FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 484

LOUIS FURTH INC.

v.

SEA-LAND SERVICE, INC.

Authority to waive collection of, and refund, freight charges denied.

REPORT

August 25, 1977

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

Sea-Land Service, Inc. (Sea-Land) has applied for permission to waive collection of a portion of the freight charges assessed on a shipment of "Tumeric" which moved from Kingston, Jamaica to New York under Sea-Land's bill of lading dated December 31, 1975. The present application was filed on June 24, 1976.

The rate in effect at the time of shipment was $45.50 per 40 cubic feet. Total freight charges, including applicable surcharges, were assessed at $1,561.28. Sea-Land asserts that on April 29, 1974, due to a clerical error in refiling the tariff, the rate base was changed from weight to measurement which resulted in higher charges than intended. It seeks permission to collect charges on the basis of $45.50 per 2,000 pounds which would yield $535.60 in freight charges and to waive collection of the balance of $1,025.68.

Before the application was submitted the U.S. Atlantic & Gulf-Jamaica Conference (Conference) whose tariff applies to the shipment, filed on April 5, 1976 a new tariff changing the rate base from measurement to weight. At the same time, however, it raised the level of the rate from $45.50 to $90.00. Thereafter, on April 25, 1977 the Conference amended its tariff to revert to the $45.50 per 2,000 pounds, the rate Sea-Land now seeks to apply retroactively to Complainant's shipment.

The Presiding Officer found that due to a clerical error the rate in effect at the time of shipment did not reflect the intended rate. He nevertheless

concluded that the application complied with the requirements of section 18(b)(3) of the Shipping Act, 1916 and granted Sea-Land permission to waive collection of the unpaid balance of freight charges. We disagree with the Presiding Officer's disposition of this matter.

CONCLUSION AND RECOMMENDATION

Section 18(b)(3) of the Act, as amended by P.L. 90–298 reads in part:

> *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: . . . (Emphasis added) 46 U.S.C. 817(b)(3).

The provision is jurisdictional and cannot be waived. The tariff containing the rate Sea-Land would charge was filed on April 25, 1977 *after* and not prior to the filing of the application on June 24, 1976. Permission to waive collection of the balance of freight charges under the rate in effect at the time of shipment must therefore be denied. Accordingly,

IT IS ORDERED That the Initial Decision in this proceeding served July 29, 1977 be reversed and the application of Sea-Land Service, Inc. to waive the collection of, or refund, certain alleged overcharges is denied.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-46

U.S. MIAMI—CARIBBEAN PUERTO RICO TRADES, POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916, AND THE INTERCOASTAL SHIPPING ACT, 1933

ORDER

August 26, 1977

By an Order of Investigation and Hearing dated October 30, 1975, this proceeding was instituted to determine whether nonvessel operating common carriers in the Port of Miami area were engaging in practices violative of Sections 16, 17, and 18 of the Shipping Act, 1916, and/or Section 2 of the Intercoastal Shipping Act, 1933. Named as respondents in this proceeding were Drake Motor Lines, Inc., Econocaribe Consolidators, Inc., Marine Trailer Transport, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Transconex, Inc. and Twin Express, Inc. Pursuant to the special settlement procedures set forth at 46 CFR 505.5(c), Respondents Econocaribe Consolidators Inc., Transconex Inc. and Twin Express Inc. requested and received Commission permission to enter settlement negotiations with the Commission's Office of the General Counsel. On August 3, 1976, the presiding Administrative Law Judge suspended the hearing schedule in order to permit the respondents to explore the possibility of settlement. Respondents Sea Trailer Express, Inc., Drake Motor Lines, Inc., Drake Marine Division, and Meteoro Express Corporation have since joined in settlement negotiations. Respondent Marine Trailer Transport Inc. filed a cancellation supplement to its tariff and no longer operates as a common carrier or has common carrier rates or fares in effect.

Prior to commencement of settlement negotiations, respondents other than Drake Motor Lines, Inc. and Marine Trailer Transport, Inc. entered into stipulations with the Commission's Bureau of Hearing Counsel. Drake subsequently executed a similar stipulation. These stipulations set forth the factual background surrounding the violations alleged in the Order of Investigation and Hearing and provided the factual basis upon which settlements have been concluded. As an express condition of settlement the respondents have consented to the entry of an Order directing them to cease and desist from practices enumerated below and

have further consented to the entry of an Order requiring the submission of compliance reports in a manner set forth below.

THEREFORE, IT IS ORDERED:

That Econocaribe Consolidators, Inc., Transconex, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Drake Motor Lines, Drake Marine Division, and Twin Express, Inc. shall cease and desist from accepting shippers' measurements without having ascertained that the shippers' measurements are, in fact, correct measurements for the cargo.

That Respondents Econocaribe Consolidators, Inc., Transconex, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Drake Motor Lines, Drake Marine Division, and Twin Express, Inc. shall cease and desist from the practice of rounding fractional cubic measurements prior to the computation of cubic measurements of cargoes tendered to Respondents for shipment.

That Respondents Econocaribe Consolidators, Inc., Transconex, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Drake Motor Lines, Drake Marine Division, and Twin Express, Inc. shall cease and desist for a period of three years from the date of this order from discarding, mutilating, disposing of or otherwise destroying such underlying documents as warehouse receipts, shippers' instructions or packing lists, delivery receipts, weight bills or other documentation which shows or reflects the actual weight or measure of cargo received by Respondents and upon which the ocean freight rate is computed and assessed.

That Respondent Transconex, Inc. shall cease and desist from the assessment or collection of pickup and delivery charges, or any other rates or charges required to be filed with the Federal Maritime Commission, prior to the effective dates of such rates and charges.

That Respondent Transconex, Inc. shall cease and desist from applying rates and charges which have been superseded by subsequent filings of rates and charges with the Federal Maritime Commission.

That Respondents Transconex Inc., Twin Express Inc., Sea Trailer Express, Inc. and Meteoro Express Corporation shall cease and desist from applying rates and charges in a manner which differs from the methods of application of said rates and charges set forth in tariffs in effect and properly filed with the Federal Maritime Commission.

That Respondent Transconex Inc. shall cease and desist from the incorrect application of commodity descriptions contained in tariffs on file with the Federal Maritime Commission.

IT IS FURTHER ORDERED:

That Respondents Econocaribe Consolidators, Inc., Transconex, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Drake Motor Lines, Drake Marine Division, and Twin Express, Inc. shall, upon reasonable notice, allow investigators or attorneys of the Federal Maritime Commission unimpeded access to the underlying documents required to be maintained by this Order, and shall allow the removal of such

documents specifically requested by Commission investigators or attorneys for the purpose of duplication.

That within sixty (60) days after service upon them of this order, Respondents Econocaribe Consolidators, Inc., Transconex, Inc., Meteoro Express Corporation, Sea Trailer Express, Inc., Drake Motor Lines, Drake Marine Division, and Twin Express, Inc. shall each file with the Commission, under the oath and signature of a responsible officer, a written report setting forth in detail the measures which have been taken to ensure the elimination of the practices which resulted in measurement errors and misratings which are the basis of the violations set forth in the Settlement Agreements concluded with each of the Respondents. Such reports shall also be submitted at such times as the Commission may require.

IT IS FURTHER ORDERED:

That this proceeding by, and hereby is, discontinued.

BY THE COMMISSION

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 380(I)

BRISTOL MYERS COMPANY

v.

PRUDENTIAL LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

August 31, 1977

Notice is hereby given that the Commission on August 31, 1977 determined not to review the decision of the Settlement Officer in this proceeding served August 19, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 380(I)

BRISTOL MYERS COMPANY

v.

PRUDENTIAL LINES, INC.

August 19, 1977

Reparation Awarded.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed December 22, 1976, Bristol Myers Company (complainant) alleges that it was overcharged $924.19 by Prudential Lines, Inc., (carrier) as a result of a misdescription of cargo appearing on the bill of lading. Complainant states that on May 30, 1975, respondent issued its freight prepaid Bill of Lading No. 11, Voyage 31, of the Santa Barbara, to cover a shipment described thereon on "9 Pallets-1 Carton Harmless Chemicals (Dical. Phosphate and Hexachlorophene)," weighing 20,673 pounds and measuring 497 cubic feet, from New York to Guayaquil, Ecuador. For this service the carrier billed, and complainant paid, freight charges totaling $1,708.47, on the basis of a rate of $123.25 per measurement ton, plus a port congestion and a bunker surcharge.

This shipment actually consisted of 9 Pallets of Dicalcium Phosphate weighing 20,662 pounds and one carton of Hexachlorophene measuring two cubic feet. The net contents of the 9 Pallets of Dicalcium Phosphate weighed 20,000 pounds and was valued at $4,000.

At the time this shipment moved respondent's tariff, Atlantic and Gulf/West Coast of South America Conference Freight Tariff F.M.C. No. 1, provided in Item 670, 17th Rev. Page 108, a rate of $61 per weight ton from New York to Guayaquil for "Phosphates, viz: Calcium, including Monocalcium, Dicalcium and Tricalcium actual value not over $400 per freight ton."

[1] Both parties having consented to the informal procedure of Rule 19.46 CFR 502.301 (as amended), this decision will be final unless the Commission elects to review it within 15 days from the date of service thereof.

On this basis, complainant alleges that it has been overcharged $924.19 as follows: In response to the served complaint, the carrier admits to the complainant's statement with respect to tariff rates that should have applied but disclaims responsibility for the overcharge on the following grounds:

9 Pallets Dicalcium Phosphate— 20,662 pounds @$61/2000 lbs.	$630.19
Port Congestion @$6/ton	61.99
Bunker Surcharge @$8.25/ton	85.23
1 Carton Hexachlorophene as Chemicals, N.O.S. 2 cubic feet @$123.25/m.t.	6.16
Port Congestion @$6/ton	.30
Bunker Surcharge @$8.25/ton	.41
Total	$784.28

Paid $1,708.47—Should be $784.28—Overpaid $924.19.

1. Undue burden is placed on carrier where cargo is improperly described on bill of lading by an organization which, by its size and frequency of booking cargo should be cognizant of published tariff rates.

2. Requirements of the "Six-month Rule" (Page 12, Item 7, Rule B of Atlantic and Gulf/West Coast of South America Conference Rules and Regulations) was not adhered to.

3. Failure of the shipper to break down quantity of each chemical carried gave carrier no choice than to charge the higher rate to avoid discrimination.

With regard to cargo misdescription generally, past Commission policy and judicial precedent have unquestionably declared that a shipper's misdescription of cargo can still afford a basis for later reparation relief, and that in cases involving alleged overcharges under Section 18(b)(3) of the Act, the controlling test is what the complainant shipper actually shipped, and is not limited to how the cargo was described on the bill of lading. *Union Carbide Inter-America v. Venezuela Line,* 17 F.M.C. 181, 182 (1973); *Abbott Laboratories v. Moore-McCormack Lines, Inc.,* 17 F.M.C. 191, 192 (1973); *Western Publishing Co. v. Hapag Lloyd A.G.,* 13 SRR 16, 17 (1973). These cases have set a precedent which clearly rejects the respondent's position noted above despite the exceptions as listed.

In the first place, the degree of transportaton experience of knowledge of a shipper organization based upon its size and frequency of booking cargo, as suggested by the respondent, would not appear to constitute a valid mitigating factor sufficient to justify a departure from the conclusion reached in the above cases.

In cargo misdescription cases, where the shipment has left the custody of the carrier and the carrier is thus prevented from personally verifying the complainant's amended cargo description, as in this case, the Commission has held that the complainant has a "heavy burden of proof" and must establish, with reasonable certainty and definiteness, the validity

of the claim. *Western Publishing Co. v. Hapag Lloyd A.G.*, 13 SRR 16, 17 (1973); *Johnson & Johnson Intl. v. Venezuelan Lines*, 16 F.M.C. 87, 94 (1973); *Colgate Palmolive Peet v. United Fruit Co.*, 11 SRR 979, 981 (1970). Note is taken of the fact that the respondent does not deny that the bill of lading at issue was misrated, and a review of the documentation submitted by the complainant adequately supports the amount of overcharge which is stipulated by the shipper. Whileit is true that the requirements of the six months rule were not adhered to, thus denying the carrier an opportunity to inspect the cargo prior to its clearing the carrier's custody, this factor in itself, does not relieve the carrier from making an appropriate rate adjustment where, as in this instance, the heavy burden of proof establishing the proper description of the shipped cargo has been met.

Finally, with regard to respondent's statement that it was obliged to freight the bill of lading on the basis of the higher rate to avoid discrimination, I find that the multitude of Commission decisions which hold that the rate applicable to the cargo actually shipped is the only rate which may be applied, renders any such logic a nullity.

Since a shipper is charged with knowledge of a tariff, it should submit cargo specifications in a manner which insures the most favorable rate application statutorily permissable. Failure to do so, however, cannot insulate the carrier against claims for a subsequent rate adjustment if the carrier chooses to accept a questionable cargo description at face value or arbitrarily freight a mixed shipment at the highest rate for any item included in the shipment for lack of a break-down of the contents. A more appropriate course of action for the carrier to follow would be to resolve questionable or insufficient cargo descriptions at the time of billing by reviewing other available supporting documentation or by contacting the shipper.

The complainant is entitled to reparation in the amount of $924.19. It is so ordered.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 493

UNION CAMP INTERNATIONAL SALES CORP.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER PERMITTING PARTIAL REFUND OF CHARGES

September 1, 1977

Sea-Land Service, Inc. has submitted the statement of concurrence duly executed by the shipper Union Camp International Sales Corp., as directed by the Commission's Order on review, served in this proceeding on July 29, 1977.

The requirement of Rule 92, Appendix II(7) having thus been met, the Initial Decision of the Administrative Law Judge in this proceeding is hereby adopted as the decision of the Commission.

THEREFORE, IT IS ORDERED, That applicant Sea-Land Service, Inc. is authorized to refund $1,874.95 of the charges collected from Union Camp International Sales 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 No. 493 that effective September 1, 1976 for purposes of refund of freight charges on any shipments which may have been shipped during the period from May 8, 1976 through June 28, 1976 the rate on kraft wrapping paper from Savannah, Georgia, to Marseilles, France, was $55.00 per ton of 2240 lbs., minimum 18 tons per container, 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) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 493

UNION CAMP INTERNATIONAL SALES CORP.

v.

SEA-LAND SERVICE, INC.

Application granted.

INITIAL DECISION[1] OF THOMAS W. REILLY, ADMINISTRATIVE LAW JUDGE

Pursuant to section 18(b)(3)[2] of the Shipping Act, 1916 (as amended by P.L. 90–298). and section 502.92 of the Commission's Rules of Practice and Procedure (46 CFR 502.92), Sea-Land Service, Inc. (Sea-Land or Applicant) has applied for permission to refund a portion of the freight charges on two shipments of common Kraft wrapping paper, which moved from Savannah, Georgia, to Marseilles, France, under Sea-Land bills of lading dated May 8 and 29, 1976. The application was filed November 4, 1976.

The subject shipments moved under a Sea-Land tariff covering shipments from U.S. South Atlantic & Gulf ports to named ports in France and Italy, Sea-Land Tariff No. 168–B, FMC–73, 22d revised page 101, item 5940, effective April 8, 1976. The aggregate weight of the two shipments was 768,604 pounds. The rate applicable at time of shipment was $55.50 per ton of 2240 pounds, with a minimum of 22 tons per container. The rate sought to be applied is $55 per ton of 2240 pounds, with a minimum of 18 tons per container, per same tariff as above, except see 23d revised page 101, effective June 28, 1976.

Aggregate freight charges payable pursuant to the rate applicable at time of the shipments amounted to $21,014.48. Aggregate freight charges at the rate sought to be applied amount to $19,139.53. The difference sought to be refunded is $1,874.95. The Applicant is not aware of any other shipment of the same commodity which moved via Sea-Land during the same time period at the rates involved in this application.

Sea-Land offers the following as grounds for granting the application:

[1] *This decision* became the decision of the Commission September 1, 1977.
[2] 46 U.S.C. 817, as amended.

(4) In early May Sea-Land's Mediterranean sales and pricing personnel agreed with the complainant to publish a rate of $55.00 per ton of 2,240 lbs., minimum 18 tons per container, on Kraft wrapping paper from Savannah, Ga. to Marseilles, France to meet the rate quoted by another carrier serving that trade. A minimum of 90 tons per shipment (5 containers) was able to be attached to the rate and an effective date of May 7, 1976 was required. The effective rate at that time was $55.50 per ton of 2,240 lbs., minimum 22 tons per container as published in Sea-Land Tariff 168–B, FMC–73, Item 5940 on 22nd Revised Page 101 (Attachment No. 1).

Through clerical error, Sea-Land's pricing personnel instructed the tariff publishing officer to publish the promised rate in Item 5550 on Kraft liner board. This was done by telegraphic filing effective May 7, 1976 on 15th Revised Page 98 (Attachment No. 2). The error was called to Sea-Land's attention by the complainant to Sea-Land sales representative by letter dated June 18, 1976 (Attachment No. 3). The agreed rate of $55.00 was then filed telegraphically in Item 5940 to become effective June 28 on 23rd Revised Page 101 (Attachment No. 4). However, the requirement for a minimum of 90 tons per shipment (5 containers) was dropped.

The shipments here involved moved immediately after the rate had been erroneously published on Kraft liner board instead of Kraft wrapping paper and were assessed the higher rate and minimum that was then in effect on wrapping paper. Complainant paid the full charges as originally billed, through his freight forwarder, and has claimed against respondent for refund of the excess charges he paid. Copy of each of the bills of lading and freight bills are enclosed as Attachment No. 5. . . .

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of 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 indavertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[3]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was an error in a tariff of a clerical or administrative nature, resulting in the publication of the agreed rate and minimum but in the wrong tariff item.

2. Such a refund of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to refund a portion of the freight charges, Sea-Land filed a new tariff which set forth the rate on which such refund would be based.

4. The application was filed within 180 days from the date of the subject shipments.

[3] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

Accordingly, permission is granted to Sea-Land Service, Inc., to refund a portion o the freight charges, specifically the amount of $1,874.95. An appropriate notice will b published in Sea-Land's tariff.

(S) THOMAS W. REILLY,
Administrative Law Judge.

WASHINGTON, D.C.,
April 22, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–17

SEA-LAND SERVICE, INC.—AMENDMENT TO FREIGHT, ALL KINDS IN THE U.S. ATLANTIC/PUERTO RICO TRADE

NOTICE OF DETERMINATION NOT TO REVIEW

September 2, 1977

Notice is hereby given that the Commission on August 31, 1977, determined not to review the order of discontinuance of the Administrative Law Judge served in this proceeding August 8, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77–17

SEA–LAND SERVICE, INC.—AMENDMENT TO FREIGHT, ALL KINDS IN THE U.S. ATLANTIC/PUERTO RICO TRADE

August 8, 1977

ORDER DISMISSING PROCEEDING

Effective May 2, 1977, Sea-Land Service, Inc. (Sea-Land or respondent) proposed to amend its tariff application on the commodity "Freight, All Kinds" (FAK) for shipments from U.S. Atlantic coast ports to Puerto Rico from one which required shipper loading to one applicable only when the carrier loads. By its May 19, 1977 Order of Investigation and Suspension, the Commission instituted an investigation into the particular tariff changes that would have effected the above result, i.e., 2d revised pages 242 and 243 and 1st revised page 285 of Sea-Land's Tariff FMC–F No. 34.

By a Petition to Postpone Prehearing Conference filed June 16, 1977, Sea-Land advised the presiding Administrative Law Judge that it had petitioned the Commission for authority to withdraw and cancel the subject pages under investigation (Special Permission Application No. 414, dated June 14, 1977). Special Permission Application No. 414 was granted and thereupon Sea-Land filed 3d revised pages 242 and 243 and 2d revised page 285, which became effective July 5, 1977. The net effect of those revisions was to return the "Freight, All Kinds" rate to the status quo existing prior to the filing of the pages that were to be subjected to investigation. Thus, the matters subject to investigation in Docket No. 77–17 have become moot and the relief originally sought by the petitioning intervenors has, in effect, been granted in full. Accordingly, on July 20, 1977, the respondent filed a Motion To Dismiss the proceeding. The motion is unopposed by either the petitioning intervenors or Hearing Counsel and, moreover, petitioners Martin Marietta Aluminum and Dolphin Forwarding have filed statements agreeing that their reasons for petitioning intervention have been rendered moot and that there is no need to continue the proceeding.

Accordingly, there being no regulatory purpose to be served in continuing this proceeding, nor any public interest to benefit from same, the Motion To Dismiss the proceeding is *GRANTED*.

(S) THOMAS W. REILLY,
*A*DMINISTRATIVE LAW JUDGE.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER A—GENERAL PROVISIONS

Part 502—Rules of Practice and Procedure

[GENERAL ORDER 16, AMDT. 20, DOCKET NO. 77-12]

September 6, 1977

Designation of Parties

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: Rules of Practice and Procedure are amended to terminate the practice of naming persons protesting individual changes in tariffs "complainants" and to cease making them automatic parties to formal proceedings instituted by the Commission to investigate rate changes in general-revenue cases. The amendment is necessary to eliminate delay and confusion which resulted from the practice. The effect will be to simplify general-revenue proceedings and advise persons who protest rate changes of the appropriate procedural steps to take to protect their interests.

EFFECTIVE DATE: Upon publication in the *Federal Register*.

FOR FURTHER INFORMATION CONTACT:

Joseph C. Polking, Acting Secretary
Federal Maritime Commission
1100 L Street, N. W.
Washington, D. C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

This proceeding as instituted by notice of proposed rulemaking published in the *Federal Register* of May 3, 1977 (42 F.R. 22383). The purpose of the proceeding was to amend Rule 41 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.41) so as to discontinue the practice of naming persons who protest proposed rate changes

"complainants" and automatically making them parties to proceedings instituted by the Commission to determine the lawfulness of proposed rate changes in so-called "general-revenue" cases. As the Commission explained in the notice cited, this practice frequently causes such proceedings to suffer undue delay because such protesting persons are usually interested in issues pertaining to the reasonableness of an individual rate or rates rather than the central issue whether the gross revenue which the carrier is seeking to derive from its proposed rate changes is just and reasonable. Consequently protestants usually consume time needlessly during the proceeding while they attempt to present evidence and arguments irrelevant to the basic issue, or they often do not appear or participate in the proceeding at all, although named as parties, requiring them to be served with pleadings and evidentiary documents, often at great expense to the active parties. Because such protestants are often interested in issues extraneous to the basic issue, they unduly broaden the proceeding and might not have even qualified as interveners under the standards prescribed by Rule 72, 46 C.F.R. 502.72 had they petitioned for leave to intervene under that rule. Nevertheless, under present practice, protestants are, in effect, granted intervention without having to make a showing of substantial interest in the issues in the proceeding or representing that they will not unduly broaden the issues.

Finally, the practice of designating protestants as "complainants" has led to confusion in the minds of such persons who have mistakenly believed that they have qualified as persons filing complaints pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. 821) with consequent rights and obligations. The Commission therefore proposed to eliminate confusion and unnecessary consumption of time and assist persons in understanding their rights and obligations in general-revenue proceedings simply by discontinuing the practice of naming such persons "complainants" and of making them parties to general-revenue proceedings automatically in orders instituting such proceedings. Should such persons have a substantial interest in the issues in these proceedings and make a proper showing that they will not unduly broaden the issues, they may, of course, be granted leave to intervene pursuant to Rule 72, cited above, and participate as parties to the proceeding.

Comments to the proposed rule were submitted by Matson Navigation Company (Matson), Sea-Land Service, Inc. (Sea-Land), and the Military Sealift Command (MSC). Matson supports the proposed rule, stating that "it will help eliminate confusion and unnecessary consumption of time and to assist persons in understanding their rights." Sea-Land agrees with the objective of simplifying and streamlining procedures and assisting persons to understand their rights, but does not believe that the proposed rules will achieve these objectives. On the contrary, Sea-Land believes that the rules will add uncertainty and place additional burdens on carriers.

Sea-Land contends that a person protesting a rate change or changes

may merely file a protest, cause an investigation and suspension of the proposed rate changes, and have nothing further to do with the proceeding, unless he files a petition for leave to intervene. Sea-Land believes that this situation may be unfair to the person with a legitimate interest in active participation in the proceeding and furthermore unfair to the carrier who is faced with an ongoing proceeding without the presence of the adversary party who caused the proceeding to commence in the first place. Sea-Land suggests that the Commission should continue to name protestants as parties to the proceeding so that the carrier can decide whether to direct its attention to the substance of the protests.

We believe that Sea-Land's comments lack merit. Even Sea-Land admits that "[i]n many, if not most such instances," statements of persons protesting rate changes "do not meet the requirements of the Commission's rules and the senders frequently have no intention of participating in an official investigation proceeding." Sea-Land even agrees that "generally speaking, senders of such statements, if called upon, will add little or nothing to the development of a factual record upon which a proper decision could be made." Furthermore, Sea-Land appears to be under the mistaken impression that protestants must be participants in Commission investigations so that the carrier can protect its interests. Sea-Land also incorrectly believes that failure to name protestants parties at the outset of the proceeding is tantamount to their being "arbitrarily dismissed in advance."

The decision to institute an investigation is made by the Commission on the basis of information submitted by the carriers, protesting persons, and other information available to the Commission, and not because protesting persons may or may not intend to take an active role in the proceeding. If protesting persons decide not to participate actively, as even Sea-Land admits happens frequently, this does not mean that the carrier suffers some kind of prejudice. By law a carrier has the burden of proving the justness and reasonableness of its proposed rate changes. Section 3, Intercoastal Shipping Act, 1933, 46 U.S.C. 845; *Commonealth of Puerto Rico* v. *Federal Maritime Commission*, 468 F.2d 872 (D.C. Cir., 1972). The failure to name as a party someone who had filed a protest before the proceeding as instituted does not change the carrier's burden nor should it prejudice the carrier if the protestant has so little interest in the proceeding that he does not even bother to seek to intervene, thereby presenting no evidence or arguments on the record against the carrier's interests. Should the carrier for whatever reason need to examine the position of such an absentee protestant, the carrier is not without means to obtain information from such a person by means of the Commission's deposition and subpena processes. Nor does the protestant suffer from arbitrary dismissal if he is not automatically named a party to the proceeding, because, as mentioned above, if sufficiently interested, such person can seek to become an active party by filing a petition for leave to intervene as provided by Rule 72.

MSC opposes adoption of the proposed rule change. MSC does not believe that protestants are confused by being designated "complainants" in orders instituting proceedings but has no objection to another appellation for such persons. However, MSC does object to the view expressed by the Commission that "general revenue cases are only concerned with carriers' needs for increased revenue and that other matters raised by protestants are not appropriate for investigation." MSC contends that a carrier's revenue needs "cannot be examined in a vacuum" and that changes in the level of particular rates will have an effect on the quantity of cargo that will move depending upon various demand factors, and therefore consideration of particular rate levels must be considered by carriers and the Commission in evaluating the reasonableness of the carrier's requests for increased revenue and the effect on the carrier's ultimate rate of return. Furthermore, MSC contends that a carrier might incorrectly evaluate the effect of increases on particular rates with the result that individual rates or groups of rates might be unjust or unreasonable. These matters should be included in any general-revenue investigation, according to MSC. Additional matters that bear consideration in general-revenue investigations are the questions whether, in the age of containerization and uniform costs, rate levels on commodities should be more uniform and whether tariffs should reduce the number of individual rates published.

Finally, MSC argues that there are two disadvantages which would result if protesting persons were compelled to file formal complaints under section 22 of the Act. First, this would create multiple proceedings with probable consolidation and increased costs of additional pleadings. Second, the burden of proof would shift from the carrier to the complainant, contrary to the Congressional intent expressed in section 3 of the 1933 Act, cited above.

The comments submitted by MSC are not without some merit but do not withstand careful analysis. Contrary to MSC's beliefs, confusion has in fact arisen in the minds of parties named as "complainants" who have confused their status as protestants with actual complainants filing under section 22 of the Act. In *Matson Navigation Company—General Rate Increase in the Hawiian Trade,* Docket Nos. 73–22, etc. (Initial Decision, February 22, 1977), fourteen protestants were named as "complainants", yet only one such "complainant" fully participated in the proceeding (Docket No. 73–22), Id., pp. 3, 4. Furthermore, in Docket No. 73–22 (Sub. No. 1), a protesting shipper named as "complainant" in the Commission's Order of Investigation, did indeed argue that it had been transformed into a section 22 complainant and was entitled to seek reparation, although it had never filed a formal complaint under that law. Id., pp. 26, 27. The presiding judge called attention to the confusion arising out of the present practice. Id., pp. 3, 4, footnote 10.[1]

[1] Significantly, despite MSC's argument that the term "complainant" is appropriate because section 3 of the

MSC's contention that the proposed rule change would eliminate all consideration of evidence pertaining to individual commodity rates and movements is unfounded. The proposed rule change is designed to facilitate general-revenue investigations by concentrating on the essential issue to be determined, that is, the reasonableness of the carrier's expected gross revenue and to avoid excursions into essentially different issues pertaining to the reasonableness of a particular rate or rates. This is not to say, as MSC seems to fear, that evidence concerning effect on the movement of particular rates has no relevance in determining the general-revenue issue. Of course, in any general-revenue case, the carrier attempts to predict volume of movement and the revenue to be expected following rate changes. Any such prediction or evaluation may obviously be affected by changes in volume of movement of particular commodities and if the commodities are major-moving items which are affected by elastic demand factors, the carrier's predictions may be subject to significant revisions. The proposed rule changes do not preclude consideration of these factors, as MSC seems to fear.[2] However, the question of reasonableness of a particular rate is still an essentially different issue which should be litigated in consideration of transportation factors such as cost of service, value of service, etc., which focus upon the particular commodity in question.[3] All too frequently, however, shippers interested in obtaining a determination that a particular commodity rate or rates are unjust or unreasonable engage in the futile endeavor of contesting evidence pertaining to the carrier's need for increased overall revenue

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Intercoastal Shipping Act, 1933, uses the term "complaint," there is independent evidence that the use of that term in the statute has no special importance. In a recent report issued by the House Committee on Merchant Marine and Fisheries on a bill amending section 3 (H.R. 6503), the Committee draft would replace the term "complaint" with the word "protest" as a routine change. See Report No. 95-474, 95th Congr., 1st Sess., June 30, 1977, pp. 14, 15.

[2] Indeed, the Commission, in several recent orders of investigation, has made clear that although the basic issue in a general-revenue proceeding still concerns the reasonableness of the carrier's gross revenue to be derived from the proposed rate changes, "[e]vidence as to the effect of the proposed changes on movement of any particular commodity or commodities will be considered relevant to this basic issue and may be used to determine what overall revenue, in fact, will be derived." See Docket No. 77-27, *Trailer Marine Transport Corporation—General Increase in Rates*, Order of Investigation and Suspension, June 30, 1977; Docket No. 77-28, *Gulf Caribbean Marine Lines, Inc.—General Increase in Rates*, Order of Investigation and Suspension, June 30, 1977; Docket No. 77-30, *Puerto Rico Maritime Shipping Authority—General Increase in Rates*, Order of Investigation, July 7, 1977.

[3] The Commission, other regulatory agencies, and the courts have recognized that the issues in a general-revenue case are essentially different from those in specific commodity cases. See, e.g., *Alcoa Steamship Co., Inc.—General Increase in Rates in the Atlantic/Gulf Puerto Rico Trade*, 9 F.M.C. 220, 222 (1966); *Matson Navigation Company—Rate Structure*, 3 U.S.M.C. 82, 87-88 (1966); *Wool Rates from Boston to Philadelphia*, 1 U.S.S.B. 20, 21 (1921). In commenting upon a decision of the Interstate Commerce Commission establishing the distinction between the two types of cases, one court stated:

> In 1905 (footnote omitted) the Commission pointed out the difference between such a rate [i.e., for carriage of a single commodity] and an entire system of rates. It said the question whether the revenue yielded by all the rates is a fair return has "only a very remote, if any practical, bearing on the reasonableness of a rate on a single article of traffic." On the other hand, it said, the reasonableness of a single rate depends upon "the value, volume and other characteristics affecting the transportation of the particular commodity." That decision of the Commission as affirmed by the Supreme Court (footnote omitted). . . . So far as we can ascertain, that rule is well established law. *Chicago Board of Trade* v. *United States*, 223 F.2d 348, 351 (D.C. Cir. 1955).

For a similar discussion see Locklin, *Economics of Transportation* (Irwin, Inc., 7th ed. 1972), Chapter 18, pp. 421-22, citing, among other cases, *Interstate Commerce Commission* v. *Union Pacific R.R. Co.*, 222 U.S. 541, 549 (1912). See also Docket No. 76-43, *Matson Navigation Company—Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade*, Denial of Appeal, May 13, 1977, where we recently confirmed this principle, and the orders of investigation served in Dockets Nos. 77-27, 77-28, and 77-30, cited in the previous footnote.

armed with little more than evidence concerning anticipated effects on movements of their particular commodities.

As the Commission remarked in our previous notice, these efforts usually consume time needlessly and are essentially irrelevant in a general-revenue case. The answer to this problem is to avoid the wasteful practice of litigating issues in wrong proceedings. The proposed rule would require protestants to file their own complaints or, under the proper circumstances, petition the Commission to institute investigations concerning a particular rate or rates. In either event, the resulting proceeding would concentrate on the proper issue to be determined and the parties would proceed to develop truly relevant evidence pertaining to revenue, transportation, and ratemaking factors relating to the specific rate in question. Similarly, this would also apply to shippers who wish to litigate issues concerning revision of tariff rate structures or reduction in the number of published rates.

After consideration of all of the comments, the Commission remains convinced that the present practice in question has caused delay and confusion in the conduct of general-revenue proceedings and that the amendments will benefit all parties in obtaining quicker decisions in such proceedings as well as shippers or other protesting persons in more effectively protecting their interests.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), sections 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 821, 841a), and section 3 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 845), Part 502 of Title 46, Code of Federal Regulations, is amended as set forth below.

1. Section 502.41 is amended by deleting the following words from the second sentence:

"and/or § 502.67 (Rule 5(g))".

Effective Date. Inasmuch as the expeditious adoption of this rule change is desirable and the change is procedural in nature, it shall be effective upon publication in the *Federal Register* and shall be applicable to all future proceedings.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 382(I)

ALLIED CHEMICAL, S. A.

v.

FARRELL LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

September 6, 1977

Notice is hereby given that the Commission on September 6, 1977, determined not to review the decision of the Settlement Officer in this proceeding served August 26, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 382(I)

ALLIED CHEMICAL, S.A.

v.

FARRELL LINES, LTD.

Reparation Denied.

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

By complaint filed December 30, 1976, Allied Chemical, S.A. (complainant) alleges that Farrell Lines, Ltd. (carrier) assessed incorrect freight charges on three separate shipments of "yarn, carpet, synthetic" resulting in combined overcharges of $1,592.34. While a violation of the Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

According to the complainant, the carrier, on January 3, 1975, issued prepaid bill of lading No. 607 to cover a house-to-house shipment on the Austral Endurance of "1 Container: Said to contain Carpet Yarn," weighing 13,460 pounds and measuring 883 cubic feet, from Norfolk, Virginia to Melbourne, Australia. For this service the carrier assessed, and complainant paid charges in the amount of $3,070.63 based upon a rate of $143/m.t. plus a seven percent currency surcharge, less a $13/ton house-to-house container allowance.

Further, on January 27, 1975, the carrier issued its prepaid bills of lading Nos. 601 and 602 to cover two house-to-house shipments on the Austral Envoy of three (3) containers of "Carpet Yarn," from Charleston, South Carolina to Melbourne, Australia. The shipment in the single container on B/L No. 601 weighed 24,328 pounds and measured 1,867 cubic feet. The shipment in the two containers on B/L No. 602 weighed 48,374 pounds and measured 3,734 cubic feet. For its services the carrier billed, and complainant paid, charges of $6,502.93 on B/L 601 and $13,005.85 on B/L 602, based upon a rate of $143/m.t., plus a seven percent currency surcharge, less $13/ton house-to-house allowance.

[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.

The complainant contends that at the time these shipments were made, the carrier's tariff[2] provided a contract rate of $134 per ton, weight or measure, for "Yarn, Carpet, Synthetic." Said rate is shown in Item 3238, 4th Revised Page 306 of said tariff. Complainant was, at the time of these shipments, a dual rate contract signator.

On the basis of the $134 "effective" rate shown above, complainant seeks overcharges in the amount of $1,592.34 asfollows:[3]

B/L No. 601	— 1,867 cubic feet (46.675) @$134	=	$6,254.45
	Less H/H allowance @$13		−606.78
	CRA @seven percent		395.34
	Total		$6,043.01
Paid $6,502.93	Should be $6,043.01 *Overpaid $459.92*		
B/L No. 602	— 3,734 cubic feet (93.35) @$134	=	$12,508.90
	Less H/H allowance @$13		−1,213.55
	CRA @seven percent		790.67
	Total		$12,086.02
Paid $13,005.85	Should be $12,086.02 *Overpaid $919.83*		
B/L No. 607	— 883 cubic feet (22.075) @$134	=	$2,958.05
	Less H/H allowance @$13		−286.98
	CRA @seven percent		186.97
	Total		$2,858.04
Paid $3,070.63	Should be $2,858.04 *Overpaid $212.59*		

In support of its allegations *the complainant* supplied copies of the rated bills of lading; and *states as follows:*

"This is a case in which the carrier applied the wrong rate to shipments of carpet yarn. While we are not certain, we believe that the carrier applied the $128 rate shown in Item 3238 of its tariff plus a $15 bunker surcharge for a total of $143 per measurement ton. That rate became effective December 13, 1974, on 3rd Revised Page 306. However, 4th Revised Page 306 canceled 3rd Revised Page 306 on October 6, 1974, and provided a rate of $134, including the bunker surcharge. We note that the rates in Items 3230, 3234, 3235 and 3236, when republished on 4th Revised Page 306, were each increased $15 to reflect incorporation of the $15 bunker surcharge.

"There are no other questions that require Commission consideration. The commodity is plainly described on the carrier's bill of lading as Carpet Yarn. The shipper is an internationally known manufacturer of chemicals, synthetics and synthetic fibers and yarns. The tariff provides a specific rate for Carpet Yarn, Synthetic, and that description was apparently used by the carrier to compute its freight charges. But apparently it overlooked the change in 4th Revised Page 306 which effectively reduced the rate from $143 to $134 per measurement ton.

[2] U. S. Atlantic & Gulf/Australia—New Zealand Conference Freight Tariff No. 3, FMC No. 12.

[3] The $13/ton house-to-house (H/H) allowance is provided in Rule 31(c) of respondent's tariff. The seven percent currency realignment adjustment (CRA) is shown on 5th Revised Page 27 of the tariff.

"On that basis the complainant, which paid the freight charges, is obviously entitled to the reparation claimed in the total sum of $1,592.34."

In response to the served complaint, the carrier states as follows:

"The Governing tariff, U. S. Atlantic and Gulf/Australia—New Zealand Conference Freight Tariff No. 3, FMC No. 12, Third Revised Page No. 306 which lists the rate of $128.00 W/M plus an additional $15.00 per ton which was incorporated into the tariff base rate in accordance with the Temporary Supplement issued by the aforementioned Conference with an effective date of October 6, 1974. This point is expanded upon in the attached letter provided to us by the Vice Chairman of the U.S. Atlantic & Gulf/Australia—New Zealand Conference and we believe this reaction regarding the actual Conference tariff filings properly clarifies the question at hand.

"We conclude that proper freight charges were collected for the carriage of these three consignments in accordance with the tariffs on file with the Federal Maritime Commission."

Due to the complexity of the situation, pertinent portions of the "attached letter" from the Conference Vice Chairman are quoted below:[4]

"Firstly we would state that it is our opinion that the rates assessed by Farrell Lines were correct. The Tariff rate at the time of shipment *should have been $143.00 W/M.*

"To give you some background as to the confusion resulting from the changes in this rate we would point out the following information. This Conference issued a temporary supplement advising the shipping public that our bunker surcharge of $15.00 per ton was to be incorporated into the Tariff base rate. Since the rate for Carpet Yarn Synthetic was $128.00 the proper rate to be assessed *should have been $143.00 W/M.* However since it was a complete Tariff revision the printed Tariff pages were not mailed to the Federal Maritime Commission until February 13, 1975. *This would be your fourth page No. 306 showing an all inclusive rate of $134.00 for Synthetic Carpet Yarn.* Since Farrell Lines did not have the pages in hand prior to February 13, 1975, and were operating on the basis of the temporary supplement which was quite clear in stating that the Tariff rate should be increased by $15.00 per ton there was no reason and the shipper well knew it, that any lower rate should have been assessed.

"Third revised Page No. 306 dated December 13, 1974, shows a rate of $128.00 W/M. This revision was issued since this Conference reduced the rate for the shipper by adding the current notation for shipments moving in 40-foot containers. As the page showing a bunker surcharge had not been printed yet this page received the next revision number as 3rd Revised Page No. 306 and which was accepted by the Federal Maritime Commission. Subsequently when tariff page 4th Revised No. 306 was issued showing an effective date of October 6, 1974, a typographical error was made in the rate which showed that it was $134.00 W/M instead of

[4] Underscoring supplied.

$143.00 W/M which would have been the inclusion of the full bunker surcharge.

"By the time this error was brought forth to us enough time had elapsed so that this Conference could not advise the Commission of a typographical error and change the rate to $143.00 as this would have been an unfair increase to the shipper. What did happen was that due to a typographical error the shipper received in fact a $9.00 per ton reduction which the Member Lines of this Conference let stand due to the time lapse involved in filing corrections for typographical errors.

"This Conference takes the position that the Tariff Page 4th Revised No. 306 filed with the Federal Maritime Commission on February 13, 1975, is the correct rate to be assessed due to our error from that time on. Prior to that the rate should have been $143.00 that is to say from October 6 until February 12, 1975."

Temporary filings are permitted under 46 CFR 536.6(c)—General Order 13. They have the force of law to the same extent as permanent filings, i.e., the matter contained therein and *in effect* at the time the cargo moves, is the only matter which may be applied against such cargo. Accordingly, once a temporary filing is accepted by the Commission, the ". . . filing is valid and binding between shipper and carrier even if subsequently found to violate provisions of the Shipping Act or the Commission's Rules; it is not void *ab initio*."[5]

In the instant case, it appears the carrier transposed the numbers on the permanent filing resulting in an inadvertent rate reduction which, granted, should have been rejected by the staff. However, at best, the rate "reduction" could not have been put into effect earlier than the day it was received by the Commission.[6] Further, Rule 3 of the Conference tariff (Effective Dates) provides that the date of delivery of the goods to the ocean carrier, on dock or alongside on lighter, governs the rate to be applied, unless specifically provided. The rule further specifies that decreases will be effective as published while increases require 30 and 90 days' filing notice, as applicable.

Based upon the state of the tariff on January 3, and 27, 1975, and consistent with the foregoing, it is my opinion that the cargo at issue as properly freighted at a rate of $143.00 weight/measure. It is not subject to adjustment based upon a filing received after the time of shipment simply because the filing submission differs from the prior quotation. In instances here a permanent filing fails to accurately reflect a temporary filing, the permanent filing is rejected. If, however, the error is not detected and the filing rejected at the time of receipt, this failure obviously cannot negate the statutory requirement which requires the application of those rates

[5] See Docket No. 76-64—*States Steamship Company, Far East/USA Household Goods Tariff No. 2, FMC-9* (Report and Order served May 18, 1977).

[6] General Order 13, Section 536.6(a)(3), regarding retroactive effective date states: "Amendments which provide for changes in rates, charges, rules, regulations, or other provisions resulting in a decrease in cost to the shipper, or amendments which result in no change in cost to the shipper may become effective upon the publication and filing with the Commission."

specified in the carrier's tariff on file with the Commission and duly published and in effect at the time.[7] To deny this logic would have the effect of opening the door to retroactive rate application which section 18(b) of the Act expressly prohibits. Not only would overcharges by the carriers be subject to adjustment through freight refund to the shipper, but the inadvertant filing of *higher rates than those provided in the temporary filing would require the carrier to collect an additional freight assessment from the shipper.*

Since a retroactive rate application is prohibited in instances where a retained permanent tariff page differs from a temporary filing, the question arises as to the applicability of any new or different rate contained in the permanent filing. It is my view that on and after the date of receipt of the permanent tariff page, any erroneously printed rate becomes the lawful rate which must then be applied. The rate may not necessarily be the legal rate,[8] *however, and if the quotation violates any part of the statute, relief may be sought by the shipper. As a case in point, had the rate error on the 4th Revised Page 305 permanent page resulted in an increase over the temporary filing, a shipper could have sought redress for failure of the carrier to observe statutory filing notice as to rate increases.*

The record in this proceeding does not disclose any violations of the Commission's statutes and accordingly,

IT IS ORDERED, That Allied Chemical's petition for reparation be, and it is hereby denied.

(S) WALDO R. PUTNAM,
Settlement Officer.

[7] "Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit a deviation from the rates, rules and regulations in the carrier's filed tariff." *Kraft Foods v. Moore McCormack Lines,* 17 F.M.C. 320, 323–fn. 4 (1974); *Louisville & Nashville Ry. v. Maxwell,* 237 U.S. 94 (1915); *Union Carbide Inter-America v. Venezuelan Line,* 17 F.M.C. 181, 182 (1973). (See Initial Decision in Docket No. 77–2, *Sun Company, Incorporated v. Lykes Bros. Steamship Company, Incorporated,* served June 16, 1977).

[8] See 46 CFR section 531.13(d)

FEDERAL MARITIME COMMISSION

DOCKET NO. 77–20

IN RE AGREEMENT NO. 8600–4

NOTICE OF DETERMINATION NOT TO REVIEW

September 12, 1977

Notice is hereby given that the Commission on September 12, 1977, determined not to review the order of discontinuance served by the Administrative Law Judge in this proceeding August 19, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77–20

IN RE AGREEMENT NO. 8600–4

August 19, 1977

ORDER DISMISSING PROCEEDING

The Commission instituted this proceeding to determine whether Agreement No. 8600–4 should be approved, disapproved or modified as measured against the standards of section 15 of the Shipping Act, 1916, 46 U.S.C. §814. The investigation was to consider Agreement No. 8600–4, a proposed modification of basic Agreement 8600 concerning agency arrangements and participation at inter-conference meetings.

On July 29, 1977, the proponents of the agreement, the members of the Trans-Pacific Freight Conference of Japan/Korea and the Japan/Korea-Atlantic and Gulf Freight Conference, agreed to withdraw Agreement No. 8600–4 and they have notified the Federal Maritime Commission's Acting Secretary of this action. On August 2, 1977, they moved to dismiss this proceeding. Hearing Counsel supports the motion to dismiss.

The motion being unopposed and there being no regulatory purpose to be served in continuing the proceeding, the proponents' motion to dismiss is *GRANTED*.

(S) THOMAS W. REILLY,
*A*DMINISTRATIVE LAW JUDGE.

FEDERAL MARITIME COMMISSION

DOCKET NO. 75-3

CHEVRON CHEMICAL COMPANY

v.

MITSUI O.S.K. LINES, LTD.

ORDER AFFIRMING ADOPTION OF INITIAL DECISION

September 14, 1977

By petition filed May 6, 1977, Complainant asks the Commission to reconsider its adoption of the Initial Decision in this proceeding.

Complainant contends that the Order of Adoption fails to consider certain arguments Complainant raised on exceptions, specifically its objections to the Presiding Officer's comments concerning (1) the filing of small claims;[1] (2) the role of professional auditors, and (3) the need to consider the chemical composition of a compound for classification purposes. Complainant recognizes that these comments were "obiter dicta" but suggests they may have been nevertheless the basis for the Presiding Officer's decision and even the Commission's adoption thereof.

The Presiding Officer's comments on the manner in which the parties conducted this proceeding, and on the role of professional freight auditors, merely reflected the Presiding Officer's thinking on these matters. Characterized as a "small digression" they did not purport to be legal arguments or conclusions and did not therefore necessitate any discussion. With respect to the classification of chemical compounds, the order of Adoption clearly states that our prior decisions do not *require* that a chemical compound be reduced to its components for classification purposes. The proper description and classification of a product may depend on various factors which must be determined in each particular case.

Complainant also contends that our holding on the merits, *i.e.* that

[1] We do not read the Initial Decision as implying that a shipper should refrain from filing freight overcharge claims. The footnote reference to Rules 92 and 311 in the Initial Decision was not intended to suggest, as Complainant apparently believes, that *all* overcharge claims can be disposed of under the procedures set forth in these rules, but appears rather as an illustration of *other* procedures *available* to an aggrieved shipper, seeking relief from overpayment of freight charges. Rule 92 applies when, due to an alleged error in the tariff, the carrier charges a rate higher than would be otherwise applicable; Rule 311 provides an informal procedure for the settlement of claims not exceeding $5000.

OLOA 229 was properly classified as a "lubricating oil additive" rather than as a "detergent", is erroneous. The Presiding Officer determined after a full hearing that Respondent had properly classified the two shipments. We reached the same conclusion upon a review of the entire record. Complainant has brought no new matter to our attention which would cause us to alter that conclusion.

Nor is Complainant's reliance on *Union Pac. R. Co. v. United States*, 93 F. Supp. 617 (Ct. Cl. 1950) appropriate here. In *Union Pac.* the court rejected the railroads contention that a shipment of "napalm," for which there was no specific commodity listing in the railroad's tariff, should have been rated under the "Chemicals noibn (not otherwise identified by name)" classification, rather than as "soap powder," which carried a lower rate at the time. The court reasoned that:

. . . any fairness which might exist in the application of the Chemicals noibn rate to any particular shipment would be purely coincidental. That would be the reason for avoiding the application of that classification if another fairly applicable one is available. (at 617)

The court then took notice of the fact that napalm was made by the same chemical process as soap bars or soap powder, down to the last stage when aluminate sulphate is added, and accordingly determined that the commodity shipped was properly classified as "soap powder." In so doing, the court explained that:

To the man on the street, the housewife, the grocery clerk, Napalm is not a soap. . . . But to chemistry which devises these combinations, and to industry which uses them . . . these commodities are soap. . . . And it is in the industry, and not the housewife or the man on the street . . . which is concerned with freight classifications and rates. (at 618).

The *Union Pac.* case can be clearly distinguished from the one before us. Here we are not confronted with a generic classification such as "Chemicals noibn" but with two specific commodity descriptions, one of which, "lubricating oil additive," has been found both by the Presiding Officer and the Commission to more accurately describe the product than the description "detergent" urged by the Complainant.[2] Such a finding is based not on the concept of what "the man in the street, the housewife, the grocery clerk" may have of a detergent, but rather on the basis is of the manufacturer's own literature and description of the product and the testimony of an expert witness. Chevron failed to refute this testimony by an expert witness of its on choosing, or indeed to offer any expert evidence whatsoever. According to the holding in the *Pac. R. Co.* case cited by Complainant, once it is found that among two or more classifications, "one of them fits [the product] better than the other . . . that one will be applied." That is the finding made here and the principle followed.

Complainant's objections to the consideration given to the description

[2] As we noted in our Adoption of Initial Decision:

Chevron's own Data Product sheet and other evidence introduced by it do not indicate that detergency is the sole or even the primary function of OLOA 229.

in the export declaration are unfounded in light of the Commission's well established policy of considering any type of evidence by which a shipper may show the true nature of his cargo. See *e.g., Ocean Freight Consultants v. Royal Netherlands Steamship Company;*[3] *Abbott Laboratories v. Alcoa Steamship Company.*[4]

One final matter raised by Complainant in its Petition requires discussion. Noting that the Commission dismissed the complaint even though the Presiding Officer had awarded reparation in the amount of $92.99, Complainant is "certain that this was an unintentional oversight" requiring some form of correction. Complainant's concern is unwarranted.

The Order of Adoption clearly states that the Initial Decision is adopted in its entirety. This, of necessity, includes the award of reparation, which rested on a finding that freight charges on one of the shipments reflected a rate increase not in effect at the time of shipment, a ground for relief not stated in the complaint. However, to dispel any misunderstanding we hereby affirm the Presiding Officer's award of reparation in the amount of $92.99. To the extent the complaint claimed reparation on the ground of misdescription and misclassification of the cargo, our holding here called for its dismissal. For reasons stated above, therefore;

IT IS ORDERED that our Adoption of Initial Decision served in this proceeding April 13, 1977 is affirmed.

By the Commission.

Vice Chairman Clarence Morse dissenting. We have here another typical situation where for a reparation suit Commission decisions compel a determination of the true nature of a shipment irrespective of any tariff rules and regulations having reference to claims for reparations.

Where two tariff descriptions could fairly apply to a given shipment, the shipper is entitled to the benefit of the description producing the lesser rate. Here, Respondent's expert "agreed" that OLOA 229, described in the shipper's Product Data Sheet as a "highly alkaline detergent" is "a highly alkaline detergent as one function of this material" (Tr., 7) albeit, in his opinion, OLOA 229 is primarily an additive and secondarily an additive which, as only one of its functions, provides detergency.

The shipment was rated as a "Lube Oil Additive, NOS". The alternative tariff description for which Complainant contends is "Detergents, Liquid or Dry, Non-hazardous N.O.S."

Obviously, all detergents when added to another substance can be said to be an "additive" but it cannot be said that all "additives" are "detergents".[5] Hence, when the shipper's Product Data Sheet (Attachment 5 to Complaint) describes the goods as:

"DESCRIPTION HIGHLY ALKALINE DETERGENT—a calcium alkyl phenate lubricating oil additive

[3] FMC Docket No. 72-39, Commission Report served January 30, 1975; 14 SRR 1485 (1975).
[4] Informal Docket 321(I), Commission Order on Review served April 8, 1975; 14 SRR 1652 (1975).
[5] ". . . additives is the broader term and detergent is a narrower term". V. Horak, Tr., 22.

"APPLICATION OLOA 229 is an economical source of very high levels of alkalinity plus good detergency for marine cylinder lubricating oils. This additive exhibits the superior antifoaming and solubility properties required for severe paraffinic base stocks. OLOA 229 is also used with other detergent and inhibitor additives in engine oils. It provides base for neutralizing corrosive acids and excellent detergency for upper ring belt deposit control under the high operating temperatures encountered in supercharged diesel engines."

it is clear that it names or describes the product OLOA 229 a "detergent" albeit a "highly alkaline" detergent.[6] Further, who is better qualified to declare the nature of a product and its intended use than the seller/manufacturer? It is the industry, not the housewife or man on the street or a professor of chemistry (no matter how brilliant a man he may be) which is concerned with freight classification and rates. *Union Pacific RR* v. *US, supra*. And industry, the manufacturer, calls it a detergent. Hence, it fairly can be said that both tariff commodity descriptions—"Detergents, Liquid or Dry, Nonhazardous N.O.S." and "Lube Oil Additive, NOS"—are applicable, although to me the greater emphasis is upon the word "detergent", and where such tariff imprecision occurs the tariff description bearing the lesser rate should apply.

I would award reparations based on the above analysis.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

[6] "The word "alkaline" is an adjective, not a noun, and means "having the properties of an alkali, or of resembling an alkali, or containing an alkali". Webster's *New World Dictionary of the American Language*, College Edition, 1968.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 377(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

ATLANTIC LINES, LTD.

June 21, 1977

Reparation Awarded.

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

By complaint filed December 16, 1976, Pan American Health Organization (complainant) alleges that Atlantic Lines, Ltd. (carrier) assessed incorrect freight charges on two separate shipments of "Malathion 50 percent Wettable Powder" resulting in combined overcharges of $1,176.13. While a violation of the Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The carrier denied the claim solely on the basis of Item 105 of tariff[2] which prohibits the payment of overcharge claims not presented to the carrier within six months after the date of the shipment.

According to the complainant, the carrier on December 23, 1974, issued its bill of lading No. 13 (M/V Atlantic Pearl) to cover a prepaid shipment described thereon as "130 Drums: Malathion 50 percent Wettable Powder" weighing 14,430 pounds and measuring 788 cubic feet, from New York to Georgetown, Guyana. Total charges of $2,830.50 were assessed based upon a class rate of $131.00 W/M (plus certain surcharges and ancillary charges) the rate published for "Insecticides, N.O.S." in the carrier's tariff (see Footnote 2).[3]

The complainant contends that "Malathion" is actually an *agricultural* insecticide for which a specific Class 9 rate of $82.50 W/M is published in the carrier's tariff.[4]

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[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] Leeaard and Windward Islands & Guianas Conference Freight Tariff FMC No. 1.

[3] *Ibid.* 13th Revised Page 53, Class No. 24; 9th Revised Page 38.

[4] *Ibid.* 13th Revised Page 53, Class No. 9; 9th Revised Page 38.

Based upon the above, the complainant states that the shipment should *have been rated as follows:*

788 cubic feet (19.7 tons) × $82.50	=	$1,625.25
Other charges, as billed		249.80
Total		$1,875.05

and seeks reparation in the amount of $955.45 ($2,830.50 less $1,875.05).

On February 12, 1975, a similar prepaid shipment was made under bill of lading 8 from New York to Grenada, B.W.I. The cargo was described on the B/L as "30 Drums Malathion 50 percent Wettable Powder" weighing 3,330 pounds and measuring 182 cubic feet. Total charges for this shipment, based upon an "Insecticide, N.O.S. class rate of $142.00 W/M plus a charge for receiving, storage and delivery (R S and D), were $668.85 (see Footnote 3).

The claimant contends that the shipment should have been rated Class 9 and agricultural insecticides at a rate of $93.50 W/M (Port Group 3(b)).[5]

Based upon the above the complainant states that the shipment should have been rated as follows:

182 cubic feet (4.55 tons) × $93.50	=	$425.42
R S & D, as billed		22.75
Total		$448.17

and, seeks reparation in the amount of $220.68 ($668.85 less $448.17).

In support of its claims for reparation, the complainant supplied copies of the pertinent bills of lading; carrier freight bills and freight forwarder bills to the complainant showing the amounts paid as ocean freight; and copies of the shipper's invoices showing the cargo to be "Malathion" and indicating that it was purchased by the complainant from "AGRI".[6]

The complainant also submitted a copy of Page 538 of the Condensed Chemical Dictionary, Eighth Edition which identifies "Malathion" as a generic name for a chemical or chemicals whose only use appears to be that of an insecticide. In addition, the complainant furnished a copy of a label allegedly obtained from the Environmental Protection Agency.[7] This label is for a commodity with the tradename "Cythion 50 W" which is identified as a 50 percent Wettable Powder containing Cythion insecticide, "The Premium Grade Malathion." The primary use of this product appears to be that of an agricultural insecticide and users of the product are referred to the "State Agricultural Experiment Station" for exact timing and spacing of sprays in their particular areas.

In response to the served complaint, the carrier: (1) admits that the claims were denied in accordance with the provisions of its tariff which

[5] See Footnote 4; also 14th Revised Page 37, Port Group 3(b).

[6] The complainant advises that "AGRI" identifies the Agricultural Division of Cyanamid International Sales Corporation (each invoice bears the notation "sold by AGRI").

[7] The label contains a perforated imprint "EPA.PR"; a E.P.A. Reg. No. 802-424-AA; and a stamp indicating that it was accepted March 7, 1974.

prohibit the adjustment of freight charges unless a claim is submitted in writing within six months of the date of the shipment (Item 105); (2) denies that the complainant was overcharged; (3) alleges that it had no knowledge or information as to the nature of Malathion; (4) asserts that it was the duty of the shipper to inform the carrier of the nature of the cargo; (5) states its opinion that the N.O.S. charges were properly applied; and (6) requests that the complaint be dismissed.

While not used as a defense by the carrier, the conference tariff contains other applicable rules which must be taken into consideration. For example:

1) Item 105, in addition to the six-month rule, prohibits payment of claims based upon alleged error in description after the cargo leaves the carrier's possession; and

2) Item 2(h) states that "whenever this tariff provides different rates on a commodity dependent upon type or kind and adequate description is not shown in the bill of lading, it will be assumed that it is of a type or kind subject to the highest of the rates provided on the commodity and freight will be assessed accordingly."

There is no question that the carrier was correct in denying the claims under its tariff, and in fact was required to. The claims were not diled within the time limits specified in the tariff; and the generic commodity description used by the shipper did not conform with the tariff descriptions dictating the assessment of the higher rates due to inadequate commodity descriptions on the bills of lading.

Concerning the published tariff time limits for filing claims, the Commission, in Informal Docket No. 115(I), *Colgate Palmolive Company v. United Fruit Company* reiterated what it specifically stated in *Proposed Rules—Time Limit on Filing Overcharge Claims* 12 F.M.C. 298, 308 (1969) that:

8 " . . . 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."

Further, in Informal Docket No. 294(I) *Prudential Grace Lines, Inc. v. P.P.G. Industries, Inc.* served February 1, 1973, it was held that the " . . . filing of a timely complaint has effectively eliminated the tariff technicality under with the claim originally was denied. . . ." Accordingly, the question of a complainant's right of relief from the so-called six-month rule has been laid to rest; and requires no further comment.

In considering the imposed time limits and conditions for filing claims alleging error in cargo descriptions, the Commission has established, and consistently held, that the determining factor is what the complainant can prove based upon all the evidence as to what was actually shipped. Informal Docket No. 256(I), *Union Carbide Inter-American v. Venezuelan Line*, Order on Review of Initial Decision, November 12, 1973; *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, 13 SRR 16 (1972).

Where the shipment has left the custody of the carrier, however, and the carrier is thereby prevented from personally verifying the complainant's contentions, the Commission has held that the complainant has a heavy burden of proof and must set forth sufficient facts to indicate with reasonable certainty and definiteness the validity of the claim. *Western Publishing Co., Inc. v. Hapag Lloyd A.G.*, cited above; *Johnson & Johnson International v. Venezuelan Lines,* 13 SRR 536 (1973); *United States v. Farrell Lines, Inc.,* 13 SRR 199, 202 (1973); *Colgate Palmolive Peet Co. v. United Fruit Co.,* 11 SRR 979, 981 (1970). Obviously, the doctrine of "what actually was shipped" applies with equal force against tariff Item 2(h), previously quoted, subject to the same "heavy burden of proof."

The carrier's tariff contains three descriptions under the generic heading of "Insecticides, viz:" i.e. Agricultural; Household, not hazardous; and N.O.S. There is no dispute that Malathion is an insecticide. The question is whether Malathion is, in fact, an insecticide used primarily in connection with agriculture so as to qualify for the specific rate on that commodity published in the carrier's tariff; or in the alternative, so far removed from agricultural use as to require the N.O.S. classification. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. *The Carborumdum Company v. Royal Netherlands Steamship Company (Antilles) N.V.*, decided January 5, 1977. Rules of tariff construction also require that the more specific of two possible applicable tariff items must apply. *Corn Products Company v. Hamburg—Amerika Lines* 10 FMC 388 (1967).

According to the Condensed Chemical Dictionary, eighth edition, Malathion is moderately toxic by ingestion and inhalation—absorbed by skin. This would appear to eliminate the "household, non-hazardous" category.

A review of the documents supplied by the complainant, indicates that Malathion is equally effective in controlling insects, and other plant pests, which destroy crops; fruits, nuts and ornamentals.

Webster's New Collegiate Dictionary, sixth edition, defines *insecticides* as "an agent or preparation for destroying insects;" and *agriculture* as the "art or science of cultivating the ground; the production of crops and livestock on a farm; farming." The tariff defines neither of these terms.

As previously stated, the Commission has held that the more specific of two possible tariff applications must prevail. Malathion is an agricultural insecticide within the meaning of the tariff item and, accordingly, the N.O.S. rate has no application. Therefore, the more specific agricultural rate should be applied.

The complainant is entitled to reparation in the amount of $1,176.13. It is so ordered.

(S) WALDO R. PUTNAM,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 377(I)

PAN AMERICAN HEALTH ORGANIZATION

v.

ATLANTIC LINES, LTD.

ORDER

September 16, 1977

By Notice served July 6, 1977, the Commission determined to review the decision of the Settlement Officer in this proceeding. Upon completion of review the Commission enters the following findings and conclusions:

The Settlement Officer's award of reparation to Complainant Pan American Health Organization (PAHO) in the amount of $955.45 for freight overcharges on the shipment from New York to Georgetown, Guyana, under bill of lading dated December 23, 1974, is hereby affirmed and his decision as to this shipment is adopted by the Commission.

With respect to the shipment to Grenada, B.W.I., the bill of lading dated February 12, 1975 and the manufacturer's invoice name as shipper not the Complainant PAHO but the World Health Organization (WHO). The complaint fails to show either corporate relationship or affiliation between PAHO and WHO which gives PAHO standing to seek reparation in its own name, or a valid assignment of the claim from WHO to PAHO. Rather than denying the claim with regard to the Grenada shipment because PAHO has not shown itself to be entitled to the reparation sought, the Commission will leave the record open for twenty (20) days within which time PAHO may correct this deficiency.

THEREFORE, IT IS ORDERED,

1. That the Settlement Officer's decision awarding reparation to Pan American Health Organization in the amount of $955.45 for freight overcharges on the shipment of Malathion from New York to Georgetown, Guyana, is hereby adopted as our own and made a part hereof.

2. That Complainant may, within twenty (20) days after service of this Order file either: (1) an affidavit duly executed by an officer of Pan American Health Organization demonstrating a relationship or affiliation with the World Health Organization which would support PAHO's

standing to claim and receive reparation on the shipment of the World Health Organization to Grenada, B.W.I., or; (2) a valid assignment of that claim from the World Health Organization; and

3. That, should Complainant fail to submit an affidavit or assignment as provided in Paragraph 2, above, reparation on the shipment to Grenada, B.W.I. in the amount of $220.68 shall be denied.

By the Commission.

[SEAL] (S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

No. 77-21

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1744R
ORLANDO A. PUIG D/B/A/ HOUSTON EXPORT I NTERNATIONAL

July 18, 1977

ORDER DISCONTINUING PROCEEDING

This proceeding, pursuant to sections 22 and 44 of the Shipping Act, 1916, 46 U.S.C. 821, 841(c), was instituted by the Commission's Order of Investigation and Hearing served June 6, 1977 (published in the *Federal Register,* June 10, 1977, pages 29964 and 29965, Vol. 42 No. 112).

The order directed, *inter alia,* an examination into the details of the forwarding operation of Orlando A. Puig d/b/a Houston Export International (Licensee or Respondent) to whom independent ocean freight forwarder license FMC No. 1744R had been issued on January 14, 1976. Also, to determine whether an export shipper, Stewart and Stevenson Services, Inc. (SSS), of Houston, Texas, by whom the Licensee was employed as an export Manager prior to being licensed, directly or indirectly controls the forwarding activities of the Licensee, and if so, whether the Licensee continues to qualify for an independent ocean freight forwarder license. Mr. Puig had submitted a letter of resignation from SSS effectiv January i4, 1976, and was licensed as an independent ocean freight forwarder on the sam date.

It is pointed out in the Commission's June 6, 1977, Order of Investigation and Hearing that "Subsequently, information has been developed indicating that the Licensee maintains a private office in the Export Department of SSS and receives approximately the same remuneration from SSS that Mr. Puig had received as a salaried employee. The Licensee also appears to be performing the same services for SSS as an independent forwarder as Mr. Puig performed as Export Manager. The great majority of shipments handled by the Licensee since January 14, 1976 have been those of SSS."

By notice served June 16, 1977, pursuant to Rule 94 of the Commission's Rules of Practice and Procedure, 46 CFR 502.94, a prehearing conference in this proceeding was called for and held on Wednesday, July

13, 1977. At the prehearing conference, counsel for the respondent and the Commission's Hearing Counsel announced they have been exploring the issues raised and that satisfactory changes have been made that warrants counsel jointly or singularly to file a motion to discontinue this proceeding.

On July 15, 1977, the Commission's Hearing Counsel an counsel for Respondent filed a joint motion to discontinue these proceedings. In support of the motion the movants state, "The circumstances giving rise to the appearance of shipper control were as follows:

"1. Houston Export International's offices were located on the premises of SSS; (offices are being moved to a location in which SSS owns no interest)

"Orlando Puig was being compensated by SSS for his freight forwarding services on a flat monthly fee basis. (Mr. Puig has cancelled his fixed fee arrangement with SSS and has undertaken to obtain the advice of the Commission's Office of Freight Forwarders before handling shipments for SSS on other than a shipment by shipment basis)

"Most of the shipments handled by Houston Export International were those of SSS." (Mr. Puig solicits business from shippers other than SSS and a growing percentage of his freight forwarding comes from shippers other than SSS)

The joint motion to discontinue, states, "Since the institution of this proceeding, Respondent has retained counsel, who has had extensive conversations with the Commission's Bureau of Certification and Licensing, Office of Freight Forwarders, and Hearing Counsel. Pursuant to these conversations, the licensee has now changed the circumstances of his operation so as to avoid any appearance or possibility of shipper control."

The joint motion to discontinue states the sole issue in this proceeding is the question of Respondent's "shipper connectedness" and/or lack of independence. Puig's fitness, willingness, and ability to perform as a freight forwarder is otherwise not in question. Hearing Counsel concurs that the exhibits appended to the motion establish Mr. Puig's independence and freedom from shipper connectedness or control.

Upon consideration of the above, the Presiding Administrative Law Judge *finds* and *concludes* that the parties hereto have agreed upon the facts referred to above as the circumstances giving rise to the appearance of shipper control, and that the affidavits and other documents appended to the motion, make unnecessary oral hearing and cross-examination for the development of an adequate record. And, he agrees with the statement in the joint motion to discontinue this proceeding "that an evidentiary hearing would serve no valid regulatory purpose, since the appended exhibits would be stipulated into evidence as the basis for decision in this case. Should a hearing be ordered and held, the parties would recommend a continuation of license number 1744–R."

The Presiding Administrative Law Judge also *finds* and *concludes* that

SSS now does not directly or indirectly control the forwarding activities of the Licensee, and that the Licensee continues to qualify for an independent ocean freight forwarder license.

Wherefore, it is

Ordered,

(A) The joint motion to discontinue this proceeding be and hereby is granted.

(B) This proceeding be and hereby is discontinued.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

FEDERAL MARITIME COMMISSION

No. 77–21

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1744R
ORLANDO A. PUIG D/B/A HOUSTON EXPORT INTERNATIONAL

ORDER ON REVIEW OF DISCONTINUANCE

September 19, 1977

The Commission, by order served August 12, 1977, determined to review the order of discontinuance in this proceeding served July 18, 1977. Upon review, we have determined that no further purpose would be served by continuing this proceeding and hereby affirm the order of discontinuance.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 394(I)

ACME COTTON PRODUCTS CO., INC.

v.

ROYAL NETHERLANDS STEAMSHIP CO.
(ANTILLES N.V.)

NOTICE OF DETERMINATION NOT TO REVIEW

September 19, 1977

Notice is hereby given that the Commission on September 19, 1977, determined not to review the decision of the Settlement Officer in this proceeding served September 7, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 394(I)

ACME COTTON PRODUCTS CO., INC.

v.

ROYAL NETHERLANDS STEAMSHIP CO.
(ANTILLES N. V.)

September 7, 1977

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Acme Cotton Products, Inc. (complainant) claims the difference between total transportation charges based on assessment of a Class 1, $124.75rate instead of a Class 7, $79.50 rate, charges paid $1,136.62 instead of $748.60, or $388.02 as reparations from Royal Netherlands Steamship Co. (Respondent) for alleged freight overcharges on a shipment from New York, New York to La Guaira, Venezuela on the SS LEO STAR on bill of lading number 493 dated November 13, 1976. The applicable tariff is the United States Atlantic & Gulf-Venezuela and Netherlands Antilles Conference S.B. VEN.-11 Freight Tariff F.M.C. NO. 2. A freight forwarder prepared the bill of lading describing the shipment as 7 cartons: Disposable Hospital Supplies, which was assessed as Cargo, N.O.S., Not Dangerous which takes a Class 1 rate of $124.75 W/M (per ton of 40 cubic feet or 2,000 pounds whichever is higher). Complainant alleges that the shipment consisted of Surgical Cotton Wadding which comes under the Cotton Wadding description at 4th Revised Page 135 of the Tariff which takes a Class 7 rate of $79.50 W/M. The shipment weighed 1,626 pounds and measured 343 cubic feet.

While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be a violation of Section 18(b)(3) thereof.

Respondent denied the claim on February 3, 1977 citing Item 11 from the tariff which provides, in part:

[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.

"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 weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found."[2]

The claim was timely filed with the Commission on April 1, 1977.

The claim was accompanied by a copy of the (1) bill of lading, (2) complainant's invoice, (3) correspondence in Spanish from Caracas, Venezuela concerning the shipment, and (4) a shipper's export declaration correction form which all will be considered below.

As indicated above, the bill of lading description was 7 cartons: Disposable Hospital Supplies. Complainant's Invoice No. 17171, dated November 25, 1976, (which number appears on the bill of lading) identifies the shipment as follows:

HUARTA QUIRURGICA
[wadding, surgical][3]

No. 688	50	cjas.	72 rolles de 3" × 6 yds.
689	100	cjas.	54 rolles de 4" × 6 yds.
690	?	cjas.	43 rolles de 5" × 6 yds.
691	50	cjas.	36 rolles de 6" × 6 yds.
		[boxes]	[rolls]

The correspondence in Spanish which was received by complainant on January 21, 1977 was translated by him at our request. Of importance here is the portion that states:

". . . we noted that you are charging the client, only for shipping freight, the amount of $1,136.62, which represents almost 40% of the value FAS of the merchandise.
"This freight seems to be much too high in our opinion, consequently, we are requesting verification on the matter. . . . "

The Shipper's Export Declaration Correction form prepared by the freight forwarder, amended the description of the shipment from Disposable hospital supplies—Schedule B commodity number 8617150 to cotton surgical wadding—Schedule B commodity number 5419100. The latter commodity number covers bandages, gauze, wad, etc., impregnated or coated with pharmaceutical products.

A copy of complainant's catalog or price list was requested to verify what the shipment consisted of. A copy of the catalog has been provided and for catalog numbers 688–691, which appeared on Invoice No. 17171, the following description appears:

"Cast Padding, Surgical Wadding Padding of a soft white cotton, sized on both sides to provide strength and to prevent tearing and lumping. Designed especially for lining

[2] With respect to such a rule the Commission, in its report on remand served November 24, 1976, in *Kraft Foods v. Moore McCormack Lines, Inc.*, negated its application with respect to claims before the Commission stating in part "In effect the Rule sets up as a period of limitation, the time during which the shipment remains in the custody of the carrier, which limitation was reviewed by the Court as infringing on the rights granted by section 22 of the Shipping Act. . . . "

[3] The translations in brackets were made at the Commission.

under plaster of paris casts or splints. Also used as an impervious backing in preparation of special dressings."

Webster's New World Dictionary, Second College Edition, 1970, defines wadding as any soft or fibrous material for use in padding, packing, stuffing, etc., esp., cotton made up into loose, fluffy sheets, or batting.

From the above, the Cargo NOS Class 1 rate appears too high yet the Cotton Wadding description, which takes Class 7 rate, would not appear to apply to the further processed surgical wadding description as defined in the catalog.

However, the tariff contains another description, Surgical Gauze, at 10th Revised Page 96, which also takes a Class 7 rate. *Stedman's Shorter Medical Dictionary,* Eighth Printing, 1950, defines gauze:

"A thin, loose meshed cloth, employed in bandages or wound dressings, when sterilized or impregnated with antiseptics."

Webster's Third New International Dictionary, 1964, includes the following as one of the definitions for gauze:

"A loosely woven cotton fabric similar to cheesecloth that is extensively used for surgical dressings."

The actual commodity that moved was surgical gauze so a Class 7 rate is applicable.

Complainant submitted substantive matter when the complaint was filed as indicated above. In addition, at my request he also promptly submitted his company's catalog and a translation of the memorandum originally submitted by him to the Commission in Spanish. Complainant has sustained the heavy burden of proof required for a reparation award.

Complainant was assessed $1,136.62 transportation charges. The assessment, based on the Class 7 rate of $79.50, for 343 cubic feet of Surgical Gauze would be:

$\frac{343}{40}$ = 8.575 MT ($79.50)	$661.71
Port Congestion ($3.00)	25.73
Bunker Surcharge ($4.80)	41.16
	$748.60

Respondent overcharged complainant $388.02. Reparation for the amount is awarded.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 395(I)

A. BOHRER INC.

v.

HAPAG-LLOYD LINES
(U.S. NAVIGATION INC.)

NOTICE OF DETERMINATION NOT TO REVIEW

September 19, 1977

Notice is hereby given that the Commission on September 19, 1977, determined not to review the order of dismissal of the Settlement Officer in this proceeding served September 9, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 395(I)

A. BOHRER INC.

v.

HAPAG-LLOYD LINES
(U.S. NAVIGATION INC.)

DISMISSAL OF PROCEEDING[1]

A. Bohrer Inc. (complainant) filed this informal complaint against Hapag-Lloyd Lines (respondent) which covers two identical movements of 750 packages of mixed vegetables weighing 16,500 pounds and measuring 437.25 cubic feet, moving as freezer cargo at a temperature range of 0–10 degrees fahrenheit, from New York, New York to KLM Royal Dutch Airlines at Amsterdam, Holland. One shipment moved on bill of lading number 16396049 dated October 1, 1976 on the SS MOSEL EXPRESS, and the second shipment moved on bill of lading number 16422712 dated October 2, 1976, also on the SS MOSEL EXPRESS. The complaint was filed with the Commission on April 1, 1977. While the complainant does not specifically allege a violation of the Shipping Act, 1916, it is presumed to be a violation of Section 18(b)(3) thereof.

The claim was filed with the Commission well within two years after the cause of action arose, i.e., October 1, 1976 and October 29, 1976, and must be considered on its merits as ruled by the Commission in *Colgate Palmolive Company* v. *United Fruit Company,* Informal Docket No. 115(I) served September 30, 1970. For the sake of good order, the settlement involved the matters discussed below.

On January 5, 1977, complainant's freight forwarder requested an adjustment based on error in measurement and respondent replied on January 6, 1977, to the effect that the conference tariff contains a rule that after a steamer left a port of loading, there can be no acceptance of packing list or reduction of measurement, however, had the matter been

[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.

brought to its attention prior to consignee's possession of the goods, then the cargo could have been remeasured at the destination port. The rule found in North Atlantic Continental Freight Conference Tariff No. (29) FMC–4 provides:

"OVERCHARGES—CLAIMS FOR ADJUSTMENT IN FREIGHT CHARGES. Claims for adjustment of freight charges, if based on alleged errors in weight or measurement, will NOT be considered unless presented to the Member Line in writing before the shipment involved leaves the custody of the Member Line. Any expense incurred by the Member Line in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found, by the claimant. All other claims for adjustment of freight charges must be presented to the Member Line in writing within six (6) months after date of shipment."

Both bills of lading were prepared by the freight forwarder indication: " 750 PKGS: MIXED VEGETABLES 16,500# 750 CF" to be moved under freezer stowage of 0–10° F. The tariff rate of $145.75 per Item No. 954.0001.115 per ton of 2,240 pounds or 40 cubic feet, whichever produces the higher revenue is found at 31st Revised Page 108 of the North Atlantic Continental Freight Conference Tariff No. (29) FMC–4.

Both due bills submitted complainant were for 750 cubic feet:

18.75 MT ($145.75)	$2,732.81	Paid 10–12–76 b/l	16396049
18.75 MT ($145.75)	2,732.81	Paid 11–23–76 b/l	16422712
	$5,465.62		

Complainant indicates in the claim that he erroneously gave the total cubic measurements as 750 cubic feet and the measurement actually was .583 cubic foot per package (750 packages) which totals 437.3 cubic feet per shipment. In its letter of December 30, 1976, complainant advised the freight forwarder that each of the packages measire 9" W × 8" H × 14" L. I compute this to be $^{1008}/_{1728}$ = .583 (750) = 437.25 total cubic feet per shipment. In its Invoice #10161, which could have covered either of the above shipments, complainant showed 437 cubic foot measurement for 750 packages.

On April 18, 1977, in response to service of the claim respondent advised:

"We regret that the person originally reviewing this claim failed to notice the measurements on the pier dock receipts which confirm the shipper's statement as to what the actual measurement of the shipment was. We herewith are attaching two manifest correctors correcting the freights on both shipments, and since the bills of lading were both prepaid the shipper should be in receipt of our check for the overcharges within the next few days.

"We believe this terminates the matter and the need for an Informal Docket No. 395(I)."

As indicated above respondent collected $5,465.62 for the two shipments from complainant. Respondent computes what should have been charged per shipment as follows:

437 cu.ft. – 10.925 MT @$145.75 = $1,592.32[2]

[2] My computations per shipment are: $^{437.25}/_{40}$ = 10.931 MT @$145.75 = $1,593.19.
As respondent has already settled the claim, I will not frustrate the settlement based on my computation which is 87 cents higher per shipment.

Two identical shipments would be assessed $1,592.32(2) $3,184.64. However, respondent advises that its settlement with complainant was:

Original bill	$5,465.62
Refund to complainant	2,295.56
Net paid by complainant	$3,170.06

Complainant should have paid $3,184.64 as computed above. As a result of the above settlement complainant received $14.58 in excess of what it should have received, i.e.,

Applicable transportation charges	$3,184.64
Net transportation paid by complainant	3,170.06
Balance due owed by complainant	$ 14.58

Pursuant to my request respondent has submitted a balance due bill of $7.29 for each of the above shipments, totalling $14.58.

Respondent has paid the claim in full and submitted the above two balance due bills to complainant. Respondent has requested termination of this proceeding, and in view of its settlement of the claim, the proceeding is hereby dismissed.

(S) JUAN PINE,
Settlement Officer.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND REGULATED ACTIVITIES

DOCKET NO. 76-40; GENERAL ORDER NO. 38

October 3, 1977

Part 531—Regulations Governing the Publishing, Filing and Posting of Tariffs in Domestic Offshore Commerce

AGENCY: Federal Maritime Commission

ACTION: Adoption of Final Rules

SUMMARY: Part 531 has been substantially revised, updated and renumbered. Most changes were for the purpose of clarifying existing Commission practices, but several new requirements and procedures have been added. The major changes include: specific regulations for through intermodal transportation; a requirement that tariffs be published on standard sized paper in looseleaf rather than bound form; a requirement that carriers promulgate 15 "minimum" tariff rules and publish them in a specific sequence; a requirement that tariff matter filed with the Commission be simultaneously served upon tariff subscribers; a requirement that special permission applications be filed upon five days notice (except in extraordinary circumstances); specific procedures for the filing of project rates; additional definitions to govern certain terms commonly appearing in tariffs (especially terms which affect intermodal transportation); and more detailed procedures governing the "adoption" of another carrier's tariff.

EFFECTIVE DATE: January 1, 1978

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney, Secretary
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

This proceeding was commenced by a Notice of Proposed Rulemaking (Notice) inviting comments on a proposal to revise, update and republish the Commission's domestic tariff regulations which included amendments adding to and significantly altering existing tariff filing requirements (41 *Fed. Reg.* 32899, August 6, 1976). Comments were received from Mr. L. A. Parish; the Institute of International Container Lessors (IICL); Matson Navigation Company (Matson); the Military Sealift Command (MSC); Household Good's Carriers' Bureau (HGCB); Puerto Rico Maritime Shipping Authority (PRMSA); Sea-Land Service, Inc. (Sea-Land); the Commission's Bureau of Hearing Counsel (Hearing Counsel); and Trailer Marine Transport Corporation (TMT).[1] Reply Comments were submitted by Matson, IICL, HGCB, and MSC.

A total of 53 sections or subsections were objected to in the initial round of comments, but Hearing Counsel proposed modifications to the original proposal which eliminated the stated objections to 29 of the challenged provisions. These reconciliatory Hearing Counsel proposals have been employed in the final regulations. The remaining controverted points, identified by the section numbers designated in the original proposal, are discussed below.

A central purpose in proposing the Part 531 amendments was to eliminate tariff practices which are overly complex or of marginal utility in light of modern transportation conditions. Steamship tariffs and the Commission's regulations alike should be readily understandable to all persons seeking transportation by sea and not just to established tariff publication specialists. Further revisions may well be required before this goal is reached, but we have striven today to adopt rules which are both thorough and clearly stated. Most of the original section numbers were reordered in the version of the rules which has been adopted (final version). This renumbering was undertaken as a clarifying measure and not to substantively change the regulations. Similarly, the final version contains a number of editorial changes intended to simplify or clarify language employed in the original proposal and not to alter its meaning.

1. *Section 531.0* Scope and Exemptions. The Notice defined the Commission's interstate commerce jurisdiction in such a way as to omit the Alaska and Hawaii trades. Matson and Hearing Counsel both recognized this omission, but were unable to agree upon the wording of a substitute version. We have essentially separated original section 531.0 into two different sections.[2] The final version of section 531.0 is considerably shorter than the original proposal and states that Part 531

[1] TMT's Comments were filed over 30 days late and were accompanied by a "Motion for Leave to File" which failed to state reasonable grounds for waiving the filing deadline as required by section 502.102 of the Commission's Rules. Accordingly, TMT's motion will be denied and only its Reply Comments considered by the Commission.

[2] Certain items initially appearing in section 531.0 which pertained to the substantive content of tariffs were placed in final section 531.3(p).

applies to all transportation (including through intermodal transportation) offered by common carriers subject to the Shipping Act and defines these "domestic offshore carriers" in non-statutory terms.[3] Through transportation to Alaska and Hawaii offered under tariffs on file exclusively with the Interstate Commerce Commission (ICC) pursuant to 49 U.S.C. 36(c), 905(b) or 1018 has been included as an exemption in final section 531.1, thereby eliminating a second Matson objection.

2. *Section 531.1.* Definitions. Mr. Parish objected to the absence of a specific statement restricting the application of the proposed definitions to "this regulation only," but neglected to explain why such a disclaimer was necessary. Although these definitions are not intended to limit the activities of domestic offshore carriers outside of the tariff promulgation sphere, neither does the Commission intend for them to be applied restrictively. Accordingly, final section 531.2 states that the definitions are to be used in interpreting *tariffs* filed pursuant to Part 531 as well as to the Part 531 *regulations* themselves.

3. *Section 531.1(m) and Section 531.14.* Intermodal Transportation. Sea-Land states that the Commission lacks jurisdiction over through routes formed in conjunction with carriers other than the "common carriers by water" mentioned in Intercoastal Shipping Act section 2. TMT contends that the Commission has authority to "accept intermodal joint rates" between FMC regulated domestic offshore carriers and carriers regulated by other agencies. The latter view must prevail in domestic offshore commerce just as it has in foreign commerce, see *Commonwealth of Pennsylvania v. Interstate Commerce Commission,* _____ F.2d _____, D.C. Cir. No. 76–1558, June 20, 1977, 16 SRR 195, and the final rules require the filing of through intermodal tariffs (final section 531.8).[4] The acceptance of such tariffs and the regulation of practices clearly ancillary to the all water transportation of domestic offshore carriers does not represent an attempt to assert substantive authority over inland activities within the exclusive jurisdiction of the ICC or the Civil Aeronautics Board (CAB). The Commission's responsibilities to prevent unfair and unreasonable rates and practices pursuant to Shipping Act sections 16 First and 18(a) and Intercoastal Shipping Act sections 2, 3 and 4, is sufficient to support the requirement that domestic offshore carriers file their entire through rate with the FMC as well as their port-to-port rates when they provide through transportation to the public. Shipping Act section 33 does not prohibit the Commission from obtaining tariff information which is also submitted to the ICC. *Alabama Great Southern Railroad Company v. Federal Maritime Commission,* 379 F.2d 100 (D.C.

[3] To more clearly distinguish interstate commerce subject to the Shipping Act from interstate commerce subject to the Interstate Commerce Act, the Commission has adopted the term "domestic offshore commerce" to refer to the former. See final section 531.2(h).

[4] Appropriate editorial changes were made in final section 531.8 to conform it to the modified definition of "through intermodal transportation" contained in final section 531.2(u). See also Items 8 and 10, *infra.*

Cir. 1967); we do not intend to "concurrently regulate" the inland rates and practices of participating overland carriers.

4. *Section 531.1(t) and Section 531.5(m).* Filing of Project Rates. The proposed rules permitted the filing (without special permission) of project rates which met certain specifications. Governmental and charitable shipments were not included within the definition of "project rates," however, and MSC objected to this exclusion. Matson stated that project rates should be banned in principle because they allegedly result in the "subsidization" of project shippers. The final rule has been modified to include major, one time only, governmental and charitable *construction or relief projects* otherwise eligible for project rates under the standards of final section 531.6(m).[5] Matson's fear that project rates will unfairly subsidize project shippers is unwarranted inasmuch as the rule requires each such rate to be accompanied by a showing that the rate covers all of the carriers' variable costs and makes more than a *de minimis* contribution to fixed expenses.[6]

5. *Section 531.1(u).* Proportional Rates. The proposed rule defined "proportional rates" as those which are "predicated on a prior or subsequent movement." Matson proposed that the definition be limited to rates for cargo "moving beyond the carrier's own line" without indicating why such a limitation was necessary or desirable. Final section 531.1(p) contains essentially the same definition as the original proposal, but has been modified for the sake of clarity.

6. *Section 531.1(v).* Definition of Substituted Service. The proposed definition limited the use of "substituted service" to the *occasional* use of other carriers or other modes of transportation necessitated by unexpected operating exigencies. Matson claimed that this limitation is inconsistent with present industry practices and suggested an amendment allowing "substitute service" to be offered on a regular basis. We have rejected Matson's proposal. It is our intention to alter industry practices in this regard. *Regular* arrangements for serving a locality indirectly on a single bill of lading by substituting the facilities of another carrier must be treated as joint through transportation (whether intermodal or not), and not as the through service of a single carrier.

7. *Section 531.1(z) and Section 531.1(aa).* Definitions of Through Rate and Through Route. Matson objected to the original proposal's failure to state that certain joint through rates in the Alaska and Hawaii trades are exclusively regulated by the ICC. Our revisions to the Scope and Exemptions sections (final sections 531.0 and 531.1) specifically mention 49 U.S.C. 316(c) and further reference is unnecessary. We have, however, deleted the requirement that a through route be offered under a single through bill of lading in response to Mr. Parish's observations on that

[5] Not all government or charity shipments fall within this relatively narrow category.

[6] Final section 531.6(m)(5) states that a project rate must *contribute to* the carrier's fixed expenses, but does not prescribe on exact percentage or standard for measuring this contribution. Proposed rates will be examined on a case-by-case basis to determine if a genuine, commercially realistic contribution is being made.

point. Otherwise, final sections 531.1(v) and (w) reflect our original proposal despite considerable modifications of an editorial nature. Final section 531.1(w) defines "through route" as an offering of a single domestic offshore carrier, two or more FMC regulated water carriers, or a domestic offshore carrier and one or more other carriers. Whether a "through rate" is formed by combining local or proportional rates is, by itself, irrelevant for tariff purposes, and requirements relating to such combinations have been deleted from final section 531.1(v).

8. *Section 531.1(bb).* Definition of Transshipment. Mr. Parish contended that the original proposal should expressly disclaim any applicability to cargo transfers between commonly controlled carriers. Such an exclusion was intended and should have been evident from the proposed definition which spoke in terms of cargo transfers between *"different common carriers by water."* We have, however, modified the original proposal in a manner which narrows this exclusion in some respects. The final rule defines "transshipment" as the physical transfer of cargo from a vessel operating domestic offshore carrier to *any other carrier* (section 531.1(x)) and the definition of "carrier" has been modified to indicate that commonly owned or controlled carriers operating in different transportation modes shall be considered separate carriers for tariff filing purposes (section 531.1(c)). We have also provided that ICC *regulated* Part III carriage shall be considered a different "mode" of transportation than domestic offshore water carriage for tariff filing purposes (section 531.1(u)). These regulations are intended to key the Commission's through intermodal tariff rules to the ICC's interpretation of "transshipment" under section 302(i)(3)(B) of the Interstate Commerce Act,[7] where the term has critical jurisdictional significance. See generally *Sacramento-Yolo Port District,* 341 I.C.C. 105, 111–113 (1972).

9. *Section 531.1(l).* Definition of Cargo Interchange. The proposed definition of "interchange" has been deleted from the final rules because the term was not employed in the regulations and because part of the original definition was incorporated into the final definition of "transshipment." It is assumed, however, that "interchange" will be employed in tariffs to describe cargo transfers which are not "transshipments" (*i.e.*, transfers between vessels of the same carrier or transfers between non-FMC regulated carriers).

10. *Section 531.1(m).* Definition of Port. The proposed subsection defined a port as "a place where actual water transportation subject to the Shipping Act commences or terminates as to any particular movement of cargo." Matson commented that the terms "commence" or "terminate" could be construed as omitting the situation where an ocean going vessel transships its cargo during through transportation. In order to eliminate any confusion on this point, we have made modifications incorporating Matson's suggestion as well as editorial changes of our

[7] 49 U.S.C. 902(i)(3)(B)

own. The final definition (section 531.1(m)) no specifically states that ocean carriage can originate or terminate by "transshipment" as well as by other methods. In the case of non-vessel operating carriers, it is assumed that "actual ocean carriage" begins when the cargo is tendered to the underlying vessel operating carrier.

11. *Section 531.2(b)*. Series Designation for Government Tariffs. Matson argued that the repeal of former section 6 of the Intercoastal Shipping Act (P.L. 93–487, October 26, 1974) effectively prohibits the publication of tariffs exclusively for government cargo in domestic offshore commerce. This position is clearly erroneous. Section 6 dealt only with the *level* of government rates. Carriers may, but are not required to, continue offering rates for U.S. Government cargos provided that any discounts or other privileges provided are reasonable and cost justified under accepted Shipping Act standards.

12. *Section 531.2(c)*. Thirty Days Notice of Effective Date. Matson opposed the proposed elimination of two existing Part 531 regulations which permitted carriers the option of "posting" (filing) tariffs 45 days prior to their effective date and thereby obtaining a longer period to respond to protests pursuant to section 502.67(b) and at least two days notice of any rate suspensions imposed by the Commission. We have adopted the original proposal with editorial changes. Final section 531.3(f) requires tariff filings to provide a *minimum* of 30 days notice. Carriers are free to file tariffs which furnish a greater period of notice if they wish, but the procedures employed to protest tariffs (section 502.67(a)) shall remain the same in each instance. Uniform procedures for protesting tariffs allow for greater efficiency in the Commission's administration of Intercoastal Act section 3 and should eliminate a present source of confusion to shippers and carriers alike. On several occasions shippers have failed to observe the special "25 days before effective date" deadline for filing protests now specified for "posting date" tariffs.

13. *Section 531.2(d) and (3)*. Service of Tariff Filings on Tariff Subscribers. PRMSA claims it is unreasonable that PRMSA be required to mail tariff matter to its "large number" of tariff subscribers on or before the time it submits its filing with the Commission. PRMSA further states that a simultaneous service requirement could delay its rate changes for as long as three days while it is preparing subscriber mailings. No other carrier objected to the simultaneous service requirement, and Sea-Land specifically stated that it had no objection to it. Final section 531.3(h) incorporates the original proposal. Although some carriers may find it necessary to begin planning their tariff filings somewhat earlier than they do now, there is no reason to believe such advance planning will cause inefficiencies or hardships as a general rule. Simultaneous service will, however, maximize the notice period provided to tariff subscribers and facilitate their participation in the rulemaking process. Should a situation arise where simultaneous service would result in a

significant hardship to a carrier, relief can be readily obtained through the special permission process (final section 531.18).

14. *Section 531.2(g).* Tariff Filing Receipts. Matson claimed that the Commission should pay the postage for mailing carriers a receipted copy of their tariff filing transmittal letters because the government enjoys a franking privilege. Final section 531.3(j) incorporates the original proposal—receipts will be provided only to carriers which furnish a stamped self-addressed envelope. The Commission does not have a franking privilege and pays the regular rates of the U.S. Postal Service. Moreover, the primary purpose for requiring carrier provided envelopes is to free the Commission's relatively small staff to work on more substantive matters than the typing of envelopes to receipt what frequently exceeds 100 different tariff filings per week.

15. *Section 531.2(m)(3).* Tariffs Must Be "Posted" 30 Days Prior to Their Effective Date. HGCB argues that the practice of posting tariffs in advance of their effective date, *i.e.*, making them available for public inspection, would confuse the public, cause delays in effectuating rate changes, and generally impose an unnecessary burden upon carriers. Final section 531.3(o)(3) incorporates the original proposal. Although an express posting requirement was not present in the Commission's previous domestic tariff rules, Intercoastal Shipping Act section 2 unmistakenly requires 30 days advance posting, and HGCB has not provided us with detailed or compelling reasons why an exemption from this statutory requirement should be granted. Posting is the only practical method for non-tariff subscribers to obtain the advance notice of tariff changes which is integral to the statutory scheme of carrier initiated rates reflected in the Shipping Act. A well informed shipping public will generally advance the purposes of the Shipping Act and assist the Commission in accomplishing its regulatory duties. Modifications were made in the final rule in response to HGCB's comments, however. These modifications more clearly indicate that "posting" refers to the maintenance of complete and up-to-date tariffs for public inspection during ordinary business hours, and require tariff material which is filed, but not yet effective, to be maintained in a manner which indicates its prospective nature. Carriers are also required to provide members of the public with sufficient access to informed carrier personnel to permit interested persons to accurately ascertain the carrier's present and proposed rates as expressly set forth in the applicable tariff or tariffs.

16. *Section 531.3(a).* Uniform Tariff Format. HGCB opposed the proposal to change the size of tariff pages from 8 by 11 inches to 8½by 11 inches and the standard format from bound to loose-leaf because HGCB wishes to avoid the expense of republishing its present tariff. Final section 531.4(a) adopts the original proposal. HGCB represents an extreme minority view in tariff filing matters. Its bound tariff (FMC–1) has rarely been modified since its initial submission in 1949, because HGCB's members essentially offer through transportation service between

interior points, and accomplish rate changes by altering their overland charges—charges which are exempt from ICC regulation pursuant to 49 U.S.C. 1002(b)(2). For the Commission's staff and for most carriers and shippers, the use of standard sized paper and a loose-leaf format minimizes difficulties in printing, circulating and maintaining tariff material in an accurate, up-to-date and useful manner. To the extent that HGCB can demonstrate good cause for the waiver of the new format requirements, relief is freely available via the special permission process articulated in final section 531.18. Section 531.19 contemplates that special permission to file bound tariffs will be granted in some instances, and prescribes standards to be followed in such tariffs. Final section 531.19(b) has been altered in response to another HGCB comment to specifically provide that "saddle stitching" is an acceptable method of fastening bound tariffs.

17. *Section 531.4(b)(3).* Street Address of Freight Receiving and Disbursing Stations. Mr. Parish and HGCB disfavored the proposal that tariffs list the street addresses of all freight receiving or disbursing stations employed by the filing carrier. Mr. Parish perceived this requirement as an attempt by the Commission to restrict carriers to the use of specific pier facilities, while HGCB complained that its 54 member carriers employ a large number of such stations and HGCB would be required to frequently amend its tariff to reflect changes in these facilities. Final sections 531.5(b)(3) and (4) incorporate the original proposal with modifications which more clearly indicate that the purpose of the rule is not to require carriers to use a particular facility within a port district, but only to provide shippers with the actual street address of any freight stations which are used. To the extent HGCB can demonstrate that it would be unreasonable to require them to furnish the street addresses of the freight stations employed by their individual members, they may obtain special permission to file tariffs which omit such information.

18. *Section 531.4(b)(7)(i(.* Effective Date of Rate Changes for Through Intermodal Transportation. Matson claimed the original proposal was unduly vague in its use of the terms "intermodal shipment" and "originating carrier." Final section 531.5(b)(8)(ii) modifies the proposed rule so that it applies to all *joint* through routes (but not single carrier transportation featuring pickup and delivery service), while retaining the essential requirement that shippers be charged the rate in effect on the day the first (or initiating) carrier takes possession of the cargo.

19. *Section 531.4(b)(7)(xv).* Container Description Rule. IICL argued for a longer, more precise definition of "container" and claimed that the proposed rule should expressly permit carriers to employ conversion tables which assess proportionately higher rates for the use of nonstandard sized containers. Matson anted the proposed definitions deleted, or, alternatively, that the definition of "container" be modified to include boxes "with or without wheels"—apparently to accommodate specific provisions in Matson's present tariff. Final section 531.5(b)(7)(xv) has

been revised to more clearly state that its intended objective is only to require an adequate *description* of all equipment used as basis for assessing rates. The rule does not require the *use* of any particular type of equipment. We find no specific fault with IICL's proposed definition of "container" from a substantive viewpoint; but it is overly complex for our present purpose. The final rule distinguishes "containers" from "trailers" in a simple fashion. Carriers are then required to describe each type of container or trailer for which they chose to make rates available. Final section 531.5(b)(7)(xv) does not forbid the use of conversion tables which discriminate against nonstandard equipment. However, any deviations from uniform treatment will be closely scrutinized by the Commission to assure that the discriminatory charges are justified by cost differences or other legitimate transportation considerations.

20. *Section 531.5(e).* Options as to Applicable Rates Forbidden. MSC found the proposed rule confusing as applied to commodities which may move under either government or civilian cargo classifications, and sought assurances that certain "options" presently available to military cargo which are under investigation in FMC Docket No. 75–20 will continue to be permitted under the new Part 531 regulations. Final section 531.6(a) contains a simplified version of the original proposal which is not intended to directly address the validity of shipper "options" such as the choice between a genuine "FAK" rate or a specific commodity rate. The final rule merely forbids the filing of rates which are clearly duplicative, conflicting or ambiguous. The possibility that a tariff allows a given commodity to qualify (*upon meeting expressly stated conditions for carriage*) for more than one rate when the different rates in question reflect *bona fide* differences in transportation conditions is not grounds for rejection or cancellation.

21. *Section 531.8(g)(6).* Notarization of Special Permission Applications. PRMSA objected to the original proposal because Puerto Rican law allows only attorneys to be notary publics and, PRMSA claims, attorneys charge too much for notarial services. MSC suggested that formal attestation be replaced with a signed "unsworn declaration under penalty of perjury" pursuant to recently enacted P.L. 94–550, 28 U.S.C. 1746. Final section 531.18(e)(3) incorporates MSC's suggestion.

22. *Section 531.9(a).* Collections or Absorptions of Terminal Charges. Matson contended that the proposed regulation was unclear and unworkable to the extent it required the "dollar amounts" of collections or absorptions to be stated in the carrier's tariff, primarily because the exact amounts involved often vary from day to day. Final section 531.9 has been modified and reorganized to eliminate the features complained of by Matson. The final rule requires a full description of all terminal services provided as part of a tariffed transportation service, whether charged for separately or included in the line haul rate. Dollar amounts must be stated only when the carrier collects a separate charge for services *it performs itself* (or through agents) or offers shippers a terminal allowance in lieu of

performing specified services—*i.e.*, when the carrier can control the dollar amounts involved. When a *third party* (not the carrier or its agents) performs terminal services which are charged against the cargo, the tariff must advise the shipper of this fact, but may refer to a terminal tariff or other governing publication for an exact statement of the charges in question.

23. *Section 531.14(d)(1).* Publication of Exact Rate Divisions Received For Through Intermodal Transportation. TMT claimed that the rate divisions received by participating carriers do not interest through route shippers, and the public availability of such information would only aggravate local shippers who pay higher rates for local transportation between the same points. The ICC permits joint through route carriers to file rate divisions on a confidential basis and TMT suggests that the Commission adopt the same policy. Final section 531.8(a)(5) contains the original proposal, modified by editorial changes and by the addition of a requirement that "charges" applicable to the through transportation in question also be broken out on a port-to-port basis. This Commission has always required public disclosure of through route rate divisions (although not always in tariff form) and has found that public reaction to such divisions is valuable in assessing the fairness and usefulness of the through rate. No valid reason occurs to us for deviating from this practice in the case of through intermodal transportation, especially since it involves rate divisions subject to the regulatory jurisdiction of different administrative agencies.

24. *Section 531.1(s).* Definition of Tariff Posting. No comments were received concerning the original proposal, but modifications were made which limit the applicability of "post" to the maintenance of tariffs for public inspection, thereby more clearly distinguishing the term from "filing" which is the submission of tariff matter to the Commission.

25. *Section 531.16(a)(2).* Seasonal Transportation Tariffs. No comments were received concerning the original proposal, but subparagraph (a)(2) has been deleted to more clearly indicate that tariffs which are filed without an express reference to their seasonal nature are subject to rejection.

26. *Sections 531.17(c)(3) and (4); section 531.17(d).* Arrangement of Tariffs in an Index of Tariffs. No comments were received concerning the original proposal, but modifications were made in final section 531. 16(c) to simplify the proposed requirements. The final rule now requires Tariff Indices to be arranged by type of tariff, listed in the order of their FMC series and number designations. Paragraph (d) was modified to require Tariff Indices to be amended within 30 days after any change in the information contained therein, rather than by the periodic reissuance of the Index.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553); sections 15, 16, 18(a) and 43 of the Shipping Act, 1916 (46 U.S.C. 814–815, 817(a) and 841a); and sections 2, 3 and 4 of the

Intercoastal Shipping Act,,, 1933 (46 U.S.C. 844–845a), IT IS ORDERED, That the Commission's Domestic Commerce Tariff Rules (46 C.F.R. Part 531) are amended as set forth in the attached Appendix; and

IT IS FURTHER ORDERED, That the aforesaid amendments shall take effect on January 1, 1978, provided that General Accounting Office clearance pursuant to 44 U.S.C. 3512 is obtained prior to that date. New or reissued tariffs tendered for filing on or after January 1, 1978 shall be fully subject to the new regulations. Tariff *amendments* submitted on or after the effective date will, however, continue to be accepted in the same format as the tariff being amended until January 1, 1979. By the latter date, all tariff material employed by carriers engaged in domestic offshore commerce shall conform to the requirements of revised Part 531.* Tariffs on file at that time which do not meet these requirements shall be cancelled; and

IT IS FURTHER ORDERED, That the aforesaid amendments to Part 531 be designated as General Order 38; and

IT IS FURTHER ORDERED, That the exemption from the Shipping and Intercoastal Shipping Acts granted to Foss Launch & Tug Co., Foss Alaska Line, Inc., Puget Sound Tug & Barge Company, and Alaska Barge & Transport, Inc., through December 31, 1978 (41 *Fed. Reg.* 6070) shall not be affected by the adoption of the aforesaid amendments; and

IT IS FURTHER ORDERED, That existing grants of special permission excusing compliance with domestic commerce tariff filing requirements shall continue according to their original terms until further action of the Commission; and

IT IS FURTHER ORDERED, That the "Motion to Accept Late Filed Comments" of Trailer Marine Transport Corporation is denied.

By Order of the Commission.

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

*The text of the amended is reprinted in 46 C.F.R. 531.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 353(I)

FREEPORT KAOLIN COMPANY

v.

COMBI LINE

NOTICE OF DETERMINATION NOT TO REVIEW

October 7, 1977

Notice is hereby given that the Commission on October 7, 1977, determined not to review the decision of the Settlement Officer in this proceeding served September 27, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 353(I)

FREEPORT KAOLIN COMPANY

v.

COMBI LINE

Reparation denied.

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

Complainant seeks reparation in the amount of $4,121.74 alleging that the respondent overcharged complainant on a shipment of common ground clay which moved from Savannah, Georgia to Antwerp, Belgium, carried aboard respondent's vessel under bill of lading dated May 24, 1974.

The circumstances surrounding the shipment are as follows:

1. The complainant booked through the respondent's agent, Halnav, Inc., one lash barge for a minimum of 360 long tons of bagged common ground clay on May 10, 1974. By letter dated May 15, 1974, Halnav, Inc. confirmed the booking citing a 360 long ton minimum and quoting a rate of $40.75 per long ton (berth terms) plus a $11.75 surcharge.

2. When the cargo arrived for shipment only 231.91 long tons (519,477 lbs.) were loaded into the barge although 360 long tons of clay were available for loading. Respondent contends that the cargo was a fluffier grade than had been expected and that one barge would not accommodate 360 long tons.

3. Complainant was assessed ocean freight charges of $15,780 based upon a rate of $40.75 weight plus a $11.75 surcharge at a 300 long ton minimum weight.

4. Complainant proffers an insurance adjuster report which disclosed

[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.

(Note: Notice of determination not to review October 7, 1977.)

that the shipment after discharge at Antwerp was 323 bags short and of the delivered cargo 280 bags were damaged.[2]

Complainant contends that it is liable for freight only on 221.27 long tons delivered.

A review of the carrier's tariff, Combi Line-South Atlantic/Continental & South Atlantic/French Atlantic-Tariff No. 1 (FMC No. 3), reveals three rates covering the subject movement. More specifically $57.00 W, no minimum;[3] $42.25 W with a 300 ton minimum (berth terms)[4] and $40.75 weight (berth terms) with a 350 ton minimum.[5]

The issue to be resolved is simply that of improper rate application. Complainant bases his computations on the $40.75 rate which in order to be applicable must meet a 350 long ton minimum weight. Respondent assessed charges at the $40.75 rate but applied a 300 long ton minimum. Both parties were erroneous in applying the $40.75 rate. The tariff clearly shows for the $40.75 rate to be applicable a 350 long ton minimum must be met. The bill of lading shows 519,477 lbs. (231.91 long tons of clay) were shipped. Hence, the only applicable rate for 231.91 long tons would be the $57.00 no minimum rate, which would produce charges of $15,943.81 (231.91 LT × $57.00 plus $11.75 surcharge). The proper charges of $15,943.81 creates an undercharge by respondent of $193.81.

Accordingly, the claim is denied and it is found respondent is due additional transportation charges in the amount of $193.81.

(S) CAREY R. BRADY,
Settlement Officer.

[2] Claims against common carrier for loss or damage to cargo in transit are specifically excluded from adjudication under the informal procedure of Rule 19 of the Commission's Rules of Practice and Procedure (46 CFR 502.301). The complainant's remedy for loss and damage lies elsewhere.

[3] Commodity Code 27621, Section I, Page 71Ac, effective March 22, 1974, To Continent and France Only: Clay in bags: All other movements, effective April 4, 1974.

[4] Commodity Code 27621, Section I, 15th revised Page 71B, Clay in bags, To: Rotterdam/Antwerp/Bremen, effective April 4, 1974.

[5] Ibid

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 421(I)

STOP & SHOP COMPANIES, INC., BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND BARBER STEAMSHIP LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

October 19, 1977

Notice is hereby given that the Commission on October 19, 1977, determined not to review the decision of the Settlement Officer in this proceeding served October 12, 1977.

By the Commission.

[SEAL]

(S) JOSEPH C. POLKING,
Acting Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 421(I)

STOP & SHOP COMPANIES, INC., BRADLEES DIVISION

v.

BARBER BLUE SEA LINE AND
BARBER STEAMSHIP LINES, INC.

Reparation Awarded.

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

By complaint filed June 22, 1977, Stop & Shop Companies, Inc., Bradlees Division (complainant) alleges that Barber Blue Sea Line (carrier) applied an incorrect rate on a shipment of "Artificial Christmas Trees", resulting in an overcharge of $459.54 in violation of section 18(b)(3), Shipping Act, 1916. That section prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The complainant also alleges that the carrier denied the claim in accordance with Tariff Rule 280[2] because the claim was not presented to the carrier within six months after the date of the shipment.

According to the complainant, the carrier, under bill of lading No. C16, dated August 14, 1975, transported a shipment of 419 cartons of cargo described as "Artificial Christmas Trees" measuring 76.591 cubic meters and weighing 6,770 kilograms from Keelung, Taiwan to Boston, Massachusetts. Rates and charges were billed as follows:

	Revenue Tons	*Rate*	*Amount*
Ocean Freight	76.591 M3	$53.00	$4,059.32
Bunker Surcharge	76.591 M3	2.70	206.80
Container Yard Delivery Charge (CYCD)	76.591 M3	.75	57.44
Total			$4,323.56

The complainant contends that the applicable rate for "Artificial Christmas Trees" is published in New York Freight Bureau Taiwan Tariff

[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] New York Freight Bureau Taiwan Tariff No. 8, FMC No. 11.

No. 8, FMC No. 11, Item 0970. Based on tariff Item 0970 rates and charges should have been billed as follows:

	Revenue Tons	*Rate*	*Amount*
Ocean Freight	76.591 M3	$47.00	$3,599.78
Bunker Surcharge	76.591 M3	2.70	206.80
Container Yard Delivery Charge (CYCD)	76.591 M3	.75	57.44
Total			$3,864.02

Based upon the foregoing, the complainant seeks reparation in the amount of $459.54 ($4,323.56 less $3,864.02).

In support of its allegations the complainant submitted a copy of its Claim No. 450303; the carrier's letter of denial thereof; the prepaid bill of lading No. C16; the shipper's invoice; and the packing/weight/measurement list.

The carrier in its response to the served complaint, does not dispute the complainant's contention that the rate was incorrectly applied; however, it states that the claim was denied in accordance with Rule 59 of the Japan/Korea, Atlantic & Gulf Freight Conference Tariff.

A review of the supporting documentation and Commission tariff files discloses that on August 14, 1975, the carrier was a participating party in the New York Freight Bureau Taiwan Tariff No. 8, FMC–11,[3] and that the effective rate for the involved commodities was, in fact, $47.00 on that date, i.e. the date of the shipment.

The complaint was filed with this Commission within the statutory time limit specified by statute and it has been well-established by the Commission that a carrier's so-called "six-month" rule may not act to bar recovery of an otherwise legitimate overcharge claim in such instance.

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled to under the applicable tariff. Accordingly, the complainant hereby is awarded reparation in the amount of $459.54.

(S) WALDO R. PUTNAM,
Settlement Officer.

[3] The carrier resigned from this tariff effective August 20, 1975.

FEDERAL MARITIME COMMISSION

DOCKET NO. 73–72

AGREEMENT NO. 10056—POOLING, SAILING AND EQUAL ACCESS TO CARGO IN THE ARGENTINA/U.S. PACIFIC COAST TRADE

An equal access to controlled cargo, coordination of sailings and net revenue pooling agreement among carriers already concertedly fixing rates, which excludes competitors from a significant share of a trade, is a *per se* violation of Sherman Act section 1 and must be justified by the parties thereto.

Agreement No. 10056 found not sufficiently justified and accordingly disapproved.

J. Alton Boyer and *William H. Fort,* for Prudential Lines, Inc.

Seymour H. Kligler and *David A. Brauner,* for Empresa Lineas Maritimas Argentinas, S.A.

Thomas E. Kimball and *Robert B. Yoshitomi* for Westfal-Larsen & Co., A/S.

Donald J. Brunner and *C. Douglass Miller,* Hearing Counsel.

REPORT AND ORDER

October 21, 1977

BY THE COMMISSION: (Clarence Morse, *Vice Chairman;* Karl E. Bakke, Bob Casey and James V. Day, *Commissioners.* Richard J. Dashbach, *Chairman,* not participating)

This proceeding was instituted to determine whether Agreement No. 10056 (Agreement) between Empresa Lineas Maritimas Argintinas, S.A. (ELMA), the national flag line of Argentina, and Prudential Lines, Inc. (PLI), a United States flag carrier, should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916. The Agreement provides for equal access to government controlled cargoes, the pooling of certain net freight revenues, and the coordination of sailings in the Argentina/U.S. Pacific Coast trade. It was formulated in response to various Argentine cargo preference laws which directly (imports) and indirectly (exports) reserve a significant portion (40%–80%) of that nation's trade to Argentine flag carriers and to carriers participating in revenue pooling arrangements with Argentine flag carriers. Westfal-Larsen & Co. A/S (WL), a third flag carrier in the trade, participated in the instant proceeding as a protestant seeking disapproval of the Agree-

ment.[1] ELMA, PLI and WL are members of the U.S. Pacific Coast/River Plate, Brazil Conference.

Administrative Law Judge Norman D. Kline (Presiding Officer) issued an Initial Decision conditionally approving the Agreement[2] on the grounds that such arrangements were a customary means of alleviating the discriminatory effects of Latin American cargo preference laws and that their anticompetitive features were overcome by their potential for avoiding conflict between governments. Heavy reliance was placed upon the Commission's decisions approving *Agreement No. 9939 (Peru Equal Access and Pooling Arrangement)*, 16 F.M.C. 293 (1973), and *Agreement Nos. 9847/9848 (Brazil Equal Access and Pooling Arrangement)*, 14 F.M.C. 149 (1970).[3]

Exceptions to the Initial Decision were filed by the Commission's Bureau of Hearing Counsel, WL and PLI, variously alleging that: (1) the Presiding Officer effectively and improperly shifted the burden of proof from the Proponents of the Agreement to the Protestant (WL and Hearing Counsel); (2) the Agreement's anticompetitive features have not been sufficiently justified to warrant approval (WL and Hearing Counsel); (3) the conditions imposed by the Presiding Officer are ineffective and meaningless (WL and Hearing Counsel); (4) proper analysis of the evidence warrants a finding that WL is substantially likely to be precluded from the trade (WL); (5) the record does not support a finding that the Commission's 1973 approval of Agreement No. 9939 was a "major factor" in the subsequent decline of WL's "A" (counterclockwise) service to Peru (PLI); and (6) the record requires a finding that Agreement No. 10056 will benefit the shipping public and not eliminate competitive incentives between PLI and ELMA (PLI). Replies to exceptions were submitted by WL, Hearing Counsel, PLI and ELMA. All parties participated in Oral Argument.

Following Oral Argument, the Commission issued a "Notice of Intent to Withhold Decision" wherein it stated that action would be postponed for up to 120 days while ELMA and PLI attempted to negotiate a modified agreement which would include WL in both the sailing/equal access and the pooling arrangements. Upon PLI's unopposed request, this negotiation period was extended an additional 120 days. Negotiations proved unfruitful, however, when, as reported to us by PLI, ELMA and PLI wished to include previously exempt cargoes (*i.e.*, woodpulp and newsprint) in the cargo pool and increase "overcarriage refunds" from 50 to 60 percent of the freight paid, and WL did not. On December 28, 1976,

[1] Further details concerning the parties, their operations, the applicable Argentine statutes and decrees, and trade conditions through 1973, are set forth in the Initial Decision, at 3–34; 47–50; and 57–59. We adopt these Findings of Fact as our own (see Appendix).

[2] The Presiding Officer's proposed conditions were: (1) a requirement that Argentine cargo preference law waivers be granted to Non-Agreement vessels if an Agreement vessel is not in position within 7 days; (2) a requirement that the parties strictly adhere to the provisions of Argentine Resolution 456 calling for negotiations between all carriers in the trade for the purpose of agreeing upon a division of cargoes which would assure the continuation of third flag carriage on an equitable basis.

[3] Hereinafter cited as the "*Peru case*" and the "*Brazil case*", respectively.

PLI advised the Commission that Resolution No. 456 of the Argentine Undersecretariat of Maritime Interests had been revoked, thereby terminating Argentine approval of the Agreement.[4]

DISCUSSION

Among other things, the agreement calls for a pooling of net revenues by carriers belonging to the same rate fixing combination which would reduce the Proponents' economic incentive to develop individual markets while simultaneously foreclosing competitors from a substantial share of the U.S. Pacific Coast/Argentina trade.[5] Such an arrangement must be considered a *per se* violation of section 1 of the Sherman Antitrust Act (15 U.S.C. 1)[6] and is *prima facie* subject to disapproval under the public interest standard of Shipping Act section 15 (46 U.S.C. 814). *Mediterranean Pools Investigation,* 9 F.M.C. 264, 290–291 (1966); *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968). Approval is only possible if its anticompetitive features have been sufficiently justified. A sufficient justification is a showing that the arrangement is *necessary* to meet a serious transportation need, to secure important public benefits, or to further a valid regulatory purpose of the Shipping Act, or the agreement is otherwise found to be in the public interest. The burden of making the required showing falls squarely on the parties to the Agreement. *Canadian-American Working Arrangement,* 16 SRR 733, 736–737 (1976). The pivotal question raised by the exceptions is whether Proponents have met that burden. We hold that they have not.[7]

The Commission shares the Presiding Officer's conclusion that the state of the record does not permit a reasonably accurate forecast of competitive conditions in the U.S. Pacific Coast/Argentina trade.[8] It has not been

[4] The date of revocation and the exact language employed by the Argentine Undersecretariat were not furnished.

[5] Articles 5 and 12 of the Agreement contemplate PLI and ELMA providing sufficient vessel sailings and cargo capacity to "satisfy the needs of the trade" and thereby assure that other carriers will have difficulty obtaining more than a negligible share of Argentine controlled cargo subject to the pooling provision. Proponents have not demonstrated what legal or practical consequences flow from the fact that the cargoes covered by the Argentine preference laws and the major provisions of the proposed Agreement are not necessarily the same. Whatever the exact description and extent of the cargo block involved, however, the purpose of Agreement No. 10056 is to divide this market equally between ELMA and PLI.

[6] See *Citizen Publishing Company v. United States,* 394 U.S. 131, 135–136 (1969) and *United States v. Topco Associates,* 405 U.S. 596, 608–609 (1972), and cases cited therein.

[7] PLI contends that equal access agreements should be viewed as concerted efforts to influence public officials, protected by the First Amendment from the application of the antitrust laws. *Eastern R.R. Conference v. Noerr Motor Freight,* 365 U.S. 127 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657 (1965). The instant pooling agreement involves far more than the filing of waiver requests at the U.S. Maritime Administration and is clearly concerned with business conduct not covered by the *Noerr/Pennington* doctrine. Moreover, the constitutional freedom "to petition the Government" does not extend to the petitioning of foreign governments, at least as far as the Sherman Act is concerned. *Cf. Occidental Petroleum Corp. v Buttes Gas & Oil Co.,* 331 F. Supp. 92, 107–108 (C.D. Calif. 1971), aff'd *per curiam,* 461 F.2d 126 (9th Cir. 1972), *cert. den.,* 409 U.S. 950 (1972). PLI's further argument that the Agreement's division of preferred cargo and revenue pooling provisions are exempt from the Sherman Act because they are authorized by the Argentine Government is equally misplaced. See *United States v. Sisal Sales Corp.,* 274 U.S. 268, 276 (1927); *Continental Ore Co. v. Union Carbide and Carbon Corp.,* 370 U.S. 690, 707 (1962).

[8] Hearing Counsel expressed concern that the Presiding Officer unduly emphasized the availability of wayport revenues to WL. A fair reading of the initial decision does not indicate that complete abandonment of U.S./Argentina service would be necessary before WL could prevail. Wayport conditions have a definite bearing upon the overall competitive strength of a carrier's operations in a specific trade. If, however, an agreement causes a nonparty carrier to stop serving the ports of one country, the elimination of that one country is a cause for concern in its own right,

established that the instant Agreement is likely to cripple WL's ability to participate meaningfully in the trade or that it is needed to better serve the shipping public. What is clear is that ELMA's 1972 entry into the trade intensified competition for many if not most cargoes. ELMA attracted appreciable tonnage from other carriers during 1972 and 1973 and was assisted to some unquantifiable extent in this accomplishment by the Argentine cargo preference laws. Nonetheless, PLI and WL successfully competed with ELMA—and with each other—during those two years and apparently continue to do so.[9] There is nothing to indicate that the present level of competition is causing service disruptions, carrier malpractices, or is otherwise detrimental to the public interest.

The Presiding Officer held that Proponents met their burden of proof because he found an important public benefit in the Agreement's potential for creating "intergovernmental harmony." Once it was determined that the Agreement was formulated in response to the Argentine cargo routing laws, the Presiding Officer automatically assumed that the Agreement represented an improvement over an unduly discriminatory and otherwise unalterable "reality." No true balancing of interests was conducted. Such an approach is, perhaps, a natural result of the Commission's decision in the *Peru case, supra*. We believe, however, it is inadvisable to adhere to the expansive rationale presented in *Peru*. Anticompetitive equal access agreements must be justified upon their individual merits and not merely because they have been "customary responses" to the problem of national flag discrimination which tend to obviate Commission consideration of more direct corrective measures pursuant to section 19 of the Merchant Marine Act, 1920, 46 U.S.C. 876.

Any "remedial effects" of Agreement No. 10056 are remote and speculative at best. The record does not reveal the existence or substantially probable existence of specific unfavorable conditions requiring remedy. Despite the potentially all-encompassing scope of the Argentine laws, as a practical matter they do not appear likely to harm shippers or to prevent either U.S. or third-flag carriers from retaining a viable portion of the traffic. The Commission sincerely hopes that intergovernmental conflict over Argentina's discriminatory shipping statutes and decrees does not occur, but the possible avoidance of conflict cannot alone provide a basis for compromising the United States' policy of free and open competition in its foreign trades. If an agreement is to be justified on the basis of "intergovernmental harmony", the Proponents must first establish a clear likelihood that a specific type of official confrontation would be avoided and particularize the negative effects this confrontation would have upon ocean shipping in the United States trade

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regardless of whether the carrier otherwise adheres to its prior schedule along an established multi-country trade route. In the instant case, the continuation of WL's "C" (clockwise) service would be irrelevant if WL were forced to omit Argentine ports of call from that service.

[9] Despite the fact that their respective market shares declined since ELMA appeared as a regularly scheduled competitor, neither PLI nor WL even attempted to prove that it is now faced with unprofitable operating conditions.

route in question. It is insufficient that the Commission may at some future date be required to take direct action against discriminatory conditions pursuant to section 19 of the Merchant Marine Act. A more immediate benefit is required to justify an obviously anticompetitive arrangement such as Agreement No. 10056.

Moreover, the methods Proponents have chosen to cope with the discrimination created by the Argentine laws are unnecessarily broad. Even if it were established that ELMA possessed (or was substantially certain to obtain) an unreasonably large market share by virtue of these preference laws and that section 19 action was an undesirable means of dealing with the problem, a multi-lateral agreement among all carriers participating in the trade would increase competition equally well without giving PLI an unfair advantage over WL.

Proponents have failed to justify their agreement to divide the U.S. Pacific Coast/Argentina market. Whether our 1973 approval of Agreement No. 9939 was a "major factor" in WL's abandonment of its "A" service is irrelevant under the circumstances.

THEREFORE, IT IS ORDERED, That Agreement No. 10056 is disapproved; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

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

APPENDIX

FINDINGS OF FACT

THE PARTIES TO THE PROCEEDING

PGL

1. PGL operates ships registered under the United States flag. It maintains various liner services under an operating-differential subsidy agreement with the United States under Title VI, Merchant Marine Act, 1936, including the service between the West Coast of the United States and Argentina subject of this proceeding. PGL is the only company operating U.S.-flag liner service in that trade. It has served the Latin American trades for nearly one hundred years, and has served the United States/Argentine trade since 1966. It has two separate Latin American services from the U. S. West Coast, the "M-class" service in this proceeding, and its "Jet" cargo service, serving only the West Coast of South America.

2. During 1971 and part of 1972 PGL operated older C–3 cargo vessels in the United States West Coast/Argentine trade. In 1972 PGL began replacing its C–3 vessels with modern "M-Class" combination cargo/passenger vessels. Commencing with sailings beginning in July 1972, all PGL vessels serving the trade have been M-class. The vessels are full cargo vessels below the main deck with passenger capacity in the deck house, main deck and above. Three holds are container holds serviced by shipboard gentry cranes, with the remaining three holds constructed to carry refrigerated cargo including deep freeze cargo, and vehicles and general cargo, serviced by under-deck bridge cranes. M vessels are 9,508 deadweight tons with a bale cubic capacity of 514,813 cubic feet and contain approximately 360,000 cubic feet of reefer space. When M service was initiated in 1972, refrigeration capacity was increased approximately tenfold, round trip transit time reduced by approximately 50 percent and container capacity increased to 175 per vessel. M vessels have a side loading capability and cargoes are unitized by PGL or by the shipper. The three M vessels presently serving in the trade have a speed of approximately 20 knots.

3. From the Pacific Coast, PGL serves Argentina in a clockwise fashion around South America via the Panama Canal. Voyages begin at Vancouver, British Columbia, and then proceed south calling at Tacoma, Washington, and San Francisco and Los Angeles, California. Vessels proceed directly to the Panama Canal and thence to Cartagena, Colombia; Curacao; La Guaira, Venezuela; Puerto Cabello, Venezuela; Rio de Janeiro, Brazil; Santos, Brazil; Paranagua, Brazil; and Buenos Aires, Argentina. Northbound voyages depart Buenos Aires and sail through the Strait of Magellan with calls at Valparaiso, Chile; Callao, Peru; and thence to Los Angeles, and San Francisco, California; Tacoma, Washington, and Vancouver, British Columbia. M vessels maintain a frequency of service of approximately once every 21 days. Since the vessels carry passengers, schedules are prepared up to a year in advance and are strictly followed. PGL plans to maintain as a minimum the 10 annual sailings called for by Agreement No. 10056 and anticipates between 15 and 17 sailings annually to Buenos Aires.

4. PGL has had considerable experience with refrigeration and containerization. Its vessels are constructed to carry containers and to accommodate refrigerated commodities, and it tends to concentrate its efforts toward securing those types of cargoes. It does not presently carry bulk liquids, including alkane and tung oil in this trade, because its vessels' deep tanks have been converted to carry fuel oil and because the cost of cleaning is excessive. PGL's M-class ships have carried woodpulp, newsprint and lumber only in relatively small quantities. Much of the woodpulp and lumber moving in the trade originates at outports in the Pacific Northwest which the M-class vessels do not serve because of their rigid scheduling requirements.

5. In addition to its clockwise Argentine service, PGL serves the West

Coast of South America from the United States Pacific Coast. This second and distinct service operates in a "shuttle" fashion, calling at ports on the United States West Coast, the West Coast of Central America, and thence to the West Coast of South America calling as far south as Chile and returning northbound. PGL has operated "Jet" class vessels in this service since December 1972, at which time two vessels were introduced to replace the older ships then in service. The "Jets" are larger, faster, and better equipped than their predecessors.

ELMA

6. At the time it entered the United States West Coast/Argentine trade, ELMA was an unincorporated agency of the Government of The Republic of Argentina. Effective April 6, 1973, ELMA became an Argentine corporation all of whose stock is owned by the Government. All of the ships operated in the U. S. West Coast/Argentine trade are owned by the Argentine Government and fly the Argentine flag. As a part of the Argentine Merchant Marine, ELMA acts as an instrument of national economic policy. ELMA initiated its service in this trade in April 1972. Transpacific Transportation Company is general agent for ELMA on the West Coast of the United States.

7. Initially, ELMA assigned three ships to the Pacific Service: RIO CALCHAQUI, RIO PARANA and RIO CORRIENTES. RIO CORRIENTES was an older vessel and found to be essentially unsuited to the trade. After two voyages she was dropped from the service and replaced by the RIO DE LA PLATA. A few months thereafter a fourth vessel, the RIO ABAUCAN, was added in order to provide regular monthly sailings. These four vessels are presently in service and are all relatively new, the oldest being the RIO DE LA PLATA constructed in 1970. They average approximately 10,000 deadweight tons capacity with approximately 450,000 cubic feet of dry cargo space, 60–80,000 cubic feet of reefer space, and deep tanks capable of handling between 600 and 800 tons of bulk liquid cargo. Service speed varies from 17 to 18 knots permitting a transit time from California ports to Buenos Aires of 30–35 days. In addition to its regular service ELMA has, on three occasions in 1973, chartered vessels to be used in the trade for the purpose of carrying full vessel loads of steel slabs.

8. Northbound, ELMA vessels proceed from Argentina through the Strait of Magellan and up the West Coast of South America, offering service paralleling that of PGL and WL. Southbound, it offers a counter-clockwise service from Canadian and United States Pacific ports, down the West Coast of South America, through the Strait of Magellan and terminating in Argentina. ELMA does not participate in the trade between Brazilian or Caribbean ports and the United States Pacific Coast. ELMA offers a sailing on the average every 25–30 days. Typically, its northbound vessels proceeding from Buenos Aires call in sequence at Valparaiso, Chile; Callao, Peru; one or two Peruvian outports; Guayaquil and Manta,

in Ecuador; Buenaventura, Colombia, and one or two Central American ports depending upon northbound cargo offerings. The ships then proceed to the United States to Los Angeles and San Francisco, California, and to the Columbia River calling at Portland, Oregon, occasionally at Vancouver, Washington, and/or Longview, Washington; then to either Seattle or Tacoma, Washington; Vancouver, British Columbia, and between one and three British Columbia outports. Vessels then proceed south to San Francisco and Los Angeles. Subject to inducement, the vessels then call at one or two Central American ports. Occasionally ships have called at Mexican ports to load southbound cargo for the West Coast of South America and Argentina. The first port of call in South America is normally Buenaventura, then to Guayaquil, Callao, Valparaiso, through the Strait of Magellan and north to Buenos Aires. ELMA had 8 sailings northbound from Buenos Aires in 1972 and 12 in 1973.

9. In addition to its Pacific Coast service, ELMA participates in the trade between the United States and Argentina by serving ports on the Gulf of Mexico and Atlantic Coast. In its entire service, which includes service to Europe and Japan, ELMA operates from 40 to 50 vessels. It has undertaken a shipbuilding program which, in the next 10 years, envisions the construction of approximately 50 to 60 vessels.

WL

10. WL is a Norwegian company with corporate offices in Bergen, Norway. It owns a total of 20 ships, operating bulk vessels and tankers and since 1926 has maintained a liner service in the United States West Coast/Latin American trade with vessels registered in Norway and crewed principally by Norwegians. General Steamship Company, Ltd., serves as general agent for WL on the United States Pacific Coast.

11. When these proceedings were initiated, the WL service pattern was as follows: WL covered the full range of Canadian and United States Pacific Coast ports in British Columbia, Alaska, Washington, Oregon, and California, calling regularly at Vancouver, B.C.; Seattle; Columbai River ports (such as Vancouver, Washington, and Portland); San Francisco; and Los Angeles; as well as the following outports on inducement; Ketchikan, Alaska; Bellingham, Tacoma, Everett, Hoquiam (Gray's Harbor), and Longview, Washington; Astoria and Coos Bay, Oregon; and Eureka, Richmond, Oakland, Long Beach, and Wilmington, California. These vessels proceeded from Canadian and U. S. Pacific Coast ports via Pacific Coast Mexican and Central American ports and then southbound along the Pacific Coast of South America, calling at ports in Colombia, Ecuador, Peru and Chile, then via the Strait of Magellan to the River Plate (Buenos Aires, Argentina, and Montevideo, Uruguay), then northbound via ports in Brazil (Rio de Janeiro, Santos, etc.), Trinidad, Colombia (Barranquilla and Cartagena), Panama Canal, Colombia (Buenaventura), returning to the Pacific Coast of the U. S. and Canada, with occasional calls at Pacific Coast Central American ports homebound. The

intervals between sailings on this voyage pattern were approximately 18 days.

In 1973, WL decided to inaugurate a new "C" (clockwise) service, proceeding from the Canadian and U. S. Pacific Coast ports listed above, via Mexico and the Pacific Coast of Central America, then through the Panama Canal to Colombian ports in the Caribbean, then southbound along the East Coast of South America via ports in Venezuela, Brazil, and the River Plate, returning northbound via the Strait of Magellan and ports in Chile, Peru, Ecuador, and the Pacific Coast of Colombia, with possible calls at Pacific Coast Central American ports before returning to the U. S. Pacific Coast. It was projected that each service would then have approximately one sailing per month.

For a number of reasons discussed below, at the end of 1973, WL discontinued its original anticlockwise, or "A" service which WL had maintained since 1926. Westfal Larsen now operates only the clockwise or "C" service, regarding the economic prospects there as more encouraging than in the "A" service. Nevertheless, WL has not abandoned completely the idea of providing an "A" service. WL is a member of the appropriate conference, has the necessary agents, and could resume the service if such resumption were economically justified.

For the years shown below, based upon round voyages as terminating in Vancouver, British Columbia, the voyage terminations in the trade are as follows:

Year	*Voyages*
1969	19
1970	18
1971	18
1972	18
1973	10—"A" service 4—"C" service

Assuming a 120-day round trip, WL plans approximately 12 voyages in 1974.

12. WL has followed a program of frequent replacement and modernization of its vessels employed in the trade. Modernization includes elimination of all 'tweendeck hatchcoamings and leveling and reinforcing of all 'tweendeck surfaces to permit the use of forklift trucks and other mechanized equipment; installation of mechanically operated steel hatchcovers, and in some cases installation of sideports. These improvements permit more efficient and economical handling of cargo and help prevent damage to cargo and subsequent inconvenience to shippers.

Further, WL has added vessels to the trade so long as it could be demonstrated that the tonnage would be utilized and the vessels would be filled on a competitive basis.

At the time this proceeding was initiated, WL operated six vessels in the trade. All had been modernized since 1966. The vessels sailing in the new "C" service were principally the M/S RAVNANGER, M/S FAUS-

KANGER and M/S HOSANGER, with the remaining vessels, M/S VILLANGER, M/S HOYANGER and M/S SIRANGER, operating in the original "A" service.

At the time of the hearing, i.e., March 1974, two of the older vessels in the service, M/S HOYANGER AND M/S VILLANGER, had been withdrawn. WL is unable to commit itself as to replacement of vessels at the present time owing to its belief that its prospects in the trade are uncertain because of the pendency of the subject agreement and other agreements such as that involved in the Colombian trade now pending before the Commission in Docket No. 74-5. The four vessels presently serving the trade have a speed of approximately 15 knots, an average deadweight capacity of 12,259 tons and an average bale cubic capacity of 620,601 cubic feet. They can carry a limited number of containers and have no reefer space. By and large, the vessels operated in the trade by PGL and ELMA are newer and faster.

13. For over ten years WL has provided the shipping public with sailing frequencies of approximately 18 days. This enabled suppliers to schedule their parcels in a way such as to keep a steady flow of material moving to customers in accordance with their requirements and their ability to handle cargoes in warehouses which are, generally speaking, rather limited in some Latin American areas. Since the "A" service was suspended, WL has not yet been able to establish a fixed frequency for its "C" service pattern although it hopes to establish a frequency of 28–30 days.

WL has been able to achieve dependability of service and scheduling by maintaining the same basic voyage pattern and itineraries over the years and by careful maintenance and periodic drydocking of its vessels. Also, during its entire history of service to this trade, WL vessels have never lost time or been delayed due to strikes or labor stoppages by shipboard personnel. This freedom from the effects, and even the threats, of offshore labor disputes has contributed to the stability and dependability of Westfal-Larsen schedule and services. WL has been especially helpful and cooperative as regards exporters of forest products located in the Pacific Northwest who have had difficulty in obtaining space elsewhere.

14. WL carries a broad range of commodities between the United States and Argentina. Southbound, this includes so-called base cargoes such as lumber, woodpulp, and newsprint, in addition to all types of general cargo such as canned goods, machinery, chemicals, metals and seeds. Northbound, this includes general cargoes such as canned beef and other foodstuffs, tung oil, ore, and quebracho extract.

WL has historically shown an interest in carrying forest products consisting primarily of lumber, woodpulp, and newsprint. It has tried to adapt to the trade by improving its vessels and adapting to carry these commodities. WL rates woodpulp among its "desirable" cargoes, i.e., those cargoes "that give the best results" and has demonstrated its

interest by calling regularly at outports and mill docks in the Pacific Northwest and Alaska to load forest products. Recently it has begun "to go for the larger parcels" of these cargoes. WL also carries relatively large quantities of alkane and tung oil, both bulk liquids and considers them to be desirable and "very desirable."

The Trade

15. The Agreement between PGL and ELMA covers the trade between ports on the United States West Coast and Buenos Aires. At the present time PGL, ELMA, and WL are the only carriers offering regular liner service in the trade, ELMA having entered the trade in April 1972. Orient Overseas Line and Mitsui-OSK Line had offered service in the past, however, by 1973 they had substantially withdrawn. The record is silent as to their plans for future participation. All carriers are members of the Pacific Coast River Plate Brazil Conference and also serve one or more ports in British Columbia from which the greatest portion of the total Pacific trade to Argentina is lifted.

16. With the exception of 1971, the northbound liner trade from Argentina to the U. S. West Coast has remained relatively level over the past four years with an annual cargo movement of between 16 and 18 thousand revenue tons. Southbound, the trade has declined steadily from a high of 55,532 revenue tons in 1970 to 27,393 revenue tons in 1973. The southbound movement from Canada to Argentina, which exceeds in volume the movement from U. S. West Coast ports, also suffered a sharp decline, dropping from 44,319 revenue tons in 1972 to 33,259 revenue tons in 1973. The following tables illustrate the situation:

	U.S. Pacific/Argentina		*Canada/Argentina*	
	Southbound	*Northbound*	*Southbound*	*Northbound*
1970	55,532	18,753	45,389	3,779
1971	41,869	13,314	46970	1,363
1972	37,631	16,671	44,319	2,583
1973	27,393	17,271	33,259	1,236

The current level of traffic is expected to continue, with the prospect that it will increase, particularly with respect to forest products.

17. The relative percentage of participation of the carriers, in terms of revenue tons for the four-year period has been as follows:

	U.S. Pacific/Argentina Southbound				*Canada/Argentina Southbound*			
	PGL	*WL*	*ELMA*	*Other*	*PGL*	*WL*	*ELMA*	*Other*
1970	50%	46%	—	4%	36%	61%	—	3%
1971	48%	50%	—	2%	17%	61%	—	22%
1972	23%	60%	13%	4%	4%	64%	25%	7%
1973	20%	38%	42%	under 1%	1%	12%	87%	—

	U.S. Pacific/Argentina Northbound				*Canada/Argentina Northbound*			
	PGL	*WL*	*ELMA*	*Other*	*PGL*	*WL*	*ELMA*	*Other*
1970	66%	34%	—	Under 1%	46%	54%	—	—
1971	60%	32%	—	8%	69%	23%	—	8%
1972	40%	25%	34%	1%	25%	38%	37%	—
1973	46%	18%	35%	1%	41%	7%	52%	—

18. Among the principal commodities shipped from the United States West Coast to Argentina are woodpulp, alkane (in bulk), aluminum ingots, lumber, seed, pencil slats, and infusorial earth, with woodpulp and alkane comprising well over half the total volume (in kilotons) moving. Northbound, the major commodities have been canned corned beef, quebracho, tung oil (in bulk), and apple juice concentrate with a substantial traffic in refrigerated cargoes including horsemeat, fish, cheese, and fruit concentrates.

By far the major commodity moving in the southbound trade between U. S. West Coast ports and Argentina, both in terms of tonnage and revenue, has been bulk woodpulp. WL has traditionally carried the major portion of this commodity and WL's retention of this commodity, even after the entry of ELMA into the trade, accounted in substantial part for its retention of a larger percentage of the trade than has PGL. PGL has followed a policy in which it tries to "steer clear of woodpulp, newsprint, and lumber for Argentina whenever we have other cargoes available paying better freight." The results of this policy can be seen in the data relating to carryings southbound of cargoes originating in Canada, where PGL's share fell from 36% in 1970 to 17% in 1971 because PGL decided to carry less newsprint, one of the major commodities moving from that area. PGL has called at outports to pick up cargoes of forest products but has required greater inducement in terms of cargo offerings than was required by WL.

WL does not have in the northbound trade the predominance in a single major commodity as is the case with woodpulp in the southbound trade, although WL has maintained substantial carryings in tung oil and canned beef which are among the major cargoes in this trade.

Argentine Cargo Preference Laws

19. The primary purpose of Agreement No. 10056 is to permit equal access for PGL to that cargo moving in the U. S. West Coast/Argentine trade which is restricted by Argentine law to Argentine-flag vessels. Cargo reservation or preference laws are utilized by virtually all South American maritime countries. Beginning in the 1950's and with increasing rapidity in the 1960's, cargo imported into Chile, Brazil, Colombia, Ecuador, Peru, Venezuela, Uruguay and Argentina has been restricted to the national flag vessels of the importing country as the result of action taken by these governments. In addition, various measures have been

adopted by these countries to stimulate exports on their national flag vessels and to foster and strengthen their respective merchant marines. Cargo has been restricted by South American countries to their national flag lines through one or more of the following actions: specific reservation of a percentage of the trade; discriminatory consular fees or other taxes; exchange controls; exoneration from import duties; reservation of government purchases or government-controlled cargoes; and direct routing. The action taken by the South American countries has been designed to foster their respective national flag lines not only because this was considered necessary to support a developing national economy but also as a matter of national pride and prestige.

20. With respect to Argentina, by a series of laws, decrees, and resolutions that Government has required that an increasing percentage of import and export cargoes be reserved for carriage by Argentine-flag vessels. As early as 1948 the Argentine Government had adopted certain discriminatory policies which effected a routing preference in favor of its national flag line. These earlier measures have since given way to a more recent and more comprehensive body of laws designed to route import and—to a lesser extent—export cargoes on Argentine-flag vessels. On June 10, 1969, the Argentine Government, citing "the necessity of securing for the vessels of its own flag a substantial share in the transport arising from" international commerce and recognizing the action taken by other countries including the United States, to promote their fleets, promulgated Law 18.250. Law 18.250, among other things, reserved to national flag vessels all imports destined to certain government entities and provided that non-governmental imports financed by State banking system were to move in Argentine bottoms. A system of fines was established to enforce compliance. The law provided that the reservation with respect to imports by government entities did not apply where treaties or private agreements were in force which reserved not less than 50% of the cargo to Argentine-flag vessels. Law 18.250 was amended by Law 19.877 on October 6, 1972. Together with its implementing decrees, the amended law constitutes the primary vehicle by which cargoes imported from the United States are routed on ELMA vessels.

21. Law 18.250 as amended by Law 19.877 provides that all goods imported "for account of, or with the intervention [of] or destined to" the national government, the provincial governments, the municipalities, or their respective departments, or government-owned or controlled entities must be transported on Argentine-flag vessels. Non-governmental imports financed by the State banking system are also so reserved. Law 19.877 made two significant modifications to Law 18.250. First, it enlarged the scope of controlled cargoes available to foreign lines which had agreements with Argentine lines by extending access to those cargoes required to be routed on Argentine-flag vessels where the importation was financed by the State banking system. Prior to that time equal access was granted to only those cargoes imported by government entities. Second, it

redefined the type of agreement which would permit foreign lines to share in the carriage of controlled cargoes. The amended law provides that agreements between lines must provide for participation by the Argentine line of "not smaller than fifty percent (50%) of the freights earned." Article 3 of Law 18.250 as amended by Law 19.877 provides that only those shipowners who are parties to approved agreements shall have a right to carry government-controlled cargoes. By these provisions it appears that only an agreement with pooling provisions would qualify to permit non-Argentine-flag lines to carry controlled cargo. The law also provides that "the necessary measures shall be adopted" to secure "the maximum participation" by Argentine-flag vessels in the carriage of exports by governmental entities; it is not known, however, what steps, if any, have been taken to implement this provision.

22. Decree 6.942 dated October 6, 1972, was issued pursuant to Law 18.250 as amended by Law 19.877. It establishes a procedure to be followed by government entities to effectuate routing on Argentine-flag vessels and provides certain implementing regulations for Law 18.250 as amended. Article 5 provides a system for permitting a waiver of the routing requirement where no national flag vessel has space available or is in position to carry the cargo. "There is no vessel in position when it causes to non-perishable goods a delay greater than seven (7) days and to perishable goods a delay greater than forty-eight (48) hours."

23. Resolution 518 of October 24, 1972, denominates the Argentine National Administration of Customs as the agency responsible for policing the import restrictions of Law 18.250, as amended. It further refines the procedure for the issuance of waivers. According to Resolution 518, the importer must secure and present to the Customs Administration a certificate of "Shipment of goods in vessels under Foreign Flag—Law No. 18.250" before the Customs Administration may release controlled cargo into the market which has been transported to Argentina on a foreign line. Certificates are granted by the National Direction of Shipping Activities (NDSA). In order to obtain a certificate, the importer must petition the NDSA 30 days before shipment is scheduled setting forth certain prescribed information relating to the nature of the goods, the date of shipment, etc. The NDSA advises the Argentine line of the petition and requests notification that no vessel is in position to lift the cargo. The Argentine line must certify the existence or nonexistence of a vessel in position within 48 hours of receipt of the request, or the NDSA grants the certificate of "Shipment of goods on vessels under Foreign Flag—Law No. 18.250" as a matter of course.

24. Law 18.250, as amended by Law 19.877, has had little or no discernible effect on exports from Argentina, as distinct from imports, however, the preferential routing of exports has been influenced by Law 19.184 and its implementing decree, Decree 3.255. Law 19.184, dated August 24, 1971, empowered the executive to establish a system of tax reimbursements for exported commodities to promote the sales abroad of

goods and services (the drawback). Pursuant to Law 19.184, Decree 3.255 dated August 24, 1971, establishes the amount of reimbursement and the commodities covered. The amount of reimbursement is computed as a percentage of the FOB vessel value if shipped on non-Argentine-flag vessels and as a percentage of the C & F value if shipped on Argentine-flag vessels. The law influences specific commodities, among which moving in the U. S. West Coast/Argentine trade are canned corned beef, frozen fish, cheese and apple juice concentrate.

25. On November 23, 1972, the Undersecretary of the Argentine Merchant Marine promulgated Resolution 626. Resolution 626 concerns the trade moving between the United States and Argentina and refers to Article 7 (non-controlled cargo) and Article 9 (exceptions) of Law 18.250, as amended. The resolution states the governmental policy with respect to the percentile division of imports and exports in the trade as between national flag and third flag lines, reserving 15% of non "official cargo" to the latter, and requires that agreements between lines which permit access to Argentine-controlled cargoes contain measures which provide equivalent freight values to the Argentine line. Consistent with Resolution 626, the Argentine Government, which gave its approval to Agreement No. 10056, provided in Resolution 456, that during the first year after approval, "the lines involved will make the necessary contacts to accomplish the participation of the remaining Conference lines which regularly serve the traffic, to be incorporated to the new Agreement . . . without affecting what is established in the preceding article" (which approved the subject agreement).

26. Finally, in Law 20.447 dated May 22, 1973, the Argentine Government declared that its merchant marine was an instrument of national economic policy, and asserted its right to carry 50 percent of all its foreign trade in its national flag vessels. The statute specifically provides for the promotion of bilateral and multilateral traffic agreements with other governments or between steamship lines and provides for additional support and regulation of the merchant marine. Decree No. 4.780 was issued pursuant to the law. The decree provides, among other things, that Argentine financial entities may finance freights for cargo carried on foreign vessels only where no service or space is available on an Argentine-flag vessel or where "agreements exist [providing] for the distribution of freights."

27. The Argentine cargo preference laws are not, for the most part, designed to route specific commodities. Generally, Argentine-flag preference arises because of the identity of the consignee or as a result of some form of government financial support given the exporter or consignee. Accordingly, it is impossible to determine with precision what proportion of the total cargo in the trade moves under such controls or how much cargo has been routed to ELMA because of such controls. Estimates have been made that 40 to 80 percent of cargoes imported into Argentina are presently controlled but, in theory, 100 percent could be subject to

the laws in question. Some commodities known or reported to have been affected by preferential routing of one kind or another are tinplate, crysylic acid, woodpulp, aluminum ingots, seed, apple juice concentrate, military vehicles.[1] It does not appear, however, that all of the cargo in any one of these categories has been controlled. In the Canadian/Argentine trade aluminum ingots, asbestos, and newsprint have been affected. According to a list furnished by ELMA, an additional variety of commodities such as machinery, seeds, some types of lumber, and logs have also been affected. Although lumber appears to have been generally free of routing controls, there is some indication that it too may become subject. Despite these controls, except for Canadian newsprint, it appears that these commodities have also moved via carriers other than ELMA and may have been free of controls at one time or another. There is no evidence that cargo presently designated as government-controlled will be substantially increased in the future but neither is there any way of determining whether it will be substantially decreased.

28. Although none of the carriers is able to determine with any precision what overall portion of the trade is subject to preferential routing under the laws, or how much cargo has been lost to ELMA because of the operation of the laws, it appears that it is substantial and that they have been damaged because cargo has been diverted to ELMA or has not been offered to them because it was required to move on ELMA.[2] When ELMA entered the trade ELMA anticipated that its "support in the traffic will be constituted by the so called 'cargo controlled by the Government,' which Law 18.250 reserves for the Argentine flag." ELMA's Pacific Coast agent indicated that considering the ideal of open competition it would be highly unusual for a new carrier to enter a trade and, within 18 months, succeed, as has ELMA, in capturing 40 to 50 percent of the cargo moving. PGL's Freight Traffic Manager testified that ELMA's rapid rise to prominence, considering PGL's and WL's reputations as established carriers, could only have been accomplished with the aid of the Argentine cargo preference laws. From ELMA's first year in the trade PGL's average tonnage per vessel in 1972 dropped down to about 300 tons a vessel, whereas, it had been about a thousand tons a vessel, the two previous years. PGL also dropped in participation from around 50% in the total trade to less than half that, partly due to the Argentine preference laws and probably partly due to a new carrier in the trade offering regular service. The effect on WL has been to appreciably curtail carryings in the northbound and

[1] Alkane, an important bulk liquid commodity moving southbound may become subject to preferential routing requirements in connection with the Argentine government's program of subsidizing imports of certain basic and scarce raw materials by means of special exchange rates, although up to the time of the hearing WL had been able to carry it without getting a waiver.

[2] Although both PGL and WL witnesses expressed the opinion that the Argentine cargo preference laws have worked to reduce their respective carryings, the record provided few specific examples showing whether diversion to ELMA occurred as a result of the laws as distinct from the added entry of ELMA into the trade. Since the laws operate on consignees in Argentina, as a practical matter, it is unlikely that the precise amount of cargo diverted to ELMA solely as a result of the laws could ever be quantified.

southbound trade. In 1973, for instance, WL's participation dropped to 38% whereas in 1972 WL had attained a level of 60% in the southbound trade.

Background of Agreement No. 10056

29. PGL first became acquainted with the Argentine cargo preference laws and the effects which they could have on a U. S.-flag carrier prior to the inauguration of ELMA's West Coast service. Before entering the Pacific service, ELMA had been operating in the trades between the Gulf and Atlantic Coasts and Argentina, trades served respectively by the U. S.-flag carriers Delta Steamship Lines, Inc. (Delta), and Moore-McCormack Lines, Inc. (Moore-McCormack). Problems occasioned by the Argentine laws discussed, affected these carriers and ultimately led to the intervention of the United States Government in an effort to resolve the situation before it escalated into a "shipping war" between the two countries. Officials of PGL were made aware of the developments in these trades through their agent in Buenos Aires, a subsidiary of Moore-McCormack and through contacts with Moore-McCormack officials in New York. In addition, PGL received correspondence from Delta concerning Argentine discrimination and later was in periodic contact with officials of the Maritime Administration.

30. In early 1969, after initial negotiations and discussions on Argentine discrimination involving officials of the U. S. and Argentine Governments, Delta and Moore-McCormack negotiated southbound Rationalization of Sailings and Cargo Agreements with ELMA which provided that each line would have equal access to government-controlled cargoes. These agreements were signed on November 27, 1969, and approved by the Federal Maritime Commission on February 18, 1970. Despite the fact that these agreements were intended to resolve the cargo discrimination experienced by the U. S. lines, however, Delta did not thereafter carry what it considered to be its proportionate share of the cargo moving from the Gulf and Moore-McCormack likewise did not regard the equal access arrangement as satisfactory.

31. Although PGL had anticipated that ELMA would enter the U. S. West Coast trade, it was not until May 1971 that it learned officially that ELMA had decided to institute a Buenos Aires/U. S. West Coast service. At that time two ELMA officials visited PGL's San Francisco office and indicated that ELMA intended to commence service from Buenos Aires in July. At that time they proposed an equal access agreement between the lines. PGL had already felt the discriminatory effects of Law 19.184 and Decree 3.255 (the drawback) in the Argentine wayport trades and from this point on took a definite interest in what was taking place with respect to Moore-McCormack and Delta. In late 1971 PGL learned from its agent in Buenos Aires that ELMA had decided to postpone commencement of its West Coast service until the longshoreman's strike then affecting U. S. ports had been settled. PGL was also aware at this time

that further Delta and Moore-McCormack negotiations with ELMA had turned toward pooling and equal access agreements which were expected to settle the problems being experienced on the Gulf and Atlantic Coasts. PGL's Buenos Aires agent represented Moore-McCormack in these negotiations. Because of the problems experienced by Delta and Moore-McCormack, and because the full effect of the Argentine laws reserving cargo for Argentine vessels would become effective once ELMA entered the trade, PGL notified its agent in December 1971 to inform ELMA officials at their next meeting on the Moore-McCormack pooling agreement that PGL was interested in entering into an equal access agreement and that it wished to be included in the pooling discussions which were then taking place.

32. By the spring of 1972 negotiations between ELMA, Delta and Moore-McCormack concerning the pools had reached an impasse. Despite its request, PGL had not been made a part of these negotiations, and ELMA had recently inaugurated its West Coast service. In an effort to resolve the continuing cargo discrimination suffered by Delta and to lay the groundwork for broader pooling agreements, a series of meetings were held between representatives of the governments of the United States and Argentina. In May 1972 the General Counsel of the U. S. Department of Commerce and a representative of the Maritime Administration visited Buenos Aires and met with the Undersecretary of the Argentine Merchant Marine. Talks were held again in June involving the Maritime Administration and U. S. State Department, but no satisfactory solution was reached at that time. Thereafter, an aide memoire was prepared by the State Department and forwarded to the Argentine Government. In the aide memoire the State Department reviewed the history of Delta's problem and expressed the policy of the United States. In pertinent part the aide memoire stated:

> US SHIPPING LEGISLATION AND THE MARITIME POLICIES OF THE EXECUTIVE BRANCH ARE BASED ON THE PREMISE THAT REASONABLE COMPETITION AND NONDISCRIMINATION AMONG CARRIERS BEST SERVE THE DEVELOPMENT OF EFFICIENT SHIPPING SERVICES AND THE EXPANSION OF TRADE. WE SEEK TO HAVE A MERCHANT MARINE CAPABLE OF CARRYING A SUBSTANTIAL PART OF OUR FOREIGN TRADE ON A COMPETITIVE BASIS, AND WE RECOGNIZE THAT MANY OTHER NATIONS HAVE THE SAME ASPIRATION.
>
> * * *
>
> SPECIFICALLY WITH RESPECT TO CARGO RESERVATIONS, THE UNITED STATES HAS FIRMLY SUPPORTED THE PRINCIPLE THAT THERE SHOULD BE EQUAL ACCESS TO GOVERNMENT-CONTROLLED CARGOES AS BETWEEN THE LINES OF THE TRADING PARTNERS. WE KNOW OF NO OTHER EQUITABLE RULE. . . .
>
> * * *
>
> REGARDING POOLING AGREEMENTS AMONG SHIPPING LINES, WE PREFER THOSE WHICH INTERFERE LEAST WITH COMPETITION AND THUS

PROTECT THE INTERESTS OF SHIPPERS AS WELL AS SHIPOWNERS. CONSISTENT WITH OUR LEGISLATION, THE FMC HAS APPROVED AGREEMENTS WHICH SIMPLY PROVIDE EQUAL ACCESS BY EACH SIDE TO GOVERNMENT-CONTROLLED CARGOES, AS IN THE DELTA/ELMA AGREEMENT, AND HAS ALSO APPROVED BROADER POOLING AGREEMENTS WHICH DIVIDE REVENUES EQUALLY BETWEEN THE CARRIERS OF THE TRADING PARTNERS WITH RESPECT TO THE TRAFFIC THEY CARRY, WITHOUT INVOLVING QUOTAS OR OTHERWISE RESTRICTING THE FREEDOM OF "THIRD FLAGS" TO COMPETE FOR NORMAL COMMERCIAL CARGOES.

* * *

IN THE US VIEW, CARGO RESERVATIONS SHOULD NOT BE SO EXTENSIVE THAT REASONABLE THIRD FLAG SERVICES CANNOT BE MAINTAINED ON AN ECONOMIC BASIS, AND THE AREA OPEN TO COMPETITION BY ALL FLAGS SHOULD BE AS WIDE AS POSSIBLE IN ORDER TO PROMOTE EFFICIENT SHIPPING SERVICES AT REASONABLE RATES FOR THE TRADING PARTNERS CONCERNED.

In conclusion, the Department urged the Argentine Government to accord equal access to Delta in order to resolve the immediate problem and "establish a basis for the negotiation of broader arrangements if desired by the parties involved." The intervention by the United States government was beneficial in bringing about meaningful negotiations between ELMA and Delta and Moore-McCormack.

33. In Chile, Ecuador, Colombia, Venezuela and Peru, PGL had seen its services adversely affected by the emergent nationalism of South American countries and the efforts of those countries to promote a national flag merchant marine as an instrument of government policy. The situation confronting PGL with respect to Argentina was therefore not novel. ELMA had entered the trade with the express intention of utilizing Argentine preference laws, and almost immediately thereafter PGL had experienced a loss in northbound cargoes as a direct result.

34. The alternatives open to PGL to prevent cargo discrimination were familiar. PGL could have done nothing while ELMA's service became established on the strength of its cargo preference laws and with the consequent erosion of PGL's cargo base. This was not acceptable to it. Another alternative, which was to negotiate an equal access type agreement with ELMA, was the most desirable from PGL's standpoint because it would avoid resort to government intervention and would not create animosity between the lines. PGL's efforts at reaching a solution on this basis, even with governmental assistance, had not met with success. Finally, PGL could have sought retaliatory or countervailing assistance directly from the United States Government, for example, action by the Federal Maritime Commission under section 19, Merchant Marine Act of 1920, and it could have requested that the Maritime Administration refuse to grant waivers for the carriage of Export-Import Bank cargoes on Argentine-flag vessels. Both alternatives were considered, and it was decided that the second approach—denial of "Eximbank" waivers—would be the appropriate course under the circumstan-

ces. PGL considered the use of section 19 to be the more drastic and least satisfactory approach. PGL considered section 19 to be both time consuming and burdensome. Moreover, whenever section 19 has been invoked in the past it has almost always resulted in a commercial agreement between the national flag lines involved.

35. PGL routinely receives communications from the Maritime Administration giving it an opportunity to express its views as to whether a waiver should be granted to a foreign line for the carriage of cargoes financed by the Export-Import Bank.[3] The Maritime Administration's judgment as to whether a waiver should be granted is based on the United States as a whole and, while there were no Eximbank cargoes moving in the U. S. West Coast/Argentine trade in the fall of 1972, the denial of waivers could be applied to shipments from the Gulf or Atlantic. In October 1972 PGL wrote the Maritime Administration and requested that no further waivers be granted.

36. In mid-December 1972, Mr. A. Theodore DeSmedt, then PGL's President, and Mr. Albert B. Wenzell, PGL's Vice-President and General Manager in charge of its Pacific services, traveled to Buenos Aires and met with ELMA representatives to discuss ELMA's continuing refusal to enter into an agreement which would grant PGL access to Argentine-controlled cargoes. ELMA remained reluctant to enter into a commercial agreement, and PGL suggested that unless some form of agreement could be reached between the lines, PGL would be obliged to seek assistance from the United States Government by opposing waivers for Eximbank cargoes or through the aid of the Federal Maritime Commission. ELMA agreed to review the situation and meet again in January. Thereafter, PGL contacted the Maritime Administration, explained their failure to reach an understanding in December, and again requested that Eximbank waivers be denied to Argentine-flag vessels until PGL and ELMA had entered into meaningful discussions. The Maritime Administration continued to grant waivers, however, because it was reluctant to upset pending Delta and Moore-McCormack negotiations while there was a reasonable prospect of finally settling that dispute without government retaliation. PGL received a copy of a letter from Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs, to the Argentine Undersecretary of the Merchant Marine indicating Mr. Blackwell's desire that all three U. S. lines be included in the agreement discussions then underway. It was the Maritime Administration's hope that this letter would start serious negotiations between ELMA and PGL.

[3] Under Public Resolution 17 of the 73rd Congress, the Congress expressed "the sense of Congress" that publi agencies making loans to finance exports shall require that those exports be carried on United States-flag vessels. PR 17 is applicable to loans of the Export-Import Bank to foreign individuals or entities for the purpose of the acquisitio and shipment of United States products. A waiver of the U.S.-flag requirement is permitted and may be granted b the Maritime Administration to vessels of the recipient country. In granting waivers for PR-17 cargoes, the Maritim Administration considers, among other things, whether U.S.-flag vessels are accorded parity of treatment in th carrying of cargoes controlled by the government of the recipient country. When the Maritime Administration i satisfied that parity is extended to U.S.-flag vessels, a 50 percent participation in the carriage of Eximbank cargoe may be granted to foreign-flag vessels. P&P SRR p. 501:101).

37. In late January 1972 Mr. DeSmedt and Mr. Wenzell returned to Buenos Aires and reached an agreement in principle with ELMA officials respecting an equal access and pooling agreement. The Delta and Moore-McCormack agreements had been completed by then,[4] and a draft agreement was drawn following those examples. After additional negotiations in the spring of 1973 during which time ELMA asked that certain changes be made,[5] agreement was finally reached. Agreement No. 10056 was signed by the parties on May 21, 1973, and approved by the Argentine government pursuant to Resolution 456, dated July 4, 1973, apparently for one year[6] during which time, as noted above, the lines are supposed to make provision for the participation of the remaining Conference lines.

38. WL has made no effort to contact PGL or ELMA to discuss an agreement concerning operations or the distribution of traffic in the United States/Argentina but neither has PGL or ELMA contacted WL for such a purpose. The Norwegian Government has expressed its concern to the Argentine Government over discriminatory Argentine cargo preference laws and has communicated its concern over Agreement No. 10056 as well as other pending agreements in the South American trades to the Commission.[7]

Agreement No. 10056

39. Agreement No. 10056 is divided into two parts, one covering cargo moving northbound (Annex I) and the other cargo moving southbound (Annex II). The operative provisions are identical except for the commodities which are excluded from the pooling provisions and the amount of the pool deductible. The agreement is limited to cargoes moving between U. S. ports in the San Diego and Bellingham range on the one hand and Buenos Aires, Argentina, on the other hand. It does not include wayport cargoes or cargoes moving to or from Canadian ports.

40. Agreement No. 10056 provides an instrument for PGL to secure equal access to cargo restricted to Argentine-flag vessels by the Argentine Government which it would otherwise be denied. Articles 3(b) (Annex I and Annex II) are the key or necessary provisions for providing equal access to government-controlled cargoes. They provide, in pertinent part:

[4] They were signed on February 18, 1973, and approved by the Federal Maritime Commission on May 3, 1973 (Agreement Nos. 10038 and 10039). The Delta and Moore-McCormack agreements were based upon an existing pooling agreement between PGL and Lloyd Brasiliero covering the U. S. West Coast/Brazil trade (Agreement No. 9873).

[5] The changes brought the agreement more in line with the PGL/Lloyd Brasiliero agreement.

[6] The Resolution, as translated, states that the agreement "is hereby homologated until the first year of its validity."

[7] Official notice is taken of the fact that an aide memoire has been transmitted and is located in the official file for this Docket and that the matters contained therein express the position of the Norwegian Government. As PGL notes, however, the Norwegian Government appears to have manifested a willingness to sanction pooling agreements between its national-flag carriers and Latin American lines in Norwegian-Latin American trades. *Agreement Nos. 9847 and 9848—Revenue Pools, U. S./Brazil Trade*, 14 F.M.C. 149, 156–157 (1970).

b) In order for he parties to participate under equal competitive conditions in the carriage of pooled cargoes, parties will do everything possible through appropriate channels with their respective Governments to assure that the legal and/or administrative regulations and practices in force in the Argentine Republic and the United States of America, regarding the reservation, protection and promotion of cargoes to their respective merchant marines are extended equally to both parties.

41. Equal access applies only to government-controlled cargoes. It does not provide for quotas or guarantees of participation. The provision would permit PGL to freely compete with ELMA for all cargo controlled by the Argentine Government. With respect to ELMA, the provision requires that PGL do everything possible to obtain equal access for ELMA to United States government-controlled cargo. This includes not only those cargoes moving from the Pacific Coast—which account for well under 10% of the total U. S. Pacific Coast/Argentine trade but also those moving from the Atlantic or Gulf Coasts which are considerable greater.

42. In order for PGL to gain equal access to Argentine-controlled cargoes, it was necessary to enter into an agreement which contained a pooling provision because of the requirements imposed by Law 18.250 and Resolution 626.

Articles 7 (Annex I and Annex II) provide for the pooling of revenues from certain specified cargoes carried by the lines. Article 3(a) excludes from the pooling provisions revenues from the carriage of the following commodities: Northbound (Annex I), liquid and dry bulk (except vegetable oils, wines, or derivatives thereof), open rated cargo, iron and steel pipe and tube, transshipment cargo and certain other miscellaneous cargoes; and southbound (Annex II), liquid and dry bulk, woodpulp, newsprint, open rated cargo, transshipment cargo and certain other miscellaneous cargoes.[8]

43. Under the pool calculation provisions (Article 7), a party's total revenue from pooled cargoes is first subject to the calculation of a carrying rate which is 50 percent of the average revenue per revenue ton and which is retained by the pool partners. It represents cargo handling charges and a part of vessel expenses. The remaining revenue is shared equally between the lines subject to a deductible of $15,000 northbound and $30,000 southbound credited to the overcarrier. PGL anticipates that there will be minimum payments from time to time or that cargoes, as between the lines, will average out so that there will not be payments over the long run.[9]

44. Article 12(b) provides that the parties will "coordinate to the best of their abilities, their sailings with spacing at regular intervals, as cargo needs may dictate." Because M ships are combination cargo/passenger vessels, PGL plans and publishes its sailing schedules one year in

[8] The "handling charge" levied on the U. S. West Coast which is applied to the movement of cargo to or from the place of rest on the dock and the ship's hook is excluded from revenue. Surcharges, taxes levied against cargo, port differentials and wharfage fees are also excluded.

[9] Had the Agreement been in effect during 1973, it was calculated that PGL would have been required to make a payment of $30,000 to ELMA in the northbound trade. This compares with total revenues of $671,515. In the southbound trade, no payment would have been necessary.

advance. It does not intend any change in its sailings as a result of Agreement No. 10056.

45. Under Article 5, each party is required to maintain a minimum of 10 sailings per year and in the event one party fails to meet his minimum, an adjustment mechanism is provided reducing that party's share of the revenue pool. The agreement does not limit the number of sailings of either party. Article 5(e) provides that each party "will provide sufficient cargo capacity to satisfy the needs of the trade." This provision does not require any specific allocation of space, but rather is an expression on the part of the lines that they will provide sufficient space to insure that there is no "cargo going begging."

46. Article 9 provides that the length of the pool accounting period shall be 12 months, including all sailings from January 1 through December 31, that the parties shall exchange bills of lading and manifests, and that certain other measures shall be employed for accounting purposes. The remaining provisions are standard and relate to cancellation, rates, claims for lost or damaged cargo, force majeure, arbitration of disputes, successors, notification, consultation, extension, and initiation.

47. As noted previously, both PGL and ELMA are members of the Pacific Coast River Plate Brazil Conference, and Articles 4(a) of Annex I and Annex II provide that cargoes shall be handled in accordance with rates, rules, and regulations prescribed by filed freight tariffs. The agreement does not call for cooperation in the setting of rates nor does PGL intend to collaborate with ELMA outside the conference structure in setting rates.

48. As the Commission's Order mentions, there are two typographical errors appearing in the original copy of the agreement filed with the Commission. First, Article 6(c) of Annex I should be amended to strike the period at the end of that sentence, and to insert the following language: "to the total number of actual sailings made by all parties. Second, the third definition of revenue tons appearing in Article 7(b)(1) of Annex II should be corrected by striking the work "long" and replacing it with "short". The corrected definition then properly reads: "two thousand (2,000) pounds on pooled cargo ratable per short ton." These corrections bring the English text into harmony with the Spanish.

49. PGL does not contemplate engaging in any joint solicitation of cargo with ELMA, joint use of offices, joint employment of agents or joint furnishing of services to shippers; nor does PGL at this time plan to act as an agent or broker, formally or informally, for ELMA. There is no provision in the Agreement restricting the solicitation of cargo. Articles 1(b) (Annex I and II) specifically provide that each line will actively and aggressively compete for available cargo traffic and promote and develop to the best of their abilities the commerce between the Argentine ports and ports in the United States. Each party is to maintain its sole discretion in the manning, navigation and operation of its vessels.

50. Article 17 provides that the agreement shall remain in force and

effect for a period of three years following approval by the respective government authorities but may be extended by mutual consent of the parties and approval of the respective authorities.

51. WL presented as its chief witness, Mr. Per Schumann-Olsen, director and chief executive officer of the line, who came to the hearing in San Francisco from Bergen, Norway, and in addition provided the record with financial data relating to WL's overall operations in the Latin American trades. Analysis of the testimony and data, however, do not permit a clear prediction as to the future of WL in these trades.

52. The primary bases for WL's contentions that approval of Agreement No. 10056 would most likely cause it to depart from all Latin American trades is Mr. Schumann-Olsen's testimony, plus certain financial data pertaining to WL's operations in 1973, and WL's experience in the Peruvian trade. In his prepared testimony (Exhibit 51) Mr. Schumann-Olsen concluded:

* * * the most likely result of approval of Agreement No. 10056 is that Westfal-Larsen Line would be unable to continue any part of its Latin American service. In other words, Westfal-Larsen Line would cease to exist.

Elsewhere he elaborated on the considerations which enter into his thinking, stating:

Westfal-Larsen Line is anxious to remain in the trades to and from Argentina as well as the rest of Latin America. Otherwise we would not bother to fight for our existence as we are doing in this case. We thrive on competition and we are willing to continue to compete fairly and effectively with Prudential-Grace Lines and ELMA, despite the present unilateral restrictions and discriminations imposed by the Government of Argentina. The same is true for other trades where Latin American governments favor their own fleets, but *only* their own fleets. We have been faced with such flag discrimination in the past and have had the flexibility and opportunity to adapt and survive. But when both national-flag lines join in agreements which result in our losing most or all of our carryings in the trade, there is no inducement for us to rationalize or adapt. We cannot do that when we do not know which country will be closed next by agreements which the Federal Maritime Commission approves.

In making our judgments about the future of Westfal-Larsen Line, we must weigh considerations such as these: What is United States shipping policy with respect to freedom of competition among vessels of all flags and freedom of shippers to choose among them? Are we, or any third-flag lines, wanted in these trades? Are we needed? We have witnesses who say we are. But approval of Agreement No. 10056 would indicate to us that the Federal Maritime Commission does not agree.

53. Mr. Schumann-Olsen gave the appearance of sincerity and genuine concern over the prospects of his line's operations in the Latin American trades. Additionally he authorized the production of financial information relating to WL's service's despite their confidential or semi-confidential nature in order to show the basis for his concern. As chief executive officer, of course, he is in a policy-making position and presumably either he or his co-directors have the authority to "call it quits" in the Latin American trades after consideration of all factors. However, as the Commission has indicated in the Peruvian case, it is objective evidence concerning WL's overall Latin American operations, including wayport

operations, which is required in order to make a reasonably accurate forecast. Peruvian case, cited above, slip opinion, p. 18. It is furthermore reasonable to expect that objective evidence will also be considered by Mr. Schumann-Olsen and his co-directors, i.e., that WL's management would carefully consider the financial prospects of the line regarding its entire Latin American operations before making any final decision to withdraw.

54. WL introduced into the record a series of financial exhibits (Exhibits 52–58; 60) containing information of a confidential nature. These exhibits contained WL's 1972 and first half 1973 operating results (Exhibit 52) and further analyzed cargo carryings and revenues derived over a period of time extending from 1970 through 1973 in WL's Latin American services. Two exhibits (53, 54) illustrate that because of the existence of many fixed costs, a relatively small reduction in gross revenues will cause a disproportionately large reduction in net results. Of course, as PGL and ELMA point out, the converse would be true in principle, i.e., a relatively small gain in revenues would lead to a disproportionate increase in net results. Nevertheless the exhibits do illustrate a peculiar sensitivity to revenue decline. Furthermore, Exhibit 52 shows that WL's net results for the first half of 1973 underwent a severe decline when compared to results from the preceding full year 1972. The exhibits also indicate a considerable volume of business derived from wayport traffic and from Latin American trade areas other than Argentina. In 1972, out of six southbound Latin American trade areas, revenues derived from the U. S. Pacific to Argentina trade area were the smallest of all areas except for Canada/U.S. to East Coast Latin America. Northbound a similar ranking existed except that the smallest trade area was shown to be Argentina to Canadian Pacific ports. For first half 1973 U. S. Pacific to Argentina revenues were far exceeded by revenues derived from Canada/U. S. Pacific to other Latin American countries and even by wayport traffic between Latin American countries.

55. Aside from the fact that some of the exhibits product results inconsistent with others owing to different bases of computation,[10] they suffer from a fundamental shortcoming which renders them unreliable for purposes of forecasting WL's prospects in the Latin American trades. Basically, the problem is that the exhibits were based upon operating experiences and facts which no longer exist. In 1972 WL had operated its so-called "A" service, serving the West Coast of South America southbound. In 1973, however, WL experimented with a new "C" service, i.e., serving the East Coast of South America southbound, and by the end of the year had abandoned the "A" service altogether. Furthermore, the year 1972 was admittedly a "very, very bad year" for WL. Other factors which have changed include the fact that WL operates

[10] For example, total freight revenues shown in Exhibit 52 for 1972 are more than $600,000 greater than those shown on Exhibit 55 for the same period of time apparently because of a different basis for including voyages.

the "C" service with four of its larger vessels whereas the "A" service had employed six vessels in 1972, including two older and more costly ships. These four ships, according to Mr. Schumann-Olsen, are better suited to the cargo moving in the "C" service than to that moving in the "A" service. Apparently, however, WL has hopes for the "C" service which serves a market showing the greatest traffic growth potential, i.e., Brazil, and at the time of the hearing (March 1974), according to WL's agent Skellenger, cargo offerings in the new service appeared to be more favorable than those in the old "A" service. Finally, as Mr. Schumann-Olsen acknowledged, the critical financial exhibits (52, 53, and 54), based as they were upon a previous pattern of operations, could not be used as the basis for determining the profitability of WL's new "C" service.

WL's Cargo Prospects

56. Both PGL and ELMA dispute WL's contention that approval of Agreement No. 10056 will cause such a serious loss of necessary cargoes as to jeopardize its continued existence in the trade. They point out that WL's revenues from the area covered by the agreement, i.e., U. S. Pacific Coast/Argentina northbound and southbound, represent a small proportion of WL's total business because of the greater volume of wayport and non-Argentine cargoes which are carried by WL. These facts have been discussed above. ELMA cites data showing that the Canadian portion of the Canada/U. S. Pacific southbound Argentine trade, not covered by Agreement No. 10056, produced greater revenues than the U. S. Pacific Coast portion for 1971 and 1972 (58.4 and 58.2 percent respectively) although this figure declined to 25.4 percent in the first half of 1973 and northbound Canadian revenues were well in the minority. They further point out that among WL's ten leading commodities are such items as woodpulp, alkane, and paper products, which are excluded from the pooling provisions of the agreement and presumably will be available to WL regardless of approval of Agreement No. 10056.[11] Of greater significance, however, is the question whether these commodities are subject to the Argentine routing laws and consequently the "equal access" rather than the pooling provisions of the agreement. If that is the case, WL could only carry the items after ELMA and PGL had first crack, after which waivers would have to be obtained in WL's behalf.

57. PGL, after analyzing WL's 1973 carryings from U.S. Pacific and Canadian ports, concludes that WL would stand to lose a maximum of only 1,590 revenue tons if Agreement No. 10056 were approved, a minimal amount of business compared to total revenue tons moving. This exercise is based upon a number of assumptions and even its final conclusion assumes that the loss of 1,590 revenue tons would not be

[11] In 1973, WL carried 55.9% of the woodpulp, 71.6% of the bulk alkane, and 73.3% of the lumber. The last item, while not excluded from the pool, moves out of Columbia River ports, which PGL is not essentially equipped to carry. Elsewhere the record indicates that so-called "low-rated" cargoes such as alkane, aluminum ingots, tinplate, all with rates at or lower than that for woodpulp ($40W) generated as much as 84% of WL's total revenue tons in 1973 in the U. S. Pacific/Argentine trade. (Exhibits 23 and 24).

significant. PGL begins with the fact that in 1973 WL carried 14,279 revenues tons from U. S. Pacific and Canadian ports to Argentina of which 12,689 tons consisted of cargoes (woodpulp, alkane, or Canadian cargo) either not covered by the agreement or by Argentine routing restrictions or not considered attractive cargo by PGL. Woodpulp and alkane, as ELMA has pointed out and the record shows, represented over 80 percent of WL's southbound revenue tonnage in 1973 in these trade areas and between 60 and 80 percent in previous years since 1970. The record shows that these items have generally been free of Argentine routing restrictions and that PGL does not consider them desirable cargoes, both being bulk commodities.[12] Theoretically, then, WL could continue to carry these items. Whether this fact standing alone would induce WL to continue its service in the subject trade area is another question. It should be remembered, however, as previously discussed, that the U. S. Pacific Coast/Argentine service of WL has been relatively small compared to WL's entire Latin American operation because of the greater volume of wayport and non-Argentine cargoes which WL has carried under its "A" service. But, as mentioned previously, since WL has now abandoned its "A" service in favor of a "C" service, WL's past experience with regard to wayport or non-Argentine cargoes or indeed with regard to overall financial results, cannot be used to predict WL's prospects.

[12] Woodpulp is not desirable cargo for PGL's M-Class cargo/passenger vessels and PGL does not regularly call at outports in the Pacific Northwest from which the greatest portion of forest products originates. Consequently PGL has carried relatively small quantities. Alkane, which is a bulk liquid, is not suitable because PGL's vessels presently do not have adequate tank capacity since the tanks have been converted to carry fuel oil. As Hearing Counsel contend, however, PGL could reconvert the tanks. Furthermore, the alkane is carried for a sole shipper and there is testimony that this commodity may become a controlled cargo in the future. Also, woodpulp, which is WL's most important single revenue-producing commodity, has been declining in tonnage over the past three years, dropping from 22,639 revenue tons in 1971 to 9,932 tons in 1973 from U. S. Pacific ports to Argentina. From Vancouver, British Columbia, the comparable figures are 25,456 down to 17,091.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 393(I)

NATIONAL STARCH & CHEMICAL CCORPORATION

v.

ATLANTIC CONTAINER LINE, LTD.

NOTICE OF DETERMINATION NOT TO REVIEW

November 1, 1977

Notice is hereby given that the Commission on November 1, 1977, determined not to review the decision of the Settlement Officer in this proceeding served October 18, 1977.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 393(I)

NATIONAL STARCH & CHEMICAL CORPORATION

v.

ATLANTIC CONTAINER LINE, LTD.

October 18, 1977

Reparation Awarded, in Part.

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

By complaint filed March 25, 1977, as amended August 15, 1977, National Starch & Chemical Corporation (complainant) alleges that Atlantic Container Line, Ltd., (carrier) applied incorrect rates or charges on each of several (six) individual shipments, resulting in combined overcharges of $449.81.[2] While a violation of the Shipping Act, 1916, is not alleged, it is presumed to be section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of the shipment.

The carrier, in response to the served complaint, admitted that the claims were denied solely on the basis of tariff rules which prohibit the payment of overcharge claims not presented to the carrier within six months after the date of the shipment.[3] The carrier also stated that it did not dispute the complainant's contentions of misapplication of rates, incorrect computation of cubic measurements and rate extension errors.

The carrier, under bill of lading No. B 75410, dated March 25, 1975, transported a container of cornstarch in drums on a house-to-house basis from Baltimore, Maryland, to Antwerp, Belgium. The carrier assessed a rate of $101.25 per 2,240 pounds on 40,448 pounds. The cargo should have been rated under tariff Item No. 048.8216.001 of the North Atlantic Continental Freight Conference Tariff (29), FMC–4, which provides for a

[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] The original complaint involved eleven (11) individual claims, five (5) of which proved to be time-barred by statute.

[3] North Atlantic French Atlantic Freight Conference Tariff No. (2), FMC–3, (Rule 8); North Atlantic French Atlantic Freight Conference Tariff No. (3), FMC–4 (Rule 9); North Atlantic Continental Freight Conference Tariff No. (29), FMC–4 (Rule 8); North Atlantic United Kingdom Freight Conference Tariff No. (47), FMC–2 (Rule 22).

rate of $93.75 per 2,240 pounds. On the basis of an incorrect application of freight charges, the complainant paid $1,910.54 ($1,828.27, plus a 4.5 percent currency surcharge of $82.27). The correct charges should have been $1,769.04 ($1,692.82, plus a 4.5 percent currency surcharge of $76.18). The resultant overcharge is $141.50 ($1,910.54, less $1,769,04).

The carrier, under bill of lading No. A 67058, dated April 19, 1975, transported a shipment of adhesive glue from New York, New York, to London, England. The carrier assessed a rate of $78.25 per 40 cubic feet on 216 cubic feet or 5.4 M/T. The cubic measurements shown on the bill of lading prove the shipment to consist of 204.5 cubic feet or 5.1 M/T. On the basis of an incorrect computation of cubic density, the complainant paid $422.55. The correct charges should have been $399.08. The resultant overcharge is $23.47 ($422,55, less $399.08).

The carrier, under bill of lading No. A 91138, dated July 5, 1975, transported a shipment of synthetic resin in bags from New York, New York, to Le Havre, France. The carrier assessed a rate of $86.50 per 40 cubic feet on 39 cubic feet. The cubic measurements shown on the bill of lading prove the shipment to consist of 28 cubic feet. On the basis of an incorrect computation of cubic density, the complainant paid $87.29 ($84.34, plus a currency surcharge of $2.95). The correct charges should have been $62.67 ($60,55, plus currency surcharge of $2.12). The resultant overcharge is $24.62 ($87.29, less $62.67).

The carrier, under bill of lading No. B 67402, dated July 10, 1975, transported a container of synthetic resin in drums on a house-to-house basis from Baltimore, Maryland, to London, England. The carrier assessed a rate of $99.75 per 2,240 pounds on 40,576 pounds. The cargo should have been rated under tariff Item No. 581.1001 which provides for a rate of $90.00 per 2,240 pounds. On the basis of an incorrect application of freight charges, the complainant paid $1,806.90. The correct charge should have been $1,630.29. The resultant overcharge is $176.61 ($1,806.90, less $1,630.29).

The carrier, under bill of lading No. A 67011, dated September 19, 1975, transported a shipment of water clarifying or purifying compounds in drums, value over $500, to and including $1,000 per 2,000 pounds, net weight, from New York, New York, to London, England. The carrier assessed a rate of $126.00 per 40 cubic feet based upon 117 cubic feet. The cargo should have been rated under tariff Item No. 510.0001 of North Atlantic United Kingdom Freight Conference Tariff (48), FMC–3, which provides for a rate of $104.00 w/m or within this value range. On the basis of an incorrect application of freight charges, the complainant paid $368.55. The correct charge should have been $304.20. The resultant overcharge is $64.35 ($368.55, less $304.20).

As previously stated, the carrier denied the above claims in accordance with the provisions of its tariffs restricting payment of overcharge claims to those claims filed within six months after date of shipment.

The complaint was filed with this Commission within the statutory time

limit specified by statute and it has been well-established by the Commission that the carrier's so-called "six-month" rule may not act to bar recovery of an otherwise legitimate overcharge claim in such instance.

Section 18(b)(3) of the Shipping Act, 1916, makes it unlawful for a carrier to retain compensation greater than it otherwise would be entitled to under the applicable tariff(s). Accordingly, the complainant hereby is awarded reparation as follows:

Bill of Lading B 75410	$141.50
Bill of Lading A 67058	23.47
Bill of Lading A 91138	24.62
Bill of Lading B 67402	176.61
Bill of Lading A 67011	64.35
Total	$430.55

In addition to the above, the claimant seeks $19.26 as reparation for an overcharge caused by an extention error on bill of lading No. A 91104 dated August 22, 1975. This bill covered a shipment of adhesive glue in drums and synthetic resin in bags from New York, New York, to Le Havre, France. The shipment was rated as follows:

2 Drums Adhesive Glue 638 lbs. at $196.00/2240 lbs.	$ 55.86
62 Bags Synthetic Resin 1612 lbs. at $89.75/2240 lbs.	83.02
Surcharge	6.25
	$145.13

The complainant correctly points out that the extension for the synthetic resin rate shown on the bill of lading should be $64.59 with a correspondent reduction in the 4.5 percent surcharge. However, the rate of $89.75 applies on a weight or measurement basis, whichever produces the greater revenue. Based upon the cubic measurements of the bags shown on the bill of lading (4 × 12 × 23), the shipment should have been rated as follows:

2 Drums Adhesive Glue 638 lbs. at $196.00/2240 lbs.	$ 55.86
62 Bags Synthetic Resin 39.61 cu. ft. at $89.75/MT	88.87
Surcharge	6.51
	$151.24

The resultant undercharge of $6.11 should be promptly adjusted between the parties with evidence of such adjustment furnished the undersigned to complete the record.

(S) WALDO R. PUTNAM,
Settlement Officer.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

SUBCHAPTER B—REGULATIONS AFFECTING MARITIME CARRIERS AND REGULATED ACTIVITIES

DOCKET NO. 72-19; GENERAL ORDER NO. 13

November 10, 1977

Part 536—Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States

AGENCY: Federal Maritime Commission

ACTION: Denial of Petitions for Reconsideration and implementation of revised tariff filing regulations.

SUMMARY: Petitions seeking reconsideration of 13 sections of General Order 13 as it was revised on October 2, 1975 (40 F.R. 47770) are denied, but several amendments to the regulations are being made on the Commission's own initiative based upon Petitioners comments. These modifications relax some requirements complained of as overly stringent and make numerous editorial changes which do not alter the substantive effect of the rules. The principal modification is the renumbering of most sections to conform the format of the foreign commerce tariff filing rules to the Commission's recently enacted domestic commerce regulations (General Order 38, 46 C.F.R. Part 531, 42 F.R. 54810). Further rulemaking on intermodal tariff requirements and other matters is anticipated shortly.

EFFECTIVE DATE: January 1, 1978

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney, Secretary
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5723

SUPPLEMENTARY INFORMATION:

The Commission has before it for decision five petitions seeking

reconsideration of its foreign commerce tariff filing regulations, as revised on October 2, 1975 (General Order 13, 46 C.F.R. Part 536, 40 F.R. 47770).[1]

The new features of the 1975 Rules fall into two general categories: (1) changes designated to regulate post-1970 developments in intermodal transportation; and (2) changes designated to clarify and update technical tariff format and filing requirements. Both types of changes were intended to aid shippers and the Commission's staff in applying ocean carrier tariffs. Petitioners seek reconsideration of 13 individual provisions, including five existing regulations which were not substantively altered by the 1975 revisions. The challenged sections of the 1975 Rules are:

1. 536.1(e). Definition of Local Rates.
"Should be made expressly synonymous with a carrier's port-to-port rate; the 1975 definition could be construed as *excluding* port-to-port rates."
ANAFC and South Atlantic Group.

2. 536.1(k). Definition of Transshipment.
"Inconsistent with parts of section 536.4; the word 'relay' should be added to the basic definition (first sentence) and 'feeder' and 'relay services' should be expressly excluded, regardless of whether such services are operationally controlled by the line-haul carrier."
ANAFC and South Atlantic Group.

3. 536.1(m). Definition of Substitute Service.
"Needlessly complex and substantive in nature; a thinly disguised attempt to enlarge the meaning of 'through intermodal transportation' to which additional tariff filing burdens attach."
ANAFC and South Atlantic Group.

4. 536.1(p). Definition of Port.
"Limiting the term 'port' to the place where actual transportation by water commences or terminates as to any *particular movement of cargo* favors LASH barge operators at the expense of other intermodal carriers; the definition should be constant for all modes of transportation; a port should be any place having water transportation facilities at which transportation by water does commence or terminate."
Sea-Land.

5. 536.15(d) (1). Intermodal tariffs must contain a precise breakout of port-to-port rates for each commodity.
"This is a harsh, commercially unreasonable, potentially disastrous practice in light of current intermodal arrangements between water and land carriers; inland carrier divisions are constants, and subject to container volume discounts, and calculated on a per container basis, while the through routes are calculated on a weight or measurement basis."
Trans-Pacific.

6. 536.4(a) (12). Tariff subscription price must include any bill of lading or rules tariff published by the carrier.
"Section 18(b) (1) does not require carriers to *distribute* bill of lading tariffs to *all* their tariffs subscribers; many shippers do not need all the components of a carrier's tariff; it is sufficient that supplementary subscriptions be offered at a reasonable cost."

[1] The effective date of the revised regulations (1975 Rules) was stayed pending disposition of the instant petitions. Foreign commerce carriers continue to operate under the previous General Order 13 regulations (Existing Rules).

Petitions were received from Sea-Land Service, Inc. (Sea-Land); the Association of North Atlantic Freight Conferences (ANAFC); Waterman Steamship Corporation (Waterman); five Trans-Pacific Freight Conferences (Trans-Pacific) and two U.S. West Coast/Latin America Conferences (Pacific Coast). Replies were tendered for filing by ANAFC and by a group of six U.S./Europe freight conferences (South Atlantic Group). Former section 502.261 of the Commission's Rules shall be waived to permit the filing of these replies.

Trans-Pacific.

7. 536.4(a) (4) (i). Tariffs listing a range of ports served must also include a specific listing of ports *not* served.

"Section 18(b) does not provide an unequivocal answer on this point as evidenced by the Commission's long standing practice of accepting only a statement of the range of ports; the rule should at least permit carriers to serve *designated ports* in a range of ports with the proviso that undesignated ports may be served on an 'inducement subject to agreement' basis; the phrase 'any restriction applying at a port' should be modified to read 'any restriction under the control of or imposed by the carrier.' "

ANAFC and South Atlantic Group.

8. 536.5(O). Conditional, temporary or emergency rates (including project rates) shall be listed under the appropriate commodity heading for each commodity affected.

"Many projects involve hundreds of commodities and the materials shipped are often not described by the carrier in the same manner as its existing commodity descriptions; it is not enough to say that large projects may be granted special permission not to list each commodity; such a procedure is time consuming and troublesome for carriers and the present standard of 'impossibility' is unfair; it would be better to place the burden on the Commission by having the staff reject any unreasonably small or non-*bona fide* project filings; a new section should be inserted to read 'Project rates may be placed in a special section of the tariff providing that the Table of Contents or Commodity Index contain a specific reference to Project Rates.' "

Pacific Coast and Waterman.

9. 536.6(a) (2). Amendments to dual rate contract rates may not be increased less than 90 days after a previous rate change has taken effect *and* before 90 days' notice has been given to contract shippers.

"This rule conflicts with the pending proceeding in Docket No. 75-13."

ANAFC, Sea-Land, and South Atlantic Group.

10. 536.4(b) (10) (v). Freight Forwarder compensation must be included in carrier tariffs.

"The rule should be revised to state that tariffs include freight forwarded compensation 'on the ocean freight' because there is considerable confusion as to what a permissible basis for freight forwarder compensation might be."

ANAFC and South Atlantic Group.

11. 536.9(c). Tariffs on imports to New York shall contain a rule which complies with General Order 8.

"This rule conflicts with the pending evidentiary proceeding in Docket No. 73-55 pertaining to the application of General Order 8 to containerized imports."

Sea-Land and ANAFC.

12. 536.5(L). When a dual rate system permits two rates to be employed, both the contract and the noncontract rates shall be published with each individual commodity item subject to the dual rate system.

"This requirement is in the present tariff rules and was superseded by Circular Letter 10-74 upon the request of ANAFC members. The Circular Letter stated that the suspension was temporary and occasioned by the 'international paper and forestry products shortage,' a somewhat dubious basis not mentioned in ANAFC's waiver request. It should be sufficient for carriers to provide a formula for calculating dual rate contract discounts rather than publishing two rates for each commodity. To do otherwise would make the use of commodity coding data more difficult."

ANAFC and South Atlantic Group.

13. 536.8(a). The last sentence of the rule states that "Section 14b of the Act does not permit . . . relief from the [advance filing] requirements of that section and applications for such permission will not be entertained."

"A statutory prohibition against section 14b waivers exists *only* if section 14b were interpreted as a *notice* provision. Until Docket No. 75-13 is resolved by the Commission the last sentence of the proposed rule should be deleted as it prejudges the issue in that proceeding."

ANAFC and South Atlantic Group.

In light of Petitioners' arguments and the Commission's recent experience in revising its domestic tariff regulations (Docket No. 76–40, 42 F.R. 54810) we have determined to make certain modifications in the 1975 Rules. The following *sua sponte* amendments are either of an editorial nature or ease 1975 requirements which were complained of as burdensome.

I. Part 536 has been renumbered to coincide with Part 531; section 536.12 has been consolidated with section 536.2; and sections 536.13, 536.14 and 536.17 have been combined in a single section captioned "Exemptions and exclusions."

II. The definitions of "through rate", "through route", "transshipment", "interchange", "substitute service", "absorption", "equalization", "port", "feeder service", "water carrier" and "intermodal transportation" have been temporarily withdrawn from section 536.1 to avoid possible conflict with recent court cases concerning intermodal transportation and the Commission's General Order 38. The definition of "carrier" was conformed to the definition in the Existing Rules, except that an express reference to nonvessel operating carriers was added to avoid any claim that the Commission has altered its long standing recognition of nonvessel operating carriers as section 1 carriers.

III. Section 536.14 governing through intermodal transportation tariffs has been withdrawn and existing section 536.16 adopted in its place, thereby temporarily removing the requirement that tariffs contain a precise breakout of the port-to-port rates for each commodity carried. Existing section 536.16 contains its own definitions of "through rate" and "through route." The reference to "through intermodal transportation" in section 536.1(u) was also deleted in light of the withdrawal of sections 536.14 and 536.1(r).

IV. A reference to the Commission's statutory responsibilities to police and prevent undully discriminatory and prejudicial practices pursuant to Shipping Act sections 15, 16, and 17 has been added to section 536.0. Tariff regulations which rely upon statutory authority in addition to that of sections 18(b) and 14b is consistent with past Commission action and the purposes of the Shipping Act. *Filing of Through Rates and Through Routes*. 35 F.R. 6394, 6397 (1970); *Report in Docket No. 875* (General Order 15), 30 F.R. 12682 (1965).

V. Section 536.16 establishes an effective date for the 1975 Rules which has long since passed. A new effective date is stated in the dispositive language of the instant Order and section 536.16 has been deleted.

VI. Section 536.4(a) (12) has been relaxed to permit carriers to offer individual subscriptions to bill of lading tariffs, rules tariffs, or other major components of their total tariff filing rather than charging a single subscription price which includes all tariff material on file, regardless of its usefulness to particular shippers. It is expected, however, that carriers

will provide subscription information which can be readily understood by shippers and which clearly identifies the various tariff components available and the charge assessed for each.

VII. Section 536.6(a) (2) has been modified to coincide with the Commission's final decision in Docket No. 75-13, 17 SRR 305 (1977). I.e., contract rates may be increased after 90 days' notice to contract shippers without regard to the length of time the rate has been in effect.

VIII. Section 536.5(O) has been mitigated by the addition of a new subsection which permits *bona fide* multiple commodity "project rates" to be printed in a special tariff section whenever the tariff contains a Table of Contents clearly identifying the existence of such a "project rates section."

IX. Section 536.8(a) has been amended to eliminate the last sentence which flatly proscribed the filing of requests for special permission to increase Merchant's Contract rates upon short notice. The Commission wishes to reserve judgment on this point until it has an appropriate opportunity to consider the matter in greater depth. In the interim, any such requests shall be entertained on an *ad hoc* basis.

These amendments moot Petitioners' stated objections to Items 1, 2, 3, 4, 5, 6, 8, 9, and 13, above. We wish to stress, however, that this action is taken only as an interim measure and does not represent the Commission's final position on the points in question—especially insofar as intermodal tariff filings are concerned. Another rulemaking proceeding proposing definitions (and other matters) which more closely parallel the domestic commerce regulations served October 4, 1977 in Docket No. 76-40 (General Order 38, 46 C.F.R. Part 531) is contemplated.

Petitioners' remaining contentions (Items 7, 10, 11 and 12, pp. 3-4, above) are rejected for the following reasons.

Item 7. Section 536.4(a) (1). Shipping Act section 18(b) requires precision in tariff preparation, content and filing to the greatest extent practical. The Commission is responsible for interpreting what is "practical" in light of current shipping conditions. In today's containerized, highly competitive shipping environment, the Commission's staff, port interests, competing carriers and shippers can all better conduct their business when tariffs list only the individual ports or points which actually receive regular service from the publishing carrier(s). ANAFC has failed to demonstrate any harm which would occur from requiring carriers to amend their tariffs upon the requisite statutory notice when they wish to call at additional ports in a port range they already serve, especially since the notice period may be shortened in appropriate cases by use of the special permission process.

Item 10. Section 536.4(b) (10) (v). This requirement has long been applicable to foreign commerce carriers as section 510.24(f) of the Commission's Freight Forwarder Rules (General Order 4). The 1975 Rules restate the General Order 4 requirement purely as an organizational improvement—in order that all tariff regulations might appear together in

General Order 13. The challenged rule requires carriers to accurately *disclose* what they pay to ocean freight forwarders. It is beyond the scope of this proceeding to determine whether modifications should be made in the nature and extent of forwarder brokerage compensation that carriers are presently paying. ANAFC's broad, conclusory contention that 1975 section 536.4(b) (10)(v) is vague and ineffective should be presented in the form of a petition or complaint directed at specific aspects of General Order 4.

Item 11. Section 536.9(c). Sea-Land misconstrues the purpose of the regulation, which is to insure that tariffs contain a rule that complies with the free time requirements of the Commission's General Order 8 (46 C.F.R. Part 526)—regardless of what these requirements are at any particular time. The fact that possible extensions of General Order 8 are under consideration in pending Docket No. 73–55 is therefore irrelevant to the instant proceeding.

Item 12. Section 536.5(1). The requirement that both contract and noncontract rates be published immediately adjacent to each individual tariff item to which they apply long precedes the 1957 Rules. Subsequent to the initiation of this proceeding, the Commission chose to temporarily suspend this existing requirement (Circular Letter 10–74), and, as a matter of policy, believes it desirable to briefly continue both the rule and the temporary suspension to gather further operating experience concerning the value of "Conversion Tables" as a means of establishing noncontract rates. Further rulemaking on this point is anticipated shortly.

THEREFORE, IT IS ORDERED, That the aforesaid "Replies to Petition for Reconsideration" are accepted for filing; and

IT IS FURTHER ORDERED, That the aforesaid "Petitions for Reconsideration" are denied; and

IT IS FURTHER ORDERED, That, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 14b, 15, 16, 17, 18(b), 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 813a, 814, 815, 816, 817(b), 820 and 841(a), the Commission's Foreign Commerce Tariff Rules (46 C.F.R. Part 536; General Order 13) are amended.*

IT IS FURTHER ORDERED, That the aforesaid amendments shall take effect on January 1, 1978. New or reissued tariffs tendered for filing on or after January 1, 1978 shall be fully subject to the new regulations. Tariff *amendments* submitted on or after the effective date will, however, continue to be accepted in the same format as the tariff being amended until January 1, 1979. On or after the latter date, all tariff material employed by common carriers by water in the foreign commerce of the United States shall fully conform to the requirements of revised Part 536. Tariffs on file January 1, 1979 which do not meet the requirements of revised Part 536 shall be cancelled; and

IT IS FURTHER ORDERED, That any existing grants of special

*The text of the amendment is reprinted in 46 C.F.R. 536.

permission excusing compliance with foreign commerce tariff filing requirements beyond the aforesaid effective date of revised Part 536 shall continue according to their original terms until further action of the Commission.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 346(I)

C S C INTERNATIONAL, INC.

v.

VENEZUELAN LINES

NOTICE OF DETERMINATION NOT TO REVIEW

November 8, 1977

Notice is hereby given that the Commission on November 8, 1977, determined not to review the decision of the Settlement Officer in this proceeding served October 25, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 346(I)

C S C INTERNATIONAL, INC.

v.

VENEZUELAN LINES

October 25, 1977

Reparation awarded.

DECISION OF FRANK L. BARTAK, SETTLEMENT OFFICER[1]

C S C International, Inc. (CSC) seeks $1,333.56 from Venezuelan Line for an alleged overcharge of freight on a shipment of 110 drums of Animal Feed Supplement from New Orleans to Puerto Cabello, Venezuela on the vessel MERIDA under bill of lading No. 27 dated April 3, 1974.

Complainant states that the shipment weighed 65,856 pounds and that the freight paid was $2,966.77 including surcharges and other accessorial charges, based upon a rate of $81.75 per weight ton.

According to complainant the correct rate for this shipment should have been $41.25 per weight ton of 2000 pounds, as provided in Item 280 of the United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference Freight Tariff F.M.C. No. 2. The freight was prepaid.

In a letter antedating the filing of the complaint herein, the carrier admitted that the claim was correct but denied the claim based upon Item 11, of the United States Atlantic and Gulf-Venezuela and Netherlands Antilles Conference Freight Tariff which requires that claims be filed within six months of date of shipment.

The Commission has repeatedly held that the conference tariff rule, requiring the presentation of claims for adjustment of freight charges within six months after date of shipment, cannot bar determination on their merits, if the claims are filed with the Commission within two years of accrual.[2]

[1] Both parties deemed to have consented to the informal procedure under Subpart S, 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.

(Note: Notice of determination not to review November 8, 1977).

[2] Informal Docket No. 115(I), *Colgate Palmolive Co.* v. *United Fruit Co.*, 11 SRR 979 (1970); *The Carborundum Co.* v. *Venezuelan Line*, 17 FMC 198, 201 (1973).

Under "Subpart S—Informal Procedure for Adjudication of Small Claims," the Commission's rules provide that if a carrier, in its response, is silent regarding consent to the informal procedure, the carrier is nevertheless deemed to have consented. See 46 CFR 502.304(e).

Despite a specific invitation to submit additional information in defense of the claim, the carrier has filed no response. Under the circumstances, it appears to this Settlement Officer that a determination on the merits of the claim is warranted.

In support of its claim, complainant filed a copy of the bill of lading, a copy of the CSC invoice (with translation), a copy of the letter of denial from the carrier (which admits the correctness of the claim but denies the claim as time-barred per conference tariff), and a copy of the pertinent pages of the tariff.

The bill of lading clearly describes the shipment as 110 drums of Animal Feed Supplement (Choline Chloride 70%) weighing 65,856 pounds.

The shipment was billed at $81.75 per ton, the rate for "Feed, Animal or Poultry, NOS . . . including . . . Supplements, NOS" based on "Actual value over $500.00 per 2000 lbs." According to complainant the actual value was $287.91 per ton and the shipment should have been billed at the rate of $41.25, the rate for "Actual value over $250.00 but not over $350.00 per 2000 lbs."

From review of the tariff and supporting documents, complainant was billed at the rate of $81.75 per ton or $2,691.84 and should have been billed for the 32.928 tons at the rate of $41.25 per ton or $1,358.28, resulting in an overcharge of $1,333.56.

This Settlement Officer can symphathize with the carrier faced with an overcharge claim made almost two years after shipment and based on value per the shipper's invoice. However, the claim was filed within two years of accrual. The conference tariff, requiring submission within six months of date of shipment, cannot bar determination on its merits. The shipper's invoice supports the claim and respondent carrier has admitted that claim is correct and has offered nothing (other than the six-month tariff rule) in defense.

Complainant has proved its overcharge claim herein and is hereby awarded reparation in the amount of $1,333.56 from Venezuelan Line.

(S) FRANK L. BARTAK,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 436(I)

THE R. T. FRENCH COMPANY

v.

PRUDENTIAL LINES, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

December 6, 1977

Notice is hereby given that the Commission on December 2, 1977, determined not to review the decision of the Settlement Officer served November 23, 1977.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 436(I)

THE R. T. FRENCH COMPANY

v.

PRUDENTIAL LINES, INC.

November 23, 1977

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

By complaint timely filed with the Commission on August 24, 1977, The R. T. French Company (complainant) alleges that Prudential Lines, Inc. (respondent) applied an incorrect rate to a shipment of empty glass bottles resulting in an overcharge of $2,842.66. Complainant alleges that the overcharge is in violation of Section 18(b) (3) of the Shipping Act, 1916.

In denying the claim in its letter of May 25, 1977, respondent referred to the publicly stated policy of the Associated Latin American Freight Conferences not to honor late filed claims regardless of merit.[2] In addition, respondent advised complainant:

"A commercial invoice attached to your claim indicates FAS value $10,962.00 and C and F value $19,649.52. We certainly do not agree as this bill of lading was rated in accordance to shipper's export declaration Schedule B 6651110 indicating a value of $40,392.00, therefore, bills of lading are rated according to FOB value and not FAS or C and F. Moreover, this bill of lading was correctly rated and this is the main reason of declining your claim."

The shipment moved from New York, New York to Puerto Cabello, Venezuela on the S/S SANTA RITA on bill of lading number 62 dated May 12, 1976. The shipment was described thereon as 101 pallets (5049 cardboard ctns.) of empty glass bottles measuring 4,025 cubic feet and weighing 53,014 pounds. The applicable tariff is the United States Atlantic

[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 complaint was filed with this Commission within the time limit specified by statute; and it has been well-established by the Commission that a carrier's so-called "six-month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

& Gulf-Venezuela and Netherlands Antilles Conference S.B. Ven.-11 Freight Tariff F.M.C. No. 2.

Respondent assessed the rate from Item No. 175 on 17th Revised Page 29 which covers Bottles, or Jars, Glass, Empty, N.O.S. Actual value over $1,000.00 per 2,000 pounds, which was $78.25 per 40 cubic feet or 2,000 pounds. Because of the high cubic measurement of the shipment, $\frac{4,025\text{cft}}{40} = 100.625$ measurement tons compared to $\frac{53,014}{2,000} = 26.507$ weight tons, respondent computed the charges on a measurement basis. Rates and charges assessed were:

Ocean Fright	4,025 cft	$78.25/40 cft	$7,873.91
Bunker Surcharge[3]	4,025 cft	$ 4.80/40 cft	483.00
Port Congestion[4]	4,025 cft	$ 3.00/40 cft	301.88
Total			$8,658.79

The claim centers on the actual value of the bottles per ton of 2,000 pounds. Complainant submitted the following pertinent documents: (1) the bill of lading; (2) respondent's due bill; (3) a letter from respondent to complainant alleging the shipment was valued at $40,392.00 based on Export Declaration Schedule B 6651110; (4) a copy of the export declaration; (5) a certified translation from Spanish to English of the commodity description on the invoice "jars for mustard with a 6 oz. capacity" and (6) a copy of the Invoice (No. 470-3220) which is cross-referenced on the bill of lading.

A review of the export declaration reveals that the figure respondent cites as valuation, i.e., 40,392 is net quantity in Schedule B units. The value declared on the export declaration is $9,593.00. Complainant advised its rate auditor of this in its letter of August 4, 1977.

In computing the actual value per ton of 2,000 pounds, it does not matter if we use the declared value on the export declaration, i.e., $9,593.00 or the value complainant indicated in its claim, i.e., $10,962.00. The latter figure was arrived at by use of complainant's invoice:

Jars for mustard with a 6 oz. capacity	$9,593.00
Palletization charge	505.00
Inland freight	864.00
	$10,962.00

Using the valuation indicated on the export declaration, $\frac{\$9,593}{26.507}$ results in a value per ton of 2,000 pounds of $360.19. Using the valuation indicated in the claim, $\frac{\$10,962}{26.507}$ results in a value per ton of 2,000 pounds

[3] Item 9, 9th Revised Page 11-A of subject tariff.
[4] Ibid.

of $413.56. Either way the actual value is over $350.00 but not over $600.00 per ton of 2,000 pounds. Therefore, the applicable rate under Item 175 of the Tariff is $50.00 per measurement ton of 40 cubic feet.

Complainant alleges that rates and charges should have been computed as follows:

Ocean Freight	4,025 cft	$50.00/40 cft	$5,031.25
Bunker Surcharge[5]	4,025 cft	$ 4.80/40 cft	483.00
Port Congestion[6]	4,025 cft	$ 3.00/40 cft	301.88
			$5,816.13

The amount assessed was $8,658.79, complainant indicated that the amount that should have been assessed was $5,816.13. The overcharge claim is for $2,842.66. It has been substantiated.

In a letter of October 24, 1977, respondent indicated that it was required by the Conference to raise the six months late claim reporting rule but apart from that it must agree that complainant is correct. The six month rule has already been discussed and disposed of. Reparation of $2,842.66 is awarded to the complainant.

(S) JUAN E. PINE,
Settlement Officer.

[5] Item 9, 9th Revised Page 11-A of subject tariff.
[6] Ibid.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 489

WILLIAMS, CLARKE COMPANY, INC.

v.

SEA-LAND SERVICE, INC.

ORDER ON REMAND

November 29, 1977

Sea-Land Service, Inc. (Sea-Land) applied for permission to refund a portion of the freight charges collected on a shipment of rubber pneumatic tires which moved from Long Beach, California to San Juan, Puerto Rico. The complaint filed under section 22 of the Shipping Act, 1916 (the 1916 Act), in the form of an application as required by Rule 92(b) of the Commission's Rules of Practice and Procedure (46 C.F.R. section 502.92(b)), alleges that, when Sea-Land reissued its tariff to incorporate a 30% rate increase and a 11% surcharge, the truckload (TL) rate on tires, contained in the cancelled tariff which was lower than the rate on less-than-truckload (LTL) shipments, had by clerical error been omitted from the new tariff, and that the rate of 82 cents per cubic foot in effect at the time of shipment, as it applied to TL as well as to LTL shipments alike was unjust and unreasonable.

In his Initial Decision, Administrative Law Judge Thomas E. Reilly found that inasmuch as Sea-Land's tariff had in the past consistently provided lower rates on TL than on LTL shipments, the assessment of the rate applicable to LTL shipments to a shipment offered in TLS was unjust and unreasonable in violation of section 18(a) of the 1916 Act and section 2 of the Intercoastal Shipping Act, 1933 (the 1933 Act). The Presiding Officer determined that 68 cents per cubic foot rather than 82 cents per cubic foot collected by Sea-Land was the maximum just and reasonable rate applicable to this shipment. In reparation for the unlawful charge, the Presiding Officer granted Sea-Land permission to refund $296.36 from the charges collected "to the party which paid" those charges. The Commission determined to review the Presiding Officer's Initial Decision.

While we agree with the Presiding Officer's award of reparation, we

are not convinced that this award was made to the proper party. The Initial Decision authorizes the refund requested "to the party which paid the freight charges", leaving unclear who the recipient actually is. The only parties here are Complainant and Respondent, yet the award implies that some other "party", a stranger to the proceeding, might be entitled to the refund.

Section 22 of the 1916 Act provides in part:

> "*Any* person may file with the board a sworn complaint setting forth any violation of this Act. . . . The board . . . may direct the payment . . . of full reparation *to the complainant* for the injury caused by such violation. (Emphasis added) 46 U.S.C. 821.

Thus, while "any person" may file a complaint, reparation may be awarded only to a complainant who has shown that it was injured by a violation of the statute.

The application states that Complainant paid the charges. It does not say in what capacity. Complainant, an independent ocean freight forwarder, was not the shipper[1] and thus had no obligations to the carrier under the contract of affreightment.[2] In the event Complainant advanced freight monies as agent of the shipper, we do not know whether and to what extent it was reimbursed by its principal.

As Complainant was not a party to the contract of affreightment, he would have no standing to seek reparation under that contract in the absence of an assignment of the claim from the shipper. See *Ocean Freight Consultants, Inc. v. Bank Line Ltd.*, 9 F.M.C. 211 (1966). Should it appear that Complainant was not fully reimbursed for the freight paid, such an assignment might be implied. The record however is void of the information needed to reach a conclusion in that respect.

For the foregoing reasons we are remanding the proceeding to the Presiding Officer and directing expedited handling so that he may elicit the information necessary to make additional findings of fact and conclusions of law on the questions raised herein, and issue a supplemental decision thereon, within 60 days of the date of this Order.

THEREFORE, IT IS ORDERED, That this proceeding be remanded to the Presiding Officer for decision consistent with this Order.

By the Commission.

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

[1] "Shipper" means "the owner or person for whose account the carriage of the goods is undertaken." *Norman G. Jensen, Inc. v. Federal Maritime Commission*, 497 F.2d 1053 (8 Cir. 1974).

[2] The bill of lading names as shipper the Goodyear Tire & Rubber Company and as consignee the Goodyear Western Hemisphere Corp.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 514

MILCHEM INCORPORATED

v.

FLOTA MERCANTE GRAN CENTROAMERICANA, S. A.

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

November 3, 1977

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 3, 1977.

It is Ordered, That applicant is authorized to waive collection of $382.11 of the charges previously assessed Milchem Incorporated.

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 514 that effective December 10, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from December 10, 1976, through January 18, 1977, the rate to Gulf Ports on 'Mud, Drilling Additives and Barytes', under 500 Tons is $50W, 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. 514

MILCHEM INCORPORATED

v.

FLOTA MERCANTE GRAN CENTROAMERICANA, S.A.

Adopted November 3, 1977

Application granted.

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

Respondent (Flomerca) seeks permission to waive collection of a portion of the freight charges on a shipment of Mud, Drilling Additives and Barytes from Houston, Texas, to Santo Tomas de Castilla, Guatemala, aboard respondent's vessel the *Dominique V–149*. The shipment weighing 20,655 lbs. moved under bill of lading dated December 11, 1976. The aggregate freight charges collected of $516.38 were based upon a rate of $50.00 per 2000 lbs., the rate which respondent thought was applicable to the shipment. A waiver for the collection of $382.11 is sought.

By telex of December 10, 1976, Flomerca sought to establish an initial rate on Mud, Drilling Additives and Barytes from Gulf Ports of $50.000 per 2000 lbs. Due to typographical error the requested effective date was stated as December 1, instead of December 10. The Commission's Bureau of Compliance, by letter dated January 24, 1976, rejected this filing since "no filing may bear an effective date prior to the date of its receipt by the Commission." Unaware that the filing had been rejected, Flomerca charged and collected aggregate freight on the basis of the $50.00 rate. In view of the rejection of Flomerca's filing the applicable rate at the time of shipment was the General Cargo rate of $87.00 per 2000 lbs. Flomerca has filed a tariff containing the $50.00 rate. No other shipments were involved and no discrimination would result from granting the waiver.

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

[1] This decision became the decision of the Commission November 3, 1977.

Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of 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: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[2]

The error set forth in the application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Accordingly it is found:

1. That there was a clerical error which resulted in rejection of the rate sought.
2. The waiver requested will not result in discrimination among shippers.
3. Prior to applying for the waiver a new tariff was filed setting forth the rate on which the waiver was based.
4. The application was filed within 180 days from the date of shipment.

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

WASHINGTON, D.C.,
November 3, 1977.

[2] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice an Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 408(I)

CONTINENTAL SHELLMAR, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

November 29, 1977

Notice is hereby given that the Commission on November 29, 1977, determined not to review the decision of the Settlement Officer in this proceeding served November 15, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 408(I)

CONTINENTAL SHELLMAR, INC.

v.

SEA-LAND SERVICE, INC.

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Continental Shellmar, Inc. (complainant) claims the difference between transportation charges based on assessment of a $52.50 rate instead of a lower commodity rate of $42.00 per 40 cubic feet, charges paid $2,546.55 instead of $2,105.02, or $441.53 as reparation from Sea-Land Service, Inc. (respondent) for alleged freight overcharges. The shipment moved house-to-house from Baltimore, Maryland to Kingston, Jamaica on the SS SEATTLE on bill of lading number 956648523 dated May 13, 1975. The applicable tariff is the United States Atlantic Gulf-Jamaica Conference S.B. JAM–8 Freight Tariff F.M.C. No. 1.

The shipment measured 1,682 cubic feet as indicated on the bill of lading and consisted of two containers containing 32 pallets of metal parts for tin cans. The carrier assessed a rate of $52.50 per ton of 40 cubic feet on the basis of Cans, N.O.S. Class 4, 9th Revised Page 45, as provided under volume shipments on 16th Revised Page 38. Total rates and charges assessed were as follows:

Ocean Freight	1,682 cft	$52.50/40 cft	$2,207.63
Bunker Surcharge	1,682 cft	$ 6.00/40 cft	252.30
Rate of Cess[2]	1,682 cft	$ 2.06/40 cft	86.62
Total			$2,546.55

Complainant advises that the claim as submitted directly to the Commission in view of the publicly stated policy of the Associated Latin

[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.

(*Note: Notice of decision not to review* November 29, 1977.

[2] The terminals at Kingston assess a charge against vessels which is said to be similar to payments made towards a guaranteed annual income paid to stevedoring labor in the port of New York.

American Freight Conferences not to honor claims filed with its members which are submitted after six months of the date of shipment. This policy appears in the tariff in Item 116(a) which provides:

"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 weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found."[3]

Complainant timely filed its complaint with the Commission on May 12, 1977 alleging violation of Section 18(b)(3) of the Shipping Act, 1916. The claim was accompanied by a bill of lading and invoice. The invoice covers "Ends." The bill of lading description is Metal Parts for Tin Cans.

Complainant alleges that the applicable rate for tin can parts (can ends) is the rate in Item 257, on 9th Revised Page 20–1 of the subject tariff, which is $42.00 per 40 cubic feet applicable to Tin Cans, Empty, S.U. in carrier's containers stuffed by shipper. He refers to the subject tariff's Item 10(f) which provides:

"Whenever rates or ratings are provided for an article named herein the same basis will also be applicable on named parts of such article, when so described on the ocean Bills of Lading, except where specific rate is provided for such parts."

In view of the lack of a more specific rate in the tariff on metal parts for tin cans, complainant's commodity description is closer then that used by respondent. If the evidence shows that a more specific tariff item fits the commodity shipped, claimant is entitled to be rated under that item. *The Carborundum Company* v. *Royal Netherlands Steamship Company (Antilles) N.V.*, decided January 5, 1977. Rules of tariff construction also require that the more specific of two possible applicable tariff items must apply, *Corn Products Company* v. *Hamburg—Amerika Lines*, 10 FMC 388 (1967).

Complainant recomputes the rates and charges he feels should have been assessed:

Ocean Freight[4]	1,682 cft	$42.00/40 cft	$1,766.10
Bunker Surcharge		$ 6.00/40 cft	252.30
Rate of Cess[5]		$ 2.06/40 cft	86.62
Total			$2,105.02

Complainant paid $2,546.55 transportation charges on this shipment. The proper charge, indicated above is $2,105.02. Therefore, the claim for $441.53 has been substantiated.

[3] The complaint was filed with this Commission within the time limit specified by statute; and it has been well-established by the Commission that carrier's so-called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

[4] The lower volume rate of $34.00 for a minimum of 1600 cft included in Item 257 does not apply as the shipment moved in to 35' containers. See Item 128(V) of the subject tariff.

[5] See footnote 2.

In a letter of July 12, 1977, respondent indicated that the complainant was correct in his contention of the rate that should have applied. Respondent further indicated that it was awaiting this decision regarding the proper disposition of the overcharge.

Complainant has sustained the burden of proof and respondent advises that complainant is correct. Reparation of $441.53 is awarded to the complainant.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 407(I)

CONTINENTAL SHELLMAR, INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

November 29, 1977

Notice is hereby given that the Commission on November 29, 1977, determined not to review the decision of the Settlement Officer in this proceeding served November 15, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 407(I)

CONTINENTAL SHELLMAR, INC.

v.

SEA-LAND SERVICE, INC.

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

Continental Shellmar, Inc. (complainant) claims the difference between transportation charges based on assessment of a $54.50 rate per 40 cubic feet instead of a lower volume (1600 cubic foot) commodity rate of $34.00 per 40 cubic feet, charges paid $2,602.50 instead of $1,749.70, or $852.80 as reparation from Sea-Land Service, Inc. (respondent) for alleged freight overcharges. The shipment moved from New York, New York to Kingston, Jamaica on the SS TAMPA on bill of lading number 941951 dated July 22, 1975. The applicable tariff is the United States Atlantic & Gulf-Jamaica Conference S.B. JAM–8 Freight Tariff F.M.C. No. 1.

From the measurements on the bill of lading respondent determined that the shipment measured 1,664 cubic feet, and complainant agrees. The shipment consisted of 1,868 cartons of empty metal tin cans, setup and parts. The carrier assessed a rate of $54.50 per ton of 40 cubic feet. Total rates and charges assessed were as follows:

1—Container 1868 Ctns—Empty Metal Tin Cans S/U & Parts	1,664 cft	$54.50/40 cft	$2,267.20
Bunker Surcharge	1,664 cft	$ 6.00/40 cft	249.60
Rate of Cess[2]	1,664 cft	$ 2.06/40 cft	85.70
Total			$2,602.50

Complainant filed a claim with respondent on May 6, 1977. On June 2,

[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.

(Note: Notice of determination not to review November 29, 1977.

[2] The terminals at Kingston assess a charge against vessels which is said to be similar to payments made towards a guaranteed annual income paid to stevedoring labor in the port of New York.

1977, respondent denied the claim based on tariff Item 116(a) which provides:

"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 weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found."[3]

Complainant timely filed its complaint with the Commission on May 12, 1977 alleging violation of Section 18(b)(3) of the Shipping Act, 1916. The claim was accompanied by a bill of lading and invoice. The invoice covers open top cans and loose ends. The bill of lading description is Empty Metal Tin Cans S/U & Parts.

Complainant alleges that respondent's basis for the ocean freight rate of $54.50 per 40 cubic feet is unknown. He further states that the applicable rate is found in the subject tariff under Item 257 on 9th Revised Page 20–1. The description thereunder is Tin Cans, Empty, S.U.: In Carrier's Containers, Stuffed by Shipper, minimum 1600 cubic feet. The contract rate thereunder is $34.00 per 40 cubic feet. Complainant further refers to Item 10(f) which provides in essence that whenever rates or ratings are provided for an article named in the tariff the same basis will apply on the named parts of such article, except where a specific rate is provided for such a part. It is indicated that a specific rate is not provided for tin can parts, therefore, Item 257 is applicable to tin can parts.

Complainant recomputes the rates and charges he feels should have been assessed:

Ocean Freight	1,664 cft	$34.00/40 cft	$1,414.40
Bunker Surcharge	1,664 cft	$ 6.00/40 cft	249.60
Rate of Cess[4]	1,664 cft	$ 2.06/40 cft	85.70
Total			$1,749.70

Complainant paid $2,602.50 total transportation charges on the shipment. The proper charge, indicated above, is $1,749.70. Therefore, the claim for $852.80 has been substantiated.

In a letter of July 12, 1977, respondent indicated that the complainant was correct in his contention of the rate that should have applied. Respoondent further indicated that it was awaiting this decision regarding the proper disposition of the overcharge.

Complainant has sustained the burden of proof and respondent advises

[3] The complaint was filed with this Commission within the time limit specified by statute; and it has been well-established by the Commission that a carrier's so-called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

[4] See footnote 2.

that complainant is correct. Reparation of $852.80 is awarded to the complainant.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-39

LATINVAN, INC., FREIGHT FORWARDER LICENSE NO. 1660

DISCONTINUANCE OF PROCEEDING

December 2, 1977

This proceeding is before the Commission on Joint Motion of Respondent Latinvan, Inc. and Hearing Counsel for dismissal of the Order to Show Cause issued by the Commission in this proceeding. This proceeding was instituted to determine whether Respondent's license to operate as an independent ocean freight forwarder should be suspended or revoked.

The basis of the Commission's Order was Respondent's apparent failure to respond to written inquiries, dated December 13, 1976, and May 2, 1977, from the Commission's Office of Freight Forwarders, wherein Respondent was asked to submit information of amounts due and payable to ocean carriers and/or steamship agents for ocean freight on shipments Respondent handled as forwarder. When no reply to these letters was received, the Commission, on July 28, 1977, instituted this proceeding.

We are now advised that Respondent only learned of the Commission's Order when an item in the Journal of Commerce was called to his attention and that upon so being informed Respondent immediately contacted the Commission, by telephone and letter of the same day, explaining that it had never received the letter of December 13, 1976, and that it had, by letter of May 18, 1977 replied to and submitted, the information requested by the Commission's letter of May 2, 1977. A copy of Respondent's May 18 letter with attachment was enclosed. Respondent by affidavit confirmed these events.

Because the premise for the issuance of the Order to Show Cause was Respondent's apparent failure to answer the Commission's inquiries and because Respondent has now shown to our satisfaction that it was not responsible for the delay and had fully complied with the Commission's request, the basis for questioning Respondent's fitness to hold its license no longer exists. Therefore, no regulatory purpose would be served by continuing this proceeding and the Joint Motion will accordingly be granted.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.
By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 518

CAPITAL TRADING CO., INC.

v.

SEA-LAND SERVICE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION

November 30, 1977

No exceptions having been filed 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 30, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 518

CAPITAL TRADING CO., INC.

v.

SEA-LAND SERVICE, INC.

Adopted November 30, 1977

Application denied.

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

Sea-Land seeks permission to waive collection from Capital Trading Co., Inc., of a portion of the freight charges on nine shipments of onions from Elizabeth, N.J., to Rotterdam, Holland.[2] The aggregate weight of the shipments was 650 long tons and the aggregate freight actually collected was $62,859.39. The rate applicable at the time of shipment was $117.50 W-noncontract[3] and the rate sought to be applied is $100.00 W-contract.[4] Permission to waive $11,812.52 is sought. The circumstances which are said to support the waiver and as they appear in the application are:

On October 11, 1976 Capital Trading Co. made application to the North Atlantic United Kingdom Conference for a rate modification on Onions. On October 25, 1976 Mr. J. P. McCluskey of N.A.U.K.F.C. advised Mr. Behrens of Capital Trading by telegram (Exhibit 2) that effective October 22, 1976 through January 20, 1977 the member lines had approved the Service rate of $100.00 W. This rate was filed by telex on October 22, 1976 on 6th RP 127 N.A.U.K.F.C. Tariff No. (48) FMC—3 (Exhibit 3).

At the time of making the application for the rate modification, Mr. Behrens of Capital Trading was not aware that Capital Trading did not have a Merchants Freight Contract with NAUKFC. The Conference did not advise Mr. Behrens in their telegram of October 25, (Exhibit 2) that it would be necessary for Capital Trading Co. to sign a Merchants Freight Agreement to qualify for the $100.00 W rate. The telegram led him to believe that he qualified for the $100.00 W rate. Capital Trading was billed the Non-Contract rate of $117.50 on the shipment as noted in Exhibit 1. It wasn't until January

[1] This decision became the decision of the Commission November 30, 1977.

[2] For the bill of lading numbers, vessels, dates of shipment and collection and the weights of the various shipments see Appendix.

[3] North Atlantic United Kingdom Freight Conference Tariff No. (48) FMC 3.

[4] *Id.*

31, 1977 that Mr. Behrens of Capital understood that the $117.50 billing is the $100.00 rate expected was the result of Capital not having a Merchant Freight Agreement with N.A.U.K.F.C. (See Exhibit 4). Capital advised the Conference on January 31, 1977 by telex that they would in fact sign the Agreement. This was accomplished effective January 31, 1977. The shipper, Capital Trading Company, tendered the shipment to Sea-Land fully expecting to pay the rate of $100.00 as telexed to them by N.A.U.K.F.C. and confirmed by Sea-Land employees. The Conference, at the time of the conference rate modification, should have advised that the $100.00 rate only applied when the shipper executed a Merchants Freight Contract. The Carrier representative should also have advised that no contract was in effect when question on the $117.50 billings surfaced.

The shipper contracted to sell 800 tons of onions at the freight rate of $100.00 (See Exhibit 5). Respondent believes that shipper acted in good faith and therefore requests that it be allowed to waive the collection of $11,812.52 based on the Conferences and Carriers error in not advising that an executed Merchants Freight Contract was necessary to qualify for the $100.00 W rate.

Section 18(b)(3), 46 U.S.C. 817 makes it unlawful for a carrier in foreign commerce to "charge, demand or collect or receive a greater or less or different compensation for the transportation of property . . . than the rates and charges which are specified in its tariffs on file with the Commission. . . ." However, the Commission,

. . . may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to . . . waive the collection of a portion of freight 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 inadvertence in failing to *file a new tariff*. (Emphasis mine.)

Statutes such as section 18(b)(3) requiring strict adherence to tariffs are themselves to be strictly construed. (See *Mueller v. Peralta Shipping Corp.*, 8 FMC 361 (1965) and cases cited therein.) Departures from the proscriptions of section 18(b)(3) should be permitted only under the express terms of that section itself, i.e., due to an error of a clerical or administrative nature in an otherwise properly filed tariff or an error due to inadvertence in failing to file a tariff. The error here was of neither kind. The tariff was filed and there was no clerical or administrative error in it. The error was in failing to notify the shipper that in order to obtain the rate quoted to him he must have signed a dual rate contract. Congress was quite specific in setting the outer limits upon departures from the rates fixed in filed and published tariffs. Those limits once set must, of course, be observed.

The application should be denied.

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

WASHINGTON, D.C.,
November 11, 1977.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 515

PORCELLA, VICINI & CO., INC.

v.

U. S. ATLANTIC & GULF—SANTO DOMINGO CONFERENCE

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

November 30, 1977

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 30, 1977.

It is Ordered, That applicant is authorized to waive collection of $22,024.60 of the charges previously assessed Procella, Vicini & Co., Inc.

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. 515 that effective October 1, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period October 1, 1976 through February 28, 1977, the contract volume rate from Atlantic Ports on 'Empty Wooden Barrels, S.U.', not over 14 cu. ft. each, minimum 1000 units is $4.75 each, 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. 515

PORCELLA, VICINI & CO., INC.

v.

U. S. ATLANTIC & GULF-SANTO DOMINGO CONFERENCE

Adopted November 30, 1977

Application granted.

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

The U. S. Atlantic & Gulf-Santo Domingo Conference seeks permission to waive collection of a portion of the freight charges on four shipments of "Empty Wooden Barrels, S.U., not over 14 cu. ft. ea." from Baltimore, Md., to Santo Domingo. The aggregate of the four shipments was 8471 units weighing 914,868 lbs. on which the total freight actually collected was $57,979.89. The four shipments moved on vessels of Seatrain Line under separate bills of lading. The first bill was dated September 9, 1976, and the last November 18, 1976. The rate sought to be applied is $4.75 per barrel. The applicable rate at the time of shipment was $7.35 per barrel. Permission is sought to waive collection of $22,024.60.

At a meeting of the Conference on August 26, 1976, it was agreed to extend the temporary rate of $4.75 on the commodity in question through June 30, 1977. The rate of $4.75 was due to expire September 30, 1976.[2] However, when the new page was filed the extension of the rate was, due to clerical error, omitted.[3] Subsequent to the shipments in question the error was discovered and the $4.75 rate was corrected by telex filing on November 22, 1976.[4] Unaware of the error, freight charges were assessed and collected on the basis of the $4.75 rate.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 6(b), *Special Docket Applications*, Rules of

[1] This decision became the decision of the Commission November 30, 1977.
[2] U.S. & Gulf-Santo Domingo Conference Tariff FMC No. 1, 54th rev'd. page 27.
[3] 55th rev'd page 27 of FMC No. 1.
[4] 57th rev'd page 27 of FMC No. 1.

Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of 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: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[5]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Thereafter, upon consideration of the documents presented by the Applicant, it is found that:

1. That there was a clerical error which resulted in the failure to extend the rate now sought to be applied.

2. That the waiver requested will not result in discrimination as between shippers.

Prior to applying for the waiver a new tariff was filed setting forth the rate upon which the waiver is to be based.

4. The application was filed within 180 days of shipment.

The application should be granted.

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

WASHINGTON, D.C.,
November 9, 1977.

[5] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 340(I)

NATIONAL STARCH & CHEMICAL CORP.

v.

HAPAG-LLOYD & UNITED STATES NAVIGATION, INC., AGENT

ON REVIEW OF DECISION OF SETTLEMENT OFFICER

December 5, 1977

This proceeding involves claims for overcharge of ocean freight on five shipments. Each of the shipments was described on the bill of lading as "Adhesive Glue Red Label". Respondent's applicable tariff contained a rate for "Adhesives, (Red Label)". Claimant seeks to have this rate applied to all five shipments.

The tariff rate in question applies on a "weight" basis only. Three of the shipments in question were rated at the applicable rate but the rate was applied on a "measurement" basis. On the other two shipments different rates were applied. The record does not show under which tariff item they were assessed.

The Settlement Officer denied the claims in question primarily on the grounds that documentation submitted in support of the claim was illegible. We determined to review and requested claimant to submit legible copies of the documentation. Claimant has submitted clear copies.

Review of the evidence now shows that the bills of lading,* and carrier due bills both show the shipments to have been adhesive glue red label and show the weights of the shipments to be as alleged by claimant. There is no evidence in the record to the contrary. Respondent has not answered in opposition.

The bill of lading is the *prima facie* evidence of what was shipped. There is no need to question the bill of lading in this instance since no one disputes the accuracy of the information contained therein. In any event, other documents substantiate the information. We think claimant has satisfied its burden of proof as to description and weight of the commodity shipped. Application of the pertinent tariff requires that the

*The Settlement Officer's concern that the bills of lading are incomplete because there is no receipt by the carrier is unfounded because each bill of lading bears the carrier's stamp of receipt showing date and number.

shipments be rated as "Adhesives, (Red Label)" on a "weight" basis. Accordingly, claimant is entitled to reparation.

One area of uncertainty remains before the amount of reparation can be determined. The Settlement Officer had observed that where claimant is seeking the benefit of a contract rate evidence should be adduced showing that the shipper indeed was eligible for such lower rate. We agree with this principle and have previously so stated. Claimant here seeks the contract rate but has not submitted any such evidence in this proceeding to show he is a contract shipper.

Accordingly, while we award reparation herein of the requested amount ($293) such award is conditioned upon submission by the claimant, within 30 days, of a copy of the contract evidencing its dual rate shipper status.

It is so ordered.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 399(I)

SIDNEY-WILLIAMS CO.

v.

MAERSK LINE AGENCY

NOTICE OF DETERMINATION NOT TO REVIEW

December 2, 1977

Notice is hereby given that the Commission on December 2, 1977, determined not to review the decision of the Settlement Officer in this proceeding served November 25, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 399(I)

SIDNEY-WILLIAMS CO.

v.

MAERSK LINE AGENCY

November 25, 1977

Complaint dismissed.

DECISION OF JAMES S. ONETO, SETTLEMENT OFFICER[1]

By complaint filed April 5, 1977, Sidney-Williams Company, an importer of general merchandise, alleges that charges in excess of those lawfully applicable for transportation in violation of section 18(b)(3) of the Shipping Act, 1916, were assessed by Maersk Line, a common carrier by water in the foreign commerce of the United States, on approximately four or five shipments of toys from Japan, Hong Kong, Taiwan, and Korea to Los Angeles sometime in August and September 1976. One thousand eight hundred and fifty-two dollars and sixty-nine cents are sought as reparation.

More particularly, the Sidney-Williams Company avers it had been shipping most of its toys from Japan, Korea, Hong Kong, and Taiwan on Orient Overseas Container Line and had been experiencing some problems in booking space on OOCL. In July 1976 complainant entered into negotiations with Maersk representatives for transportation of its imports on their vessels provided respondent's rates were the same as OOCL. Complainant alleges respondent's representatives indicated that their rates were competitive. It was not stated at the time that respondent was a member of the Japan/Korea Transpacific Freight Conference. Therefore, with the understanding that the rates of the respondent would be the same as OOCL, that is "non-conference rates," complainant agreed to specify the respondent as the carrier on its import orders. When the complainant's shipments were booked on respondent's line, it was quoted

[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.

as $63.00 (conference) rate per CBM from Korea which was higher than the complainant had expected.

Maersk Line asserts that its relationship with the Sidney-Williams Company commenced in July 1976 when discussions were held concerning the possibility of its carriage of complainant's toys from Taiwan/Hong Kong to Los Angeles. At that time respondent's rates on toys from those areas were competitive with those charged by OOCL. It was agreed that the complainant would specify respondent's line as carrier on future import orders. Shortly thereafter, respondent received notification of pending orders of the complainant from various Far East countries including Japan and Korea. This, it is alleged, was the first indication that complainant was importing from Japan and Korea. No question was asked regarding respondent's membership in the Transpacific Freight Conference of Japan and Korea. Moreover, respondent denies it was asked as to its competitiveness with OOCL or any other steamship company. Respondent concludes that if it was assumed, on the basis of the July meeting, that it was a non-conference operator from Japan or Korea, that it was not its fault.

The first question, and in the light of the result of this discussion, the only question presented is that of jurisdiction. This controversy is not one that comes within the purview of section 18(b)(3) of the Shipping Act, 1916, as enacted by Public Law 87–346, approved October 3, 1961.

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

Discussing the philosophy of the Act, the Commission has said:

> The Shipping Act is designed to place similarly situated shippers *and importers* on equal footing when using the facilities of our ocean borne foreign commerce. There is no place in this design for undue preference or unjust discrimination in the form of differing rates and charges to like users of those facilities. (Emphasis added.)[2]

Even as amended by Public Law 90–298, this section permits a common carrier by water to refund a portion of the freight charges only in the case of errors in a tariff of a clerical or administrative nature or in the case of errors due to an inadvertence in failing to file a new tariff. The legislative history of this provision in the House Report[3] describes the errors that would be rectified more particularly:

> 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 (it) intends

[2] *Inter. Trading Corp., Inc. v. Fall River Line Pier, Inc.*, 8 F.M.C. 145 (1964).

[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.*

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.

What is presented is not a question of "greater or less or different compensation for . . . transportation . . . ." Neither is it a question of a clerical or administrative error or an error due to inadvertence in failing to file a new tariff. Rather the question appears to be one more properly sounding in contract and therefore resolvable by an appropriate *nisi prius* court.

By way of summation, therefore, the legality of the actions of a common carrier by water can only be judged against the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. A shipper and a carrier are free to negotiate whatever terms they may but until those understandings are fixed as specified by the Shipping Act, the Federal Maritime Commission is not involved. Accordingly, as a cause of action has not been stated, the parties must be left where they were found and the complaint is herewith dismissed.

(S) JAMES S. ONETO,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 552

GAYNAR SHIPPING CORP.
PERRY H. KOPLIK & SONS

v.

SEA-LAND SERVICE, INC.

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

December 28, 1977

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 December 28, 1977.

IT IS ORDERED, That applicant is authorized to refund $400.00 of the charges previously assessed Gaynar Shipping Corp. and Perry H. Koplik and Sons.

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 552 that effective July 1, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from July 1, 1977, through July 12, 1977, the rate on 'Paper, waste' is $50.00 per 2,240 lbs. Minimum 20 WT per container, subject to all applicable rates, 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 5 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. 552

GAYNAR SHIPPING CORP.
PERRY H. KOPLIK & SONS

v.

SEA-LAND SERVICE, INC.

December 7, 1977

Application for permission to refund portion of freight charges granted.

INITIAL DECISION[1] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Sea-Land Service, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 18(b)(3) of the Shipping Act, 1916, has filed a timely (within 180 days from July 6, 1977, the date of the two involved shipments) application for permission to refund for the benefit of complainants Gaynar Shipping Corp. and Perry H. Koplik & Sons aggregate freight charges of $400.00 of $8,400.00 aggregate freight charges actually collected for transportation of freight from Charleston, S.C., to Leghorn, Italy.

Sea-Land's Bill of Lading No. 975718135–0 dated July 6, 1977, shows the shipper Perry H. Koplik & Sons, the freight forwarder Gaynar Shipping Corp. shipped freight prepaid on Sea-Land's vessel *Baltimore/ Market 083e* from Charleston, S.C., to Leghorn, Italy, 2 House to House containers said to contain 58 bales of Wastepaper for Recycling. The gross weight was 82,410 lbs. as 89,600 lbs. The total charges were $2,100.00 (89,600 lbs. at $42.50 per 2,240 lbs. = $52.50 × 40 = $2,100.00) and paid to carrier by the shipper.

Sea-Land's Bill of Lading No. 975718138–3 dated July 6, 1977, shows the same shipper and freight forwarder as above and also the same vessel and destination. The freight, Wastepaper for Recycling, was in 6 House to House, 35′ containers, and was freight prepaid. The gross weight was 204,900 lbs. as 268,800 lbs. The total charges were $6,300.00 (268,800 lbs.

[1] This decision became the decision of the Commission December 28, 1977.

at $52.50 per 2,240 lbs. = $52.50 × 120 = $6,300.00) and paid to carrier by the shipper. The two B/L charges total $8,400.00.

The application for permission to refund $400 of the $8,400 gives the following facts in support:

Effective May 9, 1977, special rates were established on Wastepaper in both Section 1 (France and Italy) and Section 2 (Spain) of Sea-Land Tariff 168–13. Special rate was $50.00 W, minimum 20 WT per container thru June 30, 1977.

On June 28, 1977, it was Sea-Land's intent to extend this special rate in Section 1 only thru July 7, 1977. However, due to a clerical error, this extension was made in Section 2 on proposal #4482.

On July 13, 1977, we realized our error and immediately published a $50.00 rate in Section 1 thru August 11, 1977.

The shippers on whose behalf we are filing this application, moved their shipments on July 6, 1977, and would have been afforded a $50.00 rate had it not been for our error."

The tariff applicable herein is Sea-Land Tariff 168–B–FMC–73, Item 5860. Under that tariff and similar facts in Special Docket No. 551, Sea-Land was granted permission in an Initial Decision served December 5, 1977, to waive collection of portion of freight charges. The instant application also contains the statement pointed out in Special Docket No. 551, "There are additional shipments which moved via respondent during the same period of time at the rates set forth in (1) above. Special Docket Applications will be filed for relief concurrent with this application."

Upon consideration of the above, the Presiding Administrative Law Judge deems the application for permission to refund $400 of the $8,400 freight charges collected comports with Rule 92, Special Docket Applications, Rules of Practice and Procedure, and section 18(b)(3) of the Shipping Act, referred to above, and the error asserted and explained is within the contemplation of the rules and statutes applicable.

Therefore, upon consideration of the documents presented herein, it is found:

1. There was an error of a clerical or administrative nature (corrected by effective tariff before this application was filed), which resulted in payment of an overcharge.

2. The permission to refund requested overcharge will not result in discrimination as between shippers.

3. The application, having been timely filed and having shown acceptable cause, should be granted.

Wherefore, it is,

Ordered,

The application be and hereby is granted.

(S) WILLIAM BEASLEY HARRIS,
Administrative Law Judge.

WASHINGTON, D.C.,
December 7, 1977.

TITLE 46—SHIPPING

Chapter IV—Federal Maritime Commission

[General Order 39; Docket No. 77-22]

December 8, 1977

Part 507—Actions to Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Trade of the United States

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: The Federal Maritime Commission hereby enacts rules and regulations pursuant to section 19(1) (b) of the Merchant Marine Act of 1920 (46 U.S.C. 876(1) (b)) in order to adjust or meet conditions unfavorable to shipping in the foreign trade of the United States which result from discriminatory laws of the Government of Guatemala. These rules require Guatemalan-flag carriers and their associates to pay an Equalization Fee designed to eliminate the discriminatory diversion of cargo to those carriers caused by the Guatemalan laws. These rules also require such carriers to file Summary Reports of Cargo Carryings in the U.S. to Guatemala Trade and file an Equalization Fee Payment Guarantee with the Federal Maritime Commission.

EFFECTIVE DATE: To become effective January 13, 1978.

FOR FURTHER INFORMATION CONTACT:

Francis C. Hurney
Secretary
Federal Maritime Commission
Room 11101
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

Every sovereign nation has the right to control its commercial intercourse with other nations. Therefore, participation by the citizens of

another nation in the foreign commerce of the United States is a privilege which may be terminated, conditioned, or limited.

However, the United States does not generally exercise such power because it recognizes that reciprocal privileges of commercial participation are preconditions to any substantial commercial intercourse. The United States is committed to the general idea that unrestricted participation in international trade is in the best interest of both the United States and her trading partners. It is believed that free trade can be relied upon to stimulate the most effective and efficient production and distribution of goods and services, redounding to the benefit of all involved. This commitment to the ideals of free trade is a logical extension of our national belief in market economy and competition in the marketplace.

These principles of free trade have found expression in the General Agreement on Tariffs and Trade (GATT), the antitrust laws, and the shipping laws of the United States. Generally, the ports of the United States are therefore open to the vessels of all nations who wish to compete to carry our commerce.

This commitment to the idea that all persons should be allowed to compete in the international marketplace, does not, however, constitute an abandonment of the power of the United States over its own commerce. Quite the contrary, the power to control commercial interaction with other nations is a power which must be preserved for use whenever the goods and services of the United States and her citizens are unnaturally handicapped in the international marketplace by the acts of other nations. When the acts of a foreign nation unfairly tip the delicate scales of competition in favor of their own citizens or commerce to the detriment of the citizens or commerce of the United States, it is only right and just that the scales be rebalanced. This may be done by persuading the other state to abandon or cease its actions or by balancing the detriments so as to negate any artificial advantages for the citizens or commerce of the foreign nation.

The power to regulate commerce of the United States is vested with the Congress by Article I, Section 8, Clause 3 of the Constitution. It is well recognized that the power of Congress over foreign commerce is absolute and may be used for the purposes of retaliation. These powers may, of course, be delegated by Congress.

Section 19(1) (b) of the Merchant Marine Act, 1920 (46 U.S.C. section 576, hereinafter referred to as section 19), is the delegation of such authority to the Federal Maritime Commission (Commission). Section 19 authorizes and directs the Commission to make rules and regulations affecting shipping in the foreign trade of the United States in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade of the United States and which arise out of, or result from, foreign laws, rules or regulations, or from competitive methods or practices employed by owners, operators, agents or masters of vessels of a foreign country.

The types of conditions which the Commission has found to be unfavorable to shipping in the foreign trade of the United States are generally set forth by Commission General Order No. 22 (46 C.F.R. 506). Among these are conditions which preclude or tend to preclude vessels in the foreign trade of the United States from competing in a trade on the same basis as any other vessel, and those which are discriminatory or unfair as between carriers. (46 CFR 506.3(a) and (d)).

Republic of Guatemala Decree No. 41–71 establishes a penalty of 50 percent of the ocean freight charges paid on any goods imported into Guatemala which are duty free under the Guatemalan Industrial Development Laws or the Central American Agreement on Tax Incentives for Industrial Development and which are not carried on "Guatemalan carriers." More than 600 importing industries, accounting for the vast preponderance of Guatemalan imports from the United States, qualify for such duty free status for their imports under the Guatemalan Industrial Development Law or the Central American Agreement on Tax Incentives for Industrial Development.

Decree No. 41–71 defines the term "Guatemalan carriers" as those carriers owned by the State (Guatemala), or in which the State has a majority interest, or those private enterprises of which the capital is at least 75 percent Guatemalan and their vessels are of Guatemalan registry and have a capacity of no less than 2,000 tons. Guatemalan carriers may contract for the services of foreign carriers (known as "associated carriers"), in which case, duty free goods may be transported by the associated carriers to Guatemala without being subject to the aforementioned 50 percent penalty.

Coordinated Caribbean Transport, Inc., (CCT) is such an "associated carrier". Pursuant to Article 3 of Guatemalan Decree 41–71, CCT and Flota Mercante Gran Centro Americana, S.A. (a Guatemalan-flag carrier known as Flomerca) have entered into an agreement of "association" whereby CCT pays Flomerca 2.25% of all the revenue CCT earns on cargo carried to Guatemala in return for the privilege of having CCT cargo exempted from the charges provided for in Article 3 of Decree No. 41–71.

On July 1, 1975, Delta (Delta Steamship Lines, Inc.) filed a petition with the Commission seeking relief under section 19, Merchant Marine Act, 1920, from the effects of Decree No. 41–71. Delta also filed a complaint under section 301 of the Trade Act of 1974 with the Special Representative for Trade Negotiations (STR).

On July 25, 1975, the Commission served fact finding Orders under section 21 of the Shipping Act, 1916 (46 U.S.C. 820), on all carriers serving in the trade between the U.S. Atlantic and Gulf Coasts and Guatemala. The STR also held hearings on the Delta complaint on September 25 and 26, 1976.

Based upon the information gleaned from the section 21 Orders, the hearings before the STR, and other information available to the Commis

sion, the Commission ascertained that cargoes subject to Decree 41–71 carried by U.S. vessels not associated with Guatemalan flag carriers were being fined by the Government of Guatemala. Furthermore, the preponderance of goods transported from the United States of Guatemala were subject to the Decree 41–71 penalties. Shippers were also discouraged from shipping any cargo on U.S. vessels because they could not determine which cargo was subject to Decree 41–71 and which cargo was not.

Those circumstances resulted in the diversion of cargo from U.S. and nonassociated carriers to the carriers of Guatemala and their associates. Furthermore, delays in the transportation of goods had occurred because of the limited capacities of the Guatemalan carriers. Clearly, U.S. carriers had been discriminated against and potential entrants into the U.S. Guatemalan trade had been discouraged if not precluded.

The Commission, therefore, found that not only was Decree 41–71 discriminatory on its face but that its implementation had created conditions unfavorable to shipping in the foreign trade of the United States.

By letter dated December 4, 1975, the Chairman of the Commission notified the Secretary of State of the Commission's findings in this matter. The Chairman's letter asked the Department of State to seek a diplomatic resolution of the problem, and advised that, absent such resolution by February 14, 1976, the Commission would have no recourse but to promulgate a final regulation that would impose countervailing fees on Guatemalan carriers and associated carriers transporting goods from the United States which are to be imported duty free into Guatemala.

On February 4, an earthquake devastated Guatemala and the Commission agreed, at the request of the Department of State, to postpone the implementation of this regulation.

In light of the lack of progress in the diplomatic negotiations with the Government of Guatemala, the Chairman of the Commission notified the Secretary of State on August 16, 1976, that the Commission had decided to issue a proposed rule pursuant to the authority of section 19(1) (b) of the Merchant Marine Act, 1920.

Issurance of this rule was again postponed on the basis of assurances by representatives of the Guatemalan flag lines that a satisfactory resolution of the problem would be forthcoming. However, this contemplated resolution failed to materialize and negotiations reached an impasse. Therefore, a proposed rule was issued and interested parties were given an opportunity to comment.

Comments to the proposed rule were received from Delta Steamship Lines, Inc. (Delta), Crowley Maritime Corporation (Crowley), Sea-Land Service, Inc. (Sea-Land), Transportation Institute, Dow Chemical Latin America (Dow), the Embassy of Guatemala, and Marine Chartering Co., Inc. (Marine Chartering).

Delta commented that the Government of Guatemala has again been

fining the importers of exonerated cargoes carried by Delta's vessels. Delta asserts that the Guatemalan lines have not only failed to resolve the problems in the U.S.-Guatemalan trade (which they had assured the Commission they would do, in return for holding any section 19 action in abeyance) but that the Guatemalan Lines had deliberately caused the imposition of fines against cargo carried by U.S. vessels to be reactivated.

Delta also points out that during the comment period of these rules, Decree No. 26–77 was introduced in the Congress of Guatemala. Decree No. 26–77, which has yet to be transmitted by the Guatemalan Congress to the President of Guatemala for signature, would repeal Decree 41–71 but retain a similar discrimination against U.S. vessels. Instead of penalizing the users of U.S. carriers by imposing a fine of 50 percent of the ocean freight rate, Decree No. 26–77 would punish users of U.S. carriers by denying them the duty (tax) free benefits on the imports which are provided by their industrial development laws. In light of the failure of both commercial and diplomatic negotiations, Delta asserts that the Commission has no recourse but to proceed with the promulgation of countervailing regulations.

Crowley states that their affiliated companies, namely Gulf Caribbean Marine Lines, Inc. and Trailer Marine Transport Corporation, have had numerous audiences with officials of the Government of Guatemala and Guatemalan flag lines in the previous year in an attempt to participate in the movement of cargo from U.S. to Guatemala. Crowley states:

> We have been totally unsuccessful in securing the desired waivers of penalties (50% of ocean freight) imposed by Guatemalan Decree 41–71. Our most recent meeting with Guatemalan authorities was during the week of July 18.

Crowley, like Delta, asserts that the new Guatemalan Shipping Law 26–77 would be, if finally adopted, just as discriminatory to United States flag line carriers as Decree 41–71. Crowley, therefore, also supports promulgation of countervailing fees on Guatemalan carriers and their associates.

Sea-Land fully supports the Commission's proposed rulemaking to establish countervailing fees on "favored" Guatemalan carriers. However, Sea-Land suggests that the Equalization Fee be assessed against all cargo carried by Guatemalan carriers and refunds be given for cargo identified and proven to be *not* exempt. Sea-Land also suggests that the Commission require the Equalization Fee to be passed on to the shippers in full.

On the whole, we find Sea-Land's comments to be well made. Since we have found that most of the cargo moving to Guatemala does receive the benefits of the industrial incentive laws and that the Government of Guatemala keeps the identity of importers who are granted duty free status from being revealed, we are amending the final rules to require the "favored carriers" to pay an Equalization Fee on all cargo, and make a specific request for a refund of the Equalization Fee for any shipment which does not enjoy a duty free status under the industrial incentive

laws. Refunds will not be granted for cargoes which have been subjected to penalties under Decree No. 41–71 in the past and will be granted only for cargoes which are clearly ineligible for duty free status under the industrial development incentive laws.

The Equalization Fee is expected to be passed through the carrier to the shipper. The Commission recognizes that the "favored carriers" may attempt to absorb the Equalization Fee but does not expect such an absorption to occur. The Commission will not, at this time, require any amendments to any carrier's tariff. If, however, it appears that the Equalization Fee, by itself, does not stem the artificial diversion of cargo, further measures will be taken.

The Transportation Institute, a maritime industry research organization comprised of 140 member shipper companies also supports issuance of countervailing regulations. The Transportation Institute states that:

> Because U.S. shippers often could not know the tax status of their exports until they were landed, and because the same commodity was sometimes subject to the penalty and at other times exempt, the Decree created chaos and uncertainty in the U.S.-Guatemalan trade and was tantamount to 100 percent exclusion of U.S. carriers.

It also asserts that the Decree has caused delays in transportation and discourages new entrants into that trade.

The Transportation Institute therefore concludes that countervailing regulations are required, otherwise, other nations will be encouraged to establish similar discriminatory laws.

Dow also supports the proposed rules alleging that Decree 41–71 has caused it to suffer economic loss, lost business and other undue hardships. In support of these allegations, Dow states,

> A. To date, Dow cargo routed to Guatemala on U.S. flag vessels have been fined more than U.S. $12,000 by the Guatemalan government.
>
> B. To avoid such fines, Dow has been required to ship on vessels of Guatemala flag lines, *i.e.*, Flomerca and Armagua. These lines offer relatively poor sailing schedules due to their shortage of vessels and the fact that their existing vessels are comparatively old. This poor service has caused us to lose business due to our inability to ship our products on a timely basis.
>
> C. Dow has suffered severe economic loss due to the fact tha these lines are generally restricted to break-bulk service. We have consistently sought containerized service from these lines so that our losses and damages could be controlled and, hopefully, reduced. To date, Flomerca still does not offer container service. Only recently, Armagua began to offer containers in limited numbers to Santo Tomas. This limited service is hardly adequate to cover Dow's needs, much less other U.S. shippers. Due to Decree 41–71, we continue to suffer financial losses as a result of lost and damaged cargo, because we must ship on "favored" carriers, using what we consider inadequate service.
>
> D. Two "favored" carriers do operate Ro/Ro ships from Miami. So as to take advantage of this more frequent service offered by these "favored" carriers, we must move our cargo to Miami from our principal manufacturing sites in Freeport, Texas (freight premium $29/ton); Plaquemine, Louisiana (freight premium $13/ton); or Midland, Michigan (freight premium $35/ton).

This service is obviously not the most economical or timely. However, these Miami services do offer frequent sailings and house-to-house containerized service. This allows Dow the alternative of shipping break-bulk and possibly suffering severe losses or

damaged cargo, or paying premiums and shipping via Miami. By comparison, two U.S. carriers, Sea-Land and Delta, offer containerized service from the Gulf, and Sea-Land offers service from the North Atlantic. Due to Decree 41–71, however, Dow is unable to utilize these superior alternatives without subjecting Dow cargoes to 50% fines by the Guatemalan government.

E. The "favored" carriers of Guatemala have no regularly scheduled service from Europe and the Far East. Because of Decree 41–71, Dow and other U.S. exporters are restricted to Guatemalan flag lines (and associates), while Dow's foreign competitors are free to ship to Guatemala on *any* line that offers acceptable rates and service. As a result, Dow continually faces loss of business to foreign competition.

F. While Dow and its customers have continually sought waivers so that Dow could better service the Guatemalan market through a variety of carriers, these requests have *always* been denied. When Dow has shipped on U.S. flag carriers and those cargoes were fined, Dow has had to absorb this additional expense.

Dow concludes that it is unfortunate but nevertheless necessary that countervailing regulations are required to provide U.S. flag lines equal access to cargo being shipped to Guatemala.

Marine Chartering, as managing agents of Lineas Maritimas de Guatemala, S.A., submitted comments requesting the postponement of this rulemaking because of the passage of Decree 26–77. Marine Chartering asserts that with Decree 41–71 no longer in effect, Commission action will be no longer necessary.

The Embassy of the Government of Guatemala also submitted a comment. The Embassy forwarded the following message from the President of Flomerca:

> Please inform FMC that proposed Law modifying Decree 41–71 is pending approval of Congress of the Republic and therefore we request to postpone enactment of proposed actions against Guatemalan shipping lines.

The Embassy points out that new shipping law (Decree 26–77) now with the Congress of Guatemala replaces Decree 41–71 with the purpose of eliminating any conflict with section 19, Merchant Marine Act of 1920.

Contrary to the assertions of Marine Chartering, Decree 26–77 has not yet been forwarded to the President of Guatemala for signature. However, even if that Decree were to be implemented, many of the problems would still remain. One type of discrimination would merely be substituted for another which would probably also require countervailing action by the Commission.

The comments of Delta, Dow, Crowley, Sea-and and the Transportation Institute firmly establish that the conditions unfavorable to shipping in the foreign trade of the United States have not been abated despite our repeated objections to the Government of Guatemala. Since our remonstrances have been met with refusal, the Commission will exercise the authority delegated by Congress to adjust or meet conditions unfavorable to shipping in the foreign trade of the United States which have been and continue to be resulting from the laws and acts of the Government of Guatemala.

This rule imposes an Equalization Fee on all Guatemalan vessels and the vessels of their associated carriers transporting goods from the United

States to Guatemala which may be imported into Guatemala duty free under the Guatemalan Industrial Development Laws or the Central American Agreement on Tax Incentives for Industrial Development. This Equalization Fee, amounting to 50 percent of the freight charges, is calculated to offset the penalty imposed under Decree No. 41–71 for the transportation of such goods on carriers other than Guatemalan carriers or associated carriers. Furthermore, the Commission will, by notice in the *Federal Register,* adjust the level of the Equalization Fee to any extent necessary to adjust or meet the level of discrimination imposed by the Republic of Guatemala. Thus, the Equalization Fee is designed to eliminate the discriminatory diversion of cargo to certain carriers in the U.S. to Guatemala trade resulting from Decree No. 41–71, and to place all carriers in those trades on an equal competitive footing. Guatemalan carriers and associated carriers which are authorized under Decree No. 41–71 to transport duty free goods from the United States to Guatemala will be designated as "favored carriers."

Pan American Mail Line, Inc., (Pan Am) has notified the Commission that their affiliations with Flomerca have ceased and that the joint Pan Am/Flomerca service known as Flomerca Trailer Service is now being exclusively operated by Pan Am. Pan Am d/b/a Flomerca Trailer Service has therefore requested that Flomerca Trailer Service be deleted from the list of "favored carriers".

The Commission is not convinced, however, that Pan Am d/b/a Flomerca Trailer Service is not still associated with Flomerca and receiving benefits under Decree 41–71. We are therefore issuing an Order under Section 21 of the Shipping Act, 1916, directing Pan Am to produce such information as will allow the Commission to determine whether their "associated carrier" status has indeed ceased. If an analysis of Pan Am's response to the section 21 Order shows that Pan Am d/b/a Flomerca Trailer Service is no longer receiving the benefits and privileges of an associated carried under Decree 41–71, then Flomerca Trailer Service will be deleted from the list of "favored carriers".

A "favored carrier" must file an Equalization Fee Payment Guarantee with the Commission to ensure that all Equalization Fees will be paid. The Equalization Fee Payment Guarantee must be in an amount equal to one-sixth of the total freight charges earned by the favored carrier on cargo which it loaded in the United States for unloading in Guatemala during the preceding twelve months, or equal to $75,000, whichever is greater. It is believed that this amount would be adequate to cover the total Equalization Fees which any favored carrier might accrue and not pay in a timely fashion.

A procedure is established for the favored carrier to report data pertaining to each voyage from the United States to Guatemala by each vessel of the favored carrier, including the freight charges on which Equalization Fees must be paid. Such reports would have to be filed with the Commission within four calendar days following departure of each

vessel from the United States and be accompanied by the Equalization Fee arising from that particular voyage. Failure to comply with the requirements of this rule could result in the detention of any vessel owned, operated, or carrying cargo for the account of such "favored carrier."

The final rules allow for any Equalization Fee Payment Guarantee (certified check or Surety Bond) to be used to satisfy any unpaid Equalization Fee which is delinquent for more than 15 days. The time period of 15 days has been adopted because the Commission is of the opinion that a longer period would merely encourage delinquency and that 15 days is long enough for the carriers to clear up any unforeseen difficulties in paying an Equalization Fee.

Therefore, pursuant to Section 19(1) (b) of the Merchant Marine Act, 1920 (46 U.S.C. section 876(1) (b)) and Sections 21, 29, 32, and 43 of the Shipping Act, 1916 (46 U.S.C. section 820, 828, 831, 841a), the Commission hereby enacts Part 507, Title 46 CFR.*

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

*The text of the amendment is reprinted in 46 C.F.R. 507.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 522

HERCULES INTERNATIONAL TRADE CORP., LTD.

v.

PACIFIC WESTBOUND CONFERENCE

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

December 14, 1977

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 December 14, 1977.

It is Ordered, That applicant is authorized to refund $1,077.05 of the charges previously assessed Hercules International Trade Corp., Ltd.

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 522 that effective February 9, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from February 9, 1977, through April 15, 1977, the rate on 'Ethyl Cellulose' is $131.00W, 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. 522

HERCULES INTERNATIONAL TRADE CORP., LTD.

v.

PACIFIC WESTBOUND CONFERENCE

November 22, 1977

ERRATA

The following corrections should be made in the initial decision in this proceeding served November 21, 1977:

1. Delete footnote 4 on page 1.
2. The last sentence on page 4 amended to read: "The application should be granted in the amount of $1,077.05."

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 522

HERCULES INTERNATIONAL TRADE CORP., LTD.

v.

PACIFIC WESTBOUND CONFERENCE

Adopted December 14, 1977

Application granted.

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

The Pacific Westbound Conference seeks permission to refund a portion of the freight charges on a shipment of Ethyl Cellulose from Norfolk, Virginia, to Yokohama, Japan. The shipment weighing 21,373 lbs. and measuring 867 cu. ft. was carried aboard Japan Line's *MV Pacific Arrow* under a bill of lading dated April 14, 1977.[2] The rate applicable at the time of shipment was $121.00 per kilo ton or cubic meter whichever produces the greater revenue and on this basis aggregate freight charges of $3,216.18 were collected.[3] The rate sought to be applied is $131.00 per kilo ton subject to a minimum of 36,000 lbs. which would have resulted in aggregate freight charges of $2,139.13. Permission is sought to refund $1,077.05.[4] As they are set forth in the application, the circumstances said to justify the refund are:

Per PACIFIC WESTBOUND CONFERENCE INTERMODAL TARIFF #8, FMC–15, ICC–1

Original and 1st revised page 511, item 581–3220–30 clearly stated rate on basis kilo ton (2204.62) only; when 2nd revised page 511 of tariff filed (effective 2/9/77) kilo ton basis omitted from page in error by tariff agent and not corrected on proofreading. Such omission caused illegal rate increase on less than 30 days advance notice. Japan Line, Ltd. became party to the rate filing on 2/21/77. The shipment in question originated from Norfolk 3/28/77 and laden on board vessel 4/14/77. The error in tariff filing noted between time cargo originated Norfolk and time laden on board vessel Oakland—and was corrected by 7th revised page 511, effective 4/15/77. Shipper and carrier were

[1] This decision became the decision of the Commission December 14, 1977.

[2] The shipment moved by rail from Norfolk to Oakland under a rail bill of lading dated March 8, 1977.

[3] The actual rate assessed was $131.00 per cu. meter.

[4] The correct figure is of course $77.05. $3,216.18 minus $2,139.13 leaves $77.05.

unaware of this inadvertant, erroneous error until shipment covered by this Special Docket was already enroute in joint rail/water service. This shipment was cause for discovery of error and its immediate correction. Since incorrect rate was not a result of Conference action and was effected on less than 30 days notice shipper is entitled to freight assessment based on kilo ton, minimum 36,000# and not on kilo ton/cubic meter, whichever creates greater revenue.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of 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: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[5]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was a clerical error which resulted in the failure to extend the rate now sought to be applied.
2. The refund requested will not result in discrimination as between shippers.
3. Prior to applying for the refund a new tariff was filed setting forth the rate upon which the refund is to be based.
4. The application was filed within 180 days of shipment.

The application should be granted but only in the amount of $77.05.

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

WASHINGTON, D.C.,
November 21, 1977.

[5] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 519

BUCKLEY & FORSTALL, INC.

v.

GULF EUROPEAN FREIGHT ASSOCIATION FOR COMBI LINE

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

December 14, 1977

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 December 14, 1977.

It is Ordered, That applicant is authorized to refund $116.04 of the charges previously assessed on the condition that the parties, on or before February 16, 1978, either amend the complaint to substitute M. Braunschweig Co. as the nominal complainant and supply the certification required by the Rules of Practice or Buckley & Forstall, Inc., submit an affidavit that it is acting as agent for M. Braunschweig and will remit the refunded monies to the latter.

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 519 that effective March 11, 1977, for purposes of refund or waiver of freight charges on any shipments which may have been shipped during the period from March 11, 1977 through April 1, 1977, the rate on 'Coffee Sweepings, packed, including Green Coffee rejected by USDA' is $96.75W, 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 60 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. 519

BUCKLEY & FORSTALL, INC.

v.

GULF EUROPEAN FREIGHT ASSOCIATION FOR COMBI LINE

December 5, 1977

ERRATA

Since the issuance of the initial decision, applicant has informed me that there was a typographical error in the application. The figure $1,144.38 should have been $1,044.38. This necessitates the following changes in the initial decision:

1. On page 1, next to last sentence, change $1,144.38 to $1,044.38.
2. Delete footnote 4 on page 1.
3. On page 3 delete "($16.04)."
4. On page 4 change $16.04 to $116.04.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 519

BUCKLEY & FORSTALL, INC.

v.

GULF EUROPEAN FREIGHT ASSOCIATION FOR COMBI LINE

Adopted December 14, 1977

Application granted.

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

The Gulf European Freight Association, for Combi Line, seeks permission to refund a portion of the freight charges on a shipment of green coffee sweepings from New Orleans, Louisiana, to Antwerp, Belgium. The shipment weighing 24,180 lbs. moved on the Combi Line vessel *Captain Lygonos* under bill of lading No. 20, dated March 25, 1977. The rate applicable at the time of shipment was $107.50 W[2] and on the basis of that rate Combi Line collected from M. Braunschweig Co. aggregate freight $1,160.42. The rate sought to be applied is $96.75[3] under which the aggregate freight would be $1,144.38. Permission to refund $116.04 is requested.[4]

The circumstances which are said to support the refund as they are set out in the application are:

At a meeting of March 1, 1977, the Gulf European Freight Association agreed to file a rate of $96.75 W on Coffee Sweepings, packed, including Green Coffee rejected by the U.S.D.A., effective as of March 11, 1977. (See Page 1 of Minutes of G.E.F.A. Meeting of March 1, 1977, filed with the Federal Maritime Commission.)

The office of the Gulf Associated Freight Conferences, which files all tariff rates for the Gulf European Freight Association failed to file the appropriate tariff correction.

At time of shipment, the shipper was billed at the tariff rate of $107.50 W, and the amount of $1160.42 was paid. However, the shipper had already been informed that the rate on the commodity in question would be reduced to $96.75 W as of March 11, 1977, and he seeks refund in the amount of $116.04.

[1] This decision became the decision of the Commission December 14, 1977.
[2] Gulf European Freight Association Tariff 2 (FMC 2)—15th Rev. Page 55.
[3] Gulf European Freight Association Tariff 2 (FMC 2)—16th Rev. Page 55.
[4] The $116.04 figure is of course wrong. The correct figure is $16.04, i.e., $1,160.42 minus $1,144.38 leaves $16.04.

When the error was discovered on April 1, 1977, the office of the Gulf Associated Freight Conferences immediately filed the rate of $96.75 W by telex, effective as of April 1, 1977.

Combi Line therefore requests permission to refund $116.04 to Buckley & Forstall, Inc.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90–298), and Rule 6(b), *Special Docket Applications,* Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

> The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of 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: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[5]

The clerical and administrative error recited in the subject application is of the type within the intended scope of coverage of section 18(b)(3) of the Act and section 502.92 of the Commission's Rules of Practice and Procedure.

Therefore, upon consideration of the documents presented by the Applicant, it is found that:

1. There was a clerical error which resulted in the failure to extend the rate now sought to be applied.

2. The refund requested will not result in discrimination as between shippers.

3.Prior to applying for the refund a new tariff was filed setting forth the rate upon which the refund is to be based.

4. The application was filed within 180 days of shipment.

From the foregoing it would appear that the application should be granted, however, one requirement has not been met. The nominal complainant here is Buckley & Forstall, Inc., and permission is sought to refund $116.04 ($16.04) to the complainant. Yet the application itself shows that Combi Line collected the freight charges from M. Braunschweig Co. in Antwerp. All special docket applications seeking to refund freight monies must be accompanied by a certification that the person to whom the refund is to be made actually paid the freight charges. However, since the application is in all other respects proper, rather than deny the application outright 60 days will be allowed to afford the parties an opportunity to either amend the complaint to substitute M. Braunschweig Co. as the nominal complainant and supply the necessary certification, or to allow Buckley & Forstall, Inc., to submit an affidavit

[5] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

that it is acting as agent for M. Braunschweig and will remit the refunded monies to the latter.

The 60 days here granted shall run from the date of service of this decision and if the parties comply with the conditions set forth above the application should be granted but only in the amount of $16.04.

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

WASHINGTON, D.C.,
November 21, 1977.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-36

OCEAN DRILLING & EXPLORATION CO.

v.

KAWASAKI KISEN KAISHA LTD.

NOTICE OF ADOPTION OF INITIAL DECISION

January 11, 1978

No exceptions having been filed 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 January 11, 1978.

Accordingly Kawasaki Kisen Kaisha is hereby ordered to pay to Ocean Drilling and Exploration Co. the sum of $8,401.45 with interest at 6% to begin within 45 days of the date of service of this decision unless the full amount is paid prior thereto, provided, that within 15 days of the date of service Ocean Drilling submits data demonstrating the correctness of the claimed amount. Failing this the amount to be refunded shall be $8,366.51.

By the Commission.

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

FEDERAL MARITIME COMMISSION

No. 77-36

OCEAN DRILLING & EXPLORATION CO.

v.

KAWASAKI KISEN KAISHA LTD.

December 20, 1977

Respondent found to have overcharged complainant $8,401.45. Reparation awarded..

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

This complaint by Ocean Drilling & Exploration Co. alleges that Kawasaki Kisen Kaisha Ltd. (KKK) overcharged Ocean Drilling on some shipments of "Oilwell Equipment." Claims for the alleged overcharges were filed with Kerr Steamship Company, Inc., the agent of KKK in New Orleans, Louisiana. These claims were rejected by Kerr on the basis of a rule in the Far East Conference Tariff No. 26 (FMC No. 8) which limits the filing of overcharge claims to not later than six months from the date of shipment. With the rejection of its claims Ocean Drilling filed the complaint here requesting that the overcharge claims be decided pursuant to the shortened procedure outlined in Subpart K of the Commission's Rules of Practice and Procedure (46 CFR 502.181).

The complaint was served on Kerr as the agent for KKK. In the notice accompanying the complaint KKK was told that should it consent to the shortened procedure an "answering memorandum" had to be submitted within 25 days of the date of service of the complaint. By the same notice KKK was informed that if it did not agree to the shortened procedure an answer to the complaint had to be filed within "20 days after the date of service stamped on the complaint unless additional time is permitted under Rule 64. . . ."[2] KKK neither agreed to the shortened procedure

[1] This decision became the decision of the Commission January 11, 1978.

[2] Rule 64 allows 30 days to answer if a respondent resides in Alaska or beyond the Continental limits of the United States.

nor filed an answer to the complaint and on September 21, 1977, I issued *an Order to Show Cause Why Default Judgment Should Not be Entered.* In that order I gave KKK until October 15, 1977, to either (1) file an answer to the complaint together with an affidavit stating the reasons for failing to file a timely answer, or (2) furnish a statement that it did not dispute the allegations and did not object to an award of reparations on the basis of those allegations. Failure to do either was deemed to be an admission that KKK did not intend to defend against the allegations and did not object to the entry of a default judgment. The October 25th deadline passed with no response from KKK.

At this point with unsupported allegations of the complaint before me, I issued on October 28, 1977, pursuant to Rule 64 an Order for Further Proof in which Ocean Drilling was to furnish such documentary proof in support of the complaint as was in its possession. Then on November 7, 1977, I received a letter from Kerr referring to my order of September 20th and stating:

> We can only reiterate our refusal to refund the disputed amount: Existing FEC tariff rules do not permit such refunds on claims presented later than six months after shipment, and any departure from these rules of the FMC-approved agreement would be in violation of the Conference Agreement to which our Principals, Kawasaki Kisen Kaisha are party.

The letter closes with apologies for the delay in response "which was entirely unintentional."[3]

At an extension of time Ocean Drilling on November 28, 1977, complied with my order to furnish further proof. In response to that order Ocean Drilling furnished:

(1) Copies of bills of lading Nos. 3 and 4 dated July 13, 1975, issued by Kawasaki Kisen Kaisha.

(2) Copies of the export declaration covering the shipments.

(3) A copy of Far East Conference Tariff No. 26, Third Revised Page 518 listing a project rate to Kobe, Japan on Oil Well Drilling Rigs Parts and Accessories as covered by Item 982 1005 00.

(4) A copy of a letter from Kerr dated February 18, 1977, stating that it would settle the overcharge claims against them on the basis of $118.45 W/M.[4]

The complaint states that under KKK bills of lading 3 and 4 shipments described on those bills as 57 packages "Oilwell Equipment" weighing 247,767 pounds and measuring 9.175 cubic feet moved from Houston, Texas, to Kobe, Japan, aboard the KKK vessel *Navada Maru.* KKK assessed the following freight charges on the shipments:

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[3] This response is quite simply evasive. No reason is given for the total lack of response to the complaint in this case nor is the "unintentional delay," whether it is in response to the complaint or to my order, in any way explained. Finally Kerr itself has appeared in a number of Commission proceedings and should be familiar with the proper method of dealing with a formal complaint against it.

[4] The record does not, of course, show just what prompted Kerr to later revoke the six-month rule. Possibly it was a refusal by the Conference or KKK to honor the settlement offer.

B/L 3:	*Ocean Freight*	*Rate*	*Amount*
	26,690 lbs.	152.65/2000 lbs.	$ 2,037.11
	2,009 cu. ft.	152.65/40 cu. ft.	7,666.85
	H/L Charges		
	26,290	27.25/2000 lbs.	358.30
	20,510	26.00/2000 lbs.	266.83
TOTAL			$10,329.09
B/L 4:			
	Ocean Freight	*Rate*	*Amount*
	46,064 lbs.	152.65/2000 lbs.	$ 3,515.85
	6,322 cu. ft.	152.65/40 cu. ft.	24,126.33
	H/L Charges		
	58,000 lbs.	43.40/2000 lbs.	1,258.60
	E/L Charges		
	3,336 cu. ft.	7.45/40 cu. ft.	621.33
	9,900 lbs.	7.45/2000 lbs.	36.88
	284 cu. ft.	17.40/40 cu. ft.	123.54
TOTAL			$29,682.53

On December 9, 1976, Ocean Drilling through its freight auditing agent filed overcharge claims 3905 and 3906 with respondent requesting a refund in the amount of $8,401.45 on the ground that the freight charges were not in order. The complainant goes on to allege that:

> Respondent by its letter of April 19, 1977, to complainant's freight audit agency ignored the issue of the claims merits and did not request additional proof in support of the claims, but denied the claims on the basis of a technical tariff rule which limits the filing of overcharge claims to not later than six months after date of shipment.[5]

Ocean Drilling then goes on to allege that "tariff Item 7(b) is in violation of Paragraph 502.302 Title 46 which provides for a two-year statute of limitations.[6] Finally it is alleged that the respondent applied an improper rate ($152.65W/M) to the shipments of Oil Drilling Equipment and that the proper rate should have been $118.45 W/M. A violation of section 18(b)(3) is alleged and reparation in the amount of $8,401.45 is sought.[7]

There are only two issues presented by the complaint: (1) What was the proper rate for the shipments in question, and (2) Does the "six-month" rule act to bar an award of reparation on a complaint filed within the two-year statutory period of limitation?

To deal with the latter first. It is almost inconceivable that anyone would at this late date invoke the six-month rule as ground for refusal to

[5] Ocean Drilling has unfortunately used the term respondent to mean both Kerr and KKK so it is not possible to tell whether it was Kerr or KKK which invoked the "six-month rule." Since all of the correspondence of record has been with Kerr it seems more than probable that it was Kerr which invoked the rule on April 19, 1977. This does not explain its offer to settle on February 18, 1977.

[6] This reference is to the Commission's Rules of Practice and Procedure. The two-year statute of limitations is written into law in Section 22 of the Shipping Act, 1916, (46 U.S.C. 821).

[7] Using $118.45 rate I compute the total charges at $31,644.51. Subtracting this from the total charges assessed, $40,011.30, leaves an overcharge of $8,366.79. Thus it would appear that there has been an overclaim of $34.66. However, rather than reduce the claim by that much, complainant will be given an opportunity to supply its on computations showing that the amount claimed is proper.

properly respond to formal Commission process. That no mere conference rule can work to oust the Commission of its statutory jurisdiction should, even without case precedent, be obvious even to the most oblivious. However there is precedent. See e.g., *Time Limit on the Filing of Overcharge Claims,* 10 F.M.C. 1 (1966); *Proposed Rule—Time Limit on Filing Overcharge Claims,* 12 F.M.C. 298 (1969).[8]

The bills of lading show that the commodity shipped as "Oilwell Drilling Equipment." The export declaration for the shipments show the commodity as "Parts, Accessories and Attachments, for Well-Drilling Machines." FEC tariff Item 982 1005 00 shows a rate (noncontract of $118.45 W/M)for "Oil Well Drilling Rigs, Parts and Accessories—To Kobe Only." Thus, the documents submitted by Ocean Drilling show that the proper rate to be applied to the shipments in question was the $118.45 W/M provided in Item 982 1005 00, and not the $152.65 rate charged by KKK. Even Kerr announced that the proper rate was $118.45 and but for the six-month rule would apparently have satisfied the claim.

Accordingly Kawasaki Kisen Kaisha is hereby ordered to pay to Ocean Drilling and Exploration Co. the sum of $8,401.45 with interest at 6% to begin within 45 days of the date of service of this decision unless the full amount is paid prior thereto, provided, that within 15 days of the date of service Ocean Drilling submits data demonstrating the correctness of the claimed amount. Failing this the amount to be refunded shall be $8,366.51.

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

WASHINGTON, D.C.,
December 20, 1977.

[8] This case offers but one example of the need to institute a rule-making proceeding which would ultimately require that every conference which has or in the future adopts a six-month rule must include in that rule a statement that invocation of the rule against a shipper cannot bar the shipper from seeking redress from the Commission. Such a rule would serve a tofold purpose. On the one hand it would afford unaware shippers of their rights, while on the other it would preclude the kind of tactics employed by respondent here.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET No. 379(I)

ROYAL CATHAY TRADING CO.

v.

SEAWAY EXPRESS LINES

NOTICE OF DETERMINATION NOT TO REVIEW

December 21, 1977

Notice is hereby given that the Commission on December 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served December 8, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 379(I)

ROYAL CATHAY TRADING CO.

v.

SEAWAY EXPRESS LINES

DISMISSAL OF PROCEEDING[1]

December 8, 1977

Royal Cathay Trading Co. (complainant) filed this informal complaint against Seaway Express Lines (respondent) on December 20, 1976 covering two shipments. While a violation of the Shipping Act, 1916, is not alleged, it is presumed to be Section 18(b)(3) which prohibits the assessment of freight charges in excess of those lawfully applicable at the time of shipment.

The complainant was the consignee of two shipments of bambooware from Chung I Trading Co. Ltd., Keelung, Taiwan loaded on board the MANCHESTER CONCEPT on November 18, 1974 under bills of lading KSF–2 and KSF–4, for which the port of discharge was indicated as San Francisco, California. Complainant's place of business is in San Francisco. The vessel discharged at Oakland. The equalization claims are based on the excess of the trucking rates from Oakland to San Francisco,[2] (paid by complainant) over the drayage rates within San Francisco.

The claims are based on Rule 9 of respondent's Freight Tariff No. 7, FMC No. 7 which provides:

"CARGO DISCHARGED AT OTHER THAN BILL OF LADING PORT

"When the ocean carrier discharges cargo at a terminal port other than the port named in the ocean bill of lading, the ocean carrier shall arrange, at its expense, for movement via rail, truck or water of the shipment from port of actual discharge:

"A. To ocean carrier's terminal dock at port of destination declared on the bill of lading in the case of cargo which has been entered through customs at the port of discharge. The ocean carrier may forward such cargo direct to a point designated by the consignee provided the consignee pays the costs which he would normally have incurred

[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] Complainant has submitted freight bills covering the truck movements via P&R Motor Express of the subject shipments from Oakland to San Francisco. Complainant also submitted copies of the bills of ladings which indicate San Francisco as the port of discharge.

either by rail, truck or water, to such point if the cargo had been discharged at the terminal port named in the ocean Bill of Lading, or: . . ."

On November 3, 1975 complainant filed a claim with respondent. After allegedly receiving four unanswered tracers, respondent advised complainant in the beginning of October 1976 that it would receive payment within the next few weeks. As indicated above complainant filed this claim with the Commission on December 20, 1976.

This proceeding covers two claims, both covering port equalization. The first claim covers a movement by P&R Motor Express from Oakland to San Francisco on December 16, 1974. The claim was not filed (received by) the Commission until December 20, 1976. It could be inferred that this claim was not filed within the two-year statutory limit set in Section 22 of the Shipping Act, 1916. However, reference is made to the Commission's Order on Remand in Docket No. 76-1, *CSC International, Inc.* v. *Orient Overseas Container Line, Inc.*, served July 12, 1976, wherein it held:

"The law is well settled that a cause of action based upon a claim for reparation accrues at the time of shipment or upon payment of freight charges, whichever is later. *Aleutian Homes, Inc.* v. *Coastwise Line, et al*, 5 F.M.B. 602, 611 (1959); *United States of America* v. *Hellenic Lines Limited*, 14 F.M.C. 255, 260 (1971); *U.S. ex rel Louisville Cement Company* v. *I.C.C.* 296 U.S. 638, 644 (1917). . . ."

P&R Motor Express Freight Bill No. 05814 dated December 16, 1974, was paid by complainant with its check number 9857 dated March 19, 1975 covering both shipments, which are the subject of the claim. Therefore, this claim was filed within the two-year statutory limit of Section 22 of the Act.

The first part of Claim No. RC-11 covers a movement of Bambooware (MANCHESTER CONCEPT B/L KSF-2) from Oakland to San Francisco weighing 13,709 pounds shipped as 20,000 pounds to take advantage of the lower 98 cent rate, i.e.:

Oakland to S.F. 13,709 as 20,000	($.98)	$196.00
	s/c	3.40
	1%	2.00
		$201.40
S.F. to S.F. 13,709	($1.03)	$141.20
	1%	1.41
		$142.61
Freight equalization		$ 58.79

The second Part of Claim No. RC-11 covered a December 23, 1974 movement of Bambooware (MANCHESTER CONCEPT B/L KSF-4) from Oakland to San Francisco, which moved by P&R Motor Express weighing 5,291 pounds:

Oakland to S.F. 5,291	($12.18)	$115.34
	s/c	3.40
	1%	1.19
		$119.93
S.F. to S.F. 5,291	($1.15)	$60.85
	1%	.61
		$61.46
Freight equalization		$58.47

Both claims were timely filed.

Respondent has submitted a copy of its letter, dated January 17, 1977, to complainant forwarding its check for $117.26 covering this claim in full. Under letter of June 20, 1977, complainant advised that it had received a check for $117.26 from respondent.

Respondent has paid the claim in full and complainant has acknowledged receipt of same. In view of this settlement, the proceeding is hereby dismissed.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 415(I)

CPC INTERNATIONAL TRADING CORPORATION

v.

SEA-LAND SERVICE, INC.

NOTICE OF DETERMINATION NOT TO REVIEW

December 21, 1977

Notice is hereby given that the Commission on December 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served December 9, 1977.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 415(I)

CPC INTERNATIONAL TRADING CORPORATION

v.

SEA-LAND SERVICE, INC.

Reparation Awarded.

DECISION OF JUAN E. PINE, SETTLEMENT OFFICER[1]

CPC International Trading Corporation (complainant) claims the difference between the transportation rate based on assessment of a $133.50 rate per ton of 2,000 pounds, on a shipment of corn starch, in bags, from New York, New York to Port of Spain, Trinidad instead of a lower rate of $98.00 per ton of 2,000 pounds. Transportation charges of $5,393.40 were assessed while complainant alleges said charges should have amounted to $3,595.50, and is seeking reparations in the amount of $1,797.80 from Sea-Land Service, Inc. (respondent). Although no violation of the Shipping Act, 1916, is alleged, it is assumed to be a violation of Section 18(b)(3) thereof.

The shipment consisted of 800 bags of corn starch, weighing 80,800 pounds loaded in two containers moving from New York, New York to Port of Spain, Trinidad on the SS TAMPA on bill of lading number 923447 dated June 4, 1975. The claim was timely filed with the Commission on June 1, 1977. The applicable tariff is the Leeward & Windward Islands & Guianas Conference S.B. L & W 10 Freight Tariff FMC No. 1.

The shipment weighed 80,800 pounds or $\frac{80,800}{2,000} = 40.4$ weight tons of 2,000 pounds. It consisted of 800 bags measuring 2.35 cubic feet each, or 1,880 cubic feet or $\frac{1,880}{40} = 47$ measurement tons of 40 cubic feet.

[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.

(Note: Notice of determination not to review December 21, 1977.)

Respondent assessed a rate of $133.50 per ton of 2,000 pounds or $5,393.40. Total rates and charges assessed were as follows:

Ocean Freight	40.4 weight tons	($133.50)	$5,393.40
Wharfage Dues	40.4 weight tons	($.28)	11.31
Receiving, Storage & Delivery Charges	47 measurement tons	($4.91)	230.77
Port Labor Rationalization Levy	47 measurement tons	($1.00)	47.00
Total			$5,682.48

Complainant submitted the claim to respondent on May 17, 1976. On May 26, 1976 respondent declined the claim based on Item 105 of the subject tariff which provides:

"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 weight, measurement, or description will be declined unless application is submitted in writing sufficiently in advance to permit reweighing, remeasuring, or verification of description, before the cargo leaves the carrier's possession, any expense incurred to be borne by the party responsible for the error or by the applicant if no error is found."[2]

Complainant alleges the appropriate rate for this shipment which is found on 30th Revised Page 22–A of the tariff under Item 211 is $89.00 per ton of 2,000 pounds, applicable to Cornstarch, in bags, barrels or drums. Complainant is correct with respect to the applicable rate. However, it overlooked the fact that the receiving, storage & delivery charge, and the port rationalization charge were assessed on the higher 47 measurement ton basis instead of on a 40.4 weight ton basis. The computations below and footnote 3 will clarify this oversight.

The charges that should have been assessed on the subject shipment are as follows:

Ocean Freight	40.4 weight tons	($89.00)	$3,595.60
Wharfage Dues	40.4 weight tons	($.28)	11.31
Receiving, Storage & Delivery Charge[3]	40.4 weight tons	($4.42)	178.57
Port Labor Rationalization Levy[3]	40.4 weight tons	($1.00)	40.40
Total			$3,825.88

Complainant paid total rates and charges of $5,682.48, whereas the above total rates and charges of $3,825.88 apply. The overpayment was $1,856.60.

In a letter of July 11, 1977, respondent advised that the above rates and

[2] The complaint was filed with this Commission within the time limit specified by statute; and it has been well established by the Commission that carrier's so-called "six month" rule cannot act to bar recovery of an otherwise legitimate overcharge claim in such cases.

[3] Complainant was originally assessed a charge of $4.91 per measurement ton. However, Item 110 of the subject tariff contains a Receiving, Storage & Delivery Charge on Bagged Cargo, N.O.S. of $4.91 per 40 cubic feet or $4.42 per 2,000 pounds as cargo is freighted. Cornstarch, in bags, barrels or drums is assessed a rate of $89.00 per ton of 2,000 pounds per Item 211 of the subject tariff. Therefore, the $4.42 charge applies. The Port Labor Rationalization Levy Charge is assessed on the same weight or measurement basis as the Receiving, Storage & Delivery Charge.

charges should have been assessed. Respondent further indicated that it was awaiting this decision regarding the proper disposition of the overcharge.

Complainant has sustained the burden of proof and respondent agrees that the overcharge assessed was $1,856.60. Reparation of this amount is awarded to the complainant.

(S) JUAN E. PINE,
Settlement Officer.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 418(I)

TOKHEIM CORPORATION

v.

HAPAG-LLOYD A.G.
UNITED STATES NAVIGATION INC., AGENTS

NOTICE OF DETERMINATION NOT TO REVIEW

December 21, 1977

Notice is hereby given that the Commission on December 21, 1977, determined not to review the decision of the Settlement Officer in this proceeding served December 9, 1977.

By the Commission.

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

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 418(I)

TOKHEIM CORPORATION

v.

HAPAG-LLOYD A. G.
UNITED STATES NAVIGATION INC., A GENTS

Reparation Aarded.

DECISION OF RONALD J. NIEFORTH, SETTLEMENT OFFICER[1]

By complaint filed June 8, 1977, Tokheim Corporation, Fort Wayne, Indiana, (complainant) alleges that it was overcharged approximately $1,260.73 as a result of Hapag-Lloyd A.G., (carrier) incorrectly billing the cubic measurement of a shipment transported from New York to Greenock, Scotland in December 1976.

The cargo cleared Fort Wayne via Wilson Motor Freight for delivery to the carrier's vessel M/V WESER EXPRESS sailing New York 12/10/76. Through mishap, oversight, or other unknown causes, Wilson failed to deliver 10 pallets in time for the December 10th sailing. The carrier issued bill of lading 16461966 showing 44,836 pounds and 1,612 cubic feet which, as it developed later, was only part of the total consignment of 53 pallets and boxes of gasoline pump parts weighing 57,822 pounds and measuring 1,438 cubic feet. Despite the short shipment factor, the first part of the shipment was billed out on the basis of 1,612 feet at $119.50 per 40 cubic feet. The balance of the consignment was located and shipped on the M/V MOSEL EXPRESS on December 22, 1976. This parcel which reportedly weighed 12,986 pounds and measured 248 cubic feet was freighted on basis of the measurement factor at $119.50 per 40 cubic feet.

[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.

(Note: Notice of determination not to review December 21, 1977.

The two shipments provided a total of 57,822 pounds as per complainant's packing list and inland bill of lading. However, the combined charges amounted to $5,556.76 based upon a total of 1,860 cubic feet at $119.50/40. The excess cube of 422 cubic feet resulted in the $1,260.73 overcharge which is claimed.

The record reveals that while the complainant applied for refund of the alleged overcharge and supported its petition with a copy of the packing list covering the shipment, the carrier rejected the claim based upon its obligation to adhere to the North Atlantic United Kingdom Freight Conference Tariff FMC-3, which restricts adjustments in freight charges on cargo that has left the custody of the carrier. The pertinent Rule 9, published on page 17 of the tariff reads as follows:

> (A) Claims for adjustment of freight charges, if based on alleged errors in weight or measurement, will not be considered unless presented to the member line in writing before the shipment involved leaves the custody of the member line. Any expenses incurred by the member line in connection with its investigation of the claim shall be borne by the party responsible for the error, or, if no error be found, by the claimant. All other claims for adjustment of freight charges must be presented to the line in writing within six (6) months after date of shipment. This rule shall not apply to cargo shipped by the governments of the United States, United Kingdom or Eire. Unquote.

Although the carrier is indeed prohibited by the above Rule from making a freight adjustment, it has been well established that such a tariff provision can not serve to void the requirements of Sections 18(b)(3) and 22 of the Shipping Act, 1916, as they relate to assessing the properly applicable tariff rates and charges and providing a two years time period in which a violation may be brought before the Commission.

A review of the complainant's statement and an inspection of the accompanying documentation sustains the validity of the complainant's claim as submitted. This opinion is fortified by copy of a letter dated February 4, 1977, to the complainant's broker by United States Navigation, Inc., Agent of the carrier, in which the above tariff rule was cited as the reason for not entering into an informal settlement of the claim, and a further letter of June 23, 1977, addressed to this Settlement Officer confirming that the carrier does not dispute the facts outlined in the Tokheim Corporation's complaint.

There is a plethora of Commission decisions which hold that, carrier or conference imposed tariff rules limiting the period or conditions under which claims for adjustment in freight due to errors in weight or measurement shall be considered, cannot circumvent or contravene provisions of the Shipping Act, 1916, where the assessment of an improper freight charge has been demonstrated, as in this instance. Therefore, since the propriety of the complainant's claim for refund of the overcharge is adequately supported, it is found that the complainant is entitled to reparations in the amount of $1,260.80 based upon the following computation:

Particulars of shipment as tendered Wilson Motor Freight at Fort Wayne, Indiana—
53 pallets and boxes gasoline pump parts weighing 57,822 pounds and measuring 1,438 cubic feet.

Shipment as freighted by ocean carrier—	
M/V WEISER EXPRESS 12/10/76, 44,836 pounds, 1,612 cubic feet	
1,612 cubic feet × $119.50 per 40 cubic feet	$4,815.93
M/V MOSEL EXPRESS, 12/22/76, 12,986 pounds, 248 cubic feet	
248 cubic feet × $119.50 per 40 cubic feet	$ 740.90
TOTAL FREIGHT CHARGES	$5,556.83
Shipment should have been freighted based upon measurement factor of cargo as received by Wilson Motor Freight.	
57,822 pounds, 1,438 cubic feet	
1,438 cubic feet × $119.50 per 40 cubic feet	$4,296.03
OVERCHARGE	$1,260.80

A refund of $1260.80 is due the complainant and it is so ordered.

(S) RONALD J. NIEFORTH,
Settlement Officer.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 542

ALCOA INTERNATIONAL, INC.

v.

GULF EUROPEAN FREIGHT ASSOCIATION

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

January 25, 1978

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 January 25, 1978.

It is Ordered, That applicant is authorized to waive collection of $1,785.74 of the charges previously assessed Alcoa International, Inc.

It is further Ordered, That applicant shall publish promptly in its appropriate tariff the notice prescribed in the initial decision.

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. 542

ALCOA INTERNATIONAL, INC.

v.

GULF EUROPEAN FREIGHT ASSOCIATION

January 4, 1978

Application granted.

INITIAL DECISION OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE[1]

By application filed August 22, 1977, respondent Gulf European Freight Association (GEFA) and its member line, Lykes Bros. Steamship Co., Inc., seek permission to waive a portion of the freight charges on three shipments of calcined alumina and two shipments of high temperature bonding mortar from New Orleans, Louisiana, to Rotterdam, The Netherlands. The five shipments moved under bills of lading issued May 12, 1977. The complainant is Alcoa International, Inc., the shipper shown on each bill of lading. The complainant paid freight charges (exclusive of tollage) in the amount of $22,710.31 on June 6, 1977. The amount sought to be waived is $1,785.74.

The application states that the rates applicable at the time of shipment were $83.75 W on calcined alumina and $91.25 W on bonding mortar and that the rates sought to be applied are $79.25 W on calcined alumina and $83.00 on bonding mortar.

The application goes on to say that respondent "is not aware of any other shipments of the same commodity which moved via respondent during the same period of time at the rate applicable at time of shipment." Respondent adds that it does not believe any discrimination among shippers will result from the waiver. It also agrees to publication of a notice or taking such action as the Commission may direct if permission to waive is granted.

[1] This decision became the decision of the Commission January 25, 1978.

The statement of facts made by the parties in support of the application, as pertinent, is as follows:

On February 21, 1977, the Gulf European Freight Association announced a general rate increase of 10% to become effective May 1, 1977.

On March 11, 1977 the office of the Gulf Associated Freight Conferences received a letter dated March 8, 1977 from Mr. R. W. Swoger, Assistant Manager, Export-Import Traffic Division of Aluminum Company of America, requesting relief from the 10% increase. Mr. Swoger stated that Calcined Alumina could stand a 4% increase, but requested that . . . High Temperature Bonding Mortar be maintained at the existing rate levels at least through September 30, 1977.

Alcoa's request was discussed at a meeting of the Gulf Euopean Freight Association on March 29, 1977, but no decision was reached, until April 7, 1977, when the Chairman informed Mr. Swoger, by telephone, of the following:

. . .

Calcined and Activated Alumina would take a 4% increase on May 1, 1977
High Temperature Bonding Mortar would not take increase on May 1, 1977
Effective October 1, 1977, rates would be subject to increase of 2% to 4%.

This information was confirmed to the Member Lines by telex, dated April 7, 1977.

At this time, Gulf European Freight Association Tariff 3 (FMC–3) was being assembled, incorporating the general rate increase to become effective May 1, 1977, and the pages covering Alumina and Mortar were issued, through an administrative erro, showing these commodities taking the full 10% increase.

When shipment was made on May 12, 1977, shipper was billed at the only applicable tariff rates of $83.75 W on Calcined Alumina, and $91.25 W on High Temperature Bonding Mortar, totalling $24,496.05 (plus tollage). However, Alcoa, having been informed that the rates were to be $79.25 W on Calcined Alumina and $83.00 W on High Temperature Bonding Mortar, made payment based on these rates, for a total of $22,710.31 (plus tollage).

Alcoa then called the attention of the Conference Office to the error in the tariff, and the Conference filed the correct rates with the Federal Maritime Commission on May 19, 1977.

Lykes Bros. Steamship Co. Inc. therefore requests permission to waive collection of the difference of $1,785.74 from Alcoa International, Inc.

In further support of the application the following documents were submitted:

Letter from Aluminum Corporation of America, dated March 8, 1977
Telex dated April 7, 1977 from Chairman to Member Lines confirming that rates on Alumina and High Temperature Bonding Mortar would not take 10% increase of May 1, 1977
Tariff Pages:
- 11th Rev Page 44, GEFA Tariff 2 (FMC–2) showing Alumina rates prior to May 1, 1977
- Original Page 141, GEFA Tariff 3 (FMC–3) showing Alumina rates increased by 10% effective May 1, 1977
- 1st Rev Page 141, GEFA Tariff 3 (FMC–3) showing Alumina rates adjusted to a 4% increase, effective May 19, 1977
- 24th Rev Page 90, GEFA Tariff 2 (FMC–2) showing Mortar rates prior to May 1, 1977
- Original Page 166, GEFA Tariff 3 (FMC–3) showing Mortar rates increased by 10%, effective May 1, 1977
- 2nd Rev Page 166, GEFA Tariff 3 (FMC–3) showing Mortar rates adjusted back to level prior to May 1, 1977

Copies of Bills of Lading Nos. 30, 31, 47, 66 and 92.
Copies of Invoices Nos. 30, 31, 47, 66 and 92.
Copies of deposit ticket covering ocuments involved.

The Commission's authority to permit carriers to refund a portion of freight charges collected from shippers or to waive the collection of a portion of freight charges where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff is derived from the provisions of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 17(b)(3).[2] After stating the requirement that common carriers by water in foreign commerce or conferences of such carriers charge only the rates and charges specified in tariffs on file with the Commission, section 18(b)(3) provides, as pertinent:

Provided, however, That the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of 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 inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers: *Provided further,* That the common carrier by water in foreign commerce or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund or waiver would be based: *Provided further,* That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Commission may require, which give notice of the rate on which such refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; *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.

Upon scrutiny of all of the documents attached to the application and tariffs on file with the Commission, I find the statement of facts contained in the application correct in all material respects.[3]

I find that the mistake, found here, is an "error due to inadvertence in failing to file a new tariff" of the type which Congress had in mind when it enacted section 18(b)(5).[4]

I find that the application was filed within one hundred and eighty days from the date of shipment and that prior to filing the application the conference filed a new tariff with the Commission setting forth a rate on

[2] The Commission's regulations implementing section 18(b)(3) appear in Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a).

[3] There is a difference between my computation of the aggregate charges to be waived and the computation of the parties. The difference amounts to a few pennies and is substantively insignificant. My calculations also show that all the conditions for rating the shipments under the tariff Item No. for calcined alumina "Measuring up to & incl. 80 cu ft per 2240 lbs" rather than the higher rate under the Item No. for shipments measuring over 80 cu. ft. were met. In addition, my calculations show that the bonding mortar was properly rated.

[4] The following illustration is provided in the legislative history to the above quoted four provisions of section 18(b)(3):

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 rate.

House Report No. 920 (90th Cong., 1st Sess. 1967).

which the waiver would be based. I find, further, that the conference has agreed to publish an appropriate notice in its tariff and is willing to take such other steps as the Commission may require to give notice of the rate for which waiver would be based.

Under the safeguards provided in the order, below, I find that the waiver will not result in discrimination among shippers and that additional refunds will be made with respect to other shipments of the same or similar commodities made during the same period of time.

Accordingly, the application to waive collection of a portion of freight charges is granted. It is ordered:

1. Lykes Bros. Steamship Co., Inc., shall waive collection of freight charges in the amount of $1,785.74 due it from Alcoa International, Inc., in connection with the five shipments of calcined alumina and high temperature bonding mortar under bills of lading issued May 12, 1977.

2. Gulf European Freight Association shall publish the following notices at appropriate pages in its tariff:

Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 542, that effective May 1, 1977, and continuing through May 18, 1977, inclusive, the rate on "Alumina, Calcined, measuring up to & incl. 80 cu ft per 2240 lbs in House/House containers only," from U.S. Gulf of Mexico ports as defined in this tariff to Continental European ports in the Bordeaux/Hamburg Range, as defined in this tariff, for purposes of refunds or waiver of freight charges is $79.25 W per ton of 2240 pounds, such rate subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

Notice is hereby given as required by the decision of the Federal Maritime Commission in Special Docket No. 542, that effective May 1, 1977, and continuing through May 18, 1977, inclusive, the rate on "Mortar, High Temperature Bonding: Packed in House/House containers, minimum 38,000 lbs. per container," from U.S. Gulf of Mexico ports as defined in this tariff to Continental European ports in the Bordeaux/Hamburg Range, as defined in this tariff, for purposes of refunds or waiver of freight charges is $83.00 W per ton of 2240 pounds, such rate subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

3. Gulf European Freight Association shall mail copies of the tariff notices to any persons shipping calcined alumina or high temperature bonding mortar via members of that conference during the period from May 1, 1977, through May 18, 1977, inclusive.

(S) SEYMOUR GLANZER,
Administrative Law Judge.

WASHINGTON, D.C.,
January 4, 1978.

FEDERAL MARITIME COMMISSION

DOCKET NO. 77-32

PUBLICATION OF INACTIVE TARIFFS BY NONVESSEL OPERATING COMMON CARRIERS IN DOMESTIC OFFSHORE COMMERCE

ORDER

January 5, 1978

This proceeding commenced with the issuance of a Commission Order directing four nonvessel operating common carriers (Respondents) to show cause why certain FMC tariffs maintained by them should not be cancelled on the grounds that said tariffs no longer reflected *bona fide*, active offerings of transportation service. None of the Respondent carriers replied to the Commission's Show Cause Order.

In view of Respondents' default in the instant proceeding, their failure to amend the subject tariffs since at least July 1, 1974, and their failure to submit annual financial reports pursuant to section 512.22 of the Commission's Rules commencing with their respective 1975 fiscal years, it is concluded that Respondents are no longer active participants in the trades covered by the subject tariffs and that said tariffs should be cancelled as inconsistent with section 2 of the Intercoastal Shipping Act, 1933, and the Commission's tariff filing regulations (46 C.F.R. Part 531).

THEREFORE, IT IS ORDERED, That the following tariffs are cancelled effective immediately:

Ponce De Leon Shipping Co., Inc.
350 Brook Avenue
Bronx, New York 10454

FMC-F No. 2—Between points in New York City and places in Puerto Rico.

REA Express, Inc.
219 E. 42nd Street
New York, New York 10017

FMC-F No. 2—Between Oakland, San Francisco, California; Express Offices in the State of Hawaii, Express Offices in the Continental United States or Canada (Routed via Oakland or San Francisco, California) and Express Offices in the State of Hawaii.

FMC 32—(Railway Express Agency Incorporated, series) Between Seattle, Washington; Prince Rupert, Vancouver, B.C.; Express Stations in Alaska; Express Stations in the United States or Canada (Routed via Seattle, Washington, or Vancouver, B.C.) and Express Stations in Alaska.

FMC 20—(Railway Express Agency Incorporated, series) Official Express Classification 36—Containing Ratings, Rules and Regulations applying on Express Traffic covered by Tariffs issued subject thereto.

Rico Shipping Co.
1997 Third Avenue
New York, New York 10029
FMC–F No. 1—Between New York, New York and San Juan, Puerto Rico.

Unidos Moving Express Co.
4242 W. Armitage Avenue
Chicago, Illinois 60639
FMC–F No. 3—Between New York, New York and Points and Places in Puerto.

By the Commission.

[SEAL]

(S) FRANCIS C. HURNEY,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 511

IMPERIAL OIL & GREASE COMPANY

v.

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE

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

December 28, 1977

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 December 28, 1977.

IT IS ORDERED, That applicant is authorized to refund $366.12 of the charges previously assessed Imperial Oil and Grease 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 511, that effective August 19, 1976, for purposes of refund or waiver of freight charges on any shipments which may have been shipped from August 19, 1976 through September 30, 1976, the rate on 'Oil, lubricating, in bulk, in collapsible containers' to ports in Chile only is $93.50 per 2,000 lbs. subject to all applicable rules, regulations 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 5 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. 511

IMPERIAL OIL & GREASE COMPANY

v.

LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE

Adopted December 28, 1977

Application granted.

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

The Latin America/Pacific Coast Steamship Conference seeks permission to refund a portion of the freight charges on a shipment of lubricating oil in bulk in collapsible containers weighing 12,430 pounds and measuring 300 cubic feet, shipped August 19, 1976, from Los Angeles to Valparaiso, Chile. The rate applicable at the time of shipment was $123.25 per 2,000 pounds or 40 cubic feet plus 3% CMM tax & terminal charges.[2] This rate resulted in aggregate freight charges of $1,025.24. The rate sought to be applied is $93.50 per 2,000 pounds plus 3% CMM tax & terminal charges.[3] This rate would have resulted in total freight charges of $659.12. Therefore permission to refund $366.12 is sought.

Relying on a conference rate on seal drums which had through several increases been in effect since 1967, Imperial Oil in May 1976 made a shipment of five collapsible rubber seal drums from Los Angeles to Valparaiso on the assumption that the rate was $93.50 per 2,000 pounds. In August 1976, Imperial Oil discovered that the applicable rate was $123.25 W/M and the charge was $1,025.24. The reason for that was that the conference had cancelled what they thought was a "paper rate" to effect an increase in rates on cargo which proved to be moving.

Section 18(b)(3) of the Shipping Act, 1916, 46 USC 817 (as amended by Public Law 90-298), and Rule 6(b), *Special Docket Applications*, Rules of Practice and Procedure, 46 CFR 502.92(a), set forth the applicable law and regulation. The pertinent portion of § 18(b)(3) provides that:

[1] This decision became the decision of the Commission December 28, 1977.
[2] Latin America/Pacific Coast Steamship Conference Tariff No. 80 FMC-8.
[3] Same tariff of rates.

The . . . Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of 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: Provided further, That the common carrier . . . has, prior to applying to make refund, filed a new tariff with the . . . Commission which sets forth the rate on which such refund or waiver would be based. . . . (and) Application for refund or waiver must be filed with the Commission within 180 days from the date of shipment.[4]

It is therefore found that:

1. There was an error of an administrative nature in failing to extend the rate in question.

2. The refund of a portion of the freight charges will not result in discrimination among shippers.

3. Prior to applying for authority to refund a portion of the freight charges, the Latin America/Pacific Coast Steamship Conference filed a new tariff which sets forth the rate on which such refund would be based.

4. The application was filed within one hundred and eighty days from the date of shipment.

Accordingly, permission is granted to the Latin America/Pacific Coast Steamship Conference to refund a portion of the freight charges represented by $366.12.

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

WASHINGTON, D.C.,
December 6, 1977.

[4] For other provisions and requirements, see § 18(b)(3) and § 502.92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) & (c).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 545

GENERAL MOTORS OVERSEAS DISTRIBUTION CORPORATION

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY

NOTICE OF ADOPTION OF INITIAL DECISION

December 28, 1977

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 December 28, 1977.

IT IS ORDERED, That the application herein for permission to waive collection of a portion of demurrage charges is denied.

By the Commission.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 545

GENERAL MOTORS OVERSEAS DISTRIBUTION CORPORATION

v.

PUERTO RICO MARITIME SHIPPING AUTHORITY

Adopted December 28, 1977

Application to waive a portion of demurrage charges denied.

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

The Puerto Rico Maritime Shipping Authority has applied[2] for permission to waive $4,676.76 of a total of $4,962.03 in accrued demurrage charges.[3]

The admitted facts are as follows:

On February 14 and 25, 1977, General Motors Overseas Distribution Corporation shipped under Bills of Lading 360400915–0 and 360406752–6 five passenger cars consigned to Daniel Duran Motors Corp. With respect to some of these cars this original consignment was erroneous and consequently on February 28, 1977, General Motors reconsigned four of the five cars to Ralco Auto Sales. Ralco was unable to clear three of these units (XCOS 411717, 411719, and 411721) due to financial difficulties—they were unable to post a bond with the local excise tax office. Unfortunately General Motors had not been informed of these problems at the time they arranged the reconsignment. However, Ralco advised General Motors that their financial problems would be worked out shortly and that they would be able to clear the units accordingly.

It was not until the end of June that Ralco advised General Motors of their intent to relinquish the Buick and Pontiac franchises.[4] By this time considerable demurrage charges had accumulated on these units.

Since General Motors has no excise tax bond in effect in Puerto Rico (its dealers supply the bond), they had to arrange for the units to be

[1] This decision became the decision of the Commission December 28, 1977.

[2] 46 CFR 502.92(b).

[3] Pursuant to PRMSA Tariff No. 1—FMC–F No. 12, 5th Revised p. 103 and p. 103–A.

[4] Ralco has subsequently filed a petition for bankruptcy.

cleared by another one of their dealers, Gomar Auto Corporation. This was done on July 22, 1977. The demurrage accumulated on these units by this date was $4,962.03. General Motors objected to being made responsible for the totality of this charge, arguing that they were never the intended consignee and therefore they should not be made responsible for Ralco's failure to clear the units. They have agreed to pay, and on July 26, 1977, did pay $285.27 for the demurrage charge accumulated due to General Motors' original erroneous consignment.

The parties argue that General Motors should not be saddled with consignee's obligation to pay demurrage charges. They agree that General Motors was not responsible for consignee's failure to clear the units.

It is clear that the liability for demurrage is that of the consignee despite General Motor's assumption of part of that liability for demurrage occasioned by its error in improperly designating the consignee.

There is no basis for waiver of demurrage charges otherwise properly accrued and owing pursuant to the tariff on file. Even if the provisions of section 509.92(a)—applicable in foreign commerce—were to be utilized as a basis for waiver,no waiver could be granted inasmuch as we do not have any error of a clerical or administrative nature between the parties or an error due to inadvertence in failing to file a new tariff. The clerical error on the part of General Motors was between itself and its consignee. No fault can be imputed to the carrier which would constitute any equitable basis for its waiving charges otherwise due it.

The proper remedy would appear to be the filing of a claim by PRMSA for demurrage charges against consignee in the Ralco bankruptcy proceeding.

Application for permission to waive a portion of the demurrage charges is denied and the complaint dismissed.

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

WASHINGTON, D.C.,
December 1, 1977.