. Complainant's claim was originally denied by respondent on the basis that it was time-barred under the Conference rule. However, the Commission has repeatedly held that in an action such as this which is brought under the Shipping Act, 1916, a claim arising from overcharge cannot be barred from a determination on the merits by a Conference rule, if, as here, the claim is filed with the Commission within two years of its accrual. Hence, the actual description of the shipment as it appears now of record governs the determination of the issue.

This claim has been filed within two years and, consequently, must be considered on its merits. Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to charge, demand, collect or receive a greater compensation than the rates which are specified in its tariff. Accordingly, on the basis of the foregoing reparation in the amount of $4,421.58 is awarded complainant. Respondent shall pay such amount within thirty days of this decision and failing that, interest shall accrue at the prevailing rate per annum.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
January 22, 1976..

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 330 (I)

CUMMINS ENGINE CO., INC.

v.

UNITED STATES LINES, INC.

March 3, 1976

Reparation granted.

DECISION OF CAREY E. BRADY, SETTLEMENT OFFICER [1]

Cummins Engine Company, Inc. claims $551.08 as reparation from United States Lines, Inc. (USL), for alleged overcharges on three shipments which moved on USL's vessels during March 1973. The first shipment moved on USL's bill of lading No. 631–7301, dated March 23, 1973, from Yokahama, Japan to New York, aboard the American Liberty. The second shipment moved on USL's bill of lading No. 631–7304, dated March 3, 1973, from Yokohama, Japan to New York aboard the American Archer.

The first and second shipments were described on each respective bill of lading as "50 Cases Connecting Rod Assembly". The Bureau of Customs Special Customs Invoice Form 5515 and the shipper's invoice both described the respective cargoes as "50 Cases Connecting Rod Assembly". Bureau of Customs Consumption Entry Form 7501 described the cargoes as "50 Cases Diesel Engine Parts".

Respondent rated the shipments on the basis of $67.25 per 2,000 lbs., which was the applicable rate for "Automobile, Bus and Truck Parts, viz: Other Parts", according to 5320–25 of the respondent's tariff in effect at that time. [2] Total charges on the first shipment were assessed in the amount of $568.06, which included currency surcharges and CFS charge. Total charges were assessed on the second shipment in the amount of $458.39, which included a CY discount of 5%.

The third shipment was described on the bill of lading as "36 Pkgs. 'K

[1] Both parties having consented to the informal procedure of rule 19 of the commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] Japan-Atlantic & Gulf Freight Conference Tariff No. 34, FMC–3, 14th Revised Page No. 234.

engine' component sets". Bureau of Customs Special Customs Invoice Form 5515 described the cargo as "36 Pkgs. 'K engine component sets". The shipper's invoice and packing list described the cargo as "36 Pkgs. 'K engine' component sets" and details the commodities to be: Head Assembly, Gear Cover, Camshafts, Cylinder Block and Crankshaft. Bureau of Customs Consumption Entry Form 7501 described the cargo as "36 Pkgs. Diesel Engine Parts".

Respondent rated the shipment on the same basis as the first two shipments resulting in total charges being assessed in the amount of $1,578.53, including a 5% CY discount.

Complainant contends that the respondent misclassified the shipments and should have applied the rate of $53.50 per 2,000 lbs., the rate for "Automobile, Bus and Truck Parts, viz: Cylinder Block Assemblies, with or without Crankshafts" as per Item 5320–7.[3] Such a classification would have saved the complainant a combined total of $551.08 on all shipments. Complainant argues in support of its position that the Cylinder Block Assemblies description is broad enough and ambiguous enough to cover any type of a part that goes into, or is attached to, a cylinder block. Further, that description is published without qualification other than with or without crankshafts.

Respondent maintains that in classifying the cargo, it relied on the description on the three bills of lading, namely; Connecting Rod Assembly, and K engine component sets, respectively. Respondent further states that it "is regretted that the shipper did not identify his shipments for what they actually were; namely: 'parts for engine block assembly'. As far as we, here, are concerned, we have no objection to this rate being granted but unfortunately, we feel the final decision, because of the actual description placed on the bills of lading may rest with the Conference Headquarters in Tokyo." The record indicates the Conference does not interpret the cargo shipped to fall in the category of cylinder block assemblies.

The test the Commission applies on claims of reparation involving alleged error of a commodity tariff classification is what the complainant can prove, based on all the evidence as to what was actually shipped, even if the actual shipment differed from the bill of lading description.[4] However, the complainant has a heavy burden of proof once the shipment has left the custody of the carrier.[5]

From the documentation of record, it is clear the commodities actually shipped were unquestionably parts for engines, i.e. connecting rod assembly, head assembly, gear cover, camshaft, cylinder block and crankshaft. The Conference tariff discloses no specific commodity rate

[3] Ibid.

[4] Western Publishing Company, Incorporated v. Hapag-Lloyd A.G., informal docket No. 283(I) Commission Order served May 4, 1972.

[5] Colgate Palmolive Co. v. United Fruit Co., informal docket No. 115(I) Commission Order served September 30, 1970.

for connecting rod assembly, head assembly, gear cover or camshaft. Cylinder blocks and crankshafts are named in the disputed tariff item 5320–7.

Complainant's contention that the commodities shipped are parts of a cylinder block assembly appears to be a reasonable one.

Webster's Third New International Dictionary of the English Language, Unabridged (1964), defines an assembly as:

"5a: the act or process of building up a complete unit (as a motor vehicle), using parts already in themselves finished manufacture products. b: a collection of parts so assembled as to form a complete machine, structure or unit of a machine."

Webster's New World Dictionary, College Edition (1968) defines assembly as:

"4. a fitting together of parts to make a whole, as in making automobiles. . . . . . 5. the parts to be thus fitted together."

From the above definitions of an assembly, it can reasonably be concluded that cylinder block assemblies include those parts of an engine that go into or are attached to the cylinder block to make up the end product which can be reasonably considered directly related to the construction of an engine. An exploded view of an engine readily shows a connecting rod, gear cover and camshaft go into, or are directly attached to, the cylinder block.

Tariff Item No. 5320–07 is not at all specific as to what component parts constitute a cylinder block assembly, aside from indicating such assembly may be with or without crankshafts. Such a description is so unclear that reasonable men could differ on its application. Where an ambiguity does exist, then the tariff must be construed in such a manner so as to resolve such ambiguity in favor of the shipper.[6]

In addition, the Commission has long recognized that tariff terms should be interpreted reasonably. In National Cable and Metal Co. v. American Hawaii S.S. Co., 2 U.S.M.C. 471 (1941),[7] the Commission's predecessor stated:

"In interpreting a tariff, the terms used must be taken in the sense in which they are generally understood and accepted commercially, and neither carriers nor shippers should be permitted to urge, for their own purposes, a strained and unnatural construction. Tariffs are to be interpreted according to the *reasonable* construction of their language; neither to the intent of the framers, nor the practice of the carrier controls, for the shipper cannot be charged with knowledge of such intent or with carrier's canons of instruction. *A proper test is whether the article may be reasonably identified by the tariff description*". (underlining supplied)

Since connecting rod assembly, head assembly, gear cover and camshaft are not specifically excluded by Item 5320–7, it can only be concluded that they reasonably fall within the general description of cylinder block assemblies and should have been so rated. A proper case

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[6] United Nations Children Fund v. Blue Sea Line, *15 FMC 206, 209* (1972).

[7] Also see Johns Manville Products Corporation, 13 FMC 194, (1970) and Bulkley Dunton Overseas, S.A. v. Blue *Star Shipping Corp.*, 8 FMC 137, 140 (1964).

for the recovery of reparation having been made on the three shipments, a refund in the amount of $551.08 is due to the complainant; and it is so ordered.

(S) CAREY R. BRADY,
Settlement Officer.

FEDERAL MARITIME COMMISSION

No. 75–17

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE CLETO HERNANDEZ R. d/b/a PAN INTER

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER REVOKING LICENSE

March 4, 1976

No exceptions having been taken to the initial decision of the Administrative Law Judge 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 March 4, 1976.

IT IS ORDERED, That Independent Ocean Freight Forwarder License No. 1108, issued to and now held by Cleto Hernandez R. d/b/a Pan Inter is hereby revoked pursuant to Section 44(d) of the Shipping Act, 1916, and Sections 510.9(a), (d), and (e) of Commission General Order 4.

IT IS FURTHER ORDERED, That this Notice and Order be published in the *Federal Register.*

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 75–17

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE CLETO HERNANDEZ R. d/b/a PAN INTER

Adopted March 4, 1976

License revoked.

Employment by a shipper precludes qualification as an independent ocean freight forwarder.

Failure to promptly remit sums due a principal is a violation of fiduciary relationship and demonstrates lack of financial responsibility.

Failure to pay over ocean freight charges due a common carrier by water demonstrates a lack of financial responsibility.

The shipping public is entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder. Failure to meet such standard is basis for revocation of a license as a freight forwarder.

Fred Brady for respondent.

Donald J. Brunner and *William J. Cooley* for Hearing Counsel.

INITIAL DECISION OF STANLEY M. LEVY, ADMINISTRATIVE LAW JUDGE[1]

By an Order of Investigation and Hearing issued on May 16, 1975, the Federal Maritime Commission initiated this proceeding for the purpose of determining whether Cleto Hernandez R. continues to qualify as an independent ocean freight forwarder pursuant to sections 1 and 44 of the Shipping Act, 1916, and 510.2(a) and 510.9(d) of the Commission's General Order 4. In addition, the Commission ordered a finding whether the failure to timely remit monies due to a principal in the amount of $4,475 is a violation of section 510.23(f). If was further ordered that a finding be made whether the licensee maintains all records and books of account in accordance with section 510.23(k).

Hearings were held September 23, 1975, in New York, New York.

FINDINGS OF FACT

1. Cleto Hernandez R. d/b/a Pan-Inter is the holder of a license No. FMC–1108 issued and effective January 27, 1966, by the Federal Maritime Commission to operate as an Independent Ocean Freight Forwarder.

[1] This decision became the decision of the Commission March 4, 1976.

2. He conducts the business from his home-business office located at 267 West 89th Street, New York City; has no employees but does have his adult sons as associates and his son, Robert, does incidental work involved in the conduct of the business.

3. The hours of Pan-Inter are daily from 7:00 a.m. to 8:15 a.m. and after 4:30 p.m. and on week-ends when required.

4. Cleto Hernandez R. has been employed by Continental Can Company (CCC) since April 7, 1969. CCC is a publicly owned corporation engaged in the business of container manufacturing and ships some of its products by oceangoing common carriers.

5. CCC is a publicly owned corporation with more than four million outstanding shares. Nine shares are owned by Cleto Hernandez R.

6. Mr. Hernandez's duties and title are Billing Supervisor. He supervises two employees and is charged with the preparation of invoices, both domestic and foreign; analysis reports, and statistical distribution of reports for inter-company use. He works at CCC from Monday through Friday between the hours of 8:30 a.m. and 4:30 p.m.

7. CCC does not employ Pan-Inter nor Cleto Hernandez R. to do any freight forwarding, has not referred any business to Pan-Inter, nor does Pan-Inter perform any service with companies related by business with CCC.

8. CCC employs at least five licensed freight forwarders, including Schenkers International Forwarders, American Union Transport Forwarding, Meadows, Wye & Co., Alonso Shipping Co. and Seaport Shipping Co.

9. Respondent does not use the office space, secretary, or facilities of CCC to conduct Pan-Inter business. Nor does he maintain any Pan-Inter supplies or stationery at CCC.

10. CCC and Pan-Inter clients both ship to some of the same destinations (Santo Domingo, for example), but do not otherwise ship via the same vessels, or to the same ports, or to the same agents.

11. Pan-Inter in 1972 performed freight forwarding services for 30 shipments; in 1973 for 43 shipments, in 1974 for 23 shipments. None of these shipments were for the account of CCC.

12. Pan-Inter sustained operating losses during four consecutive years:

	Receipts	*Net Operating Loss*
a. 1970	$1,030.52	$ 961.98
b. 1971	722.75	1,019.75
c. 1972	731.89	1,108.11
d. 1973	1,251.00	766.50

13. On or about April 16, 1974, Pan-Inter prepared the shipping documentation and Sales Invoice for a shipment of export goods from Brizel Leather Company (Brizel) in New York City to Fabrica de Sombreros Tropicales Lara in Venezuela.

14. The shipment sailed on or about May 31, 1974.

15. The Sales Invoice identified four charges in addition to the cost of the goods, viz., inland freight to pier and handling—$48.95; ocean freight—$243.93; insurance—$82.20; documentation and handling—$35.25 and cost of goods—$4,475.

16. When the four prepaid charges of $410.93 are added to the cost of the goods, $4,475, the total is $4,885.93.

17. Pan-Inter sent the bill of lading and invoices to the Banco de Venezuela which remitted the total amount of $4,885.93 to Pan-Inter directly at the office address of 267 West 89th Street.

18.Cleto Hernandez R. had the responsibility to retain only the amount of advanced expenses ($410.93) and remit the remainder ($4,475) to Brizel.

19. The amount of $4,783.83 was deposited in the Banker's Trust Company account #10–054–715 on June 16, 1974, being a joint account of Cleto Hernandez R. and/or Hilma de Hernandez, where it was commingled with the personal funds of Cleto Hernandez R.

20. The difference between $4,885.93 received and $4,783.83 deposited ($102.10) was used for some unexplained purpose.

21. In the transaction relating to the Brizel shipment, the deposited amount of $4,783, received and deposited on June 19, 1974, was depleted to a $37.64 balance on October 17, 1974, before repayments began.

22. The money received on behalf of Brizel had been used for other freight and personal expenses.

23. The deposit of $4,783.83 was the second largest amount of money placed into Mr. Hernandez's account during the year 1974.

24. Pan-Inter had used only the bank account at Banker's Trust Company, #10–054–715, for all receipts and disbursements relating to forwarding services during the years 1972, 1973 and 1974.

25. This account was also used for personal buriness, in addition to Pan-Inter, until a Federal Maritime Commission investigator advised separate accounts.

26. After some months had passed, and upon inquiry from Brizel as to the monies due them, on November 18, 1974, Pan-Inter offered to pay the full amount owing to the company, by providing seven checks, drawn upon Banker's Trust Company account #10–054–715, the first of which was payable on November 27, 1974.

27. The other six checks, plus an additional check sent the next day, were paid through March 1975 and satisfied the debt in full.

28. Licensee has an outstanding debt to Sea-Land Service, Inc. (Sea-Land), a common carrier by water.

29. Sea-Land obtained a default judgment against Cleto Hernandez R. t/a Pan-Inter Freight on February 21, 1975, in the amount of $2,946.11. Of this amount $2,668.61 was the sum originally owed, $180.00 is interest thereon from November 21, 1973, and $97.50 costs.

30. Of the sums due Sea-Land, the outstanding balance was $2,256 as of the date of hearing, September 23, 1975.

DISCUSSION

For several reasons, all of which are set forth in detail hereafter, the license of Cleto Hernandez R. d/b/a Pan-Inter, must be revoked.

The license must be revoked because Cleto Hernandez R. is no longer an independent ocean freight forwarder. On October 8, 1965, at the time of his application for a license, respondent asserted that he was "familiar with the Shipping Act of 1916, [and] all pertinent Acts and rules and regulations pertaining to the operations and practices of licensed independent ocean freight forwarders.", and that he was "not associated in any way with a shipper, consignee, purchaser, or seller of shipments to foreign countries." In addition, that "After being licensed I do not intend to engage in any business other than ocean freight forwarding."

The license under consideration in this proceeding was issued January 27, 1966, and Mr. Hernandez R. did not become an employee of CCC until April 7, 1969. He did not report his employment to the Commission although he did amend his application information to show a change in address. Respondent therefore asserts that his statements were true when made and hence cannot be construed as such falsification which would support and warrant revocation of the license. Further, he argues, "There is a clear distinction between being 'engaged in business' and being 'employed.' " It is respondent's position that "there is no relationship between his functioning as an independent ocean freight forwarder and his employment at CCC."

Section 1 of the Shipping Act, 1916, states that:

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

The language of the statute is clear and unambiguous. A licensed ocean freight forwarder must be independent. He cannot be one who is directly or indirectly controlled by a shipper. The Commission has consistently and unequivocally held that one who is employed by a shipper is not independent within the meaning and requirements of the statute and therefore cannot be licensed or continue to hold a license as a freight forwarder. See *License No. 790—North American Van Lines,* 14 F.M.C. 215 (1971). In *North American Van Lines* the Commission examined intensively and extensively the legislative history of Public Law 87–254, 87th Congress (section 44, Shipping Act, 1916, 46 U.S.C. 841b, 75 Stat 522) which authorized the licensing of freight forwarders by the Federal Maritime Commission. It concluded that "All the legislative history points out clearly that exceptions to the clear and unambiguous language of the statute were to be excluded and the inherent prohibition vis-a-vis control is absolute and we have so held in numerous proceedings." *Ibid.*, 221.

Nor can any weight be given to the proposition that the licensee having no shipper connection at the time of licensing has a right to its continuation when a subsequent connection is no more than being employed in a non-forwarding capacity by a shipper. The Commission in *North American Van Lines* squarely ruled that "It is immaterial that such control arises after a license is issued rather than prior to the application therefor. . . . Shipper control negates the Commission's authority not only to issue a license in the first instance, but to allow it to continue, regardless of any condition that the licensee may propose." *Ibid.*, 222.

Congress has explicitly removed discretion from the Commission when shipper connection is found, so the requirement of independence cannot be applied liberally. *Speed Freight, Inc.*, 14 F.M.C. 1, 9. The Commission is precluded from issuing a license unless it affirmatively finds that the applicant is or will be an independent ocean freight forwarder. *Frt. Fwd. Lic—Louis Applebaum*, 8 F.M.C. 306. Whenever a shipper connection is found to exist, that relationship alone is sufficient to revoke a license, notwithstanding any other merits or demerits of the particular forwarder involved. *Speed Freight, Inc., supra.*

"There is no provision in Public Law 87–254 exempting from the ban on licensing shipper-controlled forwarders who do not forward shipments for their shipper employer. . . ." *Application for Freight Forwarding License*, 9, F.M.C. 72, 75 (1965).

It is clear that the Congress intended to eliminate the evil of potential abuse. Although the situation of Mr. Hernandez appears to be more remote than the shipper-connection found in some other cases, an important public policy denies an independent forwarder the right to remain employed by an exporter, regardless of the degree or increments of "connection." That is why the Commission has rigidly adhered to the statutory prohibition. In this case there can be no contrary holding.

In addition to the statutory prohibition, there are other cogent reasons for revoking the license of Pan-Inter.

When applying for a license Mr. Hernandez advised the Commission:

> I am financially fit to qualify for a license because I am solvent and have sufficient funds to engage in the business of ocean freight forwarding. It is to be noted that no large sums are required by way of investment or outlays since shippers or others interested advance freight charges and other expenses enabling me to operate without large cash reserves. I do have available sufficient cash funds to operate adequately."

The Commission in *Dixie Forwarding Co., Inc., Application for License,* 8 F.M.C. 109, 118 (1964), synthesized the issue which this proceeding presents when it said:

> The business integrity of one who occupies the position of freight forwarder should be above reproach, and he should clearly demonstrate a complete awareness of and a willingness to accept the responsibilities that the preferred position imposes. Graves has shown an almost total lack of both. As the House Committee on Merchant Marine and

Fisheries pointed out: "The intention of the * * * licensing provision [section 44] is to have every person, firm or corporation who holds himself out as a forwarder to be fully competent and qualified to act in the fiduciary relationship which such business necessitates." Thus the philosophy of section 44 is such that the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder. The record here, however, demonstrates that members of the shipping public who do business with Graves do so at their own risk. We cannot conscientiously license such an applicant and thereby suggest to the shipping community that we have probed his conduct and found him "fully competent and qualified" to act in a fiduciary capacity.

In the language of *Dixie Forwarding,* "The record here . . . demonstrates that members of the shipping public who do business with [Hernandez] do so at their own risk. [The Commission] cannot conscientiously [continue to] license such [as he] and thereby suggest to the shipping community that [it] has probed his conduct and found him "fully competent and qualified" to [continue to] act in a fiduciary capacity."

The Brizel Leather Company provides a clear example of the business practices of Mr. Hernandez.

It is an undisputed fact that Mr. Hernandez failed to remit money owing to a shipper and entrusted to him by a consignee, until more than five months after it was due and owing. That he ultimately paid the account is only to say that he did no more than that which was required and then only when placed under pressure to do so.

As a single incident and standing alone, it might be viewed as mere oversight. A falling through the crack so to speak. However, other relevant facts as revealed by the evidence of this proceeding demonstrates a course of conduct of a different kind.

It is not reasonable to believe that the failure to remit was "pure oversight" and that the oversight was not discovered until inquiry by Brizel in November 1974, or that Cleto Hernandez R. was unaware that the total received was substantially in excess of the amount to be retained by Pan-Inter.

It is more reasonable to believe that Cleto Hernandez R. had knowledge of the $4,475 owing to Brizel Leather Company from the time when it was received, until finally repaid. The evidence to support such a conclusion is that the deposit of $4,783.83 was the second largest amount of money placed into the Pan-Inter account during the year 1974; Cleto Hernandez R. checked the monthly balances between June and November; Pan-Inter only had 23 shipments during 1974 and would normally not prepay any ocean freight for a customer if the amount was more than 2 or 3 thousand dollars since it did not have the resources to do so; analysis of account #10–054–715 at the time of the deposit of the Brizel funds on June 19, 1974, reveals that the balance therein was only $561.06. With the deposit the balance was $5,344.89; thereafter the balance in that account steadily declined to $1,815.80 until August 7, 1974, when a credit memo of $2,105.21 increased the balance to $3,578.05 whereupon the balance again steadily declined to a low of $37.64 on October 17, 1974, and rising to a high of $1,252.29 on November 27, 1974.

It is thus apparent the licensee did not between the time of receipt of the Brizel funds in June and the inquiry by Brizel in November have sufficient funds to remit the monies licensee received by it for the account of Brizel. The evidence is overwhelming that the funds were used primarily for Mr. Hernandez's personal requirements.

The failure of licensee to pay Sea-Land for ocean freight is another case of licensee's inability to properly carry out its duties and obligations as a freight forwarder.

The phrase "fit, willing, and able properly to carry on the business of forwarding" as set forth in section 44(b) of the Shipping Act, 1916, means that a forwarder is unfit and unable to perform his duties when he uses funds entrusted to him for uses not so intended or fails to pay bills incurred in connection with his freight forwarding activities. *Aetna Forwarding Co. Inc.—Revocation of License,* 8 F.M.C. 545, 551 (1965).

These standards pertain not only to complete independence, the ability to pay bills, and properly use funds entrusted to him by others, but it also means that a forwarder must act with the highest degree of business responsibility and integrity. *License Application—Guy G. Sorrentino,* 15 F.M.C. 130, 134 (1972).

The financial irresponsibility revealed by the record in this proceeding is incompatible with the fiduciary relationship which such business necessitates.

Under any of the standards applicable to the requirements of "fit, willing and able" to be licensed as an independent ocean freight forwarder Mr. Hernandez must be deemed to have failed.

CONCLUSIONS

For the reasons stated hereinabove, the Independent Ocean Freight Forwarder Licensee, Cleto Hernandez R., d/b/a Pan-Inter, is found to be in violation of section 44(b) of the Shipping Act, 1916 (46 USC 801 and 841(b)) and of sections 510.23(f) and (k) of General Order 4, and that he does not continue to qualify for a license as an independent ocean freight forwarder pursuant to sections 1 and 44(b) of the Shipping Act, 1916, and sections 510.2(a) and 510.9(d) of General Order 4.

ORDERED: License No. FMC-1108 is revoked pursuant to section 44(d) of the Shipping Act, 1916 (46 USC 841(b)) and sections 510.9(a), (d) and (e) of the Commission's General Order 4.

(S) STANLEY M. LEVY,
Administrative Law Judge.

WASHINGTON, D.C.,
February 10, 1976.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–54

WINDJAMMER CRUISES, INC. AND WINDJAMMER CRUISES LTD.

ADOPTION OF INITIAL DECISION

March 30, 1976

This proceeding was instituted to determine whether Windjammer Cruises, Inc. (Windjammer) violated sections 2 and 3 of Public Law 89–777 by embarking passengers on the *Flying Cloud* and the *Yankee Trader* at U.S. ports, and arranging, offering, advertising or providing passage on those vessels, without having first complied with the financial responsibility requirements of that statute.

In his Initial Decision, Administrative Law Judge Seymour Glanzer concluded that while Windjammer had violated section 3 of Public Law 89–777 and section 540.3 of the Commission's implementing regulations (46 C.F.R. 540.3), in arranging and providing passage on the *Flying Cloud* for persons embarking at Mayaquez, Puerto Rico, without having complied with the financial responsibility requirements, there was not proven any violation of section 2 of Public Law 89–777, since Windjammer was neither the owner or charterer of the vessels involved.

No exceptions were filed to the Initial Decision. Upon review of the entire record, we conclude that the Administrative Law Judge's finding and conclusions were proper and well founded. Accordingly, we hereby adopt the Initial Decision (a copy of which is attached) and make it a part hereof.

One collateral matter raised in the Initial Decision requires additional discussion. In the ordering portion of his recommended decision, Judge Glanzer referred to the Commission "for appropriate action" the matter of the conduct of Mr. Tarantino, counsel for Windjammer, during the course of the proceeding. Upon careful consideration of the matter, we find that the facts of record relating to Mr. Tarantino's behavior in the proceeding below, do not warrant or necessitate any type of disciplinary action or admonishment.

Nevertheless, we should like to take this opportunity to state that this Commission expects attorneys and other persons practicing before us to observe the same code of conduct and standard of diligence as would be required of them in a court of law. The Commission's quasi-judicial character must be recognized and respected not solely for its own sake but more importantly to assure that the basic procedural and substantive rights of party-litigants be properly protected and represented.

By the Commission.

Attachment

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

No. 73–54

WINDJAMMER CRUISES, INC.
AND
WINDJAMMER CRUISES, LTD.

Adopted March 30, 1976

Respondent found to have violated Section 3 of Public Law 89–777, 46 U.S.C. § 817e and General Order 20, 46 CFR § 540.3.

Investigations of violations of Section 2 of Public Law 89–777, 46 U.S.C. § 817d and General Order 20, 46 CFR § 540.22, dismissed.

Arthur E. Tarantino and *David Goldman* for respondents.[1]

Donald J. Brunner for Hearing Counsel.

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE[2]

By Order of Investigation and Hearing issued August 24, 1973, the Federal Maritime Commission initiated this proceeding to determine whether Windjammer Cruises, Inc. and/or Windjammer Cruises Ltd. doing business as "Windjammer Cruises" violated—

1. Section 2, Public Law 89–777, by embarking passengers, or having embarked passengers, at United States ports without having complied with the financial responsibility requirements of Section 2 of Public Law 89–777, and/or

2. Section 3, Public Law 89–777, by arranging, offering, advertising or providing passage, or having arranged, offered, advertised or provided passage on a vessel without having complied with the financial responsibility requirements of Section 3 of Public Law 89–777, and/or

3. Sections 540.3 and/or 540.22 Federal Maritime Commission General Order 20 (46 C.F.R. 540.3 and 540.22) promulgated to implement Sections 2 and 3 of Public Law 89–777.—

by embarking passengers on the *Flying Cloud* at Mayaguez, Puerto Rico on or about December 18, 1972, and by embarking a passenger on the *Yankee Trader* at Miami Beach, Florida on or about February 16, 1973.

The hearing was held April 17, 1975, at Miami, Florida.

[1] Mr. Goldman appeared at the hearing. His request to withdraw as counsel for respondents was granted by order of June 30, 1975.

[2] This decision became the decision of the Commission March 30, 1976.

Legislative Background to Public Law 89–777[3]

In 1966, in the light of then recent incidents involving either cancellation of scheduled cruises, with passengers being left at the pier without recourse to recover their passage money which had been paid in advance, or accidents at sea in which death and injury resulted to passengers, coupled with a significant and substantial increase in the burgeoning ocean cruise business, the Congress saw fit to enact legislation which, among other things, was designed to accomplish the dual purpose of preventing financial loss and hardship to the American traveling public, who, after payment of cruise passage money, became stranded by the abandonment or cancellation of a cruise, and of providing assurance of financial responsibility to pay judgments for personal injury or death to passengers.[4]

Public Law 89–777 and Implementing Regulations

As pertinent, Section 2 of the Act[5] provides:

> (a) Each owner or charterer of an American or foreign vessel having berth or stateroom accommodations for fifty or more passengers, and embarking passengers at United States ports shall establish under regulations prescribed by the Federal Maritime Commission, his financial responsibility to meet any liability he may incur for death or injury to passengers or other persons on voyages to or from United States ports. . . .
>
> (d) The Federal Maritime Commission is authorized to prescribe such regulations as may be necessary to carry out the provisions of this section. The provisions of the Shipping Act, 1916, shall apply to proceedings conducted by the Commission under this section.

The applicable provisions of Section 3 of the Act[6] are:

> (a) No person in the United States shall arrange, offer, advertise or provide passage on a vessel having berth or stateroom accommodations for fifty or more passengers and which is to embark passengers at United States ports without there first having been filed with the Federal Maritime Commission such information as the Commission may deem necessary to establish the financial responsibility of the person arranging, offering, advertising, or providing such transportation, or in lieu thereof a copy of a bond or other security, in such form as the Commission, by rule or regulation, may require and accept, for indemnification of passengers for nonperformance of the transportation.
>
> (d) The Federal Maritime Commission is authorized to prescribe such regulations as may be necessary to carry out the provisions of this section. The provisions of this chapter shall apply with respect to proceedings conducted by the Commission under this section.

Pursuant to the authorization of Sections 2 and 3 of Public Law 89–777, the Commission promulgated regulations in General Order 20[7] to carry out the regulatory scheme contemplated by the Congress. The provisions of those regulations cited in the Commission's Order of Investigation and

[3] 80 Stat. 1356, 1357.
[4] H.R. Rep. No. 1089, 89th Cong., 1st Sess. 2–3 (1965).
[5] 46 U.S.C. § 817(d).
[6] 46 U.S.C. § 817(e).
[7] 32 F.R. 3987, Mar. 11, 1967; 46 CFR Part 540.

Hearing are 46 CFR § 540.3 and § 540.22. Section 540.3, which appears in Subpart A of Part 540, provides:

No person in the United States may arrange, offer, advertise, or provide passage on a vessel unless a *Certificate* (Performance) has been issued to or covers such person.

Section 540.22, which appears in Subpart B of Part 540, provides:

No vessel shall embark passengers unless a *Certificate* (Casualty) has been issued to or covers the owner or charterer of such vessel.

The definitions of the words and terms used in § 540.3 and § 540.22 appear in the applicable portions of Subparts A & B, but, for the reasons discussed below, only the definitions in Subpart A[8] shall be referred to. Those and other pertinent definitions are as follows:

(a) "Person" includes individuals, corporations, partnerships, associations, and other legal entities existing under or authorized by the laws of the United States or any State thereof or the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States, or the laws of any foreign country.

(b) "Vessel" means any commercial vessel having berth or stateroom accommodations for 50 or more passengers and embarking passengers at U.S. ports.

(d) "United States" includes the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States.

(e) "Berth or stateroom accommodations" or "passenger accommodations" includes all temporary and all permanent passenger sleeping facilities.

(f)"Certificate (Performance)" means a Certificate of Financial Responsibility for Indemnification of Passengers for Nonperformance of Transportation issued pursuant to this subpart.

(g) "Passenger" means any person who is to embark on a vessel at any U.S. port and who has paid any amount for a ticket contract entitling him to water transportation.

Preliminary Matters

This proceeding was originally assigned for hearing and initial decision to Administrative Law Judge John Marshall, who participated in all prehearing matters and by Notice issued March 12, 1975, set the matter for hearing in Miami on April 17, 1975. Judge Marshall was unable to attend the hearing and I was substituted as presiding Judge. On April 30, 1975, the proceeding was reassigned to me for all purposes.

Pertinent Pre-Hearing Matters

Prior to the hearing, Hearing Counsel served a Request for Admissions[9] upon Arthur E. Tarantino, who had entered his appearance as attorney for respondent, Windjammer Cruises, Inc. on August 28, 1973. Among other things, Hearing Counsel sought to ascertain the truth of the following items:

1. That the *Yankee Trader* is a vessel operated by Windjammer Cruises, Inc., a

[8] 46 CFR § 540.2.

[9] Exhibit 1.

Florida corporation, P. O. Box 120, Miami Beach, Florida 33139/Windjammer Cruises Ltd., a subsidiary of Windjammer International Corp., Nassau, Bahamas (WCI/WCL).

2. That the *Yankee Trader* has berth or stateroom accommodations, which include all temporary and all permanent passenger sleeping facilities, for more than fifty (50) persons.

7. That the vessel *Flying Cloud* . . . is operated by WCI/WCL.

8. That the *Flying Cloud* has berth or stateroom accommodations, which includes all temporary and all permanent passenger sleeping facilities, for more than fifty (50) persons.

10. That on or about December 18, 1972, the following passengers boarded the *Flying Cloud* at Mayaguez, Puerto Rico and were thence transported thereon to the waters of the Dominican Republic, where the *Flying Cloud* became encumbered upon an unidentified submerged object or growth, or was otherwise rendered inoperative: (Please answer the following individually):

[There followed a list of 29 individual names.]

11. That WCI/WCL advertises various cruises in the United States.

12. That none of the vessels chartered, owned, and/or operated by WCI/WCL holds certificates issued by the Federal Maritime Commission under its General Order 20 (46 C.F.R. § 540). . . .

Accompanied by a Certificate of Service, signed by Mr. Tarantino and dated October 30, 1973, respondent's Reply To Request For Admissions[10] was submitted. That document was signed by Mr. Tarantino as attorney for respondent, and subscribed and sworn to by Mr. Tarantino before a Notary Public for the District of Columbia on October 29, 1973. Later, there was submitted a Certificate of Respondent's Reply To Request For Admissions[11], signed by Captain Mike Burke, president of respondent, and stating that he carefully read the Respondent's Reply To Request For Admissions and that the admissions and statements made therein were true. This Certificate was subscribed and sworn to before a Notary Public in and for Dade County, Florida on December 7, 1973.

The following answers to the above numbered items of the Request for Admissions were made in the Respondent's Reply:

1. True.
2. True.
7. True.
8. True.
10. True. [There followed a lengthy explanation of details]
11. Not accurate. [Additional information was supplied]
12. True. [Again, a lengthy explanation was furnished]

Respondent's Reply to Request for Admissions concluded with the suggestion, "In view of the admissions made and evidence presented . . . no hearing would appear necessary." Hearing Counsel countered this proposal by moving for a hearing. Over respondent's objection, Judge Marshall noticed the matters for hearing at Washington, D.C. However, at respondent's counsel's request, Judge Marshall rescheduled and relocated the hearing for Miami. The administrative record discloses that this came about after Hearing Counsel indicated its intention to examine

[10] Exhibit 2.
[11] Exhibit 3.

Captain Burke as its witness[12] and respondent's counsel renewed an earlier request for a site and time convenient to officers and employees of respondent.[13]

The Hearing—Procedural Matters

Ordinarily, it is unnecessary to recount the procedural progression of events which occur at a hearing. Here, however, because of the apparent disdainful attitude to the processes of this Commission displayed by respondent and Mr. Tarantino, it would be inappropriate to omit reference thereto.

The hearing was called for 10:00 a.m., April 17, 1975. Present at that hour were Hearing Counsel and the official reporter.[14] While Hearing Counsel, under instructions from me, was telephoning to determine why respondent had not appeared at 10:00 a.m., a gentleman entered and identified himself as Chuck Werner with Windjammer Cruises.[15] Mr. Werner stated that Mr. Tarantino would not attend the hearing, adding that he was under the impression that Mr. Tarantino had already informed me of his reasons for not being present.[16] About 10:30 a.m., when Hearing Counsel returned to the hearing room, the hearing was opened.[17]

From statements made by Mr. Werner, not under oath, several other things became evident. Mr. Werner was not an official of respondent and was not authorized by respondent or Mr. Tarantino to appear generally or to testify.[18] He was there simply to present a paper containing suggested findings and conclusions prepared by Mr. Tarantino.[19] Captain Burke, who knew that the hearing was taking place, would not attend.[20]

Mr. Werner also stated that it was he who worked closely with Mr. Tarantino in the preparation of the admissions that were adopted by Captain Burke,[21], but I would not permit him to take the stand to testify because he was not represented by counsel. Although this protection is not necessarily to be accorded a witness under subpoena, in the circumstances of an investigation into possible violation of law, I was concerned about the fairness of compelling this witness to testify without allowing him time for discussion with or representation by a legal advisor.[22] Before recessing, at 10:50 a.m., a subpoena was issued, ordering the attendance of Captain Burke at 2:00 p.m. that day.

During the recess that ensued, I spoke to Mr. Tarantino by telephone. Among other things, he informed me that the day before the hearing he

[12] Letter, dated March 3, 1975, from Hearing Counsel to Judge Marshall.

[13] Respondent's Reply to Hearing Counsel's Motion for Hearing, dated February 14, 1975, and respondent's counsel's letter dated March 12, 1975, to Judge Marshall.

[14] Transcript, hereafter Tr., p. 3.

[15] Id.

[16] Id.

[17] Tr. p. 4.

[18] Tr. pp. 6, 9, 10.

[19] Tr. pp. 5, 9, 13, 18.

[20] Tr. pp. 6–7.

[21] Tr. pp. 8, 16.

[22] Tr. p. 16

telephoned the Chief Judge to explain that he would not attend the hearing but that a local attorney would appear to represent respondent. He also told me that, by letter of April 11th, he gave some instructions to respondent, advising that an appearance be made at the hearing and that if the client acted in accordance with his letter it might not be necessary to have any counsel appear. I advised Mr. Tarantino that, if either Mr. Werner or Captain Burke appeared at 2:00 p.m. and he wished either or both to testify and be cross-examined in accordance with his letter's instructions, I wanted a telegram from him to that effect, unless, of course, they were accompanied by counsel to represent them at 2:00 p.m.[23]

The subpoena was not served, but, at 2:00 p.m., Captain Burke appeared with local counsel, David Goldman, and voluntarily took the stand. He was the only witness to be called during the proceeding.

Testimony of Captain Burke

Against the background of Respondent's Reply to Request for Admissions, admitting some but denying other facts necessary for a determination of the issues under investigation,[24] together with respondent's oft asserted belief that no hearing would be necessary because of such Reply,[25] Hearing Counsel proceeded to examine Captain Burke.

Captain Burke admitted that the signature which appears on the Certification of Respondent's Reply to Request for Admissions is his signature.[26] But he had no recollection of having seen that document or the underlying document to which it pertains, i.e.—Respondent's Reply to Request for Admissions.[27]

Thereupon, Captain Burke recanted two critical admissions concerning operation of the vessels *Flying Cloud* and *Yankee Trader* which, previously, both he and Mr. Tarantino had sworn were true. In response to questions posed by Hearing Counsel, Captain Burke stated that Admissions Nos. 1 and 7 are and were not true.[28] It will be recalled that Respondent's Reply to Request for Admissions unequivocally stated that *Flying Cloud* and *Yankee Trader* are vessels operated by Windjammer Cruises, Inc./Windjammer Cruises, Ltd. He testified that *Yankee Trader*

[23] Tr. pp. 19–20; At. 11:02 a.m., April 17, Mr. Tarantino sent the following Mailgram to me: "Re Docket NO. 73–54. Unfortunately I cannot attend hearing have a slipped disc. Mr. Werner, respondents operations assistant fully qualified to appear respond to questions and present statement on behalf of respondent. Advised Chief Judge John Cosgrove [sic] Wednesday April 16 regrets"

[24] The investigation was initiated pursuant to Section 22 of the Shipping Act, 1916, 46 U.S.C. § 821, as well as Sections 2 and 3 of Public Law 89–777. The second paragraph of Section 22 empowers the Commission on its own motion to investigate any violation of the Shipping Act, 1916. The second sentence of both Sections 2(d) and 3(d) expressly authorizes the use of all the provisions of the Shipping Act, 1916, including the investigative powers of Section 22, "with respect to proceedings conducted by the Commission under this section."

[25] Prehearing Conference, October 5, 1973, Tr. p. 3; Motion for Determination of Findings, served January 28, 1975; Respondent's Reply to Hearing Counsel's Motion for Hearing, served February 14, 1975; see also, Tr. pp. 5, 18.

[26] Tr. p. 33.

[27] Id.

[28] Tr. pp. 69–70, 76.

was owned and operated by a Panamanian Company named Hydrographer and that *Flying Cloud* was owned and operated by another Panamanian company—Flying Cloud S.A.[29] In response to my question, asking him if he had told Mr. Tarantino to tell Hearing Counsel that Windjammer Cruises, either Inc. or Ltd., operated vessels during 1972 through the first half of 1973, he answered "I don't remember."[30]

Captain Burke attempted to explain away his Certification of the admissions by stating that he is frequently away from the office, that he delegates duties to others who prepare documents for him which he does not always read but which he discusses and signs.[31] Although the Certification states that he "carefully read" the admissions, and albeit he did not explicitly testify that he had not read the admissions, it may be concluded that he wished the inference to be drawn that he had not read the underlying document at the time of certification. Needless to say, this explanation neither mitigates nor justifies Captain Burke's egregious conduct, rather it shows a supercilious disregard for his obligation under law.

In furtherance of the showing that Windjammer Cruises, Inc.[32] did not own, operate or charter any vessel during the time period under investigation, Captain Burke testified that this entity is a booking and travel agent licensed under the laws of Florida.[33] In that role, Windjammer Cruises, Inc. entered into a written agency agreement with Flying Cloud S.A.[34] whereby it agrees to "do all things necessary in order to sell tickets for cruises on the vessel, *S/V Flying Cloud;* that it shall advertise and in all manner exploit said cruises; that it shall provide office personnel and machinery for the sales of such cruise tickets."[35] In consideration of this undertaking, Windjammer Cruises, Inc. is to receive twenty (20) percent of the gross sales of all tickets sold for cruises on the *Flying Cloud* by Windjammer Cruises, Inc. or its authorized sub agents.[36] Windjammer Cruises, Inc. does advertise the availability of cruises on the *Flying Cloud* and, upon request, makes available brochures concerning such cruises.[37] Upon receipt of a deposit, Windjammer Cruises, Inc. issues a ticket, which, on its face, shows that the issuer is the booking agent for the *Flying Cloud.*[38]

[29] Tr. pp. 40–41.

[30] Tr. pp. 100–101. But, see Prehearing Conference Tr. at p. 3 wherein Mr. Tarantino stated, "Now, *I have studied* the operation, and I have seen some of the advertising, and I am fully acquainted with it, and I am acquainted with *Captain Burk's [sic] operation . . .,"* also Motion For Determination of Findings at p. 1, stating, "In support of this motion, Respondent advises that on *October 29, 1973,* it had submitted in response to Hearing Counsel's Request for Admissions sufficient, clear, unequivocal replies supported by the best available documented evidence wherein it 1. Admitted that Respondent had embarked passengers on the *Flying Cloud* . . ."

[31] Tr. pp. 33, 99–100.

[32] *Windjammer Cruises, Ltd.*, a corporation chartered in Nassau, Bahamas about 1960, became defunct about the beginning of 1972 and performed no business functions during the time period under investigation. Tr. p. 36.

[33] Tr. p. 36.

[34] Tr. p. 51–52.

[35] Exhibit 8.

[36] *Id. Cf.*, testimony of Captain Burke in which he stated the commission to be fifteen (15) percent. Tr. p. 50.

[37] Tr. p. 59; Exhibit 2, Attachments A, B and C.

[38] Tr. p. 58–59; Exhibit 9.

In all material respects, the relationship between Windjammer Cruises, Inc. and Hydrographer, owner and operator of *Yankee Trader,* is substantially identical to the agency relationship between Windjammer Cruises, Inc. and Flying Cloud S.A.[39]

Both *Flying Cloud* and *Yankee Trader* have berth and stateroom accommodations, which includes all temporary and all permanent passenger sleeping facilities, for more than fifty (50) persons.[40] Neither vessel holds a certificate issued by the Federal Maritime Commission under General Order 20 and from this fact it may be inferred that there was not filed with the Commission information necessary to establish financial responsibility or other security in lieu thereof for indemnification of passengers for nonperformance of transportation.[41]

The *Flying Cloud* and *Yankee Trader* do not schedule calls at United States ports to embark passengers. Windjammer Cruises, Inc. does not advertise that the cruises will embark passengers at United States ports.[42]

On one occasion, on or about February 16, 1973, *Yankee Trader* put into Miami, Florida, where a person named Patricia Adams was boarded on the vessel. Hearing Counsel contended she was a passenger. Captain Burke testified she was a member of the crew.[43] The *Yankee Trader* left Miami on a shakedown cruise with Ms. Adams aboard. The vessel, with Ms. Adams continued to Freeport where the passengers for the particular cruise were embarked.[44] The evidence adduced concerning her status—whether as passenger or crew member—falls on both sides of the fence. But, in view of uncontradicted testimony by Captain Burke that "[s]he had an obligation to perform certain duties aboard ship,"[45] it must be concluded that Hearing Counsel did not sustain its burden of persuasion that she was a passenger. In any event, Hearing Counsel has abandoned the allegation of the Order of Investigation and Hearing concerning the *Yankee Trader.*[46]

The incident involving the *Flying Cloud* presents a different picture. On the way to Roadtown Tortola, British Virgin Islands, to embark passengers for a cruise, that vessel became disabled and put into Mayaguez, Puerto Rico, for repairs.[47] Some of the passengers had already assembled at Tortola, others—admittedly, 29, and perhaps as many as 50—were at San Juan, Puerto Rico, ready to emplane to meet the vessel at Tortola.[48] The San Juan group became irate at the delay. Captain Burke, in his capacity as president of Windjammer Cruises, Inc., found it

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[39] Tr. p. 49; Exhibits 6, 9.

[40] Tr. pp. 70–71, 76–77; Exhibits 1, 2, items 2 and 8; Exhibit 2, Attachment D.

[41] 46 CFR Part 540; Tr. p. 84; Exhibits 1, 2, item 12; in addition, official notice is taken that an examination of the Commission's records would reveal that no such information or security was filed with the Commission and that no such Certificate was issued.

[42] Tr. 84–85, 151; Exhibit 2, item 11 and Attachments A, B and C.

[43] Tr. pp. 115–136, 154–156.

[44] Tr. p. 155.

[45] Tr. p. 154.

[46] Opening Brief of Hearing Counsel, p. 2.

[47] Exhibit 2; Tr. pp. 78–80.

[48] Id; Tr. pp. 140–142, 152–154.

expedient to send the latter group to Mayaguez and, at the same time, direct the captain of the *Flying Cloud* to embark the passengers there. The vessel's captain accepted this direction because it was the usual procedure to board passengers at Captain Burke's command.[49] After embarking the passengers at Mayaguez on December 18, 1972, the *Flying Cloud* departed on its cruise, but ran aground off the coast of the Dominican Republic. The latter occurrence caused premature termination of the cruise.[50]

Captain Burke stresses that the act of embarking passengers at Mayaguez was for the convenience of the passengers and not that of the owners.[51] This may well be. But it is inescapable that Captain Burke also acted in self interest. Windjammer Cruises, Inc.'s commissions were dependent upon the cruise taking place. If the prospective passengers had eschewed the cruise in dissatisfaction over the events, the commissions already received would have to be returned and the commissions otherwise due it from Flying Cloud S.A. would become null and void.[52]

DISCUSSION AND CONCLUSIONS

In view of the foregoing, all of which constitute my findings of fact as well as some conclusions, the following additional conclusions are drawn.

Inasmuch as neither respondent, Windjammer Cruises, Inc. nor Windjammer Cruises, Ltd., was the owner, operator or charterer of any of the vessels named in the Order of Investigation and Hearing during the period covered by such order, the provisions of Section 2 of Public Law 89–777 and 46 CFR § 540.22 can have no application to respondent's activities in this investigation. Further, the preponderance of the evidence indicates it was reasonable to believe that Ms. Adams was a member of the crew of the *Yankee Trader* when she boarded that vessel at Miami on or about February 16, 1973. Thus, insofar as that matter is involved in this inquiry, I find that there was no violation, by either respondent, of Section 3 of Public Law 89–777 or of 46 CFR § 540.3.

In boarding passengers for a cruise on the *Flying Cloud* at Mayaguez, Puerto Rico on December 18, 1972, Windjammer Cruises, Inc., violated both Section 3 of Public Law 89–777 and 46 CFR § 540.3, in that it did, in the United States, arrange, offer, provide and sell passage to 29 passengers on a vessel, having berth or stateroom accommodations for fifty or more passengers, embarking passengers at a United States port, without there first having been filed with the Commission such information as the Commission deemed necessary to establish the financial responsibility of Windjammer Cruises, Inc. or other security for indemnification of passengers for nonperformance of transportation and without

[49] Id.
[50] Id.
[51] Tr. pp. 153–154.
[52] Tr. pp. 81–82.

there being in force and effect a Certificate (Performance) issued to or covering Windjammer Cruises, Inc.

In Respondent's Reply Brief, submitted and served by Mr. Tarantino, Windjammer Cruises, Inc. admits that the *Flying Cloud* did embark passengers at Mayaguez, but contends that because the plan of operation, sailing schedules and promotional literature for the cruises sold by respondent did not contemplate embarkation of passengers at United States ports, this isolated incident did not require the issuance of a Certificate under Public Law 89–777. Curiously, and most incredibly, in the light of Captain Burke's testimony and exhibits in support thereof, this Brief perpetuates the illusory representations, set forth in Respondent's Reply to Request for Admissions, that the respondent operated cruise vessels during the period under investigation.[53]

Respondent's position is unfounded. The law makes no exception for single occurrences, and this is as it should be if the cruise oriented public is to be given the effective protection which the sense of the Congress intended. Nothing in the legislative history or in the clear language of the statute would indicate that the Congress intended otherwise. The mandate is that before passage he arranged, offered, advertised or provided, that the person so doing shall *first* make the necessary filing required by the Commission to establish financial responsibility.[54] This requirement the respondent did not fulfill, although its president appears to have had actual knowledge of the existence of the statute going back to the time of its enactment.[55]

It is noted that the issuance of a cease and desist order is not explicitly required to be considered as appropriate remedial action in this proceeding under the terms of the Order of Investigation and Hearing. Hearing Counsel has not urged that a cease and desist order be entered. However, the proceeding was instituted under Section 22 of the Shipping Act, 1916, which specifies that the Commission may make such order as it deems proper. Assuming, but not deciding, that silence in that Order does not bar the issuance of a cease and desist order,[56] nevertheless, I find that the 30 proven violations of Section 3 of Public Law 89–777[57] were not of a continuing nature and there has been no showing that a practice of violation is likely to continue. Moreover, the evidence discloses voluntary cessation of the proscribed conduct, without compulsion of enforcement proceedings, at least eight months before the investigation was initiated. In these circumstances, a cease and desist order, a remedy traditionally fashioned to discontinue ongoing violations or to forestall future violations, would be unwarranted.

[53] Respondent's Reply Brief, pp. 2, 3. Although Captain Burke testified that the admissions erroneously showed that the cruise of the *Flying Cloud* was to commence at St. Johns, Antigua Island, whereas, in fact, it was to start at Tortola, the Brief continues to refer to St. Johns as the starting point.

[54] Wall Street Cruises, Inc., 15 F.M.C. 140, 142–143 (1972).

[55] Tr. 157, 159.

[56] But, cf. Attorney General's Manual on the Administrative Procedure Act 46 (1947).

[57] Under Section 3(d) of Public Law 89–777, 46 U.S.C. 817e(d), the act of violation itself is treated as a single offense and each passage sold constitutes a separate offense.

ORDER

1. The investigation of violations of Section 2, Public Law 89–777 alleged in the Order of Investigation and Hearing is dismissed.

2. The investigation of violations of 46 CFR § 540.22 alleged in the Order of Investigation and Hearing is dismissed.

3. The respondent, Windjammer Cruises, Inc. violated Section 3 of Public Law 89–777 and 46 CFR § 540.3 on December 18, 1972, in arranging, offering, providing and selling passage to 29 passengers who embarked on the *Flying Cloud* at Mayaguez, Puerto Rico, without having complied with the financial responsibility requirements of that statute and that regulation.

4. The matter of the conduct of Arthur E. Tarantino, an attorney at law engaged in practice before this Commission, is referred to the Commission for appropriate action.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
March 8, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 337(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

NOTICE OF DETERMINATION NOT TO REVIEW

April 13, 1976

Notice is hereby given that the Commission on April 13, 1976, determined not to review the decision of the Settlement Officer in this proceeding served April 7, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 337(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE
(COMPANIA ANONIMA VENEZOLANA DE NAVEGACION)

Reparation Awarded.

DECISION OF CAREY R. BRADY, SETTLEMENT OFFICER[1]

Complainant seeks reparation in the amount of $484.70 from respondent, claiming a freight overcharge on a shipment from Houston, Texas to Puerto Cabello, Venezuela carried aboard respondent's vessel MERIDA on February 28, 1974, pursuant to the terms of the United States Atlantic and Gulf Venezuela and Netherlands Antilles Conference Freight Tariff F.M.C. No. 2, S. B. Ven-11. The bill of lading and the export declaration both described the cargo shipped as "200 Drums, Vinyl Acetate Monomer" weighing 94,000 pounds and measuring 2,142 cubic feet. The shipment was rated as 2,142 cubic feet at $68.00 per 40 cubic feet which produced charges of $3,968.70 plus accessorial charges. Complainant maintains the shipment should have been rated on the basis of $68.00 per 2,000 pounds, the applicable rate for "Vinyl Acetate Monomer", class rate 7W.[2]

Respondent denied the claim solely on the provisions of Tariff Item No. 11 which requires that claims be filed within six months after the date of shipment. The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits.[3] The shipment moved on February 28, 1974, and the claim was filed with the carrier in February 1975 and with the Commission on November 11, 1975. The claim has been filed within the two year statutory limit and thus will be treated on the merits.

While the Commission has ruled that a rule similar to the one on which

[1] Both parties having consented to the informal procedure of Rule 19, 46 CFR 502.301–304 (as amended) this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] Tariff Item No. 1000, 15th Rev. Page 70 and Item No. 999, Group 1, 6th Rev. Page 68.

[3] Colgate Palmolive Company v. United Fruit Company, Informal Docket No. 115(I), 1970.

respondent is denying relief cannot be used to defeat a claim properly filed with the Commission, the complainant nevertheless has a heavy burden of proof once the shipment has left the custody of the carrier.[4]

Respondent does not challenge any of the contentions of the complainant, in fact, by letter dated December 11, 1975, respondent stated that the claim "filed by the complainant is found to be correct. Obviously, the bill of lading was rated in error and it is requested that a ruling in favor of the complainant be issued."

Item 999 of the tariff specifically provides a rate on Acetates, Vinyl, Monomer at Class 7 on weight with no provision made for assessment on a measurement basis. The bill of lading and supporting shipping documentation clearly show the cargo shipped to be Vinyl Acetate Monomer.

Complainant having met his burden of proof, reparation is awarded in the amount of $484.70, the difference between the charges assessed of $3,968.70 and the correct charges of $3,484.00 (94,000 lbs. at $68.00 per 2,000 lbs. plus accessorial charges).

(S) CAREY R. BRADY,
Settlement Officer.

[4] Ibid.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–52

CITIES SERVICE INTERNATIONAL, INC.

v.

THE LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF INITIAL DECISION

April 22, 1976

No exceptions having been taken to the initial decision of the Presiding Judge in this proceeding, served March 31, 1976, and the Commission having determined not to review same, notice is hereby given that the decision became the decision of the Commission on April 22, 1976.

By the Commission.*

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

* Vice Chairman Morse's dissenting views attached.

FEDERAL MARITIME COMMISSION

No. 75–52

CITIES SERVICE INTERNATIONAL, INC.

v.

THE LYKES BROS. STEAMSHIP CO., INC.

Adopted April 22, 1976

Non-contract rates found inapplicable; reparation awarded on basis of contract rates.

Gerald E. Bone for the complainant.

David W. Gunther for the respondent.

INITIAL DECISION OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE[1]

The shortened procedure was followed. By complaint filed November 17, 1975, the complainant alleges that it was charged inapplicable non-contract (tariff) rates, rather than the applicable contract rates on certain shipments of aluminum stearate, oil well drilling compounds, and oil well cement, bill of lading dated August 19, 1974, from New Orleans, Louisiana to Matarani, Peru; also on certain shipments of steel pipe, oil well equipment, and auotmobile trucks, three bills of lading dated August 8, 1974, from Houston, Texas to Matarani; and also on a shipment of oil well equipment, bill of lading dated August 6, 1974, from Houston to Matarani. The complainant also alleges that it was charged the inapplicable non-contract (tariff) rate on a shipment of knocked-down steel tanks, rather than the applicable contract rate on iron or steel tank material, bill of lading dated August 5, 1974, from Houston to Matarani.

The respondent agrees that the total charges collected on all of the above shipments were $126,378.75, that the applicable charges totalled $106,074.30, and that the complainant was overcharged a total of $20,304.45.

The shipper and consignee of the above shipments, shown in the bills of lading as Peru-Cities Service, Inc., had not been listed as a fully-owned subsidiary of the complainant, Cities Service International, Inc., and

[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission. Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227.

therefore the respondent did not charge the contract rate available to contract signers, such as the complainant. Furthermore, the bills of lading failed to contain the appropriate proprietary clauses. The complainant advised the respondent on July 28, 1975, that Peru-Cities Service, Inc. is a fully-owned subsididary, and that the cargo in issue was proprietary cargo. In view of the six-months claim rule in the conference's tariff the complainant was advised by the respondent to file the present complaint.

In addition to the overcharges of $20,304.45, the complainant asks reasonable interest for the interim period in which complainant alleges it has suffered loss of use of the overcharge funds. Such interest hereby is denied inasmuch as the complainant caused its own problem in this respect, by its failure to make the proper certifications regarding the proprietary nature of the cargo, whereas the respondent charged what it had to charge on the basis of the facts then known to the respondent.

It is concluded and found that the complainant was overcharged $20,304.45 and reparation in that amount is awarded. The respondent will make such payment to the complainant within thirty days.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
March 31, 1976.

Vice Chairman Clarence Morse dissenting. I vote to review.

The Initial Decision is inaccurate as to the facts.

On prepaid bill of lading # 3, New Orleans/Matarani, dated August 18, 1974, the shipper and consignee is Peru-Cities Service, Inc. On the remaining prepaid bills of lading the shipper is Cities Service International, Inc., and the consignee is Peru-Cities Service, Inc.

None of the bills of lading contain the Industrial Contract proprietary use certification.

Cities Service International, Inc., is signatory to the Merchant's Freighting Agreement, but Peru-Cities Service, Inc., is not identified as a related company. Cities Service International, Inc., is signatory also to the Industrial Contract Rate Agreement.

Peru-Cities Service, Inc., is not signatory to either the Merchant's Freighting Agreement or the Industrial Contract Rate Agreement.

Hence, it would appear that under B/L # 3, identified above, the tariff rate would be the lawful rate because Peru-Cities Service, Inc., is neither (1) a signatory to either rate agreement (Merchant's Freighting Agreement or Industrial Contract Rate Agreement), nor (2) named as a related company on Cities Service International, Inc., Merchant's Freighting Agreement.

As to B/L # 3 discussed above, Cities Service International, Inc., violated its obligations under section 1(b) of its Merchant's Freighting

Agreement with the Atlantic & Gulf/West Coast of South America Conference applicable here. That section states that the merchant signatory "warrants and represents that the list [of related companies] is true and complete [and] that he will promptly notify the Carriers in writing of any future changes in the list . . ." Neither the shipper nor the Conference being permitted to alter the contract without Commission permission (see section 17 of the contract), both are bound by its terms as part of the Conference Tariff. Consequently, the contract rate may not be offered to or collected by a Conference member from a shipper not subject to the contract. Further, Peru-Cities Service, Inc., not being party to the Industrial Contract, rates under it are not applicable and omission of the proprietary use certification on the bill of lading is immaterial.

As to the remaining bills of lading, the only "fault" is the lack of the proprietary use certification. The Conference Tariff (at 7th Revised Page 218, effective April 1, 1974) provides that "All Bills of Lading *shall* be claused" with proprietary use certification (emphasis added). To permit a subsequent refund based upon the shipper's failure to include that clause would be to permit the carrier to deviate from its tariff.

Reparations as claimed and as authorized by the Administrative Law Judge are, therefore, incorrect.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–31

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION
LESCO PACKING CO., INC.

Application for freight forwarder license denied on grounds that applicant is unfit in view of long history of statutory and regulatory violations.

Perry Gary Fish for Applicant.

Donald J. Brunner and *C. Jonathan Benner* as Hearing Counsel.

REPORT

May 21, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett and James V. Day, *Commissioners.*)*

The Commission instituted this proceeding.to determine whether Lesco Packing Co., Inc. (Lesco), is fit to properly carry on the business of ocean freight forwarding and to conform to the provisions of section 44 of the Shipping Act, 1916 (46 U.S.C. 84lb), and whether its application for an independent ocean freight forwarder license (application) should be granted.

The Initial Decision of Administrative Law Judge William Beasley Harris (Presiding Officer) concluded that Lesco's license application should be denied. Exceptions to the Initial Decision were filed by both Hearing Counsel and Lesco and oral argument was heard by the Commission. Although we agree with and adopt the Presiding Officer's ultimate conclusion, we have, for the sake of both clarity and accuracy, found it necessary to issue our own findings and conclusions in support of this final result.

BACKGROUND AND FINDINGS OF FACT

Lesco is a New York corporation whose sole stockholder and chief executive officer since June 30, 1971, has heen Irving Betheil. Much of Lesco's present business is connected with export packing and handling

*Commissioner Bob Casey not participating.

air freight shipments.[1] During the 20 years prior to filing the instant application Mr. Betheil was involved in the following incidents:

(1) In 1959 Mr. Betheil and other principals of the Aristo Shipping Company, Inc., pleaded guilty in the U.S. District Court, Southern District of New York to a charge of conspiring to violate the Bills of Lading Act (49 U.S.C. 81–124). A sentence of a year and a day was imposed on Mr. Betheil and suspended.

(2) On June 9, 1964, the "grandfather rights" of S&C Forwarding Corp. (FMB Registration No. 1414) were revoked and the ocean freight forwarding application of International American Forwarding Corp. (IAFC) was denied on the grounds that Irving Betheil: (1) knowingly and willfully made false statements on IAFC's application for an independent ocean freight forwarder license in violation of 18 U.S.C. 1001; and (2) knowingly and willfully carried on the business of ocean freight forwarding by falsely obtaining grandfather rights during the period August 1962 through December 1962, in violation of section 44(a), Shipping Act, 1916 (46 U.S.C. 841b). Irving Betheil was president and sole stockholder of S&C Forwarding Corp. at the time its "grandfather rights" were revoked. He was also president and 50 percent owner of International American Forwarding Corp. and managed its daily operations at the time its license application was denied.

(3) In 1964 the Department of Commerce denied export privileges to a concern of which Mr. Betheil was president. This denial was based on export control law violations arising out of the improper export of strategic electronics equipment and the false description of other commodities.

(4) Mr. Betheil was one of several parties to a formal Commission proceeding involving a licensed freight forwarder and an applicant for a freight forwarder license. The Commission found that the parties had engaged in a course of conduct during 1969 and 1970 which was intended to enable Mr. Betheil to engage in ocean freight forwarding without a license, in violation of section 44. The license of the freight forwarder was revoked and the applicant was denied a license. F.M.C. Docket No. 71–47, 16 F.M.C. 256 (1973).

The prehearing conference originally scheduled in connection with the instant proceeding was cancelled by the Presiding Officer at Lesco's request.[2] In lieu thereof, Lesco was directed to submit certain basic prehearing type information.[3] When Mr. Betheil failed to respond in the time prescribed, the Presiding Officer wrote Lesco specifically inquiring about its plans for legal representation. On October 17, 1974, a standard warning Notice was issued advising Lesco of the possible penalties for noncompliance. Lesco then replied by stating that its inaction was inadvertent and it would henceforth cooperate with the Commission's representatives. Lesco subsequently admitted as "true" Hearing Counsel's request for Admission of Facts and Genuiness of Documents which included a detailed statement describing the statutory and regulatory violations referred to above.

Mr. Betheil arrived 12 minutes late for the evidentiary hearing held in this proceeding, and then without either an attorney or any witnesses.[4]

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[1] Lesco does not possess an air forwarder's license from the Civil Aeronautics Board.

[2] All of Lesco's transactions with the Commission were conducted by Mr. Betheil personally until March 4, 1975, when counsel filed a notice of appearance in the case. By this time the hearing had been completed. Lesco's motion for a new hearing based on the absence of counsel was denied by Order served June 20, 1975.

[3] This information included the name and address of Lesco's lawyer, the admission of facts and documents which would avoid unnecessary proof, the number of witnesses and their proposed testimony, the suggested date and place of bearing, and other matters designed to aid in the disposition of this proceeding.

[4] Lesco never replied to Hearing Counsel's request for the names and addressed of the witnesses it intended to call.

Later that morning, Lesco produced three character witnesses: (1) the operator of a messenger service who had known Mr. Betheil for a period of 12 to 15 years; (2) the secretary of Mr. Betheil's social lodge who had known him for 32 years; and (3) a lawyer who had known Mr. Betheil for about 20 years. All three witnesses testified favorably concerning Mr. Betheil's personal honesty and truthfulness, but were uninformed concerning his reputation in the business community, did not know others who had professional dealings with Mr. Betheil, and had only minor business contacts with Mr. Betheil themselves.[5]

Hearing Counsel conceded that Mr. Betheil possessed both the ability and willingness to perform as an independent ocean freight forwarder, but argued for denial of Lesco's license application because Mr. Betheil's past violations of law and administrative regulations represent a course of conduct which raise serious doubts as to his present fitness to operate as a licensed forwarder.

Mr. Betheil replied that his mistakes were things of the past, that he paid for his actions "over and over again" and has "changed his mode of life." He contended that a refusal to license Lesco would serve no purpose except to deprive Mr. Betheil of his livelihood because ocean freight forwarding is the only business he really knows.[6]

In denying Lesco's license application the Presiding Officer concluded that:

> 1.While the matter of past violations is germane to the question of fitness and is not singularly determinative thereof, they are evidence in the record of past law violations by the applicant which supports reasonable doubt about the applicant's good character and fitness for licensing as an independent ocean freight forwarder.
>
> 2. On the whole record a reasonable man could fairly find that there were substantial doubts about the applicant's good character, fitness, and respect for the rights of others and for the laws of the regulatory commissions and of the nation.
>
> 3. Under the circumstances of this case, the applicant has failed to meet his burden of proof as to his fitness properly to carry on the business of forwarding under section 44 of the Act. [Footnote omitted.]
>
> 4. The application should be denied.

Conclusions two through four were based not only on "the evidence of past law violations by applicant," and "doubts about Mr. Betheil's ability to avoid the sort of indiscretions which have plagued his operations for the past 16 years," but also on Lesco's disregard for what the Presiding

[5] The Presiding Officer was unimpressed with Mr. Betheil's character witnesses in part because they testified only as to their personal knowledge of Mr. Betheil's character instead of discussing his general reputation in the ocean freight industry. Although the Initial Decision is phrased in language which could be criticized as overly technical under the circumstances, the record reveals that none of the witnesses offered convincing support for a finding of good character. Richard Cotogono testified that Mr. Betheil was always honest with him and that Mr. Betheil tries very hard to do a good job, but admitted that he had no knowledge of what others thought of Mr. Betheil's truthfulness or honesty. Murray Birnback testified that within Mr. Betheil's association with the Free Sons of Israel he was loyal, industrious and honest. Mr. Birnback had no business contracts with Mr. Betheil or the ocean freight forwarding industry in general. Jacob S. Schulman stated that Mr. Betheil enjoyed a generally good reputation for integrity and honesty, except for his 1959 conviction. However, Mr. Schulman also stated he was unaware that Mr. Betheil's firm was denied export privileges in 1964 or that the Commission found him to have operated as an unlicensed forwarder during 1969–1970.

[6] No evidence was introduced to support this assertion, nor is there reason to believe that an individual skilled in the business of forwarding cannot find employment in related segments of the ocean freight industry.

Officer characterized as the "necessary processes" and "necessary details in this proceeding."[7]

Discussion and Conclusions

Lesco had broadly excepted to "the holdings of the [Initial Decision] . . . denying a forwarding license to applicant and every part thereof," and taken four specific objections as well. The Applicant first argues that the Presiding Officer erred in holding that Mr. Betheil's inattentiveness to the necessary details of the instant proceeding is a factor determinative of his "fitness" to perform as a licensed ocean freight forwarder.[8] Lesco submits that is it unfair to compare "a freight forwarder who is expected to attend to all the necessary details of shipping, insuring and documenting of goods with an applicant for a freight forwarder's license proceeding pro-se" and conclude that because Mr. Betheil had trouble complying with proper hearing procedure, he would have similar difficulty performing the details attendant to freight forwarding services.[9]

Lesco also objects to the finding and conclusion that Mr. Betheil's past violations of law and Commission regulations demonstrate a lack of "fitness" to receive a forwarder's license. On the contrary, since Mr. Betheil has "fully admitted his past violations" and "did not seek to hide what was," Lesco claims the record "reflects a definite desire on the part of the applicant to change his past and the present existence of good character." It asserts that the record in this proceeding, considered in its entirety, favors "at least a time-limited license," especially since Mr. Betheil's prior illegal activities were of the type generally termed as "malum prohibitum" violations, and, except for the 1969–70 incident when Mr. Betheil operated as an unlicensed forwarder, occurred over eleven years ago.

Thirdly, Lesco contends that the burden of proof should be upon Hearing Counsel to prove Applicant's unworthiness, and, finally, that

[7] The Presiding Officer reasoned that since a freight forwarder "is expected to attend to all the necessary details of shipping, insuring and documenting of goods," Mr. Betheil's inattentiveness to detail, as demonstrated by his conduct during this proceeding:

> . . . exposes a foible in the applicant's personal character or behavior and reflects on his ability to perform as a licensed independent ocean freight forwarder.

Specific conduct round to reflect unfavorably on Lesco's ability to carry out the duties and responsibilities of an ocean freight forwarder were Mr. Betheil's failure to: (1) honor Hearing Counsel's request for the names and addresses of witnesses he intended to call; (2) timely respond, if at all, to "various" other queries; (3) arrive at the hearing at the appointed time and with his witnesses; and (4) generally acquaint himself with the Commission's Rules of Practice and Procedure and comply with the requirements thereof. For example, Mr. Betheil submitted only three copies of his reply brief to Hearing Counsel's opening brief instead of the 15 copies required by the Commission Rules.

[8] Lesco asserts that this is the "real" reason for the denial of the license, notwithstanding the discussion of past violations. Hearing Counsel join Lesco in excepting to the assessment of demerits for Lesco's inattention and mishandling of various aspects of the instant proceeding, but support the denial of Lesco's application based upon its past violations.

[9] Applicant further argues that: "Lack of knowledge as to the law governing 'reputation evidence,' the giving of testimony or the production of witnesses is neither material nor relevant to the issue of 'fitness' under that Act; the sole issue under consideration ('willingness' and 'ability' having been conceded). Legal ignorance in the trial of a matter is certainly unrelated to any past violations of law and in no way is supportive of [the Presiding Officer's] findings."

section 44 of the Shipping Act is unconstitutional to the extent it requires Mr. Betheil "to prove his fitness to a moral certainty." Only Lesco's first exception relating to Mr. Betheil's procedural irregularities can be sustained.

It is well established that the burden of proof in a licensing proceeding is on the applicant.[10] The plain language of section 44(b) indicates as much by providing that a forwarding license shall only issue if the Commission finds that the applicant meets the statutory criteria and that "*otherwise such application shall be denied.*" By applying for its initial federal license to operate an an independent ocean freight forwarder, Lesco requests a change in the status quo. The United States Court of Appeals has held that the burden of proof in administrative proceedings falls upon the person who is seeking to change the status quo, *Commonwealth of Puerto Rico v. Federal Maritime Commission,* 468 F.2d 872, 881 (D.C. Cir. 1972). Although the Bureau of Hearing Counsel had the burden of introducing evidence on the question of Lesco's fitness, the burden of proof on that question as well as whether a license should ultimately issue fell squarely upon Lesco. See *United Church of Christ v. Federal Communications Commission, supra.*

The Initial Decision held that Lesco did not meet this burden of proof. Lesco's failure to demonstrate its character qualifications, or "fitness" to operate as a freight forwarder must necessarily result in the denial of its license application pursuant to section 44. The statute does not require proof of fitness "to a moral certainty," and section 44 has never been so applied by the Commission.[11]

The record in this case contains evidence of poor character on the part of Lesco's sole stockholder and chief executive officer. There has been a pattern of irresponsible action reaching back to 1959, including violations of the Bills of Lading Act and section 44 of the Shipping Act, the most recent of which occurred in 1970. The only rebuttal offered by Lesco was: the passage of time, character testimony from three of Mr. Betheil's long-time friends and Mr. Betheil's own assertion that he had reformed. Like the Presiding Officer, the Commission is unpersuaded that this evidence sufficiently establishes that positive steps have been taken to assure against the repetition of such incidents.

A licensed forwarder must possess, read, understand and meticulously follow the Commission's regulations. A forwarder must also accurately complete shipping documents, comply with section 16 of the Shipping Act, preserve the confidentiality of any sensitive information received by its shipper clients and handle large sums of money advanced for the

[10] 5 U.S.C. 556(d); *United Church of Christ v. Federal Communications Commission,* 425 F.2d 543, 545, 549–550 (D.C. Cir. 1969); *Towne Services Household Goods Transportation Co. v. United States,* 329 F. Supp. 815, 821–822 (W.D. Tex. 1971); *Quickie Transport Co. v. United States,* 169 F. Supp. 826, 828 (D. Minn. 1959), aff'd *per curiam,* 361 U.S. 36 (1959).

[11] There is no factual basis for Lesco's assertion that section 44 holds forwarder applicants to an unreasonably high standard of proof regarding fitness. Section 44 states only that the Commission must "find" the applicant fit, willing and able. The Commission has licensed over 1,500 independent ocean freight forwarders since 1961 and denied less than 100 applications on fitness grounds.

payment of freight. Such a person must not only be honest, but must affirmatively strive to meet the regulatory requirements under which he operates. However, Lesco's late arrival at the hearing and its unfamiliarity with the Commission's Rules of Practice are not matters of decisional significance in passing upon its "fitness" under section 44.

Lesco had no obligation to secure counsel, and that portion of the Initial Decision which relied upon Lesco's clumsiness in representing itself *pro se* was erroneous. In order to avoid any suggestion that irrelevant factors were weighed in our decision to deny Lesco's license application, we expressly find that Lesco lacked the requisite character qualifications without regard to the manner in which it conducted itself before the Commission subsequent to August 14, 1974.[12] Mr. Betheil's past disregard for the shipping laws and the Commission's regulations, coupled with the absence of convincing evidence that positive steps have been taken to reasonably assure against the repetition of such incidents, is alone sufficient basis for not placing Lesco in the position of trust and responsibility enjoyed by licensed freight forwarders. Based upon the entire record before us, we find that Lesco is not "fit" within the meaning of section 44 to carry on the business of freight forwarding and will enter an appropriate order denying its present license application.[13]

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

[12] This is not to say, however, that the Commission cannot or will not find that an applicant's disregard of or chronic inattention to official communications of any type reflects adversely upon its willingness and ability to cooperate with a federal regulatory scheme.

[13] The Presiding Officer expressed his conclusions in terms of four issues formulated by himself rather than the two issues specified in the Commission's August 14, 1974, Order of Investigation and Hearing. He also failed to make specific rather than narrative findings of fact. These errors were harmless under the circumstances. More troublesome is the Presiding Officer's insistence on using the standards of "reasonable doubt," "reasonable man," and "substantial doubt," as the basis for finding Lesco unfit to receive a license. The Presiding Officer has erroneously applied the standards of an appellate rather than a trial tribunal. The trier of fact is obliged to determine whether an applicant is fit or not fit, he does not decide whether some reasonable man might entertain substantial doubts concerning fitness. After reviewing the record in this proceeding the Commission unequivocally concludes that Lesco is unfit to be licensed.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–31

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION LESCO PACKING CO., INC.

ORDER

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

IT IS ORDERED, That the license application of Lesco Packing Co., Inc., is hereby denied pursuant to section 44(b), Shipping Act, 1916.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 474

ANDREW CORPORATION INTERNATIONAL

v.

ATLANTIC GULF SERVICE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

May 21, 1976

No exceptions having been taken to the initial decision 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 May 21, 1976.

It is Ordered, That applicant is authorized to refund $2,960.82 of the charges previously assessed Andrew Corporation International.

It is further Ordered, That applicant shall 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 474 that effective May 15, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from May 15, 1975, through July 11, 1975, the contract service two rate on 'Telecommunications, Viz Microwave Communication Systems and Equipment' is $83.00 WM, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 474

ANDREW CORPORATION INTERNATIONAL

v.

ATLANTIC GULF SERVICE

Adopted May 21, 1976

Application for permission to refund a portion of the freight charges granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Atlantic Gulf Service (AGS) has applied for permission to refund $2,960.82 to Andrew Corporation International.

AGS carried one shipment bearing the tariff description Telecommunications, VIZ, Microwave Communication Systems and Equipment, from New Orleans to Glasgow under a bill of lading dated June 6, 1975. The shipment weighed 9,981 lbs. and measured 1,066 cu. ft. AGS collected aggregate freight charges of $5,172.77 from Andrew on July 21, 1975. The freight charges collected were based upon the Cargo N.O.S. rate found in Gulf United Kingdom Tariff No. 37 (FMC 16). AGS now seeks to apply a rate of $83.00 W/M with aggregate freight charges of $2,211.95. In support of its application to refund $2,960.82 AGS states:

On February 15, 1975, Gulf/United Kingdom Conference filed a contract service two rate of $75.00 wm and non-contract $88.20 wm, plus energy surcharge to be effective for 90 days for Telecommunication Equipment. On May 23 the energy surcharge was rolled into the rate [making the contract rate $83.00].

Rate was expired on May 15, 1975, and through oversight the rate was not extended for tariff quoting period.

Meanwhile on June 6, 1975, Atlantic Gulf Service loaded a shipment for Andrew Corporation International to M/S VASAHOLM. At that time the rate had expired and our manifest department applied the Cargo NOS rate to this shipment.

On July 11, 1975, the error of not extending the rate was noted and the Conference immediately reinstated the rate with the energy surcharge rolled in.

Because we feel that the shipper should not be charged for this error, the present is to request permission to refund to the shipper the difference between the $194.00 wm

[1] This decision became the decision of the Commission May 21, 1976.

General Cargo rate charged and the $83.00 wm which should have been charged or $2960.82.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The inadvertent failure to extend the contract rate on the commodity in question would appear to fall within the intended grounds for refund. All the other conditions have also been met. Accordingly, Atlantic Gulf

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

Service is hereby granted permission to refund to Andrew Corporation International the sum of $2,960.82.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
April 28, 1976.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 471

PHILLIPS PETROLEUM CO.

v.

PACIFIC WESTBOUND CONFERENCE

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

May 27, 1976

No exceptions having been taken to the initial decision 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 May 27, 1976.

It is Ordered, That applicant is authorized to refund $2,079.69 of the charges previously assessed Phillips Petroleum Company.

It is further Ordered, That applicant shall 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 471 that effective March 2, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from March 2, 1975, through March 11, 1975, the contract rate to Hong Kong on 'Liquified Petroleum Gas, LPG, Restricted to On Deck Stowage' is $87.75 W/M, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 471

PHILLIPS PETROLEUM CO.

v.

PACIFIC WESTBOUND CONFERENCE

Adopted May 27, 1976

Application for permission to refund a portion of the freight charges granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

The Pacific Westbound Conference (PWC) has applied for permission to refund to Phillips Petroleum Company a portion of the freight charges on a shipment of fifty cylinders of Liquified Petroleum Gas weighing 18,800 pounds and measuring 550 cubic feet. Under bill of lading dated March 2, 1975, the *M. S. Queensville* of Barber Blue Sea Lines carried the shipment from Los Angeles to Hong Kong.

The rate applicable at the time of shipment was $239.00 W/M (2,000 pounds or 40 cubic feet) based on Item 340.0000.03 Pacific Westbound *Overland* Tariff No. 6–F.M.C.–13. The rate sought to be applied is $87.75 W/M based on Item 341.104.36, Pacific Coast Westbound Local Tariff No. 4–F.M.C.–12. The aggregate freight charges collected were $3,286.25. The aggregate freight charges sought to be applied are $1,206.56. The requested refund is $2,079.69. In support of the applied for permission to refund the monies, applicant states:

> Under the Pacific Westbound Conference Local Tariff #3–FMC–8 up to January 15, 1975 there was a commodity item #2575 in the tariff reading "PETROLEUM GAS, LIQUID BUTANE; FUEL PRESSURING, LIQUID PROPANE" at the rate of $87.75 per 2000# or 40 Cft whichever produces the greater revenue (W/M). Under Rule #24 covering Dangerous or Hazardous Cargo there was provision to except from the Dangerous and Hazardous Cargo rate per Item 695 cases in which specific commodity rates were provided in individual commodity items or by authorized interpretation in the tariff index. Although the commodity in question, Liquified Petroleum Gas, must be stowed on deck only per Code of Federal Regulations, Title 46, this commodity was excepted from the Dangerous and Hazardous Cargo rate Item 695 inasmuch as there

[1] This decision became the decision of the Commission May 27, 1976.

was a specific commodity rate provided in the individual commodity items, i.e. Item 2575.

The shipment in question was an Overland shipment, but as there was no specific commodity rate in the Pacific Westbound Conference Overland Tariff #5-FMC-9, the rate under the Local Tariff #3 was applicable as it was less than the Cargo N.O.S. rate in the Overland Tariff.

The Pacific Westbound Conference Local Tariff #4-FMC-12 and the Pacific Westbound Conference Overland Tariff #6-FMC-13 effective January 15, 1975, were completely revised changing from item rates as in the previous editions, to rates on the individual Schedule B Commodity numbers as used on the U.S. Customs Shipper's Export Declaration. In the revised tariffs a provision for specific rate for Liquified Petroleum Gas at the same rate of $87.75 W/M was overlooked, therefore leaving the only classification for this product under 340.0000.03 at $240.00 in the Local Tariff and $239.00 in the Overland Tariff both W/M.

Item #341.1040.36 added to Pacific Westbound Conference Local Tariff #4-FMC-12 covering Liquified Petroleum Gas, LPG, restricted to On-Deck stowage at $87.75 W/M effective March 11, 1975.

Because I was unable from the foregoing to construct the precise sequence of events with any degree of certainty, I wrote applicant a letter in which I apprised applicant that from the application I understood the following to have taken place:

Prior to January 15, 1975, the PWC *Local* Tariff # 3 carried a specific commodity item # 2575 reading "Petroleum Gas, Liquid Butane; Fuel Pressuring, Liquid Propane" with a rate of $87.75 per 2000 # or 40 Cft. whichever produces the greater revenue. The PWC Overland Tariff however carried no such specific commodity rate.

A complete revision of both the Local and Overland tariffs was undertaken in order to change "from item rates as in the previous editions to rates on the individual Schedule B Commodity numbers as used on the U. S. Customs Shipper's Export Declaration." The revised tariffs became effective January 15, 1975. However, in the revision the specific item for Liquified Petroleum Gas at $87.75 was overlooked. (Presumably only in the revised Local tariff since it never existed in the overland tariff.) This "oversight" resulted in two items applicable to the shipment in question. Item 340.0000.03 at $240.00 W/M in the Local tariff and 340.0000.03 at $239.00 W/M in the Overland tariff.

Item (4) of your application states that the "shipment in question was an Overland shipment, but as there was no specific commodity rate in the . . . Overland Tariff # 5 . . . the rate under the Local Tariff # 3 was applicable as it was less than the cargo NOS rate in the Overland Tariff." Both of these tariffs are the old prerevision tariffs.

The shipment moved on bill of lading dated March 2, 1975, and moved under the Overland tariff—presumably because it was an overland shipment. Yet under item (1) of the application you propose to amend the revised *Local* tariff by the addition of Item 341.1040.36.

I then proposed two questions (1) How does an overland shipment move or get rated under a local tariff? and (2) Since there never was a specific commodity item for "Liquified Petroleum Gas" in the overland tariff, how does the revision in the local tariff and its subsequent amendment constitute grounds for authorizing the requested refund?

Applicant replied by way of clarifying the matters set forth in the application. The relevant parts of the reply are as follows:

Your letter of March 23 concerning Special Docket No. 471, Phillips Petroleum Company vs. Pacific Westbound Conference, is certainly appreciated. You are absolutely correct as to the sequence of events outlined in paragraph 3,4,5, and 6 of your letter.

Your question of how does an Overland Shipment move under a Local Tariff is answered by the application of Overland Tariff Rule #1, which we are attaching for your ready reference. This particular portion of Overland Tariff Rule #1 has been in existence for quite a few years and basically it states, that where there is no specific commodity rate contained in the Overland Tariff, but there is a specific commodity rate found in the Local Tariff, and the use of that Local Tariff Rate is lower than the cargo NOS rate level in the Overland Tariff, or on a less specifically described commodity in the Overland Tariff, the use of the Local rate item may be applied to the Overland shipment.

When the Conference changed the format of its Tariffs in January, 1975, our previous Local and Overland Tariffs contained several hundred commodity items. When we adopted the Schedule B format, these several hundred items became several thousand items, and unfortunately one of the items overlooked to be included in our Tariff was Liquified Petroleum Gas.

Since it was not the intent of the Conference to increase Shipper's Rates when the tariff format was changed, we immediately put in our Local Tariff a specific commodity rate item covering the product that Phillips Petroleum Company ships. The specific rate item was put in our Local Tariff just as it was in our former Local Tariff and since this specific rate in the Local Tariff was lower than the less specifically described commodity, and the cargo NOS rate items in our Overland Tariff the Local rate was made to apply.

One wonders why it wouldn't be easier and somewhat less confusing to amend both the overland and local tariffs.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

In view of the Overland Tariff Rule 1 and the obviously inadvertent error made in changing to Schedule B nomenclature, the application should be granted.

It is therefore found that:

1. There was a tariff filing error due to inadvertence;
2. Such refund will not result in discrimination among shippers;
3. Prior to applying for authority to refund a portion of the freight charges, PWC filed a new tariff which set forth the rate on which the refund would be based; and
4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, the Pacific Westbound Conference will be permitted to refund $2,079.69 to the Phillips Petroleum Company.

An appropriate notice will be published in the tariff of the Pacific Westbound Conference.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
May 4, 1976.

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–8

EUROPEAN TRADE SPECIALISTS, INC., AND KUNZLE & TASIN

v.

PRUDENTIAL-GRACE LINES, INC., AND THE HIPAGE CO., INC.

Respondent Prudential-Grace Lines, Inc. found not to have violated sections 16 and 17 of the Shipping Act, 1916;

Respondent The Hipage Company, Inc., found not to have violated section 16 of the Shipping Act, 1916;

Issue remanded for further proceedings with regard to alleged violation of section 18(b) of the Shipping Act, 1916 by respondent Prudential-Grace Lines, Inc.

Issue remanded for further proceedings with regard to alleged violation of section 17 by respondent The Hipage Company, Inc.

William L. Borden for Complainants.

John B. King, Jr. for Respondent, The Hipage Company, Inc.

John H. Purcell for Respondent, Prudential-Grace Lines, Inc.

REPORT AND ORDER ON REMAND

May 27, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Ashton C. Barrett and James V. Day, *Commissioners;* Clarence Morse, *Vice Chairman,* concurring)*

PROCEEDINGS

This case arose by complaint of European Trade Specialists, Inc. (hereinafter "European") on behalf of itself as shipper and on behalf of its consignee Kunzle & Tasin (hereinafter "K&T") alleging violation of sections of the Shipping Act, 1916 (the Act) by Prudential-Grace (Prudential) and by The Hipage Co. (Hipage), Complainant's freight forwarder. The Complainant alleged, in summary, that Prudential had violated sections 16, 17 and 18(b) of the Act and that Hipage had violated sections 16 and 17 of the Act.

The claim in this case results from an alleged overcharge by Prudential

*Commissioner Bob Casey not participating.

for freight on a single shipment of goods from Norfolk, Virginia to Genoa, Italy aboard Prudential's vessel *S.S. LASH ESPANA*. In essence, Complainants allege that the carrier, Prudential, misclassified the commodity which made up the cargo and therefore applied an excessive tariff rate in violation of section 18(b)(3) of the Act. In the course of this transaction both the carrier, Prudential, and the forwarder, Hipage, are also alleged to have acted in such a manner as to have violated sections 16 and 17 of the Act.

Following certain procedural maneuvering involving the amendment of the Complaint, controversy as to proper parties, complicated discovery, and disputes related thereto, the case came before Chief Administrative Law Judge Cograve for hearing. Judge Cograve thereafter issued his Initial Decision finding no violations as alleged and dismissing the complaint. Exceptions to his decision and replies thereto were duly filed. This proceeding came before the Commission on those exceptions and on oral argument heard before the Commission.

FACTS[1]

The shipper, European, is a U.S. exporter based near Cleveland, Ohio; its consignee and co-complainant, K&T, is a partnership based in Milan, Italy. International Great Lakes Shipping Company (also known and cited here as "Lavino") of Cleveland was, at the time pertinent, the agent of Prudential, a common carrier by water subject to the Act; Hipage is a freight forwarder licensed by the Commission with its principal offices in Norfolk, Virginia.

In January 1972, a representative of Lavino met with the President of European to discuss a shipment of certain goods by European from Norfolk to Genoa. At that meeting, the two parties viewed both the commodity to be shipped and certain sales literature regarding the product. This discussion was hald to make a tentative determination of the nature of the commodity and its likely rating under the appropriate tariff.[2] The commodity was a quantity of discs made of synthetic material impregnated with abrasives and designed to be used on industrial or institutional floors for scrubbing and polishing. The trade name of this commodity was "Roto-Pads".

Notwithstanding the form of the commodity, i.e., pads, the Lavino representative informed European's President that the cargo in question would be rated as "abrasive cloth" under Item 0101 of the Tariff. That item provides for carriage of:

"Abrasive(s), viz:

[1] As a result, in large measure, of a confused and confusing theory of the case held by Complainants, there are many irrelevant facts brought out in the transcript, briefs, discovery and various motions filed by the parties. In order to pare these superfluous matters down to a workable form which is relevant to justiciable charges under the Shipping Act, we have taken certain editorial licenses. No fact, material or relevant, to the alleged violation of the Act, however, has been omitted.

[2] The applicable tariff is that of the North Atlantic Mediterranean Freight Conference (Tariff No. 10-FMC-3).

* * *

Cloth, NOT in Belt Form or Rolls (Not Pads, Scouring, or Materials Therefor)"

on a weight basis.

Following this meeting, European selected Prudential as its carrier and space was booked upon Prudential's S.S. LASH ESPANA for transport in February 1972. The booking was confirmed, a booking notice was sent to Hipage (selected by European as its forwarder), to Prudential's agents in Norfolk and to Prudential's offices in New York.

Hipage received its copy of the booking notice on January 17, 1972, and, on January 29, 1972, Hipage also received European's "Purchase Order and Shipping Instructions." This document contains an entry entitled "Freight commodity class of goods" in which appeared the statement: "Conference Item 0101, Abrasive Cloth at $122.38 per 2240 lbs." The document also contained a block entitled "description of goods." Here appeared the description: "Roto-Pads . . . Polishing Scrubbing."

Based, apparently, upon European's "Purchase Order and Shipping Instructions," Hipage prepared various requisite shipping documents. Among those was the ocean bill of lading on which the cargo was described as "92 cartons Roto-Pad Abrasive Floor Maintenance Pads." Upon presentation of this bill of lading to the carrier's agent, the cargo was rated "Cargo, NOS" resulting in a freight charge of $2,738.70 (including a bunker surcharge). Under Tariff Item 0101, described above, the freight charges would have totaled $206.25. This sum is apparently included in the vastly higher "damages" figure sought.

In April 1972, following shipment and payment by consignees for the transportation, Complainants, Respondents, and their various agents exchanged numerous telephone calls and much correspondence regarding the alleged overcharge. The result of this activity was the issuance in May 1972, by Prudential's agent of a Notice of Correction. This Notice corrected the description of the goods from "Roto-Pad Abrasive Floor Maintenance Pads" to "Roto-Pad Abrasive Floor *Cloth*" (emphasis added) with a corresponding change in applicable rates. However, in June 1972, this first Notice of Correction was itself corrected by a further Notice which re-instated the "Cargo, NOS" rate but left the description as "cloth."

The circumstances leading to the issuance of the second Notice are far from clear from the record. The Notice itself merely provides:

"As per telecon with Richard Egloff [of Prudential] June 12, 1972, correction No. 22 cancelled. Correction No. 23 to revert charges back as per original issuances [sic] of the bill of lading."

No refund was made at any time.

From these basic facts, Complainants have constructed their allegations of violations of the Shipping Act by Prudential and Hipage. The alleged actions of Respondents and the consequent charges against them read in part as follows:

> Complainant charges the respondent companies with violations of the Shipping Act . . . as well as violations of the laws of contract and the laws governing principal and agent within the context of the Shipping Act as follows:
>
> A. Respondent Prudential-Grace Lines . . . offered to ship the goods under Item Number 0101. . . ."
>
> B. The complainant accepted and acted in reliance upon the offer of shipment.
>
> E. Respondent Hipage Company prepared the bill of lading on a pre-printed form furnished by respondent Prudential-Grace Lines. The goods were described as "92 Cartons: Roto-Pad Abrasive Floor maintenance Pads," notwithstanding complainant's express instructions that the goods were to be described as "Conference Item No. 0101, Abrasive Cloth. . . ."
>
> M. *** The representation of this "agent" [Hipage] of the interests of its principal in arm's-length dealings with a "third party", the carrier, resulted in unjust enrichment of the "third party" to the extent of more than 13 times as much money as the "third party" had agreed to accept. ***
>
> The conduct of respondent Prudential-Grace Lines and respondent Hipage Company is integrally intertwined as, respectively, principal in fact and agent in fact. The result of their joint conduct was to defraud and severely injure complainant.

Upon review of all allegations, however, it is clear that the gravamen of these charges is addressed to this Commission in terms of alleged breach by Respondents of such common law principles as duties of agent to principal, common law fraud, detrimental reliance and unjust enrichment. Only briefly and obliquely do Complainants address the central issues of the alleged violations of sections 16, 17, and 18 of the Shipping Act.

As Judge Cograve made quite clear in his Initial Decision, this Commission does not exercise the authority of a court of law or of equity. We administer and enforce the requirements of the Shipping Act and related Acts. When pleadings come before us in which violations of the Act are heavily veiled in common law pleadings it becomes difficult to distill the activities alleged to be in violation of the Act from those which indicate the possible violations of some common law obligation. We have, notheless, reviewed the entire record in an attempt to identify with some certainty the particular violations of the Act complained of. Thus, we have not ignored the underlying theories of common law wrong, but, rather, have attempted to pare them down to activities at least colorably justiciable under the mandates of sections 16, 17 and 18 of the Shipping Act, 1916.

Discussion and Conclusions

The Initial Decision in this case addressed the alleged violations against the forwarder, Hipage, and the carrier, Prudential, *seriatim.* In the interest of clarity, we will track that decision and discuss each issue raised on exception to the decision as it arises, insofar as that is possible.

Judge Cograve dealt first with the violations of section 16 alleged to have been perpetrated by Hipage. From the rather unclear allegations contained in Complainants' complaint and brief, Judge Cograve deduced that:

> . . . complainants first charge Hipage with a violation of section 16 . . . which makes it unlawful to give any person, locality or description of traffic an undue or unreasonable preference or advantage or to subject the same to some unreasonable prejudice or disadvantage.
>
> Complainants' assertion of a violation of section 16 is based solely upon the failure of Hipage to clarify the commodity shipped as Tariff Item 0101. *** It would appear that Hipage originally did prepare a bill of lading with that description but that someone, probably Lavino, as Prudential's agent questioned the description, and it was changed to Roto-Pad Abrasive Floor Maintenance Pads. Thus, complainants urge, Hipage failed as an agent for the Shipper to "faithfully" carry out its obligations to its principal. Hipage, also violated section 16 it is alleged because it did not promptly inform its principal European Trade that there was some question as to the proper classification of the goods. . . .

In deciding the issue of section 16 violations by Hipage, Judge Cograve points out the difficulty which Complainants' allegations create with respect to a claim which is justiciable under section 16 of the Act. Apparently, Complainants are determined that a breach by an agent of his duty to his principal constitutes, *ipso facto*, a subjecting of a person or locality to unreasonable prejudice or disadvantage or the giving to another person or locality an undue or unreasonable preference or advantage. In rejecting this theory as totally untenable, Judge Cograve reasoned:

> . . . whatever may have been the justiciable derelictions of Hipage under other sections of the Act, the essence of any violation of section 16 is preference or prejudice to one to the advantage or detriment of a similarly situated other.

Complainants repeatedly have sought to support the alleged violations by Hipage of section 16 by claiming that Hipage subjected Complainants to undue prejudice or disadvantage to the advantage of the 3M Company, allegedly a competitor of Complainants in the abrasive pad business. Judge Cograve noted that while Complainants repeatedly attempted to show such a preference or advantage to 3M to the detriment of European, they were wholly unable to show that the alleged competitor had ever shipped any cargo whatsoever on Prudential ships, much less the commodity involved here or that Hipage had ever handled any shipments of any sort for 3M. While Complainants were able to show that the introduction of Tariff Item 0101 was prompted some years previously at the request of 3M, the origin of Item 0101 is, as Judge Cograve explained, "irrelevant to this particular case." Whether or not this rate was instigated by 3M would be of relevance only if it could be shown that 3M also shipped a similar commodity to that of Complainant and was assessed that rate while Complainants had been assessed a higher rate.

Undaunted by their inability to show any competitive relationship between themselves and 3M (or any other shipper), Complainants attempt to circumvent the need for a showing of competitive relationship citing *Valley Evaporating Co. v. Grace Lines*, 14 F.M.C. 16 (1970) for the proposition that no competitive relationship need exist in order for a violation of section 16 to be found. Judge Cograve discussed this case at length in his Initial Decision and, in our opinion, correctly distinguished that case from the present controversy. As Judge Cograve explained, the peculiar facts of the *Valley* case were such that: ". . . once the Conference had established its criteria [for retaining commodity rates], all shippers were entitled to equal treatment under those criteria whether or not there was a competitive relationship between them." Thus, in that case, when the conference eliminated a certain commodity rate in violation of its own criteria, a violation of section 16 could be made out notwithstanding a lack of competitive relationships among or between shippers.

Complainants cite the holding as creating an "absolute obligation" doctrine which they seek to have applied here. Unfortunately, as Judge Cograve observed,

> . . . complainants are unclear as to just what absolute obligation Hipage was under. As near as can be determined from a rambling and confused brief, the obligation of Hipage was to follow the instructions of European trade wherever they may lead. Thus, a failure of Hipage to somehow or other see that Lavino and Prudential accepted the classification of Item 0101, in the view of European constituted a violation of section 16.

Unable to accept the allegations of Complainants in this regard, Judge Cograve dismissed the allegation that Hipage had acted in violation of section 16.

Dismissal of this allegation is challenged on exception by Complainants. Their exception is in large measure simply a restatement of the arguments already advanced before the Presiding Officer and properly disposed of by him.

Rather than attempt to paraphrase Complainant's position, we feel compelled to use its own language. Complainants allege that:

> The record shows that Hipage usually represented the interests of the Shipper, and not the interests of the carrier; whereas, here, Hipage represented the interests of the carrier, and not the interests of the shipper, by typing the freight rate the carrier wanted contrary to received and understood shipper instructions.
>
> * * *
>
> The heart of the charge is that Hipage was under an absolute obligation to represent shipper interests rather [than] carrier interests, and to advise and consult with the shipper before implementing an extortionary freight charge wanted by the carrier.
>
> * * *
>
> Thus complainants take exception to the view of the Initial Decision on Hipage, in relation to section 16. That view is inequitable and contrary to the precedent of the cases which the Decision cites, these cases having ruled that, in circumstances comparable to those obtaining here, a competitive relationship need not be shown.

Hipage replied to this exception specifically and took strong objection to the position of Complainants. Hipage submits that:

In order to violate § 16 of the Act (46 U.S.C. § 815), it is necessary that Hipage have given an undue or unreasonable preference or advantage to some person, locality or description of traffic or have subjected European Trade Specialists and Kunzel & Tasin to some unreasonable prejudice or disadvantage. As the initial decision ably points out, in order to have a violation of § 16, there must be a party preferred and a party prejudiced. There was no showing at the hearing that the Hipage Company treated any other shipper differently than it treated Complainants. . . .

As to the alleged "absolute obligation" to the shipper which Complainants alleged and reargued, Hipage states:

. . . it is unclear as to how Hipage could have prevented the carrier from charging the rate that was charged. That § 16 imposes no such duty [to prevent a carrier's application of a certain rate] on a freight forwarder is clear.

* * *

Under complainants "absolute obligation" theory, a forwarder would be under an obligation to misdescribe goods if his principal so directed. The Administrative Law Judge discussed in detail the case of *Valley Evaporating Co. v. Grace Line* 14 F.M.C. 16 (1970), which is relied on by Complainants to support their absolute obligation theory and succinctly stated why that decision has no application to the present case. The Law Judge's interpretation of *Valley Evaporating* is the correct and Complainant's exceptions in this regard are not well taken.

We conclude that Judge Cograve's denial of the "absolute obligation" claim under these circumstances and the reasons cited by him are proper.

What Complainants are in effect alleging, under color of section 16, is a violation by Hipage of its duty to its principal under the principles of common law. We have no jurisdiction over such a claim. Further, we are of the opinion that were we to espouse the sort of duty allegedly owed by Hipage to its principal compliance by a forwarder with such a duty could well result, in itself, in a violation of the Shipping Act.

The alleged violation by Hipage of section 17 of the Act is, as Judge Cograve determined, two-fold. First, it is alleged that by its inability to secure classification of the cargo under Item 0101, Hipage "betrayed the shipper" by misdescribing the commodity. Second, Complainant contends that Hipage violated its duty to the shipper under section 17 by failing to apprise the shipper of any dispute or discrepancy as to the rate to be applied to the goods. Even assuming that these charges constitute a proper allegation of wrongdoing *under the Shipping Act,* Judge Cograve was unable to find that the actions of Hipage were violative of section 17.

As to the first allegation, Judge Cograve cited testimony in the transcript showing Lavino's (the carrier's agent) skepticism as to shipper's desired rating, the subsequent description of the goods as "Roto-Pads" and the rating of the cargo as "Cargo, NOS." On this basis, he concluded that:

. . . there is no question, even complainants admit, that the description Roto-Pad, Abrasive Floor Maintenance Pads accurately described the commodity shipped. Just where then is the unjust and unreasonable practice engaged in by Hipage? I can find none.

As to the second allegation, Judge Cograve found that when the numerous discussions of possible overcharge were held among the parties some months after shipment, at no time was there any complaint made by European to Hipage regarding the manner in which Hipage had handled the matter or the efforts made by Hipage to clarify and solve the disagreement as to freight charges. Judge Cograve found that the record of this proceeding simply would not allow him to reach any conclusion on the issue of whether Hipage had properly informed its shipper prior to shipment of the discrepancy in the applied rate. Thus, he dismissed the section 17 charge for failure of Complainants to sustain their burden of proof. As the Presiding Officer himself explained:

> The record in this case simply will not allow a definitive disposition of this issue. Mr. Ballard of Hipage testified that in the ordinary course of business the shipper would have been contacted and told of the problem. However Mr. Meade of European Trade had no recollection of any such call.
>
> At this point in the hearing, counsel for European Trade requested a continuance for the taking of depositions of European Trade's secretary. The request was opposed. I [Judge Cograve] denied the request on the ground that far from being surprised by the testimony of Mr. Ballard, counsel from European Trade had from the beginning made an issue of the lack of communication from Hipage. The burden of proving its case was upon European Trade. A part of that case was the failure of Hipage to inform European Trade of the dispute over the rate when it first arose. Counsel for European Trade had every opportunity to call any witness he chose, however he elected not to call Mr. Meade's secretary. However, in the interest of fairness I [Judge Cograve] allowed counsel for complainants an opportunity to file with me, after his review of the record, a motion for the taking of depositions. This was to allow complainants an opportunity to establish their surprise on the basis of the record in the case. No such motion was filed. Accordingly complainants having failed to prove Hipage had engaged in an unjust or unreasonable practice in the handling of the shipment in question, the charge that Hipage violated section 17 of the Shipping Act is dismissed.

The second allegation also includes, tangentially, a claim by Complainants that the alleged failure to inform its shippers of disputes incorporated other derelictions by Hipage. These include, as best as we can determine, allegations that Hipage violated section 17 by failing to make an adequate investigation of Complainant's claim following shipment, by failing to conform to its "usual routine" in such cases, and by failing to have published any sort of regulations for the handling by Hipage of such claims. All of these alleged derelictions are said by Complainants to subject them to undue prejudice or disadvantage to the advantage or benefit of another in violation of section 17. Finally, Hipage's alleged failure to have published its own regulations is claimed to be a violation of Commission General Order 4 applicable to freight forwarders.

Judge Cograve found no evidence satisfactory to him which would justify a finding of a violation of section 17 in any of the respects alleged by Complainants. Complainants have taken exception to this conclusion and each finding on which it is based. We will address each of these exceptions separately.

Complainants take exception to the failure of the Initial Decision to address their contention that Hipage violated Commission General Order

4. Complainants nowhere specified how General Order 4 may have been breached but simply allege this conclusory argument. We have been unable to determine on our own how this claim might be supported and have not been shown a way by Complainants. In fact nothing in the law or in the factual record in this proceeding will support this allegation. Certainly, and if this be the crux of Complainant's charge, there is no requirement under section 17 of the Act that forwarders publish their regulations and procedures. Nor has this Commission, either in General Order 4 or elsewhere by rule or decision, mandated that a licensed freight forwarder must establish and publish a special body of regulations. We therefore, find this exception to be without merit.[3]

Additionally, Complainants contend that Judge Cograve erred in rejecting their argument that Hipage's failure to abide by its shipper's instructions constituted an unjust and unreasonable practice in violation of section 17 of the Act. Specifically, they take issue with the Presiding Officer's conclusion that:

> There is no question, even complainants admit, that the description Roto Pad, Abrasive Floor Maintenance Pads accurately described the commodity shipped.

Complainants challenge this finding on the ground that it is "irrelevant and misleading." They urge that the important fact here is that:

> Hipage knew the description the shipper wanted. There was a *scienter* here; for Hipage started to carry out the shipper's wish [citation omitted; emphasis original]. Hipage also knew the description the carrier wanted. Both descriptions were equally accurate.
>
> * * *
>
> What did Respondent Hipage do? It elected to please the carrier.
>
> * * *
>
> This, in the opinion of complainants, is unjust and unreasonable and should move the conscience of the Commission.

In reply to this exception Hipage explains its action thus:

> The only source of this information [on which the description was based] was Complainants own shipping documents and sales literature, and this description was not something conjured up by Hipage and Prudential-Grace in an effort to defraud either of Complainants.
>
> * * *
>
> The Hipage Company fulfilled its obligation as a forwarder of accurately describing the goods in preparing the bill of lading based on information supplied by the shipper and by accurately describing the commodity did not engage in unreasonable practices within the meaning of section 17 of the Shipping Act.

This Commission, concurring with Judge Cograve and Hipage, finds

[3] If, by this general exception, Complainants refer to a failure by Hipage to inform its principal of any controversy over the shipment in question, we have incorporated that reference in our discussion of the alleged section 17 violation by Hipage. We have considered that action to be justiciable under section 17 and have included that issue in our order on remand.

that there is no evidence in the record of any collusion between Hipage and Prudential. Further, we agree that Hipage properly described the cargo as it is required by the Act to do. The alleged "scienter" seems to us to be irrelevant to a proceeding in which the pivotal issue is simply a determination of the nature of the commodity shipped.

Complainants further allege error in "the implication of the Initial Decision" that Complainants had lodged no complaint with Hipage regarding the handling of this matter of rate classification of the goods. Complainants argue that they did complain to Hipage; that Hipage failed to make an "internal" investigation of this complaint; that Hipage lacked the capability to make a "meaningful" investigation because it kept no record of the employees who handled the case; and that the Shipping Act imposes a duty on forwarders to provide a reasonable service in response to complaints which was absent here—that absence being a violation of section 17 of the Act.

Since this allegation was not addressed by Hipage, we have painstakingly reviewed the record of this proceeding in this regard and can find no support for Complainants' position. As far as may be ascertained from the record, when Complainants brought their problem to Hipage, Hipage did, in fact, take reasonable steps to intercede on Complainants' behalf with the carrier and the appropriate conference. Reduced to its essentials, theis exception only expresses dissatisfaction with Hipage's inability to induce the carrier or the conference to change its position on the rating question. We fail to see how this makes out a violation of section 17.

Finally, Complainants take exception to the conclusion of Judge Cograve that Hipage "followed its usual routine" in handling the alleged misclassification, insisting that the record shows that, in circumstances such as those prevailing here, the usual routine of a forwarder and of Hipage in particular would be to "inform the shipper that the carrier was objecting to proposed tariff classification, and to obtain additional product description from the shipper . . .; but none of this routine did respondent Hipage carry out."

Hipage, in its reply insists that the normal procedures were followed here adding that:

> This procedure would include examining the relevant shipping documents in an effort to ascertain a precise description of the goods, *communication with the shipper if the steamship company requested additional information in order to properly rate the cargo,* and preparation of relevant custom invoices, etc. (Emphasis ours.)

The record developed with respect to this issue is unclear. Whether or not Hipage was obliged to notify the shipper of any confusion, and whether or not he did so, does not appear. As a result, we are of the opinion that amplification of the actions or inactions involved must be addressed at further hearing before a determination may be made with respect to the alleged violation of section 17. We, therefore, are remanding this issue to the Administrative Law Judge for further hearing with respect to Hipage's obligations and the sequence of events during the relevant times.

In this regard, Complainants also take exception to a statement in the Initial Decision that while Complainants were invited to file a motion to depose certain witnesses, to counter alleged "surprise" testimony offered by respondents' witnesses, "no such motion was filed." The fact is a motion was filed and Judge Cograve ruled against the requested taking of dispositions and denied the motion. Complainants never sought reconsideration or Commission review of this ruling. Since the testimony sought by that motion deals with the activity of Hipage with regard to the alleged violation of § 17, which issue shall be reheard on remand, we are of the opinion that we need not rule on this exception.

The issues that remain relate to charges alleged against Prudential. We will discuss these in the order determined by Judge Cograve in his Initial Decision.

The first issue raised is the alleged violation by Prudential of section 16 of the Act. Complainants alleged that Prudential discriminated against "persons" in that it:

> (a) . . . discriminated in favor of the 3M Company and against the shipper consignee;
> (b) . . . discriminated in favor of the 3M Company and against shippers' North Carolina manufacturer;
> (c) . . . discriminated in favor of respondent carrier and against ocean carriers sailing from the Great Lakes and other U.S. ports;
> (d) . . . *discriminated in favor of respondent carrier and against other carriers sailing from Norfolk* (emphasis original);
> (e) . . . discriminated in favor of respondent carrier and against trans-Atlantic air freight carriers and;
> (f) . . . discriminated in favor of Norfolk forwarders and against forwarders in ports and at airports.

Without going into unnecessary detail, it is sufficient to relate here that Judge Cograve found none of these allegations to be supported either by the record or by the Complainants' arguments. With regard to the charge under (f) above, since Complainants themselves selected Hipage as their forwarder, Judge Cograve found great difficulty in determining how Prudential could have discriminated in favor of a forwarder in the selection of which it had no hand. As for the issues relating to alleged discrimination in favor of 3M Company, Judge Cograve again noted the absence of any showing that Prudential had ever carried any 3M cargo whatsoever (much less the same or similar commodity at issue here) which was given the Item 0101 rating for 3M.

With respect to the alleged self-preference of Prudential, Judge Cograve cited *Anglo-Canadian Ship. Co., Ltd. v. Mitsui S.S. Co., Ltd.*, 4 F.M.B. 535 (1955) to show that:

> . . . the Commission expressly excluded from section 16 the concept of "self-preference", i.e., in this case Prudential would have had to prefer a carrier other than itself to the prejudice of some other carrier, again other than itself.

Judge Cograve therefore dismissed the alleged section 16 violation as to *persons* on the ground that Complainants had failed to demonstrate on the record any preference by Prudential with respect to other carriers, air carriers or freight forwarders.

Complainants also allege violations by Prudential of section 16 with respect to *localities* in that Prudential:

> (a) . . . discriminated in favor of Minnesota, France, and Italy, where the 3M Company manufactures abrasive cloth, and against North Carolina where shipper's suppliers manufacture abrasive cloth, and
>
> (b) . . . discriminated in favor of the State of Virginia, where Norfolk is located and against other states where other ports and where airports are located.

Addressing these allegations Judge Cograve articulated a failing which typifies Complainants' brief and theory of the case. He stated:

> . . . here again complainants completely misread the law of preference and prejudice under section 16 . . . the essence of a violation of section 16 is that two similarly situated interests are treated differently without any justification and except in somewhat special instances there must be a competitive relationship between those two interests. There is no evidence whatsoever in the record that Prudential ever treated any locality any differently than it treated the port of Norfolk and the State of Virginia; and as already noted there is no evidence whatsoever that Prudential ever carried any 3M Company products.
>
> But complainants fall back on their reading of *Valley Evaporating, supra,* and what they call the doctrine of "absolute obligation."

Once again, Judge Cograve distinguished the *Valley* case and concluded:

> . . . not only must complainants show that some other interest was preferred to their prejudice, but also that the interest was a competitor. The record is devoid of any such showing. Accordingly the charge that respondent Prudential violated section 16 is dismissed.

Judge Cograve then addressed the alleged violations by Prudential of section 17 of the Act. Again he felt compelled to express the allegations in Complainants' own words, noting that Complainants alleged that:

> . . . the false assurances of a tariff rate held out by the carrier's sales agents offend section 17 in that:
>
> (a) They were unjustly discriminatory in favor of the carrier and in favor of 3M Company, and against the shipper and consignee.
>
> (b) They were unjustly prejudicial (sic) to the shipper as an exporter, as compared with the 3M Company, a foreign competitor in its capacity as a manufacturer of abrasive cloth in France and Italy.
>
> (c) They were unjust and unreasonable practices, reflective of the absence of just and reasonable regulations and practices.

The allegation of paragraph (a) above was dismissed summarily by Judge Cograve for the obvious reason that:

> As noted a number of times before, there is no evidence of record that Prudential ever carried any 3M Company products much less aboard the same vessel, etc. as it carried European Trade's shipment.

The allegation of paragraph (b) above was interpreted by Judge Cograve to refer to the portion of section 17 which makes it unlawful for a common carrier by water in the foreign commerce to charge a rate which is unjustly prejudicial to exporters from the United States as compared to their foreign competitors. On this point, Judge Cograve explained that the words of the Act contemplate two exporters, one from the United States and one a "foreign competitor," both of whom are competing for business at some third country of destination. Since the Presiding Officer found that such a situation simply was not presented here he dismissed the allegation. As he saw it:

> The charge as framed by complainants is based on competition from 3M Company plants located in Europe (France and Italy). No water carriage of any 3M products is ever alluded to. Just how this situation can bring into play the cited prohibition of section 17 is not made clear nor is it even discussed. It is indeed typical of the many manufactured allegations and arguments with which complainants' briefs are replete. Accordingly the charge that respondent Prudential was guilty of discrimination or prejudice under section 17 is dismissed.

Under section 17, therefore, there remained to be disposed of only the allegation that Prudential engaged in an unjust and unreasonable practice in that its agent International (Lavino) did not inform European of its (Lavino's) inability to bind Prudential to the rate initially quoted to Mr. Meade by Lavino. Citing testimony in the transcript, Judge Cograve concluded that Lavino's representative was not conclusive as to the rate applicable and that European's president was thoroughly aware through experience of the inability of an agent to quote an authoritative rating since the Conference and carriers were the final arbiters of the proper rate to be charged. Therefore, Judge Cograve concluded that:

> The charge that Prudential through its agent International [Lavino] committed an unjust or unreasonable practice under section 17 of the Act is dismissed.

All of Judge Cograve's conclusions regarding section 16 and section 17 have been challenged on exception by Complainants. Unfortunately, these exceptions do not differentiate between the claims under either section but rather are lumped together. Thus, Complainants again urge that Prudential violated section 17 in that: it held out assurances that the cargo would be rated under Item No. 0101; that Complainant shippers relied on this assurance to their detriment; that Prudentials' assurances were not realized when it rated the cargo as "Cargo, NOS"; that this rating made the assurances "false"; and that these "false assurances were unjust and unreasonable within the meaning of section 17." Additionally, Complainants reargue that when Prudential saw the description and tariff commodity classification described by the shipper as shown in the Purchase Order and Export Shipping Instructions, Prudential's failure to comply with these desires was unjust and unreasonable in violation of section 17.

Clearly, Complainants position on exceptions constitutes nothing more than a reargument of contentions made before Judge Cograve and rejected by him. While the activity sketched by Complainants might conceivably show a contract claim at common law based on "detrimental reliance," it falls far short of establishing a violation of section 17 of the Act. Thus, we agree with Judge Cograve's disposition of this argument and accordingly dismiss Complainants exception in the same regard.

Additionally, we know of no requirement under the Shipping Act which obligates the carrier to acquiesce to a particular description of cargo *desired* by the shipper, particularly when the description *desired* appears to be inaccurate. The carrier's obligation in general is to rate the goods accurately according to the descriptions available to him.

Finally, Complainants contend that:

> Complainants sought to use a tariff item which their dominant competitor in the European market for this product, the 3M Company, had prompted into existence. The 3M Company could have used it, but complainants were improperly prevented from using it.
>
> The import of the Initial Decision is that, absent a "competitive relationship", Sections 16 and 17 of the Shipping Act offered parties in the position of complainants no remedy.
>
> * * *
>
> The Courts and the Commission did not so hold—*Port of San Diego, Valley Evaporating,* and *New York Foreign Freight,* cases cited in the Initial Decision . . .

As we have previously stated, we find that Judge Cograve has properly interpreted and distinguished the cases cited and concur in his finding as to the prerequisite showing, under the circumstances of this case, of a competitive relationship in order for the provisions of sections 16 or 17 to apply. Further, absent such a relationship or even with such a relationship, the allegations that 3M Company prompted into existence Item 0101 and "could have used it" are irrelevant and misleading.

The final allegation by European against Prudential is that Respondent Prudential violated section 18(b)(3) of the Act by classifying the goods shipped as "Cargo NOS." The essence of this claim is that while Prudential was "prima facie" justified in rating the cargo as it did with only the bill of lading before it, at some later date, when other information became available, Prudential was no longer so justified and the cargo should have been rated under Item 0101. The document on which Complainants rely most heavily in making this argument appears to be the "Purchase Order and Export Instructions"; specifically that portion which instructs the classification of the commodity to be under Item 0101. In short, Complainants urged that the carrier should have been bound by the shipper's instructions. Judge Cograve concluded, and properly so, however, that: "this is not, of course, the real question under section 18(b)(3). That question was and remains whether Item 0101 was the proper classification under the carrier's tariff."

On this issue Judge Cograve correctly noted that "complainants are caught up in an inconsistency." On one hand, Complainants claim that:

Based on the February 20 Bill of Lading description, the shipment was correctly classified, *prima facie*, as NOS cargo.

* * *

Based on that information [the bill of lading] they classified the commodity as NOS, in accord with published tariffs on file with the Commission. Their action did not offend the statute; rather, it implemented the statute.

On the other hand, Complainants went on to argue that once the carrier came into possession of further information such as the purchase order and shipping instructions and sales literature, it should have classified the cargo under Item 0101. As Judge Cograve stated, however, "the difficulty here is that the description used on the bill of lading can be and was constructed from those very documents." Further, the President of European testified that the description "Roto-Pad Abrasive Floor Maintenance Pads" accurately described the commodity. The only question to be answered, then, with regard to the alleged violation of section 18(b)(3), is whether this commodity should have been rated as "Abrasive(s) Cloth, NOT in Belt form or Rolls (NOT Pads, Scouring or Material therefor)". Judge Cograve concluded that the articles were (1) clearly "pads" rather than cloth, and (2) were scouring pads as so described on Complainants' own sales literature. Therefore, he concluded, the carrier was justified in not applying the Item 0101 rate and no violation of section 18(b)(3) was found.

Complainants took exception to the disposition of the "tariff classification issue." They alleged that:

The legal question (not defined or mentioned in the Initial Decision) is whether a shipper such as the one here, to whom the Item 0101 commodity tariff was addressed, could reasonably have understood it to include his product.

The issue as framed is, in the opinion of this Commission, clearly erroneous. The standard for whether or not a cargo is properly rated is only a determination of what the goods transported actually were. There is no "reasonable man" standard as applied to torts at common law.[4]

Complainants seem to realize the inadequacy of this objection under the Shipping Act, since they further argue the merits of the nature of the commodity. In this regard Complainants state that in their view either the "trade name" description or the commodity name description is accurate. Complainants maintain that the commodity description is appropriately rated under Tariff Item 0101 while the "trade name" description is properly rated under the Cargo, N.O.S. rate.

Notwithstanding these statements, Complainants go on to attack the conclusion of Judge Cograve that the product shipped was scouring pads or material therefor; hence properly excluded from the application of Item 0101. Complainants submit that it was error for the Presiding Officer to focus on shipper sales literature which lauds the value of the removable

[4] See, *e.g.*, *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 S.R.R. 16 (1973) and *United States v. Farrell Lines, Inc.*, 13 S.R.R. 199 at 203–204 (1973).

center plug of the discs as "an excellent scouring pad for those hard-to-get-at places" and concluded therefrom that the entire pad must be for scouring since its center—clearly the same material—was touted as a scouring material.

In challenging this conclusion complainants argue that scouring pads are of the ilk of "S.O.S." pads or "Brillo" pads to be used on pots and pans and that the floor maintenance pads at issue here are not "scouring" pads. Having attempted this distinction between S.O.S. pads and the roto-pads at issue here, Complainants lapse into irrelevant argument as to why Judge Cograve was in error. In this connection, they claim that since the shipper could "reasonably" differentiate between its product and kitchen scouring pads:

> It is obvious that a shipper such as this one, to whom tariff Item 0101 was addressed, would reasonably have understood the exclusion of scouring material as exclusively "S.O.S." and "Brillo" and as not excluding his product made of different material and used for a different purpose.

As we have pointed out above, with respect to application of tariff rates under section 18(b)(3), the issue is not "what rate a reasonable person could expect to have applied." The issue for determination is simply what the actual nature of the commodity shipped is and whether or not the proper tariff rate was applied to that commodity. We are of the opinion that Judge Cograve was completely justified in relying upon the shipper's own sales literature and samples of the commodity itself in attempting to determine the true nature of the goods. Having thus made this determination as to the nature of the goods, the next question should involve the propriety of the rate applied to those goods. In this regard, we believe the record of this case to be inadequate.

Upon review of the Respondent Prudential's applicable tariff, it has come to our attention that on the date of shipment Prudential's tariff included a rate applicable to: "Pads, Scouring, or material therefor" which was $45.75 w/m (the contract rate) or $50.30 w/m (non-contract rate).[5] During the course of the entire proceeding, this rate was neither alluded to nor discussed by any party, nor was it raised *sua sponte* by the Administrative Law Judge. We are unable to understand this lapse, particularly, if indeed, the commodity shipped was "pads, scouring or material therefor" as found by Judge Cograve. This omission regarding an apparently applicable tariff rate indicates a continuing confusion as to the true nature of the goods and the properly applicable tariff rate. If the commodity shipped were "abrasive floor maintenance pads," as described in the bill of lading, we still are unable to determine whether or not the commodity is also "pads, scouring or material therefor." If the latter, item no. 1198 would clearly seem to be applicable. However, if the former, that item may or may not be applicable. We are of the opinion that resolution of the exact nature of the goods shipped, and therefore the

[5] Item No. 1198, 19th Rev. p. 94, No. Atl. Mediterranean Freight Conf. Tariff No. 10-FMC-3.

properly applicable rate, requires further evidentiary hearing. We are remanding this matter to the Administrative Law Judge for further hearings limited to the issues of the true nature of the commodity and the tariff rate which must be applied.

We have scrutinized each exception with reference to the record of this case and the Initial Decision rendered. That some specific exceptions have not been individually discussed does not mean that we have not considered them. Some have been subsumed in other exceptions and some are merely restatements of positions taken previously. Each, however, has been considered by us. Where the record permits, we have determined those issues as noted in our discussion of exceptions above. Where the record is unclear, we have determined that further evidence must be adduced at rehearing and have, therefore, remanded certain issues. Insofar as the record addressed so far in this proceeding is concerned, we conclude for reasons stated above that Judge Cograve's findings and conclusions were proper and well-founded as to all allegations of violations of section 16 of the Shipping Act with respect to the carrier and forwarder and section 17 of the Shipping Act with respect to the carrier.

However, there remain two issues which we are unable to determine on the record of this proceeding. The allegations of Hipage's dereliction in failing to notify the shipper of any disputes as to applicable tariff rates may not be decided on the unclear record before us. We, therefore, have determined to remand this issue in order to clarify the record in this regard.

Additionally, with respect to the alleged violation of 18(b)(3) by Respondent Prudential we have determined to order further hearing in order to determine the proper tariff rate to be applied to the goods shipped. This determination sould include consideration of tariff items no. 1198, no. 0101, the Cargo, NOS rate, and whatever other rates may properly be considered.

Vice Chairman Morse concurring:

I concur in the result but in so doing I find it unnecessary to concur in the statements of the majority that there must be a competitive relationship proved in this type of case to establish a violation of sections 16 and 17, Shipping Act, 1916. *Volkswagenwerk v. FMC*, 390 U.S. 261, 280 (1968).

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 74–8

EUROPEAN TRADE SPECIALISTS, INC. AND KUNZLE & TASIN

v.

PRUDENTIAL-GRACE LINES, INC. AND THE HIPAGE CO., INC.

ORDER ON REMAND

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

IT IS ORDERED, That the issues relating to the alleged dereliction of Respondent Hipage Company in failing to notify its shipper of any dispute as to the applicable tariff rate in violation of section 17 of the Shipping Act, 1916, be and hereby are, ordered to be remanded for further hearing consistent with our Report; and

IT IS FURTHER ORDERED, That the issues relating to the alleged violation of section 18(b)(3) of the Shipping Act, 1916, by Respondent Prudential-Grace be and hereby are remanded for further hearings in order to determine the proper tariff rate to be applied to the cargo at issue with appropriate considerations being given to tariff items No. 1198, No. 0101, the Cargo, N.O.S. rate or any other rates which may be properly considered; and

IT IS FURTHER ORDERED, That those portions of these proceedings determined in our Report and not remanded by this Order for further proceedings be, and hereby are, discontinued.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 339(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE

NOTICE OF DETERMINATION NOT TO REVIEW

June 2, 1976

Notice is hereby given that the Commission on June 2, 1976, determined not to review the decision of the Settlement Officer in this proceeding served May 27, 1976.

By the Commission.

(S) JOSEPH C. POLKING,
Assistant Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 339(I)

UNION CARBIDE INTER-AMERICA, INC.

v.

VENEZUELAN LINE

Reparation denied.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Union Carbide Inter-America, Inc. (complainant) claims $791.01 as reparation from Venezuelan Line for an alleged freight overcharge on a shipment carried from New York, New York to Puerto Cabello, Venezuela via the MARACAIBO on Bill of Lading No. 61 dated September 25, 1974. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be Section 18(b)(3).

The carrier denied the claim solely on the basis of Rule 11, United States Atlantic & Gulf-Venezuela and Netherlands Antilles Conference Freight Tariff F.M.C. No. 2, which time-bars claims for adjustments not received by the carrier within six months from the sailing date of the vessel.[2]

The shipment consisted of 22 pallets totalling 880 bags of Synthetic Resin Polyethylene weighing 46,090 pounds, (44,880 pounds net) measuring 1,360 cubic feet, and having an invoice value of $15,950. Venezuelan Line assessed a bill for total freight charges of $2,759.59 which Union Carbide paid. These charges were computed from the above conference tariff. The carrier assessed a Class 1W rate from 5th Revised Page 122–A covering Synthetic Resins, N.O.S., in bulk in bags, actual value over $650 but not over $1,000 per 2,000 pounds. This rate was $116.50 per ton of 2,000 pounds assessed on $\frac{44,880}{2,000} = 22.44$ short tons, which produced ocean freight revenue of $2,614.26 plus accessorial charges of $201.43

[1] Both parties having consented to the informal procedure of Rule 19(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

[2] The Commission has ruled that a claim filed within two years from the date the cause of action arose must be considered on its merits. *Colgate Palmolive Company* v. *United Fruit Company,* Informal Docket No. 115(I), served September 30, 1970. The bill of lading here is dated September 25, 1974 and the claim was filed November 17, 1975.

assessed on a weight ton basis,[3] minus a prepalletized cargo discount of \$2.50 per weight ton amounting to \$56.10, resulting in total freight charges assessed of \$2,759.59.

Complainant bases his computations on Item 495 of the above tariff which contains a specific rate of \$76.25 per ton of 2,000 pounds on Resins, Synthetic, in bags, Polyethylene, actual value over \$500 but not over \$700 per *2,000 pounds*. (26th Revised Page 62) In order to develop the actual value of the shipment of 46,090 pounds, the pallet weight of 22 pallets weighing 55 pounds each, totalling 1,120 pounds was subtracted therefrom resulting in a weight of 44,880 pounds. The shipment consisted of $\frac{44,880}{2,000} = 22.44$ tons of 2,000 pounds. The value per ton of \$710.78 per 2,000 pounds is greater than \$700 so the claim as submitted is incorrect. Claimant apparently, as the carrier alleges, used the gross weight of 46,090 pounds. This resulted in the use of the weight of the pallets in computing cargo valuation, i.e., $\frac{46,090}{2,000} = 23.045$ tons of 2,000 pounds.

The invoice value divided by the above $\frac{\$15,950}{23.045}$ results in a valuation per ton of \$692.12 which decreases the actual value of the cargo. The weight of the pallets should not be included in the weight of the cargo to arrive at actual value.

The claim for reparation is denied.

The carrier responded in this proceeding on December 11, 1975 that the correct value on the basis of the cargo as freighted should be \$710.78 per ton of 2,000 pounds. I concur with respect to this higher value per ton. Item 2(L) of the subject tariff provides:

> "Wherever different rates or ratings according to the value of a commodity are provided herein, it shall be understood that the value specified in writing by the shipper, is the actual value per ton of 40 cubic feet or 2,000 pounds, as cargo is freighted. The lower basis is available only where the actual value of such commodity does not exceed the limitation indicated."

The carrier further countercharges that the following description and rate under Item 495 (26th Revised Page 62) should apply: Synthetic Resins, N.O.S. *in other packing:* actual value over \$500.00 but not over \$700.00 per freight ton—\$94.75 per ton of 40 cubic feet or 2,000 pounds, whichever is the greater. The carrier would compute the charges under the above description as follows:

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[3] The exception to the weight ton basis is the charge of three cents per package assessed on all shipments to Venezuela per tariff Item 9 entitled "ADDITIONAL CHARGES."

"Calculating the valuation on the basis of 1,360/0 cubic feet less 10% Pallet Allowance per Item 26, the total cubic feet should be 1,224/0, the valuation is $521.24 per cubic feet and the rate should have been $94.75/40 cft. The correct charges are:

1,224/0 @$94.75	$2,889.35
Bunker Surcharge @$4.80	146.88
Port Congestion S/C @$3.00	91.80
Less Pallet Discount @$2.50	[−76.50]
Pkg. charge on 880 bags @3 ¢	26.40
Correct Charge	$3,087.93
As billed	2,759.59
Undercharge	$ 328.34

Complainant will be billed for the undercharge shown above."

I do not agree with the carrier's expressed intent, in its December 11, 1975 rebuttal of the claim, to bill for an undercharge on this shipment. Such a billing would be based on the commodity description Synthetic Resins, N.O.S. *in other packing*.

The original commodity description on the Bill of Lading—880 *bags* of Synthetic Resin Polyethylene is specific as to packing. This description is found on 5th Revised Page 122-A—Synthetic Resins, N.O.S. *in bulk in bags:* actual value over $650 but not over $1,000 per 2,000 pounds—class 1W ($116.50).

In *United States v. Gulf Refining Company, 268 U.S. 542, 546 (1925)*, it was held that "When a commodity shipped is included in more than one tariff designation, that which is more specific will be held applicable. And where two descriptions and tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rate."

The latter more specific description also results in lower transportation costs to the shipper.

Under these circumstances any billing over the $2,759.59 paid by claimant to the carrier would be in violation of Section 18(b)(3) of the Shipping Act, 1916.

The initial charges assessed by the carrier were correct, reparation is denied claimant, and any attempt for additional billing on this shipment by the carrier, based on the information in this proceeding, would be contrary to the Shipping Act, 1916, as indicated above.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET 479

THE BUCKEYE CELLULOSE CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

June 9, 1976

No exceptions having been taken to the initial decision 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 June 9, 1976.

It is Ordered, That applicant is authorized to waive collection of $560.00 of the charges previously assessed Buckeye Cellulose Corp.

It is further Ordered, That applicant shall 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 479 that effective October 24, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 24, 1975 through December 15, 1975, the rate on 'Woodpulp Chemical' from Charleston, South Carolina (minimum 20 WT per container) is $50.00 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 479

THE BUCKEYE CELLULOSE CORPORATION

v.

SEA-LAND SERVICE, INC.

Adopted June 9, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service, Inc., has applied for permission to waive collection of a portion of the freight charges on a shipment by Buckeye Cellulose Corporation. The shipment was 84,500 lbs. of "Woodpulp, chemical" which was carried by Sea-Land from Charleston, South Carolina, to Barcelona, Spain, under a Sea-Land bill of lading dated October 31, 1975. The rate applicable at the time was $64.00 per 2,240 lbs. (Sea-Land Freight Tariff No. 168–B, Item 17850, 9th Revised Page 192). Total freight charges under the $64.00 rate were $2,581.13. The rate sought to be applied is $50.00 per 2,240 lbs. which would result in total freight charges of $2,021.13. Permission to waive the collection of $560.00 is sought.

In order to meet the rates of the competition from South Atlantic ports to Spanish ports, Sea-Land's sales representative in St. Louis, Missouri, and Buckeye negotiated a rate of $50.00 per long ton, minimum 20 tons per container, on chemical woodpulp from Charleston to Barcelona. The negotiations centered around a two containerload shipment which was to connect with a Sea-Land sailing scheduled for October 24, 1975. The $50.00 rate was accepted and a teletype confirming that fact and requesting immediate publication was sent on October 15, 1975, by the St. Louis representative to Sea-Land's Mediterranean Pricing Division.

Actual publication should have been made in Item 17850 in Sea-Land's Tariff 168–B, FMC–73, which would have made the $50.00 rate applicable to Spanish ports. However, through clerical error "the tariff publishing officer instructed publication to ports in France and Italy instead of

[1] This decision became the decision of the Commission June 9, 1976.

Spanish ports. Thus Item 8200 of Tariff 168–B not the intended Item 17850 was amended leaving in effect the $64.00 rate from Charleston to Barcelona. The Buckeye shipment left Charleston on October 31, 1975, and since the error had not been discovered, the Sea-Land bill of lading (975–445414–16) was freighted at the $64.00 rate with the resultant aggregate charges of $2,581.13. Buckeye, however, paid the freight on the basis of the promised $50.00 rate (total $2,021.13) and this apparently led to the discovery of the error. The error was corrected on December 15, 1975, by amending Item 17850 through the filing of 9th Revised Page 192 of Tariff 168–B. In urging that the application be granted Sea-Land says that the "Erroneous publication of the negotiated rate to ports in France and Italy instead of ports in Spain was the result entirely of [the] clerical mistake on [the] part of respondent's pricing personnel."

Sea-Land knows of no other shipments of the commodity for the time involved.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges,* under *Purpose of the Bill.*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight *charges are authorized] where it appears that there is an error in a tariff of a clerical* nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The type of clerical error here involved is the kind that can be remedied under section 18(b)(3) and the application should be granted.

It is therefore found that:

1. There was a tariff error due to inadvertence;

2. Granting permission to waive collection of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for permission to refund a portion of the freight charges, Sea-Land filed a new tariff setting forth the rate upon which the waiver is to be based; and

4. The application was filed within 180 days of the date of shipment.

Accordingly, Sea-Land is permitted to waive collection of $560.00 from the Buckeye Cellulose Corporation.

An appropriate notice will be published in the tariff of Sea-Land.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
May 18, 1976.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 475

THE GOODYEAR TIRE & RUBBER CO.

v.

DELTA SEAMSHIP LINES, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING REFUND OF CHARGES

June 9, 1976

No exceptions having been taken to the initial decision 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 June 9, 1976.

It is Ordered, That applicant is authorized to refund $1,469.60 of the charges previously assessed Goodyear Tire & Rubber Co.

It is further Ordered, That applicant shall 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 475 that effective January 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from January 1, 1976 through January 21, 1976, the rate on 'Coal Tar (non-hazardous)' is $133.50 W/M, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That refund of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the refund.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 475

THE GOODYEAR TIRE & RUBBER CO.

v.

DELTA STEAMSHIP LINES, INC.

Adopted June 9, 1976

Application for refund granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Delta Steamship Lines has made application to refund a portion of the freight charges collected from The Goodyear Tire & Rubber Co. on a shipment of Coal Tar, Non-hazardous carried aboard the *Delta Sud* from Houston, Texas, to Santos, Brazil.

The shipment of coal tar which moved under a Delta bill of lading dated January 9, 1976,[2] weighed 72,823 pounds and measured 2,672 cubic feet. The aggregate freight charges collected for the shipment were $11,055.40. The basis for the aggregate freight was the Cargo N.O.S. rate of $155.50 W/M found in the Inter-American Freight Conference Tariff, Sec. A—F.M.C. No. 11.

This application requests permission to apply a rate of $133.50 W/M which would result in aggregate freight charges of $9,585.80 and a refund to Goodyear of $1,469.60. In support of its request for refund applicant states:

> "COAL TAR (Non-Hazardous)" was, through Administrative error, inadvertently omitted from our revised freight tariff F.M.C. 11, Page No. 165, which became effective January 1, 1976. The item had been carried in previous tariffs for more than 20 years. On discovery of the omission, the description was reinstated in the tariff effective January 21, 1976 as per copy of tariff Correction No. 64 attached. There are also attached copies of original Page No. 165 reflecting the omission. There are also attached copies of 32nd Revised Page No. 172 to our tariff F.M.C. No. 7 reflecting the inclusion of this item in the previous tariff just prior to its reissuance, copies of the paid freight bill, the ocean bill of lading covering the shipment on which this application is based and

[1] This decision became the decision of the Commission June 9, 1976.

[2] Through error the wrong bill of lading was attached to the application. This error was corrected and the proper bill of lading is now a part of the record.

1st Revised Page No. 21 to I.A.F.C. Tariff F.M.C. No. 11 reflecting the Bunker Surcharge in effect at time the shipment moved.

We have verified with all members of the Inter-American Freight Conference—Section A they either had no sailing during the period in question or carried no Coal Tar (Non-Hazardous) shipments, other than that covered by this application. Effective Jan. 1, 1976 there was a general rate increase of approximately 5.5% which accounts for the difference between the rate in effect last Dec. $127.00 W/M and $133.50 W/M.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90–298, and as further implemented by Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment.

Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping Act (Public Law 90–298)[3] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[4] states the *Purpose of the Bill:*

[Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

The administrative error by which applicant inadvertently omitted the Coal Tar item is clearly the kind of relief contemplated under section 18(b).

It is therefore found that:

[3] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[4] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

1. There was an administrative error due to an inadvertence in failing to include the specific commodity item Coal Tar (Non-hazardous) in the reissued tariff;

2. Such refund will not result in discrimination among shippers;

3. Prior to applying for authority to refund a portion of the freight charges, Delta Steamship Lines, Inc., filed a new tariff which set forth the rate on which the refund would be based; and

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, the Delta Steamship Lines, Inc., will be permitted to refund $1,469.60 to the Goodyear Tire & Rubber Co.

An appropriate notice will be published in the tariff of the Delta Steamship Lines, Inc.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
May 13, 1976.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 477

WYANDOT EXPORTING CO.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING WAIVER OF CHARGES

June 9, 1976

No exceptions having been taken to the initial decision 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 June 9, 1976.

It is Ordered, That applicant is authorized to waive collection of $196.36 of the charges previously assessed Wyandot Exporting Co.

It is further Ordered, That applicant shall 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 477 that effective October 15, 1975, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from October 15, 1975, through October 17, 1975, the rate on 'Popcorn, Raw, Off Ear, in bags or cases' is $64.50 W, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff."

It is further Ordered, That waiver of the charges shall be effectuated within 30 days of service of this notice and applicant shall within five days thereafter notify the Commission of the date and manner of effectuating the waiver.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 477

WYANDOT EXPORTING CO.

v.

SEA-LAND SERVICE, INC.

Adopted June 9, 1976

Application granted.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Sea-Land Service, Inc., seeks permission to waive collection of a portion of the freight charges on a shipment, Popcorn, Raw, Off Ear, in bags or cases, weighing 44,440 lbs. which was carried by Sea-Land from Elizabeth, New Jersey, to Valencia, Spain.

From the application it would appear that when Sea-Land's sales representative was soliciting the export shipments of Wyandot Exporting Company, he was told on October 9, 1975, of a shipment ready to move to Valencia, Spain. Wyandot agreed to let Sea-Land have the shipment if it met a rate of $64.50 per ton offered Wyandot by a competing carrier. The rate in effect at the time was $75.50 per ton less 10 percent house-to-house discount. (Sea-Land Tariff No. 166, FMC–43, Item 6480, 11th Revised Page 106.)

Sea-Land's next sailing to Valencia was the *S.S. Los Angeles,* Voyage 113–E, then scheduled to sail from Elizabeth on October 14, 1975. On October 9, 1975, the sales representative got approval of the $64.50 rate by phone from Sea-Land's Mediterranean Pricing Division. The sales representative requested an effective date of October 13, 1975. At 1:30 P.M. on October 9, 1975, the sales representative confirmed by teletype the phone request and the Mediterranean Pricing Division's agreement to the $64.50 rate. However, the sales representative failed to include in the message the proposed effective date of October 13, 1975. Sea-Land describes what happened next:

[1] This decision became the decision of the Commission June 9, 1976.

Administrative oversight by the Pricing Division in failing to process promptly the request for publication and filing of the agreed rate with this Commission, and clerical failure to recall and attach to it the verbal request for effective date of October 13, resulted in delay until Tuesday, October 14, of formal publication instructions to Sea-Land's tariff publishing officer. Not knowing that the proposed rate was meant to be effective for a sailing scheduled for that same day, the tariff publishing officer followed his normal procedure by filing the reduced rate to become effective in time for the next sailing, then scheduled for October 21. Filing was made on October 17, 1975 by teletype to Branch I. (Item 6480 on 12th Revised Page 106 to Tariff No. 166, FMC-43.)

Unaware of the failure to secure the October 13, 1975, effective date for the $64.50 rate, Wyandot forwarded the shipment and it was loaded on board the *S.S. Los Angeles* on October 15, 1975, and the ship sailed the same day. The Sea-Land bill of lading covering the shipment freighted at the $75.50 per ton less 10 percent rate and the aggregate freight charges of $1,348.08 were computed on that basis. Wyandot, however, recalculated the charges using the promised $64.50 rate and paid a total charge of $1,151.72. The "short-payment" of $196.36 was discovered during processing "through accounting and rate review channels," and this led to the further discovery of the failure to secure the October 13, 1975, effective date.

Thus as Sea-Land puts it, ". . . late publication of the reduced rate per ton was the result entirely of [Sea-Land's] administrative failure to promptly process a tariff publication when time was of the essence, compounded by a clerical failure to include in the publication instructions the effective date that was specifically desired."

No other Special Docket Applications involving this rate situation have been filed and Sea-Land knows of no other shipments of the same commodity during this period from other shippers.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817, as amended by Public Law 90-298, and as further implemented by Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92, is the law sought to be invoked. Briefly it provides:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in [the] foreign commerce [of the United States] to refund a portion of [the] freight charges collected from a shipper or waive the collection of a portion of the charges from a shipper . . . where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to an inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers. Furthermore, prior to applying for such authority, the carrier must have filed a new tariff which sets forth the rate on which such refund or waiver would be based. The application for refund must be filed with the Commission within one hundred and eighty days from the date of shipment. Finally the carrier must agree that if permission is granted, an appropriate notice will be published in its tariff, or such other steps taken as may be required to give notice of the rate on which such refund or waiver would be based.

The legislative history of the amendment to section 18 of the Shipping

Act (Public Law 90–298)[2] specifies that carriers are authorized to make voluntary refunds and waive the collection of a portion of their freight charges for good cause such as bona fide mistake. The nature of the mistake was particularly described:

> Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates.

The Senate Report[3] states the *Purpose of the Bill:*

> [Voluntary refunds to shippers and waiver of the collection of a portion of freight charges are authorized] where it appears that there is an error in a tariff of a clerical nature, or where through inadvertence there has been a failure to file a tariff reflecting an intended rate.

Quite obviously the administrative and clerical oversight set out above is of the kind contemplated by section 18(b)(3). The application should be granted.

It is therefore found that:

1. There was a tariff filing error due to inadvertence;

2. The granting of the requested waiver will not result in discrimination among shippers;

3. Prior to applying for permission to waive the collection of a portion of the freight charges Sea-Land filed a new tariff setting forth the rate upon which the waiver is to be based; and

4. The application was filed within 180 days of the date of shipment.

Accordingly, Sea-Land is granted permission to waive the collection of $196.36 from Wyandot Exporting Company.[4]

An appropriate notice will be published in the tariff of Sea-Land.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
May 18, 1976.

[2] House Report No. 920, November 14, 1967 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges. Statement of Purpose and Need for the Bill to Amend Provisions of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges.*

[3] Senate Report No. 1078, April 5, 1968 [To accompany H.R. 9473] on *Shipping Act, 1916: Authorized Refund of Certain Freight Charges*, under *Purpose of the Bill.*

[4] Curiously enough, but without relevance to granting it, Wyandot was unaware of the application of Sea-Land to waive collection of the monies. (See letter from Wyandot to me dated April 20, 1976.)

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-11

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION - SEQUOIA FORWARDERS COMPANY

Applicant for an ocean freight forwarder license found to be independent of shipper or consignee interests as required by section 1 of the Shipping Act, 1916. Application granted.

Robert T. Basseches for Applicant.

John Robert Ewers and *Joseph B. Slunt* as Hearing Counsel.

REPORT

June 16, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

This proceeding was instituted by the Commission to determine whether the common ownership of Sequoia Forwarders Company (Sequoia), an applicant for an independent ocean freight forwarder license, and Cal-West Produce Enterprises (Cal-West), a produce broker for a client engaged in the movement of produce in the export commerce of the United States, by third parties, leaves Sequoia in the position of independence from shippers as required by section 1 of the Shipping Act, 1916 (the Act).[1]

Hearings were held and Administrative Law Judge William Beasley Harris has issued an Initial Decision in which he denied Sequoia's application for a license. Applicant has filed exceptions to the Initial Decision to which Hearing Counsel have replied. We heard oral argument.

FACTS

The relevant stipulated facts are essentially as follows.

Two individuals who equally own Sequoia, a partnership established in

[1] Section 1 of the Act defines an "independent ocean freight forwarder" as:

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

1974, also equally own Cal-West, a corporation. Cal-West acts solely as a licensed produce broker under the Perishable Agricultural Commodities Act, 1930.[2] In such capacity approximately 20 to 25 percent of Cal-West's time is spent as the broker of fresh produce for American Foods, A.B. (American Foods), a Swedish company which purchases produce from the United States for consumption in Sweden.[3] Neither Cal-West nor American Foods has any financial or proprietary interest in one another.

Except for the price of lettuce produce, Cal-West generally includes its brokerage in the agreed sales price and its brokerage fee is not identified as a separate charge on the invoice. Cal-West's principal (American Foods) pays the invoice amount, including brokerage directly to the seller who in turn remits the brokerage fee to Cal-West.

While Cal-West has complete freedom to search out various sellers of produce to determine what produce are available, it has no leeway with respect to price and quantity on produce that meet the requirements of American Foods and have subsequently become the subject of negotiations between Cal-West and the American supplier of produce. These two requirements are firmly dictated by American Foods through almost daily communications with Cal-West although there is no continuing contract between them.

During the negotiations on contracts for produce the seller is aware that Cal-West is acting only as a broker for American Foods and not as a purchaser or seller for Cal-West's own or joint account. Accordingly, the seller invoices the purchase price directly to American Foods. Cal-West never guarantees the performance of American Foods nor otherwise shares in the risk of sale; in fact, unless specifically agreed Cal-West assumes no responsibility for payment of the seller's invoice. Further, Cal-West never advances its own funds for payment of such invoices nor does it retain any common law or statutory lien or interest in the produce contracted for.[4]

In addition to negotiating on behalf of American Foods, Cal-West will inspect the produce purchased to insure quality, and when requested, arrange overland transportation for the produce, in American Foods' name, from the seller's storage area. For these services Cal-West is paid the uniform industry brokerage fee of 10 cents for each box of produce subject to the contract. Under Department of Agriculture regulations, such brokerage fee is earned by Cal-West, once a written confirmation of sale has been executed, whether or not the contract is performed.

[2] This statute authorizes produce brokers, such as Cal-West, to be:

. . . engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively. . . . (7 U.S.C. §499(a)(7)).

[3] Of the dozen foreign consignees for which Cal-West acts as a produce broker only American Foods utilizes ocean transportation in the foreign commerce of the United States.

[4] Cal-West never physically takes possession of the produce nor does its name appear on either the invoice covering the sale of produce (except as broker) or on the bill of lading.

INITIAL DECISION

In denying Sequoia's application for a license, the Presiding Officer first rejected all arguments of both parties relating to the legislative history of the freight forwarder legislation and, specifically, to that portion of the legislative history dealing with the "independence" requirement of section 1 of the Act, on the stated grounds that such arguments "have been disposed of by the *Zanelli* case",[5] and that therefore, "any further consideration, discussion or suggestion . . . would cloud rather than clarify the matter."

The Presiding Officer next addressed the matter of whether Applicant here, Sequoia, possessed the requisite independence from shipper interests to qualify it for a freight forwarders license. After reciting the conflicting positions taken by the parties the Presiding Officer summarily concluded that he:

> . . . agree[d] with the position and reasoning of Hearing Counsel, and such other reasons as given,[6] in finding that Cal-West is an agent for a consignee, and, as such, Cal-West is not "independent" nor will be "independent" within the meaning of section 1 of the Act.[7] (Footnotes Added)

POSITION OF THE PARTIES

Sequoia excepts to the denial of its application for a license, taking issue with the Presiding Officer's conclusion that Sequoia is not "independent" within the meaning of section 1 of the Act. Its arguments, for the most part, are but recapitulations of arguments advanced before the Presiding Officer.

Sequoia first argues that if the Presiding Officer had not ignored the legislative history of the freight forwarder law, he would not have misinterpreted the court's opinion in *Zanelli*. Sequoia contends that, had

[5] *Hugo Zanelli d/b/a Hugo Zanelli & Co.*, ______ F.M.C. ______ (1974), 14 S.R.R. 1266, *Aff'd per curiam* in *Zanelli v. Federal Maritime Commission*, 524 F.2d 1000 (5th Cir. 1975).

[6] The "other reasons given" appear to relate to his collateral findings that: (1) Sequoia has been conducting freight forwarding operations prior to submitting its present application; (2) the license application was being filed as a result of dissatisfaction with existing West Coast freight forwarding service; and (3) Sequoia's request for a license is not intended to serve the best interests of the public. We agree with Hearing Counsel that these findings "are beyond the issue set for hearing and are not related to the decision on the one issue properly before the Administrative Law Judge." They will accordingly be disregarded as irrelevant.

[7] In their brief before the Presiding Officer, Hearing Counsel took the position, *inter alia*, that Applicant could not be licensed as an independent ocean freight forwarder because its alter ego, Cal-West, "acts as a purchasing agent for a consignee and purchaser of shipments moving to foreign countries by oceangoing common carriers" contrary to the independence requirement of section 1 of the Act. In support of this proposition Hearing Counsel referred to the court's opinion in *Zanelli*, wherein it was stated that:

> . . . an independent ocean freight forwarder *cannot hold such a license if he acts as* a shipper, *agent for a consignee*, seller, financier, or has obtained a beneficial interest in the goods shipped. (emphasis theirs).

Hearing Counsel viewed this language as acknowledging a congressional intent that a forwarder be "absolutely independent" and precluding Cal-West's activities here.

Hearing Counsel also relied on the change in language between the earlier definition of the term "foreign freight forwarder" and that finally adopted, noting that while the earlier definition would have specifically allowed various persons including "resident buyers [and] brokers," to be licensed as "foreign freight forwarders," the legislation finally adopted excluded such persons.

The reason for this "absolute independence" requirement, Hearing Counsel explained, was because Congress was intent on "not only halting the payment of rebates but also defining the role of forwarders and setting standards for industry." Hearing Counsel was of the opinion that the licensing of Sequoia under the circumstances presented here would pave the way for possible rebating and other potential abuses the licensing provisions were intended to prevent.

the Presiding Officer reviewed the purpose and intent of the freight forwarder laws, he would have realized that the court, in *Zanelli,* was only restating the congressional mandate that only when an applicant fits within any of the statutorily prohibited categories of section 1 is the bar to licensing absolute. Applicant points out that when Congress adopted the language of section 1, it did so with the express purpose of prohibiting the refunding of brokerage to shippers in those situations where there existed a close ownership or control relationship between the shipper and the forwarder, and was, in effect, setting forth categories of relationships which in and of themselves would remove the "independence" necessary to be a licensed freight forwarder. Sequoia concludes that since the facts of record here do not establish Cal-West as fitting into any of the proscribed categories of section 1, it has satisfied the independence requirement and should be licensed.

Hearing Counsel, in their reply to exceptions, take the position that the Presiding Officer was correct in denying Sequoia's freight forwarder license application. In supporting the ultimate determination reached in the Initial Decision as proper and well-founded, Hearing Counsel put forward much the same contentions as they did in the proceeding below. Thus, Hearing Counsel argue that the "absolute independence" requirement of section 1 is a complete bar to the licensing of "brokers or purchasing agents," such as Cal-West/Sequoia. This position, Hearing Counsel resubmit, is supported not only by the decisions of the court and this Commission in *Zanelli* but by the legislative history of the freight forwarder legislation as well.

Hearing Counsel again voice their opinion that "the relationship between Cal-West and American Foods could lead to the very type of indirect rebates Congress sought to bar by the legislation." Cited as an "example" is the possibility that Cal-West could, in consideration of the ocean freight brokerage which Sequoia would receive as a freight forwarder on American Foods' shipments, reduce the fees it earns as a produce broker and funnel indirect rebates to American Foods. Also of concern to Hearing Counsel is the possibility that Sequoia would aid Cal-West and/or American Foods in competing with other purchasers who give their forwarder business to Sequoia.

Hearing Counsel further submit that Sequoia should not be allowed to minimize the control aspects existing between American Foods and Cal-West.[8] In this regard, Hearing Counsel submit that while, in theory, Cal-West may refuse to act for American Foods, in practice, American Foods has economic control over Cal-West beyond that conferred by the actual agency agreement since Cal-West is dependent upon American Foods for

[8] Sequoia argued that since American Foods has no stock or proprietary interest in Cal-West and since Cal-West is not subject to any continuing contractual obligation to American Foods, "control" does not exist in the statutory sense of section 1 of the Act. In short, Sequoia submits that the direction given by American Foods to Cal-West with respect to price and quantity of produce is not the kind of control which can lead to indirect rebates, if Sequoia were licensed.

a major portion of its income. As a result, it is inconceivable to Hearing Counsel that Cal-West will not take into consideration the ocean brokerage paid to Sequoia in setting its fee to be charged American Foods.

Finally, Hearing Counsel point out that since Department of Agriculture regulations governing produce brokers (7 C.F.R. 46.27 and 46.28) make it clear that a produce broker acts as an "agent" for the buyer of produce, it would be impossible for Sequoia not to violate section 510.24(c) of General Order 4, considering the common ownership between it and Cal-West.[9]

DISCUSSION AND CONCLUSIONS

As the parties here have stipulated, "the proceeding presents a single issue: Whether Sequoia, if granted a license, would be an 'independent ocean freight forwarder' as defined in section 1 of the Shipping Act."[10] On the basis of the record before us and for reasons stated below, it is our opinion that Sequoia is in fact and in law "independent" of shipper and consignee interests, as required by section 1 of the Act, and, accordingly, qualified to be licensed as an ocean freight forwarder by this Commission.

The legislative history of the bill which ultimately became section 44 of the Act makes it clear that Congress established the independence requirement for forwarders to prohibit those categories of relationships which, in and of themselves, could be presumed to give rise to an illegal rebate. In fact, Congress acknowledged that a forwarder could conduct nonforwarding activities for shippers, consignees and other persons, delineated in section 1 of the Act, provided that such activities did not affect the forwarder's independence. The Commission itself allowed licensed forwarders to perform certain services for their shipper-clients.[11]

In support of their basic position that "Cal-West's activities may not be performed by an independent ocean freight forwarder," Hearing Counsel make much of the fact that while an earlier version of the freight forwarder legislation expressly included among the types of entities allowed to function as freight forwarders "resident buyers, brokers, [and] commission merchants," the final version did not address these activities specifically. Hearing Counsel view this drafting change as providing the

[9] 510.24(c) of General Order 4 (46 C.F.R. 510.24(c)) provides that:

No licensee shall share, directly or indirectly, any compensation or freight forwarding fee with a shipper, consignee, seller, purchaser, or their agents, affiliates or employees; nor with any person or persons advancing the purchase price of the merchandise or guaranteeing payment therefor; nor with any person or persons having beneficial interest in the shipment.

[10] The parties have further stipulated, and we have no basis to disagree, that subject to this issue, "Sequoia is fit, willing, and able properly to carry on the business of forwarding."

[11] *Bolton & Mitchell, Inc.*; 15 F.M.C. 248 (1973), *Report on Reconsideration*, 16 F.M.C. 284 (1973); *Aff'd on rehearing, Bolton & Mitchell, Inc.*, Supplemental Report, ... F.M.C. ...... (1973), 14 S.R.R. 179; *Aff'd on rehearing, Second Supplemental Report*, ... F.M.C. ...... (1974), 14 S.R.R. 750; *Denial of Petition for Reconsideration*, ... F.M.C. ...... (1975), 16 S.R.R. 87; *Hugo Zanelli & Co., supra*, at note 5. See also Commission *Circular Letter REF. DFF-2*, dated April 29, 1965, which in effect, allows forwarders to become resident buyers for foreign consignees provided they acquire no beneficial interest in the goods shipped.

"clearest indication" of Congress' intention that "these activities were no longer allowed to be performed by forwarders". We are not so convinced.

The legislative history of the freight forwarder amendment fails to indicate why the earlier approach was abandoned. Certainly, there is no evidence that the intent of the change in language, which Hearing Counsel views as so significant, was to preclude the licensing of the entities listed in the earlier bill. Indeed, it is equally as likely that the earlier approach was rejected in favor of that finally adopted because the Congressional draftsmen realized the problems inherent in attempting to enumerate a host of particularized activities, lest one be omitted that should be included. For whatever reason Congress went from the more specific listing of job titles to a more generic approach to the matter, the fact remains that the change in approach is absolutely inconclusive as an indication of the drafters' intent.

Hearing Counsel's reliance on the *Zanelli* decisions as support for its proposition that Sequoia is not "independent" within the meaning of section 1 of the Act is equally misplaced. Both Hearing Counsel and the Presiding Officer apparently misinterpret the standard of "absolute independence" required by section 1 of the Act and explained in the *Zanelli* case. The *Zanelli* case does not stand for the proposition that *every* agency or other relationship between a forwarder and an export shipper is proscribed by the independence requirement of section 1 of the Act. The statutory requirement of "absolute independence", discussed in *Zanelli,* is "absolute" only to the extent it "absolutely" bars the licensing of any applicant whose activities cause it to be included in one of the prohibited categories of section 1 of the Act. It is not a standard requiring an applicant to be "absolutely independent" of shipper interests, as the Presiding Officer would apparently have it. That the section 1 independence requirement does not preclude all relationships between forwarders, on the one hand, and shippers and consignees, on the other, was specifically made clear by the court in *Norman G. Jensen v. F.M.C.,* 497 F.2d 1053 (CA 8th Cir. 1974).

In the *Jensen* case the court reversed the Commission's findings that Jensen, a licensed forwarder, was, by virtue of its connection with ITC, through common ownership and interlocking officers and directors, "shipper-connected" and, as a result, derived a beneficial interest from the fee paid ITC for rendering to its shipper-clients the following services: (1) making arrangements for transportation to the ports; (2) preparing export declarations, consular invoices and related documents; (3) receiving purchase orders and payment; (4) preparing commercial invoices and inventory reports; (5) investigating credit; and (6) selecting freight forwarders.

In rejecting the Commission's determination that, by reason of its relationship with ITC and ITC's activities, Jensen was "shipper-connected'' and, accordingly, did not have the requisite independence required by section 1 of the Act, the court explained:

> [The] conclusion that ITC is 'shipper-connected,' while possibly accurate depending on how the term is defined, lacks any significance. It is undisputed that ITC is connected with its shipper-clients because it does render services to them for a fee. Any forwarder, for that matter, who renders services to a shipper-client will be 'shipper-connected.' This association, however, would not affect Jensen's status as an independent ocean freight forwarder under the definition set forth in the Freight Forwarder Law even assuming, arguendo, that Jensen controlled, or was controlled by, ITC. Jensen's status, for that purpose, would be affected only if ITC was a shipper or consignee or a seller or purchaser of shipments to foreign countries, or had a beneficial interest in such shipments. [497 F.2d at 1057].

Since neither the language of section 1, its legislative history nor judicial interpretations of that section require that an applicant for a forwarders license be free of *all* shipper-connections, Sequoia is correct in defining the ''issue'' here as:

> . . . not whether Sequoia meets some abstract standard of ''absolute independence'', but rather whether it complies with the requirement of 'independence' as defined in the statute.

On this question, we concur with Sequoia that it does so comply.

The record before us does not indicate that Cal-West is either a ''shipper'', ''consignee'', ''seller'', or a ''purchaser'' of export shipments within the meaning of section 1 of the Act, or that it has any ''beneficial interest'' in such shipments. We find no support for Hearing Counsel's assertion that Cal-West, in its role of produce broker, is a ''purchaser'', as that term is commonly understood; particularly, since Cal-West obtains neither a common law nor a statutory lien in the produce purchased by American Foods. As regards Hearing Counsel's characterization of Cal-West as a ''purchasing agent'', it should be pointed out, as Sequoia has noted, that where the Commission has found a ''purchasing agent'' to lack the requisite independence, the forwarders involved had acquired a ''beneficial interest'' in the export cargo by virtue of their activities;[12] such a finding cannot be supported here. Thus, it is the conduct of the particular person or entity involved, and not its mere characterization as a ''purchasing agent'', which raises the statutory bar.

Further, there is no reason to believe that the arrangement between Cal-West and American Foods is such that American Foods ''directly or indirectly'' controls Cal-West within the meaning of section 1 of the Act. Cal-West and American Foods neither have employees in common, nor do they own stock or have a proprietary interest in, or a corporate connection with, one another. Clearly, the relationship between American Foods and Cal-West is not the type which the Commission has in the past

[12] *Bolton & Mitchell, Inc., supra,* note 11; *Hugo Zanelli & Co., supra,* note 11.

found to allow for the granting of illegal rebates, and therefore prohibited by section 1 of the Act.[13]

We are also not persuaded by Hearing Counsel's suggestions that Cal-West, in consideration of Sequoia's brokerage, would reduce its fee to American Foods. As Sequoia, in its exceptions pointed out, this theory was specifically rejected by the court in *Norman G. Jensen v. F.M.C., supra.* In disposing of the Commission's argument that ITC, in consideration of Jensen's brokerage, would reduce its fee to its shipper-clients, the court's pronouncement, which we find equally controlling here, was that:

> This same rationale would require the finding of a violation of §16 any time a shipper employs an ocean forwarder because it is more economical than maintaining its own forwarding staff. It would strain the words of the statute too far without furthering any of the objectives for which the Act was designed to serve to find a violation in this situation. [497 F.2d at 1059]

Equally of little consequence is the possibility, cited by Hearing Counsel, that Sequoia, if licensed, would use the confidential information obtained as a forwarder to the benefit of Cal-West and/or American Foods in competing with Sequoia's other shipper-clients. That Sequoia might engage in such activity is wholly speculative and of no probative value whatever in determining Sequoia's present independence under section 1 of the Act. In short, what an applicant *might* do, if licensed, is insufficient to justify the denial of a license if that applicant is otherwise qualified in fact and in law. Once licensed, however, the forwarder is subject to all the Commission's rules and regulations and any unlawful conduct or activity can be handled in an appropriate proceeding.

Finally, Hearing Counsel, in support of their contention that Sequoia cannot be licensed as a forwarder, rely in part on the language of section 510.24(c) of the Commission's Rules, which in essence, prohibits a forwarder from sharing directly or indirectly any compensation or forwarding fee with any shipper, consignee "or their agent, affiliates or employees."[14] Hearing Counsel take the position that since Cal-West is, admittedly, an agent of a shipper, (American Foods) and since there is common ownership between Sequoia and Cal-West, it would be impossible for Sequoia not to violate section 510.24(c). Thus, Hearing Counsel argue that if section 510.24(c) is to be consistent with section 1 of the Act, the prohibition against a forwarder being a purchaser also extends to its acting as an agent of the purchaser.

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[13] *Cleto Hernandez R. d/b/a Pan Inter-Freight Forwarder Application*, Docket No. 75-17, served March 9, 1976; *License No. 790-North American Van Lines*, 14 F.M.C. 215 (1971); *Speed Freight-Independent Ocean Freight Forwarder License No. 1092*, 14 F.M.C. 1 (1970); *York Shipping-Freight Forwarder Application*, 9 F.M.C. 72 (1965); *York Shipping Corporation-Freight Forwarder Application*, 9 F.M.C. 72 (1965); *Del Mar Shipping Co.-Freight Forwarder Application*, 8 F.M.C. 493 (1965); *Wm. V. Cady-Freight Forwarder Application*, 8 F.M.C. 352 (1964). It should also be realized that although the business of American Foods comprises 20 to 25 percent of Cal-West's business, American Foods is only one of a dozen consignees with whom Cal-West serves as a produce broker. This absence of exclusivity, while certainly not singularly determinative of Sequoia's independence, is another factor indicative of the independence of Cal-West/Sequoia.

[14] We should point out, at this juncture that section 510.24(c) was not intended to enlarge upon the statutory bars to licensing in the first instance but rather to govern a forwarder's activities once he is licensed.

The purpose of section 510.24(c) is to prevent illegal rebates by prohibiting a licensed forwarder from sharing any part of his revenue with a shipper or an agent thereof, since were he to do so the shipper would in effect be receiving a rebate. While Cal-West may be a special agent of American Foods under the Agricultural Commodities Act, we do not agree that it necessarily follows that this type of special agency is of the nature which would invoke the prohibition of section 510.24(c). Section 510.24(c) is directed at those agency arrangements which give rise to direct or indirect rebate to the shipper, *i.e.*, where the agent is *controlled* by his shipper or consignee principal. The arrangement at issue here does not present the type of "agency" to which section 510.24(c) was intended to apply, since, as we have already determined, there is no control exercised over Cal-West/Sequoia by the shipper, American Foods.

In conclusion, we find that Sequoia is independent within the meaning of section 1 of the Act and is otherwise fit, willing and able to carry on the functions of an independent ocean freight forwarder. Accordingly, its application for a forwarders license is hereby granted.

An appropriate order will be entered.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–11

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION—SEQUOIA FORWARDERS COMPANY

ORDER

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

It is ordered, That the application for license of Sequoia Forwarders Company is hereby granted pursuant to section 44, Shipping Act, 1916.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–73

PORT OF HOUSTON AUTHORITY

v.

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

Complainant has failed to demonstrate that certain practices at the Ports of Galveston and Corpus Christi related to the handling of cotton cargoes, violate sections 16, 17 or 18(b)(3) of the Shipping Act.

F. William Colburn for Complainant, Port of Houston Authority.

Robert Eikel for Respondents, Lykes Bros. Steamship Co., Inc., *et al.*

Frank C. Brooks for Intervenor, Nueces County Navigation District No. 1.

Carl S. Parker for Intervenor, Board of Trustees of the Galveston Wharves.

REPORT

June 16, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett and James V. Day, *Commissioners*)*

This proceeding was initiated upon the complaint of the Port of Houston Authority (Houston)[1] against 28 carriers[2] serving the international cotton trade from the Texas ports of Houston, Corpus Christi, and Galveston (Respondents). The Board of Trustees of the Galveston Wharves (Galveston) and the Nueces County Navigation District No. 1 (Corpus Christi) intervened in the proceeding.[3]

The complaint charges that the Respondents stopped paying certain

*Commissioner Bob Casey not participating.

[1] The Port of Houston Authority is an agency of the State of Texas, charged with promoting, developing and preserving the waterborne commerce of the Port of Houston.

[2] Lykes Bros. Steamship Co., Inc., China Merchants Steam Navigation Ltd., Zim Israel Navigation Co., Ltd., Orient-Overseas Line, Inc., Nippon Yusen Kaisha Line, Ltd., Maritime Co. of the Philippines, Korean Shipping Corp., Charante T. & J. Harrison Ltd., Mitsui O.S.K. Lines, Ltd., Yamashita-Shinnihon Line, Waterman Steamship Corporation, Royal Netherlands Steamship Line, Hoegh Line, Blue Sea Line, Combi Line, Polish Ocean Line, Deppe Line Cie. Maritime Belge Lloyd Royal, Kawasaki Kisen Kaisha Line, Ltd., Atlantic Gulf Service, French Line, Trans-Sea Shipping Corp., Hellenic Lines, Ltd., Central Gulf Lines, Inc., DAFRA Line, Nervion Line, Turkish Cargo Line, Marchessini Line, and Barber Line.

[3] The Intervenors own and operate port terminal and harbor facilities at Galveston and Corpus Christi, Texas, respectively.

"heading" charges on shipments delivered to Houston after April 1, 1973,[4] but continued to make such payments at Galveston and Corpus Christi. This situation has allegedly caused cotton cargoes to be unfairly diverted from Houston to the other two ports and is claimed to be unduly prejudicial to Houston and unreasonably preferential to Galveston and Corpus Christi within the meaning of sections 16 and 17 of the Shipping Act, 1916 (Act). Houston also alleged that Respondent's payment of "heading" charges at Galveston and Corpus Christi violated section 18(b)(3) of the Act which forbids carriers to offer or extend services or privileges not stated in a duly filed tariff.

Administrative Law Judge Stanley M. Levy (Presiding Officer) issued an Initial Decision finding Respondents' selective payment of "heading" charges to violate sections 16, 17 and 18 of the Act. The proceeding is now before the Commission upon exceptions. We have heard oral argument.

FACTS

Cotton shipments at the three Texas ports involved in the instant controversy are handled in the following manner:

Houston

Prior to April 1, 1973, all export cotton cargo arriving at Houston was unloaded from overland conveyances by laborers employed and paid by the Port Authority. These laborers placed the cotton in the specified transit shed space adjacent to the vessel's assigned berth and stacked or headed the bales in the process. Shippers located *outside* of Harris County, Texas, paid Houston an "unloading" charge of $0.77 per bale for this service. Local cotton shippers did not pay any "unloading" charge. In addition, Houston's terminal tariff contained a $0.25 per bale "heading" charge which was payable by the carrier. Although not so stated in Houston's tariff, this charge was assessed only against bales arriving from compresses and warehouses *within* Harris County, Texas.

On April 1, 1973, the Port of Houston voluntarily discontinued its cargo handling and unloading services. These functions were assumed by private companies operating within the port area which refused to treat cotton bales differently from other cargoes by differentiating between local and non-local shippers. These companies issued tariffs which deleted "heading" charges entirely and assessed all cotton shippers or consignees an "unloading" charge of $0.70 per bale. "Unloading" includes all within port cargo handling from overland conveyance to the ship's assigned transit shed as well as initial *positioning of the bales within the shed.*

[4] Historically, "heading" meant the act of placing cotton bales on end so they could be readily hoisted aboard ship. More recently, "heading" has come to refer to all bale handling *subsequent to unloading* from the conveyance bringing the bales to the port area. This can include transportation to a transit shed and other within port movements as well as stacking, pyramiding, or heading (placing the bales on end) the cotton at its destination. "Heading" is used here in its broader sense.

Cotton is thus ordinarily headed (placed on end) in the transit shed at no cost to the carrier. Any further arrangement of the bales would be paid for by the vessel, however.

The record does not reveal when custody of export cotton shipments passes to the Respondents at the Port of Houston.

Galveston

Cotton received in rail cars is ordered directly to pier on ship's berth and unloaded by port authority employees. Galveston's published tariff lists an "unloading" charge for this service which is paid by the shipper. The rail car unloaders place the unloaded bales in a headed (on end) position, and no additional fee is assessed for this service. If space permits, the cotton remains where it is unloaded and there is no need for additional bale handling prior to loading aboard ship. When space limitations or other interests of the carrier require that the unloaded cotton be rearranged, this work is done by laborers known as "headers" who charge the carrier an hourly rate for their services.

A different procedure applies when a rail car contains bales with more than one shipper's mark. Such cars require additional segregation and drayage services, and separate segregation and drayage charges are assessed by Galveston against the shipper on all cotton other than the largest lot. The largest lot is treated in the same manner as a full car lot. The odd lots are segregated and if a lot is to be moved to another pier a local transfer company is engaged. The transfer company loads the bales on dollies pulled by tractors and delivers them to the second pier where it is received by a steamship company clerk and two "headers" employed by the carrier. The "headers" unload the dollies and the clerk issues the transfer company a receipt *after* it is unloaded.[5] If an odd lot is to be removed to a compress or warehouse instead of a pier, the transfer company drays it there at the warehouse's expense, but the shipper is still assessed the basic unloading charge and the additional segregation charge.

Most cotton delivered by truck arrives at Galveston's Cotton Receiving Lot, a loading/unloading area located some distance from the piers, where it is unloaded by Galveston employees. The "unloading" charge for trucks is the same as the charge for rail cars, *but also includes draying the cotton from the receiving lot to the ship's berth.* The shipper pays the "unloading" charge. Odd lot shippers pay an additional segregation charge, but not a drayage charge. At ship's berth the cotton is met by the carrier's clerk and its "headers," unloaded and receipted. Occasionally, trucks are allowed to proceed directly to ship's berth where they are unloaded by Galveston labor at the usual "unloading" charge without the assistance of carrier "headers." In such instances, however, the local Cotton Headers Union contract requires the carrier to pay its "headers"

[5] The transfer company's tractor driver generally assists the two "headers" in unloading the cotton, but is apparently not required to do so.

their usual per bale rate even though they do not do the work.[6] The carrier issues a receipt for the cotton after it is unloaded.

Cotton delivered from local warehouses arrives on tractor driven dollies and proceeds directly to ship's berth. It is handled by warehouse labor with the assistance of the two "headers" employed by the carrier and receipted by a steamship company clerk after it is unloaded. Galveston assesses no charges against cotton originating in local warehouses, but the "headers" receive their usual fee.

The record does not reveal when custody of export cotton shipments passes to Respondents at the Port of Galveston, although in most cases it seemingly occurs at approximately the time the carrier's clerk issues his receipt.

Corpus Christi

At Corpus Christi, export cotton arrives from places outside the port area by truck and rail car and arrives from local compresses by tractor-drawn dolly.

Rail cars stop on tracks adjacent to a warehouse or transit shed which is in turn adjacent to the vessel's berth space. The cars are usually spotted within 200 feet of the place or "pile" from which the bales are loaded aboard ship. Rail cotton is unloaded by laborers employed by a subcontractor of the Port who also move the bales to the pile and place them in a headed position. The subcontractor is always a stevedore and usually the same stevedore later employed by the carrier to load the cotton aboard ship. Under present billing practices, the stevedore bills the shipper directly at the rate specified in Corpus Christi's terminal tariff. Unloading includes moving the cotton from the rail car to the "pile" and the carrier pays no part of the "unloading" charge on rail cotton. Any further positioning of the bales is at the vessel's expense.

When export cotton arrives by truck, the truck is driven into a warehouse adjacent to the ship's berth and also unloaded by the Port's subcontractors. Charges for truck unloading are published by Corpus Christi and are again billed by the stevedore directly to the shipper. Once unloaded, truck cotton is moved from a paved driveway within the warehouse to the "pile" near ship's tackle and headed (placed on end) by the same men who unloaded the truck. These men are members of the local Cotton Headers Union, however, and their union contract calls for them to be paid separately for this "heading" work. The stevedore then bills the carrier directly for such "heading" services—at a current rate of $0.2026 per bale. Corpus Christi does not hold itself out to perform "heading" services, either with its own personnel or through subcontrac-

[6] The Cotton Headers Union is an affiliate of the International Longshoremens Association. In Galveston its members are paid a set fee of $0.1775 per bale for all cotton unloaded and positioned at ship's berth, except in the case of single mark bales unloaded from rail cars in headed positions. "Headers" are ordinarily employed by stevedoring companies who subcontract their labor to the carriers.

tors, and there is no charge or other reference in its terminal tariff for "heading" trucked cotton.

When the cotton arrives from local compresses, it is delivered to a warehouse adjacent to ship's berth by tractor-drawn dollies owned by the compresses and unloaded by laborers called "hookmen" who are employed and paid by the compresses for "hooking" the cotton off the dollies. Like cotton unloaded off trucks, the hooked bales are moved from the paved driveway to the pile by the same men who unloaded them, and the stevedore separately charges the carrier for this "heading" service at a rate of $0.2026 per bale. Again, Corpus Christi does not hold itself out to perform such service and there is no provision in its tariff for "heading" local cotton.

The record does not reveal when Respondents assume custody of export cotton shipments at the Port of Corpus Christi.

INITIAL DECISION

The Presiding Officer considered the crux of the controversy to be the ascertainment of how necessary cargo handling expenses are allocated between shipper and carrier once export cotton bales are delivered to each of the Texas ports involved. He found these expenses to be allocated differently at Houston, Galveston and Corpus Christi. At Houston, all costs are borne by the shipper. At Galveston the burden is sometimes on the shipper (rail cotton) and sometimes divided between shipper and carrier (truck and warehouse cotton). Shipper and carrier always divide handling expenses at Corpus Christi.[7] No evidence was found to support the Complainant's contention that cotton shipments are being diverted from Houston to the other ports because of Respondents' practices. In fact, the limited data submitted indicated that some 28,000 bales of cotton local to Corpus Christi was shipped from Houston during 1973–1974.

Despite the lack of economic injury to Houston, the Presiding Officer concluded that Respondents' partial payment of cotton "heading" expenses at Corpus Christi and Galveston, but not Houston, violates sections 16, 17 and 18 of the Act, and ordered Respondents to:

> Cease paying any of the costs of unloading, handling or heading cotton bales prior to the delivery of the cotton bales to the respondents unless they first publish tariff rules and regulations to that effect equally applicable to all shippers of cotton bales for export. I.D., at 12.

This result was grounded upon the premise that a carrier's payment of different cargo handling costs at different ports necessarily involves a discriminatory "absorption of costs otherwise chargeable to the shipper."[8] However, the only support offered for this sweeping proposition is two

[7] The Commission finds no evidentiary support for the Presiding Officer's uniquivocal determination on this point.

[8] The Presiding Officer held that:

> Undertaking a service or absorbing a charge which is otherwise chargeable to the shipper is a rebate and unless applicable to all shippers equally and set forth in the . . . tariffs of respondents is so clearly prohibited by the Shipping Act, 1916, as to be beyond dispute. I.D., at 11.

Commission decisions forbidding terminals from charging wharfage on non-railroad freight and making no such charge on freight tendered by railroads at the same port, *Practices of San Francisco Bay Area Terminals*, 2 U.S.M.C. 588 (1941), aff'd 320 U.S. 577 (1944); *Interchange of Freight at Boston Terminals*, 2 U.S.M.C. 671 (1942); and three decisions forbidding the furnishing of free storage to some shippers at a given port and not to others using the same port, *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966); *Storage Charges Under Agreements 6205 and 6215*, 2 U.S.M.C. 48 (1939); and *Storage of Import Property*, 1 U.S.M.C. 676 (1937).

Absent from the Initial Decision is any indication of whether the Respondents control the practices in question, that Respondents accept delivery or obtain custody of export cotton bales at the same time and in the same manner at each port; or that cotton "heading" expenses are costs which may properly be charged only to a shipper. Neither is there a finding that the differences in handling cotton at Galveston, Corpus Christi and Houston actually affect the shipper's cost in exporting cotton.

POSITION OF THE PARTIES

Both Galveston and Corpus Christi filed Exceptions to the Initial Decision. Replies to Exceptions were submited by Houston. The arguments of the respective parties are described below.

Galveston

Galveston excepts to the finding that "the facts at issue . . . are virtually without dispute," for it claims the Presiding Officer has misconstrued the evidence in a manner which led him to several inaccurate conclusions.

One significant factual error was the determination that delivery of cotton to carriers at Galveston and Corpus Christi was found to be "completed" at the time the steamship line's clerk tallied the cotton bales *and* gave a receipt for them. Galveston contends that the concept of "completed delivery" is crucial to the case and that it is "simply not true" that delivery is determined by the issuance of a cargo receipt; custody can and does pass from shipper to carrier regardless of whether the cargo has been receipted.

Galveston also excepts to the conclusion that 1) Respondents treat export cotton bales differently at Galveston and Corpus Christi than at Houston and 2) this difference in treatment violates sections 16, 17 and 18. Galveston claims the Presiding Officer's finding that "there is an economic burden on the bale of cotton to place it in the transit shed and that economic burden at Houston . . . is borne entirely by the shipper" (I.D., at 8) is inaccurate and contrary to certain testimony which indicated that once cotton is "unloaded" at Houston, any subsequent handling is paid for by the carriers.[9] Galveston is convinced that this is precisely the situation that prevails at its port and at Corpus Christi—the shipper pays the "unloading" fee and the carrier pays for any subsequent handling or "heading." The carrier alone makes the decision to rearrange or position cotton which has been "unloaded" based upon the amount of cargo to be lifted and the amount of space available.

Galveston concedes that the three ports have different "unloading" charges and that their cotton handling practices differ to some extent, but argues that these differences are minor and without diversionary intent. Galveston further states that even if the differences were found to have some anti-competitive effect, they are based solely upon local labor practices and port conditions and are therefore justifiable under the Shipping Act. Only undue or unreasonable preferences are condemned by law, *Intercoastal Investigation,* 1 U.S.S.B.B. 400, 444 (1935), and the mere publication of different charges does not, *ipso facto,* imply unreasonableness.

Moreover, Galveston contends that since it was Houston and not the other ports which altered its historic practices, it rings strangely hollow for Houston to now claim that the very differences it voluntarily created constitute illegal discrimination.

Galveston's final argument is that Houston has the burden of proof in this proceeding and has utterly failed to demonstrate why the differences in handling cotton bales at the three ports are unjustly discriminatory or materially affect the cost of transporting cotton.

Corpus Christi

Corpus Christi's objections are similar to Galveston's. Essentially, Corpus Christi claims that the Initial Decision erroneously describes the point at which cotton is delivered to ocean carriers at its port. An alleged contradiction in the Initial Decision's findings is recited as evidence of the Presiding Officer's misunderstanding of the facts.[10] Several judicial decisions are then cited to support the proposition that goods are "delivered" to a carrier when they pass from the custody and possession of the shipper into the custody and possession of the carrier. These decisions hold that delivery is a factual question which does not totally depend upon the issuance or nonissuance of receipts or bills of lading as such documents are considered to be but partial evidence of when delivery occurs. Corpus Christi contends that the record clearly indicates that the Respondents have custody and possession of export cotton bales from the instant they are unloaded from trucks and dollies[11] on the transit

[9] The testimony was that of Mr. C.E. Bullock, General Manager—Operations, Port of Houston Authority.

[10] The inconsistency is that at page 7 delivery is deemed to be "completed at [the] time the bales have been tallied and the clerk has given a receipt," while at page 11 it is stated that the Respondents occasionally "accepted delivery at the point of unloading rather than in place."

[11] Corpus Christi points out that the alleged absorption of "heading" charges only occurs in the case of truck and local warehouse cotton; rail cotton is subjected only to an "unloading" charge at all three ports.

shed floor, and the "heading" charge is assessed only for work performed *after* "delivery" is completed.

The Initial Decision would, in the opinion of Corpus Christi, require Corpus Christi cotton shippers to assume the obligation and expense of handling the cotton bales after they have been delivered to, and are in the possession of, the carrier; it is the carrier, not the shipper, that desires to move or arrange the cotton once it is unloaded and it is the carrier that benefits from any such subsequent handling. Corpus Christi therefore concludes that it is perfectly proper for the carrier to bear the expense of "heading" the bales.

Houston

Houston's Reply to Exceptions supports the findings and conclusions of the Presiding Officer, and stresses the fact that Houston shippers pay all costs of unloading, handling and heading cotton bales into the ship's transit shed regardless of overland transportation methods, while at Corpus Christi and Galveston the cost of "heading" is borne by the vessel in some instance. The cargo delivery cases cited by Corpus Christi have no relevance to the instant proceeding, because, even though they necessarily turned upon the point where "complete delivery" was made, the issue before the court was the risk of loss, not the application of the Shipping Act. According to Houston, the facts show disparate cotton handling practices at the three ports and the mere existence of this disparity violates the Act.

Discussion and Conclusions

The record below is far from clear, but sufficiently describes cotton handling practices at Houston, Galveston and Corpus Christi to indicate that the complained of variations do not violate sections 16 and 17 of the Act. It has long been established that not all preferences or advantages offered by carriers are condemned by law, but only those that are undue or unreasonable violate the Shipping Act. *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.* F.M.C. ,14 S.R.R. 1468 (1975), aff'd 527 F.2d 1386 (D.C. Cir. 1976); *Lake Charles Harbor and Terminal District v. Port of Beaumont Navigation District,* 12 F.M.C. 244 (1969); *Investigation of Overland and OCP Rates and Absorptions,* 12 F.M.C. 184 (1969), aff'd *Port of New York Authority v. Federal Maritime Commission,* 429 F.2d 663, 669–670 (5th Cir. 1970). *Stockton Port District v. Pacific Westbound Conference,* 9 F.M.C. 12 (1965), aff'd 369 F.2d 380 (9th Cir. 1966), *cert. den.,* 386 U.S. 1031 (1967); *Intercoastal Investigation,* 1 U.S.S.B.B. 400 (1935). Moreover, the existence of unjust discrimination or prejudice must be demonstrated by substantial proof. *Philadelphia Ocean Traffic Bureau v. Export S.S. Corporation,* 1

U.S.B.B. 538, 541 (1936); *Lake Charles Harbor and Terminal District v. Port of Beaumont Navigation District supra,* at 248.[12]

Applying these principles to the case before us, we find no basis for a determination that Respondents are selectively absorbing costs at Galveston and Corpus Christi which should be paid by their shippers or are otherwise unfairly discriminating against the Port of Houston. Houston's argument that the "heading" charges paid by Respondents are not true operational costs customarily associated with vessel loading and included in ocean freight rates without itemization is without support in the record. Nor does the evidence support the Presiding Officer's conclusion that the delivery of export cotton bales to the Respondents at Galveston and Corpus Christi is completed only *after* the challenged "heading" services are performed. Not only are the facts concerning the time at which cargo receipts are issued insufficient to support a precise finding on that point,[13] but existing case law unequivocally provides that the question of delivery is not decided entirely by the presence or absence of a cargo receipt. *E.g., Mackey v. United States,* 197 F.2d 241, 243 (2d Cir. 1952); *Stromeyer & Arpe v. American Lines S.S. Corp.,* 97 F.2d 360, 361 (2d Cir. 1938). We know of no Shipping Act authority which holds that completion of delivery is the sole criterion for allocating cargo handling expenses between shipper and carrier, and a flat policy which makes the validity of a given division of such expenses depend upon the moment a carrier chooses to issue a cargo receipt strikes us as arbitrary in the extreme.

We are not prepared to decide on the record before us whether any particular party must bear the heading fees on truck and local warehouse cotton unloaded at Galveston and Corpus Christi. We do, however, hold that Houston has failed to establish why its 1973 decision authorizing a uniform cotton "unloading" fee which includes positioning bales in the transit shed should necessitate a change in Galveston's and Corpus Christi's pre-existing cotton handling practices. The burden of proof in a section 22 complaint proceeding is always upon the complainant. When the burden is not met, the complaint must be denied.

Inasmuch as Houston has completely failed to demonstrate that the Respondents' payment of local "heading" charges has injured or unfairly affected any person, Houston's section 16 and section 17 allegations fail as a matter of law. The Shipping Act does not require all carriers or all ports to offer identical services or engage in the same practices. Competition and innovation are encouraged. Local differences are permit-

[12] In *Philadelphia Ocean Traffic Bureau, supra,* the Commission stated:

As a general rule there must be a definite showing that the difference in rates complained of is undue and unjust in that it actually operates to the real disadvantage of the complainants. In order to do this [a complainant must] reveal the specific effect of the rates on the flow of the traffic concerned and on the marketing of the commodities involved, and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities.

[13] No information at all was provided concerning cotton receipting practices at Houston or rail cotton delivered at Galveston and Corpus Christi.

ted up to the point they unfairly injure shippers, ports or other persons protected by the Act.

Finally, Houston has not established whether shippers or carriers primarily benefit from any particular aspect of cotton handling at Galveston or Corpus Christi. No one other than the Respondents has been identified as having a duty to pay for "heading" and there is no indication that this practice materially affects the aggregate cost of shipping cotton at the various ports involved. Cotton handling practices at Galveston and Corpus Christi appear to be grounded upon local labor and geographical considerations of long standing and the gravamen of the instant section 18(b)(3) dispute lies not with the Respondent carriers' tariffs, but with those of the three Port Authorities—these tariffs do not specifically identify those instances when "unloading" charges paid by the shipper include "heading" at ship's berth and when they do not. While the Port Authority tariffs are beyond the scope of the present record, we strongly recommend that clarifying amendments be made to reflect the actual unloading and heading practices followed by each port.

All of these circumstances compel us to conclude that there is no basis for finding Respondents to have violated section 18(b)(3) of the Act by failing to file tariffs which state when the basic ocean freight rate will include "heading" charges.

Respondents' actions have not been shown to violate any section of the Shipping Act, 1916. Accordingly, the Initial Decision in this proceeding is reversed and the complaint of the Port of Houston Authority is denied. An appropriate order will be issued.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–73

PORT OF HOUSTON AUTHORITY

v.

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

ORDER

The above-captioned complaint having been duly heard and the Commission having this day made and entered a report stating its findings and conclusions thereon, which report is hereby expressly incorporated herein;

IT IS ORDERED, That the complaint of the Port of Houston Authority is DENIED.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

Subchapter B—Regulations Affecting Maritime Carriers and Related Activities

[DOCKET NO. 73-4; TARIFF CIRCULAR 3; GENERAL ORDER 13]

Part 531—Filing of Freight and Passenger Rates, Fares, and Charges in the Domestic Offshore Trade, Publication and Posting
Part 536—Filing of Tariffs by Common Carriers by Water in the Foreign Commerce of the United States and by Conferences of Such Carriers

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GRANT OF SPECIAL PERMISSION AND WAIVER OF TARIFF FILING REQUIREMENTS

June 29, 1976

This proceeding was originally instituted in February 6, 1973, to provide an exemption (pursuant to section 35 of the Shipping Act, 1916) from the Commission's tariff filing requirements to nonvessel operating common carriers by water (NVOCC's) engaged exclusively in providing transportation for used household goods and personal effects where there is also a domestic movement within the United States. In lieu of the tariff filing requirements of section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) and sections 18(a) and (b) of the Shipping Act, 1916 (46 U.S.C. 817, 817(b)), the proposed rule would have required the submission of a semiannual report covering, *inter alia,* the number of household goods shipments, the number of complaints concerning rates or service received and settled during the period, and the names of ocean carriers utilized.

Respondents[1] Who had originally sought the exemption subsequently moved for discontinuance of the proceeding on the grounds that the subject exemption was "unnecessary." After advising that the preponderance of the household goods shipments handled by them is Government Bill of Lading traffic for which they have thousands of world wide single-

[1] Household Goods Carriers' Bureau, Household Goods Forwarders Association of America, Inc., Bekins Van Lines Co., Bekins Moving and Storage Company of California, Bekins Moving and Storage Company of Hawaii, North American Van Lines, Inc., United Foreign Shipping Co., United Overseas, Inc., and United Van Lines, Inc.

factor rates on electronic key-punch cards, Respondents requested that they be allowed to work out with the Commission's staff:

> . . . a means of compliance which would not require a change from rate filings on electronic key-punch cards to manual filings, and which would also temper the burden upon the Commission, as well as Respondents, arising from the filing with the Commission of several hundreds of thousands of rates.

On July 7, 1975, the Commission issued its Order on Review of Discontinuance, wherein it determined that the proceeding "should remain open and be used as the vehicle whereby any alternative plan can be publicly presented to the Commission for approval."

After discussions between Respondents and members of the Commission's staff, the Household Goods Forwarders Association of America, Inc. (HGFAA) submitted a proposed tariff which does not fully comply with the tariff filing format of General Order 13 but which the Commission is asked to accept. The proposed tariff contains identical military basic tender rules, regulations, rates and charges, including the through government bill of lading computer printout rates, by carrier code, as are now filed with the Department of Defense (DOD) together with a specification of the port-to-port portion of the applicable through rates. In addition to requesting the Commission to waive the tariff format requirements of General Order 13, HGFAA also asks special permission, pursuant to section 18(b), to file supplements and/or revised pages on less than statutory notice, but not less than one day's notice.

On April 2, 1976, the Commission issued a Notice of Intent to approve the nonstandard tariff format of HGFAA and to grant a continuing authority under its special permission powers to relieve the HGFAA tariff from the statutory 30 days' notice requirement of section 18(b). However, before approving a waiver of the involved tariff filing requirements, the Commission solicited comments as to:

> Whether compliance with section 18(b)(2) is necessary in the above described circumstances to fulfill any valid regulatory purpose and whether waiver of the filing requirements will or will not substantially impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce.

Only the Household Goods Carriers' Bureau (HHGCB) responded to the Commission's Notice. Essentially, HHGCB's position is that HGFAA's proposed method for complying with the Commission's tariff filing format is no more than a duplication of effort that will not justify the added financial burden incurred by the NVOCC's of household goods. In this regard, HHGCB points out that, except for that part of the proposed tariff which lists the port-to-port portion of the single factor rates between points in the U.S. and overseas countries, the remainder of the information therein is currently available to the public since it already is on file with the DOD.[2]

Moreover, HHGCB contends that HGFAA's proposed tariff is prema-

[2] HHGCB is of the opinion that, in any event, the port-to-port rate is meaningless to the general shipping public since the rate applies to shipments solely for the use of DOD.

ture since there exists pending legislation (S. 2023) which, in effect, would exempt NVOCC's of military household goods from the tariff filing requirements of section 18(b) of the Act. HHGCB therefore urges that the Commission "delay its action" in this proceeding until a final determination is made on the pending legislation. Additionally, HHGCB suggests that, if the bill should fail, there be a reopening of discussions between the Commission's staff and Respondents for the purpose of establishing a less costly and less redundant filing procedure applicable to all NVOCC's of household goods.

HHGCB's comments are generally unresponsive to the Commission's April 2 notice, and, to the extent they suggest delaying the action proposed in that notice, are unacceptable.

HHGCB's arguments of redundancy and excessive cost are not persuasive when it is considered that all the remaining NVOCC's are in favor of the Commission's proposed action. In fact, it was the NVOCC's, in the first instance, who suggested what the Commission now proposes. More important, section 18(b) of the Shipping Act, 1916, requires that carriers/conferences in foreign commerce file with the Commission rates and charges "for transportation to and from the United States ports and foreign ports between all points on its route and on *any through route which has been established*" (emphasis added). Thus, the requirement clearly applies not only to port-to-port traffic, but to through routes as well. Therefore, and until exempted, pursuant to section 35 of the Act, the law requires the filing of through rates with the Commission notwithstanding that such rates are also on file with another agency.

Further, HHGCB's suggestion that the Commission delay its action with respect to its waiver proposal until, at least, final action on the pending legislation must also be rejected. The Commission should not abrogate its responsibilities in anticipation of what Congress might do. If the legislation becomes law, it will be an easy matter to amend the Commission tariff filing regulations to conform to the Congressional action. In the interim, it is important that the Commission take some action in this area of cargo movement.

Finally, it is our opinion that the granting of our proposed waiver of the filing requirements will not substantially impair effective regulation by the Commission, be unjustly discriminatory or be detrimental to commerce.[3] In fact, we believe that a granting of a waiver under the circumstances presented here will reduce an unnecessary burden on both the Commission and NVOCC's. Not only is competition not a factor here since DOD is the only shipper of military household goods but also since DOD participates in the setting of the rates, it knows immediately when rates will become effective. The acceptance of a computer read-out should also enable the Commission to more effectively regulate the activities of these

[3] We would emphasize, however, that our action applies only to DOD shipments. Thus, NVOCC's who move nonmilitary household goods must still comply with the Commission's notice and format requirements of sections 2 and 18(a) and (b) of the 1933 and 1916 Acts respectively, and Tariff Circular No. 3 and General Order 13.

NVOCC's since it will now be given information that previously was considered too difficult to provide in the standard form required.

Accordingly,

IT IS ORDERED, That pursuant to section 4, Administrative Procedure Act (5 U.S.C. 553), section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) and sections 18(a) and (b), 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 817,) 817(b), 821, 841(a), Parts 531 and 536 of Title 46, C.F.R. are hereby amended.*

Effective Date. The special permission and waiver herein granted shall become effective upon publication in the *Federal Register*.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

* The text of the amendment is reprinted in 46 C.F.R. 531.27 and 536.17.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–12

CRESTLINE SUPPLY CORPORATION

v.

THE CONCORDIA LINE AND BOISE-GRIFFIN STEAMSHIP CO., INC.,

Carrier properly rated goods in question as synthetic sheets and tapes and applied proper tariff classifications.

Leon T. Knauer for Complainant.

Stanley O. Sher, Terrence D. Jones and *John R. Attanasio* for Respondent.

REPORT

July 1, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

I. PROCEEDING

This proceeding was initiated upon the complaint of Crestline Supply Corp. (Crestline) against Concordia Line (Concordia) and Boise-Griffin Steamship Co., Inc. (Boise), alleging that Concordia overcharged Crestline for a shipment of synthetic rubber from New York, New York to Benghazi, Libya in violation of section 18(b)(3) of the Shipping Act, 1916 (Act).[1] Crestline seeks $15,868.40 in reparation—the amount of the alleged overcharge.

Administrative Law Judge William Beasley Harris (Presiding Officer) issued an Initial Decision denying the complaint. Crestline filed Exceptions and a Reply to Exceptions was filed by Concordia.

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

No common carrier by water in foreign commerce . . . shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. . .

II. BACKGROUND INFORMATION

Crestline is a Utah corporation engaged in the business of designing, supplying and installing water control and conservation structures through the world.

Concordia is a common carrier by water regularly engaged in the transportation of general cargo in the foreign commerce of the United States. It is also a member of the North Atlantic Mediterranean Freight Conference and its rates are governed by that organization's tariff. Boise acted as general agent for Concordia with respect to the disputed shipment, but is neither a common carrier by water nor an other person subject to the Shipping Act.[2]

The goods in question were butyl or synthetic rubber products purchased by Crestline from the Carlisle Tire and Rubber Company (Carlisle) for shipment to Libya where they would be further fabricated prior to being used in a water conservation project undertaken by the Government of Libya. The goods were shipped under Concordia's Bill of Lading No. 1065, dated September 27, 1975, which contained the following data:

No. of Packages	*Description of Packages and Goods*	*Gross Weight*	*Measurement*
102	Rolls: Butyl Rubber Sheets	134,640 lbs.	4700 CF
1	Pallet: Rubber Tapes	1,068 lbs.	79 CF
2	Pallets: Rubber Cement, 0 degrees	1,298 lbs.	103 CF

Prior to shipment, Crestline conversed with an ocean freight forwarder and with Carlisle concerning transportation charges and was under the impression that the freight rate would approximate $10,000. No rates were listed on the bill of lading issued to Crestline. Concordia subsequently rated the "Butyl Rubber Sheets" as *Rubber, Sheeting, N.O.S.* under Item 1454, North Atlantic Mediterranean Freight Conference Freight Tariff No. 10–FMC–3. The "Rubber Tapes" were rated as *Rubber, Goods, N.O.S.*, pursuant to Item 1450 of the same tariff. Both classifications were chosen on the theory that the goods were articles "manufactured from" synthetic rubber and not entitled to the rate for unfabricated synthetic rubber.[3] On this basis, Crestline was assessed freight charges in

[2] Boise did not reply to Crestline's allegations or participate in the instant proceeding in any manner.

[3] The North Atlantic Mediterranean Freight Conference Freight Tariff No. 10–FMC–3, effective August 15, 1974, contains only the following tariff classifications for rubber commodities.

Rubber, viz:
(1) Bands (1445a)
(2) Crude or Raw (1446)
(3) Foam, Slabs or Blanks (1448)
(4) Gloves (1449)
(5) Goods, N.O.S. (1450)
(6) Heels & Soles, Including Crepe (1451)
(7) Hose (1452)
(8) Reclaimed or Shoddy, in Compressed Sheets or Slabs [Not Scrap Rubber] (1453)
(9) Sheeting, N.O.S. (1454)
(10) Synthetic [Not Articles or Materials manufactured therefrom] (1455)
(11) Threads [camelback]

the sum of $24,244.24 which it duly paid.[4] Crestline was not aware of the commodity classifications employed by Concordia or the total freight due until after its goods were on the high seas.

The complaint asserts that Crestline was entitled to have its goods classified under Tariff Item No. 1455, *Rubber, Synthetic (Not Goods or Articles Manufactured Therefrom)*. Had this Item been applied, the parties stipulated that the charges would have been $9,278.87, or $15,868.40 less than Crestline actually paid.[5]

The Initial Decision held that the rubber sheets and tapes were articles "manufactured from" synthetic rubber or butyl, regardless of whether they required further processing upon arrival in Libya, and found no ambiguity in the term "manufactured" as it appeared in Tariff Item 1455. The Presiding Officer then concluded that Concordia properly applied Tariff Items 1454 and 1450, and that no violation of section 18(b)(3) had occurred. The following four reasons were expressly offered in support of this result: (1) Neither Respondent ever quoted Crestline a price of $9,000 to ship the goods in question;

(2) Crestline failed to establish that it had a contract with the Government of Libya to further process or install the rubber products in that country; the Libyans may have done the installation work themselves;

(3) No one supplied the Respondents with any cargo descriptions or directions different from those which appeared on Concordia's Bill of Lading;

(4) It is doubtful that transportation costs of $23,347.99 for commodities worth $205,988.00 into a troubled zone of the world are unjust and unreasonable or in violation of any section of the Act.

III. POSITIONS OF THE PARTIES

A. Complainant

Crestline excepts to the Presiding Officer's conclusion that Concordia correctly applied Tariff Items 1454 and 1450 to the butyl sheets and tapes in question and claims that the Initial Decision is procedurally and substantively defective in several areas.

Procedurally, the Presiding Officer is alleged to have:

1) Failed to articulate a rational basis for the conclusion he reached because the four "reasons" recited at pages 7 and 8 of the Initial Decision are irrelevant and immaterial to the cargo classification issue under review and because Crestline's arguments were not specifically rejected;

2) Improperly permitted Concordia's expert witness (McKenna) to testify that the

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[4] Concordia applied its contract rate to Crestline's shipment.

[5] Crestline originally alleged that its rubber cement was also misrated and sought a total of $16,483.74 in reparations. The rubber cement claim was withdrawn at the prehearing conference and the demand for reparations reduced to $15,868.40. It should be noted, however, that the parties' stipulation concerning the Item 1455 rate applicable to the rubber sheets and tapes ($7,861.37—Hearing Exhibit 16) was improperly computed. The correctly computed *Rubber, Synthetic* rate would have been $14,473 and the amount of overpayment only $9,256.17. *I.e.*, 119.5 measurement tons multiplied by the $105.32 contract rate (including 19% bunker surcharge) plus 15% war risk surcharge.

rubber sheets and tapes were "fully manufactured for tariff purposes," while refusing to allow Crestline's expert witness (Kenney) to offer his opinion that Tariff Item 1455 was ambiguous in light of the nature of synthetic rubber.

Crestline concedes that its rubber sheets and tapes were to some degree "manufactured" out of synthetic rubber. It rests its claim to the Tariff Item 1455 rate on two contentions. First, the phrase "not articles manufactured therefrom" in Item 1455 is contradictory and ambiguous because all synthetic rubber is manufactured out of other chemicals. Secondly, Crestline's goods were not manufactured within the meaning of Tariff Item 1455, because they were not "completely finished," *i.e.*, further processing was required before they could be finally installed in the water conservation equipment for which they were ultimately intended. Consistent with this position, Crestline attributes the following substantive errors to the Initial Decision:

1) The uncontroverted testimony of expert witness Kenney was ignored and unwarranted weight was given to the testimony of expert witness McKenna;

2) The conclusion that the rubber sheets and tapes were sufficiently fabricated to be classified as "articles manufactured from" synthetic rubber is contrary to the weight of the evidence;

3) The conclusion that Tariff Item 1455 was unambiguous as applied to the disputed shipment is contrary to the weight of the evidence.

B. Respondent

Concordia supports the Initial Decision and claims the evidence shows that the butyl sheets and tapes shipped by Crestline were in an essentially different form than the large synthetic rubber bales from which they were fashioned by the Carlisle Company. Concordia further states that whereas synthetic rubber may be used to manufacture any product requiring synthetic rubber as an ingredient, synthetic rubber in the form of sheets and tapes has a relatively limited range of further uses; Crestline's claim that the sheets and tapes were not "finished products" must therefore be incorrect because the construction of watering facilities out of the sheets and tapes is a separate and distinct process from the manufacture of the sheets and tapes themselves.

Concordia also argues that the classification of products for ocean freight purposes does not depend upon the end use to which the consignee intends to put the product; if a roll of butyl sheeting is a finished product when pieces are cut off and placed directly on hospital beds, it should also be considered a finished product when pieces are joined together to form water proofing devices.

IV. DISCUSSION AND CONCLUSION

The uncontradicted testimony of Crestline's own witness.[6] is sufficient to dispose of this matter on the merits, and we also find that the rubber sheets and tapes shipped in 1974 were "manufactured" articles and that

[6] This witness was Hugh Kenney, Sales and Product Manager, Construction Materials Department, Carlisle Tire and Rubber Company. Mr. Kenney was qualified as an expert in synthetic rubber fabrication.

no Shipping Act violation has occurred. We cannot, however, simply adopt the Initial Decision without comment. Crestline's contention that the Presiding Officer's statement of reasons is critically unclear cannot be ignored. A more disciplined and logical approach is unquestionably required and rather than consume further time by remanding the proceeding for clarification, we have written our own decision denying Crestline's complaint.

The Carlisle Company fabricated the goods in question out of crumbly, bulk butyl which it purchased in 70 pound bales from one of several large synthetic rubber manufacturers such as DuPont or Exxon.[7] The butyl bales were then placed in mixing equipment with other materials such as pigments, extenders, vulcanizing agents and antiozonants, and the mixture run between two steel rollers to form synthetic rubber sheets approximately a quarter of an inch thick. After being scored for 48–72 hours, these sheets were fed into a calendar (a series of steel rollers) and further formed into much thinner sheets. The thin rolls of sheeting were then joined into the particular widths and lengths desired by Carlisle's customers, placed on a mandrel and vulcanized. After this processing, the rubber was no longer crumbly and the sheets could be directly employed in a variety of end products with only minor subsequent alterations. The only thing remaining to be done to Crestline's sheets and tapes upon arrival in Libya was to cut them to appropriate sizes and apply them to a tank or reservoir. They could also have been employed as inner tubing, heater ducts or roofing materials.

The primary factual question to be determined in this proceeding is whether the sheets and tapes were "manufactured from" synthetic rubber at the time they were shipped. Crestline's evidence aimed at proving that the sheets and tapes were not "completely finished" goods is irrelevant to this determination. The final application of a product with several possible end uses is immaterial to the proper classification of commodities for tariff purposes. *Misclassification and Misbilling of Glass Articles,* 6 F.M.B. 155, 159 (1960). The applicable freight rate should depend upon the intrinsic nature and market value of the goods themselves, rather than a shipper's representation as to the intended use of goods, as it would be virtually impossible for ocean carriers to ascertain whether each item transported is subsequently put to the use for which it was rated for ocean transportation.

The record leaves no doubt that Crestline's goods were sufficiently new and different articles from the butyl bales initially entering Carlisle's plant to be considered "manufactured articles." See generally, *Interstate Commerce Commission v. Weldon,* 90 F. Supp. 873 (W.D. Tenn. 1950), aff'd 188 F. 2d 367 (6th Cir. 1951), *cert. denied,* 342 U.S. 827 (1951), where shelled, but otherwise unprocessed peanuts, were held to be

[7] Butyl is itself "manufactured" out of petroleum products and other chemicals. In bales it represents an unprocessed stage of synthetic rubber comparable to that of natural rubber in its crude state.

"manufactured products" within the meaning of section 203(b)(6) of the Interstate Commerce Act.[8] *Cf. East Texas Motor Freight Lines v. Frozen Foods Express*, 351 U.S. 49 (1955); see also *Twine and Crude Rubber—Emery Transportation Company*, 311 I.C.C. 226 (1960); *A.N. Deringer, Inc. v. United States*, 40 Cust. Ct. 261 (1958); *United States v. International Paint Co.*, 35 C.C.PA. 87, 94 (1948).

The fact that all synthetic rubber is manufactured from petroleum products and other chemicals does not make Concordia's tariff ambiguous. Other than *Rubber, Synthetic* and *Rubber, Crude or Raw*, all rubber categories in the tariff describe specific products or groups of products. Tariff Item 1455 does not exclude "manufactured synthetic rubber." It excludes only "articles manufactured *from*" synthetic rubber. The former phrase would support the inconsistent and therefore ambiguous interpretation urged by Crestline. The latter language is plain on its face.

Applying the principles of tariff construction articulated in *Sacramento-Yolo Port Dist. v. Fred F. Noonan Co., Inc.*, 9 F.M.C. 551, 558–560 (1966), we find Tariff Item 1455 sufficiently clear as published to advise synthetic rubber experts and laymen alike that butyl bales (or other unprocessed, unvulcanized forms of synthetic rubber) are the only types of goods entitled to the *Rubber, Synthetic* rate.[9] The instant case is therefore readily distinguishable from *United States v. Hellenic Lines, Ltd.*, 14 F.M.C. 254 (1971) and *Rubber Development Corp. v. Booth S.S. Co., Ltd.*, 2 U.S.M.C. 746 (1945), where a tariff's intended meaning could not be fairly ascertained from its published language. We recognize that the term "manufactured" describes a process with no absolute boundaries and that different goods may be "manufactured" in varying degrees, so that carriers may upon occasion be required to make close judgments in rating synthetic rubber products for shipment. Such a situation does not make a tariff inherently ambiguous, and in this instance, the record shows that Concordia's assessment of Crestline's butyl sheets and tapes as "manufactured articles" was indisputably correct. *Cf. Trumbull-Vanderpool Co. v. Luckenback Co.*, 1 U.S.S.B. 126, 127–128 (1927).

Accordingly, on the basis of the foregoing and the entire record before us, it is concluded that the synthetic rubber sheets and tapes tendered for shipment on September 27, 1974, by Crestline Supply Corporation were

[8] 46 U.S.C. 303(b)(6).

[9] Crestline's hearsay evidence concerning the different rate quotations it received from three different freight forwarders between July and October, 1974, provides no basis for a finding of ambiguity. *Rubber Development Corp. v. Booth S.S. Co., Ltd., infra*, is inapposite, for there a carrier actually *applied* three different rates to successive shipments of the same type of metal basin, and the Commission found that the tariff was otherwise ambiguous. Extrinsic evidence is not considered when a tariff is unambiguous on its face. Moreover, a shipper's reliance upon a misquoted rate does not warrant the exaction of a rate different from that specified in the carrier's tariff. *Texas & Pacific Ry. v. Mugg*, 202 U.S. 242, 245 (1906); *Farley Terminal Co., Inc. v. Atchinson, Topeka & Santa Fe Ry. Co.*, 522 F.2d 1095, 1098 (9th Cir. 1975); *Ken Royce, Inc. v. Pacific Transport Line, Inc.*, 3 U.S.M.C. 183, 186 (1949); *Pacific Lumber & Shipping Co. v. Pacific-Atlantic S.S. Co.*, 1 U.S.M.C. 624, 625 (1936).

We also note that Crestline's "quotation evidence" is of little probative value in that it does not indicate that the three forwarders were given the same weights, measurements, and commodity descriptions with which to work or even that they consulted the same tariff. In fact, the rate quotation from Luigi Serra, Incorporated (Hearing Exhibit 6) states a rate for "synthetic rubber—butyl" without giving any indication that this butyl was in the form of rubber sheets and tapes.

not entitled to the rate described by North Atlantic Mediterranean Freight Conference Tariff Item 1455, and that Concordia Line properly classified these goods as *Rubber, Sheeting, N.O.S.*, and *Rubber, Goods, N.O.S.*, respectively. It therefore follows that Respondent Concordia Line did not charge or demand a greater or different compensation for the transportation of property than that specified in its duly filed Federal Maritime Commission tariff, and did not violate section 18(b)(3), Shipping Act, 1916, as to the aforesaid shipment. Crestline's Exceptions are therefore granted insofar as they demand a clarification of the Initial Decision and denied in all other respects. An appropriate order denying the complaint and terminating this proceeding will be issued.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75–12

CRESTLINE SUPPLY CORPORATION

v.

THE CONCORDIA LINE AND BOISE—GRIFFIN STEAMSHIP CO., INC.

ORDER

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

IT IS ORDERED, That the complaint of Crestline Supply Corporation is denied, and that the proceeding in Docket No. 75–12 is dismissed.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 468

REAL FRESH, INC.

v.

MATSON NAVIGATION COMPANY

NOTICE OF ADOPTION OF INITIAL DECISION

July 28, 1976

No exceptions having been filed to the initial decision of the Administrative Law Judge 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 July 28, 1976.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 468

REALFRESH, INC.

v.

MATSON NAVIGATION COMPANY

Adopted July 28, 1976

Requests to refund a portion and to waive collection of a portion of freight charges denied.

INITIAL DECISION ON REMAND OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

Matson Navigation Company (Matson) requested permission to refund a portion and to waive collection of a portion of the freight charges on three shipments of sterilized milk in hermetically sealed containers from Oakland, California, to Guam. Permission was requested to refund $170.77 and to waive collection of $327.38. Permission was granted in the initial decision. On review however, it was determined that section 18(b)(3) of the Shipping Act, 1916, did not apply as the foreign commerce of the United States was not involved. Rather it was the domestic offshore commerce of the United States and therefore the applicable laws would be section 18(a) of the Shipping Act, 1916, and Section 4 of the Intercoastal Shipping Act, 1933. The application was remanded for consideration under the foregoing sections of the Shipping Acts. In the Order of Remand it was stated:

> Unlike section 18(b)(3), section 18(a) of the 1916 Act and Section 4 of the 1933 Act do not contemplate refunds and waivers to compensate for errors in tariff filings. They do, however, empower the Commission to determine the reasonableness of a rate and to prescribe a reasonable maximum or minimum rate. Consequently while an error in a tariff may cause a particular rate to be unreasonable, it is not, standing alone and in the absence of a finding of unreasonableness, ground for permitting a carrier to charge rates other than those on file and in effect at the time of shipment.

In the present application Matson Navigation Company (Matson) requests authority to refund a portion of the charges and also requests

[1] This decision became the decision of the Commission July 12, 1976.

authority to waive collection of a portion of the charges applicable to three shipments of Milk, sterilized, in hermetically sealed containers aggregating 119,546 pounds or 2,768 cubic feet, carried per bills of lading dated September 9, 23, and 28, 1974, on Matson's vessels *Transchamplain, Transoneida,* and *Transontario,* from Oakland, California, to Guam. Matson issued on June 26, 1974, effective August 5, 1974, Second Revised Page 109, to its Guam Container Freight Tariff No. 32, FMC–F No. 152. In doing so, the rates for Items 1358 and 1359[2] were mistakenly changed to W/M from a W/T[3] basis. Accordingly, during the period of these three shipments, the $53.10 W/M rate was the applicable rate, resulting in a higher charge than would have been the case if the shipments had been rated on the basis of $53.10 W/T.

Consequently, on the shipment per bill of lading dated September 9, via the *Transchamplain,* $1,295.56 was paid, whereas it should have been $1,082.28. Permission to refund $170.77 is sought. On the shipment per bill of lading dated September 23, via the *Transoneida,* $1,093.11 was paid, whereas it should have been $1,268.07. Permission to waive collection of $174.96 is sought. On the shipment per bill of lading dated September 28, via the *Transontario,* $1,418.13 was paid, whereas it should have been $1,570.55. Permission to waive collection of $152.42 is sought.

According to the application the increased charge resulted from the fact that the charges were based on a measurement rather than on a weight basis. Nothing more is offered. All the precedents cited by Matson involved the foreign commerce and not the domestic offshore commerce of the United States. By way of example, but not limitation, determination of the reasonableness of rates involves comparison of rates; (*Oxenberg, infra*); cost of service; distance; taxes; nature of the commodity; volume of movement; and return on investment.

Unlike *Oxenberg Bros., Inc. v. United States,* 3 F.M.B. 583 (1951), where the rate charged varied so greatly from rates for the same commodity between nearly equidistant points on the same route as to be clearly unreasonable and therefore in violation of section 18 of the Shipping Act, the situation in the instant situation is more like that presented in *Davies, Turner & Co., as Agents for Robert S. Schlesinger, Owner v. Atlantic Lines, Ltd.,* 13 F.M.C. 279 (1970). There the final charges for the transportation were merely alleged to have been higher than the charges originally quoted the shipper because the carrier's agent had not been advised that the rate he quoted had been deleted from the tariff over a month before. The Commission concluded:

> The application in this instance, like that in East Asiatic,[4] . . . does not even allege

[2] Item No. 1358, MILK STABILIZER, powdered W/M $87.03. Item No. 1359, MILK STERILIZED, in hermetically sealed containers with or without added flavoring, W/M $53.10.

[3] Rate applies per ton of 2,000 pounds.

[4] *The East Asiatic Co., Inc.—Application for Permission to Waive Collection of Undercharges,* 9 F.M.C. 169 (1965).

that the rate duly applied was unreasonable nor does the record contain facts upon which such a finding can be made. There being no alternative, the application is hereby denied. (Footnote added.)

Moreover in *East Asiatic, supra,* it was concluded:

> The Examiner, however, did not find nor did the applicant allege that the duly applicable rate was unreasonable and that the rate actually charged was reasonable. Indeed, the record is devoid of any facts upon which we, in the final analysis, could make any such findings. Therefore, on the basis of the record before us, we have no alternative but to deny East Asiatic Inc.'s application.

As the determination of a reasonable (lawful) rate is a prerequisite to establishing damages which is the difference between reasonable and unreasonable rates,[5] and as such determination cannot be made here, the request of Matson Navigation Company to refund a portion and to waive collection of a portion of the freight charges on the aforementioned shipments must be denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
June 30, 1976.

[5] *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 332(I)

F. POWERS CO., INC.

v.

ORIENT OVERSEAS CONTAINER LINES

Claimant's contention that its cargo was destined for the Port of San Francisco and not the Port of Oakland is sufficiently supported by the evidence.

Respondent's policy of not paying overland transportation charges from the port of discharge to the bill of lading port on LTL shipments is disallowed because:

(1) Respondent's Tariff Rule 28 expressly provides for cargo forwarding to the bill of lading port at carrier expense without distinguishing between LTL and trailer load shipments.

(2) The implementation of special rules for LTL shipments which are not stated in a carrier's tariff violates section 18(b)(3) of the Shipping Act, 1916.

Daniel L. Goldberg for Claimant.

REPORT

August 18, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* Clarence Morse, *Vice Chairman;* Ashton C. Barrett, Bob Casey and James V. Day, *Commissioners*)

This proceeding was initiated upon the informal complaint of F. Powers Co., Inc. (Claimant), a textile importer principally located in San Francisco, against Orient Overseas Container Lines (Respondent), a common carrier in the foreign commerce of the United States subject to our jurisdiction. Claimant alleges that Respondent failed to adhere to Rule 28 of its FMC tariff in violation of section 18(b) of the Shipping Act, 1916 (46 U.S.C. 817(b)).[1]

[1] Hong Kong Eastbound Pacific Coast Tariff No. 1 (FMC-1). Prior to October 1974, Tariff Rule 28 provided:

If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier *may* arrange at its *option* to move the shipment from actual port of discharge as follows:

To the port of destination stated in the bill of lading, alternatively the carrier may forward the cargo direct to a point

The instant controversy concerns eight relatively small shipments of cotton goods from Hong Kong to San Francisco, California, transported during the period of October 1973 to September 1974. Claimant states that San Francisco was the intended port of discharge. The goods were unloaded at Oakland and trucked to San Francisco in less than trailer load (LTL) lots at a total cost of $297.93, which was paid by Claimant.

It is alleged that Respondent has followed a "policy" of not paying the transportation costs involved in trucking less than trailer load goods from the port of discharge to the bill of lading port of destination while paying the trucking fee on full trailer load shipments. Respondent does not deny it has followed such a policy, and the issue to be resolved is whether a distinction between LTL and full trailer load shipments is permitted under Respondent's FMC tariff, and if not, whether Claimant is entitled to reparation for the $297.93 it paid for overland transportation on the eight shipments in question.

The matter was referred to Settlement Officer James S. Oneto, who issued a decision on June 29, 1976, denying the complaint on two separate grounds:

(1) The Claimant did not produce the bills of lading but only invoices, and the bill of lading ports cannot, therefore, "be established with sufficient certainty to make a determination thereof."

(2) The shipments involved were LTL shipments, the carrier had a policy of not paying equalization on LTL shipments, and because no such allowance was contained in the tariff, reparation cannot be granted.

As to the first ground for denial, the Claimant alleged that although the port of discharge was Oakland, the bill of lading specified San Francisco. As evidence of that allegation the Claimant submitted carrier invoices. All but one of these show a space calling for the bill of lading number, and in all those invoices there appears in that space before the number the notation "HK-SF." The Claimant states that this signifies Hong Kong as the port of loading and San Francisco as the port of destination as specified in the bills of lading.[2]

The invoices attached to the complaint indicate Oakland as the port of

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designated by the consignee, provided, the consignee pays the costs which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading. (Emphasis added.)

In *Konwal Co., Inc. v. Orient Overseas Container Line*, 16 S.R.R. 395, 482 (1975), the Commission held that this version of Rule 28 obligated the carrier to pay the cost of overland transportation from Oakland (the actual port of discharge) to San Francisco (the port of discharge specified on the bill of lading) and awarded reparation for eight LTL shipments where the carrier had not paid.

The rule was subsequently amended, effective October 1, 1974, and now reads:

If the carrier discharges cargo at a discharge port other than the port of discharge named in the bill of lading, the carrier (C) *shall* arrange at its (C) *expense* to move the shipment from actual port of discharge as follows: To the port of destination stated in the bill of lading, alternatively the carrier may forward the cargo direct to a point designated by the consignee, provided, the consignee pays the costs which the consignee normally would have incurred to move the cargo to such point had the cargo been discharged at the port of destination stated on the bill of lading. (Emphasis added).

[2] It is a common steamship practice to identify bills of lading by port of loading and port of discharge, with a numerical number following, thus B/L Hong Kong/San Francisco 1, or B/L Hong Kong/Los Angeles 12, etc.

discharge. In referring to the bill of lading, however, the invoices contain the annotation: "B/L HK-SF." This supports Claimant's contention that while Oakland was the port of *discharge,* the port of *destination* was San Francisco.

The Respondent's reply to the complaint significantly does not deny that the bill of lading port was in fact San Francisco. The Respondent says only that:

> We note with interest that [the Complainant] filed this complaint . . . apparently on the strength of "HK-SF" bill of lading numbers taken from truck invoices and . . . without . . . copies of the actual bills of lading. . . .

The Respondent could have denied that San Francisco was the bill of lading port or could, itself, have provided copies of applicable bills of lading if San Francisco was not shown thereon as the bill of lading destination. Instead the Respondent merely noted the Claimant's form of proof.

Rule 5(d) of the Commission's Rules of Practice and Procedure [46 C.F.R. 502.63] provides:

> Recitals of material and relevant facts in a complaint . . . unless specifically denied in the answer thereto, shall be deemed admitted as true. . . .

The Respondent's allusion to Claimant's allegation is not such a denial. Consequently it must be taken as established that San Francisco was the bill of lading port of destination.

Furthermore, if the Settlement Officer deemed the proof inadequate, which we do not, he should have required the Claimant or the Respondent to supply additional documentation [46 C.F.R. 502.304(a), (e)]. The Claimant states that he was unable to obtain copies of the bills of lading, and the Settlement Officer should have directed the Respondent carrier to produce them.

The second ground for the Settlement Officer's decision rests on the Respondent's policy on LTL shipments of not assuming to pay equalization from the port of discharge to the bill of lading port. The Respondent, in fact, places its main reliance on that policy, and says that all importers were aware of it (including the Claimant) and that the Claimant is therefore barred from seeking reparation for equalization of LTL shipments to the bill of lading port of destination. This asserted "policy" or rule did not appear, at the pertinent time, in Respondent's filed tariff.

The Settlement Officer concluded that because:

> . . . respondent's rule that no equalization would be paid on LTL shipments . . . was not embodied in respondent's tariff . . . therefore reparation . . . could not be awarded thereon.

If that were the law we could not award reparation unless a carrier's tariff specifically provided for the payment of reparation in the event a shipper were overcharged.

The fact is that the Respondent's Tariff Rule 28 provided for the forwarding of cargo, at carrier's expense, from the port of discharge to the bill of lading port without distinguishing between LTL and trailer load shipments. Similarly, no other provision of the Respondent's tariff added such a qualification.

Section 18(b)(1) of the Shipping Act, 1916, provides that tariffs shall contain "any rules or regulations which in anywise change, affect, or determine" the tariff rates. Consequently, the Respondent carrier could not by a statement of policy, no matter how widely published, establish a rule binding on shippers unless such rule was first filed with the Commission under section 18(b). An unfiled rule distinguishing between LTL and trailer load shipments not only cannot be relied upon to deny reparation, but itself violates section 18(b)(3) of the Act by denying transportation privileges to LTL shippers in a manner not stated in Respondent's Tariff.

The Respondent states in its answer to the complaint that it changed its policy in October 1974 and began paying equalization on the Claimant's shipments. Thus, at that time, Respondent began to fully adhere to its tariff rule without asserting any other disqualification in Claimant's shipments. Therefore, there being no other defects in the Claimant's shipments at issue here, the Claimant is entitled to reparation as set forth in its complaint.

An appropriate Order will be issued.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 332(I)

F. POWERS CO., INC.

v.

ORIENT OVERSEAS CONTAINER LINES

ORDER

The Commission having fully considered the above-styled matter and having this date made and entered of record a Report containing its findings, conclusions and decisions therein, which Report is hereby referred to and made a part thereof;

IT IS ORDERED, That the Settlement Officer's Decision is reversed and reparation in the amount of $297.93 is awarded.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-37

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION
INTERNATIONAL FREIGHT SERVICES, LTD.

ADOPTION OF INITIAL DECISION

August 18, 1976

This proceeding was instituted to determine whether, in view of the past activities of Mr. Ismail K. Renno and Mr. Rafael Swift, two of the Applicant's principal officers and stockholders, International Freight Services, Ltd. (IFS) is fit and able to properly carry on the business of forwarding and to conform to the provisions of section 44 of the Shipping Act, 1916, within the meaning of that statute, and whether its forwarder application should be granted.

In his Initial Decision, Administrative Law Judge John E. Cograve concluded that the Applicant lacked both the fitness and ability necessary to be licensed and accordingly denied IFS's application. The basis of his conclusion were (1) the false representations made in IFS's application and to the District Investigator and (2) IFS's lack of experience to conduct an ocean freight forwarding business.

No exceptions were filed to the Initial Decision. However, IFS and Hearing Counsel have submitted a stipulation intended to clarify the record with respect to the "fitness" of Mr. Dennis M. Costin, a third IFS officer, to carry on the business of ocean freight forwarding. In the course of his opinion, the Presiding Officer found that Costin was not a stockholder of IFS as was represented in the application. The joint stipulation, citing section 1701.01(F) of Ohio General Corporation Law, advises that, by virtue of a subscription agreement, Costin is in fact an IFS shareholder under Ohio Law. This proceeding is now before us on our own motion to review.

While we are accepting the joint stipulation, it does not in any way undermine Judge Cograve's ultimate determination in this proceeding. The legal status of Costin as a stockholder or nonstockholder is wholly irrelevant to the matter at issue in this proceeding. What is important is that on the record neither Renno, Swift, nor, for that matter, Costin, have the necessary ocean forwarding experience to qualify IFS for an ocean freight forwarder license.

Even assuming, *arguendo,* that IFS had an officer qualified to conduct ocean freight forwarding, there is still the matter of Swift submitting false information to the Commission and its representative with the presumed knowledge of Renno (who together hold most of the IFS stock). This activity alone calls into question Applicant's "fitness" to conduct a freight forwarder operation.

Therefore, we are of the opinion that the Presiding Officer's findings and conclusions were proper and well founded. Accordingly, we are adopting the Initial Decision (a copy of which is attached) as our own and making it a part hereof.

By the Commission.

(S) JOSEPH C. POLKING,
Assistant Secretary.

FEDERAL MARITIME COMMISSION

No. 75–37

INDEPENDENT OCEAN FREIGHT FORWARDER APPLICATION
INTERNATIONAL FREIGHT SERVICES, LTD.

Adopted August 18, 1976

Applicant found neither fit nor able to conduct the business of forwarding within the meaning of the Shipping Act, 1916.

The application is denied.

W.B. Ewers for applicant.

Paul J. Kaller and *Bert I. Weinstein* as Hearing Counsel.

INITIAL DECISION OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE[1]

The Commission instituted this proceeding to determine whether International Freight Services, Ltd. (International), should be licensed as an independent ocean freight forwarder under section 44 of the Shipping Act, 1916 (46 U.S.C. 841b). The present application is the third one to be filed by International.

In November of 1973 International filed its first application for a freight forwarder license, but it was withdrawn and a revised application was filed in March of 1974. After review of the second application the Commission advised International of its intent to deny the requested license. International made a timely request for a hearing to contest the Commission's intended denial and by Order served in December of 1974, Docket 74–54 was instituted.[2]

In February of 1975, prior to hearing in Docket 74–54, International filed its third application—the one under scrutiny here. With the filing of the third application, Docket 74–54 was dismissed and after due investigation of the third application, notice to International of intent to deny that application, and timely request by International for hearing, the present proceeding was instituted. The Order instituting this proceeding raises issues concerning the fitness and ability of the applicant to carry on the business of forwarding. At issue are certain fraudulent representations alleged to have been made by the applicant to the Commission which if

[1] This decision will become the decision of the Commission August 18, 1976.

[2] The provisions 46 CFR § 5108(a) set forth the procedure governing the issuance and denial of licenses.

proven would raise questions as to applicant's fitness to be a forwarder, and an asserted lack of experience which if true would question applicant's ability to carry on the business of forwarding. The Commission's Order details certain apparent conduct which came to light during its investigation of International's first and present applications.

The Commission's Order instituting this proceeding states that the investigation of International's first application revealed (1) an apparently false enlargement of the experience of one of International's employees who was to be the qualifying officer of the corporation pursuant to section 510.5(a)(2)(iii); (2) that Mr. Rafael Swift, the President of International apparently induced an employee and another person to make false representations to a Commission investigator; and (3) that Mr. Swift stated that he was a citizen of the United States when apparently he was a citizen of Mexico.

The Commission's Order then goes on to state that on the present or third application a Mr. Ismail K. Renno appears as President and majority stockholder of International; that Mr. Rafael Swift, previously listed as President and sole stockholder of International, now appears as Executive Vice President and a minority stockholder of International, and that a Mr. Dennis M. Costin is also named as an Executive Vice President and minority stockholder of International.

According to the Commission's Order, investigation of the third application (the one here in question) revealed apparently:

(1) that Mr. Renno was always, in fact, the majority stockholder of International;

(2) that while Mr. Swift had previously stated that the capitalization of International came exclusively from his own personal savings and proceeds from loans he had received from a bank, Mr. Renno also contributed substantial monies for the capitalization of International;

(3) that Mr. Swift had stated on an application for an International Air Transport Association cargo agency that he was the sole stockholder of International, when he was not;

(4) that Mr. Swift's conduct while with a previous employer gave rise to a lawsuit in which a final judgment of $1,000.00 was entered and an injunction was issued prohibiting Mr. Swift from soliciting employees and accounts from the employer;

(5) that Mr. Renno appears to have been a party to the deceptions and falsehoods of Mr. Swift, as they relate to the ownership of International.

The Order then raises the issue of the lack of experience on the part of both Renno and Swift.

For the purpose of this decision it is presumed that except for the issues raised in the Commission's Order the application of International is in all other respects proper. This presumption makes necessary some comment on the procedure adopted for the trial of this case. At the prehearing conference, Hearing Counsel took the position that it was incumbent upon the applicant to proceed first and present a case demonstrating that International was "fit, willing and able" to conduct the business of forwarding. The reasons given for this position were that (1) the Order instituting this proceeding made International a "petitioner" pursuant to Rule 3(a) of the Commission's Rules of Practice and Procedure (46 CFR 502.41) and (2) section 22 of the Shipping Act, 1916, which had appeared in previous orders in forwarder licensing cases as authority for their institution, had been omitted from the Order in this proceeding.

It was my view however that (1) the Commission's Order contained certain allegations of fact which if proven would appear to demonstrate that applicant was not qualified for a license; (2) the evidence to support the allegations which was developed during the investigation of the applicant was then in the hands of Hearing Counsel; and (3) had the Commission's investigation uncovered anything else tending to disqualify applicant it would have included appropriate allegations in its Order. Thus, absent proof of the specific allegations in the Order, International was qualified for a license. Under these circumstances to have the applicant to proceed first and prove that he was "fit, willing and able" to conduct the business of forwarding would make the applicant spread on this record facts which were not challenged by the Commission's staff during its investigation nor raised as issues in the Commission's Order; or if applicant chose to challenge the allegations in the Commission's Order, he would be put in the position of disproving allegations in support of which no evidence had yet been adduced—he would be attempting to prove the negative. Accordingly, I ruled that Hearing Counsel must proceed first and present his case in support of the allegations in the Order.

Hearing Counsel take no issue on brief with the procedure adopted and I only allude to it here because of the impression conveyed to me by Hearing Counsel that the Commission had intended a new type of procedure when it made the mentioned changes in its Order. I have no idea what if any changes in trial procedure were intended by the Commission when the Order was changed, and they are not evident from the terms of the Order. If faced with the same kind of order in the future, I would adopt the same procedure.

The statement of facts set forth below is divided into two parts. First, those findings dealing with the alleged misrepresentations of applicant to the Commission, and second, those findings concerned with the experience or lack of it on the part of the applicant corporation's qualifying officer. Certain other facts appear in the Discussion and Conclusion portion of this decision primarily due to an effort to achieve continuity in presentation.

Misrepresentations

On its first application, International represented one Miss Belinda Hilbert as an officer of International and gave her experience as two years in "international freight forwarding." On January 24, 1974, Mr. Swift, then the purported President of International, informed the Commission's District Investigator Robert St. John that Miss Hilbert was to be the officer of International who had sufficient ocean freight forwarding experience to qualify International for a license.

On January 25, 1974, Mr. St. John phoned Miss Hilbert and she then said that she had approximately three years of ocean freight forwarding experience. Later, on February 6, 1974, Miss Hilbert visited the Commission's New York District Office and talked with Mr. St. John. At that time she apologized to Mr. St. John for giving him false information during their earlier phone conversation. She then admitted that she had only five months ocean forwarding experience. Miss Hilbert explained that Mr. Swift was "listening in" on her conversation with Mr. St. John and that Mr. Swift was directing her responses to Mr. St. John's questions by means of written notes.

Again on January 24, 1974, Mr. Swift told Mr. St. John that he had confidentially arranged to hire a Miss Margaret Sforzo, then employed by Paulsen & Guice, a licensed freight forwarder, and that in the event International was granted a license, Miss Sforzo would become a vice-president of International.[3] Subsequently, Mr. St. John phoned Miss Sforzo and she confirmed that she had made an arrangement with Mr. Swift whereby she would work for International as a vice president. Later, however, Mr. St. John interviewed Miss Sforzo at Paulsen & Guice—this was on February 8, 1974. During the interview Miss Sforzo apologized to Mr. St. John for her previous statements. She then told Mr. St. John that her previous statements had been made at Mr. Swift's instigation, that he had suggested that she tell Mr. St. John that she was to be a vice president of International when in fact the true situation was that she was to be a vice president in "name only with a salary of one dollar."

Rafael Swift signed International's first application as President thereof and reported his citizenship as "United States" with date and place of birth as "11/19/49, Galveston, Texas." On the second application, Swift, again as President, reported his citizenship as "Mexican" with date and place of birth as "11/19/49, Matamoros, Mexico." Swift further gave his residence as Cleveland, Ohio, from 1949 to the present. Finally on the third application Swift gave his citizenship as "United States" with date and place of birth as "11/19/49, Matamoros, Mexico." As for Swift's residence being Cleveland, Ohio, from 1949 to present, the record shows that he moved from Mexico to Galveston in 1951, remained in Galveston until 1957, when he moved to Cleveland, Ohio.[4]

International's first application, filed November 30, 1973, shows Rafael Swift as the President and sole stockholder of the outstanding shares of International. But by an agreement executed November 3, 1973, four of

[3] On at least one occasion Ismail Renno also discussed with Miss Sforzo her possible "employment" with International.

[4] Again, applicant doesn't challenge the accuracy of the facts surrounding Swift's representations concerning birthplace, citizenship and residence. He only points to Swift's assertions that he "thought" he was a citizen of the United States, and urges that there is no fraud involved because there was no misrepresentation of a "material fact," i.e., United States citizenship is not a requirement for a forwarder's license.

the six shares of International's stock were held in "trust" by Swift for Ismail Renno. The shares were deliverable to Renno on demand.

On December 3, 1973, Rafael Swift in the course of sworn testimony offered in open court in the course of a lawsuit against him by a former employer, stated that he was not an officer or director of International, but that he held stocks for "some people" and was the statutory agent for the corporation. Yet on the second of International's applications filed with the Commission on March 18, 1974, Swift again described himself as the President and sole stockholder of International.

Swift and Renno, on October 15, 1973, executed a "Management Agreement." Swift was to receive $17,000 a year as "Manager" and Renno was to receive $12,000 a year as "Partner." The agreement further provided that Swift and Renno would make "all major decisions . . . jointly." By a further "Agreement" made November 6, 1973, the subject of which was "Stock Issue" Swift, after "being first duly sworn" deposed that "four (4) shares of six (6) shares of common stock of the aforesaid International . . . that are held are being held in trust for the benefit of Ismail Renno." The agreement further provides "that upon demand of the said Ismail Renno, I [Swift] will immediately assign and release to the said Ismail Renno and/or his nominee, four (4) shares of common stock of International. . . ." Although denominated as "Agreement" the document of November 6, 1973, is nothing more than a sworn affidavit by Swift. As already noted in the first application filed with the Commission on November 30, 1973, Swift listed himself as President and sole owner of International.

The third application filed by International shows the ownership of the corporation as: Ismail Renno—51 percent, Rafael Swift—30 percent, Dennis Costin—10 percent. Mr. Costin has not contributed financially to the corporation nor has he been issued any shares of stock.

Mr. Renno in his testimony stated that both Rafael Swift and himself obtained $5,000 loans individually and a $15,000 loan jointly "to start the company."

Over a period of time International issued salary checks payable to one J. Knott. Swift testified that the monies were paid to J. Knott for consultation services. J. Knott is actually the maiden name of Mrs. Renno and at no time did she perform any services for International.

In May of 1974 International applied for an International Air Transport Association cargo agency. On the application Swift represented that Rafael Swift was the sole shareholder of the corporation and that no other individuals or business entities had any financial interest or any other form of control in the corporation.[5] Subsequently in May of 1975 a revised application reflecting Renno's stock ownership was filed. Ultimately the application was approved.

Between February of 1969 and November 13, 1973, Swift was

[5] Ismail Renno reviewed the application prior to filing it with IATA.

employed by All-Airtransport, an air export and import company whose place of business was in Cleveland, Ohio. While still an employee of All-Airtransport, and prior to submitting a letter of resignation or other notice of such action, Swift phoned a Mr. Dodsworth requesting him to divert traffic from American Sterilizer Company to International. Swift called a Mr. Gusky of the Broadhead Garrett Company requesting him to alter a bill of lading so as to consign a shipment to International. Swift also caused an employee of the McGee Company to divert a shipment to International. These actions were made possible by Swift's access to All-Airtransport's customer files which were under his control. These actions of Swift gave rise to a lawsuit by All-Transport against Swift. In its final order the Court of Common Pleas, Cuyahoga County, Ohio, enjoined Swift from using confidential information obtained while an employee of All-Transport and from soliciting employees of All-Airtransport, and from announcing his former employment with All-Airtransport. International also paid $1,000 in settlement of the controversy.

Lack of Experience

Neither Swift nor Dennis Costin has ever performed ocean freight forwarding services which are defined by the Commission as encompassing "freight forwarding service or dispatching of shipments" at 46 CFR § 510.2(c).

Renno has personally handled only a single ocean shipment. This occurred in London while Renno was directing the operations of Cleveland Freight Service a wholly-owned subsidiary of International. However, both Swift and Renno point to their experience in air forwarding and urge what is in effect the transferability of that experience to ocean forwarding. This question of transferability together with further facts found on the alleged lack of experience of applicant is deferred to a later portion of this decision.

Discussion and Conclusions

Under section 44 of the Shipping Act, 1916, anyone who desires to engage in the business of ocean freight forwarding must first secure a license from the Commission. Before issuing a forwarding license, the Commission must determine that an applicant is "fit, willing, and able to carry on the business of forwarding." (Section 44, Shipping Act, 1916, 46 U.S.C. 841b.) Hearing Counsel urge that International's application for a forwarder's license be denied because of its "lack of fitness and ability to carry on the business of forwarding." Applicant, of course, asserts the contrary.

A license granted under section 44 is somewhat more than a mere license to do business. The holder of a forwarder's license "occupies a position of enormous competitive and economic power and enjoys a fiduciary relationship with shippers." *Dixie Forwarding Co., Inc., Appli-*

cation for License, 8 F.M.C. 109 (1964). In the *Dixie* case, *supra,* the Commission spoke of the standards required of licensees under section 44:

The business integrity of one who occupies the position of freight forwarder should be above reproach and he should clearly demonstrate a complete awareness of and a willingness to accept the responsibilities that the preferred position imposes . . . [T]he philosophy of section 44 is such that the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder. (8 F.M.C. at 118.)[6]

The giving of false information to the Commission or its representative is to be considered in determining the fitness of an applicant. *Dixie, supra; Independent Ocean Freight Forwarder License Application—L.T.C. Air Cargo, Inc.,* 13 F.M.C. 269 (1970); and *Harry Kaufman-Independent Ocean Freight Forwarder License,* 16 F.M.C. 256 (1973).[7]

The record in this proceeding is replete with instances of applicant's cavalier approach to the truth of representations made by it to the Commission and its representative, Mr. St. John. To demonstrate applicant's approach to the disclosure of discrepancies in its various representations in at least two instances a chronology is instructive.

International's first application was filed with the Commission on November 30, 1973. That application listed a Miss Belinda Hilbert as an officer of International. On January 24, 1974, Swift informed District Investigator St. John that Miss Hilbert was to be the officer of International who had sufficient ocean freight forwarding experience to qualify International for a license. During this same conversation Swift also informed the District Investigator that he had "confidentially arranged to hire a Miss Margaret Sforzo, then employed by a forwarder, to become a vice president of International in the event International was granted a license."[8]

On January 25, 1974, one day after Swift's conversation with Mr. St. John the latter phoned Miss Hilbert who then stated that she had approximately three years ocean forwarding experience. At about this same time Miss Sforzo in another phone conversation with Mr. St. John confirmed that she was to be a vice president of International.

On February 6, 1974, some two weeks after her phone conversation with Mr. St. John, Miss Hilbert visited the Commission's New York

[6] Applicant does not question the applicability of the "standards" quoted above, rather he argues against the comparison of the conduct of the applicant in the *Dixie* case with his own. This, of course, misses the point. No such comparison is made or even suggested. Interestingly, upon reconsideration Dixie was granted a license because (1) applicants emphasized that their livelihood depended upon their being licensed; and (2) applicants have committed themselves to "cooperate fully with the Commission and adhere scrupulously to the requirements of the law and the requirements imposed by the Commission." *Dixie Forwarding Co., et al. Application for Licenses,* Report on Reconsideration, 8 F.M.C. 167 (1964). Subsequently the licenses were "voluntarily" submitted for cancellation in the face of further proceedings to revoke them. (See Commission Order dated October 19, 1966, dismissing the proceedings in Docket No. 66–44.)

[7] Section 510.9(c) of General Order 4 (46 CFR 509.9(c)) provides that a license may be revoked, suspended or modified for "making any wilfully false statements to the Commission in connection with an application for a license or its continuance in effect."

[8] About the only conclusion one can come to concerning the confidentiality of the hiring of Miss Sforzo was that it was not known to Miss Sforzo's then employer Paulsen & Guice. Certainly everyone else concerned, Swift, Renno and Miss Sforzo, knew about it.

District Office and apologized to Mr. St. John for giving him "false" information during her previous phone conversation with him. Miss Hilbert explained that Swift was listening in on another extension and was telling her what answers to give to Mr. St. John by passing her notes written on pages from a yellow legal pad.

On February 8, 1974, two days after Miss Hilbert's visit, Mr. St. John called Miss Sforzo a second time. As in the case of Miss Hilbert, Miss Sforzo apologized to Mr. St. John for giving him false information during their first conversation, She now told Mr. St. John that Swift had encouraged her to represent to Mr. St. John that she was to be an active vice president when in fact she was to be vice president in name only at a salary of one dollar.

On March 18, 1974, International filed its second application. Miss Hilbert was no longer listed as the qualifying officer and no mention was made of Miss Sforzo.

Had there been no investigation of applicant by Mr. St. John, the inescapable conclusion is that applicant would have rested on his first application and a license then granted would have been based upon the patently false statements in that application. Swift had no hand in the ultimate disclosures.

Applicant's position on the foregoing events is best presented in its own words on brief. To take the case of Miss Hilbert first:

> Hearing Counsel's allegations with respect to Miss Hilbert are to the effect that she had only 5 months vice 3 years experience in *ocean* forwarding and that Mr. Swift allegedly directed her in answering certain questions to Mr. St. John. It is to be noted that the first application (Ex. 1) listed Miss Hilbert's experience as 2 years in "*international* freight forwarding." What Miss Hilbert told Mr. St. John about her *ocean* experience is irrelevant. There is no evidence that Miss Hilbert did not have 2 years in the international freight forwarding area. This question also became moot when the second application was filed (Ex. 5) since she was no longer being considered for employment.

Several things may be said about applicant's "explanation" of the incident involving Miss Hilbert but the most striking thing about it is applicant's attitude toward it, an attitude held even now—an attitude which clearly belies any idea of the seriousness of being licensed as an ocean freight forwarder and the importance of complete candor in the licensing process. Thus, Miss Hilbert's misrepresentations become "irrelevant" since she is "no longer being considered for employment."

Moreover, applicant seems to be arguing that the reason Miss Hilbert's initial represtation to Mr. St. John are irrelevant is because on the first application her experience was "correctly" stated as two years in "international freight fowarding." While this particular point is somewhat obscure, if I understand the argument it goes somewhat like this. Miss Hilbert had at the time of the first application two years experience in "international freight forwarding." Presumably this experience was in air freight forwarding—although this does not appear in the record. Therefore, since the original description of Miss Hilbert's experience was accurate, anything followin that statement is irrelevant because the original statement was correct.[9]

Is it really necessary to point out that the application in which the statement in question was made was an application for a license as an independent ocean freight forwarder? Is it further necessary to state that when an application for a license as an ocean freight forwarder calls for a statement of experience it is expected that the experience given will be experience in ocean forwarding? Apparently it is necessary to now make this clear to the applicant.[10]

As for the incident involving Miss Sforzo, applicant has only the following to say:

> With respect to Miss Sforzo, the alleged "fraudulent representation" according to Miss Sforzo and Mr. St. John,
>
> Q. What falsehood?
>
> A. (Mr. St. John) The falsehood that she had indicated that she would be a Vice President of the Corporation,
>
> and again,
>
> . . . where in fact it was Mr. Swift's suggestion that she be Vice President in name only with a salary of one dollar.
>
> The salary of one dollar was obviously to be in excess of whatever salary she would receive otherwise. We suggest that judicial notice be taken of the fact that a vice president title does not necessarily require a substantial salary or dollar figure.
>
> Miss Sforzo was not even listed on *any* of the applications, and her status with respect to the pending application is moot. (Applicant's brief, page 2.)

The first thing to be noted here is that there is not one word of testimony or a single scrap of documentary evidence supporting the bald assertion that Miss Sforzo's one dollar salary "was to be in excess of whatever salary she would receive otherwise." Indeed, since she was, by her own unrebutted statement to Mr. St. John, to be a vice president "in name only" what other salary would be coming to her? And for what other duties? The applicant attempts to explain away past misrepresentations by at the very least further obfuscation, and at the worst by further misrepresentations; and here again the whole question of Miss Sforzo's status is "moot" because she is "not even listed on *any* of the applications." This is an interesting theory and under such a theory any false representation made to an official representative of the Commission is "moot" and without consequence so long as nothing concerning that representation appears on the application previously filed with the

[9] More importantly when Miss Hilbert visited Mr. St. John at the Commission's New York office she told Mr. St. John that her ocean forwarding was limited to some five months and that prior to that she had been a "dance instructor." Other than the statement appearing in the first application filed by International, the only other evidence dealing with the experience of Miss Hilbert is Swift's statement that she was employed by All-Airtransport sometime prior to November 13, 1973.

[10] There is absolutely nothing in this record to demonstrate that the applicant was trying to qualify Miss Hilbert as the corporate officer with the requisite experience on the ground that some forwarding experience other than ocean would serve as some sort of an equivalent. To the contrary it appears to represent yet another instance of a calculated lack of complete candor in dealing with the Commission.

Commission. But what are the purposes of such representations? Indeed, what was the purpose of the precise representation made here?

Quite obviously the news of Miss Sforzo's "confidentially" arranged hiring was imparted to Mr. St. John with the obvious intent of enhancing International's qualifications, namely its experience in ocean forwarding. If it was not intended that Mr. St. John rely on these representations there was of course no need to make them.

On the question of the representations concerning Swift's citizenship, it will be remembered that on the first application Swift gave his citizenship as United States with date and place of birth at "11/19/49, Galveston, Texas." On the second application citizenship, date and place of birth were given as "Mexican . . . 11/19/49, Matamoros, Mexico." On that same application Swift reported his residence as "Cleveland, Ohio, from 1949 to present." (The record shows that Swift moved from Mexico to Galveston in 1951, remained in Galveston until 1957, when he moved to Cleveland.)

Applicant deals with these inconsistencies by simply pointing out that Swift thought all along that he was an American citizen, and concludes, "But more importantly citizenship is *not* required to be a freight forwarder. To be fraud there must be a misrepresentation of a *material* fact." The fact that Swift throught he was a "citizen" does not go far in explaining how he could represent his birth as having taken place in two different countries and how he could represent that he had lived in Cleveland from the year of his birth to present. Moreover, as to his constantly held thought that he was an "American citizen," how was it he listed his citizenship as Mexican on the second application?

On International's first and second applications Rafael Swift appeared as President and sole stockholder. The record shows otherwise. As early as November 3, 1973 (the first application was filed on November 30, 1973), Swift in an affidavit stated that he held four of the six outstanding shares of International in "trust" for Ismail Renno. The shares were returnable to Renno upon demand at any time.

Applicant takes the position that the so-called "stock agreement" was merely security for a loan from Swift to Renno. The transaction is likened to borrowing from a bank and pledging the stock as collateral and it is suggested that such a transaction does not "make the bank a stockholder." This argument overlooks two very salient points. First the so-called stock agreement makes absolutely no mention of any loan for which the stock is held in "trust" as collateral. Secondly, it overlooks the Management Agreement executed on October 15, 1973, in which Renno was to receive $12,000 a year as a "Partner" in International. Finally we have the testimony of Renno himself that he and Swift individually obtained loans of $5,000 and jointly obtained a loan of $15,000 "to start the company."

There remains of course the fact that Renno's participation was not in any way reported on either the first or second application. Applicant's argument that Renno was not a stockholder of International during the pendency of the first and second application is singularly unpersuasive. Swift's "possession" of the four shares of Renno was, whatever the technical or legalistic terminology applied, tenuous at best. But clearly they were Renno's shares held by Swift and subject to reclamation by Renno apparently at the whim of Renno. Under such circumstances, and for the purposes of the application, Renno clearly owned the stock. Moreover, I conclude that Renno's participation in the major decisions of International was in fact due to his stock ownership in International. More importantly, applicant should have apprised the Commission of the real terms of the stock distribution and of the fact that Renno indeed played a very active part in the management of the company. This situation goes beyond technicalities and legal fictions. When a person not listed anywhere on a forwarder's application has the right to demand at anytime the "return" of four of the six shares of the corporation applying for the license, the very failure to show him on the application distorts the Commission's picture of the applicant. Again applicant's position on Swift's representations to the Commission on who in fact owned and controlled the company is edifying:

> Here again intent must be examined. Mr. Renno's connection with Mr. Swift was not a material fact in the application being granted or not. *Technically*, if not legally Mr. Renno was not a "Stockholder." If he had been what would be the reason for not naming him as such? Certainly it wouldn't hurt the application. And certainly Mr. Swift didn't try to "hide" the arrangement . . . from the investigator. We submit that the arrangement was a non-material fact, that there was no fraudulent misrepresentation, *and no one was deceived by it.* (Emphasis mine.) (Applicant's brief, page 4.)

The bare facts in this record clearly demonstrate that for whatever reason Swift sought to disguise Renno's ownership and participation in the management decisions of International. Thus the first application filed after the two "agreements" between Swift and Renno, showed Swiftas President and sole stockholder of International. The application, then, clearly did not show the actual organization and management of International. Yet applicant contents himself with the explanation that no one was "deceived" and the deception did not involve a "material fact." The Commission, of course, was "deceived," and were it not for Mr. St. John's investigation, the deceit would have been perpetuated. The question of whether a material fact was involved is in applicant's frequently used word "irrelevant." I know of no Commission decisions, and none have been cited to me, dealing with misrepresentations that have held that the misrepresentations must be such as to constitute legal fraud.[11] Questions of "legal fraud," of course, have no place determining whether an applicant has been truthful in his representations to the Commission about his qualifications for a forwarder's license. Ability to

[11] Applicant's constant reference to "fraudulent misrepresentations" as legally involving representations of material fact stems quite obvioulsy from Hearing Counsel's frequent use on brief, perhaps from a slight excess of zeal, of the term "fraudulent misrepresentations"

serve the public in an endeavor as sensitive as forwarding should not turn on nice legal distinctions.

The third application lists Mr. Dennis Costin as holder of 10 percent of the outstanding shares of International. Costin had, at the time of the third application, a "subscription agreement" which according to applicant "by operation of law legally makes him a stockholder whether or not the shares have been actually issued." Applicant cites for authority 18 Am. Jur. 2d § 465 as follows:

> To constitute a stockholder, some sort of contract, expressed or implied, is required whereby he obtains the right to hold stock or, upon some condition, demand stock and to exercise the rights of a stockholder . . . It is held that a subscription to stock in a corporation already organized by the corporation makes a subscriber a stockholder, but a contract to subscribe in the future does not make one a stockholder.

Hearing Counsel on the other hand argue that the omission of the following paragraph from the cited section of Am. Jur. § 465 results in a misstatement of the law:

> An agreement to transfer stock to a certain person at a future time does not make that person a stockholder as of the time of the agreement. Even persons holding priority rights or warrants for stock are not considered stockholders.

Hearing Counsel by way of conclusion urges that, Costin's case is but another example of ". . . the absence of forthright disclosure of [International's] ownership [which] has pervaded each of petitioner's three applications before this Commission."

While it is true that Costin has been issued no shares in International, he apparently has the right to purchase 10 percent of those shares when he can. However, under the full statement of the law quoted above, Mr. Costin was not "legally" a stockholder. He had no right to hold stock and he did not exercise the rights of a stockholder, at least so far as this record shows. He merely had an agreement which permitted him to purchase stock at some unspecified future time. However, it seems to me unnecessary to determine Mr. Costin's legal status as a stockholder or non-stockholder. It is only pertinent to point out that once again applicant has chosen to state first what it desires the Commission to know and later argue the "legalities" and "technicalities" of its representations on an application.

Applicant does not dispute that Rafael Swift was placed under an injunction by an Ohio state court, nor does he argue that Swift did not use his position with All-Airtransport to spirit away clients from All-Airtransport to International while he was still an employee of the former. Rather applicant contents itself with characterizing the lawsuit "as the usual one by a disgruntled employer." For reasons not entirely clear, applicant cites the fact that during the testimony at the trial it was alleged that after Swift's departure from All-Airtransport some pictures were missing from the walls of the office.[12] Applicant says that this is an "example" of the employer's "disgruntlement."

[12] From the transcript it would appear that the pictures were of the "promotional" type furnished by airlines.

Concerning the gravamen of the complaint and the subject of the court's judgment and injunction, applicant has only this to say:

> The complaint asked for more—$75,000.00 plus prohibiting soliciting of any of plaintiff's [Swift's employer All-Airtransport) customers. To settle for a nuisance fee of $1,000.00 and a meaningless injunction shows good business acumen of applicant.
>
> * * *
>
> Would Hearing Counsel stifle this normal competition?
>
> Even the president of the company (Mr. Nachbur) left and started his own company!![13] (Applicant's brief, pages 5 and 6.)

What really can be said about applicant's attitude toward his then employer or toward the law and the responsibilities imposed upon him by the law. Having been found guilty by a court of law of unlawful business practices, applicant now chooses to dismiss the court's decision as a "meaningless injunction" based upon a suit by a "disgruntled employer" and wants to know if, "Hearing Counsel stifle this *normal* competition?" (Emphasis mine.)

Normal competition does not consist of diverting shipments from an employer to someone else—to say nothing of the fact that the shipment is diverted to a company in which you have an interest; nor does normal competition include luring employees away from your own employer without even some minimal notice of intent to do so. The applicant's idea of what constitutes "normal competition" not only brings into question the business integrity of applicant but casts considerable doubt upon his awareness of and his willingness to accept the responsibilities of the preferred position of freight forwarder and should he be licensed, how would his concept of normal competition affect the conduct of his business?

Couple applicant's idea of normal competition with his notion of what constitutes business acumen and some idea of the way in which applicant views his obligations as a prospective licensed ocean forwarder can be gained. This attitude certainly does not comport with a desire to scrupulously adhere to the laws, rules and regulations governing his conduct as an independent ocean freight forwarder.

The record shows that International issued checks to J. Knott as payment for "consultative services." J. Knott, never afforded any services to International. The funds were actually for Renno. At the hearing in this proceeding, Swift first testified that J. Knott performed consultation services and referred to J. Knott as "him." Swift subsequently acknowledged that J. Knott was Renno's wife. Renno testified that J. Knott was his wife's maiden name; that she had never performed consultative services for International and that in their nine years of marriage she had never before used her maiden name in a business

[13] The record contains nothing whatsoever about the circumstances of Mr. Nachbur's resignation. The testimony of Renno concerning this incident does show that even then Renno was in close association with Swift and was advising him.

transaction. Hearing Counsel urges that this resulted in International "fraudulently" reporting "income" to the Internal Revenue Service. Applicant merely says: "What fraud. These were the amounts paid to the persons designated, deposited by them and properly reported to the IRS." It cannot, of course, on this record be determined that the reports of income to the IRS constituted "fraud" under the laws administered by the IRS. However, if Swift was willing to distort International's books and records for this purpose, it is possible to infer that he would do it for other purposes. The inference is more readily drawn when this incident is viewed in the light of the other activities of applicant spread across this record.

Finally, under the heading "Further Legal Argument" applicant urges:

> Although we do not agree that applicant was in violation of any rules or regulations for the reasons stated above, even if it was it would appear to fall within the leading case of *Bolton & Mitchell, Inc.—Independent Freight Forwarder License No. 516,* 15 F.M.C. 248 (1972).

Applicant "points out" that despite numerous violations of both the Act and the Commission's Rules and Regulations, the respondent was given a "second chance." I find that case inapposite. I do not believe that the respondent's conduct in the *Bolton & Mitchell* case, *supra,* can be equated with that of applicant in this case. In *Bolton & Mitchell, supra,* the Commission after pointing out that respondent committed a willful violation of section 16, First, of the Act, had the following to say:

> . . .Under most circumstances, wilful violations of law of the nature set forth above would be sufficient standing alone to revoke respondent's freight forwarder license. However, we note that the record establishes that Bolton & Mitchell embarked upon this illegal activity only after consultation with Counsel. While the actions of respondent are violations of law, nevertheless we are disinclined at this time to revoke respondent's license and deprive him of his livelihood when respondent appears to have acted in *good faith* upon advice of counsel. Furthermore, Bolton & Mitchell had been operating as a licensed freight forwarder for the past ten years, and formerly provided good and valuable service for approximately forty years without serious complaints. (Emphasis mine.)[14]

In *Bolton & Mitchell, supra,* the activity which was ultimately found violative of the law was at its inception at least arguably lawful, and respondent was found to have acted in good faith upon the advice of his counsel in the conduct of that activity. By contrast we have an applicant who not only itself indulged in misrepresentations to the Commission, but also induced others to do so. One does not indulge in this kind of activity in "good faith."

The record in this case shows that the applicant was less than candid—in fact the record clearly shows a number of instances when the applicant lied—and perhaps more importantly two instances when the applicant induced others to lie for him. The applicant clearly has little regard for its

[14] See also *License Application—Guy G. Sorrentino,* 15 F.M.C. 127 (1972), particularly the statements of Sorrentino at page 137 and the Commission's comments in its Adoption of the Initial Decision at page 128. A

own reputation for veracity, and appears not to be concerned about others who would be compromised—Miss Hilbert and Miss Sfarzo.

The "explanations" offered by applicant on brief are indicative of applicant's attitude that he has done nothing wrong—even if he has done nothing right. However, applicant has in fact done a good number of things "wrong" and it ill behooves the applicant to conclude by suggesting to me on brief that:

> What possible purpose could be served by utilizing prior possible peccadillos to prevent expanded service to the shipping public?[15] (Applicant's brief, page 10.)

The record shows what the conduct of the applicant was and the final reference to that conduct as "prior possible peccadillos" is but another example of the seriousness and worth applicant attaches to his various supplications and representations to the Commission and its representatives. Even now when applicant does not, and indeed cannot, challenge the accuracy of the facts of record, the applicant merely wants to explain them away—it wants to characterize the conduct as a series of "peccadillos."

If we are to set any standards for integrity, and if we are to make any effort to insure that licensees are "fit," then the applicant here must be denied a license. To do otherwise would be (1) to condone a cavalier approach to misrepresentations made by the applicant himself; (2) to overlook the fact that he induced others to falsely represent themselves; (3) to finally accept those proven acts as "peccadillos" which should be overlooked for the sake of permitting the applicant to "provide expanded service to the shipping public"; and (4) to accept applicant's concept of "normal competition" practices which were found unlawful in open court.

One need not rehash the varied and multiple instances of the applicant's disregard of candor. The record speaks for itself. The applicant remains secure in his own knowledge that his actions constituted nothing more than "peccadillos." The applicant has at no point in this proceeding shown that he was even aware that his fabrications were of any real import nor has he shown or even hinted that he would do otherwise if he were licensed.

While the most troublesome of the activities dealt with above are more directly attributable to Swift, the record is clear that Renno was an active participant in the management of International and either was or should have been aware of the activities in question.[16] At no point in his

[15] Applicant makes brief reference to the 300 or 400 (members of the shipping public) who might want to use IFS as ocean freight forwarder. This reference is to the asserted number of persons who now use International as an air forwarder. However, applicant called not one of them to testify nor did it submit a single affidavit from one of them expressing a desire to use International as an ocean forwarder. In short we have only applicant's speculations in the record.

[16] It is really inconceivable on this record that Renno could have remained in ignorance of Swift's problems particularly in view of the three separate and distinct applications it became necessary to file with the Commission.

testimony did Renno attempt to disassociate himself from Swift or Swift't's past representations to the Commission.[17]

On the basis of the record before me and for the reasons stated, I find and conclude that applicant is unfit to "carry on the business of forwarding" within the meaning of section 44 of the Act and that therefore the application should be denied.

The Commission's Order instituting this proceeding questioned applicant's "ability" to conduct the business of forwarding.

As already noted Swift has had no actual experience in forwarding and Renno's experience was limited to one shipment which he personally handled.

However, Renno testified that there was little significant difference between the forwarding of a shipment by air and the forwarding of a shipment by water. In addition Renno has supervised the Cleveland Freight Services office in London which has forwarded shipments by water. Renno also attended a two year course in transportation at LaSalle College of which "the biggest portion was ocean freight." It is Renno's testimony that the work involved in ocean freight is less than that involved in air freight. Renno states that he is familiar with all of the documentation necessary for the successful movement of a foreign shipment. Renno also agrees should International be granted a license he will spend whatever time is necessary in International's office in Cleveland to insure that all personnel are properly trained.

In their opening brief Hearing Counsel urge that "Mr. Swift and Mr. Costin have no ocean freight forwarding experience and that Mr. Renno tried, unsuccessfully, to appear experienced beyond the one shipment he claims to have made while in England."[18] Hearing Counsel further

[17] In fact Renno himself seems to have adopted a rather curious approach to his testimony. The following colloquy took place at the hearing:

Q. Would you please describe what kind of financial arrangements exist between IFS and Cleveland Freight Services?

MR. EWERS: As of what time?

THE WITNESS: I can't understand really.

BY MR. WEINSTEIN:

Q. As of the time that IFS acquired Cleveland Freight Services?

A. Yes.

Well, I will tell you about it and if you don't like it tell me and I will change it. . . .

[18] This was elicited from Renno during the following colluquy.

Q. Mr. Renno, while you were operating in London with the company Cleveland Freight Services how many ocean shipments did you perform service on?

A. I really have no idea. Figures are very, very difficult.

Q. Approximately.

A. I would say over one.

Q. More than a hundred?

A. No, not really.

Q. More than 50?

A. Yes. Well, well I would say most of the shipments we have are on either letters of crèdit or legalized—well, let me tell you what accounts we have and then you make the estimate.

Q. I'm interested in exactly and not the accounts, but what services you were performing.

A. You see, Your Honor, there is something very important here. There are certain things I don't want my competitor to know about. It is unfair for example to let them know at what level we are growing at this time.

contend that International waas aware of its deficient experience because of the "outrageous conduct of Mr. Swift in encouraging one prospective employee to lie about her experience and another about her intent to become a qualifying officer of [International]." Applicant counters with the argument that Renno is "expert" in air freight forwarding and his vast experience in air shipments and his "limited" contact with the ocean field leads him to the "unrebutted" conclusion that "air and ocean are similar and that ocean shipments only require a portion of the work involved in air." Finally Hearing Counsel reply that it has "no way of knowing" whether "air and ocean are similar" for "there is no evidence of record by one competent to testify[19] to the similarity. . . ." Hearing Counsel then rest content to state that the burden to establish its experience is upon the applicant and that applicant has failed to meet that burden.

Neither counsel for applicant nor Hearing Counsel afforded me a meaningful analysis of the testimony on the issue of the applicant's experience. It is true that Renno's testimony is unrebutted, but is equally true that the distortions and misrepresentations concerning applicant's experience would appear to stem from applicant's awareness of its deficiencies as to the "necessary" experience to be licensed. The question presented here is really one of the credibility of the witness.

I have no real doubt that Renno did in fact "handle" one ocean shipment personally nor do I doubt that Renno was in charge of the London office of Cleveland Freight Services when it handled some ocean shipments as a forwarder.[20] My doubt arises when it become necessary to conclude that Renno himself is personally knowledgeable enough to take over the training of International personnel in the everyday intricacies of ocean forwarding as it must be conducted to meet the justified expectations of clients and the laws, rules and regulations of the United States and this Commission which govern those activities.[21]

Accordingly, having observed the demeanor of the witness Renno on the stand and having considered the whole of his testimony and the entire record in this case, I cannot conclude that his experience renders him sufficiently "able" to conduct the business of freight forwarding so as to be the qualifying officer for the corporate applicant. Therefore, I conclude

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And I have very, very fierce competition in England and in Cleveland. Now, I call on people for example in Paris and the rest of the places where they provide things like this and I have to be very cautious of what I am saying I am in a situation now where I do have very hard competition But I am willing to tell him about the accounts I do have, one of them which is Lord Corporation

JUDGE COGRAVE: Just a minute, Mr. Renno. I think it is a legitimate inquiry to know not only that you have had experience but how much experience you have had and I think that is what counsel's question is designed to do. There is an entire difference between a man who has forwarded [many] shipments and a man who has forwarded one or don't you agree with that?

THE WITNESS. I agree with you entirely, Your Honor

JUDGE COGRAVE. All I think we are trying to do here is arrive at some roundhouse figure that shows us how much experience you have had in the field of ocean forwarding You have no idea?

THE WITNESS Well, I would say one shipment I have moved myself, one shipment, Your Honor

[19] Hearing Counsel did not at the hearing attempt to probe the specific qualifications of Renno to testify as to the similarity between ocean and air shipments.

[20] Neither the degree of supervision nor the experience of the employees supervised in the London office appears in the record

[21] Renno's "limited contact" with ocean forwarding insofar as this record shows took place in England.

that the applicant International Freight Services is unable to conduct the business of an independent ocean freight forwarder and its application should be denied.

For the foregoing reasons I conclude that applicant, International Freight Services, Ltd., is neither fit nor able to conduct the business of forwarding and that its application for a license as an independent ocean freight forwarder should be and is denied.

(S) JOHN E. COGRAVE,
Administrative Law Judge.

WASHINGTON, D.C.,
May 19, 1976.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 352(I)

ANDES PRODUCTS EXPORT-IMPORT

v.

PRUDENTIAL LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

August 26, 1976

Notice is hereby given that the Commission on August 26, 1976, determined not to review the decision of the Settlement Officer in this proceeding except to make the following clarifications.

In page 2 the references to "Pencils, Not Mechanical," Class Rating I should read "Pencils Not Mechanical," Class Rating 11.

In the concluding paragraph of the Settlement Officer's decision, it is stated that the evidence substantiates the claim that the shipments were lead pencils and thus should have been rated under the specific commodity description. The specific commodity description sought to be applied, however, in not lead pencils but "Pencils, Not Mechanical." We find that the evidence substantiates the claim that the pencils were not mechanical.

By the Commission.

(S) JOSEPH C. POLKING,
Assistant Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 352(I)

ANDES PRODUCTS EXPORT-IMPORT

v.

PRUDENTIAL LINES, INC.

Reparation granted.

DECISION OF JAMES S. ONETO, SETTLEMENT OFFICER[1]

By informal complaint filed in April 1976, Andes Products Export-Import (Complainant) alleges that Predential Lines, Inc., (Respondent), a common carrier in the foreign commerce of the United States, during July and October 1974, overcharged complainant (in violation of section 18(b)(3) of the Shipping Act, 1916), on two shipments of Plast-O-Cap lead pencils in seventy-five cartons weighing 4,725 pounds from New York to Guyaquil, Ecuador. Complainant contends the shipments should have been rated on the basis of the tariff commodity description "Pencils, Not Mechanical" and not as "Pencils, N.O.S." Instead of total freight being $970.35, it is contended it should have been $699.53. Reparation in the amount of $270.82 is requested.

The shipments moved prepaid and hence are within limitations.

The bills of lading were made out by Leading Export Service Corporation, foreign freight forwarder, air freight forwarder, and freight consolidator, FMC License Number 1027. The bills of lading described the shipments as "Lead Pencils." The respondent's tariff of rates had commodity description only for "Pencils, Not Mechanical," otherwise the "Pencils, N.O.S." rate applied. The respondent, not knowing whether the pencils were mechanical or not, rated the shipments "Pencils, N.O.S."

Accordingly, the rate applied by the respondent per the bill of lading description "Lead Pencils" was "Pencils, N.O.S.," Class Rating I, in effect July 15, 1974, $130.75 W/M, and "Pencils, N.O.S.," Class Rating I, in effect October 23, 1974, $135.75 W/M. Complainant argues the

[1] Both parties having consented to the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301–304), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

proper description is "Pencils, Not Mechanical," Class Rating I, in effect July 15, 1974, $91.50 W/M, and "Pencils, Not Mechanical," Class Rating I, in effect October 23, 1974, $96.50 W/M.[2]

Complainant, by way of exculpation, argues it "has no knowledge of tariff matters and was not aware that the bill of lading description was inadequate for rating purposes." Anyway "it is not the declaration on the bill of lading but what is actually shipped that determines the applicable rate."

Respondent replies that the bills of lading furnished by the complainant described the shipment as "Lead Pencils." The attachments to the complaint were not provided respondent at the time of shipment and to require respondent or any other carrier to inquire of a shipper as to whether or not the description of cargo is correct, places an undue burden on the carrier. Respondent avers its tariffs are a matter of public record and complainant and/or its forwarding agent are expected to maintain their own expertise.

Although the complainant states the pencil manufacturer, Empire Pencil Company, has no catalog, the complainant's supplier, Cendisc Corp. states the company does not manufacture mechanical pencils and the shipments in question were wood lead pencils with erasers. The complainant has also submitted two invoices covering two shipments of Plast-O-Cap Pencils. One invoice is dated twenty-one days before the first bill of lading. The other invoice is dated contemporaneously with the second bill of lading. The weights and quantities on the invoices tally with those on the bills of lading. Further documentation is afforded by a statement from the merchandiser asserting that the shipments of two consignments of Plast-O-Cap Pencils were made on the relevant dates to the complainant.

The applicable law in these misclassification disputes is only partially quoted by the complainant.[3] What was not mentioned was the counterpart to the statement "what is actually shipped determines the applicable rate." That is where the shipment has left the custody of the carrier and the carrier is thereby prevented from verifying the claimant's contentions, the claimant has a heavy ultimate burden of proof to establish his claim. The rationale underlying the heavy burden of proof requirement in these misclassification cases is simply that there is no practical way to effectively check the contents of shipper loaded/consignee unloaded containers unless each and every container is stripped and its contents examined piecemeal while in the carrier's possession.

Although respondent's argument that forcing the carrier to inquire of the shipper whether or not the description of cargo is correct places an undue burden on the carrier, is a compelling plea on equitable grounds, it is not a cognizable legal defense. This agency cannot consider arguments addressed to equitable considerations in matters arising under section

[2] All rates from Atlantic and Gulf/West Coast of South America Conference Tariff.

[3] Docket No. 383(I)—*Western Publishing Co., Inc. v. Hapag Lloyd A. G.*, 13 SRR 16 (1972).

18(b)(3) of the Shipping Act.[4] Moreover although the ocean freight forwarder would appear to be at least in *pari delicto* with the carrier, nevertheless as the freight forwarder's deliquencies are also not within the stricture of section 18(b)(3) of the Shipping Act, it may not be called to account, at least not before this forum.

Therefore, on the basis of the invoices and statements submitted, it is found that an adequate substantiation of the complainant's claim that the shipments were lead pencils has been established. Thus, since the shipments consisted of lead pencils, they should have been rated under the specific commodity description and accordingly reparation in the amount of $270.82 is awarded.

(S) JAMES S. ONETO,
Settlement Officer.

[4] *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361 (1965).

FEDERAL MARITIME COMMISSION

DOCKET NO. 69–57

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

NOS. 71–2, 71–8, 71–26, AND 71–34

TRANSAMERICAN TRAILER TRANSPORT, INC., SEATRAIN LINES, INC., DANIELS & KENNEDY, INC., CHANDRIS AMERICA LINES, INC., GREEK LINE, INC., HOME LINE AGENCY, INC., INCRES LINE

v.

THE NEW YORK SHIPPING ASSOCIATION, INC.

Claim of States Marine Group, consisting of 12 break-bulk lines, against New York Shipping Association, based upon overassessments for the benefits for longshoremen for the 1969–1971 period found justified in amount of $689,599. New York Shipping Association directed to satisfy claim and notify Commission of method of satisfaction, or establish, with the concurrence of the Group, and advise of, the method of satisfaction, within 60 days. Provisions made for filing of additional claims by other persons seeking refund for 1969–1971 period.

C. P. Lambos and *Donato Caruso* for Respondents, the New York Shipping Association and its members.

Stanley O. Sher and *Jacob P. Billig* for Interveners, States Marine International, Inc., Isthmian Lines, Prudential Lines, Inc., Atlanttrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Meyer Line, Nedlloyd Line and Norwegian America Line.

Ronald A. Capone and *Stuart S. Dye* for Intervener and Complainant, Transamerican Trailer Transport, Inc.

Neal M. Mayer for Intervener and Complainant Seatrain Lines, Inc.

Gerald A. Malia for Intervener, Sea-Land Service, Inc.

Alan F. Wohlstetter for Intervener, Wallenius Line.

Herbert Rubin, Cecelia H. Goetz and *Alan A. D'Ambrosio* for Intervener, Wolfsburger Transport-Gesellschaft m.b.H.

Joseph F. Kelly, Jr. for Complainant, Daniels & Kennedy, Inc., and for Intervener, the Madden Corporation.

Samuel H. Moerman for Intervener, the Port Authority of New York and New Jersey.

Mario Escudero for Intervener, the Commonwealth of Puerto Rico.
Donald J. Brunner and *Paul J. Kaller* as Hearing Counsel.

REPORT

September 14, 1976

BY THE COMMISSION: (Karl E. Bakke, *Chairman;* James V. Day and Bob Casey, *Commissioners.* Clarence Morse, *Vice Chairman,* and Ashton C. Barrett, *Commissioner,* concurring and dissenting.)

This is the final phase of protracted and complex litigation arising out of disputes as to the proper method to be utilized by the New York Shipping Association, Inc. (NYSA), an organization composed of water carriers, terminal operators, and stevedores, serving the Port of New York, for assessment for the period October 1, 1969–September 30, 1971 of cargo moving through that port in order to meet certain benefit payments for which NYSA is obligated under a collective bargaining agreement with the International Longshoremen's Association, AFL-CIO (ILA).[1]

On June 9, 1972, after two Initial Decisions by Administrative Law Judge Charles E. Morgan (Judge Morgan or the ALJ), and a prior Report and Order of our own, we approved a formula for the assessment of the longshoremen's benefits. (See *Agreement No. T-2336—New York Shipping Association,* 15 F.M.C. 259 (1972)).[2] This action was subsequently affirmed by the Court of Appeals for the District of Columbia Circuit. *Transamerican Trailer Transport, Inc. v. F.M.C.,* 160 U.S. App. D.C. 351, 492 F.2d 617 (1974) (*Transamerican*).

Our decision in 15 F.M.C. did not, however, resolve all of the problems relating to the assessments. When this proceeding was instituted, we granted an interim "conditional approval" to the assessment formula proposed by NYSA to enable payments to be made to the ILA so as not to jeopardize the bargained-for benefits. The "condition" was that the approval was subject to such "adjustments and conditions" which the Commission might, after hearing, impose in determining a reasonable formula for allocating assessments on different categories of cargo. (See Order of March 11, 1970).

The assessment formula approved in 15 F.M.C. 259 differed substantially from that to which we had granted interim conditional approval. Under the interim agreement, with certain exceptions not here relevant, all categories of cargo were assessed alike on a basis including both "tonnage" and "manhour" factors. Direct employers of longshore labor (*i.e.,* stevedores and terminal operators) paid assessments on a manhour basis, while carriers paid on a tonnage basis. Under the modified formula

[1] Generally, where reference herein is made to assessment periods by years only, such as 1969–1971, this is meant to cover the periods beginning October 1, and ending September 30.

[2] Our Earlier Report and Order appears at 14 F.M.C. 94 (1970).

approved in our original Report (at 14 F.M.C. 94), cargo carried in the Puerto Rican trade was given "excepted" status, *i.e.*, was excepted from the manhour/tonnage basis and assessed for both direct employer and carrier contributions only on a manhour basis. Under the modified formula approved in our second Report, and affirmed by the Court of Appeals in *Transamerican,* the Puerto Rican trade was given "excepted" status with respect to some benefits (those funded for pensions, welfare and clinics), but carriers in that trade were required to pay the costs of Guaranteed Annual Income (GAI) on the regular tonnage basis in the proportion Puerto Rican tonnage bore to total tonnage. Newsprint was given treatment similar to cargo in the Puerto Rican trade, and automobiles were assessed under the manhour/tonnage formula on a weight basis rather than on the basis of 20% of cubic measurement as had been the prior case.

We recognized that our decision approving the modified formula would "necessitate many assessment adjustments—that simply cannot be helped—for these adjustments are ordered on the record established in this proceeding only, and will not have application to additional assessment proceedings, if any, initiated in the future." (15 F.M.C. at 282.) Adjustments were particularly required in the case of the carriers operating in the Puerto Rican trade (the Puerto Rican carriers), which had been paying assessments on the "excepted" basis adopted by the Commission in its first decision. NYSA was ordered to accomplish the adjustments in the assessments which were made necessary by the terms and conditions of approval granted to the assessment agreement, Agreement No. T-2390 (15 F.M.C. at 287).[3] When the parties were unable to agree on the specific amounts of adjustments or the manner of implementing the required adjustments, the matter was referred to Judge Morgan for the purpose of determining the amounts and "resolving the manner and method adopted by NYSA to accomplish the adjustments. . . ."

While the assessment adjustment implementation proceeding was pending before Judge Morgan, NYSA and the ILA negotiated settlement agreements with the newsprint and automobile interests and the Puerto Rican carriers. These settlement agreements related both to the 1969–1971 assessment period which is the subject of this proceeding and the assessment periods for 1971–1974 (covered by Agreement No. T-2804) and 1974–1977 (covered by Agreement No. T-3007).

NYSA and ILA (which had become a party to the assessment agreements for the two later time periods) agreed that newsprint would be assessed on a manhour/ton basis during 1971–1974 and on a completely "excepted" basis during 1974–1977. In return newsprint agreed to drop any claims for adjustments it may have had arising out of the Commission

[3] The style of this proceeding refers not to the agreement actually in issue but an earlier agreement which was replaced by Agreement No. T-2390.

ordered modification of Agreement No. T-2390 or with respect to No. T-2804. The automobile interests agreed with NYSA and ILA to assessment on a 14% measurement ton assessment basis (*i.e.*, somewhere between the original 20% measurement ton basis of T-2390 and the weight basis ordered by the Commission) for the 1971-1974 period and a weight ton basis for a full tonnage assessment for the 1974-1977 period. NYSA agreed to assessment for the 1969-1971 period on the weight ton basis prescribed by the Commission and credited the automobile interests with $165,051, the difference between assessments on the basis approved by the Commission and that upon which they had actually been made. Newsprint, automobiles, NYSA, and ILA stated in their settlement agreements that these agreements settled all issues with respect to the assessment formulas for the three assessment periods as between themselves. The settlement agreements were approved by the Commission.

The Puerto Rican carriers agreed with NYSA and the ILA to assessment on a manhour/tonnage basis for the 1971-1974 assessment period and a full tonnage assessment for the 1974-1977 assessment period.[4] NYSA agreed to give up its right to recover the monies due it from the Puerto Rican carriers under the Commission's second decision in this proceeding. This agreement was also approved by the Commission, but with the "condition" that the settlement with the Puerto Rican carriers "shall in no way affect or diminish the rights of States Marine International, Inc. et al. [twelve breakbulk carriers operating in foreign commerce who were seeking assessment adjustments before Judge Morgan (hereinafter the States Marine Group)[5]] to refunds under Agreement No. T-2390 and/or arising out of Docket No. 69-57." We explained, in granting the "approval with condition" that "the manner of 'assessment adjustment' necessary to satisfy the claims of States, *et al.*, as well as the amounts to be paid, are the subject of the implementation phase of our Docket No. 69-57 and will be decided therein."

The Initial Decision

In his Initial Decision, Judge Morgan found the claim of the States Marine Group for refunds based upon alleged overassessments during the 1969-1971 period "unjustified and completely without merit." He further found that, to the extent the States Marine Group seeks recovery against the three carriers in the Puerto Rican trade whose underpayments are the basis for the States Marine Group's claims, such recovery is barred by the provision of section 22, Shipping Act, 1916, requiring that actions for reparation be filed within two years of the accrual of the cause of action.

[4] Under Agreement No. T-3007 assessments for the 1974-1977 period were assessed only against carriers, the manhour assessment against the direct labor employer embodied in the prior assessment agreements having been dropped.

[5] These carriers are States Marine International, Inc., Isthmian Lines, Prudential Lines, Inc., Atlanttrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Meyer Line, Nedlloyd Line and Norwegian America Line.

The ALJ first of all determined that the Commission in its two earlier decisions in this proceeding "approved" the combination manhour/tonnage assessment of the breakbulk cargo carried by the States Marine Group because it directed no change in such assessment basis, and that "this assessment basis for the States Marine Group was affirmed" in *Transamerican*. Judge Morgan then stated that the Commission never found that the States Marine Group had been overassessed, and that the major issue in the Commission's prior actions in this proceeding was the proper assessment for the Puerto Rican carriers, the automobile interests, and the newsprint interests. The ALJ also maintained that in order to grant refunds to the States Marine Group, the Commission would have to give similar refunds to all carriers of breakbulk cargo that had been assessed on the regular man-hours/tonnage basis, totaling about $28,000,000, which would in turn require increases in the present tonnage assessments that would be likely to result in cargo diversions away from the port of New York.

If in fact the States Marine Group was overassessed during the 1969–1971 period, Judge Morgan contended, then it was compensated by its assessment treatment during the 1971–1974 and 1974–1977 periods. Insofar as the 1971–1974 period is concerned, Judge Morgan found that the States Marine Group obtained a reduction in assessments by virtue of the Puerto Rican carriers' acceptance of assessment on the man-hour/tonnage basis during that period, which resulted in increased assessments on the Puerto Rican carriers. The increased assessments on the Puerto Rican carriers created, the ALJ asserted, a savings to the States Marine Group of about $750,000, which more than offsets the claimed $715,000 overassessment of that group for the 1969–1971 period.

DISCUSSION AND CONCLUSIONS

The States Marine Group and Hearing Counsel have excepted to the ALJ's denial of the claim of the States Marine Group, while NYSA and the Puerto Rican carriers support such denial. We turn now to the positions of the parties with respect to the individual issues for resolution raised by the exceptions to Judge Morgan's Initial Decision and the replies thereto.[6]

[6] The States Marine Group had maintained before the ALJ that it was entitled, as part of its refund claim, to a share of an alleged "surplus" in the assessment fund at the end of the 1969–1971 assessment period. The ALJ denied this part of the claim on the grounds that the alleged surplus claim was not raised at hearing or made the subject of proof and that, in any case, the "surplus" was merely the result of imprecise prediction as to amounts which would have to be expended during the assessment period and have since been expended to meet NYSA's continuing fringe benefit obligations. To the extent there was a "surplus" at the end of the 1969–1971 period, such surplus merely indicated that the amounts payable by longshore employers for the 1969–1971 period had more than been met. All funds received by NYSA are not held but promptly expended to pay fringe benefit obligations for succeeding assessment periods. Assessments with respect to these later periods are the subject matter of other proceedings, in which the States Marine Group has chosen not to participate. In its exceptions, the States Marine Group itself states, ". . . we recognize that, strictly speaking, the surplus arises to some extent from NYSA's miscalculations. In this forum, and under the assumptions the refunds will be made, we do not at this time press the surplus issue."

I. The Alleged Overassessment of the States Marine Group During the 1969–1971 Assessment Period

We agree with the States Marine Group and Hearing Counsel that the ALJ erred in finding that the Commission has not already determined that the States Marine Group had been overassessed for the 1969–1971 period. We have specifically found, in our Report and Order of June 14, 1972 (15 F.M.C. at 275), that the improper basis of assessment for the Puerto Rican carriers had resulted in the underassessment of that group. It necessarily follows, since the total assessment obligation is fixed, that the States Marine Group was overassessed. We also specifically found, moreover (at 15 F.M.C. 275), that the "underassessment of the Puerto Rican trade" resulted in the "glaring inequity" of shifting "some $6 million in costs to the remaining carriers," among which, of course, are the States Marine Group. The earlier phases of this proceeding were designed solely to determine the proper bases of assessments for different categories of cargo. The fact that we did not, in such earlier phases, require an adjustment of the tonnage/manhour basis upon which the States Marine Group's cargo was assessed, as we had done with respect to automobiles, newsprint and Puerto Rican trade cargoes, does not mean that in implementing our order requiring adjustments of assessments the breakbulk carriers cannot be compensated for overassessments caused by underassessments on the Puerto Rican carriers.

II. The Amount of the States Marine Group Overassessment

Although NYSA does not agree that it has any liability to the States Marine Group with respect to the 1969–1971 assessment period, it is in substantial agreement with the States Marine Group as to what the dollar amount of the Group's claim would be, if valid. Basically, the methodology used by the States Marine Group in computing the claim was to take the difference between the dollar amount of the assessments due from the Puerto Rican carriers for GAI on the tonnage basis approved by the Commission (see page 3, *supra*) and the "excepted" basis on which such payments had actually been made, and then to determine the amount due each member of the States Marine Group by multiplying the amount still owing from the Puerto Rican carriers by the percentage each carrier in the States Marine Group has borne of total tonnage assessments. NYSA maintains that, if this methodology were used, the amount of the States Marine Group's claim should be reduced by the net effect of the automobile credit adjustments for the 1969–1971 period made as a result of the automobile settlement.[7]

We agree with NYSA that, in computing any liability to the States Marine Group, account must be taken of any valid claims that reduce the

[7] Although the difference between the total liability to all carriers of the States Marine Group as computed by the Group and as reduced by NYSA is, as Judge Morgan observed, "relatively small," i.e., $715,621 as opposed to $689,599, the exact amount of such liability becomes important here since we, unlike the ALJ, find that NYSA in fact has such liability.

size of the liability against which the States Marine Group's claims are to be offset. The present amount of such total liability, i.e., the underassessment of the Puerto Rican carriers for the 1969–1971 period, has, by virtue of Commission-approved settlement (see pages 4–5, *supra*), been reduced by credits by NYSA to the automobile interests to effectuate the adjustments required by our order at 15 F.M.C. 287. As thus reduced, the amount of overassessments against the members of the States Marine Group are as follows:

Total States Marine Group Overpayment October 1, 1969-September 30, 1971:

	$5,004,344	(Puerto Rican carrier underpayment) less
$689,599	$ 165,051	(automobile credit) multiplied by
	14.3%	(% of States Marine Group's assessments vis-a-vis total tonnage assessments)

Overpayment of each member of States Marine Group 1969–1971:

Norwegian America Line	$ 14,518 (.30% of total tonnage)
Atlanttrafik	10,646 (.22% of total tonnage)
Nedlloyd & Hoegh Lines	17,905 (.37% of total tonnage)
Hellenic Lines Ltd.	29,520 (.61% of total tonnage)
Concordia Line	62,911 (1.30% of total tonnage)
Blue Sea Line	8,711 (.18% of total tonnage)
Barber Steamship Lines, Inc.	94,850 (1.96% of total tonnage)
States Marine International, Inc. and Isthmian Lines	103,077 (2.13% of total tonnage)
Meyer Line	114,207 (2.36% of total tonnage)
Prudential Grace Steamship Co. (now Prudential Lines, Inc.)	233,254 (4.82% of total tonnage)

III. The Alleged "Satisfaction" of the States Marine Group's Claims by Virtue of the Group's Assessment Treatment During the 1971–1974 and 1974–1977 Assessment Periods

Hearing Counsel and the States Marine Group maintain that the ALJ erred in concluding that even if the States Marine Group had been overassessed during the 1969–1971 period, it was "compensated" by its treatment during the following two assessment periods. We agree.

As we stressed in our second Report in this proceeding, assessment adjustments "are ordered on the record established" in a particular assessment proceeding, and do "not have application to additional assessment proceedings, if any, initiated in the future." (15 F.M.C. at 282.) Once liability for overassessments has been established, it cannot be removed by contentions that, since assessments are raised continuously over successive periods, all periods must be considered in determining assessment liabilities. Under such a theory, assessment adjustments which the Commission had found to be required by law could be postponed indefinitely in light of the possibility that shifting liabilities for succeeding assessment periods would "even-out" liabilities for prior periods, and the approval which we originally granted to the assessment agreement embodied in No. T-2390 upon the "condition" that "any and all adjustments and conditions as shall be ordered by the Commission in its final disposition of this proceeding" would be rendered meaningless. If one determined to be entitled to adjustments because of overassessment during a certain assessment period were not given such adjustments promptly, the result, in Hearing Counsel's words, ". . . would make a mockery of the Commission's conditional approval . . . as well as its ability to evoke confidence in the use of this device when deemed necessary to the public interest in the future."

On the other hand, since payments are made for benefit funds on a continuing basis over many assessment periods, it is arguable that liability to certain carriers for overpayment for earlier periods could be discharged by assessment reductions for later periods. Such an approach has been used by NYSA in the past and is the basis for the settlement with the automobile interests herein. Assessment of the automobile interests on the basis prescribed by the Commission for 1969–1971, which was one of the bases of the settlement, was achieved through credits for the automobile interests against payments for the 1971–1974 period. (See pages 4–5, *supra*.) NYSA contends that, insofar as the States Marine Group is concerned, its claim has been discharged because increased payments by the Puerto Rican carriers for the 1971–1974 assessment period have fully compensated the States Marine Group for any overpayments for the 1969–1971 period.

The "compensation" offered the States Marine Group is, however, totally unlike that given the automobile carriers. Specific credits were given the automobile carriers for overassessments, while the States Marine Group is asked to accept compensation not based on actual credits, but upon an alleged reduced assessment it has been given in a later assessment period.

Ordinarily we would be reluctant to pursue NYSA's contention that the States Marine Group may be compensated for claims relating to overassessment in an earlier period, not by credits, but by alleged reductions for later periods flowing from the assessment formula for a later assessment period. Such contentions have the same basic fault as the position that liability for a single contract period cannot be considered by itself, namely, that the payment of just claims could be postponed indefinitely. Here, however, where the period upon which the alleged "compensation" is based, i.e. 1971–1974, is past and all relevant assignment figures with respect to it are of record herein, we will examine NYSA's contention.

The problem with NYSA's argument is that it rests upon many integral assumptions, none of which has been or can be proved in the context of this proceeding. These assumptions are: (1) that if the assessment formula for the 1971–1974 period had been litigated, the Puerto Rican carriers would have been found to have been overassessed by virtue of the shift to the tonnage basis embodied in the Puerto Rican carrier/NYSA settlement agreement; (2) that by virtue of this fact, the States Marine

Group was underassessed; and (3) that the underassessment of the States Marine Group during the 1971–1974 period exceeded any overassessment of that group during the preceding period, thus wiping out the States Marine Group's claim.

Perhaps the weakest link in NYSA's argumentative chain is its assumption as to what would have happened with respect to the assessment for cargo in the Puerto Rican trade if the assessment formula for the 1971–1974 period had been litigated. The context in which the assessment formulas for Puerto Rican cargo for the 1971–1974 and 1974–1977 periods were approved was one of settlement. As stated in our order of conditional approval of the agreement between NYSA, the ILA, and the Puerto Rico carriers for assessments for those periods, we approved that agreement because "the parties' approach to settlement of the rights and obligations between and among themselves does not appear to be improper. . . ." Considerations underlying settlements do not necessarily coincide with the process of making findings on a record in a litigated proceeding. See *Agreement No. T-2635-2—Pacific Maritime Association Final Pay Guarantee Plan,* 16 S.R.R. 103, 132–133 (1975).[8] Moreover, although our decision in this proceeding in 15 F.M.C. establishing the assessment formula for the Puerto Rican carriers can be said to have some significance for the future, it has such significance only to the extent that the facts and circumstances are the same in the "future" (i.e., 1971–1974, 1974–1977) as they were in 1969–1971. As we said in 15 F.M.C. (at 282), "We should also point out that our decision, of course, applies only to the obligations arising under Agreement T-2390 and the particular collective bargaining agreement which created the benefits to be funded." "We cannot assume, absent findings on a record, that conditions are the same now as they were with respect to Agreement T-2390. . . ."[9]

To the extent that the record in this proceeding shows anything about the application of the formula adopted by the Commission for the Puerto Rican carriers for the 1969–1971 assessment period to the later periods, it would appear to lend significant support to the argument that, if the matter had been litigated, such application would not have been made.[10] In both of his Initial Decisions in this proceeding, Judge Morgan noted the likelihood that a "whole tonnage" formula of the type we have approved for the 1974–1977 period (see page 5, *supra*) would be the appropriate and lawful form of assessment for *all* categories in the

[8] Nothing we say herein is to be construed as casting doubt upon the validity of the Puerto Rican carrier or other approved settlehent agreements as between the parties thereto. By virtue of those agreements, the parties have resolved their differences in a manner which we have found to be proper. Regardless of how the issues with regard to the assessments for the 1971–1974 and 1974–1977 periods may have been resolved if they had been fully litigated, the parties to the settlement agreements exercised good faith in attempting to predict rights and liabilities and cannot be faulted in desiring that, as between themselves, assessment litigation should cease.

[9] See Order of Investigation and Hearing on Agreement No. T-3007 (covering the 1974–1977 assessment period), page 3, served November 1, 1974.

[10] We take no position as to what Puerto Rican assessment formula would have been approved for the 1971–1974 and 1974–1977 periods if these matters had been litigated. We wish only to highlight the highly speculative nature of predictions in this regard.

future.[11] We, furthermore, relied, at least in part, in establishing the partial exemption of the Puerto Rican cargo from the tonnage portion of the assessments for the 1969–1971 period on the ground that such partial exemption would prevent "impos[ing] on the Puerto Rican trade at this time an unnecessarily severe increase in costs. . . ." (15 F.M.C. at 265.)[12] Prior to 1969, NYSA collected all benefit assessments on a manhour basis. See 15 F.M.C. at 291–292. Since the Puerto Rican carrier assessment formula approved for the 1969–1971 period imposes cost burdens somewhere between those of the excepted, i.e., manhour, assessment level and the manhour/ton or whole ton level, the shift to manhour/tons and whole tons embodied in the agreements covering 1971–1974 and 1974–1977, respectively, would have been much less severe and may have suggested a different result in the Commission's determinations.

Since it cannot be shown that the Puerto Rican carriers were overassessed for the 1971–1974 period, it follows, *ipso facto,* that the States Marine Group cannot be shown to have been underassessed by virtue of such overassessment.

Although the States Marine Group never challenged the assessment formula as it applied to breakbulk cargo for the 1971–1974 period before the Commission, the record is not without evidence suggesting that even if the Puerto Rican assessment formula did not result in overassessment for Puerto Rican cargoes during 1971–1974, the States Marine Group may still have been overassessed during that period. The presidents of both NYSA and the ILA testified that they felt the assessments during this period were unfair to the breakbulk carriers, and this was also the view of an independent labor arbitrator who, however, lacked jurisdiction to alter the assessment formula.

Insofar as the 1974–1977 assessment period is concerned, the president of NYSA testified that the assessment on breakbulk cargo embodied in the agreement for that period reflected only that to which the breakbulk carriers were already entitled as "fair and equitable." The president of the ILA testified that he felt the formula for 1974–1977, although more equitable than those of earlier periods, should have been even more favorable to breakbulk cargoes.

The implication of all of this is that, rather than reimburse the States Marine Group for claims for overassessment during the 1969–1971 period, the assessments upon it during the later periods may themselves have

[11] " 'Hours' was the key in the past. 'Tons' will be the key in the future. In the present a combination of tons and hours is the key. Agreement No. T–2390 is a combination of tons and hours. It places some of the assessment costs on a man-hours basis, and some on a tons basis. In other words, it is a compromise solution." 15 F.M.C. at 293. "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." 14 F.M.C. at 146.

[12] See also: "[The Puerto Rican assessment formula] not only requires the Puerto Rican trade, like all others, to contribute toward the industry problem of escalating GAI costs in an adequate fashion but also *cushions the trade against the severe increase in costs for containerized operations which results from a shift from a strictly man-hours basis of assessment to tonnage.*" (15 F.M.C. 272.) (Emphasis supplied.) ". . . We are convinced that the proposals [adopted] . . . not only have substantial record support but also obtain a reasonable degree of relating benefits derived to the costs imposed, *including a reduction of the severity of costs* to these parties had we adopted the examiner's decision." (15 F.M.C. 282.) (Emphasis supplied.)

been too high or may only have been what they should have been based upon the weighing of relative benefits and burdens for that period. We do not say that this is necessarily the case. We do, however, stress that such possibility as shown by the records herein hardly supports NYSA's contention that assessments on the States Marine Group during the later periods "compensated" it for any overassessments which may have been made in the 1969–1971 period.

The mathematical computation engaged in by NYSA with respect to the assessments levied against the States Marine Group for the 1969–1971 period as compared with the assessments levied against the Group for the 1971–1974 period is faultless as a mathematical computation. It does indeed show, as NYSA contends, that assessments against the Puerto Rican trade on the manhour/ton basis for 1971–1974 did result in an assessment against the States Marine Group as a whole of $749,334 less than would have been the case if the Puerto Rican trade had been assessed on the basis established by the Commission for the Puerto Rican carriers for the 1969–1971 period, and that the $749,334 figure is larger than either the $715,621 claimed by the States Marine Group or the $689,599 we here find to be the proper amount of the claim. NYSA is faced with the difficulty, however, that the record herein will support neither the conclusion that the Puerto Rican carriers were overassessed for the 1971–1974 period nor the finding that the States Marine Group was underassessed for that period, and in fact suggests that the contrary may be the case. Thus the mathematical computation must remain a mere exercise in arithmetic insofar as its utility in this proceeding is concerned.

We conclude that the States Marine Group's claim for overassessment during the 1969–1971 assessment period has not been satisfied by virtue of the Group's assessment treatment during the 1971–1974 and 1974–1977 assessment periods.

IV. The Alleged Agreement Not to Pursue or Waiver of the States Marine Group's Claim

Even though an unsatisfied claim of the States Marine Group may have existed with respect to the overassessment it bore for the 1969–1971 assessment period, such claim may, as NYSA asserts and as the States Marine Group and Hearing Counsel deny, have been relinquished by the Group's agreement not to pursue it or by its waiver of the claim. We find, however, upon careful examination of the record herein, nothing which convinces us that such agreement or waiver has taken place, and much which convinces us that it has not.

Certainly the Puerto Rican settlement itself cannot be said in any way to constitute a waiver or settlement of the States Marine Group's claim. That agreement specifically recognizes, as do the automobile and newsprint settlement agreements, the possibility of "the continuance of . . . [the] litigation [in this proceeding] by other parties," and our approval of the Puerto Rican settlement was specifically conditioned upon the preservation of "the rights of States Marine International, Inc., *et al.*, to refunds under Agreement No. T-2390 and/or arising out of Docket No. 69-57." Moreover, the States Marine Group's conduct with respect to its claim is entirely consistent with its position that such claim was never waived or settled. The States Marine Group has consistently maintained, from 1972 to the present time, by means of formal pleadings and representations of counsel in this proceeding, statements to NYSA representatives, formal representations to the NYSA-ILA Contract Board, and letters to the entire industry, that it intended to pursue and was pursing its claim for refunds. Furthermore, counsel for NYSA informed NYSA's board of directors, shortly before the whole tonnage formula had been adopted and the Puerto Rican settlement had been agreed to between the parties thereto, that breakbulk carriers might, in spite of the settlement, nevertheless proceed with their refund claims. Although the representative of the States Marine Group on NYSA's board of directors voted to approve the Puerto Rican settlement, he at that time "expressed that this would not affect in any way the break bulk carriers' interests," and voted against a board resolution to deny claims of breakbulk carriers arising out of this proceeding.[13]

As evidence in support of the alleged settlement or waiver of the States Marine Group's claim, NYSA relies upon testimony of representatives of NYSA and the ILA and some documentary evidence intended to show their understanding that the Puerto Rican and other settlements would and should bar the States Marine Group's claim and upon the by-laws of NYSA. The record is not completely clear with respect to the extent that the positions of NYSA and ILA that refunds should not be paid were communicated to the States Marine Group, but even assuming that all such communications were made to and fully understood by the States Marine Group, they can hardly be viewed as constituting either a satisfaction of the Group's claim, in view of the language in all the settlement agreements referring to the continuance of this proceeding by other parties and our order preserving the Group's claim, nor a waiver of the claim, in view of the persistent prosecution of that claim by the Group.[14]

[13] Similarly, the mere fact that representatives of breakbulk carriers were, due to their insistence, granted places on the ILA-NYSA Contract Board, NYSA Negotiating Committee, and NYSA Internal Assessment Committee in 1974 and participated in the formulation of the full tonnage assessment basis for the 1974-1977 period and the Puerto Rican carrier and other settlement agreements hardly demonstrates a settlement or waiver of the States Marine Group's claims.

[14] It is particularly difficult to see how the ILA position can affect the claim when it is remembered that the ILA was not a party to the assessment agreement for the 1969-1971 period out of which the claim arises. We note in this regard the decision issued on August 27, 1976, by the Court of Appeals for the District of Columbia Circuit in *Pacific Maritime Association and International Longshoremen's and Warehousemen's Union v. FMC & USA*, Nos. 75-1140 and 75-1215, in which the court held that the Commission lacked preimplementation approval authority under section 15 of the Shipping Act, 1916 over any agreements between labor and management, contrary to the holding of the Court of Appeals for the Second Circuit in *New York Shipping Association, Inc. v. FMC*, 495 F.2d 1215 (2nd Cir. 1974), *cert. den.*, 419 U.S. 964 (1974). While we are seeking review of the D.C. Circuit's decision, that decision does not affect the Commission's action in the subject proceedings. As the D.C. Circuit itself observed, it has affirmed the Commission's jurisdiction over the Agreement here in issue, T-2390, in *Transamerican*, and that Agreement deals only with obligations between employers, "not . . . [those] negotiated between union and the multi-employer unit." (See fn. 33).

The by-laws of NYSA authorize NYSA to represent its members solely with respect to actions against labor organizations and officials, and the organization's purposes are restricted to "labor relations matters." Moreover, the president of NYSA testified that he, speaking for NYSA, had no authority to settle the States Marine Group's claims if the Group did not wish to settle its claims because "it takes two to tango." The presence of a majority vote provision in the bylaws and the fact that all but one of the Board of Directors voted to deny the States Marine Group's claim does not in any way militate against the viability of the claim where the action on the claim appears, both from the literal language of the bylaws and NYSA's president's admission, to be *ultra vires*, and where the representative of the States Marine Group voted against denial of the claim.

We further note the additional facts that there is no evidence that the Group or its members ever authorized anyone to settle such claim, that nothing resembling a settlement has been produced on the record here, and that, perforce, no such settlement has been approved by us as is required by section 15 of the Shipping Act and as was done with respect to the settlements with the other interests with which NYSA has reached agreements, i.e., the Puerto Rican carriers, newsprint, and automobiles. When all of the above matters with respect to the question of the existence of an agreement not to pursue or a waiver of the States Marine Group's claim are weighed, together with these additional facts, we can only conclude that the States Marine Group has not in any way agreed not to pursue or waived its claim for assessment adjustments arising out of our decision in 15 F.M.C. in the earlier stages of this proceeding.

NYSA remains liable for the satisfaction of such claim. NYSA is itself an entity subject to the Shipping Act (See *New York Shipping Association*, 16 F.M.C. 381, 387–389 (1973), affirmed *sub nom. New York Shipping Association, Inc. v. FMC*, 495 F.2d 1215 (2nd Cir. 1974), *cert. den.* 419 U.S. 964 (1974); see also *United Stevedoring Corp. v. Boston Shipping Assoc.*, 16 F.M.C. 7, 9–10 (1972) and bears the responsibility to make such adjustments as are necessary to implement our approval of Agreement No. T–2390. (See 15 F.M.C. 282, 287.) Whatever effect the various Commission-approved settlement agreements may have as between the parties thereto (see footnote 8, *supra*), they cannot, as we specified in the order conditionally approving the Puerto Rican carrier settlement, and as NYSA itself unconsciously suggests, affect the rights of the States Marine Group.[15]

V. The Claim For Interest on the Refunds Due the States Marine Group

The States Marine Group claims interest as a part of the outstanding liability with respect to the 1969–1971 assessment period. It accuses

[15] As noted at pages 16–17, *supra*, in both its deliberations on, and in the language of, the settlement agreements themselves, there is an acknowledgement on the part of NYSA that parties to this proceeding could continue the litigation in spite of the settlements.

NYSA and the Puerto Rican carriers of engaging in "delaying tactics" and suggests two percent per month as the measure of interest since this is the rate NYSA charges carriers for late payment of assessments.[16] The Group states, however, that the "rate of interest is not as important as the 'principle': There must be some cost to those who hold another's funds for such a protracted period." We feel that the claim for interest should be denied.

The decision whether or not to grant interest as a part of the States Marine Group's recovery is one within our discretion (See *Flota Mercante Grancolombiana v. FMC,* 373 F.2d 674, 681 (D.C. Cir. 1967).), and we feel that neither equity nor promotion of effective regulation requires such grant here. Although it is true in a sense that the States Marine Group has been deprived of the use of its funds by virtue of its overpayment, the fact that such overpayment was made, much less the amount of such overpayment, could not have been ascertained prior to our second decision herein.[17] In fact, in our first decision in this proceeding we found that the Puerto Rican carriers should have been assessed on an excepted basis (See 14 F.M.C. 94, 97–99, 103), which would have required adjustments in their favor as opposed to that of the States Marine Group.

Insofar as the period from the date of our remand is concerned, although various delays in this proceeding have occurred, the postponements were granted by Judge Morgan or by us because good cause was found for them. We also note in this regard that the States Marine Group itself has obtained several delays in the proceeding. We find nothing showing "delaying tactics" by anyone in obtaining such delays.

The contention that NYSA has "held" the funds which the States Marine Group claims is incorrect. NYSA promptly pays over any monies it collects to fund the benefits under its collective bargaining agreement with the ILA.

Although NYSA cannot be absolved from its liability to the States Marine Group for overassessment for the 1969–1971 period, it does not appear equitable or necessary or helpful for regulatory purposes to impose liability for interest upon it where NYSA has not engaged in any conduct which it should have known was improper at the time, has not been shown to have improperly delayed this proceeding, and did not hold but promptly paid over the assessments it collected for the use and benefit of ILA which was their intended and proper purpose.[18]

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[16] Although, in view of our denial of any interest on the States Marine Group's claim, it is unnecessary for us to determine what a proper rate of interest would have been, we do note in passing that the two percent figure suggested by the Group may not have much relevance to the problem since there appears to have been no late payment for which NYSA has exacted a two percent penalty.

[17] Cf. our denial of interest on unliquidated claims in *Philip R. Consolo v. Flota Mercante Grancolombia,* 6 F.M.C. 262, 269 (1961), reversed on other grounds *sub nom. Flota Mercante Grancolombiana v. FMC,* 342 F.2d 924 (D.C. Cir. 1964), and ultimately affirmed *sub nom. Consolo v. FMC,* 383 U.S. 607 (1966).

[18] The claim of the States Marine Group for refund, unlike its claim for interest, does not rest upon a discretionary basis. It rests upon the requirement of compliance with our order approving Agreement T-2390 upon the condition that such adjustments would be made as the ultimate decision showed to be necessary, our order in 15 F.M.C. (at 282, 287), ordering adjustments, our order of remand to Judge Morgan directing "implementation of the terms and

VI. The Manner in Which the Claim of the States Marine Group is to be Satisfied

There remains as an issue in this proceeding the manner in which the necessary adjustments to satisfy the claim of the States Marine Group will be made. As we observed in our order conditionally approving the settlement with the Puerto Rican carriers and in our order remanding this proceeding to Judge Morgan, the manner and method to accomplish the necessary assessment adjustments is one which is to be "adopted by NYSA." We, moreover, have not as yet determined that any of the members of the States Marine Group is necessarily entitled to a cash refund. (See Order of Remand, pages 5–6.) We expect NYSA to carry out its responsibility under our orders and establish a proper means for meeting its liability. While, as we have stated above, we attach no culpability to anyone for the delays which have occurred in this proceeding, we do note that over four years have elapsed since our order requiring that assessment adjustments be made and over two and a half years since the Court of Appeals for the District of Columbia Circuit affirmed the decision incorporated in that order. We now expect that, the amount of recovery having been determined here, the method of satisfying the States Marine Group's claim can be established with some dispatch. We would further expect NYSA and the States Marine Group, who deal with assessments on a regular basis and who best understand the mechanics involved in adjustments, to be able to resolve this matter in the most appropriate manner. To facilitate the resolution of this matter

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conditions of the approval of Agreement No. T–2390," and our order approving the settlement with the Puerto Rican carriers upon the condition that the rights of the States Marine Group were preserved. Our duty under section 15 to insure that agreements are carried out only as approved, as well as our obligations to insure that agreements we approve do not operate in a discriminatory manner, require that the adjustments we have ordered be made. Failure to make the adjustments here required would constitute the carrying out of an unapproved agreement because it would result in the imposition of an assessment burden on the States Marine Group different from that which flows from the modified assessment allocation formula which we have approved for Agreement No. T–2390. Furthermore, as we noted in our order of conditional approval of the settlement agreement with the Puerto Rican carriers, an approval of that agreement which did not adequately protect the rights of the States Marine Group "would operate in an unjustly discriminatory manner."

Even if the claim for refunds to the States Marine Group could be analogized to an action for reparation by a private complainant, which unlike the directive embodied in Commission orders, may permit of discretion and equitable Shipping Act policy considerations (See *Consolo v. FMC*, 383 U.S. 607, 621–622 (1966)), it is clear that both equity and policy considerations would require that the claim of the States Marine Group be granted. In conditionally approving Agreement No. T–2390, the Commission was resolving a dilemma in the only feasible manner. The public interest required that *some* assessment formula be approved in order that the payments be made to longshoremen which NYSA was obligated to make. See Order of Conditional Approval, March 11, 1970, pages 7–8. (For the important public interest in agreements of this type see also *Volkswagenwerk v. F.M.C.*, 390 U.S. 261, 263–264; *New York Shipping Association v. F.M.C.*, 495 F.2d 1215 (2nd Cir. 1974), *cert. denied*, 419 U.S. 964 (1974).) However, the agreement conditionally approved by the Commission had not been subjected to hearing, and in fact after hearing was found unlawful in part and ordered modified. See 15 F.M.C. 282, 287. In order both to serve the public interest by allowing collection of the longshoremen's benefits to be made and to protect all interests challenging the reasonableness of the assessment formula, the Commission had no alternative but to approve T–2390 on the condition that the necessary adjustments be made. For the Commission now to deny the States Marine Group's claim would be tantamount to declaring that its conditional approval was improper since such approval, absent hearing, can only be justified on the theory that effective adjustments would be made to cure any problems arising from assessments which are shown, after hearing, to be unlawful. The Commission, however, because of the paramount public interest in seeing that longshoremen's benefit payments are made and shipping is not disrupted, has no alternative but to grant a conditional approval prior to hearing. Thus a refusal by the Commission to grant the Group's claim would place the Commission in the untenable position of acknowledging on the one hand that it has to give conditional approval to assessment agreements and on the other that it cannot effectively do so.

we now set forth guidelines for the parties' consideration with respect to the manner and method of the adjustments which we here require.

Of course, cash refunds would be a proper means of making the necessary adjustments due the States Marine Group. Such cash refunds were made by NYSA to certain stevedores for overpayment of assessments at the end of 1968.

We further find no fault in principle with a system of "credits" against present or future assessments in lieu of direct payments as a means of reimbursement. We have, in fact, recognized that amounts due because of past expenditures may be repaid by means of credits rather than direct cash payments. See *Philippine Merchants Steamship Co., Inc. v. Cargill, Inc.*, 9 F.M.C. 153, 163 (1965). The "credit" method, moreover, may be a particularly appropriate one where, as here, we deal with continuing obligations under several successive agreements, the smooth operation of which is critical in the area of labor relations.[19] Credits, as noted above, have been given the automobile interests against overassessments for the 1969–1971 period as a basis for the settlement with those interests.

One other method might be to give the members of the Group "partial credits." Rather than not imposing any assessments against the States Marine Group until assessments due for future cargo movements equalled the $689,599 liability, NYSA might assess the members of the Group at a lower rate. The effect of this would be that the "repayment" would take more time, but since it would nevertheless be certain, such an approach could be acceptable if the time for repayment were reasonable.

Of course, although we here find that no settlement or waiver has occurred with respect to the Group's claim, the States Marine Group could, if it desired, agree to such settlement or waiver for valid consideration.

Our singling out of these methods of satisfaction of the States Marine Group's claim is not intended to exclude other methods as permissible approaches to satisfaction. Certain approaches, of course, are not acceptable. As we have made clear above, we cannot accept any lack of adjustments based upon the theory that adjustments have, because of the assessments in later assessment periods, already taken place.

Similarly, we cannot accept NYSA's position that three carriers of the States Marine Group, States Marine International, Inc., Isthmian Lines, and Meyer Line, which no longer serve the port of New York, are not in any case entitled to assessment adjustments. No carrier has ever been charged or penalized by NYSA in the past for leaving the port. Moreover, we are unable to see that the departure of the carriers has, as NYSA asserts, left assessment obligations behind. Uncontested evidence of record shows that each of these three lines paid all assessments due during the entire period it served New York. Assessment obligations in

[19] The States Marine Group itself suggests that its members "presently serving New York might be compensated by direct credits against present assessments. . . ."

the future will be met, as they should be, by those who actually employ longshore labor, directly or indirectly. By requiring adjustments for the three named carriers we do not, as NYSA contends, reward them for leaving the port. We merely require that the liability owed them be met. Since the three carriers no longer serve the port of New York, however, and thus no longer pay assessments, a system of credits or partial credits against present or future assessments is not a feasible means to satisfy their claim, and some other means of satisfaction must be adopted.

Although, of course, the burden which might fall upon NYSA as a result of its obligation to make adjustments cannot defeat that obligation, we do wish to point out that it is by no means clear that the burden is either of the type or magnitude which NYSA alleges. It is entirely possible, for example, that the satisfaction of the States Marine Group's claim may require no adjustment whatsoever in the level of assessments payable by those who pay fringe benefit assessments now and in the future. We note, for example, that a "surplus" existed both at the beginning and at the end of the period covered by T–2390. If this is also true at the end of the present period, no increases in the assessment level will be necessary and no disruption or modification of the assessment funding will be necessary or occur by reason of the Group's claim.

Furthermore, it is not certain that the liability of NYSA as a result of our decision herein will be $5,000,000, as it contends. It is true that the total overassessment against which refunds could be made for the 1969–1971 period is $4,839,293 ($5,004,344 Puerto Rican carrier underassessment less $165,051 automobile overassessment - see page 9, *supra*.). This does not, however, mean that NYSA will therefore be required to refund this amount. Since only the States Marine Group, of all the potential recipients of refunds, has participated in this phase of the proceeding and pressed its claim here, it would be inappropriate to attempt to make any determinations with respect to the rights of others to refunds. We would make only three observations in this regard. First of all, the necessary adjustments to satisfy the claims of the States Marine Group will in no way affect the possible rights to refunds of any other claimants. The dollar amount of the refund due the States Marine Group has been calculated in such a way that it is limited solely to that part of the refund to which the States Marine Group is entitled. Thus, the possibility of refunds to other claimants is irrelevant to the Group's claim, and no reason appears why such claim should not be discharged now. Secondly, other claimants may not be in the same position with respect to refund claims as the States Marine Group, having settled, waived, or agreed not to pursue such claims.[20] Finally, even if the entire $4,839,293 overassess-

[20] We note in this regard, without of course in any way deciding the merits of overcharge claims by claimants other than the States Marine Group, that the States Marine Group appears to be the only claimant which has actively pursued its claims, the order of approval of the Puerto Rican settlement refers specifically only to the claims of the States Marine Group, and that some potential claimants which may have been entitled to refunds replied to an informal poll conducted by a representative of the States Marine Group that they did not wish such refunds.

ment were repaid, it would amount to only about 1.55 percent of the $312 million benefit fund which is the subject of the present assessment period, and thus would not appear to create a significant financial problem when viewed in its proper context.

Accordingly, we will hold this proceeding open, and direct that within 60 days from the date of service of this Report and Order[21] NYSA (1) satisfy the States Marine Group's claim and notify us in writing of the method of satisfaction thereof, or (2) establish, with the concurrence of the States Marine Group,[22] the manner and method by which satisfaction of such claim is to be made, and furnish us with a written description thereof.[23]

Additionally, within this 60-day period, we will receive filings of claims on behalf of persons other than the members of the States Marine Group for assessment adjustments. Such claims must be supported by computations establishing the amount of the alleged overassessment in the manner adopted herein to compute the overassessment of the States Marine Group, i.e., $4,839,293 multiplied by the percentage the claimant's assessment bears to total assessments for the October 1, 1969–September 30, 1971 period. (See pages 8–9, *supra*.) In light of the problems present here with respect to the existence of possible settlements, agreements not to pursue, or waivers of claims (see pages 25–26, *supra*), such claims should also be supported by evidence that they are still extant. Copies of such claims should be served on counsel for NYSA. Finally, to insure that all possible claimants will be fully advised, we will publish in the *Federal Register* a notice of our action herein.

For the foregoing reasons, we find that refund adjustments are due the States Marine Group for the October 1, 1969–September 30, 1971 assessment period in the amount of $689,599. An order will be issued directing that within 60 days of date of service, NYSA (1) make such adjustments and notify us in writing of the method used for the adjustments, or (2) establish, with the concurrence of the States Marine Group, the manner and method of such adjustments and furnish us with a written description thereof. Claims by other persons for assessment adjustments relating to this period, duly supported, with copies to counsel for NYSA, may also be filed during that time.

Vice Chairman Clarence Morse and Commissioner Ashton C. Barrett concurring and dissenting.

We dissent from the majority report because we do not consider there to be any amounts owing from NYSA to the States Marine Group except

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[21] Sixty days appears to be sufficient for such action in light of the parties' long familiarity with the subject matter of assessments and the fact that only the manner and method of satisfaction of the claim and not the amount of the claim itself is to be resolved.

[22] We, of course, expect that the States Marine Group will not withhold such concurrence for any manner and method of satisfaction which is within the spirit of this Report and Order.

[23] We, of course, cannot accept adjustment methods which we here find to be improper and remind both NYSA and the Group that a satisfaction or method of satisfaction risks rejection if it is not in good faith compliance with this report and order. See *American Export-Isbrandtsen L. Inc. v. F.M.C.*, 444 F.2d 824, 827–829 (D.C. Cir. 1970).

perhaps to the three carriers which discontinued service to the port in 1972.

Our disagreement is not as to whether the States Marine Group was overassessed in the 1969–1971 period. We agree that it was overassessed as the majority found in the Commission's prior decision.[24] We find from the evidence, however, that the overassessment of the States Marine Group (not including the three carriers) has since been recompensed and no further adjustment is required.

One of the critical elements of this matter is the Puerto Rican settlement.[25] There is no question that the settlement, itself, and the Commission's approval of it did not extinguish the States Marine Group's rights, if any, which were then unsatisfied. Similarly, those same actions did not create any new rights or revive any rights previously satisfied. What the settlement and order of approval did accomplish in this respect was to settle certain claims and permit the States Marine Group to have the opportunity to litigate its claims under any rights it believed remained to it after our approval of the settlement. Our Order of "Approval with Condition" said:

> We believe our action here . . . is fully consistent with the preservation of all "*rights*" *or* "*claims*" which States, *et al.*, have acquired by virtue of our decision in Docket 69–57. [Emphasis added.] [26]

By stating the alternative words "rights" and "claims" the order merely ensured that the States Marine Group could still make a claim as to any rights which the Group acquired in Docket No. 69–57, but the language does not say that the Group had any unsatisfied rights.

As the order further said:

> The manner of "assessment adjustment" necessary to satisfy the *claims* of States, *et al.*, as well as the amounts to be paid, are the subject of the implementation phase of our Docket No. 69–57 and will be decided therein. [Emphasis added.] [27]

This language can be fairly read to mean only that any unsatisfied rights previously accrued by the States Marine Group could still be pursued as to the amount of any adjustment and the manner of satisfying it.

Nowhere is it said that the rights preserved included the "right" to prevail as to any claim.

Thus, with respect to the effect of the Puerto Rican settlement, it is not enough to say, as does the majority, that by the Puerto Rican settlement, NYSA gave up "any and all claims to any recoveries which may be due in Docket No. 69–57"[28] [the 1969–1971 period]. There was a *quid pro quo* for that release. The Puerto Rican carriers "waive[d] any and all

[24] *Agreement No. T–2336—New York Shipping Association*, 15 F.M.C. 259 (1972). But see concurring and dissenting opinion of Commissioner Morse, 15 F.M.C. 259 at 283.
[25] Agreement No. T–3017, approved January 16, 1975.
[26] Agreement No. T–3017, Approval with Condition, January 16, 1975, pp. 4–5.
[27] *Id.*, p. 6.
[28] Agreement No. T–3017, par. 2.

rights to any recovery from NYSA . . . pursuant to the issues involved in . . . *Docket [No. 73-34]*",[29] *i.e., the 1971–1974 period.*

The majority gives little weight to those claims asserted and then waived by the Puerto Rican carriers: "Considerations underlying settlements do not necessarily coincide with the process of making findings on a record in a litigated proceeding." That is true, but the parties to the settlement agreed to something. And that something, according to our order, was the "settlement of the rights and obligations between and among" the parties.[30]

Is the majority now saying that there really were no mutual obligations subject to the settlement—that it was a mere facade—and that because there existed real obligations on only one party, i.e., NYSA, there was no agreement and nothing to approve? Yet we said in our order approving the agreement that the settlement "does not appear to be improper".[31]

There was a legitimate understanding among the parties to the Puerto Rican settlement: while NYSA had real claims for the 1969–1971 period, the Puerto Rican carriers had real (albeit unlitigated) claims for the 1971–1974 period. In addition, there were other claims against NYSA by carriers which were overcharged in 1969–1971 because of and aside from the underpayment by the Puerto Rican carriers during that period. Thus NYSA had the prospect of paying claims of carriers for 1969–1971 and 1971–1974. For 1969–1971, it was non-Puerto Rican carriers, and for 1971–1974 it was the Puerto Rican carriers. However, there was also the collectible debt due to NYSA from the Puerto Rican carriers.[32]

What then was to be done? NYSA could have insisted upon payment to it by the Puerto Rican carriers of $5 million which it would probably have had to distribute to all carriers overassessed in 1969–1971. Then NYSA would have had to pay a substantial sum (estimated at $7.4 million) to the Puerto Rican carriers; but to do so NYSA would have had to collect that amount from all non-Puerto Rican carriers underassessed in 1971–1974. As a further complication there were specific payments due from NYSA to certain carrier groups, i.e., the automobile and newsprint carriers, and also claims arising out of periods after 1969–1971.

To avoid the making of payments back and forth and to avoid further litigation, NYSA, on behalf of its membership,[33] including the States Marine Group, negotiated settlements with the specific carrier groups found in Docket No. 69–57 to have been improperly assessed. Such agreements were reached with the automobile, newsprint, and Puerto

[29] *Id.*, par. 3.

[30] Approval with Condition, p. 4.

[31] In fact, the record shows the value of NYSA claims to be about $5 million and of the Puerto Rican carriers' claims, about $7.4 million. See 15 F.M.C. 259, 275 and Exh. 157, p. 3.

[32] Approval with Condition, p. 4.

[33] NYSA By-Laws, Article IV, section 3; Exh. 160, p. 11:

Duties of Directors. The Board shall have the power . . . to employ counsel, and to direct any of the employees of the Association . . . to devise and carry into execution such other measures as they may deem proper and expedient to promote the objects of the Association and to protect the interests and welfare of the membership.

Rican carriers and included several types of settlement: credits, setoffs, and waivers of claims.

The improper assessment of the States Marine Group was not dealt with by NYSA in the same fashion because the States Marine Group was on the same side of the "settlement table". It was among the members of NYSA for whom NYSA was negotiating the settlements with the automobile, newsprint, and Puerto Rican carriers. Thus, the three settlements resolved the improper assessment problems for all concerned: those carriers whose overassessments were specifically "repaid" or underassessments specifically "collected", and the rest of the NYSA membership.

No one objected to those settlements. Neither the States Marine Group nor any other carriers objected to the necessary payments, credits, or setoffs. Most importantly, no objections were made to the fact that although the automobile and newsprint carriers' claims arose originally out of the 1969–1971 period, NYSA agreed to make "payment", in part, through reduced assessments in later periods.[34] Furthermore, the Commission approved those settlements.[35]

It is contended by the majority that "merging" more than one contract period is wrong for purposes of effecting a settlement with the States Marine Group. Yet, as noted above, that very approach was approved by the Commission when it approved the automobile and newsprint carriers' settlement agreements with NYSA. There is, therefore, precedent for the use of future reduced assessments for the settlement of claims arising out of this proceeding.

Furthermore, the relationship between NYSA and ILA is more truly a continuing, ongoing, long-term relationship than it is a series of finite, short-term, unrelated agreements—the relationship is long-term; only the details of the relationship vary from contract period to contract period. Rather than becoming involved in unneeded and expensive litigation, it is in the public interest in these ongoing relationships of labor and management that the interested parties themselves adopt adjustment procedures which have the objective of leveling out the occasional contractual inequities.

The States Marine Group, however, objects vigorously to that type of settlement as applied to it as being improper. The Group contends that this proceeding, and the 1969–1971 period for which it has been litigated, must stand on its own, completely separate from all consideration of future periods. Obviously other carriers who possessed rights and claims arising out of the 1969–1971 period did not share that view when they agreed to exchange their rights and claims for future benefits; and neither did the Commission object to that approach in approving those arrangements.

[34] Agreement No. T–3023, par. 4; Agreement No. T–3055, par. 6.

[35] Approval of Agreement No. T–3023, December 13, 1974, and Approval of Agreement No. T–3055, February 21, 1975.

It cannot, therefore, be found that the Commission may not accept satisfaction of the States Marine Group's claims on the same basis. It might be contended, however, that although the Commission may approve such a settlement of the States Marine Group's claims on that basis, the States Marine Group has not agreed to it. Nevertheless, the purpose of this phase of Docket No. 69–57 is to finally resolve all claims arising out of our prior decision herein; and the Commission has the authority to find, and we do find, that although no agreement, as such, has been reached between NYSA and the States Marine Group, nevertheless, adequate recompense has in fact been made except, perhaps, as to the three carriers which discontinued service to the port in 1972.

The majority leaves it to the parties to agree on a settlement within 60 days. Despite our approval of the other settlements based upon reduced future assessments, the majority would apparently not accept an agreed settlement on the same basis. We find, however, that satisfaction of the States Marine Group's claims (except as noted) has been made in that fashion and there is no point in prolinging the litigation. If the parties do not agree on a settlement within the 60 days, the majority will be faced with the problem of imposing a settlement, although we find one is in existence now.

We consequently conclude that the reduced future assessments accorded the States Marine Group adequately settled the States Marine Group's claims, but even if they did not do so in whole or in part, the claims have been resolved entirely by virtue of the setoff aspect of the Puerto Rican settlement.

The Puerto Rican settlement was, basically, a setoff of claims. NYSA could have insisted that the Puerto Rican carriers pay the $5 million; but those carriers would then have pursued their claims against NYSA for the $7.4 million. Instead the two parties mutually relinquished their claims. The obvious benefit to the States Marine Group and other carriers was avoidance of the need to pay the difference to the Puerto Rican carriers.

The argument is made by the States Marine Group and adopted by the majority that such a conclusion is based on speculation. They contend that the level of the NYSA debt to the Puerto Rican carriers is unknown if it existed at all, having not been litigated.

As we discussed above, however, the Commission having approved the Puerto Rican settlement as not being improper, we may not now say that no claims of the Puerto Rican carriers against NYSA existed. Furthermore, the States Marine Group did not oppose the settlement except to reserve its rights. In other words, the States Marine Group acquiesced in the Puerto Rican carriers' assertion of $7.4 million in claims and in NYSA's agreement to set them off against the $5 million NYSA claim against the Puerto Rican carriers. In fact the States Marine Group asserted "their position that, inasmuch as they have no direct interest in the settlement, they neither object to nor oppose its approval.[36]

That the States Marine Group felt it had "no direct interest" in the Puerto Rican settlement cannot prevent us from finding that the settlement did in fact resolve its claims as part of the over-all interests of NYSA. Counsel for the States Marine Group said at Oral Argument in this proceeding:

> The entire case against us is that settlement which is used to offset our claims . . . and, frankly, had we known that the arguments . . . were going to be made today, I think we would have taken a different position on that Puerto Rican settlement.[37]

Having, therefore, not objected to the settlement and its contents, the States Marine Group was bound because of its membership status within the NYSA structure.[38]

Thus, regardless whether or not the Puerto Rican carriers' claims against NYSA were litigated as to validity or amount, all parties in interest accepted those claims as fact, and we approved them.

The majority says, however, that the NYSA case is based on speculation, and is therefore untenable. The same can be said for the majority's view. The majority starts with the contention that the States Marine Group was overassessed in the periods after 1969–1971. It is then said that even if the Puerto Rican carriers were overassessed in 1971–1974, the States Marine Group may also have been overassessed in that period, thereby negating the benefits to the latter of the Puerto Rican settlement. Yet the majority says: "We do not say that this is necessarily the case . . . [but] stress that such possibility . . . hardly supports NYSA's contention that assessments on the States Marine Group during the later periods 'compensated' it for any overassessments which may have been made in the 1969–1971 period." [*supra*, p. 15].

If the claims of the Puerto Rican carriers for 1971–1974 are speculative, as the majority contends, the possible overassessment of the States Marine Group in the same period is even a worse sort of conjecture. It is based merely on the "implication" of some evidence.

The majority says further:

> Since it cannot be shown that the Puerto Rican carriers were overassessed for the 1971–1974 period, it follows, *ipso facto*, that the States Marine Group cannot be shown to have been underassessed by virtue of such overassessment. [*supra*, p. 14].

The evidence is certainly no less persuasive as to the converse: since it cannot be shown that NYSA and the Puerto Rican carriers entered into a meaningless settlement based on a nonexistent overassessment of the Puerto Rican carriers, it cannot be shown that the States Marine Group (not including the three carriers) was not recompensed by that settlement.

The majority argues that the reduced assessment for future contract periods is not a proper setoff for the States Marine Group's claims

[36] Agreement No. T-3017, Approval with Condition, p. 4.
[37] Transcript of Oral Argument, Docket No. 69-57, July 1, 1976, p. 68.
[38] See Footnote [33], *supra*.

because the Group was entitled to the lower assessment. This is based on the assumption that the Commission-approved assessment formula for 1969–1971 would not have been approved for later periods. This assumes that the parties to the later assessment agreements would have ultimately submitted the same formula (which they did not) and this is surely no less speculative than NYSA's contentions. Furthermore, if the majority is correct now, the Commission should not have approved the automobile and newsprint carriers' settlements which gave future reduced assessments to which those carriers were arguably entitled. What is permissible for one group of carriers ought to be equally so for all. The evidence in this case does not reveal any grounds for different treatment.

With respect to the three carriers which discontinued serving the port in 1972, we find them not to have been compensated by NYSA. Their claims were not covered by either the reduced future assessments or the setoff aspect of the Puerto Rican settlement, being events subsequent to the three carriers' departure from the trade. Also, we concur in the majority's conclusions with respect to NYSA's contentions as to the three carriers having left debts behind. We therefore concur in the requirement imposed by the majority that, as to the three carriers which discontinued serving the port in 1972, a method of satisfaction, exclusive of interest, be adopted within 60 days.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-57

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

NOS. 71-2, 71-8, 71-26, AND 71-34

TRANSAMERICAN TRAILER TRANSPORT, INC., SEATRAIN LINES, INC., DANIELS & KENNEDY, INC., CHANDRIS AMERICA LINES, INC., GREEK LINE, INC., HOME LINE AGENCY, INC., INCRES LINE

v.

THE NEW YORK SHIPPING ASSOCIATION, INC.

ORDER

The Federal Maritime Commission, having this date made and entered of record a Report in the above matter, which Report is hereby referred to and made a part hereof;

THEREFORE, IT IS ORDERED, That the New York Shipping Association, Inc. (NYSA) is found and declared to be liable to the following carriers for claims in the following amounts, constituting overpayments made by such carriers with respect to the October 1, 1969—September 30, 1971 period of assessments for longshoremen's benefits:

Norwegian America Line	$ 14,518
Atlantrafik	10,646
Nedlloyd & Hoegh Lines	17,905
Hellenic Lines Ltd.	29,520
Concordia Line	62,911
Blue Sea Line	8,711
Barber Steamship Lines, Inc.	94,850
States Marine International, Inc. and Isthmian Lines	103,077
Meyer Line	114,207
Prudential Lines, Inc.	233,254;

IT IS FURTHER ORDERED, That NYSA shall, within 60 days of date of service of this order, (1)satisfy the above enumerated claims and notify the Commission in writing of the method of satisfaction employed, or (2) establish, with the concurrence of the above named carriers, a manner and method of satisfaction of the claims of said carriers and furnish the Commission with a written description thereof; and

IT IS FURTHER ORDERED, That within 60 days of date of service of this order the Commission will receive filings of claims on behalf of persons other than those above named for assessment adjustments for the October 1, 1969—September 30, 1971 period. Such claims must be supported by computations establishing the amount of the alleged overassessment (i.e., $4,839,293 divided by the percentage the claimant's assessment bears to total assessments for the October 1, 1969—September 30, 1971 period) and evidence that claimants have not settled, agreed not to pursue, or waived such claims. Copies of such claims shall be served on counsel for NYSA; and

IT IS FURTHER ORDERED, That a notice of our action in this proceeding shall be published in the *Federal Register*.

By the Commission.

[SEAL] (S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69–57

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TRANSAMERICAN TRAILER TRANSPORT, INC.
SEATRAIN LINES, INC.
DANIELS & KENNEDY, INC.
CHANDRISAMERICA LINES, INC.
GREEK LINE, INC.
HOME LINE AGENCY, INC.
INCRES LINE

v.

THE NEW YORK SHIPPING ASSOCIATION, INC.

Claim of States Marine group, consisting of 12 so-called break-bulk lines, that these lines were overassessed in 1969–1971 for fringe benefits for longshoremen in the Port of New York, in the sum of about $4,000,000, including an alleged share of a surplus of funds of the New York Shipping Association, and including interest at 2 percent per month, found unjustified and completely without merit; said claim insofar as made against three Puerto Rico carriers, namely Sea-Land, Seatrain and TTT, found barred by the two-year statute of limitations.

C. P. Lambos and *Donato Caruso* for respondents, the New York Shipping Association and its members.

Stanley O. Sher and *Jacob P. Billig* for interveners, States Marine International, Inc., Isthmian Lines, Prudential Lines, Inc., Atlanttrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Meyer Line, Nedlloyd Line and Norwegian American Line.

Ronald A. Capone and *Stuart S. Dye* for intervener and complainant, Transamerican Trailer Transport, Inc.

Neal M. Mayer for intervener and complainant Seatrain Lines, Inc.

Gerald A. Malia for intervener, Sea-Land Service, Inc.

Alan F. Wohlstetter for intervener, Wallenius Line.

Cecelia H. Goetz and *Alan D'Ambrosio* for intervener, Wolfsburger Transport-Gesellschaft m.b.H.

Joseph F. Kelly, Jr., for complainant, Daniels & Kennedy, Inc., and for intervener, the Madden Corporation.

Samuel H. Moerman for intervener, the Port Authority of New York and New Jersey.

Mario Escudero for intervener, the Commonwealth of Puerto Rico.

Donald J. Brunner and *Paul J. Kaller* as Hearing Counsel.

SUPPLEMENTAL INITIAL DECISION OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE[1]

In the subject proceedings many of the matters in issue for a long time, either have been litigated to final conclusion, or have been settled by certain settlement agreements,[2] reached voluntarily by the parties, and approved by the Federal Maritime Commission (FMC or Commission). These approved agreements pertain to the automobile interests, the newsprint interests, and to the Puerto Rican ocean common carriers. The last of these agreements concerning the Puerto Rican carriers was approved on April 22, 1975.

There remains presently in issue the claim for about $4,000,000 made by 12 so-called break-bulk lines, the States Marine group, based upon this group's allegation that these 12 lines or their predecessors were overassessed by the New York Shipping Association, Inc. (NYSA), in a 1969-1971 period for fringe benefits for longshoremen in the Port of New York. NYSA made the assessments to raise monies required by the collective bargaining agreement between NYSA and the International Longshoremen's Association, AFL-CIO (ILA).

Besides the settlement agreements, there have been two prior FMC decisions, and a Court of Appeals decision which affirmed the second FMC decision. The first FMC decision is *Agreement No. T-2336,* 14 F.M.C. 94 (1970). The second FMC decision is *Agreement No. T-2336—New York Shipping Assoc.*, 15 F.M.C. 259 (1972). The Court decision is *Transamerican Trailer Transp., Inc. v. Federal Mar. Com'n.*, 492 F. 2d 617 (D.C. Circuit 1974). These decisions will be referred to as the first decision, the second decision, and the Court decision. The second decision made findings which in the view of the States Marine group support the present claim.

In both its first and its second decision the Commission dealt with agreement no. T-2804, which was NYSA's so-called permanent man-hour/tonnage assessment agreement for the two year period from October 1, 1969 through September 30, 1971. Generally where reference herein is made to assessment periods or labor contract periods by years only, such

[1] This decision will become the decision of the Commission in the absence of exceptions thereto or review thereof by the Commission. Rule 13(g), Rules of Practice and Procedure, 46 CFR 502.227.

[2] Approval of Agreement No. T-3007-1, December 13, 1974, Approval of Agreement No. T-3023, December 13, 1974, both relative to the automobile interests; Approval of Agreement No. T-3007-2, February 21, 1975, Approval of Agreement No. T-3055, February 21, 1975, both relative to the newsprint interests; and Approval With Condition of Agreement No. T-3017, January 16, 1975, Approval of Agreement No. T-3017-3, April 22, 1975, both relative to the three Puerto Rican carriers, Sea-Land, Seatrain and TTT.

as 1969–1971, this is meant to cover the periods beginning October 1, and ending September 30.

In both decisions the Commission approved agreement no. T–2804 subject to certain modifications. There were differences in the two decisions as to the modifications approved by the Commission, mainly with regard to the rate of assessment for the three carriers then in the Puerto Rican trade, namely Transamerican Trailer Transport, Inc. (TTT), Seatrain Lines, Inc. (Seatrain), and Sea-Land Service, Inc. (Sea-Land). Other modifications in the first decision related to bananas, Alaskan cargoes and Hawaiian cargoes, and in the second decision to automobiles and to newsprint.

The present claim is largely, if not entirely, related to the findings regarding the Puerto Rican carriers in the second decision, and to the approval with condition of the Puerto Rican settlement agreement. But, for background purposes and for a complete understanding of the present issues, many other facts of record are pertinent.

Agreement no. T–2804 provides the so-called man-hour/tonnage combination assessment basis for all regular cargoes not otherwise specially provided for in this agreement. Agreement no. T–2804 also provides the so-called "excepted cargo" treatment for listed cargoes such as, domestic intracoastal and intercoastal, lumber at lumber terminals, bulk cargo (including scrap and sugar), and passengers and their personal baggage. Excepted cargoes generally are considered to be marginal cargoes, which might otherwise be lost to the Port of New York if they were to be assessed on some other basis, such as the combination basis of man hours and tons. Excepted cargo pays on a man-hour basis subject to any applicable royalty, exhibit no. 9, and *first decision,* 14 F.M.C. 94, 114. The "excepted cargo" assessment rate included a flexible amount for the fringe benefit expense of guaranteed annual income (GAI), because GAI fluctuated from quarter to quarter depending upon the numbers of longshoremen eligible for GAI *second decision,* 15 F.M.C. 259, 264, footnote 10, and 302.

The tonnage assessment factor under agreement no. T–2390 is a variable or plugged amount, *first decision,* 14 F.M.C. 94, 120. The tonnage assessment is calculated by first estimating total liabilities or total fringe benefit obligations, then subtracting therefrom the estimated sum of the monies to be obtained from "excepted cargo" assessments and from the man-hour portion of assessments on regular cargoes. From the net figure above, divided by estimated tons of regular cargo, is derived the per ton assessment for the regular cargoes assessed on the combination basis.

Besides "excepted cargo," other cargoes such as bananas and unboxed automobiles, trucks and buses, received special treatment by virtue of variations in the definitions of a ton of cargo.

When various cargoes were given "excepted cargo" treatment, special tonnage definition treatment, or partially excepted cargo treatment as was the cargo of the Puerto Rican carriers in the *second decision*, 15 F.M.C. 259, 271, 272, it naturally followed that the remaining regular cargoes assessed on the man-hour/tonnage basis would tend to be assessed higher tonnage-factor rates, insofar as the excepted cargoes and partially excepted cargoes did not pay assessments equal to those paid by the regular cargoes on a ton of cargo.

Because NYSA never could precisely forecast tonnages prospectively moving in the Port of New York, the agreement T-2804 tonnage factor was an estimate always subject to change from time to time. Also, as seen the excepted cargo man-hour rate of assessment was subject to change because of the GAI factor.

When NYSA underassessed its members because of inaccurate tonnage estimates, at times NYSA had to borrow funds from banks to meet its fringe benefit obligations to the various ILA-NYSA trust funds. On the other hand, when NYSA overassessed its members, it could carry forward such monies to be used in the next quarter or next contract year. An overassessment in one period generally would be offset by a reduced or adjusted assessment in the next period. Such a procedure was fully in accord with the provisions of agreement no. T-2804 regarding "Tonnage Assessment," wherein the Board of Directors of NYSA was authorized to modify the tonnage assessment on the basis of experience.

From the above it follows that various carriers as they entered and left the trade of the Port of New York might temporarily gain or suffer from the changed tonnage assessments, which were necessarily imprecise, because of the vagaries of the economics of the times, and because of other factors affecting shipping tonnages, as well as because of the problems of forecasting precise fringe benefit expenses when these included the highly unpredictable expense of GAI. However from period to period all carriers' overassessments and underassessments would tend to even out, and compensate for the imprecise tonnage estimates. And it was the standard practice, and the only practicable method to operate, for NYSA to adjust or offset overassessments and underassessments by adjusting the assessment rates or net bills on future, but not on past, assessments.

As inflation increased from year to year, and various fringe benefit expenses for longshoremen increased from year to year, this had the general effect of placing many of the burdens of fringe benefits on carriers new to the trade of the Port of New York, and in effect of letting those carriers which ceased serving the trade escape many of their just fringe benefit burdens which they left behind, such as the fringe benefit burden of pensions.

As may be seen from the general discussion above, among other reasons, there is no way that the benefits derived by the carriers serving the trade of the Port of New York can be related precisely to their obligations to pay fringe benefit costs. There is simply no way to obtain a perfect formula of assessment, *second decision,* 15 F.M.C. 259, 281, 282, and *first decision,* 14 F.M.C. 104, 147.

In the *second decision,* 15 F.M.C. 259, 275, as well as in the *first decision,* the FMC made no changes in the combination man-hour/tonnage assessment basis proposed by NYSA for carriers of general cargoes operating in the foreign trades, including containership carriers and break-bulk carriers, including among the latter the 12 lines of the States Marine group, except to the extent that these carriers may have handled a relatively few unboxed automobiles. Most autos were handled by carriers who specialized in carrying autos. In the *second decision,* the Commission said, It would perhaps be desirable if the entire formula could be reworked so that every interest could be carefully examined and assessments revised in an attempt to achieve a more equitable allocation, but such an exercise would lead to administrative complexities which would offset any slight improvement that could be achieved.

In other words the basis of assessment of the lines of the States Marine group was approved by the FMC in its two decisions. Also, this assessment basis for the States Marine group was affirmed by the Court decision.

How then can the States Marine group now assert any claim of overassessment? The Commission promised that necessary adjustments in assessments would be made, based on the findings of its second decision, but there were no findings in the second decision that the lines in the States Marine group were overassessed. The major issue covered in the second decision was the rate of assessment for the Puerto Rican carriers, and for the automobile and newsprint interests, *second decision,* 15 F.M.C. 259, 262.

Nevertheless, the States Marine group latches on to the findings in the second decision that the Puerto Rican carriers were underassessed to the extent that they were found not to have been assessed for their fair share of the fringe benefit cost of guaranteed annual income in 1969–1971. From this finding regarding the Puerto Rican carriers, the States Marine group leaps to the conclusion that concomitantly it was overassessed in 1969–1971. The States Marine group chooses to ignore its assessment treatment in 1971–1974 and 1974–1977.

If under the reasoning of the States Marine group those 12 lines were overassessed in 1969–1971, so also were the numerous other carriers operating in the foreign trades including the containership lines and the other break-bulk lines. In other words, not only would the States Marine group be entitled to assessment adjustments, but so also would all carriers which were assessed on the regular man-hours/tonnage basis. This would even necessitate 1969–1971 adjustments for Sea-Land and Seatrain, which also operated in the foreign trades (where they were assessed on the combination basis), in addition to their operations in the Puerto Rican domestic off-shore trade.

The States Marine group in effect now says to forget about the other carriers in the foreign trades, because these other carriers have not been represented by their own counsel continuously, and have not pressed claims for adjustments of their assessments, as have the States Marine group, and as have the automobile and newsprint interests. The States Marine group conveniently forgets that the Commission made specific findings necessitating assessment adjustments regarding the automobile and newsprint interests.

Also, NYSA points out that adjustments for 1969–1971 on the basis sought by the States Marine group when projected for all of the carriers in the foreign trades would total about $28,000,000. If such a sum now had to be raised, the monies would have to come from carriers presently serving the trade of the Port of New York, and an increase in the present tonnage assessment would be required. Such an increase would do nothing to help preserve the Port's cargoes. In fact there likely would be cargo diversions to other ports, and the resulting increased assessments for fringe benefits would result in harm to the shipping industry and its labor relations at the Port of New York.

In the FMC's order, *second decision,* 15 F.M.C. 259, 287, NYSA was required to submit a report on the manner and method adopted by NYSA to accomplish the adjustments in the assessments made necessary by the terms and conditions of the second decision. NYSA submitted its proposed method of implementation, and the other parties were permitted to comment thereon.

Seatrain and Hearing Counsel then suggested that there be an informal meeting of all parties to develop mutually acceptable procedures with FMC staff supervision to meet the issues then posed. The Director, Bureau of Hearing Counsel, was designated by the Commission to select staff members.

Staff attempts to implement the FMC's second decision by voluntary agreement of the parties were unsuccessful. For one reason, the parties insisted that action could not be taken pending decision by the Court of Appeals. Also, dollar amounts and methodology of adjustments remained bitterly contested.

Accordingly, on April 6, 1973, the Commission ordered the proceedings remanded to the Office of Administrative Law Judges for further formal hearing for the limited purpose of implementing the manner and method adopted by NYSA to accomplish the adjustments in the assessments as made necessary by the terms and conditions of approval of agreement no. T–2390 contained in the FMC's second decision. The present initial decision is the decision in accordance with that order, except to the extent that subsequent to that order the parties voluntarily have reached certain settlement agreements approved by the FMC, which settlement agreements have disposed of most of the issues covered by the said order of remand for implementation. In fact, as ultimately concluded herein, the said settlement agreements have disposed of all issues covered by the order of remand and implementation, inasmuch as it is found herein that the claim of the States Marine group is unjustified.

Before the voluntary settlements were reached a prehearing conference was held in May 1973, in Docket No. 69–57 and the related subject proceedings, and certain discovery procedures began. Audits by certified public accountants were deemed necessary with regard to documents of confidential nature. Each party wanted to perform its own audit or to have its own auditor check the tonnage records of other ocean carriers. A limited group of auditors was ordered to be agreed upon, and in time audits were made.

Whether as a result of the audits, or because the Court of Appeals made its decision in 1974, or because of the desire to avoid more protracted and expensive litigation, the parties reached their settlement agreements voluntarily.

Also, to a great extent the parties, including the ILA, reached the settlement agreements so as to avoid labor problems in connection with the 1974–1977 longshoremen's labor contract.

The hearing on remand for implementation was concluded on April 21, 1975, and the record includes the records of the two prior proceedings, with a total of 4649 pages of transcript and some 167 exhibits, among which are the recent settlement agreements.

The States Marine group never filed a formal complaint in these proceedings. While two of the Puerto Rican carriers had filed complaints and the three in time had protested agreement no. T–2390, the States Marine group never listed itself or its lines as protestants. In fact these 12 lines or their predecessors were designated as respondents in Docket No. 69–57 as members of NYSA. But, this group, knowing that its interests did not coincide with the interests of the members of NYSA, intervened and were represented by their own counsel. Generally the States Marine group supported the NYSA's contention that the combination assessment basis was proper for most all carriers including the States Marine group and the Puerto Rican carriers, although the States Marine group would have preferred a straight tonnage assessment basis for the 1969–1971 period.

Other members of NYSA, such as the Puerto Rican carriers, which vigorously protested agreement no. T–2390, also were represented by their own counsel. Non-members of NYSA, such as Wobtrans (a carrier of Volkswagen automobiles) and Wallenius (a carrier of other foreign cars westbound and of a few American cars eastbound), also intervened and opposed agreement no. T–2390. These automobile interests bore the expenses of the fringe benefit assessments through payments which they made to their stevedores, who were the direct employers of the longshoremen. The newsprint interests likewise intervened and opposed agreement no. T–2390. Many other interests also were represented by independent counsel from time to time in these proceedings, but they and their counsel withdrew, either after agreeing with NYSA on proper assessment bases, or upon the belief that NYSA and its counsel properly represented the positions of these other interests.

From time to time counsel for NYSA, representing the majority views of NYSA, has been aligned on many issues with the views of the break-bulk carriers, and on other issues has been aligned with the views of other parties. As to the present claim of the States Marine group both NYSA and the Puerto Rican carriers oppose making additional adjustments or payments to the States Marine group. At all times the break-bulk carriers have been represented on the Board of Directors of NYSA. In fact, when the recent settlement agreement with the Puerto Rican carriers was approved by NYSA, it was without objection by any of the members of the Board of Directors including the so-called break-bulk representation on the Board of NYSA.

The ILA also participated in the so-called settlement agreements with the automobile interests, the newsprint interests, and the Puerto Rican carriers. The ILA had long supported the views of the break-bulk carriers that there should be a change from the old man-hours only method of assessment for fringe benefits. The ILA also supported arguments made in 1974 that changes were needed to correct inequities in the man-hour/tonnage assessment formula. It is the view of the ILA, through its president, that the said settlement agreements, along with the full tonnage assessment agreement approved by the ILA and NYSA for 1974–1977, would put an end to all assessment litigation, such as the present claim of the States Marine group. The president of the ILA stated that the ILA was ultimately convinced that the full tonnage assessment method of 1974–1977 was on a fair and equitable basis because it very substantially reduced the assessment cost to the break-bulk carriers. The ILA agreed with this assessment method on certain conditions, one important condition being that the litigation regarding fringe benefit assessments in the Port of New York, be settled.

Accordingly in 1974 discussions were had by the ILA with NYSA members of the Negotiating Committee, including members of NYSA's Board of Directors, including Mr. Dagfinn Gunnarshaug, who is also a director of Concordia Line, one of the States Marine group. Mr. Gunnarshaug was put on the Board of Directors of NYSA to represent the interests of the break-bulk lines and he was also a member of the NYSA–ILA Contract Board.

The ILA took the position that the assessment solution had to be a full, fair and final one and that only three adjustments were required as follows:

1. Newsprint had to be encouraged to stay in the Port by the settlement of its claims;
2. Automobile carriers, that had been seeking berths in other ports, should also be encouraged to stay in the Port of New York by adjustment of the tonnage definition of an unboxed automobile to a weight basis; and
3. The Puerto Rican carriers should continue to pay on a full tonnage basis but the NYSA claim for 1969–71 should be waived by NYSA and the Puerto Rican carriers' claim for 1971–74 should be waived for the Puerto Rican carriers.

The above three were the only assessment adjustments contemplated, and it was clear to all participants in the negotiations, that as a result of the negotiations the break-bulk carriers were fully satisfied and had been given more than ample consideration for waiving any and all claims which they may have alleged under the 1969–1971 period. In fact, the president of the ILA had specific and express discussions with respect to the claim of the break-bulk carriers, and he stated on a number of occasions that he was sure that the break-bulk carriers would not seek "icing on their cake," after having been given full consideration in the 1974 negotiations. The president of the ILA accordingly was greatly surprised when he learned of the position taken by the States Marine group in the present proceedings.

The president of the ILA points out also that States Marine International, Inc. (including Isthmian Lines) and Meyer Line reduced and phased out their operations in the labor contract year 1971–1972, and in contract year 1972–1973 they completely abandoned the Port of New York, and that they left behind tremendous liabilities of over a half of a billion dollars to the ILA's pension fund and other fringe benefit funds. The testimony of the ILA's president, exhibit 159 of record, is uncontroverted.

It is the position of the ILA that the ILA will continue to protect the interests of the break-bulk carriers as well as the interests of all contributors to job opportunities for the ILA's work force in the Port of New York, but that the break-bulk carriers including the States Marine group have no justifiable present claim.

The consist of the States Marine group varied from time to time. Originally it included only two lines (States Marine Lines, Inc., and Isthmian Lines, Inc.). At one time it included Marchessini Lines and Moller Steamship Co., but these two lines are no longer listed. The present 12 lines as listed on the brief of their counsel are States Marine International, Inc., Isthmian Lines, Prudential Lines, Inc., Atlanttrafik, Barber Lines, Blue Sea Line, Concordia Line, Hellenic Lines, Hoegh Lines, Meyer Line, Nedlloyd Line, and Norwegian America Line. Prudential Lines, Inc., apparently is the successor to Prudential-Grace Steamship Co., listed in the *second decision,* 15 F.M.C. 259, 262, footnote 3. Presumably, the States Marine group consists of only those break-bulk lines willing to bear the expenses of separate counsel, independent of counsel for NYSA, whose expenses they share through the fringe benefit expense of NYSA administration.

Specifically the States Marine group alleges four things. One, that collectively these 12 lines for 1969–1971 were overassessed $715,621. Two, that these 12 lines are entitled to a further collective sum of $1,315,600 as their allegedly proper share (14.3 percent) of an alleged surplus of about $9,200,000 in the fringe benefit funds as of September 30, 1971. Third, that on the total of the two above sums of about 2.031 million dollars, these lines are entitled to interest at 2 percent per month, which amounts to at least 24 percent per year, if not compounded, with interest payable from September 30, 1971, until paid. Adding 96 percent for interest for 4 years, results in the total claim of about $4,000,000. Four, that these sums are due and payable to the States Marine group directly from Sea-Land, Seatrain, and TTT, the three Puerto Rican carriers which operated in the New York/Puerto Rican trade in the 1969–1971 period.

In its reply brief the States Marine group states that its claim is against both NYSA and the Puerto Rican carriers.

Item four above, the claim of direct liability of the Puerto Rican carriers, is made in spite of the fact that in the past no ocean carrier ever made any assessment payment to any other ocean carrier, and in fact all assessment payments were made by the direct employers of the longshoremen, that is, by the ocean carriers and stevedores, members of NYSA, to NYSA. In turn, NYSA turned over the monies raised from the assessments to the fringe benefit funds administered jointly by NYSA and by the ILA.

The States Marine group on brief states that an order by the Commission is acceptable to the States Marine group, if the order first requires the three Puerto Rican carriers to make sufficient payments to NYSA, and second requires NYSA to pass on these payments to the States Marine group, so as to fully recompense this group.

Technically, the claim of the States Marine group against the three Puerto Rican carriers is barred by the two-year statute of limitations. No complaint was filed against these carriers in accordance with section 22 of the Shipping Act, 1916 (the Act). Also there are meritorious reasons for denying such a claim if it had been filed properly.

The States Marine group denies that it is exercising anything in the nature of a vendetta against the Puerto Rican carriers.

The Puerto Rican carriers and the States Marine group have been at opposite poles regarding the assessments issues, simply because the Puerto Rican carriers have been innovative, using large containers, containerships and roll-on/roll-off (ro-ro) ships, whereas the States Marine group largely have used the relatively old-fashioned break-bulk ships but with such ships adapted to improved methods such as palletization of cargoes, and carrying some containers. Generally speaking, containers, containerships, and ro-ro ships require large capital investments in ships, containers, cranes and shoreside facilities, whereas break-bulk ships operate with much smaller capitalizations.

By using large containers and cranes located at shoreside facilities, the labor productivity of the containership lines is about 5 times as efficient as that of the break-bulk lines. A containership, with an estimated productivity of 2.54 tons of cargo per man hour of longshore labor may be loaded or unloaded about 5 times as fast as a conventional break-bulk ship with an estimated productivity of 0.52 tons of cargo per man hour. *First decision,* 14 F.M.C. 94, 119.

For many years prior to October 1, 1969, the ocean carriers in the Port of New York were assessed for fringe benefits on the basis of man hours of longshore labor. This was the logical way to do, when the so-called "industry" fringe benefit expenses of pensions and welfare/clinics appeared to be related proportionately to the hours worked by the longshoremen. Vacation and holidays expenses were and are also related to hours worked. But these expenses are not included in the fringe benefit expenses and assessments in issue herein.

When more and more cargoes moved in containerships and in large containers, lesser hours of longshoremen's labor were required for the same tonnages of cargo, and the ILA began to blame the containership carriers for their reduced hours of labor, and for the increased numbers of hours of guaranteed annual income expense, another of the fringe benefits of the longshoremen. The break-bulk carriers had taken the same views. The Puerto Rican carriers responded to the ILA and to the break-bulk carriers, that the Puerto Rican trade tonnage increased from year to year from 1959 to 1969, and that the Puerto Rican trade was not responsible for the "shortfall" of hours worked by the longshoremen, *first decision,* 14 F.M.C. 94, 98.

Upon further consideration in its second decision, the Commission concluded that while the Puerto Rican carriers were not responsible for the shortfall of hours worked, they were responsible for their share, about 10 percent, of the fringe benefit expense of guaranteed annual income, *second decision,* 15 F.M.C. 259, 271, 272, because GAI was a shipping industry problem. The Puerto Rican carriers were left to pay the fringe benefit expenses of pension, welfare/clinics, and NYSA administration at the man-hour excepted cargo level, but would have to pay GAI on a tonnage basis. Thus, the Puerto Rican carriers had been underassessed for 1969–1971.

As proposed in agreement no. T–2390 for 1969–1971, also for the period 1971–1974, NYSA proposed a similar man-hour/tonnage assessment basis in its agreement no. T–2804. This agreement was placed under investigation in Docket No. 73–34, *New York Shipping Association—Man-Hour/ Tonnage Assessment Formula.* Hearing in No. 73–34 was closed conditionally subject to petition for reopening in the event that the so-called settlement agreements previously referred to herein did not settle all the issues in No. 73–34.

The Puerto Rican carriers were assessed and paid their assessments for fringe benefits for the 1971–1974 period on the combined man-hour/ tonnage basis. It is their view, and the view of NYSA, that if there had been no voluntary settlements with reference to both the 1969–1971 period of Docket No. 69–57 (agreement no. T-2390) and the 1971–1974 period of Docket No. 73–34 (agreement no. 2804) and if Docket No. 73–34 and agreement no. 2804 had been fully litigated before the Commission and the Courts, that the same assessment basis would have been granted the Puerto Rican carriers for 1971–1974 as for 1969–1971. Thus, it would have been found that the Puerto Rican carriers were overassessed for 1971–1974. The States Marine group naturally disputes these assumptions.

NYSA calculates overassessments of the Puerto Rican carriers, and NYSA estimates its liability to the Puerto Rican carriers under agreement no. T–2804 for 1971–1974 as $7,457,849 if the matter had been fully litigated. NYSA points out that the same parties protested no. T–2804 as had protested no. T–2390, namely the Puerto Rican, newsprint, and automobile interests. The same formula of assessment was present in both no. T–2390 and no. T–2804 and the issues were the same.

Likewise, NYSA calculates that the Puerto Rican carriers were underassessed for 1969–1971 in the amount of $5,004,344, Exhibit no. 157.

Of course, no one can be certain what would have been the result if agreement no. T–2804 for 1971–1974 had been fully litigated, but what is certain is that the Commission approved settlement agreements no. T–3017 and no. T–3017–3 for the settlement of the Puerto Rican carriers assessments.

Therein (exhibits no. 155 and no. 165 respectively, approved January 16, 1975, and April 22, 1975), it was stated that the settlement agreements were between the ILA, NYSA, and the three Puerto Rican carriers; that the agreements provide for the settlement of the parties' litigation in and the withdrawal of the Puerto Rican carriers from FMC Docket Nos. 69–57 and 73–34; that NYSA and the ILA relinquish all claims to any recoveries in No. 69–57 (for 1969–1971), and will not make further claims against the Puerto Rican carriers regardless of future developments in the proceeding; that with respect to No. 73–34 (for 1971–1974), the Puerto Rican carriers withdraw and waive all rights to any recovery from NYSA, the ILA, or any NYSA–ILA fringe benefit funds regardless of the ultimate disposition of No. 73–34; that proponents of this settlement agreement made statements in support of the settlement agreement; that in reply the States Marine group stated that it had no direct interest in the settlement and that the States Marine group only sought a clarifying condition to the Commission's order of approval of agreement no. T–3017 that this group's rights to refunds for the 1969–1971 period would not be affected; the Commission stated that it believed that its action approving agreement no. T–3017 with a condition as explained below is fully consistent with the preservation of all "rights" or "claims" which the States Marine group acquired by virtue of the second decision of the FMC; that the FMC had not prescribed any particular manner or method of making assessment adjustments; that nowhere did the FMC state in its second decision and order of June 14, 1972, that the only way assessment adjustments could be made in conformance with the FMC's order was by direct cash refunds to the States Marine group; that the FMC's order of approval of the Puerto Rican carriers' settlement agreement is not to be construed as determining that the States Marine group are necessarily entitled to a cash refund; and that the *manner of assessment adjustment* necessary to satisfy the claims of the States Marine group *as well as the amounts to be paid* are the subject of the implementation phase of Docket No. 69–57 and will be decided therein.

The Commission clearly provided that the implementation phase of the hearing in No. 69–57 et al. would decide the manner of the adjustment and the amount of the adjustment of assessments for the States Marine group. The amount of any adjustment to be determined in the implementation proceeding thus could be anything which the record in the implementation proceeding justified. The amount thus might be large, small, or even zero. The implementation proceeding also could determine the manner of adjustment, including that adjustments might be other than cash refunds. In other words adjustments might be made in other assessments as offsets of the 1969–1971 assessments. The adjustments might be adjustments made in assessments subsequent to September 30, 1971.

Exhibit no. 157 of record shows $689,599 of alleged overassessments for 1969–1971 of the 12 lines in the States Marine group. This compares with the States Marine group's claim of $715,621 as per Exhibit no. 153. The difference is relatively small and unimportant in view of the ultimate conclusions herein.

If the reasoning of the States Marine group is to be given any credence that it was overassessed in 1969–1971 because the Puerto Rican carriers were underassessed in 1969–1971, then it follows that if the Puerto Rican carriers were overassessed in 1971–1974 then the States Marine group was underassessed in 1971–1974. The Puerto Rican settlement agreement was based upon the assumption that the Puerto Rican carriers were overassessed in 1971–1974 and these carriers dropped their claims for any reimbursement or adjustment for 1971–1974 in consideration for the fact that NYSA and the ILA dropped any claims against the Puerto Rican carriers for 1969–1971.

The States Marine group claims that it was overassessed in 1969–1971, but fails to acknowledge that it was underassessed in 1971–1974, and in effect the States Marine group would throw out any consideration of the factual basis on which the Puerto Rican settlement was made.

If the States Marine group is to be given the benefit of the technical, rather than meritorious, argument that only the years 1969–1971 should be considered, then likewise, the States Marine group must be bound by the technical argument that there was no finding in the second decision that the States Marine group was overassessed.

The States Marine group cannot have it both ways, that is, it cannot argue the technicalities in one instance and insist on merits in another. The States Marine group cannot argue that there is merit to its contention that since the Puerto Rican carriers were underassessed in 1969–1971, that ergo concomitantly the States Marine group was overassessed in 1969–1971, unless the States Marine group also admits the merits of the facts that the States Marine group was underassessed in 1971–1974.

The facts are that the dollar figures are greater for 1971–1974 than for 1969–1971. That is, the Puerto Rican carriers were underassessed about $5 million in 1969–1971 and overassessed about $7.5 million in 1971–1974. Similarly, if the States Marine group as alleged was overassessed about $715,000 in 1969–1971, then also it was underassessed about $750,000 in 1971–1974, with allowances being made in the latter figure for the fact that States Marine International, Inc. (including Isthmian Lines), and Meyer Line ceased operations in the Port of New York during the 1971–1974 period. Exhibit no. 157. Thus, there is no merit to the contention of the States Marine group that it was overassessed by NYSA.

Another allegation of the States Marine group relates to the alleged surplus question. The States Marine group in its brief makes claim for the first time for a total of $1,313,000 (brief, page 39) or $1,315,600 (brief, page 38) of an alleged surplus of $9,200,000 in NYSA's fringe benefit funds as of September 30, 1971. The record as to the alleged surplus came from cross-examination of a NYSA witness. And in fact the $9.2 million was a figure for total NYSA activity, which only in part included fringe benefits under agreement no. T–2390. No precise figure was developed for these benefits. The burden here was on the States Marine group which failed to meet its burden of proof. The record shows that this claim for a share of the alleged surplus was never raised at any time in the hearing, the claim was never made the subject of proof, it was never mentioned in the States Marine group's written direct case, or in its oral rebuttal. The States Marine group state on brief that "we have direct rights against the Puerto Rican carriers because that is what this litigation is all about." But the States Marine group is barred from any rights against the Puerto Rican carriers. As an alternative, the States Marine group turns and seeks to exercise a claim against NYSA. In the second decision, there was no finding that the States Marine group was improperly assessed or that it deserved any share of any alleged surplus. What the States Marine group is now trying to do is not to uphold the second decision, but to attack the manner in which NYSA has administered and implemented the assessment formula of agreement no. T–2390. The States Marine group have concocted an alleged right predicated upon the non-existent duty of NYSA under agreement no. T–2390 to conclude the administration of that agreement with a zero balance in its assessment account. Nowhere in agreement no. T–2390 is there any requirement that NYSA must so administer the assessment program. In fact that was a practical impossibility in view of the difficulties in forecasting tonnages and fringe benefit expenses including GAI.

NYSA did not collect assessments under no. T–2390 for its own use, rather it did so as the fiduciary for the fringe benefit funds. NYSA cannot now refund any monies from the alleged surplus, because the surplus has been expended, or to the extent any surplus exists NYSA consistent with labor law and internal revenue service law must utilize its funds for prospective fringe benefit obligations.

The States Marine group were neither overassessed nor underassessed during the period 1969–1974. For the 1974–1977 period the States Marine group on the full tonnage basis will pay less per ton of cargo in fringe benefit assessments than will the containership carriers and other innovators, because all will be paying the same per ton assessments, but in addition the innovators will be paying container royalties. The break-bulk operators including the States Marine group will be paying the same or less assessments per ton of cargo in 1974–1977 notwithstanding the fact that their method of operation is labor intensive and requires about five times as many hours of longshore labor to load a ton of cargo.

In view of all the above circumstances, there is indeed not the tiniest bit of merit to the claim of the State Marine group in these proceedings.

It is ultimately concluded and found that the claim herein of the States Marine group is unjustified and completely without merit; and further it is found that insofar as the said claim is directed against the three Puerto Rican carriers, namely Sea-Land, Seatrain and TTT, the claim is barred by the two-year statute of limitations in the Shipping Act.

All other complaints and outstanding matters in the subject proceedings, to the extent that these matters have not been fully litigated and concluded heretofore, should now be concluded by orders dismissing the subject complaints and by order discontinuing the subject investigation in Docket No. 69–57, on the grounds that either the remaining complaints are without merit or that the parties have dropped their complaints by lack of prosecution.

(S) CHARLES E. MORGAN,
Administrative Law Judge.

WASHINGTON, D.C.,
January 20, 1976.