DECISIONS OF THE

FEDERAL MARITIME COMMISSION

VOLUME 25

JULY 1982 TO JUNE 1983

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1983

Alan Green, Jr., Chairman
James J. Carey, Member
James V. Day, Member
Thomas F. Moakley, Member
Robert Setrakian, Member

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FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 536]

[GENERAL ORDER 13, AMENDMENT 12; DOCKET NO. 80-54]

TIME/VOLUME RATE CONTRACTS - TARIFF FILING REGULATIONS APPLICABLE TO CARRIERS AND CONFERENCES IN THE FOREIGN COMMERCE OF THE UNITED STATES

July 2, 1982

ACTION: Final Rule

SUMMARY: This prescribes uniform rules and regulations governing the filing of time/volume rates. It will eliminate the present confusion and imprecision surrounding existing time/volume rates and their related tariff provisions. It will also enable the Commission to monitor the use of time/volume rates to ensure that they comply with the terms of their related contracts and the Shipping Act, 1916.

DATE: Effective August 9, 1982.

SUPPLEMENTARY INFORMATION:

On November 2, 1981, the Commission issued a notice of proposed rulemaking (46 F.R. 54390) requesting comments on a rule which would govern the filing of time/volume rates. Forty-four comments have been received by or on behalf of shippers, carriers, conferences of carriers, ocean freight forwarders, and other interested parties (*See* Attachment A). In light of these comments, a number of changes have been made to the rule as proposed. However, before discussing these changes, certain threshold issues must be addressed.

Some commentators challenge the Commission's previous finding that this rulemaking is exempt from the Regulatory Flexibility Act (RFA) (5 U.S.C. § 601 *et seq.*). They believe that this finding is incorrect and that the Commission is required to conduct an initial regulatory flexibility analysis before continuing this rulemaking. The Commission has considered these arguments but continues of the view that the requirements of the RFA do not apply. This proceeding clearly relates to the particular applicability of rates and practices exempt under section 601(2) of the Act (5 U.S.C. § 601(2)).

Several commentators question whether a non-vessel operating common carrier by water (NVOCC) is entitled to use time/volume rates. They contend that an NVOCC is not a true shipper in that it has neither title nor beneficial interest in the shipments it handles. They further submit that conferring shipper status on NVOCCs and permitting them to gain the benefits of the underlying carriers' time/volume rates will disrupt the United States oceanborne foreign commerce. They fear that the use of time/volume rates by NVOCCs will enable them to consolidate small shipments which would otherwise not qualify for a volume rate and thereby erode the underlying carriers' revenues. Commentators are also concerned that an NVOCC will be able to secure for its customers an undue advantage over other shippers who prefer to deal directly with a carrier. Some commenting parties believe that because of the NVOCCs ability to consolidate small shipments and qualify for lower volume rates, they will eventually use their increased market power to obtain unlawful rebates, unjustly discriminatory arrangements, and other illegal favors.

The Commission has historically considered an NVOCC as a shipper in relation to the underlying vessel operating carrier. Nothing presented herein convinces the Commission otherwise. Moreover, the time/volume tariff rules contain sufficient safeguards to prevent the alleged potential abuses, as does the Shipping Act itself. It should also be noted that freight consolidators have been using time/volume rates for many years without adverse consequences. Therefore, there appears to be no valid regulatory reason to deny to the NVOCC class of shippers the benefits which may accrue from time/volume rates.

Finally, there is the question of whether conferences, and dual rate conferences in particular, should be authorized to participate in time/volume ratemaking. Certain commentators argue that time/volume rates are not conventional or routine ratemaking and that contracts for such rates contravene section 14b of the Act (46 U.S.C. § 813a). The Commission disagrees. Time/volume rates are a routine form of ratemaking, interstitial to agreements approved pursuant to the Shipping Act, 1916. Contracts providing for such rates are not exclusive patronage contracts subject to section 14b, but rather are contracts based on the volume of freight offered.

The Commission will now address individual sections of the proposed rule and the comments addressed thereto.

Section 536.2, as proposed, included separate definitions for time/volume rate and time/volume contract. One commentator suggested that two separate definitions are unnecessary. The Commission agrees. These two interrelated definitions can be combined to form a more concise and exact definition and the final rule has been amended accordingly.

Several commentators opposed proposed section 536.______ (a), which requires the publication of time/volume rates and contracts 30 days *prior* to their taking effect and their being made available to all shippers during that period. They noted that, if a contract rate accomplishes a reduction, it should be permitted to take effect upon filing, consistent with existing requirements for rate reductions.

The Commission understands the need to accommodate those instances when market conditions necessitate fast transactions while preserving the need to make all contracts available to all shippers. Moreover, the Commission does not wish to preclude the use of renewable contracts. Therefore, the final rule has been amended to permit new time/volume rates to become effective upon filing. They must, however, be made available to all shippers or consignees under the same terms and conditions for a period of at least thirty (30) days subsequent to the commencement of a new or renewal contract period.

At the suggestion of some commentators, proposed section 536.______ (b)(1) is being amended to make clear that time/volume contracts may cover more than one commodity. This change will permit a single time/volume rate and/or contract to apply to several commodities, thereby eliminating the additional time and expense of maintaining several different contracts.

Several commentators suggested that the recordkeeping requirements of proposed sections 536.______ (b)(5), (b)(8), and (f) be combined or eliminated. Other commentators more particularly objected to section 536.______ (b)(8), which required that a shipper/consignee furnish written notice to the designated record-keeper of any shipment under a contract. The contention is that the carrier's bill of lading is a sufficient written record of time/volume shipments, because both carrier and shipper receive copies for each shipment, and no useful purpose would be served by requiring additional written notification. The Commission concurs. Proposed section 536.______ (b)(8) has been deleted from the final rule. However, it is the Commission's opinion that section 536.______ (f) more closely relates to section 536.______ (g) and therefore they have been combined in section 536.7(e) of the final rule.

Also, with respect to written notifications, several shippers have expressed a desire that our regulations provide that carriers be required to inform shippers as to the number of tons shipped under a particular time/volume contract at various times during the contract period. While there are advantages to such a procedure, the Commission views this as a commercial problem, the details of which should be worked out between the parties. Therefore, it is unnecessary to address this matter in the final rule.

Some reservations were expressed concerning proposed section 536.______ (b)(6), because of its use of the words "precise" and "disabling circumstances." Commentators contend it would be difficult, if not impossible, to precisely describe some "disabling circumstances" and that, moreover, the term "disabling circumstances" is not specific enough to prevent its use as an easy escape from the contract. This point is well taken. This section has therefore been amended to clarify its terms and to prevent "commercial" contingencies (*e.g.*, changing markets, poor management decisions, business declines, etc.) from being labeled "disabling circumstances" to contravene otherwise binding time/volume contracts.

This final rule has also been revised to address the concern of many commentators that the Commission was precluding all but one time/volume rate scheme. Accordingly, proposed sections 536.______ (b)(9) and (c) have been revised and combined to reflect the fact that contracting parties are free to develop their own time/volume schemes within the strictures of the rule.

Proposed section 536.______ (d), which prohibits the filing of time/volume rates in terms of a percentage, fraction, decimal, or multiple of any other rate, was challenged by one commentator. It will nonetheless remain unchanged. Numerous problems could arise if a change in a non-time/volume rate automatically triggers a like percentage, fraction, decimal, or multiple change in a time/volume rate. For instance, if a time/volume rate were stated as a percentage of a non-time/volume rate, and the non-time/volume rate had numerous changes, the time/volume rate would never be clearly and explicitly stated, since it could require numerous comparisons and calculations involving several tariff pages.

Finally, some commentators urge that the record retention period be limited to two years rather than the proposed five-year requirement. The five-year requirement was established to conform with the statute of limitations applicable to rebating violations and it will be retained.

The Commission requested estimates of the financial and man-hour burdens anticipated in complying with the proposed time/volume rule. Only two commentators replied, expressing financial and man-hour burdens of $1,000/40 hours and $30,000/600 hours, respectively. The Commission believes that even these two estimates are no longer relevant in light of the elimination of the reporting requirement for each shipment, as originally proposed. The remaining record-keeping requirement is to simply maintain copies of bills of lading and related documents, accessible within the United States, to substantiate the proper application of time/volume rates as required by section 18(b) of the Shipping Act, 1916. Additionally, there is the potential that some reports will be prepared pursuant to section 536.7(d), concerning disabling circumstances. However, the Commission believes that they will be of a *de minimis* nature.

Information collection requirements contained in this regulation (sections 536.7(a), (b), (d), and (e)) have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. § 3504) and have been assigned OMB control number 3072-0042.

As a result of the above changes, the Commission has renumbered and rearranged certain sections of the rule.

List of subjects in 46 C.F.R., Rates, Maritime Carriers.

THEREFORE, IT IS ORDERED, That pursuant to 5 U.S.C. § 553 and sections 18(b) and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 817(b) and 841(a)), Part 536 of 46 C.F.R. is amended as follows:

I. Section 536.2 is amended by the addition of the following: (p) *Time/Volume Rate* - A rate conditioned upon the shipment of a specific or minimum quantity of cargo over a set period of time, implementation of which is accomplished pursuant to the terms of a time/volume contract set forth in the appropriate tariff and complying with the terms and conditions of section 536.7.

II. A new section is added to 46 C.F.R. Part 536, as follows:

§ 536.7 Time/Volume Rates

Time/volume rates may be offered by common carriers by water in the United States foreign commerce or conferences of such carriers, subject to the following terms and conditions:

(a) Time/volume rates and related contracts shall be published in tariffs on file with the Commission and made available to all shippers or consignees under the same terms and conditions upon filing and for a period of at least thirty (30) days subsequent to the commencement of a new or renewal contract period;

(b) A time/volume contract shall clearly state:

(1) The commodity or commodities to which it applies;

(2) the minimum quantity of cargo necessary to obtain the time/volume rate;

(3) the effective time period of the contract;

(4) the origin and destination ports/points involved;

(5) the manner in which shipment records supporting the time/volume rate are to be maintained.

(6) a clear description of any disabling circumstances, not commercial contingencies (*e.g.*, changing markets, poor management decisions, business declines, etc.), which will permit (i) a reduction in the quantity of cargo required for the contract period, (ii) an extension of the contract period without any change in the contract rate, (iii) a discontinuance of the contract, or (iv) other options not contemplated above;

(7) whether reductions in quantity will be permitted for Saturdays, Sundays, or legal holidays occurring during a disability period;

(8) in situations, other than those described in § 536.7(b)(6), where the volume requirement will not be met during the contract period, (and due to carriers' rate structure undercharges result therefrom) whether a shipper/consignee will be permitted to pay the deficit between the actual quantity shipped and the minimum volume requirement or whether the entire amount shipped during the contract period will be rerated at the applicable non-time/volume rates in effect for the commodity on the date that each particular shipment sailed;

(9) whether or not any surcharges shall apply to the time/volume contract rate;

(c) No time/volume rate may be stated in terms of a percentage, fraction, decimal, or multiple of any other rate;

(d) If a specific reduction in the quantity required for the contract period is stated in the contract for situations when a shipment cannot be made due to specified disabling occurrences, the party encountering disability days shall, within five days of the date of disability, provide written notice to the person designated to maintain records of the nature of disability, and, of its termination, when that event occurs;

(e) Every carrier and conference shall designate a resident representative in the United States for the maintenance of time/volume shipment records. Shipment records concerning each time/volume contract shall be maintained by the designated recordkeeper for a period of five years from the completion of each contract.

IT IS FURTHER ORDERED, That any existing contracts which would otherwise fall under the provisions of this Order shall be permitted to remain in effect but may not be extended or renewed without compliance with this Order or upon Commission approval. In no case shall any existing contract remain in effect more than 12 months from the effective date of this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

Attachment A

Shippers

1. Boise Cascade Corporation
2. E.I. duPont de Nemours and Company
3. FMC Corporation
4. Kero-Sun, Inc.

Carriers and Conferences

1. American West African Freight Conference
2. Atlantic & Gulf/West Coast of South America Conference
3. Continental North Atlantic Westbound Freight Conference
4. Continental-U.S. Gulf Freight Association
5. East Coast Colombia Conference
6. Greece/U.S. Atlantic Agreement
7. Gulf-European Freight Association
8. Gulf/Mediterranean Conference
9. Gulf-United Kingdom Conference
10. Hapag-Lloyd (America) Inc.
11. Iberian/U.S. North Atlantic Westbound Freight Conference
12. Japan/Korea Atlantic & Gulf Freight Conference
13. Japan-Puerto Rico & Virgin Islands Freight Conference
14. Marseilles/North Atlantic U.S.A. Freight Conference
15. Med-Gulf Conference
16. Mediterranean-North Pacific Coast Freight Conference
17. North Atlantic Baltic Freight Conference
18. North Atlantic Continental Freight Conference
19. North Atlantic French Atlantic Freight Conference
20. North Atlantic Mediterranean Freight Conference
21. North Atlantic United Kingdom Freight Conference
22. North Atlantic Westbound Freight Association
23. Open Bulk Carriers, Ltd.
24. Pacific Coast European Conference
25. Scandinavia Baltic/U.S. North Atlantic Westbound Freight Conference
26. Sea-Land Service, Inc.
27. The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference

28. Trans Freight Lines, Inc.
29. Trans-Pacific Freight Conference of Japan/Korea
30. United Kingdom & U.S.A. Gulf Westbound Rate Agreement
31. United States Atlantic & Gulf-Venezuela Conference
32. U.S. North Atlantic Spain Rate Agreement
33. U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement
34. Westwood Shipping Lines
35. 8900 Lines
36. Inter-American Freight Conference

Other

1. Holland & Knight
2. Military Sealift Command
3. National Customs Brokers & Forwarders Association of America, Inc.
4. New York Foreign Freight Forwarders and Brokers Ass'n., Inc.
5. United States Department of Agriculture

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-65

ROHDE & LIESENFELD, INC., INDEPENDENT OCEAN FREIGHT FORWARDER NO. 1832

NOTICE

July 12, 1982

Notice is given that no exceptions have been filed to the June 2, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-65

ROHDE & LIESENFELD, INC., INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1832

An investigation was begun to determine whether respondent, Rohde & Liesenfeld, Inc., a licensed ocean freight forwarder, had violated section 16, Initial Paragraph, Shipping Act, 1916, and section 510.23(d) of the Commission's General Order 4 then in effect, by misstating the port of discharge as Kiel, West Germany, instead of the true ports of Hamburg or Bremen on 48 shipments of mixed commodities and by understating cargo measurements on 11 shipments of fiberglass boats to Hamburg and 5 shipments of machinery to Paraguay, between 1976 and 1978, all for the purpose of reducing freight charges. The investigation also included the question of respondent's fitness to retain its license and the question of assessing penalties for the alleged violations. After several months of prehearing inspection and discovery, the parties formulated a settlement agreement under which respondent would pay $20,000 and institute certain controls to prevent recurrence of the conduct in question. On the basis of the substantial record developed and applicable principles of law, it is found that:

(1) The settlement agreement is fair and reasonable and comports with Commission case law and standards governing the approvability of such settlements since it considers the risks and costs of litigation and various mitigating factors and will have a deterrent effect.

(2) Although the record developed thus far does show that respondent was involved in the shipments in question as alleged, it also shows that respondent may not have been aware of the true destination of the 48 shipments, that it may not have authorized or approved of the misstatements on the 11 shipments, which misstatements may have been made by an employee no longer with respondent at the suggestion of the ocean carrier involved, and that respondent may have attempted to fashion more accurate measurement figures for the five shipments in lieu of the obviously inaccurate figures supplied by the exporter. Moreover, respondent terminated these practices voluntarily, fully cooperated with the Commission's staff and Hearing Counsel, has an otherwise unblemished record of service, and the record does not suggest that respondent harmed any shipper or significantly benefited financially from the above transactions.

(3) The record supports a finding that respondent is fit to retain its license on the basis of the mitigating factors mentioned above and evidence showing that it can be trusted to comply with law in the future.

Gerald H. Ullman for respondent Rohde & Liesenfeld, Inc.

John Robert Ewers, *Joseph B. Slunt*, and *Deana E. Rose* for the Bureau of Hearings and Field Operations, Office of Hearing Counsel.

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

Finalized July 12, 1982

This is an investigation begun by the Commission's Order of Investigation and Hearing, served October 8, 1981. According to the Order, the Commission began the proceeding because it had information which revealed that respondent Rohde & Liesenfeld, Inc. (R & L), an independent ocean freight forwarder licensed by the Commission, may have violated certain provisions of the Shipping Act, 1916, and the Commission's implementing regulation, General Order 4, in connection with three groups of shipments. More specifically, the information seemed to show that R & L had prepared or had otherwise become involved with 48 shipments of mixed commodities moving between December 15, 1976, and November 8, 1978, in which the bills of lading had incorrectly shown the ultimate port of discharge as Kiel, West Germany, rather than the true port of discharge, which was Bremen or Hamburg, in order to obtain lower freight charges applicable to shipments destined for Baltic seaports, supposedly saving $43,654 in freight charges. In addition, R & L may have declared false cubic measurements as a means of obtaining or attempting to obtain ocean transportation for less than applicable charges in connection with 11 shipments of fiberglass boats carried from Baltimore, Maryland, to Hamburg, Germany, between December 31, 1976, and June 27, 1977, saving $14,661 in freight charges, and may have done the same thing in connection with 5 shipments of cotton gin machinery carried to Paraguay between January 24, 1977, and September 8, 1977, saving $24,350 in freight charges. If any of these events occurred and could be proven, they could constitute violations of section 16, Initial Paragraph (46 U.S.C. § 815) which prohibits any forwarder from "knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means, obtain[ing] or attempt[ing] to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable." Moreover, they could violate section 510.23(d) of the Commission's General Order 4 (46 C.F.R. 510.23(d)) in effect at the time of the shipments,[2] which prohibited any forwarder from "knowingly impart[ing] to a principal or oceangoing common carrier false information relative to any [forwarding] transaction."

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[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

[2] The provisions of section 510.23(d) forbidding forwarders from knowingly imparting false information to carriers or other persons were transferred to section 510.32(f) of General Order 4, which was revised effective May 1, 1981 (46 F.R. 24568).

Because of the above alleged misconduct, the Commission also questioned whether civil penalties should be invoked against R & L pursuant to section 32(e) of the Act, and, if so, the amount of any penalty, "taking into consideration factors in possible mitigation," and whether R & L's forwarding license should be suspended or revoked pursuant to section 44(d) of the Act for "willful violations of the Act or such conduct as the Commission finds to render R & L unfit to carry on the business of forwarding in accordance with sections 510.9(b) and 510.9(e) of General Order 4."

Following commencement of the formal proceeding, the case moved into its prehearing inspection and discovery phase in which the parties, respondent and the Commission's Office of Hearing Counsel exchanged discovery requests and participated in numerous meetings and discussions seeking either to proceed to trial or settle. After a series of such meetings and discussions interspersed with periodic reports to me concerning the progress being made and the ongoing development of a record, the parties participated in an informal prehearing conference on February 19, 1982, which I convened, which resulted in the formulation of settlement proposals which were to be transmitted to the parties' respective principals. Thereafter, these proposals were accepted by the principals and after certain difficulties relating to the furnishing of documentary materials from overseas were overcome, the parties were able to submit the text of their settlement together with a well-developed supporting record and legal memoranda, all of which materials were submitted on or before May 14, 1982.[3] On the basis of this record prepared by the parties and their persuasive arguments favoring settlement, I find that their settlement is just and reasonable and should be approved under applicable standards of law and that respondent is fit to retain its license.

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[3] The record consists of a joint stipulation of the parties setting forth the facts concerning R & L's involvement in the 48, 11, and 5 shipments and establishing that R & L did prepare bills of lading which incorrectly stated that the 48 shipments of mixed commodities were destined for Kiel, West Germany, and did understate measurement of cargo on 11 shipments of fiberglass boats to Hamburg and 5 shipments of cotton gin machinery to Paraguay, resulting in considerable freight reductions. The record also shows the ocean carriers involved, namely, Polish Ocean Lines and Baltic Shipping Company for the 48 shipments, Baltic for the 11 shipments, and Moore-McCormack Lines and a company known as Nautilus Chartering Inc. S.A. for the 5 shipments to Paraguay. The supporting materials for this stipulation consist of 78 exhibits comprising numerous basic shipping documents (bills of lading and related documents), tariffs, calculations of freight savings caused by the misstatements, etc. It also includes a sworn statement and two affidavits of Erich H. Trendel, President of R & L (Exhibit 75), Klaus Stankowitz, Vice-President of R & L (Exhibit 76), and Dieter Liesenfeld, Chief Executive Officer and sole stockholder of R & L (Exhibit 77). These affidavits, especially that of Mr. Stankowitz, provide greater details concerning the three groups of shipments and show R & L's potential defenses and factors in mitigation which are discussed later in the body of this decision. Because this case is being settled, the three officials have not, of course, been cross-examined so that the merits of these defenses and the validity of the factual details have not been fully tested. However, as with any settlement, the defenses and proffered evidence are evaluated in terms of probability of success and risks of litigation and such testing is not required.

DESCRIPTION OF THE TERMS OF THE SETTLEMENT

The proposed settlement consists of a payment by R & L of the sum of $20,000 and certain curative undertakings by R & L which are designed to prevent recurrence of the type of conduct described above.[4] Essentially R & L states that it has terminated all such practices as those described and agrees to inform all owners, officers and employees of itself and of its owners, subsidiaries, and affiliates that such practices are not company policy and must not be repeated. A notice to this effect will be submitted to such owners, officers, and employees within 30 days of final approval of the settlement and will be furnished to future owners, officers and employees for three years following approval of the settlement. Furthermore, within 30 days after approval of the settlement, all owners, officers, and employees of R & L will execute a statement under oath that they have read and understood the terms of the settlement agreement and will abide by them, and these statements will be furnished to the Commission. Similar statements of future owners, officers, or employees will be furnished to the Commission for a period of three years after the settlement is approved. R & L also agrees to institute all reasonable measures designed to prevent conduct that may be violative of section 16, Initial Paragraph of the Act, and of section 510.23(d) of the Commission's General Order 4.[5]

APPROVABILITY OF THE PROPOSED SETTLEMENT

Both respondent and Hearing Counsel, in their respective memoranda of law, strongly urge approval of their proposed settlement. Respondent cites previous decisions of the Commission which continually reiterate the principle that "both the law and Commission policy encourage settlements and engage in every presumption which favors a finding that they are fair, correct and valid." (Respondent's memorandum, p. 3, citing, among other cases, *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 974, 983 (I.D.) (adopted by the Commission, 23 F.M.C. 973 (1981)). Respondent argues that the settlement not only comports with the general policy of the law mentioned but also with specific regulations of the Commission

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[4] The brief description of the settlement agreement is only an outline and is not all-inclusive. However, the complete text of the settlement agreement and of the documents mentioned in the agreement are set forth in the appendix to this decision.

[5] As mentioned above, section 510.23(d) is now section 510.31(f). Therefore, the approval of the settlement is conditioned on the understanding that the settlement will be amended to include the present, correct designation where such amendment is necessary in the context of the agreement. It appears that such amendment will be necessary in only one place in the agreement, namely, paragraph no. 4 on page 3, where R & L agrees to "maintain all reasonable measures designed to discourage, prevent, and eliminate the conduct that may be violative of . . . section 510.23(d) of the Commission's General Order 4." References to the earlier section number elsewhere in the agreement are proper in the context.

governing the settlement of civil penalties set forth in 46 C.F.R. Part 505 and the specific instruction of the Commission in its Order of Investigation and Hearing, about "taking into consideration factors in possible mitigation of such penalty." (Order, p. 4.) Respondent cites factors which the Commission's regulations establish as relevant in determining the reasonableness of payments in settlement of cases such as doubts and litigative probabilities and the deterrent effect of settlements, standards adopted by the Comptroller General and Attorney General which are published in 4 C.F.R. 103.3 and 4 C.F.R. 103.5, respectively, and incorporated by reference by the Commission in 46 C.F.R. 505.1. In this regard respondent contends that there are valid doubts concerning the ability of Hearing Counsel to prove the elements of violations of section 16, Initial Paragraph, of the Act (and presumably the corresponding portion of General Order 4) with regard to the requirement that Hearing Counsel show that the alleged misstatements on the 48 bills of lading which incorrectly showed Kiel as port of discharge and the alleged false statements of cubic measurement on the 11 shipments of boats to Hamburg and 5 shipments of cotton gin machinery to Paraguay were made "knowingly and wilfully." Respondent cites affidavits of its officials showing that respondent may not have been aware of the true destination of the 48 shipments, that it did not condone the actions of a lower level employee, no longer with R & L, who apparently understated the measurement of the 11 shipments to Hamburg at the suggestion of the ocean carrier involved, and was not aware of his action, and that R & L acted to protect its principal by preparing a more reasonable estimate of the measurement of the 5 shipments of machinery when the shipper admittedly did not submit a correct figure. Finally, respondent contends that it has cooperated fully with the Commission's investigators even to the extent of providing German consular documents which would not normally be available to the Commission, has had an unblemished record since it was licensed in 1976, and has firmly committed itself to take action to ensure compliance with all U.S. legal requirements in the future.

Hearing Counsel similarly cite some of the multitude of cases which emphasize that settlements are encouraged especially in the functioning of the administrative process. Hearing Counsel also cite General Order 30, the Commission's regulation governing the compromise and settlement of cases involving civil penalties and state that there has been full consideration of mitigating and other factors set forth in that regulation. Hearing Counsel cite respondent's full cooperation with the Commission's staff, its prior unblemished record, and its diligent remedial action as well as the absence of any indication that respondent has been guilty of fraudulent or deceitful conduct or that it has misappropriated funds or violated any position of trust or responsibility. Although Hearing Counsel do not state that they could not prove that R & L violated section 16, Initial Paragraph, of the Act and section 510.23(d) of General Order 4 by "knowingly and wilfully" misstating destination and cubic measurement on the various bills of lading, Hearing Counsel do appear to recognize the difficulties of proving such elements at a trial-type hearing in view of the evidence so far developed and in consideration of various mitigating factors. Thus, Hearing Counsel acknowledge that affidavits of an official of R & L and of its sole owner indicate that the incorrect designation of Kiel as port of discharge on the 48 shipments to Hamburg and Bremerhaven [6] was done without knowledge of R & L of the true destination and was done at the behest of R & L's parent company, R & L GMBH, a German freight forwarder located in Hamburg, which was not acting in violation of German law and did not believe that R & L, which was not a direct party to these arrangements made overseas between R & L GMBH and steamship lines, would be considered to have violated U.S. law under the circumstances. Furthermore, as to the 11 shipments of fiberglass boats to Hamburg,[7] the affidavits indicate that a "lower-level" employee no longer with R & L undertook to understate the cubic measurement at the behest of the ocean carrier involved without the knowledge or permission of the company, which, when the facts became known, stopped the practice immediately. Finally, as to the five shipments of cotton gin machinery to Paraguay, affidavits of two R & L officials indicate that R & L was attempting to ascertain a more realistic measurement figure than the one which the exporter had supplied which was obviously inaccurate and that, in the interest of the party who paid the freight, the overseas consignee, R & L made what it considered to be a more realistic estimate of the proper cubic measurement than the figure originally provided by the exporter who had little or no interest in providing an exact figure since the exporter did not pay the freight and later appeared to acknowledge that its figure might not have been correct. In the above groups of transactions, R & L does not appear to have derived direct financial benefit of any great significance although reductions in freight charges had resulted from the various misstatements on the bills of lading. Moreover, as noted, R & L has taken steps to prevent recurrence of similar conduct and in case exporters furnish uncertain or inaccurate measurement figures such as apparently occurred with respect to the five shipments of cotton gin machinery, R & L has agreed to seek correct figures diligently prior to dispatch of the shipment and, if this cannot be done, then R & L will decline to handle

[6] Although the Commission's Order mentions Bremen as one of the true ports of discharge for the 48 shipments, the record indicates the correct port was Bremerhaven.

[7] The record indicates that the port of discharge was Antwerp on 10 of the shipments and Bremen on one shipment rather than Hamburg as the Commission's Order states.

the shipment. (See "Exhibit A" to the settlement agreement, paragraph 3.)

In conclusion, Hearing Counsel mention that R & L ceased the practice of marking consolidated export shipments to Kiel on the bills of lading nearly three years before this investigation formally commenced and halted the aforementioned practices of underdeclaring cubic measurements to carriers over four years before the formal investigation began, repeat the fact that R & L cooperated fully with the Commission's staff, including Hearing Counsel, to the extent of producing critical documents located in Germany and that R & L did not realize the full benefit of the freight savings, expressly acknowledge that the requisite intent, i.e., knowledge and wilfulness, may not have been present as regards the 48 shipments mistakenly showing Kiel as port of discharge, and recommend a settlement payment of $20,000 as sufficient to act as a deterrent in view of the various factors in mitigation discussed above.

I find the settlement agreement to be fair and reasonable and to comport with previously enunciated policies and standards governing the settlement of cases before this Commission. There are now so many cases and decisions of the Commission encouraging settlements instead of expensive litigation with doubtful results that the matter is now axiomatic and no extended discussion of the reasons underlying this policy should be necessary. A discussion of these principles as applied by the Commission in virtually every type of case involving alleged violations under the Shipping Act is contained in such cases as *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910*, cited above, 23 F.M.C. at 983-985, *Kuehne & Nagel, Inc. - Independent Ocean Freight Forwarder License No. 1162*, 24 F.M.C. 315, 325-328 (I.D., administratively final, October 13, 1981); and in *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 506, 511-515 (I.D., administratively final, November 29, 1978). They demonstrate that the presiding judge and Commission, although approving of the idea of settlements in general, do not become rubber stamps when settlements are proffered. See *Universal Transcontinental Corporation*, 24 F.M.C. 911, 916 (1982). Instead, settlements are scrutinized to ensure that they do not themselves violate any law or public policy and that they represent reasonable judgments by the parties of the economic worth of the case and probabilities of success compared to the cost of continued litigation. In cases in which assessment of penalties is made an issue, furthermore, the Commission will pay attention to such factors as deterrent effects and cost of recovery as well as the risks of litigation and mitigating factors.

The instant case and settlement provides an excellent example of how a combination of factors supports the proffered settlement. As both Hearing Counsel and respondent indicate, although the record thus far developed indicates that R & L did participate in the above transactions directly or indirectly and that its participation did ultimately result in reductions of freight costs for the 48 shipments to Bremerhaven and Hamburg, the 11 shipments of fiberglass boats to Hamburg (or Antwerp), and the 5 shipments of cotton gin machinery to Paraguay, the record also strongly suggests that R & L was either not the prime instigator of these transactions, was unaware of most of them, or was itself victimized by the acts of a lower level employee, no longer with the company, who acted at the behest of the ocean carrier involved. Thus it appears quite possible that on the 48 shipments which were incorrectly shown to be destined for Kiel for the purpose of obtaining lower freight charges published in the ocean carriers' tariffs applicable to Baltic Sea ports, the idea was conceived by the ocean carrier and R & L's parent company, a German forwarder known as R & L GMBH, which apparently acted properly under German law and believed that R & L, which was not a direct party and was possibly unaware of the true ports of discharge, could not be held accountable under U.S. law. As to the 11 shipments of fiberglass boats to Hamburg (or Antwerp), it appears that the ocean carrier involved suggested to an R & L employee that he understate measurement so that the carrier need not file a reduced rate in its tariff and that the employee, without the knowledge or consent of R & L, proceeded to do so. According to the affidavit of Dieter Liesenfeld, Chief Executive Officer of R & L GMBH and sole owner of R & L, R & L was trying to obtain a competitive rate from the ocean carrier but was not instructed to do so in an unlawful manner because this might jeopardize R & L's valued forwarding license. As to the five shipments of cotton gin machinery, it is quite possible that R & L acted reasonably in its effort to ascertain from the exporter a more accurate measurement figure than the suspicious-looking figures which the exporter, which may have had little or no interest in accuracy, had furnished, and that R & L's estimate of measurement was itself reasonable. All of the above facts do not mean that were the case to proceed to trial-type hearings complete with cross-examination and fully researched post-hearing briefs, R & L would not be held accountable for the misstatements of destination and measurement on the bills of lading notwithstanding these various defenses. Ignorance of the law is not a traditional defense nor is it clear that the improper acts of an employee are not imputed to the employer or a parent to a subsidiary nor that the well-meaning construction of a measurement figure in lieu of reliable supporting evidence is acceptable conduct. However, as both parties acknowledge, a critical element of violation of section 16, Initial Paragraph, is knowledge and wilfulness (and for violation of 46 C.F.R. 510.23(d), knowledge), and there are valid doubts as to whether Hearing Counsel could prove these elements for all the shipments under the circumstances so far shown by the affidavits submitted by respondent.

Furthermore, there are a number of mitigating factors which may affect both the ability to prove the offenses as well as support the idea of a settlement, for example, the fact that the events have long since terminated with no indication of recurrence, that R & L did not derive direct, significant financial benefit from freight reductions, that the "lower-level" employee has been discharged, that R & L apparently made its own estimate of the measurement of the machinery moving to Paraguay in an effort to be accurate, not to cheat the carrier, that R & L has fully cooperated with the Commission's staff and Hearing Counsel even to the extent of furnishing critical documents from Germany, that R & L has taken and will take remedial action to prevent recurrence, and that there is no indication of fraudulent conduct or harm to shippers. The Commission has often considered such mitigating factors as those present in this case when deciding the proper amounts of penalties to assess or whether to revoke or suspend licenses in full recognition of the fact that the freight forwarder law is "remedial," not punitive. For example, in *Paulssen & Guice Ltd. - Independent Ocean Freight Forwarder License No. 1166*, 24 F.M.C. 583 (1982), the Commission, among other things, granted a license to an applicant although finding that the applicant had committed 922 violations of law by forwarding that many shipments without a license, and assessed a penalty of $5,000, the statutory maximum for one violation. (Section 32(a) of the Shipping Act, 1916, as amended, 46 U.S.C. § 831.) However, the Commission found many mitigating factors such as the fact that applicant believed that it had been authorized to forward under a previously-approved branch office operation, that it curtailed the unlawful activities promptly after learning that they were unlawful, that it had not violated any law prior to this time, that it was not guilty of fraud and had not acted out of moral turpitude, that no shipper had suffered, that it had not received any improper financial gain, that it was technically well qualified and its president had operated as a qualifying officer of the previously authorized branch office since 1976, that he was committed to adhering to the requirements of law in the future, and that applicant had retained counsel familiar with the legal requirements of freight forwarding to prevent the recurrence of regulatory problems. 24 F.M.C. at 591. Such factors have often been considered by the Commission as mitigating. See, e.g., *Continental Forwarding, Inc. - Independent Ocean Forwarder Application and Possible Statutory Violations*, 23 F.M.C. 634 (I.D. partially adopted by the Commission, 23 F.M.C. 623 (1981)) (prior good behavior, cooperation with the Commission's staff, diligent remedial action); *H.K. International Forwarding, Inc., Independent Ocean Freight Forwarder License Application*, 22 F.M.C. 622 (1980) (cooperation with the Commission's staff, termination of allegedly violative activity, absence of fraud, deceit, financial misappropriation, or breach of fiduciary duty); *Eastern Forwarding International, Inc. - Inde-*

pendent Ocean Freight Forwarder Application, 23 F.M.C. 206 (1980) (prompt termination of allegedly unlawful conduct, absence of fraud, deceit or other conduct involving moral turpitude, cooperation with the Commission's staff). The Commission has also recognized that if a forwarder's conduct occurred at a time when the state of the law on the subject was unclear, the lack of clear and definitive administrative or judicial precedent will also be considered as a factor in mitigation. See *Behring International, Inc. - Independent Ocean Freight Forwarder License No. 910,* cited above, 23 F.M.C. at 991-992. This last factor has some relevance to this case with respect to the fact that apparently it was R & L's parent company, R & L GMBH, not R & L, which made arrangements for the 48 shipments to be designated as bound for Kiel, knowing that the true destinations were Bremerhaven or Hamburg, more costly ports of destination under the carriers' tariffs, and presumably R & L was not made aware of the true destinations. If so, it is not clear that R & L would be held accountable for the conduct of its parent which believed it was operating in accordance with German law and was not implicating its subsidiary company in the United States. Moreover, when considering whether the amount of payment upon which the parties have settled, $20,000, is within a zone of reasonableness, considering the need to deter future violations as well as the risks of litigation and the various mitigating factors mentioned, it would also be well to recall that R & L apparently received only a portion of benefits in the form of credits from its parent, R & L GMBH, and to consider that although there may have been 48, 11, and 5 shipments in which misstatements and misdeclarations occurred, the Commission has in at least one occasion considered far more violations (922) as essentially one for which a penalty of $5,000 was assessed because all of the violations occurred under the same mitigating circumstance, namely, the belief by the forwarder that it was authorized to perform the services. See *Paulssen & Guice Ltd. - Independent Ocean Freight Forwarder License No. 1166,* cited above, 24 F.M.C. at 591. In short, then, the proffered settlement appears to reflect fully the various factors enunciated by the Commission in previous cases of this type and the factors in mitigation which are almost identical to those present in such cases as *Paulssen & Guice, Continental Forwarding, H.K. International,* and *Eastern Forwarding,* cited above. Finally, it bears noting the particular provisions of the settlement agreement requiring notification to owners, officers, and employees of R & L of the company's strict policy against violations of U.S. law and the execution of statements under oath by such persons binding them to this policy and to the settlement agreement as well as the termination of the questionable practices and remedial measures taken to prevent recurrence. These measures, as well as the payment of $20,000, should work together to provide the necessary deterrent effect.

THE QUESTION OF FITNESS

The question of R & L's fitness to continue to operate under its license without suspension or revocation now remains for determination. This issue has been included in this investigation by specific order of the Commission which questioned whether R & L's license should be suspended or revoked for "wilful violations of the Shipping Act, 1916; or . . . such conduct as the Commission finds renders R & L unfit to carry on the business of forwarding . . ." (Order of Investigation and Hearing, issue no. 8, page 4). Under previous decisions of the Commission, it has been held that the question of fitness cannot be settled by the parties. See *Kuehne & Nagel, Inc. - Independent Ocean Freight Forwarder License No. 1162*, cited above, 24 F.M.C. at 335; *Independent Freight Forwarder's License—E. L. Mobley, Inc.*, Order, 18 SRR 451 (1978). See also *Universal Transcontinental Corporation*, cited above, 24 F.M.C. at 916 (1982) (Commission finds forwarder to be fit on the basis of the record as a whole notwithstanding presiding officer's "termination" of that issue upon approval of a settlement agreement).

Both respondent and Hearing Counsel argue persuasively that revocation or suspension of R & L's license would be a drastic sanction without justification on the record. Respondent (which has not conceded that its conduct violated law, among other reasons, because of the doubtful presence of knowledge and wilfulness) cites the numerous mitigating factors discussed above, for example, respondent's complete cooperation with the Commission's staff and with Hearing Counsel, its furnishing of critical German consular documents not ordinarily available to the Commission as well as its files in New York, its unblemished record since 1976 when it obtained its license, its able service to the American shipping public since that time, its firm commitment to abide by U.S. law, and the innocence of its 30-odd employees "virtually all of whom were not even aware of the alleged violations." (Respondent's Memorandum, p. 10.) Respondent cites previous decisions of the Commission such as *E. Allen Brown*, 22 F.M.C. 583 (I.D., adopted in relevant part, March 24, 1980); *Delmar Shipping Corporation*, 8 F.M.C. 493, 497 (1965); and *E. L. Mobley, Inc.*, cited above, 21 F.M.C. 845 (1979), in which the Commission showed great sensitivity to saving jobs of forwarders that had been in business for a number of years and in fashioning reasonable remedies short of revocation or suspension of licenses. Hearing Counsel cite similar factors in mitigation such as R & L's cooperation and voluntary termination of the allegedly unlawful conduct, cite similar case law showing that the Commission considers the freight forwarder law to be remedial, not punitive, and accordingly seeks to fashion reasonable, not draconian sanctions when such are not necessary to achieve regulatory purposes, and Hearing Counsel assert that there is "strong evidence to demonstrate that R & L intends to comply with the shipping laws and regulations and seeks to prevent the recurrence of past activities in question." (Hearing Counsel's Memorandum, p. 17.) I agree with both parties that revocation or suspension is totally unnecessary and completely unsupported by this record and, furthermore, on the basis of the record and R & L's firm commitments to prevent future violations of law, I find R & L to be fit to retain its license, as the Commission found the forwarder in *Universal Transcontinental Corporation*, cited above, 24 F.M.C. 911.

It is true, as both parties contend, that the Commission seeks to fashion reasonable remedies and does not merely issue draconian decrees of revocation or suspension when such are unnecessary to achieve regulatory purposes. Moreover, the Commission has avoided such drastic sanctions even when the record shows, as it does not here, that there have clearly been wilful violations of law. The Commission seems more concerned that it has evidence that a forwarder can be trusted in its future business behavior to adhere to all requirements of law and the Commission's regulations. These principles and supporting case citations are discussed in *Kuehne & Nagel, Inc.*, cited above, 24 F.M.C. at 355-340; see also *Behring International, Inc.*, cited above, 23 F.M.C. at 990; *E. Allen Brown*, cited above, 22 F.M.C. at 596; *E. L. Mobley*, cited above, 21 F.M.C. at 847; *Harry Kaufman D/B/A International Shippers Co. of N.Y., etc.*, 16 F.M.C. 256, 271 (1973); *Independent Ocean Freight Forwarder License Application - Guy G. Sorrentino*, 15 F.M.C. 127, 134, 136 (1972). The present record, as the parties indicate, contains virtually all of the evidence necessary to find R & L fit in cases of this type, for example, R & L's termination of the questionable practices long before this case began, its cooperation with the Commission's staff, its unblemished record, and its firm commitment to abide by U.S. law with specific remedial action and controls. To such evidence of good-faith intentions to comply with law coupled with specific remedial action, the Commission has previously responded with restraint and has refrained from invoking the extreme sanction of revocation or suspension. See, e.g., *Kuehne & Nagel, Inc.*, cited above, 24 F.M.C. at 340-341; *Universal Transcontinental Corporation*, cited above, 24 F.M.C. at 915-916. In the last cited case, furthermore, the Commission found the forwarder to be fit after considering a record which showed no clear-cut violations, no harm to shippers, voluntary termination of the questionable practices some time before the proceeding began, and the forwarder's commitment to prevent recurrence of such practices. In these regards, the Commission stated:

> Finally, there is no evidence in the record of this proceeding which would call into question Respondent's continued fitness to be licensed as an ocean freight forwarder. The compensation practices at issue have not, in this case, been held to constitute a violation of the Shipping Act, 1916 or any Commission rule. Moreover, there is no indication that UTC other-

> wise violated the Act by passing on any compensation received to its shipper-clients or by entering into any unapproved section 15 agreements with the involved carriers. Nor does the record indicate that Respondent engaged in any conduct inconsistent with its fiduciary responsibility to its shipper-clients. On the other hand, Respondent did terminate the practices prior to the institution of this proceeding and agreed to implement certain internal controls to preclude their recurrence. Accordingly, the Commission finds that UTC remains fit to be licensed as an independent ocean freight forwarder.

Similarly, I find on this record that R & L is fit to retain its license.

ULTIMATE CONCLUSIONS

I find that the proposed settlement agreement which respondent and Hearing Counsel have negotiated is fair and reasonable, comports with previously enunciated standards of law, and should be approved. The record does show that during the period 1976-1978, R & L was involved in forwarding 48 shipments of mixed commodities to Hamburg and Bremerhaven, Germany, which were mistakenly shown as bound for Kiel on the bills of lading, and in understating measurements of cargo for 11 shipments of fiberglass boats to Hamburg (or Antwerp) and for 5 shipments of cotton gin machinery to Paraguay, and that as a result of these misstatements and misdeclarations considerable reductions in freight were realized. However, the record also shows that R & L may not have been aware of the true routing in Europe, i.e., that the 48 shipments were actually to be discharged at Bremerhaven and Hamburg without transshipment to Kiel, since its parent, R & L GMBH, located in Germany, had arranged for the discharge in cooperation with the ocean carrier involved as permitted by German law. Furthermore, the understatements on the 11 shipments of boats appear to have been made by a lower-level employee no longer with R & L at the behest of the ocean carrier involved without the knowledge or permission of R & L's management. Finally, R & L appears to have changed the measurement figures furnished by the exporter for the 5 shipments of machinery in an effort to correct obviously inaccurate figures rather than to cheat the ocean carriers involved. Although R & L might still have been found to have violated section 16, Initial Paragraph, of the Shipping Act, 1916, and 46 C.F.R. 510.23(d), notwithstanding the above facts and defenses, it is not clear that it would be so found after a full trial-type hearing nor that all these defenses are invalid under the present state of the law. Rather than consume time and money in litigation with significant risks and doubts, the parties have formulated a settlement agreement which would deter recurrence of the questionable practices and which fully considers not only the risks of litigation but various mitigating factors.

This record will not support the drastic sanction of revocation or suspension of R & L's license. The record rather supports the finding that R & L is fit to retain its license since it shows such facts as R & L's termination of the questionable practices long before this proceeding began, full cooperation with the Commission's staff and Hearing Counsel, firm commitments to prevent recurrence of such practices, and shows an otherwise unblemished record of service since 1976 when R & L obtained its license. Furthermore, there is no evidence of harm to shippers, of direct and substantial financial benefit to R & L as a result of the questionable conduct, or of fraudulent conduct or behavior stemming from moral turpitude on the part of R & L. In similar cases with similar records, the Commission has found that such factors warrant a finding of fitness.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX

BEFORE THE FEDERAL MARITIME COMMISSION

ROHDE, & LIESENFELD, INC.
INDEPENDENT OCEAN FREIGHT
FORWARDER NO. 1832

DOCKET NO. 81-65

PROPOSED SETTLEMENT OF CIVIL PENALTIES

The Proposed Settlement has been entered into between the Bureau of Hearings and Field Operations (Hearing Counsel) and Respondent Rohde & Liesenfeld Inc. (Rohde & Liesenfeld). It is submitted to the presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.162) and section 505.3 of the Commission's General Order 30 (46 C.F.R. § 505.3).

WHEREAS, by Order of Investigation and Hearing served October 8, 1981, the Commission instituted the present Investigation to determine whether Rohde & Liesenfeld has violated section 16, Initial Paragraph, of the Shipping Act, 1916 (46 U.S.C. § 815) and section 510.23(d) of the Commission's General Order 4 (46 C.F.R. § 510.23(d)) during the period December 5, 1976 to November 8, 1978 and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of section 16, Initial Paragraph of the Shipping Act, 1916 and section 510.23(d) of the Commission's General Order 4 so found;

WHEREAS, the Order of Investigation and Hearing alleges that Rohde & Liesenfeld may have violated section 16, Initial Paragraph of the Shipping Act, 1916 and section 510.23(d) of the Commission's General Order 4;

WHEREAS, Rohde & Liesenfeld has admitted that it has engaged in specified conduct which may be violative of section 16 of the Shipping Act, 1916 and section 510.23(d) of the Commission's General Order 4;

WHEREAS, Rohde & Liesenfeld has terminated the allegedly violative conduct and has indicated its willingness and commitment to cooperate with the Commission and maintain measures designed to eliminate, discourage, and prevent such conduct in the future;

WHEREAS, the parties, in order to avoid the delays and expense that would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of settling expeditiously the issues of alleged violations and civil penalties in accordance with the terms and conditions of this Agreement; and

WHEREAS, section 32(e) of the Shipping Act, 1916 (46 U.S.C. § 831(e)), authorizes the Commission to assess or compromise all civil penalty claims under the Shipping Act, 1916;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from violations of the Act and General Order 4 as set forth in the factual record submitted in the present proceeding and as set forth and described in the October 8, 1982 Order of Investigation and Hearing, that the Commission believes may have been committed during the period December 5, 1976 through November 8, 1978, Rohde & Liesenfeld agrees, as a condition of this Agreement, to comply with all requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

1. Rohde & Liesenfeld hereby agrees, as a condition of this Agreement, to pay to the Federal Maritime Commission the monetary amount of Twenty Thousand Dollars ($20,000) within thirty (30) days following approval by the Commission of this Proposed Settlement of Civil Penalties.

2. Rohde & Liesenfeld has terminated all practices such as those described in the Commission's October 8, 1981 Order of Investigation and Hearing, and has informed all of its owners, officers and employees and the owners, officers and employees of all of its parents, subsidiaries, and affiliates in writing, that such practices, and all practices not in accordance with the provisions of the Shipping Act, 1916, and the Commission's Rules and Regulations now in force or that may be adopted, are contrary to Rohde & Liesenfeld's company policy, must be terminated immediately and must not be engaged in at any time.

3. Respondent will, within thirty (30) days following final approval of this Proposed Settlement, furnish a copy of Exhibit "A," attached thereto, to all its owners, officers and employees, and to all the owners, officers and employees of its parents, subsidiaries, and affiliates. Respondent will furnish a copy hereof to all future such owners, officers and employees for a period of three years following final Commission approval of this Settlement.

4. Rohde & Liesenfeld will institute and has indicated its willingness to maintain all reasonable measures designed to discourage, prevent, and eliminate the conduct that may be violative of section 16, Initial Paragraph of the Shipping Act, 1916 and section 510.23(d) of the Commission's General Order 4.

5. Within thirty (30) days following final approval of this Proposed Settlement, each of Rohde & Liesenfeld's owners, officers, and qualifying officer will execute a statement under oath that he/she has read and

understood this Agreement, and that he/she will abide by all of its terms and conditions with respect to the termination of the practices set forth and described in the factual record submitted in the present proceeding. For a period of three years following Commission approval of this Settlement, all future such officers, owners, and qualifying officers will execute such statement under oath. These statements will be submitted promptly to the Secretary, Federal Maritime Commission. The form of this statement is attached hereto as Exhibit "B".

6. Rohde & Liesenfeld hereby agrees, as a condition of this Agreement, that, if it breaches this Agreement, it will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to August 1, 1985 by or on behalf of the Commission, to recover civil penalties for violations of section 16, Initial Paragraph of the Shipping Act, 1916 and of violations of the Commission's General Order 4, arising out of the conduct set forth in the factual record submitted in the instant proceeding. In the event of such a breach by Rohde & Liesenfeld, if such noncompliance shall not have been cured or explained to the Commission's satisfaction within thirty (30) days after written notice to Rohde & Liesenfeld by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of this Agreement, or to declare this Agreement null and void; provided, however, that Rohde & Liesenfeld's waiver of the Statute of Limitations under this paragraph shall remain in full force and effect. In the event the Commission declares this Agreement null and void and such determination is not reversed by a court of competent jurisdiction, any monies paid to the Commission shall remain the property of the United States, and Rohde & Liesenfeld will not interpose any defense based on the Statute of Limitations in any action which the Commission may institute to recover civil penalties arising out of the conduct set forth in the factual record submitted in the present proceeding.

7. It is expressly understood and agreed that this Agreement and final approval hereof is not to be construed as an admission by Rohde & Liesenfeld or its owners, officers, directors, employees or affiliates of the violations alleged in the Order of Investigation and Hearing by which this proceeding was instituted.

8. Rohde & Liesenfeld acknowledges that it has voluntarily signed this Agreement and states that no promises or representations have been made to it, other than the agreements and consideration herein expressed.

9. Insofar as this Proposed Settlement may be inconsistent with Commission procedures for compromise and settlement of violations as set out at 46 C.F.R. § 505, the parties hereby waive application of such procedures.

10. The undersigned represents that he/she is properly authorized and empowered to execute this Agreement on behalf of Rohde & Liesenfeld and to fully bind Rohde & Liesenfeld to all of the terms and conditions set forth herein.

Rohde & Liesenfeld, Inc.

By: (S) Klaus Stankowitz
Title: Vice President

(S) JOHN ROBERT EWERS
Director
Bureau of Hearings and Field Operations

(S) JOSEPH B. SLUNT
Chief
Office of Hearing Counsel

(S) DEANA E. ROSE
Hearing Counsel

April 23, 1982

EXHIBIT "A" to Proposed Settlement Agreement in Docket No. 81-65

ROHDE & LIESENFELD, INC.

NOTICE

This is to notify you that it is the policy of this company to strictly adhere to the duties and obligations of a licensed freight forwarder as prescribed by the U.S. Federal Maritime Commission.

This means that this company, its owners, officers and employees will familiarize themselves with applicable provisions of the U.S. Shipping Act, 1916 (46 U.S.C. § 801, *et seq.*), and any subsequent amendments thereto, and Federal Maritime Commission General Order 4 (46 C.F.R. Title 510), and will abide completely by these provisions. Your attention is directed to the following particular provisions to which strict adherence is required:

1. Give correct information to ocean carriers regarding the weight, measurement and destination of shipments in connection with forwarding transactions.
2. Do not obtain transportation at other than applicable rates.
3. Seek diligently to ascertain from the supplier, before exportation, accurate information as to the actual measurement of each shipment where a question has arisen as to the actual measurement and decline from handling such shipment if Rohde & Liesenfeld is unable to confirm the correct measurement prior to the ocean transportation.
4. Do not seek a freight rate which is not provided in the carrier's tariff.

The foregoing list of freight forwarder duties and obligations is for example only, and you are directed to adhere to all other obligations of the Shipping Act, 1916, and General Order 4.

Please sign the attached copy of this notice in the space provided, and return it within two days to Rohde & Liesenfeld, Inc., One World Trade Center, New York, New York.

I, ____________________ , hereby acknowledge that I have read the foregoing notice and agree to adhere to it completely.

(S) ____

Signature

____

Title:

____

Office:

____

Date

EXHIBIT "B" to Proposed Settlement Agreement in Docket No. 81-65

AFFIDAVIT

I, ____________________, hereby depose and state as follows:

1. I am the ______________________________ of Rohde & Liesenfeld, Inc. with offices at ______________________________________.

2. I have read and understood the settlement agreement entered into between Rohde & Liesenfeld, Inc, and Federal Maritime Commission Bureau of Hearings and Field Operations in Commission Docket No. 81-65.

3. I will not engage in, and will instruct those under my supervision to not engage in any practices which would violate the U.S. Shipping Act, 1916 (46 U.S.C. § 801, *et seq.*), and Federal Maritime Commission General Order 4 (46 C.F.R. Title 510), both of which I have read and with which I have become familiar.

4. I will strictly abide by all provisions of the Shipping Act, 1916, and General Order 4, and will instruct those under my supervision to do the same.

5. I understand that I am signing this affidavit under oath, and that any false statement herein could subject me to possible criminal penalties.

(S) ____

Sworn to before me, a Notary Public,
this __________ day of ____________________, 19______.

(S)______________________________________
Notary Public
My Commission Expires:

[Seal]

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-11

JOHNSON & JOHNSON INTERNATIONAL

v.

ECUADORIAN LINE, INC.

NOTICE

July 19, 1982

Notice is given that no exceptions have been filed to the June 7, 1982 initial decision in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-11
JOHNSON & JOHNSON INTERNATIONAL

v.

ECUADORIAN LINE, INC.

Five shipments of polyethylene film improperly classified as Cargo N.O.S. Reparation awarded.

Axel O. Velden and *Harold Clevett* for complainant.

Paul G. Kirchner for respondent.

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

Finalized July 19, 1982

Johnson & Johnson International accuses Ecuadorian Line of improperly classifying five shipments of polyethylene film as Cargo N.O.S. and seeks $20,822.64 in reparation for the overcharges resulting from the alleged misclassification.

Johnson & Johnson asked that the case be handled under the shortened procedure of Subpart K of the Commission's Rules of Practice and Procedure and attached to its complaint a brief and supporting documents. The use of the shortened procedure is conditioned upon the consent of the respondent. However Ecuadorian Line in its answer to the complaint stated that ". . . Ecuadorian Line does not at this time consent to the shortened procedure." In response to an order calling upon respondent to either consent to the shortened procedure or state its unqualified refusal to do so, respondent agreed to the shortened procedure and filed its answering memorandum pursuant to the schedule established by my order of March 12, 1982. On April 27, 1982, Johnson & Johnson filed a "Reply of Johnson & Johnson International to the Motion of Ecuadorian Line dated April 9, 1982." The document to which Johnson & Johnson's Reply was addressed was actually the respondent's Answering Memorandum of Fact and Argument which ended with a more or less pro forma motion to dismiss. Ecuadorian Line has now filed a motion to strike the reply and dismiss the proceeding. Under the schedule mentioned above, Johnson & Johnson's reply

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

should have been filed on April 19, 1982, but was not served until April 26, 1982. Respondent, while recognizing that "reparation proceedings should not be overburdened with legal technicalities or procedural niceties," urges that the "gross failure" of Johnson & Johnson to comply with my order "cannot reasonably be considered to involve a mere legal technicality." According to Ecuadorian Line "The integrity of the Commission's decision-making process would be significantly impaired if such orders could be disregarded at the whim of the parties involved in these proceedings." Johnson & Johnson by telex expresses its regret at filing its reply seven days late and asks that the motion to dismiss be denied and the matter settled on its merits.

While the delay in filing the reply may not be a mere legal technicality (whatever that may mean), I do not find that excusing it will significantly impair the Commission's decision-making processes. The motion to dismiss is denied.

The facts giving rise to Johnson & Johnson's claim for reparation are few and undisputed. The bills of lading covering the five shipments described the commodity shipped as "polyethylene film." Ecuadorian Line rated the shipments as Cargo N.O.S. because the tariff [2] contained no rate for polyethylene film.

Subsequently Ocean Freight Consultants on behalf of the complainant filed claims for overcharges with respondent on the basis that the shipments should have been classified as Film, viz: Cellulose (Cellophane) or Resinous Film Products, viz: in sheets, sheeting or rolls (not adhesive or gummed). The claims were rejected on the ground that the N.O.S. classification was the correct one and ultimately this complaint was filed.

The single issue presented [3] is whether polyethylene film is included within the description "Film, viz: Cellulose (Cellophane) or Resinous Film Products. . . ." Complainant asserts that polyethylene and resinous film are synonymous while respondent says that they are separate and distinct articles. Both rely on dictionary definitions to support their disparate conclusions.

In its opening memorandum, complainant's argument consisted of reliance upon a "dictionary definition on page 759" which stated, "Polyethylene is a semi-transparent film and the white leathery resinous form are [sic] by far the most common." [4] To complainant this makes polyethylene film and resinous film synonymous and dictates the application of the "Film" classification to the five shipments.

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[2] Freight Tariff FMC No. 2, Atlantic & Gulf/West Coast of South America Conference.

[3] The issue of whether Johnson & Johnson had actually paid the freight and thus had standing was rendered moot by the submission of cancelled checks showing payment of the freight.

[4] The dictionary was unidentified in the opening memorandum; it was identified in complainant's reply as the *Condensed Chemical Dictionary, Eighth Edition.*

The respondent, however, relies upon the *New Webster's Encyclopedic Dictionary of the English Language* which at page 716 defines resin as "[a] flammable substance of sundry varieties found in most plants, and often obtained by spontaneous exudation." From this and other definitions,[5] respondent feels that "it is clear that resin, in its usual and ordinary meaning, refers to a substance derived from plants." Respondent then offers a string of definitions which it says shows the difference between resinous film products and polyethylene film. Polyethylene is defined as a "polymer of ethylene" (*New Webster's Encyclopedic Dictionary*, page 643) and "polymerization" is defined by the *Condensed Chemical Dictionary* at page 710 as "a chemical reaction usually carried out with a catalyst, heat, or light in which two or more relatively simple molecules (monomers) combine to form a chainlike macromolecule or polymer." Finally ethylene is defined as a "colorless, highly flammable gas found in coal gas" (*Condensed Chemical Dictionary*, page 301, note 4). From all of this, respondent concludes that far from being synonymous, polyethylene and resinous film are distinct and cannot be covered by the same classification, i.e., polyethylene is not derived from plant exudation and, therefore, it cannot be described as a resinous product. Complainant finds respondent's reliance on resin's origin from plant exudation as misplaced because resin is also synthetically produced.[6]

The arguments would end here were it not for respondent's contention that this "battle of the dictionaries" is "both unnecessary and of questionable relevance" because ". . . tariff terms and commodity descriptions are to be construed in the sense in which they are generally understood and commercially available." Having said this, however, respondent's entire support for its idea of the "generally understood" meaning of polyethylene is found in the following:

> In this case, even complainant must admit that polyethylene is commonly known, identified, and described simply as polyethylene. It is extremely doubtful that anyone even remotely familiar with polyethylene would ever describe it as a resinous film. Indeed, complainant refused to identify it as resinous film on the bills of lading subsequent to being put on notice that Ecuadorian would not accept the assertion of OFC [Ocean Freight Consultants] that polyethylene should be interpreted

[5] Respondent also cites the following: "Any of various solid or semisolid amorphous, fusible, flammable, natural organic substances that are usually transparent or translucent and yellowish to brown, are formed especially in plant secretions. . . ." *Webster's New Collegiate Dictionary*, 8th Edition (1980) at 977. "Any of various solid or semisolid, viscous, usually clear or translucent, yellowish or brownish, organic, substances exuded from various plants and trees." *Webster's New World Dictionary of the American Language* 2nd Edition (1970) at 1210.

[6] Complainant also alludes to the fact that other carriers have classified polyethylene as resinous film. This, however, neither proves nor disproves the validity of those classifications and certainly does not resolve the dispute here.

> and considered a resinous film product so as to receive the lower freight rate for that classification.[7] Complainant must have been uncomfortable with the idea of describing a commodity that is universally recognized as polyethylene as something else in order to get a lower rate.

Unfortunately this falls considerably short of establishing that the relevant segment of the commercial population calls polyethylene simply polyethylene and nothing else. Complainant seems to feel that respondent may be biased and not really conversant with the many and varied facets of polyethylene because it is clear to complainant that "not only those remotely familiar with polyethylene and with an objective mind" can see that polyethylene and resinous film are the same, but this is "widely recognized by other steamship conferences." Complainant uses several commodity classifications from other tariffs to show that other conferences share its views on polyethylene.

One example offered by complainant is that of Inter-American Freight Conference, the tariff of which contains the classification "Film, Transparent Cellulose or Resinous." Another is found in the Atlantic & Gulf West Coast of South America Conference tariff which lists "Film, viz.: Cellulose (Cellophane) or Resinous Film Products, viz.: . . . Moving Picture, Photographic or X-Ray." Complainant also offers the tariff of the North Atlantic Baltic Freight Conference which has a commodity description "Sheets or Film . . . Plastic or Resinous. . . ."

From these examples, complainant argues that, "It can be seen . . . that film cellulose, resinous, plastic and polyethylene are treated, so far as tariff classification and construction are concerned, on the same rate level. Hence, it goes without saying that they must be synonymous." Complainant's "hence" is ill-used here for it simply does not follow from the stated "facts" that resinous film and polyethylene film are synonymous, i.e., that they have the same or nearly the same meaning. The reasoning is circular at best. None of the cited examples contains "polyethylene," so complainant must necessarily begin with the very proposition it wants to establish—that polyethylene and resinous are synonymous. More importantly complainant simply states that polyethylene, cellulose and resinous film are treated the same for classification or rate purposes. It offers not a single instance of an actual shipment which was treated this way. A degree of emphasis is placed on the North Atlantic Baltic Freight Conference Tariff which includes "plastic" film in its classification. About this complainant says that:

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[7] There is some dispute as to the sequence of events and, in view of this, respondent's "refusal" to change its description of the commodity on the bill of lading is irrelevant to the issue of the proper classification.

Polyethylene is a kind of plastic is plainly defined in the condensed chemical dictionary, page 690.[1]

[1] "Plastic in general (including all forms) are sensitive to high temperatures, among the more resistant being fluorcarben resins, nylon, phenolics, polyamides, and silicones, though even these soften or melt above 500°F. Other types are combustible which [sic] exposed to flame for a short time (*polyethylene*, acrylic . . .)—" [Emphasis complainant's.]

Unfortunately for complainant, the ground for the inclusion of polyethylene in this description is found in the presence of the word "plastic," a word notable in respondent's tariff only for its absence.

Complainant has shown only that other conferences have commodity classifications the same as or similar to respondent's. It has not shown that these conferences routinely include polyethylene film within those commodity descriptions. Complainant has simply failed to establish that those "remotely familiar with polyethylene" can see that polyethylene film and resinous film are synonymous—that this is the way polyethylene is commonly known in the commercial world. From all this, it seems that resort to the "battle of the dictionaries" is indeed necessary.

In the final analysis, complainant's case rests upon the seemingly slender thread of *Condensed Chemical Dictionary's* discussion of the characteristics of polyethylene, and here complainant does not do itself justice in presenting its case. Its entire argument on this head consists of two statements:

> As per dictionary definition on page 759 (copy attached) "Polyethylene is a semi-transparent film and the white leathery resinous form are [sic] by far the most common. The definition goes on to say that polyethylene is the high molecular weight materials [sic], are tough, white leathery resinous materials. *The term polyethylene usually refers to the latter.*" (Emphasis complainant's.) (Opening memorandum, "Brief".)

> As stated in our complaint, the dictionary clearly defines: "polyethylene as a semi-transparent film and the white leathery resinous form are [sic] by far the most common. The definition goes on to say that polyethylene is the high molecular weight materials [sic], are tough white leathery, resinous materials. *The term polyethylene usually refers to the latter.*" (Emphasis complainant's.) (Reply, page 1.)

Aside from playing fast and loose with quotation marks, complainant has the disconcerting habit of combining or reordering various portions of the definition without any real indication that it is doing so.

The opening definition of polyethylene, as found on page 759 of the *Condensed Chemical Dictionary*, is:

> Polymerized ethylene, available in various forms, but the semi-transparent films and the white leathery resinous form are by far the most common.

The definition then deals with the three weights of polyethylene, low, medium and high and as to the latter it states, "The high molecular weight materials (molecular weight greater than 6000) are tough, white leathery, resinous materials. The term polyethylene usually refers to the latter," i.e., the high weight molecular materials as distinguished from the low weight polymers, which are high grade lubricating oils, and the medium weight polymers, which are waxy materials miscible with paraffin.

The immediate difficulty with the precise definition in *Condensed Chemical Dictionary* is the distinction it seems to make between the two most common forms of polyethylene—"the semi-transparent film" and the "white leathery resinous form." The inference to be drawn from this would seem to be that whatever the "semi-transparent film" may be, it is not "resinous." However, having made this distinction, the definition later seems to abolish it when under the heading "Properties," the author of the definition uses the term "these resins" to refer to all of the low and medium weight polymers and the high weight molecular materials. From this it would appear that all polyethylene contain "resins," albeit synthetic, and, therefore, polyethylene can be deemed "resinous."

The respondent would, as already noted, restrict "Resinous Film Products" to substances "derived from plants," and would exclude polyethylene from various resinous products in that it "*inter alia*, is not derived from plant secretions." Respondent, however, conveniently excludes a portion of the standard definition of resin:

> Resin—1 a: any of various hard brittle solid to soft semi-solid amorphous fusible flammable substances (as amber, copals, dammars, mastic, guaiacum) that are usu. transparent or translucent and yellowish to brown in color with a characteristic luster, that are formed esp. in plant secretions . . . 2 a: any of a large class of synthetic products (as alkyd resins or phenolic resins) usu. of high molecular weight that have some of the physical properties of natural resins but typically are very different chemically, that may be thermoplastic or thermosetting, that are made by polymerization or condensation, and that are used chiefly as plastics . . . (*Webster's Third International Dictionary*.)

Thus, "resin" can be prepared synthetically [8] and its meaning is not confined to plant secretions. Moreover, in its attempt to exclude poly-

[8] The *World Book Dictionary* defines resin as including "any of a large group of resinlike substances that are made artificially and are used especially in making plastics."

ethylene, respondent states that *New Webster's Encyclopedic Dictionary of the English Language* defines polyethylene as a "polymer of ethylene" and then launches into a description of "polymerization" to show that polyethylene is the result of a chemical process not plant exudation, all of which is true as far as it goes. Polyethylene, however, is further defined as "a polymer of ethylene, one of a group of partially crystalline light weight *thermoplastics* . . . ." (Emphasis mine.)

From the foregoing, it is my conclusion that the five shipments should have been classified as Film, Cellulose (Cellophane) or Resinous Film Products, etc. "Resin" must be read as including resins produced synthetically. Synthetic resins include "thermoplastics" and polyethylene is a thermoplastic. "Resinous" means "having the nature or characteristic of or like resin" and should be read to cover the synthetic resin polyethylene. The application of the classification Cargo N.O.S. to the five shipments of polyethylene film was improper under section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)). Complainant is awarded reparation in the amount of $20,822.64 with interest to be computed under Rule 253 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.253.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-42

RAMON ARGUELLES AND RAMON E. ARGUELLES D/B/A MIAMI CARGO

SERVICES - FMC INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE NO. 1464

NOTICE

July 29, 1982

Notice is given that no exceptions have been filed to the June 21, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-42

RAMON ARGUELLES AND RAMON E. ARGUELLES D/B/A MIAMI CARGO SERVICES - FMC INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1464

Held:

(1) Where the respondent improperly acted as an ocean freight forwarder while its license was revoked for failing to file a required security bond; and where the respondent issued invoices to its customers billing them for cartage and local insurance without performing any services or placing any insurance; and where the respondent issued invoices which co-mingled various components of insurance and accessorial charges and invoiced clients for more than the actual cost of the insurance and added other expenses to the insurance charges; and where the respondent entered into a scheme with a carrier whereby it overcharged the shipper and then paid the overcharge to selected individuals in the form of "kickbacks," after the carrier made an "overcharge correction" in a like amount, a settlement of $35,000.00 is just and proper. Such a penalty recognizes the seriousness of the possible violations of the Shipping Act and the Commission's Rules and Regulations, and gives due consideration to mitigating circumstances. It is within that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others so inclined, and which will secure compliance with the law and the Commission's rules and policies.

(2) Where the respondent freight forwarder engaged in various practices not knowing or believing they were serious violations, and where he now recognizes their seriousness, and where the respondent has demonstrated he is able and willing to carry on the business in accordance with the pertinent law and regulations and has sworn to do so in the future, it is held he is "fit" to carry on such a business and his license need not now be suspended or revoked.

Irving Schulman for respondent.

Alan Jacobson as Hearing Counsel.

INITIAL DECISION [1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized July 29, 1982

PRELIMINARY MATTERS

By Order of Investigation dated July 1, 1981, the Commission ordered that pursuant to sections 22, 32 and 44 of the Shipping Act, 1916, a proceeding be instituted to determine:

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. 502.227).

1. Whether Ramon Arguelles and Ramon E. Arguelles, d/b/a Miami Cargo Services, violated section 44(a) of the Shipping Act, 1916, and section 510.3 of the Commission's General Order 4 (46 C.F.R. 510.3), by carrying on the business of forwarding without a license;

2. Whether Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services violated sections 510.23(d), 510.23(e) and 510.23(j) of General Order 4 by incorrectly invoicing shippers for the cost of cargo insurance and accessorial services during the months of October and November, 1978 and April, 1979;

3. Whether Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services violated section 510.23(f) of General Order 4 by failing to account to its principals for overpayments, reductions in rates, insurance refunds and other sums in April and May, 1979;

4. Whether civil penalties should be assessed against Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services, pursuant to section 32(e) of the Shipping Act, 1916, for violations of section 44 of the Shipping Act, 1916, or sections 510.23(d), 510.23(e), 510.23(f), and 510.23(j) of the Commission's General Order 4 and, if so, the amount of such penalty; and

5. Whether the independent ocean freight forwarder license of Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services should be suspended or revoked, pursuant to section 44(d) of the Shipping Act, 1916, for:

a. willful violations of section 44 of the Shipping Act, 1916, or willful violations of the Commission's General Order 4 as listed in subparagraph 4 above; or

b. such conduct as the Commission shall find renders Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services unfit to carry on the business for forwarding in accordance with section 510.9(e) of General Order 4.

As a result of the above Order the parties submitted a joint stipulation of facts and a proposed settlement of civil penalties. In addition, testimony was taken regarding the imposition of civil penalties as well as to whether or not the respondent was "fit" to continue as a licensed ocean freight forwarder.

STIPULATION OF FACTS

1. Miami Cargo Services, hereinafter referred to as MCS, is located at 3050 Biscayne Boulevard, Suite 306, Miami, Florida, and is an independent ocean freight forwarder operating under FMC License No. 1464-R, which was transferred to it on May 3, 1976. (Stip., para. 1)

2. Prior to May 3, 1976, Ramon Arguelles d/b/a Miami Cargo Services, as a sole proprietor, operated as an independent ocean freight

forwarder under FMC License No. 1464, issued on March 26, 1973. (Stip., para. 2)

3. MCS is a partnership composed of Ramon and Ramon E. Arguelles, both of whom are certified as qualifying officers. Ramon has not been active in MCS for several years, and Ramon E., as senior partner, has been running the firm. (Stip., para. 3)

4. In the latter part of 1978 the FMC increased the surety bond needed by a licensed independent ocean freight forwarder from \$10,000.00 to \$30,000.00. MCS failed to file the necessary surety bond and on December 2, 1978, its license was revoked. (Stip., para. 4)

5. MCS obtained the required surety bond on January 24, 1979, so notified the Commission, and was reissued License No. 1464-R, effective April 12, 1979. (Stip., para. 5)

6. From December 2, 1978 through April 11, 1979, MCS dispatched 584 shipments on behalf of others by oceangoing common carriers in the foreign commerce of the United States. During this period MCS's senior partner believed that all shipments were covered by the surety bond issued on January 24, 1979, and that the license had been reinstated. (Stip., para. 6; Tr., pp. 18, 19)

7. Prior to October, 1979, MCS issued invoices to customers which did not state separately the insured value, insurance rate and premium cost, the charge for each accessorial service including terminal charges, and the fee for arranging for insurance and/or accessorial services. The senior officer of MCS was not then aware that such separate statements were required (Stip., para. 7; Tr. 23-25)

8. On at least 55 shipments made during the months of October and November, 1978, and April, 1979, MCS invoiced its clients for "insurance and placement" charges in an amount totalling \$3,912.77 more than the actual cost of the marine insurance. MCS, through its senior officer, was unaware that such a collective charge, even though disclosed, was improper because it did not distinguish between insurance policy premiums and handling charges. (Stip., para. 8)

9. On 144 shipments made during the months of October and November, 1978, and April, 1979, MCS invoiced its clients for insurance charges which were never reported or paid to the insurance carrier. In one instance, when a claim occurred for goods valued at \$13,000.00, MCS reimbursed the shipper in full, even though it did not receive an insurance reimbursement itself. When the "irregularities in reporting proper insurance premiums" were called to the attention of MCS, they were immediately corrected. (Stip., para. 10; Tr. 22-27)

10. On 108 shipments dispatched during the months of October and November, 1978, and April, 1979, MCS invoiced its clients for "cartage and local insurance" totalling at least \$3,397.50. The money was used by MCS to pay fees to various persons referring business to MCS and not to pay cartage and insurance costs. (Stip., para. 11)

11. On April 12, 1979, MCS remitted the sum of $4,000.00 to Jose Mora, a partner of V & E Inter-American Sales (V&E). The money was actually a freight overcharge correction given MCS by the carrier, Maritimas Del Caribe (Maritimas) which was due MCS's principal, V&E. It was paid to Mr. Mora instead of V&E because "he wanted some cash in Miami that would not show up in his Venezuelan company." (Stip., para. 12; Tr. 15, 16)

12. On May 31, 1979, MCS received a credit from Marine Agency, Inc., agents for Maritimas, in the amount of $2,128.60, representing a reduction in monies owed on a shipment made by MCS on behalf of V&E. MCS applied this money as an insurance discount, paid it to an unidentified third party, and failed to notify V&E. (Stip., para. 13; Tr. 16, 17, 29, 30, 31)

13. On a shipment of 16 vehicles dispatched by MCS for Orlando Auto Square, moved by Maritimas in 1979, MCS collected the full charges of $12,334.90 from the shipper. In paying Maritimas, through its agent, Marine Agency, MCS paid the full charges less $1,600.00. On May 11, 1979, MCS paid the $1,600 to Jose Carillo, who was an officer of the consignee of the shipment. (Stip., para. 14)

14. On April 11, 1979, MCS collected a total of $10,379.55 from J. M. Hallet New Car Brokers for a shipment made on a Maritimas vessel. Included in the bills of lading charges was the sum of $859.60 for special handling. In paying the charges to Marine Agency, acting as agent for Maritimas, MCS deducted the $859.60 and paid this amount to one L. Yanez. (Stip., para. 15)

15. In 1979 MCS collected a total of $1,571.80 from Maronne Ford Inc. for a shipment made on a Maritimas vessel. Included in the bill of lading charges was the sum of $200.00 for special handling. In paying the charges to Marine Agency, MCS deducted the $200.00 and paid it to Manuel Blanco. (Stip., para. 16)

16. With respect to the transactions described in paragraphs 11 through 15 above, the carrier, Maritimas agreed to add an unwarranted "handling charge" to the normal bill of lading so that it could later issue a "correction" for that charge which would then enable MCS to pay the monies to selected individuals. (Tr. 16, 17, 29, 30, 31, 32)

17. In September, 1979, FMC District Investigator Donald Butler conducted a field review of MCS operations. He advised Ramon E. Arguelles that MCS may have violated section 44 of the Shipping Act as well as various provisions of General Order 4. Mr. Arguelles stated he would bring MCS into full compliance with Commission regulations. Mr. Butler again reviewed MCS's operation in September of 1981. MCS no longer invoices clients for "cartage and local insurance" without performing such services. Also, it does not invoice clients for insurance placement charges without placing the insurance. (Stip., paras. 17-22)

ULTIMATE FINDINGS OF FACT

18. The record in this proceeding justifies a settlement whereby the respondent pays $35,000.00 to the Federal Maritime Commission. Such a settlement recognizes the seriousness of the alleged violations involved and takes into consideration relevant mitigating circumstances and is within the parameters of that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others so inclined, and which will secure compliance with the law and the Commission's rules and practices.

19. The respondents Ramon Arguelles and Ramon E. Arguelles d/b/a MCS are fit to continue as licensed ocean freight forwarders.

DISCUSSION AND CONCLUSIONS

1. *Settlement of Civil Penalties*

It is well settled that the law generally, as well as the Federal Maritime Commission, encourages settlements and that there is a presumption that settlements are fair, correct and valid. Section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. 554(c)(1), provides:

> The agency shall give all interested parties opportunity for--
> (1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustments when time, the nature of the proceedings, and the public interest permit.

In *Pennsylvania Gas & Water Co. v. Federal Power Commission*, 463 F.2d 1242, 1247 (D.C. Cir. 1972), the Court, noting its legislative history,[2] referred to the above provision "as being of the 'greatest importance' to the functioning of the administrative process" and stated:

> The whole purpose of the informal settlement provision is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest.

[2] Senate Judiciary Comm., Administrative Procedure Act--Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 203 (1945). In considering the settlement provision in S. 7, 79th Cong., 1st Sess. (1945), which ultimately became Section 554(c) of the Administrative Procedure Act (see note 5, *supra*), the Senate Judiciary Committee stated:

> Subsection (b) [now Section 554(c) of the Administrative Procedure Act] provides that, even where formal hearing and decision procedures are available to parties, the agencies and parties are authorized to undertake the informal settlement of cases in whole or in part before undertaking the more formal hearing procedure. Even courts through pretrial proceedings dispose of much of their business in that fashion. There is much more reason to do so in the administrative process, for informal procedures constitute the vast bulk of administrative adjudication and are truly the life- blood of the Administrative process. . . . The statutory recognition of such informal methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves.

S. Doc. No. 248, *supra*, at 24.

Further, the Commission has by rule encouraged settlement [3] and has often favorably looked upon them as a matter of policy.[4]

As to the propriety of the settlement itself the parties propose that MCS will pay the FMC $35,000.00 over a five year period. In addition, MCS agrees to notify all of its owners, directors and officers of the terms of the agreement and, most importantly, has agreed to permit an independent audit of its books and records over a four year period, with or without notice to MCS. The audit will be furnished to the FMC. In determining whether or not the proposed settlement is fair and reasonable and is in the public interest, one must refer to the settlement standards set forth in 4 C.F.R. Parts 101-105 (1980), which are referred to in section 505.1 of the Commission's Rules and Regulations, 46 C.F.R. 505.1 (1980). Those standards involve such criteria as the cost of collecting the claim, enforcement policy and litigative probabilities. 4 C.F.R. 103 (1980). Embodied in these general standards are more specific factors such as:

1. The nature and seriousness of the violations alleged;
2. The amount of money generated through the allegedly violative conduct;
3. The distribution of monies generated through the violative conduct;
4. The cessation of the allegedly violative conduct; and
5. The level of cooperation provided.

When one applies the above standards to the instant case there is little question but that the alleged violations are serious. First, the respondent engaged in business as an ocean freight forwarder without a license. Second, it invoiced clients for insurance charges it never paid and failed to separately state various charges on the invoices. Third, it caused erroneous charges to be refunded from carriers so that the monies could be used to pay "kickbacks" to various third parties. All of

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[3] Rule 91 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment. . . ."

See also Rule 505, 46 C.F.R. 505, where in General Order 30 the Commission provides for: "compromise, assessment, settlement and collection of civil penalties under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933"; and the criterion contained in the government-wide "Standards for the Compromise of Claims" where in section 103.5 under the heading "Enforcement Policy" (4 C.F.R. 103.5) it is stated that:

> Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised pursuant to this part if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon.

[4] See *Perry Crane Service v. Port of Houston Authority, of Port of Houston, Texas (Approval of Settlement)*, FMC Docket No. 79-51, 22 F.M.C. 30 (1979); *Del Monte Corp. v. Matson Navigation Co. (Approval of Settlement)*, FMC Docket No. 79-11, 22 F.M.C. 364 (1979); *Merck, Sharp & Dohme v. Atlantic Lines*, 17 FMC 244 (1973).

these activities violate the Shipping Act and go beyond the point of inadvertent error or indifference. Rather, they connote a purposefulness that cannot be condoned or allowed to continue.

On the other hand, in mitigation, it must be noted that even though MCS operated without a license it did so at a time when the Commission was changing its bonding requirements and actually had secured the necessary bond for most of the period involved. In addition, while the respondent engaged in prohibited activity in scores of transactions, the amounts of money involved were small. Indeed, if one counts the insurance damage claim it paid to a customer, and amounts paid to third parties the evidence does not establish any material unjust enrichment. Finally, the record is clear that once contacted by the FMC regarding possible violations the respondent cooperated fully. It made its records available and immediately undertook to correct the violative conduct. It made no attempts to conceal and has taken steps to prevent future wrongdoing.

Considering all pertinent settlement criteria we believe the proposed settlement is a fair and equitable one and is in the public interest. The $35,000.00 payment is substantial, but is neither excessive, nor inadequate.[5] It represents an amount which will further FMC's enforcement policy in that it will discourage the respondent from repeating its improper conduct and will deter others from doing the same.[6] Further, it recognizes the likelihood that even if this matter were litigated it is doubtful that a greater amount could be realized, especially when one considers the additional litigating costs. As to the other aspects of the settlement they are all positive. The fact that there will be an audit of the respondent's activities over a four year period assures a continuity of responsibility, and, together with its cooperative attitude during the investigation, demonstrates an intent on the part of the respondent that favors approval of the agreement.[7]

Without further belaboring the point, the settlement of the civil penalties proposed by the parties here is a fair and an equitable one in the light of the facts and circumstances involved, is in the public interest, and is approved. A copy of the settlement agreement is attached.

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[5] *Behring International*, Initial Decision served March 17, 1981, adopted by the FMC on June 30, 1981, 23 F.M.C. 973 (1981).

[6] *United States v. Atlantica, S.p.A.*, 478 F. Supp. 833, 836 (SDNY 1979. *Sovereign International Corp., Etc.*, FMC No. 80-66, served February 19, 1982 (24 F.M.C. 880).

[7] See *Continental Forwarding, Inc., Etc.*, FMC No. 80-3, served February 2, 1981 (23 F.M.C. 623, 630), where the Commission indicated that "cooperation with investigators and immediately taking remedial action" is a valid mitigating circumstance.

Fitness.

After settlement of the penalty provisions the only issue left for decision is whether or not the respondents' ocean freight forwarder's license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916 (Issue No. 4 of the Order of Investigation and Hearing). In *Independent Freight Forwarder's License—E.L. Mobley Inc.*, 18 S.R.R. 451 (1979), Initial Decision served November 6, 1978, where the Commission issued an Order of Investigation regarding both civil penalties and the question of fitness, the Commission held that:

> Freight forwarder licensee will not be permitted to use the settlement procedures in lieu of proceeding with a hearing ordered by the Commission to investigate alleged violations of the freight forwarders rules and the fitness of the forwarder to continue as a licensee . . . it would be an abrogation of the agencies Shipping Act responsibilities to permit the licensee to negotiate the issue of fitness. . . .

So here, it is necessary to make a determination on this issue.

Section 44 of the Shipping Act, 1916, provides in pertinent part:

> SEC. 44.(a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business. . . .
>
> (b) A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an independent ocean freight forwarder as defined in this Act and is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1916; otherwise such application shall be denied. . . .

Part 510 of the Commission's rules (46 C.F.R. 510.1 *et seq.*) deals with the Licensing of Independent Ocean Freight Forwarders. The case law that has evolved from the application of the pertinent legislation and regulations is understandably subjective in nature. On the one hand it has been held that where violations of the Shipping Act have occurred and it is believed the licensee will continue in the violative conduct, that licensee cannot be deemed to be fit to be so licensed. *Independent Ocean Freight Forwarder Application—Alvarez Shipping Co., Inc.*, 16 F.M.C. 78 (1973); *G.R. Minon—Freight Forwarder License*, 12 F.M.C. 75 (1968). See also, *Harry Kaufman D/B/A International Shippers Co. of N.Y.—Independent Ocean Freight Forwarder License No. 35 and Forwarding Activities of Irving Betheil and Stephen M. Betheil*, 16 F.M.C. 256 (1973). On the other hand, it has been held in *Mobley, supra*, that:

> Administrative sanctions should not, however, be blindly or automatically imposed and even in cases where the violation is clear, evidence of mitigation will be considered in tailoring the sanctions to the facts of the specific case (footnote omitted). Section 44 and its regulations are based on an underlying remedial public interest purpose and the sanctions imposed must serve such a purpose and not be punitive in character (footnotes omitted);

and in *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246*, FMC Docket No. 79-16, Initial Decision served October 19, 1979 (22 F.M.C. 583), and partially adopted March 24, 1980, that:

> . . . Thus, the courts as well as the Commission have recognized that evidence of mitigation should be considered when determining whether a license applicant should be found to be fit although implicated in violations of the Act in the past (citations omitted). Furthermore, in previous cases the Commission has expressed its belief that the Freight Forwarder Law, P.L. 87-254, was enacted as remedial statute in order to correct abuses in the forwarding industry (citations omitted). The principle that the Commission should not rush to extreme sanctions without considering all factors of mitigation in an effort to fashion a just and reasonable remedy is well supported by the courts. Although agencies are not required to impose sanctions in a perfectly even manner because of the wide latitude they are given by the courts as the expert bodies most skilled in devising means to carry out specific legislative purposes, the agencies are nevertheless expected to consider less drastic alternative remedies and to base whatever remedy they select on facts and reasonable interpretations of law (footnote omitted).

Applying the above law and principles to the facts involved in this case, we must determine whether or not the respondents are fit to continue to be licensed as ocean freight forwarders. The evidence clearly establishes that the respondents violated provisions of the Shipping Act, and the Commission's Rules and Regulations. It also establishes that MCS's principal officer is now aware of the seriousness of the offenses involved and his testimony convinces us that they will not happen again. We believe that given Ramon E. Arguelles' obvious expertise in the area of freight forwarding, his obvious sincerity in testifying that he was determined to operate in accordance with the Commission's rules in the future, and the fact that his business is a small one wherein Mr. Arguelles' livelihood depends on future compliance with the law and regulations—suspension or revocation of the freight forwarder licenses would be too harsh a result. MCS and the Arguelles's deserve another chance and we, therefore, hold that the respondents are fit to carry on the business of independent ocean freight forwarders.

This proceeding is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

BEFORE THE FEDERAL MARITIME COMMISSION

RAMON ARGUELLES AND RAMON E. ARGUELLES
D/B/A MIAMI CARGO SERVICES - FMC INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1464

DOCKET NO. 81-42

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Hearings and Field Operations (Hearing Counsel) and Respondents, Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services. It is submitted to the presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.162) and section 505.3 of the Commission's General Order 30 (46 C.F.R. 505.3) and is to be incorporated into the Final Order in the instant proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served July 1, 1981, the Commission instituted the present investigation to determine whether Respondents had violated section 44(a) of the Shipping Act, 1916 (46 U.S.C. 841), and sections 510.23(d), 510.23(e), 510.23(f) & 510.23(j) of the Commission's General Order 4 (46 C.F.R. 510.23(d), 510.23(e), 510.23(f) & 510.23(j)), and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of the above sections of the Shipping Act, 1916, or the Commission's General Order 4 so found;

WHEREAS, the Order of Investigation and Hearing alleges that Respondents may have violated the above sections of the Shipping Act, 1916 and the Commission's General Order 4;

WHEREAS, Respondents have admitted that they have engaged in specified conduct which may be violative of section 44(a) of the Shipping Act, 1916, and sections 510.23(d), 510.23(e), 510.23(f), and 510.23(j) of the Commission's General Order 4;

WHEREAS, Respondents have terminated the conduct that may be violative of the Shipping Act, 1916, and of the Commission's General Order 4 and have instituted and have indicated their willingness and commitment to maintain measures designed to eliminate, discourage, and prevent such conduct in the future;

WHEREAS, the parties, in order to avoid the delay and expense that would be occasioned by further litigation of the issues specified in the Order of Investigation and Hearing, are desirous of settling expeditiously the issue of the appropriate amount to be paid by Respondents in accordance with the terms and conditions of this Agreement; and

WHEREAS, section 32(e) of the Shipping Act, 1916, (46 U.S.C. § 831(e)) authorizes the Commission to assess or compromise all civil penalty claims under the Shipping Act, 1916;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from the conduct set forth in the factual record submitted in the present proceeding, Respondents agree, as a condition of this Agreement, to comply with all requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

1. Respondents hereby agree, as a condition of this Agreement, to pay a monetary amount of Thirty-Five Thousand Dollars ($35,000) of which Five Thousand Dollars ($5,000) shall be payable thirty (30) days following approval by the Commission of this Proposed Settlement and Thirty Thousand Dollars ($30,000) shall be payable according to the terms of the Promissory Note attached hereto as Appendix I.

2. Except as provided in paragraph six (6) below, this Agreement shall forever bar the commencement or institution by the Commission of any civil action or other claim for recovery of civil penalties from Respondents arising from the conduct set forth and described in the factual record submitted in the present proceeding. It is understood by Respondents that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or any other department or agency of the United States Government based upon the specific conduct engaged in by Respondents, other than these actions and claims for recovery referred to above.

3. Respondents agree to take all reasonable steps to preserve and maintain at a location agreeable to the Commission through January 1, 1987 all records and documents now in their possession or under their control that in any way or manner either indicate or verify the conduct set forth in the factual record submitted in the present proceeding and, upon reasonable notice, to allow Commission investigators or attorneys unimpeded access to such records and documents and to allow the removal of documents specifically requested by Commission investigators or attorneys for the purpose of duplication.

4. Respondents agree to take all reasonable measures designed to discourage, prevent, and eliminate the conduct that may be violative of the Commission's General Order 4. These measures shall include, but need not be limited to, the measures set forth in Appendix II attached hereto.

5. Respondents agree that within thirty (30) days following the approval of this Proposed Settlement, they will either furnish copies of this Agreement, or will give affirmative notice of the terms and provisions thereof, to all of their owners, directors, officers, and employees.

6. Respondents hereby agree, as a condition of this Agreement, that, if they breach this Agreement, they will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to January 1, 1987, by or on behalf of the Commission, to recover civil penalties for violations of the Commission's General Order 4, arising out of the conduct set forth in the factual record submitted in the instant proceeding. In the event of such a breach by Respondents, if such noncompliance shall not have been cured or explained to the Commission's satisfaction within thirty (30) days after written notice to Respondents by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of this Agreement, or to declare this Agreement null and void; provided, however, that Respondent's waiver of the Statute of Limitations under this paragraph shall remain in full force and effect. In the event the Commission declares this Agreement null and void and such determination is not reversed by a court of competent jurisdiction, any monies paid to the Commission shall remain the property of the United States, and Respondents will not interpose any defense based on the Statute of Limitations in any action which the Commission may institute to recover civil penalties arising out of the conduct set forth in the factual record submitted in the present proceeding.

7. In the event of changes of law or other circumstances at any time during the term of this Agreement that Respondents believe warrant modification or mitigation of any of the requirements imposed on Respondents by this Agreement, the Commission agrees, as an inherent part of this Agreement, to Respondents' right to petition the Commission to this end.

8. It is expressly understood and agreed that this Agreement is not to be construed as an admission by Respondents of the violations alleged in the Order of Investigation and Hearing by which this proceeding was instituted.

9. Respondents acknowledge that they have voluntarily signed this Agreement and state that no promises or representations have been made to them, other than the agreements and consideration herein expressed.

10. The undersigned represents that he/she is properly authorized and empowered to execute this Agreement on behalf of Respondents and to fully bind Respondents to all of the terms and conditions set forth herein.

11. Insofar as this agreement may be inconsistent with Commission procedures for compromise and settlement of violations as set out at 46 C.F.R. 505, the parties hereby waive application of such procedures.

RAMON ARGUELLES AND
RAMON E. ARGUELLES D/B/A
MIAMI CARGO SERVICES

BY_________________________

TITLE _______________________

ALAN J. JACOBSON
Hearing Counsel

JOSEPH B. SLUNT, *Chief*
Office of Hearing Counsel

JOHN ROBERT EWERS,
Director
Bureau of Hearings
and Field Operations

January __________, 1982

PROMISSORY NOTE

Appendix I to Proposed Settlement in FMC Docket No. 81-42

For value received, Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services (MCS) promise to pay to the Federal Maritime Commission (Commission) the principal sum of Thirty-Five Thousand Dollars ($35,000) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

Five Thousand Dollars ($5,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before twenty-four (24) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before thirty (30) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before thirty-six (36) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before forty-two (42) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before forty-eight (48) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

Three Thousand Dollars ($3,000) on or before 54 months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 81-42;

> Three Thousand Dollars ($3,000) on or before 60 months following the approval by the Commission of the Proposed Settlement in Docket No. 81-42.

In addition to the principal amount payable hereunder, interest on the unpaid balance thereof shall be paid with each installment. Such interest shall accrue from the date upon which the Commission approves the Proposed Settlement in FMC Docket No. 81-42 and be computed at the rate of twelve percent (12%) per annum on the unpaid balance.

If any payment of principal or interest shall remain unpaid for a period of thirty (30) days after becoming due and payable, the entire unpaid principal amount of the Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand or notice, said demand and notice being hereby expressly waived.

If a default shall occur in the payment of principal or interest under the Promissory Note, MCS does hereby authorize and empower any U.S. attorney, any of his/her assistants or any attorney of any court of record, Federal or State, to appear for them, and to enter and confess judgment against MCS for the entire unpaid principal amount of this Promissory Note, together with interest, in any court of record, Federal or State; to waive the issuance and service of process upon MCS in any suit on this Promissory Note; to waive any venue requirement in such suit; to release all errors which may intervene in entering up such judgment or in issuing any execution thereon; and to consent to immediate execution on said judgment. MCS hereby ratifies and confirms all that said attorney may do by virtue thereof.

This Promissory Note may be prepaid in whole or in part by MCS by bank cashier's or certified check at any time, provided that accrued interest on the principal amount prepaid shall be paid at the time of the prepayment.

RAMON ARGUELLES AND RAMON E. ARGUELLES
D/B/A MIAMI CARGO SERVICES

BY: ______________________________

TITLE: ___________________________

DATE: ____________________________

Appendix II to Proposed Settlement in FMC Docket No. 81-42

For a period of four years following final Commission approval of the Proposed Settlement in FMC Docket No. 81-42, Ramon Arguelles and Ramon E. Arguelles d/b/a Miami Cargo Services (MCS) will permit an independent audit of their books and records, as described below.

(1) The audit will be conducted by a certified public accountant or such other independent auditor as may be named subject to Commission approval who will have complete authority to examine any and all books and records of MCS and Miami Cargo Services Overseas Corporation (MCSOC) (see Attachment A hereto); and upon the issuance of a written statement by the independent auditor that he/she has been denied access or reasonable cooperation in an audit of MCS's or MCSOC's books and records, he/she will so certify to the Commission, and said action by MCS or MCSOC will be conclusively considered to be a breach of the Settlement Agreement.

(2) The independent auditor will be authorized to audit MCS and MCSOC's books and records for the purpose of detecting violations of Federal Maritime Commission's freight forwarder regulations and/or section 44 of the Shipping Act, 1916.

(3) The audits will take place once a year with or without notice to MCS or MCSOC.

(4) The independent auditor will furnish MCS and the Commission with a report of each audit, identifying in his/her report the materials inspected, including in such identification the reference number of the shipping files reviewed, the method of review and the findings of the audit.

RAMON ARGUELLES AND RAMON E. ARGUELLES
D/B/A MIAMI CARGO SERVICES

BY:____________________________

TITLE:__________________________

DATE:__________________________

Attachment A to Appendix II to Proposed Settlement Agreement in FMC Docket No. 81-42

[MIAMI CARGO SERVICES Letterhead]

Re: *Audit of Miami Cargo Services and Miami Cargo Services Overseas Corporation*

Gentlemen:

This is to set forth the terms of our agreement that you provide the necessary services to audit the billing practices of Miami Cargo Services and Miami Cargo Services Overseas Corporation (Collectively MCS).

Pursuant to the Settlement Agreement in Federal Maritime Commission Docket No. 81-42, MCS has undertaken to adopt measures to eliminate and prevent practices by MCS which may violate the Federal Maritime Commission's freight forwarder regulations.

To accomplish this, MCS has authorized you to conduct an independent audit of the books and records of MCS. This auditing is to continue for a period of four years following final Federal Maritime Commission approval of the Settlement Agreement. The audits will take place every twelve months.

The complete terms of the audit procedures and of MCS's obligations thereunder are contained in Appendix II to the Settlement Agreement, which is attached hereto.

It is agreed that you will be compensated for your audit services at $____________________.

It is also agreed that all information and documents that you obtain by virtue of this audit will be maintained by you in strict confidence, except to the extent the Settlement Agreement requires you to make reports to the Federal Maritime Commission.

If the foregoing comports with your understanding of our agreement, please sign the enclosed copy of this letter, and return it.

MIAMI CARGO SERVICES

BY:______________________________

TITLE:__________________________

DATE:__________________________

Attachment

BY:______________________________

TITLE:__________________________

DATE:__________________________

cc: Federal Maritime Commission

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-45

LOUIS DREYFUS CORPORATION, ET AL.

v.

PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

ORDER ADOPTING INITIAL DECISION

July 30, 1982

This proceeding was instituted by the filing of a complaint pursuant to section 22 of the Shipping Act, 1916 by various shippers and carriers (Complainants) [1] against the Plaquemines Port, Harbor & Terminal District (Port).[2] The complaint alleges that the Port has assessed Complainants fees for the use of terminal facilities which are unjust and unreasonable and unduly prejudicial in violation of sections 15, 16 and 17 of the Act (46 U.S.C. 814, 815 and 816). The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) intervened in the proceeding. Administrative Law Judge Charles E. Morgan issued an Initial Decision finding that the Port was an "other person" within the meaning of section 1 and that its fees violated sections 16 and 17 of the Shipping Act, 1916.[3] Exceptions to that decision have been filed by the

[1] Complainants are: Louis Dreyfus Corp.; The Early & Daniel Co., Inc.; Dixie Carriers, Inc.; LeBeouf Bros. Towing Co., Inc.; The Valley Line Company; Federal Barge Lines, Inc.; and Hollywood Marine, Inc.

[2] Prior to the filing of this complaint Louis Dreyfus Corp. brought suit in the U.S. District Court for the Eastern District of Louisiana against the Port alleging that the tariff is unconstitutional. Several local collection suits were removed to the federal court and consolidated with that proceeding. The court action has been stayed pending the outcome of the FMC proceeding.

[3] The pertinent provisions of the Shipping Act, 1916 are:

(a) Section 1 (46 U.S.C. § 801):

The term "other person subject to this act" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

(b) Section 16 First (46 U.S.C. § 815):

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

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

(c) Section 17 (46 U.S.C. § 816):

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such reg-

Continued

Port and Hearing Counsel. Complainants have filed a Reply to these Exceptions.

INITIAL DECISION

A. *Findings of Fact*

The Port encompasses approximately the first 100 miles of the Mississippi River from its mouth in the Gulf of Mexico and is coextensive with the Parish of Plaquemines in the State of Louisiana. It operates five public facilities, none of which serves common carriers by water. There are several private facilities within the Port serving, among others, common carriers by water.

The Port has on file with the Commission a tariff which provides for the assessment of a Harbor Fee and a Supplemental Harbor Fee. The Harbor Fee is collected from any vessel over 100 feet which docks or anchors within the Port. The fee is $100 for vessels 100 to 250 feet in length and $150 for vessels over 250 feet. The fee applies unless a flat rate permit is issued. Permits are issued free of charge to vessels entered on the Parish *ad valorem* tax rolls. Vessels are held primarily liable for the Harbor Fee but cargo and wharf interests are made sureties.

The Supplemental Harbor Fee is a charge of $.10 per ton on all cargo over 500 tons "first handled" within the Port at anchorage or in midstream. Cargo owned by the wharf owner is exempt from this charge. The cargo is primarily liable for the Supplemental Harbor Fee but vessel and wharf interests are made sureties. The tariff also provides that the Harbor Fee shall be credited against the Supplemental Harbor Fee.

The Port is the sole interpreter of the tariff and reserves the right to deny access to private Port facilities as well as assess civil and criminal penalties against those who fail to pay the charges stated in the tariff.

The Port's original interpretation of the tariff was that vessels which handled cargo paying a Supplemental Harbor Fee were not assessed a Harbor Fee. Subsequently, this interpretation was changed. Presently all vessels handling cargo are assessed the Harbor Fee and this amount is credited against the cargo's Supplemental Harbor Fee. The Port's cargo reporting system is unreliable and resulted in many vessels paying a Harbor Fee which would not otherwise have been assessed.

The Port has exempted subsidiaries of wharf owners from the Supplemental Harbor Fee. The 500 ton Supplemental Harbor Fee exemption was applied to loaded ships leaving the Port although the tariff

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ulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

The allegations of a section 15 violation were dismissed by the Presiding Officer due to lack of proof.

stated that the fee was assessed on cargo "first handled" in the Port. Until recently, if the Supplemental Harbor Fee was less than the Harbor Fee the Port assessed the Harbor Fee.

In 1978, the first full year the tariff was in effect, the Port collected over $1.35 million in fees, divided approximately equally between Harbor Fees and Supplemental Harbor Fees. Complainant Dreyfus paid 23% of all Supplemental Harbor Fees for 1978 and 11% of all fees collected in 1978. Complainant Early was found to have paid 7% of all Supplemental Harbor Fees for 1978 and 3% of all fees collected in 1978.

Total Port expenditures were approximate]y $1.59 million in 1978, of which $1.35 million were general parish service costs allocated to the Port. The remainder were *direct* Port expenditures. That portion of each Parish operating department budget which, in the opinion of its department head, reflects "marine related" expenses, is allocated to the Port.

There are no written criteria for determining what is a "marine related" expense. They are reported on an "honor system". No attempt is made to allocate expenses to those classes of entities which actually pay tariff fees. Rather, a "but for" test is applied which results in anything remotely related to the Port being allocated as "marine related".[4] Those ultimately assessed the tariff fees obtained little or no direct services from the Port.

B. *Jurisdiction*

The Port was found to be an "other person" subject to the Shipping Act within the meaning of section 1 on the basis that through its municipal authority it exerts critical control over both the access of common carriers to the Port's private facilities and the rates and practices of those facilities. Under Louisiana law private marine facilities are impressed with a public servitude. The Port can control facilities in which it has no direct ownership interest. On this basis the Port has the authority to assess charges and control a crucial link in the chain of transportation. In light of this control the Presiding Officer held that the Port was "furnishing . . . terminal facilities" within the meaning of section 1.[5]

[4] Allocated expenses have included those of the Sheriff's Department, Councilmen and Staff, Aviation, Fire Protection, Ferries, Safety Engineer, Ambulance, Itinerant Labor, Coroner, Health, Waterworks, Garbage, Sewerage, Purchasing, Internal Auditor, Data Processing, Accounting and Payroll, Insurance, Social Security, Retirement and Boatways.

[5] The Presiding Officer cites *Agreement Nos. T-2455/T-2553*, 18 F.M.C. 115 (1974) and *A.P. St. Philip, Inc. v. Atlantic Land Improvement Co.*, 13 F.M.C. 166 (1969) as cases which establish the "control" basis of jurisdiction and *Agreement No. T-2719*, 16 F.M.C. 318 (1973), and *New Orleans Steamship Asso. v. Bunge*, 8 F.M.C. 687 (1965) as cases which reject ownership of facilities as the required basis of jurisdiction.

The Presiding Officer also held that although the challenged charges are called "harbor" fees, by their express terms and in their application, they are in effect charges on the handling of cargo in the Port and, therefore, subject to section 17 of the Act.

C. *Sections 16 & 17 Violations*

The Presiding Officer concluded that the Supplemental Harbor Fee violated both sections 17 and 16 First. The charge was determined not to be reasonably related to the services provided those paying the fees and the exemptions in the tariff were found to create a narrow class of persons subject to the charge who were unjustly and unduly prejudiced by it. The Presiding Officer explained that the tariff exemptions resulted in identical cargo being treated differently. He found that most cargo pays no fees and the burden of supporting "port services" is borne by the shippers who are not exempt. The Presiding Officer rejected the Port's justification for the exemptions, *i.e.*, that wharf ownership and the payment of *ad valorem* taxes is a financial assistance to the Port, finding that these "substituted" revenues did not approach the level of otherwise assessable costs on these interests. Moreover, because the Port was charging for traditional government services, the tariff provisions were found to result in the costs of these "services" being borne by those who do not and cannot use them.

Other aspects of the Supplemental Harbor Fee were also found unlawful under section 17. Making vessel and wharf interest sureties under the tariff was determined to create liability for an obligation of a third party not in privity or duty bound to the charged party. The Presiding Officer also determined that the assessment on loaded ships leaving port instead of those entering port was contrary to the "first handled" provision of the tariff. Only one 500 ton fee exemption was allowed on an exiting ship when many such exemptions should have been granted on the entering inland barges constituting that load.

The Presiding Officer concluded that the Harbor Fee also violated sections 17 and 16 First. The tariff exemptions were held to be irrational and prejudicial, particularly because the exemption of all vessels under 100 feet includes most vessels calling in the Port and results in the major users of the Port not paying for the Port's "services". He explained that *ad valorem* tax revenues and flat rate permit fees do not recoup the costs fairly assessable to the interests exempted and that no recognition is given to those users paying state *ad valorem* taxes of which the Port obtains a portion. The Presiding Officer found that the existing system results in the expenses of the Port attributable to local and frequent users, the majority of the users of the Port, being passed on to other users. The surety provisions which apply to the Harbor Fee were also found to be unreasonable for the same reasons as were the Supplemental Harbor Fee surety provisions.

Finally, the Presiding Officer concluded that the enforcement provisions of the tariff were unreasonable under section 17. The Port's naming itself the sole interpreter of the tariff was found unreasonable, as was the imposition of civil and criminal penalties for non-payment of the tariff charges. The Presiding Officer viewed the tariff provisions as quasi-contractual in nature rendering these enforcement provisions unlawful and an abuse of municipal authority.

POSITIONS OF THE PARTIES

A. *The Port*

On exception, the Port argues that it is not an "other person" subject to the Shipping Act because it does not own or operate any facilities serving common carriers. It is alleged that no common carriers call at the public facilities owned by the Port, and that the percentage of common carriers calling within the Port is so small that there is an insufficient impact on the common carrier industry to warrant the assertion of jurisdiction over it as a matter of public policy.

Furthermore, the Port submits that the charges at issue do not relate to the handling of cargo but are rather a means of recouping the expenses of operating the Port. The Port insists that the charges are reasonably related to the services rendered users of the Port. The Port submits that Complainants should not be permitted to argue that the fees are too high because they refused to obtain flat rate special permits which would have substantially reduced their fees.

The Port also contends that the charges are not unduly preferential or unjustly discriminatory. In so doing, they argue that the exemption for small craft is based upon the administrative costs of accounting for these numerous vessel calls. Furthermore, most small craft using the Port are also on the *ad valorem* tax rolls. The *ad valorem* tax payer exemption is allegedly reasonable because it prevents a double assessment against interests located in the Parish. Flat rate permits are allegedly lawful because they allow frequent users to put a ceiling on their fees. The wharf owners' cargo exemption is allegedly justified because these entities incur significant expenditures to protect cargo and thereby supplement Parish services.

Finally, the Port argues that minor errors in the tariff and its application of the wharf owners exemption are not a valid basis upon which to find the tariff unlawful. The Port advises that the "first handled" language of the tariff was intended to prevent assessments for rehandled cargo, and does not preclude reporting of assessments on the basis of departing vessels, when cargo ownership is determined. Further, it maintains that assessing liability on third parties to a cargo transaction is lawful because all parties are users of the Port services. Finally, the Port insists that the Parish has an inherent right to impose civil and criminal penalties to enforce collection of assessments lawfully due it.

B. *Hearing Counsel*

Hearing Counsel agrees with the Port that the Commission does not have jurisdiction over it. Hearing Counsel submits that there must exist both an ownership interest as well as substantial control over the rates and practices of a terminal facility to confer jurisdiction. Finally, it is alleged that the charge at issue here is for the recoupment of expenses for general port services and is not related to receiving or handling cargo within the meaning of section 17.

C. *Complainants*

Complainants argue that the Presiding Officer was correct in finding that the Commission has jurisdiction over the Port. Controlling access to the private facilities and requiring the collection of fees for Port-rendered services allegedly constitute "furnishing . . . terminal facilities" within the meaning of the Shipping Act. The proprietary interest requirement advanced by Hearing Counsel is alleged to be erroneous in light of the fact that midstream transfers of cargo have been deemed to be a terminal operation and regulated by the Commission.

Complainants also maintain that the absence of common carriers calling at Port-owned facilities is irrelevant as there are sufficient carriers calling at Port-controlled facilities to make the Port subject to Commission jurisdiction.

Complainants allege that the charges at issue are within the ambit of section 17 because they are "related to or connected with receiving, handling or storing of property," but that in any event, even if a fee does not relate to the handling of property under section 17, this does not affect section 1 jurisdiction or the application of section 16 First.

Complainants believe that the Presiding Officer was correct in his determination that the charges violate section 17 because they are not reasonably related to the services rendered the charged party. The costs allocated for the specific benefits rendered by port services allegedly are not reasonably related to the class of users assessed. Complainants submit that only a very limited class of port service users are actually assessed fees which represent the costs attributable to all the users; this results in 49% of the Port's revenue being assessed on 25% of cargo.

It is alleged that cargo interests receive no direct benefit from the Port services and only an indirect benefit in the form of risk insurance, and that a generalized benefit is insufficient to sustain the charge under section 17. There allegedly must be a reasonable relationship between the costs assessed and the benefits derived based on actual use in order for the charge to be valid.

Complainants state that their refusal to obtain flat rate permits from the Port is justified because they are under no obligation to voluntarily comply with an illegal licensing scheme.

Complainants also believe that the Presiding Officer properly concluded that the charges as assessed result in undue and unjust preference and prejudice in violation of section 16 First. There is allegedly no need to establish a competitive or triangular relationship because the charges do not relate to the type or nature of the cargo assessed.

Complainants further argue that the Presiding Officer was correct in finding "errors" in assessments by the Port violated section 17. These "errors" were allegedly regularly and knowingly made and therefore constitute an unreasonable practice under section 17. Similarly, through its allegedly unreasonable interpretation of the "first handled" provision of the tariff, the Port denied numerous 500 ton Supplemental Harbor Fee exemptions to barges entering the Port and assessed Complainants substantial overcharges. The "solidary liability" provisions of the tariff are challenged because they impose *primary* liability on those not in privity with the assessed party. Finally, Complainants maintain that it is unreasonable and unjust for a local government authority to enforce a port tariff by means of criminal penalties.

DISCUSSION

The Commission has determined that the Presiding Officer correctly disposed of all issues presented in this proceeding with the exception of his treatment of the surety provisions of the Port's tariff. The Port's Exceptions are essentially a reargument of matters fully and adequately considered by the Presiding Officer, and will generally be denied. Accordingly, the Initial Decision will be adopted with only minor modifications.

A. *Jurisdiction*

The Commission finds, for reasons stated below, that the Port is an "other person" subject to the Shipping Act, 1916, *i.e.*, one which "furnishes . . . terminal facilities . . . in connection with a common carrier," within the meaning of section 1 of that Act. In construing the scope of the Commission's jurisdiction under section 1, the Supreme Court has focused upon the integrity of the legislative scheme of the Shipping Act and has required a broad construction of its terms to effect its purposes.[6] The statutory scheme contemplates regulation of any entity if it exercises sufficient control over terminal facilities to have a discernible effect on the commercial relationship between shippers and carriers involved in that link in transportation.

Local governmental authorities are not categorically exempt from the requirements of the Shipping Act,[7] nor is there any court or Commis-

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[6] *U.S. v. American Union Transport,* 327 U.S. 437, 450-451 (1946); *California v. United States,* 320 U.S. 577, 585 (1944); *See also, Agreement No. 8905 Port of Seattle and Alaska S.S. Co.,* 7 F.M.C. 792, 795-796 (1964).

[7] *California v. United States, supra.*

sion precedent requiring ownership of a facility in order to confer jurisdiction under section 1. It was clearly the intent of Congress to prevent "any person", including local government authorities, from discriminating among shippers or carriers in providing terminal facilities.[8] Thus, the crucial issue in determining whether a given entity is subject to Commission jurisdiction as an "other person" is the degree of its involvement in the furnishing of terminal services to common carriers by water.

The "control" theory of jurisdiction, cited by the Presiding Officer, has, in different contexts, been relied upon by the Commission. An entity need not directly or physically provide terminal services to be deemed an "other person" subject to the Act. The holdings in several terminal lease cases support the proposition that it is the control of terminal rates and practices which constitutes "furnishing" terminal facilities and confers Commission jurisdiction.[9] Conditioning access to a port's private facilities upon the payment of a charge for governmental services reflects significant threshold control over terminal facilities.

Jurisdiction over the Port here, however, is not premised solely on the fact that it conditions access to private facilities upon the payment of a charge. Assessments by local authorities could in a variety of situations constitute the exercise of lawful taxation authority. The Shipping Act does not authorize the Commission to review local taxes for government services that are incidentally imposed on carriers and terminals. The Port's charges here, however, are not taxes--but rather fees for essential health, safety and security services which are rendered to vessel and cargo interests in commercial, cargo-handling transactions.

The Commission has determined that under the facts of this case the Port's practice of assessing, on the basis of cargo transactions, a fee for providing vessels and cargo essential health, safety and security services constitutes the furnishing of "other terminal facilities" within the meaning of section 1 of the Act. The term "other terminal facilities" contemplates not only physical assets such as docks, wharves and warehouses, but also encompasses *services* rendered "in connection" with the marine terminal "link" in transportation modes.[10] The Port is intimately involved in common carrier cargo transactions. It has imposed utilization of its services and payment of its fees as an unavoidable appurtenance of all private terminal facilities. The combination of the Port's exclusive ability to furnish such terminal services, its assessment of selective cargo transfer fees and its control of access to the private facilities

[8] *California v. United States, supra* at 586; 53 Cong. Rec. 8276.

[9] *Agreement Nos. T-2455/T-2553, supra* ; *Agreement No. T-4: Terminal Lease Agreement at Long Beach, Cal.*, 8 F.M.C. 521 (1964); *Agreement No. 8095 - Port of Seattle and Alaska Steamship Co., supra.*

[10] *See Marine Terminal Practices of the Port of Seattle*, 21 F.M.C. 397 (1978); *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761, 767 (1946).

results in fundamental control over the rates and practices of terminal facilities. The Commission finds that such pervasive involvement in the business of common carriers,[11] marine terminals and the commerce of the United States confers on the Commission jurisdiction over the Port under section 1 of the Shipping Act, 1916, and subjects the Port's fees to scrutiny under the substantive provisions of that Act.

The Port's assessment of the fees in question also falls within the ambit of sections 16 First and 17 of the Act.[12] Complainants are clearly "persons" and the assessed cargo a "description of traffic" within the meaning of section 16 First.

In order for the Commission to assert jurisdiction under section 17 the charges or practices in question must have an underlying purpose related to terminal operations and must nave more than an incidental relationship to the handling of cargo or the movement of vessels into a harbor.[13] The underlying purpose and justification for the Port's charges enable the Commission to readily classify them as "terminal related". Moreover, because the Port's services are held to be "other terminal facilities" within the meaning of section 1, the charges for these same services are necessarily "terminal related". The Supplemental Harbor Fee is levied directly on cargo for terminal services allegedly rendered the cargo interests. The Harbor Fee directly affects the amount of Supplemental Harbor Fee paid by cargo interests. The Commission finds that both fees fall within the ambit of section 17.

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[11] Sufficient common carriers call at the Port to serve as a basis for jurisdiction if the Port is otherwise found to be "furnishing . . . terminal facilities." The Commission has found that even minimal contacts with oceangoing common carriers can serve as a basis of jurisdiction if interstate common carriers also call at a port and the port otherwise holds itself out as accessible to common carriers. *Bethlehem Steel Corp. v. Indiana Port Comm.* (Denial of Motion to Dismiss) 12 S.R.R. 1061 (1972), *adopted* 13 S.R.R. 22 (1972).

[12] Section 16 (46 U.S.C. § 815) provides, in pertinent part:

> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:
> First, To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 17 (46 U.S.C. § 816) provides in pertinent part:

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

[13] *See Bethlehem Steel Corp. v. Indiana Port Comm.*, 21 F.M.C. 629 (1979), *aff'd sub nom., Bethlehem Steel Corp. v. F.M.C., supra,* where the Commission held that section 17 applies to charges which are terminal related and not those which are navigation related.

B. *Sections 16 and 17 Violations*

The Commission has determined that the Presiding Officer was generally correct in his finding that the fees are unlawful under sections 16 First and 17 of the Shipping Act, 1916.

Because there is no differentiation as to the nature of the cargo or other transportation factors involved in the assessment of fees, a competitive or "triangular" relationship need not be proven to establish a violation of section 16 First.[14] The Port has treated different classes of persons and descriptions of traffic unequally in the imposition of its fees. Because the exemptions from the tariff fees create a situation where a minority of port users pay substantial fees to defray general port expenses while the majority of users pay little or nothing, Complainants have made a *prima facie* showing of undue preference and prejudice. This shifts the burden to the Port to justify the exemptions,[15] which burden the Port has failed to meet.

A measure of the reasonableness of the exemptions would be whether the other revenue considerations of the exempted classes are reasonably related to the fees forgiven. None of the exemptions appears to meet this standard. No revenue-based justification is advanced in defense of the Port's flat rate permit exemption. There is no evidence of record to substantiate the claim that the administrative cost of assessing vessels under 100 feet exceeds the revenues to be obtained. Similarly, there is no showing that the cargo protection costs saved through the expenditures of private wharf owners equals or exceeds the foregone revenue resulting from their exemption. Finally, there is no proof that the revenues derived from *ad valorem* taxes paid by port users exempted from the harbor fees are generally comparable to the fees that would otherwise be assessed these users. Indeed, the low *ad valorem* tax rates [16] and the admission by the Port that *ad valorem* revenues represent a small portion of Port revenues undermine the validity of the harbor fees exemption and support the Complainants' allegation that the fees are a device whereby non-local interests subsidize the governmental services rendered Parish residents.

Complainants have also made a *prima facie* showing under section 17 that the charges do not bear a reasonable relationship to the comparative benefit obtained from the Port services by the assessed parties.[17]

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[14] *Volkswagenwerk A.G. v. F.M.C.*, 390 U.S. 261, 278-80 (1968); *Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16 (1970); *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525 (1966).

[15] *See e.g., Freight Forwarder Bids on Gov't Shipments*, 19 F.M.C. 619 (1977). The failure of Complainants to obtain flat rate permits and thereby reduce their expenses does not relieve the Port of the obligation to rationally justify its assessment methods. Complainants are not seeking reparations and unless the Port can show that the use of the permit system results in a fair apportionment of revenue contributions among all users of the Port, this allegation is irrelevant.

[16] *See* Initial Decision at 14.

[17] *Volkswagenwerk A.G. v. F.M.C., supra.*; *Baton Rouge Marine Contractors, Inc. v. F.M.C.*, 655 F.2d 1210 (D.C. Cir. 1981).

The charged parties have not received benefits from the Port's services proportionate to the costs allocated to them. Moreover, other users of the services obtain equal or greater benefits and have not been shown to have paid their allocable share of Port costs. The charges are not based upon the actual use of the Port services by the charged parties. Even if the "generalized benefit" concept advanced by the Port were acceptable it appears that the exempted users obtain the same generalized benefit as the charged parties. Yet, as mentioned above, there is no evidence that these exempted classes have made other contributions to the operating costs of the Port that approach the level of fees that would have been paid under the Port tariff if an exemption were not granted. Moreover, the tariff is applicable only to users of the navigable waterways of the Port, although a large portion of "marine-related" Parish expenses allocated to the Port arises from Parish services provided outside the navigable waterways. While there need not be a precise correlation between "marine related" costs allocated to the Port by the Parish and the classes of Port users assessed fees, they must be reasonably related. Here, there is a broad basis for determining "marine related" costs and a narrow class of Port users assessed those costs.

The other tariff provisions and practices of the Port found to be in violation of the Shipping Act by the Presiding Officer, with one exception, have been correctly evaluated. Although isolated errors in billing procedures are not unlawful, repeated misbilling, particularly after the Port is made aware of the errors, constitutes a willful disregard of tariff provisions and an unreasonable practice under section 17.[18]

The "first handled" provision of the tariff is, at the very least, an ambiguous provision which obscures the rights and obligations of the charged parties.[19] Moreover, this provision has historically been given a strained construction against the shipper. It therefore constitutes an unreasonable practice.[20]

Finally, the civil and criminal penalty provisions of the tariff are unreasonable. Without determining whether this practice is otherwise unlawful, the Commission finds that it is excessive and not reasonably related, fit and appropriate to the ends in view.[21] While penalties in the form of denial of credit or access to the Port would be legitimate enforcement mechanisms, "fines" and incarceration are not.

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[18] *See European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc.*, 21 F.M.C. 888, 892 (1979), *aff'd mem. sub nom. European Trade Specialists, Inc. v. FMC*, D.C. Cir. No. 79-1503, June 5, 1980.

[19] *See Investigation of Free Time Practices - Port of San Diego, supra* at 543.

[20] *West Gulf Maritime Ass. v. Port of Houston Authority*, 22 F.M.C. 420 (1979), *aff'd mem. sub nom. West Gulf Maritime Assoc. v. FMC*, 652 F.2d 197 (1981) (Table). The Port has not excepted to the Presiding Officer's finding that it was a violation of section 17 for the Port to include a provision in its tariff naming itself as sole interpreter of its provisions.

[21] *West Gulf Maritime Asso. v. Port of Houston Authority*, 21 F.M.C. 244, 248 (1978), *aff'd mem. sub. nom., West Gulf Maritime Ass'n v. F.M.C.*, 610 F.2d 1001 (D.C. Cir. 1979) (Table), *cert. denied*, 449 U.S. 822 (1980).

The Presiding Officer's holding that the surety provisions of the tariff are unreasonable, however, will not be adopted. A terminal operator can hold liable for tariff fees all direct and indirect users of its services.[22] All parties made sureties for the Port's fees are either direct or indirect users of the Port's services. Furthermore, the allegation that vessel interests, cargo interests and wharf interests are not in privity nor owe any duty to each other in a cargo handling transaction is not explained or supported by evidence. Finally, there is no evidence that the Port has abused these liability provisions or that a hardship or injustice has resulted from their application.

THEREFORE, IT IS ORDERED, That the Initial Decision of the Presiding Officer is adopted as clarified or limited above; and

IT IS FURTHER ORDERED, That the Exceptions of the Port are granted only to the limited extent indicated above, and denied in all other respects; and

IT IS FURTHER ORDERED, That the Port immediately cease and desist assessing a Harbor Fee and Supplemental Harbor Fee in violation of sections 16 First and 17 of the Shipping Act, 1916 as described herein.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

[22] *Id.*

*Vice Chairman Moakley's dissenting opinion is attached. Commissioner Daschbach concurs in Vice Chairman Moakley's dissenting opinion.

DOCKET NO. 79-45

LOUIS DREYFUS CORPORATION, ET AL.

v.

PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

Vice Chairman Moakley, dissenting.

I cannot find on the basis of this record that respondent Plaquemines Port, Harbor and Terminal District is an other person subject to the Act within the meaning of Section 1 of the Shipping Act, 1916.

The Commission is not a court of equity, but an agency whose powers arise solely out of the statutes entrusted to it by Congress. The Shipping Act does not provide a cure for every practice that takes place in ocean transportation nor does it vest in the Commission the right to determine that actions taken by a litigant are so offensive that we must assume jurisdiction.

The pertinent statutory language is as follows:

> The term "other person subject to this act" means any person not included in the term "common carrier by water" carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water.

Respondent clearly furnishes no physical assets such as docks, wharves or warehouses in connection with common carriers. Recognizing this, the majority would interpret the word "facilities" to include "*services* rendered 'in connection' with the marine terminal 'link' in transportation modes." The authorities cited for this interpretation are two earlier Commission cases.

The first, *Marine Terminal Practices of the Port of Seattle,* 21 FMC 397 (1978) is a case in which a port, which was a terminal operator in other respects, was found to be an "other person" by virtue of providing consolidation services for inbound OCP shipments. The Commission said that

> the consolidation service is part of a broader marine terminal process, to the extent that the Port, in providing it is furnishing terminal facilities in connection with common carriers by water. (*id.* at 399)

The second, *Status of Carloaders and Unloaders,* 2 USMC 761, 767 (1946) stands for the proposition that a person furnishing hand trucks, lift trucks, flat top trucks and the labor required to operate such equipment for loading and unloading rail cars on a marine terminal is providing terminal facilities within the meaning of section 1.

The "services" provided by respondent in this case are quite distinguishable from those in the *Seattle* and *Carloaders* cases. They are essentially governmental services such as police, health, and fire protection. If, in charging a fee for those services, Plaquemines becomes an other person subject to the Act, then virtually every State and local taxing authority in this nation which assesses any type of fee to recoup the cost of such services is likewise subject to the Commission's jurisdiction. Moreover, the majority's rationale for exercising jurisdiction here could apply equally to jurisdiction over other federal agencies which charge fees for cargo-related services, such as the U.S. Customs Service or the U.S. Department of Agriculture.

I believe that this dramatic expansion of the Commission's jurisdiction is both impermissible and unwise. I would dismiss this complaint for lack of jurisdiction over the respondent.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-45

LOUIS DREYFUS CORPORATION,
THE EARLY & DANIEL COMPANY, INC.,
DIXIE CARRIERS, INC.,
LE BEOUF BROS. TOWING CO., INC.,
THE VALLEY LINE COMPANY,
FEDERAL BARGE LINES, INC., AND
HOLLYWOOD MARINE, INC.

v.

PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

1. Plaquemines Port found to exercise control as to whether or not certain terminal facilities located in Plaquemines Port are furnished; and Plaquemines Port found by virtue of such control to be an "other person" subject to the Shipping Act, 1916, by furnishing wharfage, dock, or other terminal facilities in connection with common carriers by water.
2. Plaquemines Port's "supplemental harbor fee" found to be a wharfage charge based on tonnages of cargo handled at facilities located in Plaquemines Port; and the supplemental harbor fee to be subject to section 17 of the Act covering regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.
3. Plaquemines Port's "Harbor fee" found to be a dockage and anchorage charge on vessels docking or anchoring at facilities or points in Plaquemines Port, and insofar as this fee applies to vessels which dock for the purposes of having their cargoes handled at terminal facilities in Plaquemines Port, such harbor fee found to be related to the supplemental harbor fee inasmuch as the amount of the latter is reduced by the amount of the harbor fee; and because the harbor fee, at least in part, is related to the handling of cargoes at terminal facilities, said harbor fee found to be subject to section 17 of the Act covering the regulations and practices recited therein.
4. Plaquemines Port, as an other person, through the imposition of its supplemental harbor fee, found to have given undue and unreasonable preference or advantage to certain descriptions of traffic, such as to cargoes owned by facilities' owners and to certain cargoes believed to be but not in fact so owned, and to have subjected other descriptions of traffic to undue and unreasonable prejudice or disadvantage in violation of section 16 First of the Act. Similarly, Plaquemines Port found in violation of section 16 First, insofar as certain vessels were subjected to the harbor fee and other vessels were exempted from such fee.
5. Plaquemines Port, through the imposition of its supplemental harbor fee and harbor fee, found to have established, observed and enforced unjust and unreasonable regulations and practices relating to or connected with the receiving, handling, storing or delivering of property, particularly insofar as it has not been shown that the said fees are reasonably related to the services performed by Plaquemines Port.

6. Plaquemines Port found in violation of section 17 of the Act, insofar as its tariff provisions hold liable for the debts of shippers and consignees of cargoes all parties who may have contact with the debtors, including vessel owners, terminal operators and other "users" of the vessel or facility.
7. Plaquemines Port found in violation of section 17 of the Act, insofar as its tariff item 145, as amended, is ambiguous because it covers cargo when "first handled" in the Port and then contradicts the meaning of first handled by providing that the reporting of such cargoes should be made when the cargo leaves the wharf or facility.
8. Plaquemines Port found in violation of section 17 of the Act, insofar as its tariff under item 10 purports to establish itself as sole interpreter of the provisions of its tariff.
9. Plaquemines Port found in violation of section 17 of the Act, insofar as item 130 of its tariff sets up civil and criminal sanctions for the refusal to pay fees assessed by the tariff.
10. The complaint insofar as it alleges violations of section 15 of the Act is dismissed for lack of proof.

William E. O'Neil and *Terry A. McCall* for the complainants.

Louis B. Porterie and *Robert E. Fontonelle, Jr.*, for the respondent.

Paul J. Kaller and *Aaron W. Reese* as Hearing Counsel.

INITIAL DECISION [1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Adopted July 30, 1982

INTRODUCTION. On February 1, 1978, the Plaquemines Parish Sheriff's Department arrested an intoxicated toolpusher, domiciled in the parish, for shooting his dog at a sand fill on Deadman's Lane in Boothville.[2] Two days later an oyster fisherman from another parish turned himself in at the Port Sulphur [2] Jail, upon learning of a warrant for his arrest for the unlawful removal of oysters from a leased bedding ground. In mid-April two fishermen from neighboring St. Bernard Parish were arrested for fishing with a gill net in the pond at Braithwaite Park.[2] Not a month later two more fishermen were arrested at their trailer home in Venice [2] and charged with the illegal firing of weapons: each had got off two blasts from a twelve-gauge shotgun.[2]

On the fifteenth of June a driver veered off the road and came to a stop in the midst of a cane field; [2] he thereupon climbed to the roof of his car and began hollering. Deputies quickly took him away. On July 1 a fisherman from Moss Point, Mississippi, improperly backed his car, causing it to strike a 1978 Ford Torino belonging to the Plaquemines Parish Commission Council, that was parked at the Good Rockin' Club.[2] The inept backer was carted off to jail. Two weeks later a

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

[2] Towns and locations referred to are located in Plaquemines Parish, Louisiana, unless some other Parish or State is specified.

laborer in the employ of Brown & Root, a construction firm, was seen tossing a beer can from the passenger window of his vehicle, which was northbound at the time on Louisiana Highway 23, just north of Burmaster Street.[2] When a deputy pulled him over, the suspect could not produce a driver's license and was promptly removed to jail. On July 21 a roustabout was found at home, bleeding from a self-inflicted neck wound, accomplished with a butcher's knife. Deputies took him to the Port Sulphur [2] Hospital, where the cut was stitched, and thence to jail, where a records check later revealed that the subject was on parole from a bank robbery conviction. August 11, 1978, found an agent of the Louisiana Department of Wildlife & Fisheries turning over to the Plaquemines sheriff a Vietnamese fisherman from Texas who had been apprehended in Breton Sound; [2] he was charged with double rigging in inside waters in closed season. Less than two weeks later a roustabout from Port Sulphur [2] turned himself in at the local jail upon learning of a warrant for his arrest: the offense—aggravated battery with a pool stick.

In the same year the Plaquemines Parish Fire Department was called upon to fight a variety of fires. On New Year's Day—an ominous portent of things to come—a Cadillac caught fire at the Shell Oil Company dock in Venice.[2] St. Patrick's Day was the occasion of a grass fire behind the office [2] of Freeport Sulphur Company. In June Trident Communications in Belle Chasse [2] was the scene of a fire caused by the punctured fuel tank of a tractor-trailer rig. On July 2 a Vietnamese fisherman's houseboat burned in the Kincaid Canal,[2] and a scant five days later a grass and trash fire erupted on the Belle Chasse [2] levee, not far from Tidewater Marine. A shortout in the fusebox at the day quarters [2] of Buster Hughes' night-shift construction workers led to a fire in late August, and within two weeks, in early September, an aluminum boat caught fire aboard a flatbed truck at Delta Well Tester.[2] A week before Halloween an underground natural gas pipeline [2] was inadvertently ruptured by a backhoe digging a waterline.

In the same year the Plaquemines Parish Health Unit donated its supply of rat traps, as yet unused, to the parish Mosquito Control Department. The unit also investigated a fish kill caused by the overflow of an oxidation pond at an industrial galvanizing plant.[2] The parish Ambulance Service transported the 16-month-old child of an oil company employee from her Buras home to the Port Sulphur [2] Hospital. And the coroner's office [2] issued death certificates on a variety of aircraft pilots, fishermen, pleasure boaters, and swimmers who drowned or suffered death from such causes as coronary and carcinoma. The Buras [2] Waterworks projected that it would run a deficit for the year

[2] See preceding pages for footnote.

of $29,280. And the five members of the Plaquemines Parish Commission Council devoted 30 percent of their official time to the business of the Plaquemines Port, Harbor and Terminal District.

The expenses above to local government occasioned by each and all of these occurrences—and thousands more—were classified as costs incurred by the Plaquemines Port, Harbor and Terminal District (Plaquemines Port or the Port), on the theory that these were "marine-related" events. The cost of these "marine-related" events was then passed on to common carriers by water, other vessels, and shippers utilizing private wharfage, dock, warehouse, and other terminal facilities within the port of Plaquemines, with said cost to be defrayed by the collection of harbor fees and supplemental harbor fees pursuant to a tariff filed with the Federal Maritime Commission.

The subject proceeding is a complaint filed by two shippers in the foreign trade, by three common carriers by water, and by two private carriers by water, all using terminal facilities in Plaquemines Port, alleging that the said harbor fees and supplemental harbor fees are unlawful in violation of the Shipping Act, 1916 (the Act).

THE COMPLAINANTS. The complainants Louis Dreyfus Corporation (Dreyfus) and The Early & Daniel Company, Inc. (Early), both are grain exporters in the foreign trade. The complainants Dixie Carriers, Inc. (Dixie), The Valley Line Company (Valley), and Federal Barge Lines, Inc. (Federal), are three common carriers by water certificated by the Interstate Commerce Commission, with operating rights to and from ports on the Great Lakes and to ports on all waterways connecting to the Great Lakes, including ports on the Mississippi River to the Gulf of Mexico. The complainants Le Beouf Bros. Towing Co., Inc. (Le Beouf), and Hollywood Marine, Inc. (Hollywood), are private carriers by water. All five of these carriers by water call at, among other ports, the port designated as the Plaquemines Port, Harbor and Terminal District. The two grain exporter complainants ship grain from a terminal located in Plaquemines Port.

THE RESPONDENT. The respondent is the Plaquemines Port, Harbor and Terminal District. Plaquemines Port extends southward from its boundary with the Port of New Orleans, at or about mile 81.6 on the Mississippi River, to mile 0 at "Head of the Passes" leading to the Gulf of Mexico, plus another 21.2 miles below Head of the Passes via Southwest Pass, for a total of about 102.8 miles. The principal waterway of Plaquemines Port is the Mississippi River, including its Passes to the Gulf of Mexico. The Plaquemines Port is coextensive geographically with the Parish of Plaquemines, Louisiana. In this state, a parish is the general equivalent of a county in another state. This Port and the Parish also include portions of the Gulf Intracoastal Waterway, various canals and other navigable waters. The Intracoastal Waterways flow across the northern portion of Plaquemines Port. The Doullut

Canal flows from the Mississippi River at Empire, La., and connects with a waterway which flows to the Gulf of Mexico.

The Plaquemines Parish is governed by the Plaquemines Parish Commission Council, which consists of five commissioners, who also govern the Plaquemines Port.

Located in Plaquemines Port are various terminal facilities, docks, a grain elevator, and federal anchorages for ocean-going vessels. Also in the Port are facilities which are located "midstream" in the Mississippi River, which are used for the transfer of coal and other commodities from barge to ocean vessel.

The locations of the major facilities on Plaquemines Port are:

On the Mississippi River and its passes.

On that portion of the Algiers Cut Off Canal (Intracoastal Alternate Waterway) lying between Orleans-Plaquemines Parish line (at Donner Canal) westward along the Intracoastal Waterway to the intersection with the Barataria of the Jefferson-Plaquemines Parish Line.

On the Empire Doullut Canal from the Mississippi River to the Gulf of Mexico.

At Jump Basin, Tiger Pass, Grand Pass, and Baptiste Collette, from the Mississippi River to the Gulf of Mexico.

Plaquemines Port and Plaquemines Parish do not operate any vessels which are common carriers by water in the foreign commerce, or in interstate commerce on the high seas or on the Great Lakes.

The Plaquemines Parish Commission Council, as governing body for the Parish of Plaquemines and for the Plaquemines Port, owns or operates only five public facilities in the nature of terminal facilities located on the Mississippi River or other Plaquemines Port waters.

These five facilities include three marinas or boat harbors, used by small pleasure craft and by fishing craft. The fourth facility is a shipyard for vessels 65 feet or less in length needing repairs, and the fifth facility is an unused dock about 90 to 100 feet long on the Mississippi River, which dock has been converted to an intake structure for water pumps supplying water from the river to the Plaquemines Parish Water Works.

The charges applicable at these three marinas and at the shipyard are not listed in Tariff No. 1 of the Plaquemines Port, which is filed with the Federal Maritime Commission, but these charges are noticed under separate ordinances of the Plaquemines Parish Commission Council.

However, items 155 and 160 of Tariff No. 1, respectively, provide "Wharfage Rates at Public Wharves," and "Basis for Assessment of Wharfage Charge." The wharfage charge of Plaquemines Port on all commodities at its Public Wharve is $0.50 per net ton or fraction thereof unloaded by and with the equipment furnished by the owner of cargo, with a minimum wharfage charge per shipment of $5.00.

It appears that at least in recent years Plaquemines Port has not assessed charges under items 155 and 160 of its tariff. Also it appears that in recent years no cargoes or vessels have used the above listed fifth facility, the dock, although it is conceivable that a new or different water intake facility could be utilized by the Parish, and the said dock could be converted back to use as a public dock for cargoes.

The existence of items 155 and 160 above do not show that Plaquemines Port now is a person furnishing terminal facilities in connection with common carriers by water.

However, there are many private facilities in Plaquemines Port, and in its answers to interrogatories propounded in certain stayed Federal Court actions, Plaquemines Port stated that it "administers" all privately owned docks, wharves, etc., within its geographical jurisdiction.

The respondent admits that, "There is a public interest of ownership impressed upon the banks of the navigable streams and waterways of the State of Louisiana." "The permission to use them is vested in local governments, especially when they have a Port District enabling statute." "These local governments have a right to make charges for the use of these areas for wharves." "The local governments have a corresponding power to impose a fee on the cargoes that are stored on such public banks, even if there are no wharves or facilities." "The right to make the charge is inherent, because private ownership of such area is impressed with the vested right of public use of the banks of such rivers and waterways." "In addition, the enabling legislation for the Port District states that the prior permission for the building of any wharves or facilities must be obtained."

Plaquemines Port was deemed not eligible to join the Mid-Gulf Seaport Marine Terminal Conference (FMC Agreement T-2002, approved January 17, 1967), by Mr. Cyrus C. Guidry, Executive Secretary and Legal Advisor to the said Conference. Mr. Guidry's opinion was based on certain information given to him by the attorney for Plaquemines Port. Mr. Guidry was told that Plaquemines Port did not own or operate or furnish any wharves for the use of which charges were assessed common carrier vessels loading or unloading cargo. Also Mr. Guidry was given other information, including that the sole public facilities of Plaquemines Port were marinas for pleasure and fishing boats.

Mr. Guidry's opinion is only a legal opinion and is not evidence of any basic facts relative to whether or not Plaquemines Port furnishes any terminal facilities in connection with common carriers by water.

Plaquemines Port filed its Tariff No. 1 with the Federal Maritime Commission for informational purposes only, with the understanding that the filing of the tariff, in and of itself, does not confer jurisdiction of the Federal Maritime Commission over Plaquemines Port.

Of course, the mere filing of a tariff is not proof of jurisdiction over the filer of a tariff. The filing of a tariff may be only one of many facts relating to jurisdiction.

In determining whether Plaquemines Port is an "other person" subject to the Shipping Act, one of the issues herein set out below, it must be determined whether Plaquemines Port is *a person* carrying on the business of forwarding or *furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.*

As will be seen below, many common carriers by water have used certain so-called private facilities in Plaquemines Port for the use of which facilities these carriers by water have been subjected to the Tariff No. 1 charges of Plaquemines Port. One principal factor in determining the ultimate jurisdictional question herein appears to be whether by conditioning the use of these private terminal facilities on the payment of its tariff charges, Plaquemines Port thereby controls the use of these terminal facilities, and in effect is, at least in part, furnishing these facilities.

THE COMPLAINT. By complaint filed April 20, 1979, served April 24, 1979, the seven complainants allege that the respondent, Plaquemines Port, is an "other person" subject to the Shipping Act. Further, it is alleged that the respondent's tariff on file with the Federal Maritime Commission (the Commission) contains: in item 135 a "Harbor Fee" which purports to be applicable to each vessel which docks, moors or anchors within the Plaquemines Port; in item 136(D) a provision for issuance to vessels over 100 feet long of special permits described in item 137; and in item 137 a provision that these special permits will be issued to certain vessels appraised for "ad valorem" taxes in the Parish of Plaquemines upon payment of such taxes.

It is alleged also that the combined effect of these tariff items results in the giving of undue and unreasonable preference and advantage to particular persons, such as the corporations whose vessels are entered on the tax rolls of the Parish, and results in undue and unreasonable prejudice and disadvantage to the five complainant carriers by water, who pay property taxes on their vessels in other Louisiana parishes, or in states other than Louisiana, and who are required by the terms of the tariff to incur charges from the Plaquemines Port of $150 each time one of their vessels enters the Plaquemines Port, in violation of section 16, First, of the Act.

Further, the complainants allege that the tariff contains in item 145 a Supplemental Harbor Fee which purports to be applicable to all cargo handled by a privately owned wharf, excepting cargo which is owned by the private wharf owner. The two complainant grain exporters, Dreyfus and Early, allegedly are subjected to undue and unreasonable prejudice, while other persons moving cargo owned by them across wharves or through terminals owned by them are given undue and unreasonable preference and advantage, by the terms of item 145, in violation of section 16, First, of the Act.

Further, it is alleged that the terms of item 145 result in the establishment, observance and enforcement of unjust and unreasonable regulations and practices related to and connected with the receiving, handling, storing, and delivering of property, in violation of section 17 of the Act.

Finally, it is alleged that the Supplemental Harbor Fee contained in item 145 of the tariff operates to the detriment of the commerce of the United States, is contrary to the public interest and is otherwise unlawful in violation of the Act, and therefore is in violation of section 15 of the Act.

Also, the complainants suggest that the Supplemental Harbor Fee contained in item 145 conflicts with guidelines of the Commission regarding the filings of tariffs by terminal operators, 46 CFR 533.6, defining "handling" of cargo between point of rest and any place on the terminal facility other than the end of ship's tackle, insofar as item 145 refers to cargo when first handled in the Plaquemines Port "in midstream or at anchorage," and insofar as item 145 further states that "all other cargo handled by a privately owned wharf shall be deemed midstream unloading." To complainants, item 145 appears to be an attempt to assess a fee that is tantamount to wharfage for the use of public facilities, when at the same time the private facilities, used by the complainants, additionally charge their own fees for the use of their facilities.

COLLATERAL PROCEEDINGS. Since September 1, 1977, the date on which the tariff of Plaquemines Port became effective, the Port has sought to charge the complainants its fees under items 135 and 145.

On March 15, 1978, Dreyfus brought suit in the United States District Court for the Eastern District of Louisiana, seeking to have the tariff of Plaquemines Port declared unconstitutional, and null and void "*ab initio.*" Trial was set for November 24, 1978.

On July 14, 1978, Dreyfus filed a motion for summary judgment, which was denied by the United States District Court on December 6, 1978.

On November 14, 1978, the Plaquemines Parish Commission Council, as governing body of Plaquemines Port, filed several suits in the Judicial District Court for the Parish of Plaquemines against 25 defendants, various vessel interests, shipping agents, and terminal operators doing business in Plaquemines Port, to enforce collection of amounts invoiced pursuant to the tariff of Plaquemines Port.

These additional Plaquemines Judicial District Court items were removed and consolidated with the Dreyfus action into the Federal Court action.

The parties defendant in the consolidated Federal Court action who are not before the Federal Maritime Commission in the present proceeding are National Marine Service, Inc., Midland Enterprises, . Inc., General Electric Credit and Leasing Corporation, TTT Shipping Agencies, Inc., Biehl & Company, Inc., Strachan Shipping Co., Rogers Terminal & Shipping Corporation, Oceans International Corporation, Hauser & Tidemann, Dalton Steamship Lines, Inc., Norton, Lilly & Co., Inc. (carriers or shipping agents representing carriers), Mississippi River Grain Elevator, Inc., Electro-Coal Transfer Corporation (terminals), and Mannesmann Pipe & Steel Corporation and Artfer, Inc. (shippers). Three other defendants have compromised and have been released, and another is bankrupt.

The amounts assessed the fifteen defendants who are not before the Federal Maritime Commission, through June 30, 1980, and in a few cases July 2, 1980, totaled $774,745.90.

This total above, plus $843,316.20 claimed against the complainant, as of the same time, made the total of tariff fees then in litigation of $1,618,062.10.

In each of its suits, the Plaquemines Parish Commission Council sought preliminary injunctions against the defendants, prohibiting their use of the Plaquemines Port and any facilities therein public or private.

In lieu of enjoining the defendants' access to the Mississippi River and Gulf Intracoastal Waterway and the facilities thereon located within Plaquemines Port, the Plaquemines Parish Council agreed to accept surety bonds and deposits in the registry of the federal courts to secure payment of the claimed fees.

A motion to dismiss the complaint filed by respondent was denied by the Administrative Law Judge on August 20, 1979, as was respondent's motion for leave to appeal to the Commission, which was denied on October 25, 1979.

Dreyfus filed a motion for stay in the United States District Court, based upon the doctrine that the Federal Maritime Commission has primary jurisdiction. This motion was granted on January 30, 1980, and the United States District Court Action and all consolidated actions were stayed, pending the outcome of the present proceeding before the Federal Maritime Commission.

INTERVENTION BY HEARING COUNSEL. A petition for leave to intervene was filed by Hearing Counsel, stating their belief that the impact of the tariff provisions at issue herein was far broader than the tariff provisions' effect upon the seven complainants, and stating that there was a significant effect on the shipping public and the ocean transportation industry. This petition was granted, but thereafter Hearing Counsel did not participate in the hearing, nor did they offer any evidence into the record. Hearing Counsel did file opening and reply briefs, taking the position that respondent is not an "other person," that respondent is not required to file a tariff with the Commission, and that the tariff items 135 and 145 providing a Harbor Fee and a Supplemental Harbor Fee are not regulations or practices related to or connected with the receiving, handling, storing or delivery of property.

Hearing Counsel do "concede that is arguable that the Supplemental Harbor Fee is a regulation or practice related to or connected with the receiving, handling, storing or delivering of property, for the reason that the fee is a charge against cargo and the assessed fees are based on tonnage." But, Hearing Counsel argue that this fee is not related to or based upon any terminal services or facilities "supplied" by respondent. Hearing Counsel on brief do not admit that control of the use of a terminal facility plus the imposition of a fee for use of such a facility might result in control of the furnishing of a terminal facility. Nor do Hearing Counsel on brief discuss other issues relating to the merits of the complaint, such as whether the amount of the Supplemental Harbor Fee is reasonably related to the benefits received by those charged this fee.

THE UNIQUENESS OF PLAQUEMINES PARISH AND PORT. The Plaquemines Port and the Parish sit astride the delta of the Mississippi River on its southernmost portion. Only 6 percent of the surface of the Parish is habitable. This habitable area consists of two relatively narrow strips of land along each bank of the Mississippi River between the riverfront levees and the back levees. The latter protect the land from waters other than the Mississippi. Substantially all of the habitable area is close to the waterways in Plaquemines Port. The remaining area is either water or marsh and wetland area.

On the East Bank, or left descending bank (l.d.b.) of the Mississippi River, the strip of habitable land is accessible by only one highway, 35 miles long, and on the West Bank, right descending bank (r.d.b.), the one highway is 70 miles long. The Parish population is about 27,000 permanent residents, plus as many or more itinerant laborers and professionals. The largest industry group and the largest employer in Plaquemines Parish is the oil industry. Plaquemines Parish has it own oil deposits and also serves as a base for offshore oil exploration and production in the Gulf of Mexico.

There are no bridges across the Mississippi River in Plaquemines Port. The first bridge north of the Gulf of Mexico is one at New Orleans. There are two ferryboat crossings of the Mississippi River in Plaquemines Port, one at Belle Chasse, La., in the northernmost part of Plaquemines Port, and the other at Pointe-a-la-Hache, La., nearer to the central point of Plaquemines Port.

Plaquemines Parish provides its two ferryboat services until about 11:30 p.m. daily. The parish has three ferryboats, one of which, the *M/V Louisiana*, has been equipped with water pumps and firefighting apparatus.

In the Parish there is a very considerable threat of extensive damages to property and life caused by hurricanes and other storms, which periodically beset this Gulf coastal area of Louisiana.

Because of the tendency of the hurricanes to damage citizens' residences in the Parish, one ostensible result is that property tax millage rates in Plaquemines Parish are either very low or the lowest in the State of Louisiana.

According to the state constitution, personal and real property is assessed for tax purposes at 15 percent of fair market value. Millages applied to the assessed valuation are determined by local election. The total combined millage rate for Plaquemines Parish in 1979 was 22.45 mills,[3] and the 1977 and 1978 rates were similar. The component millages included school tax, parish tax, water tax, hospital tax, library tax, pollution control tax, road maintenance tax, waste disposal tax, incineration tax, and law enforcement tax.

A property worth $100,000 assessed at 15 percent or $15,000 would pay ad valorem taxes at the rate of 22.45 mills of $336.75. One witness who owns 248 acres of marshland pays about $100 a year in ad valorem taxes.

Nevertheless, in spite of the hurricanes, etc., there are some properties in Plaquemines Parish of considerable value. A marine engineer who has specialized in the design and construction of marine terminals made an inspection and appraisal of the fair market value of certain marine facilities in Plaquemines Port, evaluating only that portion of a facility located from the center line of levee to the Mississippi River, including those structures in the river. His appraisals were:

Mississippi River Grain Corporation, Alliance, La.,
Barge-Unloading-Ship Loading Terminal,
$12,000,000.00

Amax Nickel Refining Co., Inc., Braithwaite, La.,
Dock Facilities,
$4,600,000.00

Cal-Ky Pipeline Terminal, Empire, La.,
Dock,
$812,000.00

[3] The Orleans Parish's millage rate was about 86 to 87 mills.

Getty Oil Company, Venice, La.,
Ship Dock and Barge Dock,
$4,675,000.00
Gulf Oil Co., U.S., Ostrica, La.,
Liquid Products Handling Facilities,
$6,350,000.00
Gulf Oil Company, U.S., Alliance, La.,
Coke Dock & Liquid Plastics Dock,
$20,350,000.00
Electro-Coal Transfer Corporation, Davant, La.,
Marine Transfer Facilities,
$30,000,000.00
Signal Oil Company, Homeplace, La.,
Loading Dock,
$690,000.00

As to the facilities above of the Mississippi River Grain Corporation, the fair market value estimate of $12,000,000 apparently included only the barge unloading and ship loading terminal. In fact, the replacement cost of the grain elevator and the dock facilities together would be about $80,000,000. Also, the other facilities listed above would show further values if properties beyond the center line of the Mississippi River levee were included.

When various industrial facilities were located within Plaquemines Port or Parish, often arrangements were made under Louisiana law to waive collection of certain taxes for a number of years as inducements for the industries to locate in the parish. For example, when the Mississippi River Grain Elevator facility originally was constructed, it was granted a ten-year industrial exemption from ad valorem taxes by the State of Louisiana. The exemption expired in 1978 on portions of the facility, and MRGE voluntarily has placed the remaining portions of the facility on the ad valorem tax rolls of Plaquemines Parish.

Other concerns having ad valorem tax exemptions in Plaquemines Parish include Chevron Chemical Company, Empire Menhaden Company, Inc., Louisiana Power & Light Co., SECO Industries, Universal Foods, and Signal Petroleum.

THE HISTORY OF PLAQUEMINES PORT AND ITS POWERS. The predecessor of Plaquemines Port originally was created in 1954 and was then entitled the Plaquemines Parish Port Authority. It was created by an Act of the Louisiana Legislature. Amendments to the statute by the state legislature account for Plaquemines Port's present form. From 1954 to 1977 Plaquemines Port and its predecessor existed in law but in fact were dormant. The Port was "activated" in 1977, as testified by the President of the Plaquemines Parish Commission Council, Mr. Chalin O. Perez, and by the Plaquemines Port Director, Mr. Albert Beshel, who also is one of the five commissioners of the Plaquemines Parish Commission Council.

Mr. Perez, a lifelong citizen of the Parish of Plaquemines, became president of the Parish Council in 1967. Certain other Parish Commissioners and Parish employees also are lifelong citizens of the Parish.

Under applicable Louisiana statutes which created the Plaquemines Port, Harbor and Terminal District (Ex. C-1 of record), Plaquemines Port may acquire by purchase, donation, expropriation, appropriation or otherwise any lands in the Plaquemines Port needed for railways, wharves, sheds, buildings, canals, channels and other facilities required for the operation of the Port. The Plaquemines Port may levy annually an ad valorem tax not to exceed five mills on the dollar on property subject to taxation situated in the Port.

The Plaquemines Port shall have the power to regulate the commerce and traffic within the Port in such manner as may in its judgment be best for the public interest.

Riparian owners or those lessees of property along the banks of any navigable stream or other body of water may, with the consent of Plaquemines Port and in conformity with plans and specifications approved by the governing authority of the Port, erect and maintain on the batture,[4] banks or bed of any navigable stream or other body of water owned or leased by them, such wharves, buildings or improvements, as may be required for public or private purposes; *but in all cases, such wharves, buildings or improvements shall remain subject to the administration and control of the Plaquemines Port with respect to their maintenance and to the fees and charges to be exacted for their case by the public.* (Emphasis supplied.)

As seen above, Plaquemines Port retains administrative authority and control over the private wharves and other terminal facilities in the Port, including control over the fees and charges exacted by the owners of private facilities for their use by the public.

The fees and charges of Plaquemines Port here in issue are in addition to the fees and charges and contractual rates and arrangements of the owner of a private facility, such as the Mississippi River Grain Elevator (MRGE).

MRGE has a "through-put" agreement, a private contract, with Dreyfus, for example. A through-put agreement provides an all-inclusive charge for certain services rendered by MRGE, including unloading grain from barges into MRGE's grain elevator, the storing of the grain in the elevator, and the taking of the grain out of the elevator and

[4] Batture is the land lying between the low tide line of the River and the middle of the levee.

loading it onto an ocean vessel. In other words, the grain is put through the elevator for a fee.

Also, MRGE has its own grain tariff, which provides, among other things, for dockage charges to vessels. The same MRGE grain tariff also provides charges for drying and cleaning the grain.

Plaquemines Port contains many oil deposits, and serves as a base for offshore oil exploration and production operations in the Gulf of Mexico.

The oil and gas portion of the Plaquemines Parish tax rolls is the largest in terms of value and produces the largest share ad valorem taxes collected.

Plaquemines Parish has a wide variety of industries related to oil exploration and production, such as oil field supply and service companies. Services include drilling pipe, diving, food, metering, and wireline services. Supplies include oil drilling chemicals and mud. Most of the oil field activity takes place in shallow, marshy waters outside of the principal land areas of the Parish.

A large number of vessels, many hundreds if not thousands, operate in the Parish to service the oil industry. About 95 percent of these are on the ad valorem tax rolls of the Parish. Most of the vessels are crewboats and supply boats which are less than 100 feet long.

Numerous pipelines for both oil and gas crisscross South Louisiana and Plaquemines Parish. These pipelines generally bring oil in from offshore areas to refineries or production facilities. Some pipelines are used for the interstate transmission of oil and gas.

Plaquemines Parish has a fishing industry, involving oysters, shrimp and menhaden. Most fishing vessels are less than 100 feet long. The Parish has a large number of docks and facilities for the fishing industry, including menhaden processing plants at Empire, La., and docking and ice facilities at Venice, La.

Plaquemines Parish also supports recreational fishing and hunting. Various marinas and boat launches supply services to hunters and pleasure fishermen. Pleasure fishing extends to the Gulf of Mexico and to the inland marsh areas of the Parish. Duck hunting is a popular pastime. Plaquemines Parish operates a number of marinas.

The "activation" of Plaquemines Port in 1977 coincided with a period of declining fortunes for the Parish, as its oil severance and royalty collections and other revenues were not keeping pace with increased Parish governmental expenditures.

The Parish passed its first sales tax in about 1976 or 1977. It was only one and one-half percent. Plaquemines Parish had a deficit for about the last four or five years up to April 29, 1980.

Because of declining oil and mineral revenues and for other reasons, such as the increased traffic on the Mississippi River and increased industrial activities in the Parish, the Plaquemines Parish Commission

Council decided on or about early in 1977 to raise additional revenues through the Harbor Fees and the Supplemental Harbor Fees here in issue, as published in the Plaquemines Port's tariff, which first became effective on September 1, 1977.

It is the complainants' view that at this time in 1977 it was the intent of the Plaquemines Parish Commission Council to raise additional funds for the general governmental functions of the Parish by levying the tariff charges in issue on "foreign business interests," that is, on those businesses such as the complainants' businesses, not domiciled in Plaquemines Parish.

Plaquemines Port takes the contrary view that it merely sought or seeks to recoup "marine-related" expenses from the users of the facilities of the Port of Plaquemines.

Plaquemines Port takes a very broad view of its definition of "marine-related" in allocating portions of the general expenses of the Parish government to the costs of operating Plaquemines Port. While practically every industry in Plaquemines Parish might be considered directly or indirectly marine-related, nevertheless it is abundantly clear from the evidence that the so-called "marine-related" expenses were not passed on to the persons and industries which caused these expenses, but these "marine-related" expenses were sought to be recovered only from vessels and cargoes subjected to the Harbor Fees and the Supplemental Harbor Fees.

THE FOUR LOUISIANA PORT AUTHORITIES. Plaquemines Port is one of the four port authorities created by the State of Louisiana along the Mississippi River from the Gulf of Mexico northward to and including Baton Rouge, La.

Plaquemines Port includes only one Parish (Plaquemines) and extends from the Gulf to Mile 81.6 on the River. The Board of Commissioners of the Port of New Orleans have jurisdiction over the area along the river from Miles 81.6 to 115, including the Parishes of St. Bernard, Orleans and Jefferson. The South Louisiana Port Commission has jurisdiction along the river from Miles 115 to 168, including the Parishes of St. Charles, St. John the Baptist and St. James. The Greater Baton Rouge Port Commission has jurisdiction covering Miles 168 to 255, including the Parishes of Ascension, Iberville, East Baton Rouge and West Baton Rouge.

The three upriver port authorities each are concerned with areas of three or more parishes, and either own or control public wharves.

The State of Louisiana authorized differing modes of government for these four Louisiana Port Authorities.

The Port of New Orleans has a seven-member board, with four members from Orleans Parish, two from Jefferson Parish and one from St. Bernard Parish. The State Governor selects these members of the board from among nominees put forth by civic and business organizations, including the Chamber of Commerce of New Orleans, the New Orleans Board of Trade, Ltd., the New Orleans Steamship Association, the International Freight Forwarders and Customs Brokers Association of New Orleans, Inc., and the International Trade Mart. The Greater Baton Rouge Port Commission has fifteen members appointed by the State Governor from nominees supplied by such authorities as the police jury of the Parish of West Baton Rouge, the mayor and alderman of the town of Port Allen, La., and the city council of Baton Rouge.

The South Louisiana Port Commission is composed of nine members, of whom two each are appointed by the authorities of the Parishes of St. Charles, St. John the Baptist and St. James. A seventh member is appointed by the State Governor, and the other two positions are occupied ex officio by the directors of the Louisiana Department of Public Works and the Louisiana Department of Commerce and Industry.

The title to port facilities operated by the Greater Baton Rouge Port Commission and by the South Louisiana Port Commission vests in the State of Louisiana.

As seen above, Plaquemines Port has the same governing body as does the Parish of Plaquemines, namely the five-member Plaquemines Parish Commission Council. This is in contrast with the three other Louisiana Port Authorities, whose governing bodies are independent of and differ greatly from the governing bodies of the various parishes. This situation in Plaquemines leads to the charge by the complainants that the Plaquemines Parish Commission Council has tended to conduct the business of Plaquemines Port without distinguishing it from the operations of the Parish government.

THE TARIFF PROVISIONS OF PLAQUEMINES PORT, WHICH RESULTED IN THE CHARGES IN ISSUE. The Complainants' exhibit No. 3 contains the entire tariff of Plaquemines Port as filed with the Commission, and as it was effective at the time of hearing, including some original and some revised pages. Originally the tariff was adopted April 20, 1977, but did not become effective. The tariff, as later adopted on August 17, 1977, became effective for the first time on September 1, 1977. Subsequent to the hearing, the Port's tariff was amended, effective July 4, 1980, to reflect changes, including changes in Items 135, 145 and 165. Pages 44 to 61, inclusive, of respondent's opening brief recite the tariff provisions and charges of the Port including the changes and additions effected on July 4, 1980. Official notice is taken of all of the tariff provisions of the Plaquemines Port's tariff, including those in the amendments effective July 4, 1980.

To fully understand the controversy herein, it is necessary to consider the tariff's provisions as they were originally at the time of the hearing, and as they were amended after the hearing. At the hearing, with Hearing Counsel not present to represent the public, the Administrative Law Judge deemed it advisable to comment on the existing tariff provisions, with the view of assisting in their clarification, so as to make the tariff provisions definite and certain, and more readily understandable by the shipping public.

Item 135 of the tariff at the time of the hearing was as follows:

> *Item 135 - Harbor Fee*
>
> Each vessel which docks, moors, or anchors within the District, including Lash and Seabee barges and movable oil rig and platforms, shall be assessed a Harbor Fee, as provided herein, to assist in defraying the expense of the administration and maintenance of the Plaquemines Port, Harbor and Terminal District, including the supervision of the shipping of the district, with the view of preventing collisions and fires, policing the river and river front, rendering aid to vessels in distress, and to aid in extinguishing fires in vessels and equipment and in their cargoes aboard such vessel, or upon wharves and other facilities in the District.
>
> Fee Per Vessel
>
> | | |
> |---|---|
> | Vessels over 100 and under 250 feet in length | \$100.00 |
> | Vessels 250 feet and over in length | \$150.00 |
>
> This Harbor Fee is due for the first five days or any part thereof that the vessel remains within the District.

Effective July 4, 1980, this item 135 was amended according to respondent for two reasons, one, to clarify the amount of the Harbor Fee for vessels remaining over five days in the Port and, two, to make all parties liable for the Harbor Fee. The amendment added the following:

> and for each day or any part thereof over five days that the vessel remains within the District, the Harbor Fee due shall be one-fifth of the above stated Fee Per Vessel.
>
> The payment of the Harbor Fee shall be the *primary obligation of the owner, agent, or user of the vessel,* but the owner of the facility handling or storing the cargo and the cargo owner whose cargo is loaded unto a vessel outbound from the Port District from any wharf, dock, facility, mooring facility, or anchorage within the Port District shall be liable *in solido as surety* for the payment of the Harbor fee due by the owner, agent or user of the vessel unto which such cargo has been loaded; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner, agent, or user of the vessel against the owner, agent, or user of

the vessel, who is primarily liable for all amounts paid by those responsible in solido but not primarily obligated. (See Item 145 Supplemental Harbor Fee and Item 165, Payment of Bills hereof.)

Item 136 of the tariff provides:

Vessels Exempted From Harbor Fee

(A) Vessels passing through the port which do not berth at any wharf, anchor within the District, or in any way moor themselves within the District limits. Vessels stopped with the District for the sole purpose of changing pilots, or because inclement weather remaining less than twelve hours within the limits of the District.

(B) Government vessels not engaged in carrying cargo, troops or supplies.

(C) Private, non-commercial pleasure craft.

(D) Special permits, vessels over 100 ft. in length as set forth in Item 137.

Item 137 of the tariff provides:

Special Annual Or Temporary Port Permit Vessels

Annual special permits will be issued by Plaquemines Parish Port Authority to every vessel over 100 ft. in length that is appraised for Ad Valorem taxes in the Parish of Plaquemines upon payment of the Parish taxes resulting from such Parish assessments. Special Permits will be issued by Plaquemines Parish Port Authority upon the payment of the following fees:

I

Vessels over 100 ft. to 200 ft. in length:

a. For 30 days	$100.00
b. For 90 days	250.00
c. For 180 days	450.00
d. For 365 days	750.00

II

For non-self propelled barges, lighters or other watercraft over 100 feet in length, and not more than 200 feet in length:

a. For 30 days	$ 50.00
b. For 90 days	125.00
c. For 180 days	225.00
d. For 365 days	375.00

III

For non-self propelled barges, lighters or other watercraft over 200 feet in length and not more than 300 feet in length:

a. For 30 days	$200.00
b. For 90 days	500.00

c. For 180 days	900.00
d. For 365 days	1500.00

Such permits will exempt such vessels from payment of Harbor and Lay-Up Fees, as set out in Items 135, 136 and 140 hereof.

As seen from the *amended provision* regarding who shall be liable *in solido as surety* in item 135, the payment of this harbor fee relates to those *vessels on which cargo has been handled in the Port, or stored in the Port, or loaded upon a vessel outbound from Plaquemines Port.* As item 135 existed before the July 4, 1980, amendment, the fee related to *vessels which dock, moor or anchor* in the Port. As further seen in item 136 of the tariff, the exempted vessels which do not pay the harbor fee in item 135 are those vessels merely passing through the Port, etc. These vessels, in other words, are those vessels not handling cargo in not storing cargo in, or not loading cargo outbound from the Port.

Clearly items 135 and 136 connote the intention of Plaquemines Port to assess only those vessels handling cargo in the Port in some fashion. But, other vessels not assessed could be involved in collisions, fires, or other emergencies. Thus, the harbor fee is in reality more of a fee related to cargo than a fee regarding navigational problems in a harbor.

Item 145 of the tariff at the time of the hearing, 1st revised page 13, was as follows:

Item 145 Supplemental Harbor Fee

All cargo when first handled within the district in midstream or at anchorage shall be assessed, in addition to Items 135, 137 and 140, \$.10 per net ton or fraction thereof over 500 tons of the weight of cargo handled, provided that no cargo shall be assessed a tonnage harbor fee more than one time. The payment of supplemental harbor fee shall be the *primary obligation of the owner of the cargo,* but the owners or other users of the vessels and facilities handling or storing such cargo shall be bound and responsible in *solido as surety* for the payment of such cargoes; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner of the cargo against the owner of the cargo, who is primarily liable, for all amounts paid by those responsible in solido but not primarily obligated. The cargo of the owner of a privately owned wharf shall be handled by the owner of the wharf without the payment of this fee to the District. The Harbor Fee Charge of Item 135 and on any vessels involved in the handling of cargo subject to this supplemental harbor fee shall be credited against this cargo. All other cargo handled by a privately owned wharf shall be deemed midstream unloading and shall be subject to the same fee as that imposed above upon midstream unloading.

Effective July 4, 1980, item 145 was amended in several ways as follows:

The first sentence became the first paragraph. The second sentence became the second paragraph, and was changed somewhat but not in substance according to the respondent, to read as follows:

> The payment of Supplemental Harbor Fee shall be the *primary obligation of the owner of the cargo,* but the owners, the agents, or other users of the vessels and the owners of the facilities handling or storing such cargo shall be bound and responsible *in solido as surety* for the payment of such charges; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner of the cargo against the owner of the cargo, who is primarily liable, for all amounts paid by those responsible in solido but not primarily obligated.

The new second paragraph above mentions "agents of vessels" specifically. In other words, the respondent intends that all parties involved with the handling of cargo in the Port to be liable for the fees in item 145. As seen, Item 145 of the tariff holds cargo interests primarily liable for the payment of the Supplemental Harbor Fee. But, in addition, this item makes the owners or other users of the vessels and facilities handling or storing such cargo bound and responsible *in solido as surety* for the payment of the debt incurred by the cargo owner, subject to the right of full subrogation and full recovery against the owner of the cargo.

It should be emphasized that item 145 provides a fee on cargo tonnage handled in a terminal facility. It is a fee assessed *against cargo,* and not a fee on vessels using a harbor, although its title, "Supplemental Harbor Fee," has that connotation. In other words, item 145 more properly should be titled a "Terminal Fee" instead of "Harbor Fee." This Plaquemines fee was modeled on the Supplemental Harbor Fee of the Port of New Orleans.

But by way of contrast, the Supplemental Harbor Fee of the Port of New Orleans is assessed *against vessels* handling or transferring cargo in midstream or when the vessels are anchored at or moored to mooring facilities, including barge fleet mooring facilities.

The third sentence of item 145 of Plaquemines Port's tariff has become the third paragraph.

The fourth sentence of item 145 was made the fourth paragraph and now reads:

> The Harbor Fee of Item 135 on any vessels involved in the handling of cargo subject to this Supplemental Harbor Fee shall be credited against this Supplemental Harbor Fee.

The above fourth paragraph corrected a clerical error (the word "and" after Item 135 in the prior version was deleted), and clarified "this charge" at the end of the sentence to mean "this Supplemental Harbor Fee."

This correction further has the effect of emphasizing that the Harbor Fee on vessels in item 135 is on any "*vessels involved in the handling of cargo,*" and as will be seen from item 136, such handling of cargo must be in Plaquemines Port. In other words, both the Supplemental Harbor Fee (item 145) and the Harbor Fee (item 135) relate to, or are dependent on, the handling of cargo in or on terminal facilities in Plaquemines Port. Item 145 is a fee on cargo based on tonnages of cargo handled, and item 135 is a fee on vessels but only on vessels which transport cargo handled in the Port. Vessels which merely pass through Plaquemines Port which do not berth at any wharf, anchor within the Port, or in any way moor themselves in Plaquemines Port are exempted from the Harbor Fee. That is, vessels loaded with cargo, but merely passing through Plaquemines Port and going to or from other ports, such as the Ports of New Orleans, Baton Rouge or South Louisiana, are exempted from the Harbor Fee.

The fifth and last sentence of the prior item 145 has become the seventh paragraph and reads:

> All cargo handled by a privately owned wharf shall be deemed midstream unloading and shall be subject to the Supplemental Harbor Fee imposed above which includes midstream unloading.

A new fifth paragraph of item 145 reads as follows:

> The cargo is assessed the Supplemental Harbor Fee when it is first handled within the District, but because of the exemption granted for cargo owned by the handling wharf owner, the reporting of cargoes should be made when the cargo leaves the wharf or facility, and the assessment calculation shall then be made since the joint ownership of the cargo and the wharf cannot be finally determined until the cargo leaves the wharf or facility. The Harbor Fee credit is given for the outbound vessels onto which the cargo is loaded from the wharf, and the reporting to the Port District as to cargoes, vessels, and ownership thereof is to be made at the instant before the cargo leaves the wharf or facility.

A new sixth paragraph of item 145 reads as follows:

> A Supplemental Harbor Fee shall be assessed for cargo not owned by the owner of the wharf or facility irrespective of the manner in which the cargo leaves the wharf or facility. If the cargo leaves the wharf or facility other than by vessel, for example by pipeline, rail, truck, etc., and therefore no Harbor Fee is assessed with such outbound cargo, there is no Harbor Fee to be credited against the Supplemental Harbor Fee.

The first proposed tariff of Plaquemines Port, which did not become effective (filed with the Federal Maritime Commission on May 23, 1977), provided a Supplemental Harbor Fee of 20¢ a net ton, with assessment against the vessel, rather than against the cargo.

The amended tariff No. 1 of the Plaquemines Port which became effective September 1, 1977 (filed with the Federal Maritime Commission on August 25, 1977), provided a Supplemental Harbor Fee of 10¢ a net ton, *with assessment against the vessel.*

However, the first revised item 145 (received by the Commission on December 27, 1977), effective January 1, 1978, provided the same 10¢ a net ton *Supplemental Harbor Fee,* but *with assessment against the cargo.* This assessment against the cargo remained at the time of, and subsequent to, the hearing.

The new fifth paragraph of item 145 remains somewhat contradictory in and of itself. First, it provides that cargo is assessed the "Supplemental Harbor Fee" "when it is first handled in the District." However, the new fifth paragraph goes on to state that "the reporting of cargoes should be made when the cargo leaves the wharf or facility."

Obviously, when cargo is first put into a facility such as the Mississippi River Grain Elevator, it has been "first handled." Just as obviously, when that same cargo leaves the facility, it has been second, third, or fourth handled, but surely not first handled.

The key words in the new fifth paragraph of item 145 are that the reporting of cargoes (for purposes of collecting the charges under item 145) should be made when the cargo leaves the facility "since the joint ownership of the cargo and the wharf cannot be finally determined until the cargo leaves the wharf or facility," (in the event that there is such a joint ownership).

The respondent's intention is, and generally has been, to assess the Supplemental Harbor Fee where there is no joint ownership against the owner of the cargo with such ownership to be determined when the cargo leaves the wharf or facility, apparently because such cargo owner, such as Dreyfus for example, does business regularly in Plaquemines Port, has employees stationed there, and is reachable easily for purposes of collecting the Supplemental Harbor Fee. This is in contrast to an ocean vessel which may make only one or a few calls in Plaquemines Port and may be difficult later to reach. As seen, item 145 in its second paragraph places the primary obligation of the charges on the owner of the cargo but makes all other parties responsible as surety.

The privately owned wharves in the Port of Plaquemines are publicly oriented, in that these wharves may handle cargoes owned by the general public, as well as any cargoes owned by the wharf owners. In contrast, at the Port of New Orleans, privately owned wharves are restricted by law to the handling of cargoes of their owners. The Port of New Orleans has "public wharves" owned or operated by the Board of Commissioners of the Port of New Orleans.

OTHER PERTINENT TARIFF PROVISIONS OF PLAQUEMINES PORT. Item 10 of the tariff provides, in part, that "The Plaquemines Port, Harbor and Terminal District shall be the sole judge as to the interpretation of this tariff." Item 10 also provides that the rates, rules and regulations in the tariff apply to all users of the waterways and facilities.

Item 50 (General Anchorage) of the tariff lists the General Anchorage for Plaquemines Port as follows:

1. Fairway Anchorages
   A. South Pass Mississippi River Anchorage
   B. Southwest Pass Mississippi River Anchorage
2. Pilottown Anchorage
   1.5-6.7 R.D.B.
3. Boothville Anchorage
   12.2-18.5 R.D.B.
4. Ostrica Anchorage
   23.5-24.4 R.D.B.
5. Port Sulphur Anchorage
   37.5-39.7 L.D.B.
6. Deer Range Anchorage
   53.5-54.5 L.D.B.
7. Alliance Anchorage
   63.6-65.8 R.D.B.
8. Cedar Grove Anchorage
   70.6-71.2 R.D.B.
9. Augusta Anchorage
   71.4-72.0 R.D.B.
10. Belle Chasse General Anchorage
    73.6-75.2 R.D.B.
11. 12 Mile Point Anchorage
    79.0-80.8 R.D.B.

The rules and regulations concerning the General Anchorages are prescribed by the U.S. Army, Corps of Engineers, and their enforcement is a responsibility of the U.S. Coast Guard. Vessels anchored in the River, except as below noted, shall be anchored in the above listed General Anchorages.

Item 55 (Special Permission To Anchor) of the tariff provides:

Vessels may be granted special permission by the Director (of Plaquemines Port) to anchor in other parts of the District.

Item 125 (Loss or Damage Responsibility) of the tariff provides:

> The Plaquemines Port, being a political subdivision of the State of Louisiana, is not liable and cannot assume responsibility for any loss or damage to cargo or other property while on the wharves, docks, landings or other *facilities, both public and private, under the administration of this District* which have been assigned or used for the shipment, reception or storage of such cargo or other property.
>
> Each shipper or receiver of cargo, or those acting for them, must protect such cargo from loss or damage from any causes whatsoever.

Item 130 (Penalties for Violation) of the tariff provides:

> (a) It shall be unlawful for any person, firm, or corporation to utilize or make use of the Plaquemines Port, Harbor and Terminal District or any of its facilities without paying to the District the proper toll, charge or fee therefore as fixed and specified in this tariff, or by designation otherwise, and every person, firm, or corporation violating any provision of this order, respecting the payment of any toll, charge or fee, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than Five Hundred ($500.00) Dollars, or by imprisonment in the Parish Jail, for a period of not more than thirty days, or by both such fine and imprisonment. The Court in its discretion may consider each day on which the violation occurs as a separate offense.
>
> (b) It shall be unlawful for any person, firm or corporation to fail, refuse or neglect to comply with any of the provisions of the rules and regulations prescribed by this tariff or supplement thereto, or by designation otherwise, and any person, firm or corporation violating any of the provisions of these rules and regulations shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than Five Hundred ($500.00) Dollars, or by imprisonment in the Parish Jail for a period of not more than thirty days, or by both such fine and imprisonment. The Court in its discretion may consider each day on which the violation occurs as a separate offense.

Item 155 (Wharfage Rates at Public Wharfs) of the tariff provides:

> The rate of wharfage on all commodities shall be $.50 per net ton, or fraction thereof, unloaded by and with the equipment furnished by the owner of the cargo. The minimum wharfage for any shipment shall be $5.00.

Item 160 (Basis for Assessment of Wharfage Charge) of the tariff provides:

> All cargo or freight, shall be subject to the wharfage charge as follows:

1. When cargo or freight is placed onto public wharves, docks, landings, mooring facilities, or other structures for handling to or from vessels; or
2. When cargo is placed on the public wharves for outbound movement and is not subsequently loaded aboard a vessel, but is removed from the wharves; or
3. When such cargo or freight is transferred over or under such wharves, docks, landings, mooring facilities, or other structures to or from vessels; or
4. When such cargo or freight is delivered to or received from vessels by other watercraft, or when transferred over the side of vessels directly to or from the water:
    a. When said vessels are occupying berths at wharves, docks, landings, mooring facilities or other structures;
    b. When said vessels are moored outside of other watercraft occupying berths at wharves, docks, landings, mooring facilities, or other structures.

Item 165 (Payments of Bills) of the tariff provides:

> All bills are due upon presentation by the District and failure to pay when presented shall place the name of the vessel, its owners and agents, or other user of the facilities, upon a Delinquent List, conditions of which are hereinafter defined. The payment of supplemental harbor fee shall be the *primary obligation of the owner of the cargo*, but the owners or other users of the vessels and facilities handling or storing such cargo shall be bound and responsible *in solido as surety* for the payment of such charges; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner of the cargo against the owner of the cargo, who is primarily liable, for all amounts paid by those responsible in solido but not primarily obligated. All other charges applicable to this Tariff shall be assessed to owners of the vessels, their agents or facilities in solido.
>
> All common carriers, vessels, their owners and/or agents, and/or owners, assessors, or leasors [sic] of wharves or other users of the facilities, landing goods on or in the facilities, or receiving goods from and/or over the facilities, or delivering or receiving goods from barges or other craft while said vessel is berthed at a wharf, or at anchorage in the harbor, thereby contract to pay and are responsible for the dockarge, [sic] storage or other charge on such goods at the rates provided herein to be collected either from the common carrier, vessel, there [sic] owners, and/or agents, or other users of the facilities.
>
> The Plaquemines Port, Harbor and Terminal District reserves the right to estimate and collect in advance all charges which

> may accrue against common carrier vessels, their owners and/or agents, or against cargo loaded or discharged by such vessels or other users of the facilities of the Plaquemines Port, Harbor and Terminal District, whose credit has not been properly established with the District or who are habitually on the delinquent list. Use of the facilities may be denied until such advance payment or deposits are made.
>
> The District reserves the right to apply any payment received against the oldest bills rendered against common carriers, vessels, their owners and/or agent or other users of facilities.
>
> All common carriers, vessels, their owners and/or agents, and/or owners, assessors, or leasors [sic] of wharves or other users of the port or facilities of the Plaquemines Port, Harbor and Terminal District placed on the delinquent list for reasons hereto stated shall be denied further use of the port or facilities by the District until all such reports have been filed and all charges thereon, together with any other charges due, shall have been paid.

As seen, the provisions of item 165 of the tariff impose civil sanctions, including the placing of vessels, owners, agents, and users of Plaquemines Port facilities on a delinquent list with consequent denial of further use of the Port or its facilities. These civil sanctions are in addition to the criminal sanctions provided in item 130 of the tariff.

Item 175 (Reports Required From Towing Companies, Bar Pilots Assn., and Others) of the tariff provides:

> The owner, agent, operator or pilot of any watercraft engaged in the towing or transportation of any commodities within or passing through the waters under the jurisdiction of the District must render periodically, when called upon by the District, complete reports covering all tonnage handled, including description, weight, and approximate valuation. Failure to render reports will subject the person or persons concerned to the penalty prescribed in Item 130.

SOME OF THE EFFECTS OF THE TARIFF PROVISIONS. Item 135 imposes a harbor fee on vessels over 100 feet long which dock, moor or anchor in Plaquemines Port. Exempted are vessels passing through without berthing at a wharf, anchoring or mooring, vessels stopped only to change pilots or ride out inclement weather and for such purposes remaining less than twelve hours. Also exempted are government vessels not carrying cargo, troops, or supplies. Also exempted are private, non-commercial pleasure craft. And also exempted are vessels carrying "special permits" as defined in item 137 of the tariff.

Item 137 of the tariff makes two classes of vessels eligible for "special permits," every vessel over 100 feet in length which is appraised for ad valorem taxes in Plaquemines Parish and for which the assessment has been paid; and vessels between 100 feet and 300 feet in length for which the "special permit" may be purchased for periods of 30, 90, 180 or 365 days. Special permits are not available to selfpropelled vessels above 200 feet in length or to non-self-propelled vessels above 300 feet in length.

Unlike other Gulf Ports which have harbor fees, Plaquemines Port's fee falls on inland watercraft, as well as on those engaged in foreign, coastwise or intercoastal commerce.

Item 145 of the tariff, the "Supplemental Harbor Fee" is in fact a harbor tonnage fee or a cargo tonnage fee, to be assessed against all cargo when first handled in Plaquemines Port in midstream or at anchorage. This provision was modeled after a rarely used provision of the tariff of the Port of New Orleans, but the New Orleans fee is assessed not against cargoes but against vessels which handle cargoes in midstream or at anchorage. The New Orleans fee does not apply to operations at private wharves and does not apply to inland watercraft.

The Plaquemines Port fee of item 145 is assessed against cargoes moved across docks, wharves, and through terminals, as well as to cargoes handled at midstream or at anchorage.

Plaquemines Port has extended the fee in item 145 from a charge on cargo handled in midstream to a charge on cargo handled at docks. As seen, a part of item 145 provides that cargo handled by a privately owned wharf shall be deemed midstream unloading subject to the fee for the same.

Item 145 creates two classes of exemption, namely for the first 500 tons of cargo handled, and for the entire tonnage of any cargo which is owned by the owner of the facility at which the cargo is handled. The said "owner" includes parent company of the owner and any 100 percent owned subsidiary of the "owner" or parent company.

The rationale of the respondent regarding item 145's exemptions is that 500 tons at 10 cents a ton is $50, which would be uneconomical to bill and collect, and that the owner of a facility by virtue of his investment in the facility is entitled to special consideration.

Also contained in item 145 is a provision allowing a credit between the Supplemental Harbor Fee and the Harbor Fee of item 135. "The Harbor Fee charge of item 135 on any vessels involved in the handling of cargo subject to the Supplemental Harbor Fee shall be credited against this charge."

From May of 1978 until after May of 1980, Plaquemines Port interpreted this credit provision of item 145 so that if a Supplemental Harbor Fee was paid by the cargo owner, a credit in the amount of the Harbor Fee was given the vessels. In other words, in such case *no* Harbor Fee was assessed against the vessel.

In 1978, 434 oceangoing vessels docked in Plaquemines Port. Of these, 291 vessels were assessed the Harbor Fee docking charge, but for the remaining 143 ocean vessels *no* Harbor Fee was assessed because a Supplemental Harbor Fee was charged.

Subsequent to May 1980, after the hearing, Plaquemines Port changed its interpretation of the exact same wording in the credit provision of item 145 so that the vessel was charged the Harbor Fee in each instance, and the amount of the Harbor Fee was subtracted from (credited against) the amount assessed as a Supplemental Harbor Fee.

An example of the above follows. Prior to the hearing, vessels calling at the Mississippi River Grain Elevator to be loaded with Dreyfus grain were not assessed the $150 docking fee (Harbor Fee), as the Supplemental Harbor Fee was assessed without any credit of the Harbor Fee. The Supplemental Harbor Fee charge to Dreyfus averaged about $3,000 on the cargo loaded on an ocean vessel, and occasionally exceeded $7,000.

During the same period of time, ocean vessels calling at MRGE to receive grain from Artfer, Inc., were assessed the Harbor Fee of $150, but no Supplemental Harbor Fee was assessed under the mistaken belief that Artfer, Inc., and MRGE were under the same ownership. This mistaken belief rested upon the fact that a Mr. Ferruzi had an interest in both Artfer and MRGE.

Subsequent to the hearing, Plaquemines Port's new policy is to assess the vessel a $150 docking fee (Harbor Fee) and to assess the cargo owner the Supplemental Harbor Fee less the amount of the docking fee of $150.

For the calendar year 1978, about one-fourth of the total tonnage of cargo moved and handled through facilities in Plaquemines Port was assessed the Supplemental Harbor Fee, that is 6,875,412.09 tons out of 26,236,525.28 tons.

Appendices VI and X of Exhibit C-15 show that 6,857,412.09 tons [5] total were assessed the Supplemental Harbor Fee in 1978. This included 1,714,956.40 tons of soybean meal, 1,769,430.65 tons of coal, 776,291.50 tons of phosphate, 1,813,916.25 tons of corn, and 782,817 tons of "other" commodities, such as alfalfa pellets, urea, coke, ammonium sulfate, distilled corn & corn pellets, sunflower seeds, oats pellets & meal, wheat, chicken feed, linseed meal, soybean meal pellets, and rock salt.

In 1978 the monthly tonnage totals assessed the Supplemental Harbor Fee ranged from 320,490.13 tons in July to 1,040,881.23 tons in March and averaged 571,451 tons per month.

Appendix X of Exhibit C-15 shows the tonnages transferred over docks and facilities in Plaquemines Port, as reported, where the cargoes

[5] Appendix VI of Exhibit C-15 shows the incorrect total of 6,708,584.15 tons, which error results from an error in the total shown for August 1958. This appendix shows the incorrect total tons for August of 397,306.80, whereas the correct total for August is 546,134.14 tons.

were classified as owned by the facility owner, and thus these cargoes were exempted from the Supplemental Harbor Fee. The reported cargoes listed as exempt are coal, sulfuric acid, fuel oil, nickel products, nickel & cobalt products, nickel matte raw ore, and sulphur. Some of the figures are in tons and some are in barrels. The separate tonnage total is 6,471,657.21. Separately listed are 43,854,212.57 barrels, which when converted to tonnage amounts to 6,078,009.67 tons. The conversion factor apparently was 0.1385958. Also a note explains that the barrels reported above are incomplete, and the estimated apparently unreported barrels for 1978 are 94,204,033, or 13,056,283.22 tons.

Appendix IX to Exhibit C-15 shows dry tons for 1978 in the amount of 13,180,241.96 and 94,204,033 liquid barrels, or 13,056,283.32 unreported tons, or total dry and liquid tons of 26,236,525.28. This figure differs from the total calculated from Appendix IX of 12,549,666.88 tons, plus 13,056,283.32 tons, or a total of 25,605,950.20 tons. The 13,056,283 tons represents oil and petroleum products which were handled through terminal facilities in Plaquemines Port in 1978, but which cargoes were not assessed the Supplemental Harbor Fee.

With 6,857,412 tons subjected to the Supplemental Harbor Fee, and whether the total tonnage in 1978 was either 25.6 million or 26.2 million, these figures show that 26.78054 percent or 26.13689 percent of the total cargoes was subjected to the Supplemental Harbor Fee. Among other reasons, because some 74 or 73 percent of the cargoes were not subjected to the Supplemental Harbor Fee in 1978, the complainants naturally conclude that the implementation of the Supplemental Harbor Fee resulted in undue preference and undue prejudice.

During the period from September 1977 until June 1980, Plaquemines Port exempted from the charges of item 145 of its tariff, that is the Supplemental Harbor Fee, the cargoes of the oil companies and grain cargoes of Artfer, Inc., among others exempted.

ADDITIONAL FACTS OF RECORD. The monies generated by the Harbor Fee and Supplemental Harbor Fee (Items 135 and 145 of the tariff) are turned over by Plaquemines Port to the Plaquemines Parish Commission Council, which places them in the Parish's general fund. Tariff funds are commingled with revenues which the Parish obtains from such sources as ad valorem taxes, license fees, mineral royalties, and sales taxes. The identity of Plaquemines Port has been submerged within the identity of the Plaquemines Parish Commission Council. It was not until a meeting conducted in November 1977 that any systematic effort was made by the Plaquemines Parish or by Plaquemines Port to determine the cost of Parish services properly chargeable as expenditures of Plaquemines Port. This was done some months after the Plaquemines Port's tariff had been prepared and charges already imposed.

At the meeting in November 1977, attended by various heads of the branches of the Parish government, such as the comptroller, the safety director and the Commission Council members, the parties attending the meeting were advised to estimate the percentage of the budget of each department which could be charged to Plaquemines Port.

In other words, it had been determined already that vessels would be charged a specific fee for docking and anchoring, and cargoes a specific fee for wharfage, without any evidence of the actual costs of the services to be defrayed or recompensed by the Harbor Fees and Supplemental Harbor Fees.

At the meeting in November 1977, it was determined to advise each department head to select from his documentary records any document tending to show that the department's activity or service was water-connected or marine-related. Secondly, a determination was directed to be made of the percentage of such activity or service as related to the department's total activity or service performed. Thirdly, it was directed that the total annual budget of a department be multiplied by the said percentage, to get a dollar amount to be reimbursed from anticipated tariff revenues of Plaquemines Port. The sum of these calculations from the budgets of all departments of the Parish government, coupled with the actual projected expenditures of Plaquemines Port, constitute the Plaquemines Port's annual budget. These department percentages calculated at the end of each year as charged to Plaquemines Port, plus actual direct disbursements by Plaquemines Port, determine how much of its budget that Plaquemines Port has spent in a year.

In 1978, 50 percent of the cost of fire protection in Plaquemines Parish was allocated to Plaquemines Port. In 1979, the same percentage was used, although the budget of the fire department increased from $127,800 in 1978 to $200,300 in 1979. There was no administrative review of the 50 percent figure to determine for 1979 whether the percentage should be raised, lowered or maintained. Only slightly over four (4) percent of the 1978 fires bore any connection at all to the port users who had been subjected to the fees collected pursuant to the Port's tariff. That is, when complainants requested production by the fire marshall of documents of fires in those vessels or cargoes made subject to the payment of the harbor fees and supplemental harbor fees, the fire marshall produced fire reports regarding slightly over 4 percent of the fires.

The "marine-related" test or "port-related" test was applied individually by the head of each department of the Parish, or by employees of each department, without any general review.

Oceangoing vessels enter the Mississippi River through two passes at the river's delta, Southwest Pass and South Pass. From Southwest Pass, the primary pass, vessels travel 21.8 miles to the Head of Passes, where the main, as well as lesser passes not suitable for deep draft vessels, converge. Pilotage is compulsory on the river. The Bar Pilots board at the seabuoy and take vessels to Pilottown at the Head of Passes. There a Crescent River pilot boards. There is another change of pilots about mile 90 above the Head of Passes near New Orleans. A New Orleans-Baton Rouge pilot goes from there as far as Mile 255 near Baton Rouge.

During 1978, the first full year of the activation of Plaquemines Port, a total of about 26 million tons of cargo passed through terminal facilities in the Port, 434 oceangoing vessels docked at some 26 private facilities on the Mississippi River in the Port, and 3,286 tows or barge flotillas called at private docks in the Port.

The complainants Dreyfus and Early have been assessed "supplemental harbor fees" by Plaquemines Port; and Dixie, Le Beouf, Valley, Federal and Hollywood have been assessed "harbor fees" by the Port when their barges were docked at private facilities in the Port. Through the middle of 1979, some 202 corporate entities were assessed charges under the Plaquemines Port's tariff.

A representative sample of those assessed charges under the Port's tariff include Atlantic Richfield, Barber Lines Steamship Co., Biehl & Co., Inc., Canal Freight Line, Central Gulf Lines, Inc., Delta Steamship Lines, Inc., Exxon Company, U.S.A., Gulf Coast Shipping, Hansen & Tidemann, Inc., Ionian Transportation, Kerr Steamship Company, Lykes Bros. Steamship Co., Inc., Maersk Line Agency, Mitsubishi International Corp., Nopal Lines Steamship Agency, Norton, Lilly & Co., Pundsack International Shipping Agency, Seatrain, TTT Ship Agencies, Texaco, Inc., and Waterman Steamship Corp.

Lykes Bros. has received cargoes in Plaquemines Port aboard Lykes Seabee barges which were then carried to foreign destinations aboard oceangoing Seabee vessels. Likewise Combi Line, another common carrier with tariff on file with the Commission, has received cargo in Plaquemines Port aboard its LASH barges, which were then transported to foreign destinations aboard its oceangoing LASH vessels. Lykes and Combi were assessed docking charges (harbor fees) by Plaquemines Port in regard to these movements. Lykes was assessed for six such movements from March to July 1979, and Combi was assessed 58 times for its movements from January 1978 to August 1979, through its agent, Biehl & Company. From November 1977 to June 1978, Lykes was assessed on ten occasions for docking charges. Also, Lykes' vessels have been assessed anchoring charges by Plaquemines Port when these vessels were anchored in federally designated anchorages, such as Twelve Mile Point Anchorage, Belle Chasse Anchorage, and Boothville Anchorage.

For the years 1978 and 1979, the complainants combined were assessed nearly $750,000 by Plaquemines Port.

From January 1, 1978, through January 1, 1980, Dreyfus was assessed $310,943.90 of "supplemental harbor fees," at the rate of 10 cents per net ton of cargo over 500 tons per shipment pursuant to item 145 of the tariff in 98 instances where oceangoing vessels were loaded at MRGE.

Subsequent to the hearing, Plaquemines Port altered its interpretation of the credit provision of item 145, and reinvoiced Dreyfus for $287,442.40 for the same 98 instances. Each of the 98 original invoices was reduced by the amount of the harbor fee, usually $150. The old average invoice charge was $3,172.90, and the new altered invoice average charge was $2,933.10.

Early put grain through MRGE only from September 15, 1977, to December 31, 1978. Early also has been reinvoiced subsequent to the hearing. For 17 instances, Early originally was assessed $56,081.09 in supplemental harbor fees, and it has been reassessed a total of $46,599.60. The average charge of $3,298.89 has been revised to an average of $2,741.15.

MRGE is the southernmost grain elevator on the Mississippi River and is exclusively involved in the export shipment of grain. It is one of ten such export elevators located on the Mississippi River below Baton Rouge. MRGE is not engaged in grain merchandising or trading, and does not own any grain passing through its elevator. Although MRGE was organized by the late Mr. Arturo Ferruzzi, who had an interest in the grain trading company, Artfer, Inc., Artfer has no ownership interest in MRGE.

The silos of the grain elevator are more than 900 feet from the dock area of the MRGE facility, which was constructed in several stages. The dock was originally built in 1967, and it was improved in 1979 to enable it to handle a vessel in excess of 30,000 tons. Half of the silo structures were constructed in 1967, and the other half in 1973. To replace the entire facility of MRGE would cost about $80,000,000.

MRGE has facilities for receiving grain by barge and by railcar. Grain is barged from the heartland of the United States to the lower Mississippi River. Then the large river barge flotillas are broken up and individual barges are placed in numerous fleeting areas, usually between New Orleans and Baton Rouge. Smaller towboats take barges from the fleeting areas to their ultimate destinations on the lower Mississippi River.

The grain of Dreyfus and others using MRGE is brought to the elevator from three upriver fleeting areas. At the elevator each barge is discharged at the elevator's single barge unloader. Then the grain is moved through the elevator to a ship dock and to an awaiting ocean vessel.

There is never sufficient storage space at MRGE to allow the loading of an export ocean vessel only from the elevator. Instead grain in barges must be brought constantly to the unloader, unloaded into the elevator, inspected, graded, and blended or aerated as necessary, in the elevator, and then loaded aboard the oceangoing vessel. The most economical method of operation at MRGE is to keep a continuous flow of incoming barges when an ocean ship is loaded at the elevator. The coordination of ship and barge movements is an important cost factor in grain operations.

About 24 barge loads of grain are required to load one 30,000-ton ship.

About 7 percent of all grain shipped to MRGE arrives in railcars. In 1978 there were 1,109 rail carloads of Dreyfus grain received at MRGE. In 1978, the MRGE elevator handled about 4 million tons of grain for export. During 1978, Early moved about 24 million bushels of grain, and Dreyfus moved about 55 million bushels of grain through the MRGE elevator.

By the terms of its throughput agreement, Dreyfus pays MRGE certain contract fees which include the costs of the movement of barges from the MRGE fleet to a discharge berth at the elevator and return of the barges to the MRGE fleet, the movement of rail cars in and out of the Myrtle Grove switching district, barge dockage, unloading of the grain from the barges and railcars, inbound elevation of the grain in the silos, storage of the grain, insurance of the grain at full market value, routine blending and handling of the grain, and the loading of the grain into ocean vessels.

In addition to the above throughput fees, Dreyfus pays MRGE's private facility tariff rates for wharfage and dockage. MRGE provides office space and related facilities so that Dreyfus can station its six or seven employees at MRGE to observe the loading and unloading, storage, blending and handling of grain and attend to the interests of Dreyfus.

Dreyfus is the owner of all grain arriving at MRGE for the account of Dreyfus. It retains title to the grain while it is at MRGE. Title to the grain passes to the export buyer when the grain crosses the ship's rail and is loaded aboard the ocean vessels.

It is the practice of Plaquemines Port to apply the supplemental harbor fee to the total tonnage loaded aboard the outbound vessels, less the 500-ton exemption provided for in the tariff.

As seen, since the hearing Plaquemines Port has changed its policy, so as to credit, or subtract, the harbor fee from the supplemental harbor fee resulting in lower supplemental harbor fees since the hearing.

Both respondent and the complainants have submitted tables showing for the year 1978 the supplemental harbor fees assessed against Dreyfus and against Early (complainants corrected page 35 of its initial brief, and respondent's supplemental reply brief dated September 2, 1980).

They agree on a Dreyfus assessment figure of $153,856.20, subject to complainants' addition of $2,760 for Dreyfus invoice 5415 for the ship *Astoria*, Delta Steamship Lines, Inc., Agent, which departed - MRGE on December 26, 1978, but was invoiced on January 17, 1979. The complainants' total thus becomes $156,616.20 for Dreyfus.

Likewise, these two parties agree on an Early assessment figure of $44,294.40, subject to complainants' addition of $2,857 for Early invoice 5482 for the ship *Sea Corridor*, Strachan Shipping Co., Inc., Agent, which departed MRGE on December 29, 1978, but was invoiced on January 19, 1979. The complainants' total thus becomes $47,151.40 for Early.

The complainants' and the respondent's tonnage figures differ in that the complainants apparently include and the respondent excludes the 500 tons per shipment exempted or subtracted from the supplemental harbor fee assessment. In some cases the 500 tons would be prorated among two or more cargo owners in the event that their cargoes moved out on the same ocean vessel. Thus the Dreyfus or Early exemption would be less than 500 tons.

Both the complainants and the respondent use the figure of $670,732.20 as the total for 1978 for all assessments of the Supplemental Harbor Fee by Plaquemines Port.

Using $153,856.20, this is 22.93854 percent of $670,732.20. Using $156,616.20, this is 23.35003 percent of $670,732.20. In other words, about 23 percent of the total supplemental harbor fees for the year 1978 were assessed against Dreyfus.

In no way has the respondent shown that Dreyfus received 23 percent of the benefits for any services performed by Plaquemines Port for which Dreyfus was assessed these supplemental harbor fees.

Early's assessment for supplemental harbor fees for 1978 was $44,294.40, to which figure the complainants add $2,857 for invoice 5482, or a total of $47,151.40, as detailed above.

Using $44,294.40, this is 6.60388 percent of $670,732.20. Using $47,151.40, this is 7.02983 percent of $670,732.20. In other words, about 7 percent of the total supplemental harbor fees for the year 1978 were assessed against Early.

The total of Dreyfus and Early for 1978 was about 30 percent of the total for all supplemental harbor fees assessed by Plaquemines Port. Thus, it is clearly understandable why Dreyfus and Early are two of the complainants in this proceeding.

Appendix VII to Exhibit C-15 for the year 1978, under headings of "Docking" and "Anchorage," shows the Harbor Fees (docking fees) paid by 3,286 tows of $434,780, by 43 tugs of $4,350, and by 291 ships (ocean-going vessels) of $49,730, or a total of $488,860 for dockage. For anchorage, 978 ships paid a total of $200,000. The grand total of Harbor Fees was $688,860. In 1978, 143 ships were not billed for the Harbor Fee, inasmuch as the practice of the Port at the time was credit the Harbor Fee against itself, where the cargo was assessed an equal or larger Supplemental Harbor Fee. A proper description of tugs in this connection would include offshore supply vessels.

Adding the Harbor Fee total of $688,860 above to the total for Supplemental Harbor Fees of $670,732.20, brings the total of Harbor Fees and Supplemental Harbor Fees to $1,359,592.20 for the year 1978.

Using complainants' $156,616.20 of assessments against Dreyfus, this is 11.51935 percent of the total of Plaquemines Port's assessments for 1978. Using respondent's figure of $153,856.20, this is 11.31634 percent of the same $1,359,592.20.

Similar calculations for Early using complainants' $47,151.40 of assessments and respondent's $44,294.40 result respectively in percents of 3.46805 and 3.25791.

In other words, Dreyfus was assessed 11.5 or 11.3 percent of Plaquemines Port's total assessments for Harbor Fees and Supplemental Harbor Fees in 1978, and likewise Early was assessed 3.5 or 3.3 percent of the same.

The five water carrier complainants all have been assessed the "Harbor Fee" for the docking of their barges in order to discharge or load cargo at numerous privately owned terminal facilities in Plaquemines Port. In 1978 and 1979, the following assessments were made against these complainants:

Dixie	$158,000
Federal	5,150
Le Beouf	135,850
Valley	3,900
Hollywood	16,950

Dixie has carried steel pipe products to Anchor-Wate, a facility on the Intracoastal Waterway in Belle Chasse, La., in Plaquemines Port.

Federal has transported nickel products to or from the Amax Nickel Refining Company dock in Plaquemines Port and has carried steel pipe products to Anchor-Wate.

Valley has carried steel to the A and Z Terminal at Venice, La., in Plaquemines Port.

The five complainant carriers have called at the major private wharves in Plaquemines Port to load or unload cargo, including at Gulf, Alliance; Gulf, Ostrica; Gulf, Venice; Chevron Chemical; Amax Nickel; Anchor-Wate; Getty, Venice, Cal-Ky, Empire; Texas Pipeline, Pilottown; and Texas Pipeline, Davant.

Unlike the other Gulf ports which have charges denominated as "Harbor Fees," the Plaquemines Port's Harbor Fee falls on inland watercraft (such as barges), as well as on ocean vessels engaged in the foreign trade, and vessels engaged in the coastwise and intercoastal trades. Other ports such as New Orleans, Baton Rouge and Houston exempt inland watercraft from Harbor Fee provisions.

In order to implement its tariff charges, Plaquemines Port requires terminal facility owners or operators to report the loading and unloading of vessels at their facilities. A variety of methods of reporting has been permitted by Plaquemines Port. Form "PPA No. 1" contained no place to identify the owner of the cargo or the number of tons transferred. Form "PPA No. 1 Revised 4-1-78" was later provided, although the original form was still in use by some facility owners in late 1979. Some facilities such as Getty Oil, Gulf Alliance, Gulf Venice, Bass Cox Bay, Shell Southwest Pass, and Texas Pipeline were allowed to telephone their reports on cargo transfers, although the Plaquemines Port's telephone log forms do not contain blanks to record the owner of the cargo. Some facilities, such as Gulf Alliance and Gulf Venice were allowed to submit written summaries identifying the vessels calling at their docks to receive cargo, but not specifying the owner of the cargo.

With incomplete information as to the owner of the cargo, Plaquemines Port could not determine that the "Supplemental Harbor Fee" should be charged. "Harbor Fees" to vessels were prepared and assessed on vessels calling at facilities not supplying cargo information, whereas at the time, vessels calling at other facilities which did report cargo ownership and cargo tonnage enjoyed an exemption from the Harbor Fee under the Plaquemines Port's practice prior to the hearing of giving the vessel a credit if the "Supplemental Harbor Fee" was assessed.

To further complicate matters, where the appropriate cargo information was available, Plaquemines Port at times ignored the information and failed to assess the Supplemental Harbor Fee on numerous occasions. Plaquemines Port either failed to act on the cargo information in these instances or it charged whichever fee was the highest, thereby allowing the "Harbor Fee" to fall on the vessel interest rather than allowing the "Supplemental Harbor Fee" to fall on the cargo interest, if the "Supplemental Harbor Fee" was less than the "Harbor Fee" of $100 or $150 per vessel. Such an optional procedure of assessment was not sanctioned by any tariff provision.

An example is invoice No. 6779, dated April 24, 1979. A carrier operating under the name of Oilfield Barges was charged a Harbor Fee of $150 for docking at Anchor-Wate at 6:00 a.m., on April 17, 1979, and departing the dock at 5:00 p.m., the same day. The tow loaded 655 tons of pipe for the account of Tennessee Gas Company. The reporting form showed that the cargo owner and wharf owner were distinct and separate entities, and therefore the "Supplemental Harbor Fee" should have been assessed. Plaquemines Port failed to assess the cargo interests and assessed the carrier. Since item 145 creates an exemption of the first 500 tons of cargo, the "Supplemental Harbor Fee" should have been assessed against (655-500) 155 tons of cargo, at 10 cents a ton, or $15.50. Instead respondent invoiced the carrier and collected $150, rather than assessing the cargo and collecting $15.50.

On June 6, 1980, Plaquemines Port invoiced Artfer, Inc., an owner of cargoes mainly of grain and grain meal, which were loaded on ocean vessels at MRGE between September 1977 and March 31, 1979, assessing the "Supplemental Harbor Fee" on numerous shipments. A cover letter dated June 10, 1980, from Plaquemines Port explained that it had mistaken the cargoes handled for Artfer by MRGE to be cargoes belonging to the elevator, and as such exempt from the "Supplemental Harbor Fees." The same letter notes that Artfer is to be given credit for the "Harbor Fees" invoiced originally to the water carriers involved in these movements. These new invoices assess Artfer a total of $244,029.40 for cargoes handled by MRGE in 59 instances.

Plaquemines Port failed to invoice Artfer for "Supplemental Harbor Fees" from November 1978 through June 1980, even though respondent had knowledge from the deposition of the Manager of MRGE in November 1978 that MRGE did not have an ownership interest in the cargo at its facility.

In a usual operation at MRGE, the oceangoing ship will take about 2 million bushels of grain. MRGE's main function is to move the grain between the barge (or rail car) and the oceangoing vessel. MRGE also may dry, fumigate, aerate, or clean the grain.

Between the farmer in Iowa or the Dakotas, for example, there is the country elevator in the interior of the land, then there is the river elevator up north on the Mississippi, Illinois, Ohio, or other river. Then there is the terminal elevator such as MRGE. Although MRGE is not geared to receive grain from farmers, because no farmer would produce two million bushels of grain on his own farm, in one rare instance a farmer delivered direct to the MRGE elevator. In that case, Mr. Perez sold his grain to Artfer, Inc., which in turn shipped out the grain. The deposition of Mr. Robert L. Beukenkamp, Executive Vice President and General Manager of MRGE, does not reveal which Mr. Perez he refers to. Official notice is taken that members of the Perez family have for many years played prominent roles in Plaquemines Parish, and Lake Judge Perez is named in honor of the father of Chalin Perez, the President of the Plaquemines Parish Commission Council.

Plaquemines Port received "run tickets" from the Cal-Ky pipeline facility in Empire, La. These run tickets were used in lieu of the reporting form, and they showed that certain oil loaded or unloaded at the facility was for the account of others than Cal-Ky. Nevertheless, no Supplemental Harbor Fees were assessed at the time. However, following the hearing, Plaquemines Port issued 138 additional invoices to cargo owners for the oil moved at Cal-Ky. In the majority of these instances, the additionally invoiced Supplemental Harbor Fees involved movements for which one of the carrier complainants was invoiced a Harbor Fee, and under Plaquemines Port's policy prior to the hearing, the complainant carriers would not have been assessed the Harbor Fee if Plaquemines Port had assessed the Supplemental Harbor Fee.

Plaquemines Port's definition of owner in its tariff includes the parent company of the owner and any 100 percent owned subsidiary of the owner or parent company. This definition allows the cargoes of subsidiaries and related companies to be moved across the dock of a company without payment of the Supplemental Harbor Fee.

Thus Texaco, Inc., is not charged when its product is moved across the wharf of another corporate entity, Texas Pipeline Company. Transactions between Amax, Inc., and Amax Nickel Refining Company have not been subject to the Supplemental Harbor Fee. The Getty dock at Venice could handle products belonging to Getty Oil Company, Getty Refining and Marketing Co. and Getty Pipeline Company. The Gulf Alliance Refinery could handle products of Gulf Oil Corporation or Gulf Refining Co. Chevron Oil could handle products of Chevron USA, Inc., Chevron International Oil Co., Chevron Industries, Chevron Chemical and Chevron Pipeline Company.

As seen in the year 1978, only 6,875,412 tons of cargo out of 26,236,524 tons handled in Plaquemines Port were assessed a Supplemental Harbor Fee, and during the same year, 13,056,283 tons of oil and petroleum products were handled in the Port with nothing assessed against these oil and petroleum cargoes.

Plaquemines Port justifies its wharf owner exemption for several reasons. One is that the owner has a capital investment on which he pays ad valorem taxes for which his cargo should receive a credit. However, other facilities' owners in Plaquemines Port have large capital investments on which they pay ad valorem taxes, but do not own cargoes passing handled by their facilities, and these cargoes are assessed the Supplemental Harbor Fee. Such facilities include MRGE, Electrocoal and Cal-Ky.

On the other hand, the docks of Signal Oil, Getty Oil, and Gulf Ostrica have not handled cargoes assessed the Supplemental Harbor Fee.

MRGE's elevation fees (throughput contract fees) and its tariff fees together are designed to recover the costs to MRGE of providing wharf, dock and other facilities to Dreyfus and Early. One of the cost factors considered by MRGE in determining that rate which it charges is the ad valorem taxes assessed against MRGE.

The additional rationales of Plaquemines Port for the exemption of the wharf owner's cargo from the Supplemental Harbor Fee are that the private wharf owner is better equipped to take care of his cargo, and that although a facility may be privately owned or operated, its operations remain private when it handles its own cargo, but are public when it handles the cargo of others. But the ability to protect cargo does not vary as between owned cargo and non-owned cargo handled at any one facility.

Plaquemines Port's practice up to the completion of the hearing was to not charge a Harbor Fee to a vessel if a Supplemental Harbor Fee was charged to the cargo. Subsequent to the hearing, Plaquemines Port reinvoiced some Supplemental Harbor Fee charges less the amount of the Harbor Fee.

As a result, the overall charges of Plaquemines Port will not be reduced, but the Supplemental Harbor Fee will be reduced by the amount of the Harbor Fee for 143 vessels, and the "Harbor Fee, Docking: Ships" will be increased by the fee on 143 additional vessels, which amounts to a shift of about $150 times 143 vessels or $21,450.

The expenditures of Plaquemines Port are of two types, first, those items purchased directly for the Port, and second, "expenditures from other accounts," which are allocations of percentages of the expenditures of the various Plaquemines Parish departments.

For the Aviation Department, 50 percent is allocated to the Port; for the Coroner, 20 percent; for the primary salaries of Commission Council and staff, 30 percent; for Accounting and Payroll, 5 percent; for Internal Auditor, 10 percent; for Purchasing, 10 percent; for Data processing, 7 percent; for Fire protection, 50 percent; for Ambulance service, 50 percent; for the two Ferries (Belle Chasse and Pointe-a-la-Hache), 10 percent each; for Sewerage, 5 percent; for Garbage, 10 percent; and for the Waterworks, 10 percent. The Sheriff's Office does not have a percentage allocation, but a lump sum is estimated by the Sheriff and is charged as an expenditure of Plaquemines Port. Insurance is prorated in a percentage manner, but is listed as a lump sum expenditure of Plaquemines Port.

The percentage allocations figures for the various Parish departments are based upon the "marine-related" or "port-related" activities of each department, with the department heads outlining what they consider to be "marine-related" activities of their departments. The Plaquemines Parish Commission Council adopted the percentage figures suggested by the department heads.

The definition of "marine-related" originated with the Council according to Commissioner Albert Beshel, but there was no formal vote adopting a definition of "marine-related." Commissioner Beshel's definition of "marine-related" is:

> Any waterborne accident, seaman leaving ships causing problems in our small communities, automobile accidents by drunken seamen, drunken crew members, deaths by drowning, injuries on the water, any type of injury on watercraft.

However, the department heads have other interpretations of the origin of the definition of "marine-related" incidents. The Sheriff defined "marine-related" for himself based on his understandings of the discussion in November 1977. The administrator of the Parish Health Unit created her own definition. The Coroner's Office and the Aviation Department got their definitions or understandings from the November discussion. But no written guidelines were given to any of the participants in the 1977 meeting. The Port Manager, Mr. Hugh Benvenutti, who attended the November meeting, remembers that a definition of "marine-related" was discussed, but that no concrete examples were elicited. Mr. Benvenutti is responsible for auditing the backup materials of various departments to determine that the percentages given by these departments were accurate, according to Commissioner Beshel, but Mr. Benvenutti was not directed to audit the percentage figures, and did not do so.

The comptroller of the Parish described a process of annually accepting the Sheriff's estimate of his office's "marine-related" activities as the honor system.

Those department heads who prepared the backup material did not and do not understand the classes of vessels or cargoes which are charged the Harbor Fees and the Supplemental Harbor Fees under the terms of the tariff of Plaquemines Port. Those department heads did not limit their definition of "marine-related" activities to those activities only involving those persons charged by the tariff.

Plaquemines Port's rationale for classifying certain incidents as marine-related is based upon the "but for" test. "But for" the users of the Port, the Parish would not incur extra expenses according to the respondent. The Sheriff provides an example of the "but for" test. But for the presence of Brown & Root Company, an offshore construction company having a shipyard in Belle Chasse, the Sheriff would not have had to make arrests of either Brown & Root employees engaged in criminal activities or of other persons committing criminal acts against the property of Brown & Root.

The Sheriff's office in Plaquemines Parish is an independent agency established by Louisiana statute. This office maintains its own accounting practices, is audited by state auditors, receives its own ad valorem millage, and is not under the direction, supervision or control of either the Plaquemines Port or of the government of Plaquemines Parish.

Although the Plaquemines Sheriff by Louisiana statute may call a special election for the purposes of increasing general millage of the Law Enforcement District, the Sheriff has not done so to raise additional revenues since this law was passed in 1976. Rather, the Sheriff has received assistance in the form of grants from the Plaquemines Parish Commission Council to supplement funding of the Sheriff's Office. This assistance has been in the form of direct cash grants and the purchase by the Council of equipment for the use of the Sheriff's Office.

In making cash grants, the Parish has not required that the Sheriff's Office dedicate them to any specific purpose. The Sheriff may apply these funds as he sees fit in order to carry out his law enforcement duties. The Parish Sheriff has undertaken no duties other than those already required of his office by Louisiana state laws.

In the fiscal year ending June 30, 1978, of the Sheriff's Office, this office also received a variety of revenues from the federal and state governments. Louisiana sheriffs receive 15 percent of the federal revenue sharing funds allocated to the State of Louisiana and its parishes. The Sheriff's office similarly receives a sum under a state revenue sharing program, as well as state funds to supplement the salaries and supplemental pay of deputies. In the above fiscal year, 32 percent of the Plaquemines' Sheriff's "general fund" revenue was derived from the above-mentioned federal and state sources, as follows: $136,526 from federal revenue sharing, $25,225 from state appropriations for salaries of deputies, $136,617 from state appropriations for supplemental pay of deputies, and $130,677 from state revenue sharing, which makes a total of $429,045, and which was over 32 percent of the Plaquemines Sheriff's total revenues of $1,333,789. In that fiscal year, other revenues of the Plaquemines Sheriff's office included $588,021 from ad valorem taxes and a $125,000 appropriation from the Plaquemines Parish Commission Council, among other revenue items.

In fiscal 1978, the Plaquemines Sheriff had an excess of revenue over expenditures of $111,157, which brought his year-end general fund balance to $463,347. The fiscal year 1978 was the last year for which an official state legislative audit of the Plaquemines Sheriff's office was available for the record herein.

The Plaquemines Sheriff regarded as "marine-related" any incident connected with the waterways of the Parish involving a business connected with water in some manner. Under the Sheriff's definition, an oil field supply company which employs Parish residents, has no dock, and has none of its employees working over water, but which sells equipment which may be used offshore is considered marine-related, and the burglary of such a company is deemed a marine-related incident by the Sheriff. Incidents involving pleasure craft are considered marine-related.

Of a total of 1,076 arrests made between January and August 1978, 487 were classed as marine-related or port-related. Only 51 arrests involved employees or persons or companies assessed under the tariff of Plaquamines Port. These 51 arrests represent 10.97 percent of the so-called marine-related and 4.7 percent of total arrests. Of the 487 marine-related arrests, 60.74 percent were Parish residents, and 80 percent worked for Parish employers. Twenty-one of the 51 subjects whose employers were assessed under the tariff were themselves residents of the Parish. Employees of Brown & Root and J. Ray McDermott, two oil field service companies with extensive property holdings in the Parish accounted for 31 of the 51 arrests, or 68.63 percent of all arrests of subjects working for individuals or concerns subjected to tariff fees. Of the remaining 16 arrested subjects, 10 were employed by terminal facilities, two by shipping agents secondarily liable in the event shippers or carriers fail to pay the tariff charges, and four were employed by water carriers (including two by complainant Federal Barge Lines and two by oceangoing vessels).

The four arrests of employees of carriers amounted to less than one percent of "marine-related" incidents. The ten terminal-employed personnel accounted for 2.05 percent of marine-related arrests, and the two employees of shipping agents accounted for 0.4 percent of marine-related arrests.

Traffic violations accounted for 29 of the 51 arrests above, and other charges were possession of marijuana, disturbing the peace, aggravated battery with a crutch, forcible rape, littering, and criminal damage to property.

Among the 487 marine-related arrests were traffic violations, unlawful removal of oysters, shooting a dog, attempted murder, kidnapping, fugitives from other jurisdictions, assault with a rifle, forgery, attempted grand theft, trespassing at a picket line, criminal neglect of family, receiving stolen goods, shoplifting and various others not directly related to transportation by water or to the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water.

A review of the sample months of August and September 1978 shows that only one of the 148 calls to the Sheriff classified as marine-related involved a corporation or employer subject to the tariff fees.

Thirty percent of the expenditures for the Plaquemines Parish Ambulance Department are charged is an expenditure of Plaquemines. Port. In 1978 the Parish ambulance responded to 1,463 calls, of which 394 were classified as port-related. Of these 394 there were 31 involving foreign seamen. Only 26 of the patients moved in these 394 instances were employed by these companies which had been assessed fees under the tariff. Two patients were employed by Parish or local government units and two by the federal government. None of the remaining 333 patients were employed by those assessed fees under the tariff.

Of the 26 patients employed by those assessed fees under the tariff, seven patients were residents of the Parish. None of the complainants, except Dixie Carriers, have ever used the Parish ambulance service. Dixie was invoiced for its one ambulance call and promptly paid the invoice.

In every case of the use of an ambulance, a bill is prepared by the Parish and sent to the user, but Parish collections of such billings generally have been limited. During the first eight months of 1979, the

Parish had total receivables of $51,022 for ambulance service. For all of 1979, the Parish collected ambulance receipts of $33,787.

The criteria of the Director of Ambulance Service to determine marine-related expense, generally, was where ambulances had to respond to incidents on water or to a company which handles vessels on water anywhere in the Parish. If the victims worked for an oil company, or an oil service company, it was deemed marine-related. No consideration was given to whether the incident involved a local resident, whether the employer was assessed tariff changes or was subject to ad valorem taxes, or whether the incident was of a type for which the employer might respond or be responsible.

Marine-related was deemed to include among others a 16-month-old child whose father was employed by Oil Well Services; an 81-year-old lady with no occupation listed whose husband was retired and for which incident a 16- to 18-foot boat was required to remove the lady from Lake Judge Perez; a 17-year-old unemployed male whose father worked for Freeport Sulphur; a Plaquemines Parish Council employee who had to be removed from his trailer park after he swallowed half of a thermometer, which mishap occurred after he, as a Ferry Boat employee, became sick on the ferry; a pregnant woman in labor; an employee of Southeastern Construction Company; an employee of the Belle Chasse Boat Launch, a facility using crewboats exempt from the Harbor Fee tariff provision because the boats were less than 100 feet long; an auto accident victim employed by Continental Oil Company; and a four-year-old girl whose father worked for A & Z Terminal Company, which provides drilling pipe and service pipe to oil field service personnel.

Thirty-three percent of the expenditures of the Parish Safety Department are charged to Plaquemines Port. The duties of the Safety Engineer include traffic control, investigating industrial accidents, evaluating the safety habits and equipment of Parish departments, and holding safety meetings. About 5 percent of the Safety Engineer's time is estimated to involve marine incidents. His assistant may devote as much as 10 percent of his time to marine activities.

The Safety Engineer does not make routine inspections of vessels or wharves or facilities in the Port. In the event of a shipboard fatality, he may have occasion to investigate aboard the vessel, and he will investigate in connection with explosions, fatalities of an accidental nature or drownings. When such investigations have proved extensive, the Parish has directly billed the companies involved.

The U.S. Coast Guard investigates marine casualties and accidents.

In 1978 the Plaquemines Parish Council commissioned a study by outside consultant engineers of the Myrtle Grove, La., facility of the MRGE. Although the Parish has several large oil refineries, chemical plants, and manufacturing complexes, as well as smaller oil storage facilities, MRGE is the only facility in the Parish which has been inspected by outside consultants for explosion and fire hazards.

The report prepared by the consulting engineers was sent to MRGE but the Parish neither followed up to determine whether the consultant's recommendations were implemented by MRGE, nor did the Parish take actions with regard to the recommendation made to it. The consultant's inspection report found that the high-risk area at MRGE is in the silo area, not at the loading and unloading areas, the docks.

MRGE is under the extensive regulation and inspection of various agencies which include the State Environmental Protection Agency, the Federal Grain Inspection Service, and the U.S. Department of Agriculture.

MRGE has implemented extensive design changes since 1977, including a negative pressure dust removal system. The probability of a fire or dust explosion has been reduced to an extremely low level, and the facility is capable of handling its own fire-fighting requirements. Dust missions have been virtually eliminated.

Ten percent of the budgets of each of the five Parish waterworks is allocated to Plaquemines Port. Funding for these waterworks is derived from rates paid by water users and an ad valorem water tax. The Port makes no direct sales of water to either vessels or the owners of cargo.

The 10 percent allocation above is related to the sales of water to "dock-related companies" having water lines on their docks. "Dock-related companies" include marinas, grocery stores, seafood, fishing and fish processing docks handling vessels less than 100 feet long, U.S. government installations such as the Corps of Engineers and the Coast Guard, small boat launches, ship repair facilities, oil and chemical plants, oil field and oil field service companies, grain handling companies, companies involved in mineral processing or mining other than oil and docks of private individuals. Water delivered to "dock-related companies" becomes the property of the company once it passes the water meter of a company. Such water is paid for at the prevailing water rate and through ad valorem taxes paid by such companies.

Only seven sites in Plaquemines Parish were approved by the U.S. Department of Health, Education and Welfare as acceptable vessel watering sites. Vessels operating in interstate commerce and those in international commerce may use these sites.

None of the water carriers have taken on water in Plaquemines Parish. Nor does MRGE supply water to vessels calling at that facility.

In the neighboring Port of New Orleans, oceangoing vessels requiring water contact the New Orleans Sewerage and Water Board, which installs a meter line and hose for use of the vessels. Vessels are then charged directly for water. Elsewhere along the Mississippi River, other than in Plaquemines Parish, water is furnished to ocean-going vessels by barge from New Orleans or by the mooring facility, on a gallonage or flat-rate basis. Generally, oceangoing vessels in Plaquemines Port obtain water through their agents in New Orleans with delivery to Plaquemines by barge.

Meter rates and the ad valorem millage charged by Plaquemines Parish are calculated to cover the operation and maintenance of the waterworks system, and this level of rates of taxes is not set to generate funds for capital improvements, such as extension of water lines to outlying areas.

Five percent of Plaquemines Parish's expenditures for sewerage are allocated to Plaquemines Port. The Port conducted a survey of companies with docks and only eight of 42 companies which responded were connected to the Parish sewerage system. Many industries use septic tanks. Of the eight companies connected to the Plaquemines sewerage system, no cargoes handled at these docks were assessed the Supplemental Harbor Fee.

None of the complainants in this proceeding use the sewerage system of the Parish. MRGE has a septic tank. The vessels calling at MRGE do not use this tank. Vessels operating in United States waters, including vessels operated by the complainants, are required to comply with federal standards established by the Environmental Protection Agency and enforced by the Coast Guard, requiring marine sanitation devices for the onboard handling and treatment of sewerage. The Plaquemines Port does not charge for the actual use of the Parish sewerage systems. The amount of sewerage generated by vessel or cargo is not known to Plaquemines Port.

Ten percent of the Parish budget for garbage is allocated to Plaquemines Port. There is no service charge for garbage collection in Plaquemines Parish.

In order to remove garbage, vessels engaged in foreign commerce must receive the permission of the United States Customs. Before garbage can be landed, the United States Department of Agriculture must approve of the disposal techniques, and upon such approval the garbage is removed and destroyed by incineration under the supervision of U.S. Customs and the Department of Agriculture.

During 1979 Plaquemines Parish responded to requests of United States Customs Service for the use of Parish incineration allowing the burning of vessel garbage on eight or nine occasions. Customs Service representatives were informed by Plaquemines that the Parish would not continue to accommodate or make a regular practice of responding to such Customs Service requests. The Parish has not accepted garbage for disposal on a continuing basis. The Parish made no charge for incineration in these limited instances.

In 1979 a Parish study of solid waste disposal concluded that 17 percent of Parish expenditures on solid waste management were attributable to Plaquemines Port users. The study was designed to disclose the level of effluents coming from "oil field related stuff and also from docks," but all of the supporting material refers to offshore and oil-field related wastes. Nothing in this study segregates waste generated aboard vessels or by cargo interests subject to the tariff from wastes generated by the offshore oil industry on fixed platforms or by oil field related companies on land. None of the complainants in this proceeding discharge garbage at any facilities in Plaquemines Parish. MRGE accepts no garbage from vessels mooring at the elevator and does not use the Parish's garbage pickup service.

Plaquemines Parish operates two ferries, one each at two crossings (Belle Chasse and Pointe-a-la-Hache). Ferry service to passengers and autos is provided 18 hours a day, from 6:00 a.m., to midnight. Ten percent of the Parish expenditures for these ferries is allocated as an expenditure of Plaquemines Port. This percentage does not include any of the Port's special expenditures to outfit one of the ferries for firefighting. In 1979, the 10 percent allocation paid for various repairs to ferry landings, mooring dolphins and log boom, one of the ferry boats, pilings, and the purchase of a new diesel engine for another ferry boat, all of these expenditures being in addition to the regular operations costs of the ferries.

Thirty percent of the costs of the Plaquemines Parish Health Unit are allocated to Plaquemines Port. This unit charges no fees for its services. The Louisiana statute requires that each parish of the state provide and fund a parish health unit. The administrator of the Plaquemines Parish Health Unit used her own criteria to determine "marine-related" matters, which she defined as anything that would have something to do with Plaquemines waterways. If a construction company provided material or equipment that is used in a way associated with marine use, that would be "marine-related" to the Health Unit. Other examples of marine-related would be inspection of an oyster shucking plant, inspection of the Venice, Boothville and Empire marinas being facilities which handle vessels less than 100 feet long, inspection of septic tanks of businesses not located on the Mississippi River or other waterways but which are oil field supply operations, x-raying persons employed on the Parish ferry, and public health medicine in the form of TB and VD programs for oil company rig workers and vessel operators.

The Health Unit on one occasion sent a public health nurse to a dock at the request of a private physician to stamp the immunization records of a seaman inoculated by the doctor. The nurse did not board the vessel. On only one occasion could the Health Unit Administrator remember any of its personnel going aboard vessels. The agents of oceangoing vessels generally use medical clinics in New Orleans for inoculations and health examinations of crew members.

Private sewage facilities may be operated only if they comply with the Sanitary Code of the State of Louisiana. Construction of a septic tank may not be undertaken without a permit issued by the State Health Office.

In the three years from 1977 to 1980, the Health Unit has investigated less than ten fish kills, which included incidents such as the discharge of effluent from the oxidizing pool of a galvanizing plant, discharge of fish heads and shrimps from trawlers less than 100 feet long, and a fish kill caused either by discharges from a menhaden processing plant or by boats operating in a canal churning up water and depriving fish of oxygen.

In 1977 the Administrator of the Health Unit advised a Commission Council member that one of the services available to vessels operating within the Parish was a control program for murine typhus, a disease often transmitted by rodents who host the fleas which carry the typhus. The only actions taken by the Health Unit in this regard consisted of the purchase of several rat traps, later turned over to the Mosquito Control Unit and never used, and the showing of a film on murine typhus.

All vessels entering the United States from foreign countries are subject to the quarantine regulations of the U.S. Public Health Service. Vessels may be granted radio-free *pratique* by the Public Health Service without a full quarantine inspection if the vessel properly responds to questions posed to the master of the vessel by radio. An office of the U.S. Public Health Service in New Orleans grants such *pratiques.*

Vessels also are subject to a sanitary inspection by the Public Health Service at any time. Vessels entering the United States are required to have a valid de-rat certificate issued for six-month periods. The Food & Drug Administration approves all interstate vessel watering points and inspects them every six months, with a representative of the Louisiana State Health Department also present. A member of the Parish Health Unit accompanies the inspection team. Approval is based on federal standards. The Parish has a water sampling program, but this sampling is required by the Environmental Protection Agency and is a necessary duty even if no vessels were in the local jurisdiction. The U.S. Public Health Service maintains a hospital in New Orleans which provides full medicinal care for United States seamen.

Fifty percent of the expenditures of the Parish Aviation Department are allocated as expenditures of Plaquemines Port. At its inception in 1964, the Aviation Department had a helicopter and a spray plane for mosquito control. At present this department operates one helicopter and two fixed-wing aircraft, one of which is a seaplane. These aircraft are available to all departments of the Parish government, as well as to other local officials such as the Sheriff, District Attorney, Clerk of Court, and Tax Assessor.

The Port contends that 50 percent of flight time is devoted to port, harbor and marine matters. Flight time for the Port is deemed proper if the flight is associated with water, either inland, outland, river or any type of water. If it is a water-oriented type of activity, the Plaquemines Port is charged for a portion of the flight. Port-related activities are deemed to include mosquito control, protection of levees, flights over water to an extent, and flights for the Sheriff such as those involving surveillance to intercept contraband. Other activities considered port-related include search and rescue and surveillance of anchorages. Search and rescue operations primarily are for commercial fishermen who operate boats 24 to 26 feet long, and secondarily for hunters and pleasure craft. Plaquemines Parish did this kind of rescue operation before the enactment of the tariff here in issue.

The Coast Guard maintains an air station in Plaquemines Parish from which it conducts all types of search and rescue activities in the Parish. Coast Guard aircraft are better equipped than those of the Parish. The Coast Guard, in conjunction with the Public Health Service, carries out standard procedures for the evacuation of personnel from vessels at sea. Vessel agents rely on the Coast Guard when the evacuation of personnel from oceangoing vessels is required.

At the lower end of the Parish, a large number of private aircraft, seaplanes and helicopters utilized in oil operations in the Gulf and surrounding areas is available to the oil industry for search and rescue of its personnel. The New Orleans area supports an organization known as MEDI-VAC, a helicopter ambulance unit stationed at the West Jefferson Hospital. Plaquemines Parish's ambulance director calls for this MEDI-VAC unit when his auto ambulance has no land access to a patient, and he does not call the Parish helicopter which is not equipped for medical evacuation.

Anchorages in the Mississippi River have been created by the U.S. Coast Guard pursuant to federal law and regulation. The Coast Guard enforces such regulations and requires vessels which are out of anchorage to return to designated anchorages. During daily flights from its air station in Plaquemines Parish, the Coast Guard conducts surveillance operations to control pollution and for general purposes. On the other hand, the head of the Plaquemines Aviation Department does not carry with him a chart identifying the locations of the federal anchorages when he flies.

The Aviation Department has been listing every ship anchored in the Mississippi River in Plaquemines Port since January 1980, but the same information is available by telephone from two official sources: (1) the Pilot's Association, an organization of state-licensed compulsory pilots whose members have the sole discretion to decide where to anchor a particular vessel, and (2) the U.S. Coast Guard Vessel Traffic Service.

The Sheriff's Office does not have its own aircraft, but utilizes the Parish helicopter to aid in enforcement activities. When such activities are over terrain subject to tidal action, they are logged as Port matters.

Beginning in 1979, 50 percent of the expenditures of the Itinerant Labor Department of Plaquemines Parish were charged as expenditures of Plaquemines Port.

This Department operates a program whereby itinerants, people coming in and out of the Parish, are fingerprinted and photographed to determine if there is a rap sheet on them or if they are undesirables. Those persons employed in the Parish for more than six weeks are issued permits by this department, and a processing fee is imposed. In June 1980, subsequent to the hearing, Plaquemines Port changed its policy so as to give a credit to the Port for the revenue from the processing fees. Vessel personnel, crews of oceangoing vessels or of barges or tugs, are not required to obtain itinerant labor permits unless they remain in Plaquemines Parish for a longer period than six weeks to two months.

Some 50 to 60 percent of all businesses taken care of through the Itinerant Labor Department was oil field related. None of the complainants in the subject proceeding have employees to whom have been issued itinerant labor work permits. None of the barge line complainants have any employees permanently stationed in Plaquemines Parish.

Beginning in 1979, 20 percent of the cost of the Coroner's Office of Plaquemines Parish was allocated to Plaquemines Port. The Coroner under state law is an independent elected officer, but each Parish is required by statute to compensate the Coroner for the performance of autopsies and other services. In addition, the Coroner receives compensation from the state.

Regardless of whether the complainants or others pay tariff charges to Plaquemines Port, the Coroner is obligated to investigate deaths in accordance with Louisiana statutes, and he must investigate deaths whether the decedent is or is not a resident of Plaquemines, and whether or not the decedent or his employer pays ad valorem taxes to Plaquemines Parish. In classifying deaths as port-related, this was done where the deaths were directly connected with navigable waterways of the Port.

In 1979 33 of 110 parish wide total deaths were classified as directly related to the Port. Such port-related deaths included the recovery of six unknown persons from the Mississippi River; two bodies that drifted into Plaquemines Parish from upriver parishes; the deaths of three aircraft pilots, two over water and one on land from a heart attack on takeoff; the death of a man falling overboard from a work barge in the Gulf of Mexico; four deaths from a pipeline explosion; three deaths from drownings of persons swimming in the Mississippi River; the death of a man who wandered away from his cottage and fell into the Mississippi River; the deaths of two fishermen aboard vessels less than 100 feet long engaged in servicing fish processing plants; and the death of a retired carpenter preparing to go trawl fishing. The Coroner classified these thirty-three deaths as four heart disease, one homicide, ten accidental drownings, twelve industrial drownings, one industrial death, two industrial plane crashes, and three unclassified.

Of the above thirty-three deaths, twelve were Parish residents or persons who worked for firms on the Parish ad valorem tax rolls, six unidentified persons removed from the Mississippi River. three nonresidents of the Parish who were not at work at their place of employment at the time of their deaths, one Orleans Parish resident whose body drifted downriver, and three non-residents of the Parish whose deaths occurred in areas open to the Gulf of Mexico outside the area in which the respondent assesses its tariff charges. The remaining eight persons included one foreign seaman, an Orleans Parish resident employed by the telephone company who died while not at work aboard a small boat 15 to 25 feet long, and an Arkansas resident and deckhand employed by a water taxi service who suffered a heart attack aboard a vessel about 65 feet long.

None of the decedents classified as directly related to the Port were employed by any of the complainants or by anyone assessed the Supplemental Harbor Fee. None of these decedents can be identified as being employed by those charged the Harbor Fee.

The Port of New Orleans immediately upriver does not impose charges in its Federal Maritime Commission tariff for services provided by the Coroner of Orleans, St. Bernard or Jefferson Parishes. Nor are such services claimed to be provided for, or paid for, through the tariff charges of other Gulf ports.

Fifty percent of the expenditures of the four volunteer fire departments operated by Plaquemines Parish is allocated to Plaquemines Port. The four departments are located at Belle Chasse, Port Sulphur, Buras and Venice, La., all on the west bank of the Mississippi River, or right descending bank. The Parish is in the process of establishing a fifth fire department on the east bank of the river to replace the contract service of St. Bernard Parish.

In both 1978 and 1980, the Fire Marshal of the Plaquemines Parish estimated that 5 to 8 percent of the fires reported in the Parish are aboard vessels. In 1978, there were 14 vessel fires, including one aboard a dredge out of a total of 321 fires in the parish representing 4.36 percent of the fires that year.

These vessel fires included fires aboard a Vietnamese fishing boat in Mrs. Kincaid's canal at Empire; an unidentified boat fire; a fire in an aluminum hull boat belonging to the Delta Well Testing Service while the boat was on a flatbed trailer; a fire aboard a crew boat belonging to residents of Plaquemines Parish; a fire aboard an unidentified skiff; a fire aboard an oyster boat owned by an Orleans Parish resident; a fire involving an old boat hull with owner unknown; a fire aboard a boat of the Johnette Boat Rental Company; a fire aboard the *M/V Captain Kyle* owned by a Plaquemines resident; a fire aboard a boat at the Bayside Marina; a fire aboard a crew barge belonging to the Circle Bar Drilling Company, which is on the ad valorem tax rolls of the Parish; a fire aboard a tugboat alongside the said barge and belonging to the same company; and a fire aboard a suction dredge in Tiger Pass. These fires can be classified alternatively as six involving private fishing or pleasure craft, three crewboats, crew barges or tugs, one boat on a flatbed trailer, one oyster boat, one dredge, and one unidentified boat. Eight of the vessels in these fires belonged to persons residing in or paying ad valorem taxes to the Parish, in three cases the fire records do not reveal the identity or residence of the owner, and in two cases the owner resided in other Louisiana parishes. In one case the owner but not his residence was identified.

In 1978 there were three dock fires, which included a dock under construction at Mile 57 on the River; a dock fire involving Dravo, a contractor for a new coal plant; and a fire spreading to the Lee Service Dock from a crewboat belonging to a parish resident.

The Plaquemines Port classified 61 of the total of 321 fires as marine-related. These marine-related fires include the three dock and fourteen vessel fires above, plus two automobile fires, six truck fires, six fires in buildings, seven trash fires, two grass fires, two waste oil fires, two sulphur fires, six cases of gas leaks or gas clouds, three tank fires, one crane fire, one fire alert, five false alarms, and one shiploader fire.

GENERAL DISCUSSION. The complainants generally contend that the services charged for by Plaquemines Port in its tariff filed with the Commission are services purportedly provided by the Port, but in truth are the customary day-to-day services rendered by the Parish of Plaquemines to the people, citizens or not, within its boundaries. The complainants contend that the Parish services are comparable to those provided by any similar governmental unit, and that for Plaquemines Port to charge for these services is unlawful in violation of the Shipping Act.

On the other hand, the respondent points out that Plaquemines Parish is not a typical Louisiana Parish, in that, for example, a central Louisiana Parish where there is no Mississippi River would not have ship collisions and the drownings associated with the Mississippi River. Respondent also points out that in the stretch of the River between Venice and Pilottown, at times there are as many as 100 to 200 vessels, and because Plaquemines Parish is stretched out over 100 miles from end to end, a Port or Harbor police force separate from the Parish police force would be impractical.

The record shows in general that the responsibility for ships anchorage in the Mississippi River is that of the U.S. Army Corps of Engineers and the U.S. Coast Guard. For fires and collisions and other harbor matters, including communications, the U.S. Coast Guard primarily responds, whereas the Parish of Plaquemines and the Port of Plaquemines acting as good neighbors have voluntarily sought to help in emergency situations.

The ordinary services of police, fire, ambulance, etc., were provided as a matter of course by the Plaquemines Parish government or by the Sheriff prior to September 1, 1977, without thought of relating such services to Plaquemines Port. Since that date, these services have not been shown to be directly related to the so-called supplemental harbor fees and harbor fees of Plaquemines Port.

The fee embodied in Item 145 of the tariff is denominated as a "Supplemental Harbor Fee," but in fact it is a fee assessed solely against cargo. It is in the nature of a wharfage fee. The fee is to be charged against all cargo handled within Plaquemines Port, exempting the first 500 tons in a cargo-handling operation, and with the exception that no charge is made for the handling of cargo whenever the cargo owner utilizes his own wharf, dock, warehouse, or other terminal facility in connection with the movement of cargo to or from a vessel. But in other instances, where the owner of the cargo is not the owner of the facility which handles the cargo, the wharfage fee (Supplemental Harbor Fee) is assessed by Plaquemines Port, even though the facility is not owned by Plaquemines Port.

Plaquemines Port conditions the public's use of the Mississippi River and of private terminal facilities located in the Port. The "Supplemental Harbor Fee" operates as a wharfage fee for the use of private facilities, which in addition themselves charge wharfage, or fees which are in lieu of wharfage. The Plaquemines Port administers and controls all private facilities within the Port and is empowered to condition the shipping public's use of such facilities upon the payment of its wharfage charges (Supplemental Harbor Fee).

Every person subject to the Act must establish, observe and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing, or delivering of property. The charging of wharfage by Plaquemines Port, for the use of private facilities, when the private facilities also charge wharfage, is an unreasonable and unlawful practice, contrary to section 17 of the Act. This practice is assuredly unlawful inasmuch as the charges assessed clearly are not reasonably related to the services provided. For example, Dreyfus was assessed about 23 percent of the total supplemental harbor fees assessed by Plaquemines Port in 1978, whereas there is little or no proof that Dreyfus received any of the services of the police, fire, ambulance, coroner, sewage, water and other departments whose costs were allocated in substantial parts to the Port of Plaquemines.

The Supplemental Harbor Fee discriminates against the cargoes of persons other than facility owners, subjecting these persons' cargoes to undue and unreasonable prejudice and disadvantage, under section 16

First of the Act, while giving the cargoes of the facility owners undue and unreasonable preference and advantage.

Plaquemines Port contends in effect that its assessment of the Supplemental Harbor Fee, as an equivalent of wharfage, is justified on the ground that all private facilities located within the Port are impressed with a servitude of public use, and that all private facilities are public facilities when they receive cargoes owned by persons other than the facility owner. If, as Plaquemines Port says, these private facilities become public facilities, and Plaquemines Port charges a supplemental harbor fee for use cargo handled through such facilities, then Plaquemines is not only administering these public facilities, but also is controlling them through the imposition of its fees.

Regardless of who owns the terminal facilities in Plaquemines Port, if Plaquemines Port were justified in assessing supplemental harbor fees against any cargo owner whose cargo is handled through a terminal facility located in Plaquemines Port, then all such cargo owners whose cargoes are so handled should be assessed equally; and if Plaquemines Port were to give credit to cargo owners who also owned facilities, this conceivably might be accomplished by crediting assessed supplemental harbor fees paid by a facility owner against ad valorem taxes paid or to be paid by the same cargo-and-facility owner, thus preserving equality of assessments of the supplemental harbor fees.

Instead, at present certain facility owners are exempted from supplemental harbor fee assessments merely because they own their facilities and pay ad valorem taxes.

In docket Nos. 73-17 and 74-40, *Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc. - Proposed Rules on Containers,* 21 F.M.C. 1 (1978), Order on Reconsideration served June 14, 1978, 20 F.M.C. 788, the Commission held unlawful a requirement in the tariff which would have required importers and consignees utilizing facilities other than their own to pay normal warehouse storage fees for a minimum of thirty days even though such storage service was not desired, while at the same time exempting other importers and consignees who owned or operated their own warehouse facilities, instead of using public warehouses. This proceeding in Nos. 73-17 and 74-40 is under appeal in the Court of Appeals for the D.C. Circuit, but is not being appealed on the above tariff principle.

The complainants herein properly contend that it is unlawful to differentiate between shippers in the assessment of terminal charges (supplemental harbor fees) based on differences in ownership or operations of terminal facilities.

The complainants also point out that the ad valorem taxes paid by the facilities' owners in the present proceeding (No. 79-45) are not paid to Plaquemines Port, but are paid to Plaquemines Parish. This fact bolsters the above finding of unlawfulness as between the treatment of cargo owners not owning facilities and cargo owners also owning facilities.

At least up until the time of the close of the hearing, the respondent exempted the cargoes of Artfer, Inc., and the cargoes of all of the oil companies, notwithstanding that all of Artfer's cargoes and many of the oil cargoes under the tariff's terms failed to qualify for exemption under item 145. In the calendar year 1978, about 26 percent of the total tonnage of cargo moved through Plaquemines Port was assessed the supplemental harbor fee. Assuming that respondent properly calculated the 10-cents a ton fee on estimated tonnage, it follows that respondent's failure to assess some significant tonnages of cargo would result in a higher than reasonable basis of charges to those cargoes actually assessed the supplemental harbor fee, and that perhaps the supplemental harbor fee should have been 2-1/2 cents a ton.

A giving of a noncompensatory rate to some shippers or cargo owners can cause a disproportionate share or burden of costs to fall on other cargo owners. A competitive relationship between such shippers or cargo owners is not necessarily a prerequisite to a finding of unlawfulness. In *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525 (1966), it was held at page 547 that, whatever the justification for requiring a competitive relationship when determining the existence of preference or prejudice in ocean freight rates, such a requirement cannot be justified when determining whether prejudice or preference results from free time or free storage practices, for free time bears no relationship to the character of the cargo. In the present proceeding, we have a charge for wharfage to one cargo owner and no charge to another cargo owner for wharfage. The same finding as in the *Port of San Diego* case should follow in the present cases, to wit, that the wharfage charge (supplemental harbor charge) herein is unlawful.

The police, fire, ambulance, etc., services allegedly provided by Plaquemines Port, which services are said to justify the supplemental harbor fee, are essentially the general services of local government and they are not dependent upon such factors as differences in transportation circumstances or differences in commodities.

The actual costs incurred by Plaquemines Port, through the receiving, handling, storing, and delivering of property at private facilities do not reflect the cost to Plaquemines of the services provided to those assessed under the tariff of Plaquemines Port. Actually the tariff rates require that those assessed pay for services which they do not, and in many instances, cannot use.

Each ton of cargo is uniformly charged for police, fire, ambulance, coroner, aviation, water, sewerage, and other general Parish services. But, a shipment of grain owned by Dreyfus is never attended by the coroner, conveyed to a hospital in a Parish ambulance, etc., and it is assessed 10 cents a net ton for services it has not received.

Item 145 provides that "the owners or other users of the vessels and facilities handling or storing the assessed cargo herein shall be bound and responsible *in solido as surety* for the payment of the supplemental harbor fee or wharfage charge." This provision creates a liability in a given person for the obligations of a third party with whom the given person is not in privity, and to whom the given person owes no duty. This tariff provision is therefore unlawful for this reason alone.

Item 145 defines the handling of certain cargoes by a privately-owned wharf as "midstream unloading" and subject to the same fees as imposed for midstream unloading. Section 1 (Definitions) of the tariff defines midstream unloading as "cargo loaded from a vessel and reloaded on a vessel without being removed from a public or private wharf."

Thus the tariff defines "midstream unloading" as a cargo operation accomplished without the use of wharfage, dock, warehouse or other terminal facilities, but elsewhere in item 145, the tariff classifies midstream unloading as cargo operations when conducted at such terminal facilities.

It is evident that a more precise heading for item 145, in lieu of "supplemental harbor fee," would be "midstream unloading fee; and wharfage fee at privately owned wharves."

Item 145 of the tariff was in part changed by amendment effective July 4 1980. But, the first paragraph of this item still provides, as it did before the amendment, that "all cargo *when first handled* (emphasis supplied) within the District in midstream or at anchorage shall be assessed . . . $.10 per net ton or fraction thereof over 500 tons of the weight of the cargo handled, provided that no cargo shall be assessed a tonnage harbor fee more than one time."

Another part of item 145 was amended on July 4, 1980, to provide in the fifth paragraph (an added paragraph or added provision) that the cargo is assessed the Supplemental Harbor Fee when it is first handled within the District, but because of the exemption granted for cargo owned by the handling wharf owner, the *reporting of cargoes should be made when the cargo leaves the wharf or facility* (emphasis supplied), and the assessment calculation shall then be made since the joint ownership of the cargo and the wharf cannot be finally determined until the cargo leaves the wharf or facility." "The Harbor Fee credit is given for the outbound vessels onto which the cargo is loaded from the wharf, and the reporting to the Port District as to cargoes, vessels, and ownership thereof is to be made at the instant before the cargo leaves the wharf or facility."

The inconsistency in the tariff of the meaning of "first handled" is of materiality to the complainants, because of the exemption afforded the first 500 tons of any cargo handled within the District.

Were this exemption literally applied to the cargo when first handled, it would result in the first 500 tons offloaded from each and every barge calling at the MRGE elevator, for example, being exempted under terms of tariff item 145. But by assessing the cargo, not upon first handling, but rather as it leaves the elevator and is onloaded into oceangoing vessels, Plaquemines Port avoids granting a multiplicity of 500-ton exemptions and instead grants only a single exemption per ocean-going vessel.

If Plaquemines Port had adhered to the terms of its tariff item 145 as it originally provided clearly before July 4, 1980, it would have resulted in the assessment of the supplemental harbor fee of $.10 per net ton against only 50 tons from each of the barges (based upon a barge-load of 550 tons), for a total assessment of $5 per barge times 30 barges, or a total of $150. But, ignoring the "first handled" requirement, and assessing the supplemental harbor fee against the ocean vessel, the shipper is required to pay for all but 500 tons of the same 16,500 tons (30 barges times 550 tons per barge) of soybeans, and the shipper's supplemental harbor fee or wharfage fee is $1,600 (16,500 tons minus 500 tons, times 10 cents a ton).

Dreyfus, from September 1, 1977, through June 3, 1980, was assessed $414,000 in cargo fees under item 145, but on the basis that the 500 ton exemption should have been applied per barge, rather than per ocean vessel, Dreyfus' estimated overcharge in this period is about $372,000.

Cargo such as Dreyfus' grain is always in the care of either a vessel or of a facility such as MRGE. These vessels are assessed a "harbor fee" for docking or anchoring within Plaquemines Port when they are handling cargo such as Dreyfus' grain. The MRGE elevator facility or other facilities located in Plaquemines Port pay ad valorem taxes purportedly for any services rendered to them by Plaquemines Port. Without the cargo, such as Dreyfus' grain, there would be no need for the vessels or facilities above. Thus, the attempt by Plaquemines Port to separately charge the cargo above, regardless of charges or taxes paid by the vessels and facilities above, is illogical.

Only one other Gulf of Mexico port of the United States, the Port of New Orleans, imposes a supplemental harbor fee. New Orleans assesses this fee only against midstream activity, whereas Plaquemines moves shoreward to impose the fee against cargo operations conducted at private wharfage, dock, warehouse and other terminal facilities.

Plaquemines' supplemental harbor fee discriminates against interstate and foreign commerce, it imposes charges for services not rendered, and is unreasonably high. The tariff provision itself is ambiguous. It holds unrelated third parties liable for payment, and it conditions the public's access to and use of navigable waters of the United States, and of privately owned facilities situated on such waters.

Item 135 of the tariff is titled as a Harbor Fee and is in reality a fee for anchoring and docking. In fact, the bills rendered by Plaquemines Port to the various vessels paying such a fee uniformly refer to anchoring, or docking, or both. The harbor fee does not apply to vessels under 100 feet long. It is difficult to see that hundreds of 90-foot oil industry crewboats and supply boats, daily trafficking between Plaquemines Port's docks and numerous offshore platforms, place no burden on the Port, if at the same time vessels over 100 feet long and under 250 feet are charged $100 per entry into the port, and vessels 250 feet and longer are charged $150 per entry, plus $20 or $30 respectively for each day over five days. Nearly all vessels trafficking in the oil and mineral business in Plaquemines Port are under 100 feet in length, and thus exempted from the Harbor Fee.

Item 135 thus burdens vessels in interstate and foreign commerce, and gives an undue and unreasonable preference and advantage to vessels under 100 feet, essentially local vessels or boats in the oil industry.

Item 136(D) of the tariff provides for special permits for vessels over 100 feet in length as set forth in item 137. This item provides exemptions to all vessels which have been appraised for ad valorem taxes in the Parish of Plaquemines. This exemption accords an undue and unreasonable preference and advantage to local maritime interests and subjects interstate shipping to undue prejudice and disadvantage. Certain vessels, such as the barge lines, not paying ad valorem taxes in Plaquemines Parish, are required by the State of Louisiana, and by other states, to pay a percentage of ad valorem tax, which is equivalent to the percentage of the carrier's (barge line's) total transportation mileage attributable to its movement through the waters of the state. Thus, while paying state-assessed ad valorem taxes, common carriers by water in interstate commerce cannot qualify for Plaquemines Port's tariff exemption based on appraisal for ad valorem taxes because their tax situs is elsewhere than in Plaquemines Parish.

Item 137 further provides for the sale of special permits to vessels which, because of their tax situs, cannot qualify for the free permit granted to locally taxed vessels. This permit scheme operates to reduce the compensation required of vessels holding permits to a fraction of the amounts which would be realized if the permits were not offered.

Consequently, those vessels granted special permits on the basis of their ad valorem tax status and those vessels purchasing special permits in anticipation of avoiding the higher cost of a multiplicity of harbor fees have been unduly and unreasonably preferred in violation of section 16 First of the Act.

The tariff in item 135 specifies that the harbor fee is to assist in defraying the expense of the administration and maintenance of the Port, including the supervision of the shipping in the Port, with the view of preventing collisions and fires, policing the river and river front, rendering aid to vessels in distress, and to aid in extinguishing fires in vessels and equipment and in their cargoes aboard such vessels, or upon wharves and other facilities in the Port.

To exempt local traffic from the harbor fee, while assessing interstate and foreign water carriers, amounts to an unreasonable practice in violation of section 17 of the Act, inasmuch as the expenses ostensibly incurred by Plaquemines Port in respect to local water carriers necessarily must be passed on to non-local water carriers. Because local traffic is of greater frequency than interstate or foreign traffic, a greater part of the burden purportedly placed on Plaquemines Port is shifted by the terms of the tariff to a class of water carriers responsible for the lesser part of that burden. The permit scheme from top to bottom shifts the major share of port costs to the minority of port users.

The permit scheme furthermore operates to license the use of the first 102 miles of the Mississippi River and the Plaquemines mileage of the Gulf Intracoastal Waterways.

The complainants point out that the exemption of shippers and consignees from the supplemental harbor fee (wharfage fee) when they own the terminal facilities handling their cargo is violative of section 16 First of the Act. This violation is compounded when the water carrier handling the shipper's or consignee's cargo must pay the harbor fee, whereas in the past, before May 1980, the vessel did not have to pay such a harbor fee when the supplemental harbor fee was assessed. By the conditioning in the past of the payment of a harbor fee upon the applicability to cargo of the wharfage fee, this was in itself a violation of section 16 First of the Act. In other words, in the past, while it was in the economic best interests of the cargo to escape the wharfage fee, it was to the vessel's best interest to carry only cargo destined to pay the wharfage fee.

A tariff provision which sets up such a conflict between the water carrier and the shipper is at odds with the principle that all shippers should be treated substantially equally.

Item 165 of the tariff establishes rules and regulations for the payment of the harbor fees and the supplemental harbor fees. Paragraph four of item 165 provides that Plaquemines Port may require common carriers or other users of the facilities of the Port to make advance payment of estimated assessments for harbor fees (dockage), whose credit has not been established with the Port. Use of the facilities may be denied, according to this paragraph of item 165, until advance payments or deposits are made.

Paragraph six of item 165 provides that common carriers, vessels, their owners or agents, and owners of wharves, and other users of the Port or its facilities, upon being placed on a delinquent list shall be denied further use of the Port or facilities until all charges have been paid.

These provisions of item 165 of Plaquemines Port's tariff condition the use of the Port itself and of all private and public facilities therein upon the payment of fees for anchoring, docking, and utilizing such facilities for the handling of cargo.

Consequently, no use can be made of any facility within Plaquemines Port without the entering into and the performing of certain contractual obligations to Plaquemines Port. Respondent, thus by controlling the use of terminal facilities in the Port, such as the MRGE facility, and by subjecting the public which used such facilities to the harbor fees and supplemental harbor fees, in effect in substantial part furnishes all wharfage, dock, warehouse and other terminal facilities in Plaquemines Port.

Item 165 of the tariff is not a sanction without teeth. Items 130(a) and 130(b) of the tariff, respectively, provide that failure to pay Plaquemines Port the proper toll, charge or fee for use of any facilities, and failure to comply with any provisions of the rules and regulations prescribed by the tariff, both will result in findings deeming the person, firm, or corporation guilty of a misdemeanor, punishable upon conviction by a fine of up to $500 or by imprisonment in the Parish Jail for 30 days, or both; and that the Court in its discretion may consider each day on which a violation occurs as a separate offense. The complainants suggest that respondent is without power to impose the sanctions in items 130(a) and 130(b) for violations of its tariff provisions.

Item 10 of the tariff states in part that Plaquemines Port is the sole judge as to the interpretation of its tariff. However, the law requires that tariffs be clear and definite. If tariffs are ambiguous, they must be construed against the tariff issuer. A tariff provision purporting to allow a port to interpret provisions of the port's tariff is in violation of section 17 of the Act. Docket No. 74-15, *West Gulf Maritime Association v. Port of Houston*, order adopting initial decision, served January 28, 1980, 22 F.M.C. 423.

Plaquemines Port's expenditures for 1978 totalled $1,590,879.87. Of this amount, $1,345,856.59 represented the charges allocated to the Port from the various departments of the Parish government. This transfer of Parish expenses to the Port was improper in view of the fact that the Parish expenses so transferred were not compensable by the common carriers, other vessel interests, and shippers who use the Port.

Many of the Parish expenses transferred to the Port are expenses which can be and have been recouped by municipalities by fees assessed against those using the services.

Parties using the Parish ambulance service are individually invoiced but the Parish failed to pursue its accounts receivable, permitting or suffering the ambulance service to operate at a loss. To recover this deficit, the Parish required the Port to bear 30 percent of the deficit. The Port in turn passed on or attempted to pass on its costs to the shipping public.

Ten percent of the cost of the two ferries conveying vehicles and passengers across the Mississippi River in the Parish was passed on to the shipping public, but no tolls are charged for the use of the ferries.

Ten percent of the Parish budget for garbage collection and disposal, five percent of the cost of sewerage, and ten percent of the annual deficit of the various Parish waterworks were passed on to the shipping public, notwithstanding that fees for these services are assessed the facilities in the Parish.

Tariff assessments against vessels and cargoes have been used for the operation of five waterworks in the Parish, and for the stock water plants, and water delivery truck, whereas the record shows that no vessel and no cargo utilizing Plaquemines Port has freely obtained any water from the Parish. All water is metered out, and any water used by a vessel or cargo has been charged to the shoreside facility through whose meter it has flowed.

Part of the cost of fire protection is the purchase of foam for fighting fires. The Parish charges a fee to any vessel receiving the benefit of such foam. The ferries perform no services to vessels.

To allocate 10 percent of the annual water deficit to the Port, or more than $100,000, is to charge twice for the same service.

Forty-nine percent of all assessments by Plaquemines Port for the year 1978 were based on the supplemental harbor fee, the fee for wharfage of cargo. Yet the majority of Parish departmental services (the expenses of which were allocated to the Port to be defrayed less the supplemental harbor fee and harbor fee assessments) are of no avail to cargo.

The ferries, the ambulances, the coroner, the health unit, the Parish helicopter, water, sewerage and garbage are services which cannot be rendered to cargo.

General administrative expenses of Plaquemines Port have been inflated because they were based in part on the time of the Parish Council in administering certain services, which services in turn, could not be in many instances, and were not, rendered to vessel and cargo interests. Since the basic services cannot be allocated properly to the Port's users, the costs of administering the basic services also cannot be so allocated properly. Hence, 30 percent of the Council's official time, costing the Port $80,580 for 1978, and varying percentages of the expenses for data processing, internal auditing, insurance, hospitalization, social security contributions, etc., were improperly and unreasonably allocated to the Port.

In 1978, part of the Plaquemines Sheriff costs were allocated to the Port in the amount of more than $290,000, assertedly for services performed in connection with "Parish waterways, coastal waters and offshore industries." The record shows that the great majority of these services were in no way connected with the shipping public.

A principle of criminal law is that one person is not chargeable for the criminal offense of another merely because of a conjugal, blood, or employer relationship. In spite of the above principle, the respondent seems to take the position that an employer, whether water carrier, shipper, or terminal operator, is answerable for the criminal acts of his employee. Plaquemines Port seemingly contends that the employer is obligated to pay for the Sheriff's expense in arresting an offending employee, booking and housing him in the Parish jail, and otherwise exercising control and custody of him.

An oil field service company will pay neither the harbor fee nor the supplemental harbor fee, but the cost to the Port ostensibly created by the employee's violation of the law will be shifted to those who do pay the harbor fees and the supplemental harbor fees, such as Dreyfus, Early, Lykes Bros. Steamship Co., Combi Line, and the complainant barge lines.

Respondent erred in ascribing to the shipping public the costs incurred by the Sheriff in policing Plaquemines Parish for two reasons, first, for holding the employer liable for the criminal acts of an employee when such Acts were committed beyond the scope of the employment, and second, by charging costs occasioned by criminal acts to employers other than those whose employees committed the acts.

The allocation to the shipping public of $1,345,000 of Parish governmental expenses for 1978, which expenses were substantially local in nature, resulted in assessments against the shipping public without any substantial proof of any related services being performed for the shipping public. A terminal charge for services not rendered is violative of section 17 of the Act.

THE RESPONDENT, PLAQUEMINES PORT, IS AN "OTHER PERSON" SUBJECT TO THE SHIPPING ACT. Plaquemines Port is one of four port authorities authorized by the State of Louisiana to promote and facilitate marine commerce on that portion of the Mississippi River which serves ocean commerce. Respondent exercises its jurisdiction over 102 miles of the Mississippi River from the Gulf of Mexico to the Port of New Orleans, and over a part of the Gulf Intracoastal Waterway. Through its tariff on file with the Federal Maritime Commission, Plaquemines Port *controls* the shipping and cargo-handling activities of at least 110 wharves, docks, and terminals, and of at least 202 water carriers, including common carriers by water as defined by section 1 of the Act.

Plaquemines Port derives its authority from Louisiana statute laws. Its authority includes the right to make reasonable charges and collect the same for the use of all structures, works and facilities administered by the Port, and it may regulate the fees and charges made by privately owned wharves, docks, warehouses, elevators and other facilities located within Plaquemines Port when the same are offered for public use.

Respondent Plaquemines Port, in its annual report of 1978 and in its answers to interrogatories in certain civil actions in the United States District Court Eastern District of Louisiana (Exhibits C-15 and C-21 of the present record), admits that it administers all privately owned docks and wharves within the Port, as well as all cargoes and vessels during their presence in the Port.

In addition, respondent owns three marinas or boat harbors, a small shipyard for boat repair, and a used dock 90 to 100 feet long. Its tariff in items 155, 160, and 165 provides wharfage rates at public wharves, conditions under which wharfage will be assessed, and for the responsibility of common carriers, vessels, owners, agents, etc., for payment for dockage, storage or other charges, among other provisions of these items. Thus, Plaquemines Port offers its facilities to the public through a published tariff, but inasmuch as there is no record of the use of such facilities by common carriers and no record of payment of wharfage charges under item 155, the finding below that respondent is an "other person" does not rely on these tariff items. Rather the finding relies on the fact that respondent Plaquemines Port controls the use of certain private terminal facilities and subjects their use to the imposition of its harbor fee and supplemental harbor fee.

In the year 1978, some 26 million tons of cargo were handled through private terminal facilities in Plaquemines Port, and the Port imposed its harbor fees and supplemental harbor fees on a substantial portion of this cargo. Many common carriers by water have called at these private terminal facilities, and many cargoes transported by these common carriers have been subjected to the supplemental harbor fees herein, and many of the vessels transporting these cargoes have been subjected to the harbor fees herein.

Plaquemines Port superimposes its tariff fees upon the charges (contract and tariff) of the private terminal facilities located in the Port. Furthermore, and most important to the "other person" finding herein, Plaquemines Port conditions the use of these private terminal facilities upon the payment to Plaquemines Port of its harbor fee and supplemental harbor fee. If these fees are not paid, Plaquemines Port will bar, or attempt to bar, the use of these private facilities to the shipping public, viz, common carriers by water and cargo owners, shippers and consignees.

In so conditioning the use of these private facilities, Plaquemines Port controls their use, and control is the key factor. Control outweighs the factor of private ownership of these facilities. But, even then Plaquemines Port asserts that ownership of battures and banks of rivers under Louisiana law are impressed with a public interest and a private wharf can only be built with the consent of a deep-water port commission. This public interest in private facilities forms part of the basis for Plaquemines Port's right to charge its harbor fees and supplemental harbor fees in the view of the Port.

Control of the use of these private facilities in Plaquemines Port, in the circumstances herein, outweighs the factor of who operates these facilities, because these facilities cannot be operated unless the harbor fees and supplemental harbor fees are paid to Plaquemines Port on cargoes not owned by the facilities' owners.

In the case of MRGE, which is solely a service company, all cargoes passing through this facility are not owned by MRGE. Thus, MRGE is a privately owned facility which serves the public. So, Plaquemines Port, in controlling the use of the facilities of MRGE, is at least in substantial part carrying on the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with common carriers by water.

The assessment of the supplemental harbor fee on the cargo by Plaquemines Port has the same effect on the cargo owner as if the private facility had imposed this charge. In the same manner as other terminal charges affect water commerce, so do the supplemental harbor fees (wharfage charges) herein. These charges are one of the crucial links in the transportation chain which the Shipping Act was intended to regulate.

One who conditions the use of a terminal facility is himself an other person because such a person influences whether and on what terms a terminal facility will be furnished to common carriers or to the shipping public. A lessor of terminal facilities, whose lease conditions the use of the facilities, is an other person because the lessee's use of the terminal facilities is influenced by the lease provisions. Here, Plaquemines Port is analogous to a lessor whose lease is conditional, because Plaquemines Port says, to MRGE for example, you can only operate your grain elevator if you collect 10 cents a net ton on grain handled through your terminal facility and remit this 10 cents a ton to Plaquemines Port.

Public entities owning or operating wharves are subject to the Shipping Act, so that they are subject to the same Shipping Act Laws preventing discrimination between carriers and between shippers, as are private owners of wharves. It follows that public entities controlling the use of wharves are likewise subject to the Shipping Act the same as are owners and lessees of wharves, when the latter control the use of these terminal facilities. In fact, obviously the more fundamental factor is not ownership, but it is control of the use of the facility. An owner of a terminal facility who has given up all control of that facility, by long-term lease for example, may be in no wise carrying on the business of furnishing terminal facilities, and in such case the lessee would be the other person. But, if the owner by the lease terms or otherwise retains some control of the furnishing of the terminal facility, that owner, of course, remains an other person. To properly regulate terminal activities, one must not go only to the nominal person furnishing the terminal facility, but to the actual person or persons who controls the business of furnishing terminal facilities.

The interpretation of the term "other person," as made herein, and the finding that Plaquemines Port is an other person, appear absolutely necessary to the general intent of the Shipping Act insofar as it is designed to prevent unlawful discrimination among shippers and common carriers by water.

Plaquemines Port not only superimposes its charges upon those of private facilities, such as MRGE, but in addition Plaquemines Port has the right under Louisiana law in connection with "such wharves, buildings or improvements" in Plaquemines Port, to administer and control with respect to their maintenance and to do the same with respect *to the fees and charges to be exacted for their use by the public.*

While Plaquemines Port has not yet, so far as the record shows, dictated or controlled the fees and charges of any facility, such as MRGE, Plaquemines Port does have the right to control such fees and charges. Thus, in toto, Plaquemines Port controls the harbor fees and supplemental harbor fees which it charges, and also may control those fees and charges of the private facilities it administers. In effect, Plaquemines Port may exercise total control over such fees and charges as are imposed in connection with the use of private terminal facilities in Plaquemines Port.

Midstream activity takes place in Plaquemines Parish. Dockside, Inc., operates a floating elevator in midstream 5 or 6 miles below the Belle Chasse, La., ferry landing in the Mississippi River. Other midstream activity involves the loading and unloading of LASH and Seabee barges. This is a type of terminal activity, such as the loading of barges onto mother vessels, which no doubt was not contemplated more than sixty years ago when the Shipping Act was enacted, but the terms of the Act can be read now to include this type of terminal (midstream) operation within the term "other terminal facilities in connection with a common carrier by water." Herein, Plaquemines Port furnishes the point of interchange in midstream at which the terminal activity takes place, by conditioning the very existence of midstream loading and unloading in the Mississippi River upon the payment of Plaquemines Port's supplemental harbor fees.

The essence of a terminal operation is that of a point of interchange or a link between one mode of transportation in another.

When Plaquemines Port conditions and controls midstream activity upon the payment of its supplemental harbor fees, Plaquemines Port again controls the furnishing of terminal facilities in connection with common carriers by water. Plaquemines Port is an other person under the Shipping Act.

SOME CASE LAW CITATIONS. In *Bethlehem Steel Corp. v. Indiana Port Commission*, docket No. 71-76, served January 8, 1979, 21 F.M.C. 629, it was determined that a harbor service charge was not necessarily a regulation or practice related to or connected with the receiving, handling, storing or delivery of property, inasmuch as the harbor charge was intended to recoup the port's investment in construction of the harbor, and that purpose was unrelated to cargo handling. The charge was levied on vessels entering the harbor and was assessed per gross registered ton of the vessel. This was a manmade port, not a natural one. It was constructed in part with State of Indiana or Port funds. Bethelem Steel Corp. and the Midwest Steel Division of National Steel Corporation constructed large portions of the harbor.

The facts and circumstances in the present proceeding differ greatly from those in the *Bethlehem Steel* case above. There it was decided that not all of the Indiana Port's activities were subject to section 17 of the Act simply because the Port was a terminal operator and an "other person" subject to the Act. The Indiana harbor charge was related to the construction of the harbor, rather than to the construction of pier facilities, warehousing or wharfage facilities. The charge in question was based on the navigational aspect of the harbor, and it was unrelated to cargo handling.

In the present proceeding, we do not have fees or charges related to the construction of a harbor. Plaquemines Port's harbor is in essence the Mississippi River and is not a man-made harbor. Plaquemines Port's fees mostly are related to cargo handling, not to navigational aspects of the River. The supplemental harbor fee only applies to cargoes handled through terminal facilities, midstream or shoreside. The harbor fee only applies on vessels, docking, mooring, or anchoring, and when they have their cargoes handled at terminals in Plaquemines Port, whereas vessels passing through the Port of Plaquemines are exempted.

Patently, the *Bethlehem Steel* case does not support the contention that Plaquemines Port's supplemental harbor fee and harbor fee are not regulations or practices related to or connected with the receiving, handling, storing or delivering of property under section 17 of the Act. Most assuredly, the Plaquemines supplemental harbor fee relates to the receiving, handling, storing or delivering of property, such as grain at MRGE.

The Plaquemines harbor fee falls on vessels which are docked so that they may have their cargoes, of grain for example, delivered to MRGE or handled by MRGE. If the vessels are merely passing through Plaquemines Port and their cargoes are not being handled in terminals, there is no harbor fee assessed by Plaquemines Port, such vessels being exempted by the tariff's terms.

In *New Orleans Steamship Association v. Bunge*, 8 F.M.C. 687 (1965), and in *Agreement No. T-2719*, 16 F.M.C. 318 (1973), the Commission held that an operator of a terminal grain facility who had filed a tariff indicating that common carriers would not be served, is not an other person subject to the Act.

In the present proceeding, Plaquemines Port argues that it does not furnish terminal facilities to common carriers by water, but this argument relates only to the aspect of *furnishing terminal facilities* rather than to the fact that common carriers are welcomed and served at the various private terminal facilities in Plaquemines Port. Accordingly, the two cases cited next above are not determinative of the basic issue in the present proceeding, which issue is whether Plaquemines Port by controlling the use of private terminal facilities is thereby furnishing such facilities.

In *Clyde Mallory Lines v. State of Alabama*, 296 U.S. 261 (1935), at page 266, the Supreme Court stated that "the policing of a harbor so as to insure the safety and facility of movement of vessels using it differs from wharfage or other services which benefit only the particular vessels using them."

In the present proceeding, Plaquemines Port's supplemental harbor charge is a wharfage charge applied on tonnages of cargoes, and it is not a harbor policing charge. In like manner, the Plaquemines Port's harbor charge has been applied in part to vessels whose cargoes are handled at terminals in Plaquemines Port, and other vessels passing through the harbor are not charged the harbor fee. Thus, this fee is not a navigational fee or a fee related to policing of the harbor, but is a fee related to cargo handling. Additionally, these fees are set off one against the other. Since both the supplemental harbor fee and the harbor fee herein, therefore, are wharfage, dockage, and cargo related fees, the principles of the *Clyde Mallory* case are not pertinent to the present Plaquemines proceeding.

In *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 735 (1978), cited by the respondent, in issue was the State of Washington's application of its business and occupation tax to stevedoring. Obviously, the present Plaquemines proceeding differs, because it is not concerned with state taxes, but with Port fees.

In *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968), an assessment levied upon terminal operators and ship lines who were members of the Pacific Maritime Association to fund a modernization and mechanization fund was found unlawful, because of the measure of the assessment on automobiles. It was found that the question under section 17 of the Shipping Act is not whether petitioner had received some substantial benefit as a result of the assessment, but whether the correlation of that benefit to the charges imposed is reasonable. Both the respondent and the complainants rely on the principle of this *Volkswagenwerk* case. The respondent argues that there is a reasonable approximation between the benefits which Plaquemines Port provides and the charges which it assesses in consideration of these benefits, whereas the complainants argue that these benefits and charges are not reasonably related. The complainants in this proceeding have shown that the fees imposed by respondent have been anything but fair, and that these fees have not been imposed in a reasonable and evenhanded manner.

An initial basic issue herein is whether respondent is an "other person." The critical fact is that Plaquemines Port absolutely controls whether or not any terminal facility located in Plaquemines Port (whether such facility is private or public) may carry on the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with common carriers by water. Unless Plaquemines Port's fees (the supplemental harbor fee and harbor fee) are paid to it, the shippers of cargoes and the river barges and ocean vessels will be barred by Plaquemines Port from using any terminal facilities located in the Port.

Thus, *control* of the furnishing of terminal facilities, in connection with common carriers by water, amounts to the *furnishing* of terminal facilities in connection with common carriers by water. Plaquemines Port by virtue of such control is an "other person" subject to the Shipping Act.

Plaquemines Port superimposes its charges on fees on the charges or fees (contractual or tariff) of existing private facilities, conditioning the use of those private terminal facilities upon the payment of Plaquemines Port's supplemental harbor fee and harbor fee.

In *Investigation of Storage Practices*, 6 F.M.B. 871 (1961), the Board reasoned that one of the respondents therein, Trans-Oceanic Agencies (TOA), was an "other person" because it placed itself between the Port of Stockton and its consignee customers for the purposes of ordering or obtaining the port's services for them, and that if Stockton furnished warehouse or terminal facilities in connection with a common carrier by water, so did TOA. In the present proceeding, Plaquemines Port has placed itself between or astride the private terminal operators and their consignee customers, for the purpose of collecting Plaquemines Port's fees.

In the matter of *Agreement Nos. T-2455/T-2553*, 18 F.M.C. 115 (1974), the Commission determined that the Philadelphia Port Corporation (PPC) was an "other person" because a clause in a lease agreement gave PPC some "oversight control" of the use of terminal facilities. In the present proceeding, Plaquemines Port has greater control than mere oversight because Plaquemines Port levies direct charges (fees) for the use of terminal facilities, and because under its tariff provisions Plaquemines Port may exclude cargo owners and vessels from using terminal facilities located in Plaquemines Port. Plaquemines has done more than PPC. Plaquemines has exercised control, whereas PPC had not done so.

In *A. P. St. Philip, Inc., v. Atlantic Land Improvement Co.,* 13 F.M.C. 166 (1969), the Commission found that the lessor of a terminal facility effectively controlled the persons and traffic, who and which were permitted to use the facility, by requiring in its lease agreement that all vessels berthing at the facility make use of a specific tug service. Respondent Atlantic therein was found to have subjected itself by its control of the terminal facility to the jurisdiction of the Shipping Act.

The status of a lessor is not determinative of whether a person is furnishing terminal facilities. The conditioning and controlling of their use is the key. The lessor who does not so control or condition is not an other person. The lessor who does is.

The status of "other person" does not attach to lessors as a class, but rather attaches to those persons who condition or control the furnishing of facilities. Plaquemines Port by Louisiana statute and by its tariff is vested with and retains control over private terminal facilities in Plaquemines Port. As an administrator of such facilities, Plaquemines Port has the power to control and to condition the use of private terminal facilities in the Port. It is concluded and found that Plaquemines Port is an "other person" subject to the Act.

The regulatory authority in its definition in section 1 of an "other person" concerns persons who furnish facilities rather than furnish services because it is the facility which is the link between shippers, carriers, terminals and modes of transportation.

Plaquemines Port as an other person has cast a wide net and snared numerous common carriers and shippers of cargo. Total assessments for one year, 1978, were about $671,000 for the supplemental harbor fee and about $689,000 for the harbor fee.

Cargo tonnages assessed the supplemental harbor fee in 1978 totalled about 6,857,413 tons. About 3,620 vessels were assessed docking fees totalling $488,860 in 1978; and about 978 ships were assessed anchoring fees in 1978 of $200,000 by Plaquemines Port. None of the complainant barge lines were assessed the harbor fees herein for anchoring, but these five complainants were assessed the harbor fees for docking at privately owned terminal facilities in the Port.

In 1978 and 1979 combined, the following harbor fees for docking of barges in order to discharge or load cargo at numerous privately owned facilities in Plaquemines Port were assessed, against Dixie $158,000, against Federal $5,150, against Le Beouf $135,850, against Valley $3,900, and against Hollywood $16,950. As seen, supplemental harbor charges assessed in 1978 against Dreyfus were $156,619.20 and against Early were $47,151.40.

RULING ON LATE-FILED MOTIONS. Since the close of the hearing, the respondent has filed motions to file late exhibits and to file a supplemental brief, which motions are opposed by the complainants. The last such motion was dated October 6, 1981.

Except to the extent that such motions and exhibits refer to tariff items, or to amendments to tariff items, and to Louisiana statute laws, the said motions hereby are denied. Ordinarily, tariffs may be noticed officially, and the recognition of the Louisiana laws referred to in the last motion and exhibits does not alter the existing record in any substantial way, nor does it affect the findings and conclusions in this decision.

ULTIMATE CONCLUSIONS AND FINDINGS. It is ultimately concluded and found: (1) that Plaquemines Port has exercised, and exercises, control as to whether or not certain terminal facilities located in Plaquemines Port are furnished; and that Plaquemines Port is by virtue of such exercise of control an "other person" subject to the Shipping Act, 1916, because it furnishes wharfage, dock, or other terminal facilities in connection with common carriers by water; (2) that Plaquemines Port's "supplemental harbor fee" is a wharfage charge which is based on tonnages of cargo handled at terminal facilities located in Plaquemines Port; and that this supplemental harbor fee is subject to section 17 of the Act, covering regulations and practices related to or connected with the receiving, handling, storing or delivering of property; (3) that Plaquemines Port's harbor fee is a dockage and anchoring charge on vessels docking or anchoring at facilities or points in Plaquemines Port, and because this fee applies to vessels which dock for the purposes of having their cargoes handled at terminal facilities in Plaquemines Port, such harbor fee is related to the supplemental harbor fee inasmuch as the amount of the latter is reduced by the amount of the harbor fee; and because the harbor fee, at least in part, is related to the handling of cargoes at terminal facilities, said harbor fee is subject to section 17 of the Act covering the regulations and practices recited therein; (4) that Plaquemines Port, as an other person, through the imposition of its supplemental harbor fee, has given undue and unreasonable preference or advantage to certain descriptions of traffic, such as to cargoes owned by facilities owners and to certain cargoes believed to be but not in fact so owned, and that Plaquemines Port has subjected other descriptions of traffic to undue and unreasonable prejudice and disadvantage in violation of section 16 First of the Act; that Plaquemines Port is in violation of section 16 First of the Act because certain vessels were subjected to the harbor fee and other vessels such as those under 100 feet long and those issued certain permits were exempted from such fee; (5) that Plaquemines Port, through the imposition of its supplemental harbor fee and its harbor fee has established, observed and enforced unjust and unreasonable regulations and practices relating to or connected with the receiving, handling, storing or delivery of property, particularly because it has not been shown that the said fees are reasonably related to the services performed by Plaquemines Port, and because it has been shown that the complainants have been subjected to charges which are not reasonably related to any services performed in their behalf by Plaquemines Port; (6) that Plaquemines Port is in violation of section 17 of the Act because its tariff provisions hold liable for the debts of shippers and consignees of cargoes all parties who may have had contact with the debtors, including vessel owners, terminal operators and other "users" of the vessel or facility; (7) that Plaquemines Port is in violation of section 17 of the Act because its tariff item 145, as amended, is ambiguous because it covers cargo when "first handled" in the Port and then contradicts the meaning of "first handled" by providing that the reporting of such cargoes should be made when the cargo leaves the wharf or facility; (8) that Plaquemines Port is in violation of section 17 of the Act because its tariff item 10 purports to establish itself as sole interpreter of the provisions of its tariff; (9) that Plaquemines Port is in violation of section 17 of the Act because its item 130 of its tariff sets up civil and criminal sanctions for the refusal to pay fees assessed by the tariff; and (10) that the complaint insofar as it alleges violations of section 15 of the Act is dismissed for lack of proof.

An appropriate order should be entered barring the assessments against the complainants which herein have been found to be unlawful under the Shipping Act.

(S) CHARLES E. MORGAN
Administrative Law

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-77

U.S. SOUTH ATLANTIC & GULF/PANAMA & COSTA RICA RATE AGREEMENT (NO. 10045–6)

U.S. SOUTH ATLANTIC & GULF/GUATEMALA, HONDURAS & EL SALVADOR RATE AGREEMENT (10105–4)

NOTICE

July 30, 1982

Notice is given that no exceptions have been filed to the June 25, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-77

U.S. SOUTH ATLANTIC & GULF/PANAMA & COSTA RICA RATE AGREEMENT (AGREEMENT NO. 10045-6)

U.S. SOUTH ATLANTIC & GULF/GUATEMALA, HONDURAS & EL SALVADOR RATE AGREEMENT (AGREEMENT NO. 10105-4)

The Commission instituted this proceeding to determine whether two 48-hour rate agreements consisting of three carriers operating in two Central American trades, which agreements, as expanded, the Commission approved effective November 1980, should continue to enjoy approval under section 15 of the Shipping Act, 1916. This determination was to consider updated evidence showing the effects of the expanded agreements on the trades served, how intermodal authority was being used, and the effects, if any, of an overlapping conference. I find the agreements deserve continued approval for a three-year term for the following reasons:

(1) Findings which the Commission made when approving the agreements in 1980 regarding the potential for rate instability in the trade and the potential stabilizing effect of the agreements are still valid;

(2) There are benefits which have occurred since the approval of the expanded agreements, namely, the development of joint tariffs publishing uniform rates and uniform descriptions of service, the implementation of uniform intermodal service, and the employment of a full self-policing system. Although all the hoped-for stabilizing effects have not been realized so far and numerous outside competitors continue to operate in the trade, there is some sign of improving rate stability and no signs of harm to shippers or outside carriers. Moreover, there is no overlapping effect between the agreement covering Panama and the separate Panama Conference agreement;

(3) Firm conclusions regarding effects of the agreements on cargo shares and trade carryings cannot be made because pertinent Census data are not available beyond June 1981, shortly after the agreements' joint tariffs were filed, and such data are unadjusted. However, the data show no harmful trends developing as to outside carriers but rather a decline for agreement members in 1981;

(4) The agreements should be approved for a term of three years following final Commission decision rather than enjoy unlimited approval. This follows Commission precedent by which parties to agreements are permitted opportunities to demonstrate that their agreements are beneficial on the basis of actual operating evidence when their operating experience has been limited and when evidence of such experience has not been available.

Donald J. Brunner for proponents.

John Robert Ewers, Joseph B. Slunt and William D. Weiswasser for the Commission's Bureau of Hearings and Field Operations, Office of Hearing Counsel.

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

Finalized July 30, 1982

This proceeding was begun by the Commission to determine whether two rate-fixing agreements in the trade between U.S. South Atlantic and Gulf ports and five Central American countries should continue to enjoy Commission approval under section 15 of the Shipping Act, 1916, or whether they should be disapproved, canceled, or modified on the basis of an updated record which would be developed in the formal investigation. The two agreements consist of so-called 48-hour rate agreements under which the member carriers may fix rates jointly but are free to determine their own individual rates provided they give other members of the agreements 48-hours notice. One of the agreements (No. 10045) presently consists of three member lines, Coordinated Caribbean Transport, Inc. (CCT), Linea Naviera Pan Atlantica, S.A. d/b/a Pan Atlantic Lines (LINAPA), and Sea-Land Service, Inc., and covers the trades between ports in the U.S. South Atlantic and Gulf ranges and Caribbean ports and points in Costa Rica and Panama. The other agreement (No. 10105) also presently consists of three member lines, CCT, Pan American Mail Lines d/b/a Pan Atlantic Lines (PAML),[2] and Sea-Land, and covers the trades between U.S. South Atlantic and Gulf ports and Caribbean ports and points in Guatemala, El Salvador, and Honduras. Sea-Land, which is a member of both agreements, is also a party to another agreement (Agreement No. 3868 - The Atlantic & Gulf/Panama Canal Zone, Colon and Panama City Conference) but, as mentioned below, it does not participate in Agreement No. 10045 with respect to any ports in Central America within the scope of the aforementioned Panama Conference, in other words, Sea-Land does not participate in the Panama section of Agreement No. 10045.

Agreement No. 10045 (Panama/Costa Rica) was first approved by the Commission on July 5, 1973. Agreement No. 10105 (Guatemala, El Salvador, and Honduras) was first approved on May 23, 1974. Originally, the scope of these agreements was limited to Florida ports on the U.S. side and consisted of only two carriers (CCT and Pan Atlantic). In 1978, however, Sea-Land sought to join the agreements and the parties sought other changes as well, namely, an extension of the geographic scope of the agreements to add U.S. Atlantic and Gulf ports, to include inland points in the Central American republics, to establish new self-

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

[2] Under a separate agreement approved by the Commission (No. 10421), the two companies, LINAPA and PAML, are permitted to utilize the same trade name, Pan Atlantic Lines.

policing provisions as required by the Commission's General Order 7, 46 CFR 528, to authorize joint tariffs, and to make certain other changes relating to authority to agree on demurrage charges and to alteration of certain voting procedures. (See *Conditional Approval of Agreement No. 10045-3,* 20 SRR 437 (1980).) Proponents sought these changes to their agreements on several grounds, contending that the subject trades were highly competitive and unstable, that tariff and rate structures were confusing and chaotic, that rates had recently undergone wide fluctuations, that these conditions prompted certain carriers to leave the trades, that the uniform tariff would benefit shippers, that an expanded scope of the agreements would make it possible for additional carriers to join the agreements, and that the agreements, as expanded, would lead to greater rate stability and thereby encourage carriers to make major investment decisions which would result in improved quality of service. (*Id.,* 20 SRR at 437-438).

On September 15, 1980, the Commission issued two orders of conditional approval, which, with two dissenting opinions, approved the amended agreements on certain conditions, effective November 10, 1980, for a one-year term. The Commission found that the proponents had demonstrated the existence of past rate instability and a clear potential for future instability and that the authority to discuss and agree upon rates in an expanded trade area "should have a stabilizing effect." (*Id.,* 20 SRR at 439). The Commission further found that prevention or correction of rate instability "is a legitimate Shipping Act objective and the Commission considers the instant agreement to be a manifestation of such a measure." (*Id.*) The Commission acknowledged that the existence of non-comparable tariffs and rate structures made it difficult for shippers to make accurate rate comparisons but was not convinced that the agreements would solve this problem because there were only three carriers out of 13 or so in the trades who were members of the agreements and even the three retained the right to file separate rates on 48-hours' notice. The Commission concluded that important public benefits would be derived and valid regulatory purposes would be served by expansion of the subject agreements and that the additional authority to establish intermodal through rates to add from inland points in Central America was warranted in view of inadequate port facilities, the needs of shippers for fast-flowing inland service, the natural movement of cargo to and from inland points in Central America, the consistency of such intermodal service with proponents' ro-ro and containership services, and the offering of such services by competitors.

Having found benefits and valid regulatory purposes, the Commission approved the agreements but on several conditions. Thus, it restricted the agreements to U.S. South Atlantic and Gulf ports on the U.S. side, finding no "nexus of competition" among proponent carriers outside of the Southeastern and Gulf regions of the United States. (*Id.*, at 439). The Commission also limited the term of approval to one year so that "the Commission may have a further opportunity to assess the impact the expanded rate agreement has had on the trade." (*Id.* at 439; Order of Investigation and Hearing, p. 2). The Commission imposed further conditions on approval, namely, requiring the agreements to specify the use of a joint tariff rather than individual tariffs as required by 46 CFR 536.3(j), restricting Sea-Land's participation in Agreement No. 10045 (Panama/Costa Rica) to Costa Rican matters so long as Sea-Land remained a member of the separate Panamanian conference agreement (No. 3868), clarifying that the foreign ports served would be Caribbean ports, and conforming the new self-policing provisions of the agreements to the detailed requirements of General Order 7, 46 CFR 528. (*Conditional Approval of Agreement No. 10045-3*, cited above, 20 SRR at 441-442).

After these conditions were met and the Commission's approval became effective on November 10, 1980, for a one-year term, as mentioned, nearly three months were consumed by the parties who were required by the Commission's orders to formulate new joint tariffs to reflect the agreements' expanded scope. Because time had to be utilized for developing these tariffs and because the agreements had to be refiled with the Commission some time in advance of their expiration date (which was in November 1981),[3] proponents were able to furnish the Commission with trade and carriage data which covered only six months of the one-year approval period. In the Order of Investigation and Hearing which began this proceeding, the Commission stated that although proponents had demonstrated the existence of past rate instability and the potential for future rate instability, the data submitted by proponents together with their refiling did not demonstrate that their rate agreements had ameliorated this instability. However, the Commission acknowledged that proponents only had a relatively short time to show the actual effects of the agreements on the trades and that the Commission would therefore permit the parties to develop further evidence "which the Commission requires to realistically assess the agreements' impact." (Order, p. 3). Moreover, the Commission stated that based upon their review of the limited data furnished, the Commission believed that the stabilizing effect which proponents had contended would result from the expanded scope of the agreements "has not yet occurred." (*Id.*, p. 3). Rather than granting the indefinite extension of approval as sought by proponents, the Commission granted approval

[3] The Commission's regulations (General Order 17, 46 CFR 521) require parties to agreements, who wish to have their agreements' period of approval extended, to file the requisite application "not less than one hundred twenty (120) days prior to the date on which the approved agreement would otherwise terminate." 46 CFR 521.2(a). Proponents requested extension on July 17, 1981.

pendente lite and launched this investigation.[4] However, the Commission did not limit its concern to the question of whether the agreements were ameliorating unstable conditions in the trade and should be approved or disapproved only on that basis. Rather the Commission stated that it wished to examine the entire question of continued approval of the subject agreements under the standards enunciated by the Supreme Court in *F.M.C. v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 243 (1966) (*Svenska*), and that it would consider four factors, among others, when deciding whether the agreements continued to meet the Svenska standards. These four factors are:

(1) the impact of the agreements on the rates and cargo shares of the parties in the subject trades;

(2) the impact of the agreements on overall rate stability and service in the trades;

(3) the utilization of intermodal authority; and

(4) the effect, if any, of overlapping conferences. (Order, p. 3).

The Record Developing Phase of the Proceeding

As noted above, the Commission initiated this formal investigation to permit the parties to develop a more recent record to enable the Commission to evaluate the various contentions made by proponents that the subject agreements were producing benefits and serving valid purposes and also to determine the impact of the agreements on the basis of actual experience with particular concern for specific evidence of rates and cargo shares, overall rate stability and service, utilization of intermodal authority, and the effect of overlapping conferences in the Panama trade area. In response to the Commission's wishes, the parties cooperated in an effort to develop an adequate record despite certain handicaps relating to the limited period of time in which the agreements have been operating under joint tariffs and the difficulty of assembling reliable trade data from unadjusted Census Bureau figures and actual carrier data. Notwithstanding these difficulties, the parties did accumulate additional evidence in accordance with procedures established at several informal prehearing conferences and in response to my own requests. The evidence of record furnished in this manner consists of the following items: (1) written, sworn testimony of Messrs. Robert E. Tapia of CCT and Kenneth J. Coleman of Pan Atlantic Lines and related answers of Mr. Tapia to Hearing Counsel's interrogatories, under cover letter dated March 1, 1982, from Mr. Donald J. Brunner to Hearing Counsel; (2) written, sworn testimony of Mr. Fran-

[4] By previous order of the Commission of November 6, 1981, approval of the subject agreements had been extended from November 10, 1981 to December 31, 1981. The Commission's Order of Investigation and Hearing and Pendente Lite Approval, which was served on December 23, 1981, extended approval *pendente lite* to prevent the lapse in approval which would otherwise have occurred.

cis J. O'Donnell of Sea-Land together with copies of the amended agreements, justification statements and data for the amended agreements submitted in 1978, a petition of October 1981 seeking expedited consideration of the agreements, a copy of the Commission's order of conditional approval of Agreement No. 10045-3, and statistical data for the first and second quarters of 1981, all under cover letter from Mr. Brunner to myself dated March 9, 1982; (3) written testimony given under penalty of perjury by Robert G. Adam, senior economist of the Commission's Office of Regulatory Policy and Planning, consisting of 51 pages with attached tables. These various materials, which have been treated as evidence of record by the parties in accordance with my tacit approval, are hereby admitted formally into evidence. Since neither party saw any need to cross-examine these witnesses, no trial-type hearing was conducted and the parties submitted simultaneous opening and reply briefs on May 21 and June 4, 1982, respectively.

Summary of the Evidence

The following section provides a summary of the evidence which, as mentioned, consists mainly of the written testimony of three officials of each proponent carrier, the rather detailed economic testimony of Mr. Adam, the Commission's economist, and numerous statistical data and tables relating to cargo carryings in the subject trades.

A. *Proponents' Services and Investments in the Trades*

1. CCT provides the following service as listed below by vessel name and TEU capacity. All vessels are RO/RO-type vessels:

Vessel	*TEU Capacity*	*Scheduling*
Lionheart	240	weekly-Miami to Guatemala and Honduras
Mar Caribe	112	every 10 days-Miami to Costa Rica, Panama
Coral Gables	120	weekly-New Orleans to Guatemala, Honduras
Sea Drake	110	every 10 days-New Orleans to Costa Rica, Panama

2. LINAPA provides a 9-day sailing between Miami, Florida, and Panama/Costa Rica, utilizing the *MV Costa Rica* which is a 148 TEU RO-RO vessel.

3. PAML offers a weekly service between Miami and Guatemala/Honduras/El Salvador, utilizing the *MV Central America,* a RO-RO vessel with a 14B TEU capacity. PAML offers a service on a 9-day

turn from New Orleans to Guatemala/Honduras/El Salvador, employing the *MV Pan Caribe,* a RO-RO vessel with a 60 TEU capacity.

4. Sea-Land serves the Gulf ports on a weekly basis, utilizing four vessels with TEU capacities varying between 569 and 630 TEU's connecting with feeder vessels at Kingston, Jamaica. Sea-Land serves the South Atlantic range with the vessel, *Seattle,* which has a 620 TEU capacity. This cargo is relayed at San Juan to Kingston, thence by feeder to the ultimate destination. Sea-Land has two feeder ships, the *ASD Hektor,* a 300 TEU vessel which serves Porto Cortes and Santo Tomas on a 7-day turn. The *MAR Tierra,* a 126 TEU vessel serves Porto Limon on a 7-day turn. All Sea-Land vessels are lift-on/lift-off.

5. The line haul vessels which have been listed for Sea-Land in the preceding interrogatory also serve the Puerto Rico trade, Caribbean Islands trade and Panama, in addition to serving North Atlantic ports.

6. CCT and Pan Atlantic have been established carriers in the Miami/Central America trade for over twenty years. Both have recently inaugurated their services from New Orleans to Central America, to Guatemala/Honduras/El Salvador in November 1980, and to Costa Rica/ Panama in May 1981.

7. Sea-Land has a worldwide transportation system and has been in the subject trade for the last five years. Sea-Land announced that its America's service has become a separate division (the other two divisions within Sea-Land are the Atlantic and Pacific).[5]

8. All proponents have increased their investment in the trade in the last three years. CCT's total new investment during this period (including vessels, terminal improvements, trailers, etc.) totals $61,427,000. Pan Atlantic's new investment during that period was approximately $40,000,000, including two new ships, new refrigerated equipment and expanded terminal facilities at Miami and New Orleans. Sea-Land's specific investment to the trade is difficult to identify because Sea-Land serves the foreign countries from the North Atlantic (not within the scope of Agreements Nos. 10045 and 10105), the West Coast (minibridge) as well as foreign origins. However, Sea-Land has increased its equipment pool and terminal facilities in the foreign countries encompassed within the agreements. Also, Sea-Land has recently expanded its service to include Port Everglades (Miami).

B. *Competition*

9. The record contains various estimates of the large number of carriers competing in the subject trades, ranging from 14 to 20. Thus,

[5] This announcement was made after the record closed. Hence, as proponents suggest it is outside the record. However, Commission Rule 226, 46 CFR 502.226, permits me to take official notice of such matters of widespread knowledge which require no formal proof. Since Hearing Counsel have not disputed this proposed fact and it appears not necessary to provide formal proof of the public announcement, I will invoke Rule 226.

according to Mr. Adam, the Commission's staff had at one time found 14 carriers serving the trades in 1981 (Adam, p. 5). Pan Atlantic's witness Coleman identified 16 carriers competing in recent years with the members of the subject agreements (Coleman Interrogatory No. 25) including such carriers as Cass Line, Mayan, Chilean Line, Johnson Line, Nexos Line, and Bernuth Marine, in addition to better known national-flag lines. According to Mr. Coleman, furthermore, Pan Atlantic has faced competition from as many as ten lines which have refused invitations to join the subject agreements. Flomerca, the national flag line of Guatemala, had once been a member of Agreement No. 10105 (Guatemala/Honduras/El Salvador) but withdrew for reasons relating to its desire to maintain a 15 percent rate differential below the existing structure of the agreement members. Flomerca also enjoys a certain advantage over other lines serving Guatemala because Flomerca is exempt from a 6 percent Guatemalan Merchant Marine Tax. 10. In the agreement area covering Guatemala/Honduras/El Salvador, the primary nonagreement competition is presented by Flomerca Line, which, as noted, is the national flag carrier of Guatemala. In addition, government supported lines, namely, NAMUCAR, NANICA (Nicaragua national lines) and TRANS NAVE (Ecuadorian national line) compete for cargo between U.S. Atlantic, Gulf and all foreign ports encompassed within the agreements. Moreover, at Panama, there is direct competition with members of FMC Agreement No. 3868, as amended, which includes Sea-Land, U.S. Lines, Delta, Lykes and others.

11. Competition in the trade can best be characterized as "carriers who serve the trade on inducement or who are in and out of the trade in a relatively short period of time." Armasal and Uiterwyk Lines were, at one time, members of the agreements. However, the former went bankrupt and the latter discontinued its services to both trade areas presumably because of lack of profitability. Recently, Jeco Lines entered the trade, cut rates and existed within three months.

12. The agreement lines offer the only consistent regular containerized service in the trades and carry or have carried a majority of the liner cargo. Based upon *Import Bulletin* data, the agreement lines are consistently among the top four liner carriers in each country (except Panama). The fourth carrier is the aforementioned Flomerca which offers a breakbulk service limited to Gulf ports.

C. *Unfavorable Economic and Political Conditions in Central America*

13. Mr. Adam has prepared a detailed study of the economic conditions of the five Central American republics served by the parties to the two agreements. He paints a rather gloomy picture of the prevailing conditions. Generally, all of Latin America registered its lowest rate of economic growth in 1981 for the past 35 years, its gross domestic product (GDP) rising by a mere 1.2 percent in 1981. During 1981 a

decline in the rate of real economic growth was experienced in all of the Central American countries where most of them suffered either a continuation or an aggravation of political tensions and social conflicts with resulting acceleration of economic uncertainty. Deterioration was most severe in El Salvador where GDP declined by 9 percent for the second straight year. Economic activity also declined in Costa Rica by 1.5 percent and reached a virtual standstill in Guatemala and Honduras. As a result, per capita GDP was down in all four nations in 1981. Per capita GDP also declined in Panama to 2.1 percent in 1981 although the growth rate in Panama had reached 4.5 percent in 1981, above the regional average for Latin America. Inflation continued to be a problem in Central America as well, although the average rate of increase of consumer prices in Central American and Caribbean nations declined slightly to 15.5 percent in 1981 from 17 percent in the prior year. Among the five nations covered by the subject agreements, in 1981, inflation increased dramatically in Costa Rica (60 percent), while increasing to 10.2 percent in Guatemala, 10 percent in Honduras, 13.3 percent in El Salvador, and under 6 percent in Panama.

14. The economies of most of the countries of the Caribbean basin have been adversely affected by depressed prices of the goods they export and a rise in costs of goods they import. This has resulted in severe shortages of foreign exchange. Moreover, Latin America is facing one of its most critical periods since the war. The most optimistic forecasts expect the current recession to last for the major part of 1983 with moderate recovery only beginning by the end of 1982. The down turn in Central America is furthermore exacerbated by political tension and organized terrorism throughout much of the region. Because of shortages of foreign exchange, the governments of Costa Rica, Guatemala, Honduras, Nicaragua, and El Salvador have imposed import controls and many exporters to these nations now require confirmed letters of credit before shipping. Panama, with political stability and no exchange controls, is an exception. The outlook in that country is for continued growth in 1982.

15. Mr. Adam's detailed study of the economies of the five Central American nations covered by the subject agreements is similarly gloomy. Thus, Costa Rica, which has traditionally been the most prosperous nation, is now undergoing a severe financial crisis. High prices for oil imports, reduced coffee prices, years of large deficits in the public sector, and external borrowing have combined to bring the economy of Costa Rica to a standstill. Foreign exchange reserves have declined, foreign debt is significant, and inflation is steep. Exports and imports from and to Costa Rica have generally been in decline as a result of these negative factors. Panama, unlike the other four countries studied, is apparently the only bright spot. Its economy grew by 4.5 percent in terms of real GDP in 1981 and prospects for continued real

growth are good. Unlike other economies in the region, Panama is primarily a service-oriented economy and the Canal, banking, tourism, and the Colon Free Zone account for 60 percent of GDP. Construction projects also are important aids to the economy. Based on 1981 data, U.S. exports to Panama are rising by only 21 percent while imports from Panama are declining by about 10 percent. Guatemala's economy is on the brink of stagnation. Economic growth declined to only 1 percent in terms of real GDP in 1981 because of sharp drops in commodity prices, deterioration of the regional Central American Common Market, and internal violence. Inflation began to rise in 1981 and agricultural exports fell largely due to lower world coffee prices and pesticide-contaminated beef. U.S. exports to Guatemala were up by only 1 percent in 1981 over the prior year while imports from that nation were declining at a rate of 20 percent in 1981. Honduras has been relatively stable politically but it also suffers from capital flight and balance of payment deficits, falling prices of exports, high cost of oil, investor fears of regional instability, and a dismal real GDP growth rate of 0.5 percent in 1981. Honduras remains the poorest and least sophisticated country in the region and is not as well equipped as most of its neighbors to sustain an economic crisis. Based on 1981 data, U.S. exports to Honduras were off by 7.9 percent while imports were rising by 3.3 percent. The near-term prospects for Honduras are not bright with export growth stagnant and shortages of capital for investment combined with political uncertainties. The economy of El Salvador has been deteriorating with unemployment up to 25 percent or more, decline in GDP, and a need for foreign assistance to repair damaged highways, bridges, and power equipment caused by the current upheaval in El Salvador. Output dropped by almost 10 percent in 1981 while per capita GDP was also down by 12 percent in 1981. The economy of El Salvador may fall by an additional 5 to 7 percent in 1982 without the infusion of massive foreign assistance. Capital outflows have been a continuing problem. Exports fell in 1981 while imports declined in volume but not in value because of increased cost of oil, leaving the country with a trade deficit of $110 million in 1981. Based on 1981 data, U.S. exports to El Salvador rose by nearly 13 percent over 1980 while imports plunged nearly 40 percent.

16. The countries of Central America are small and except for Costa Rica, relatively underdeveloped. The region as a whole has been projected to grow rapidly in the future in terms of trade and income with variances among individual countries. However, this optimistic forecast may now be completely obsolete because of the current political turmoil in the region. The trade of most of the countries in Central America is forecast to increase more rapidly than their growth rates. However, the total volume of trade in the region is not large, total regional exports and imports, exclusive of Mexico, expected to reach

only 14 million and 33 million tons by 1980. According to Mr. Adam (Table 2 to his testimony) the total volume of trade for the five subject countries for the year 1981, as annualized on the basis of the first six months' results, amounts to only something in the neighborhood of 1 million short tons.

17. The transportation problems of these countries are as diverse as their economies. Many of the Central American countries have poor inland transportation and port systems with varied requirements and government responses to these conditions. Puerto Barrios, in Guatemala, has very limited breakbulk handling equipment and inadequate inland transportation. Port congestion is expected to become even worse. However, plans to construct a modern port adjacent to Barrios have been announced. Port congestion at Puntarenas, Limon, and possibly Golfito, in Costa Rica has led to a rerouting of cargoes destined for that country via the port of Balboa in Panama. There is an indication that two projects are underway to cope with this problem, but their status is uncertain given the current negative outlook for the Costa Rican economy. According to a MarAd report, a new container terminal is planned for Acajutla in El Salvador. Plans there are to improve the current inadequate rail system to the port prior to the completion of the container terminal. Honduras has been expanding Puerto Castilla to cope with increased agricultural and lumber exports and Panama may invest up to $200 million in container port development at both ends of the Canal Zone. The latter project is designed to spur private economic activity in the Canal Zone when it is incorporated into Panama.

D. *Proponents' Carryings in the Trade and Overall Trade Developments*

As mentioned, a main purpose of this investigation was to give the parties an opportunity to develop more recent evidence to show proponents' actual experience under the agreements as amended by the Commission's orders of approval, effective November 10, 1980. Since the parties to the agreements were required by the Commission's order to formulate new joint tariffs in place of their individual tariffs as one of the conditions of approval and since this task required several months to complete, resulting in the filing of the joint tariffs in February 1981, and since the proponents were required to refile for approval in July of 1981 under the Commission's regulations, proponents' experience under the approved agreements, as amended, was rather limited at the time the Commission considered whether to extend its approval beyond the November 1981 expiration date established by the Commission in its original orders of approval. Since this proceeding commenced on December 23, 1981, the parties have been diligently assembling updated data in order to bring the proceeding to a reasonably prompt conclusion. However, the record developed still does not cover a full year's actual results under the new tariffs, one reason being that Census data which Mr. Adam used to prepare his trade analyses were not available for the full year 1981. Instead, as he explained, Census provided data covering only the first six months of 1981 and when necessary to show yearly comparisons, Mr. Adam was forced to double, *i.e.,* annualize these data. (See Adam's testimony, p. 25, footnotes 13 and 14.) Therefore, to some extent, it is still somewhat premature to make trade analyses which will reflect actual experience under the amended agreements as they have been operating under the conditions required by the Commission and under the new joint tariffs. (*Id.,* p. 25 n. 14). Moreover, as Mr. Adam indicates and as proponents have noted, Census data for the first six months of 1981, the latest data available at the time Mr. Adam prepared his testimony are "unadjusted" whereas previous year's Census data have been "adjusted" by the Commission's Office of Data Systems.[6] Notwithstanding the limited period of time for which data were available and the need to utilize Census data which are not precisely correlated to common carrier operations as they are understood by the Commission or possibly to the exact trade area covered within the port-and-point scope of the agreements, it appears that such data are the best available and in the absence of any superior source, one must work with them. Furthermore, although perhaps not as precise as one would ideally wish, they can be used to seek trends in the subject trades and to make approximations of the experience of the proponents in these trades. In other cases the Commission has recognized that mathematical precision is not possible or that indirect evidence is all that is available. This occurs frequently in so-called rate cases but even in section 15 cases. *See, e.g., United States v. F.M.C.,* 655 F.2d 247, 253-254 (D.C. Cir. 1980); *Agreement No. 57-96,* 19 F.M.C. 291, 303 (1976); *Svenska,* cited above, 390 U.S. at 249. In some instances, furthermore, data are derived from carrier proponents' own records and when used to determine trends merely from these data, the problems associated with Census data would obviously not apply.

18. Quarterly reports covering the first half of 1981, submitted by proponents in response to the request of one of the Commissioners who voted to approve the agreements (Teige), show that cargo movements in tonnage terms under Agreement No. 10105 (Guatemala/Honduras/El Salvador) exceed those under Agreement No. 10045 (Panama/Costa

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[6] Although there has been no oral examination of Mr. Adam which would explain the meaning of the "adjustments," it is well known that Census data are not precisely correlated to common carrier cargo within the meaning of the Shipping Act. Some filtering out of irrelevant cargo might therefore be necessary. In this case, moreover, Census data reflect cargo moving by countries of origin and destination (Adams Table No. 2, footnote 1). Since this case involves agreements covering only Caribbean ports, some cargo moving via Pacific ports to and from the five subject countries will be picked up in the Census data and, accordingly, the data will be gross figures. However, since the carrier members of the agreements have inland intermodal authority in the Central American countries, the Census data will reflect the total pool of cargo for which the agreement members can compete. (See Proponents' Opening Brief, p. 8).

Rica) by a ratio of 2.6 to 1 (201,616 tons vs. 77,548 tons). The fact that Sea-Land does not serve Panama under Agreement No. 10045 accounts for some of this differential. Moreover, the unbalanced nature of the trades is apparent with the combined southbound cargo of Agreements 10045 and 10105 exceeding the northbound cargo by a ratio of 3.3 to 1 (214,211 tons vs. 64,953 tons), Miami being the principal port in the southbound trades under both agreements. As noted above, overall, the trade between the U.S. South Atlantic and Gulf and the countries involved is fairly small.

19. Data furnished by proponents covering the full year 1981 as well as 1980 and 1979 indicate a slight growth from 1979 to 1980 with a rather substantial drop in 1981 except for El Salvador which experienced a slight recovery in 1981 which may be attributable to the political situation there in that year. The following table reflects proponents' predominant southbound carriage for the past three years. Sea-Land is stated in TEU's, Pan Atlantic and CCT are stated in tons:

	Guatemala	*El Salvador*	*Honduras*	*Costa Rica*	*Panama*
		1981			
CCT (Tons)	38,267	14,853	25,570	26,521	49,307
Pan Atlantic (Tons)	20,000	18,404	10,606	20,296	22,178
Sea-Land (TEU)	1,806	515	1,230	1,888	----
		1980			
CCT (Tons)	39,733	13,491	34,369	39,912	53,735
Pan Atlantic (Tons)	24,440	10,060	14,805	27,816	27,644
Sea-Land (TEU)	3,315	280	1,554	2,214	----
		1979			
CCT (Tons)	43,356	22,750	36,488	36,065	45,310
Pan Atlantic (Tons)	18,084	18,900	12,295	21,909	31,466
Sea-Land (TEU)	1,608	350	1,677	2,349	----

Overview of the Trade 1979-1981

The following section represents Mr. Adam's trade analyses for the years 1979 through 1981 derived from Census data and therefore subject to the qualifications discussed above concerning unadjusted data for 1981, annualization of 1981 data where appropriate, and use of trade and liner definitions which are not identical to those terms as used by the Commission. Nevertheless Mr. Adam's studies do show trends which are sometimes corroborated by proponents' own data and since they all derive from the same common cource, they are internally comparable. Therefore they do provide an approximation of the trade situation of some help to the Commission in evaluating any impact of the agreements, albeit tentative.

20. In the subject trades total U.S. liner exports, in tonnage terms, were up slightly from 1.3 million tons in 1979 to 1.4 million tons in 1980 before dropping off sharply to less than 1.0 million tons in 1981. During this period, the percentage share held by the rate agreement member carriers of the total export tonnage to the five countries, as a group, also rose significantly from 37 percent in 1979 to 49 percent in 1980 before dropping off again to 39 percent last year. The percentage shares of the member carriers of total exports broken down by Agreements 10045 and 10105, respectively, tend to follow the same pattern indicated for the overall export trade; rising from 48 and 32 percent shares of the tonnage in 1979, to 56 and 46 percent in 1980, and down again to 34 and 42 percent shares by 1981. It is interesting to note that the share of the member carriers of U.S. tonnage exports to Panama in 1981 amounts to only 24 percent—well below their shares of the other countries' trades that year. The member carriers' share of U.S. exports to El Salvador did not follow the general trend of dropping off in 1981. The member carriers' share of U.S. exports to that nation rose steadily from 49 percent in 1979 to 55 percent in 1980 and an impressive 61 percent in 1981.

21. U.S. liner exports, in terms of value, rose from $1.4 billion in 1979 to $1.8 billion in 1980 before falling off sharply to $926 million last year. The percentage share of the member carriers of total U.S. exports to the group of countries, by value, appears to have followed the same path indicated for total tonnage movements except that the shares for the three years are very much larger; 68 percent in 1979, 75 percent in 1980, and slightly off to a 70 percent share in 1981. The percentage shares of the member carriers of total exports, by value, broken down by the respective Agreements 10045 and 10105, rise from 73 and 65 percent in 1979 to 76 and 74 percent shares in 1980. By 1981. the member carriers' share of 10045 had declined to 61 percent but continued to rise to a 77 percent share for Agreement 10105. The member carrier percentage shares of U.S. exports to the individual countries presents somewhat differing trends. Their shares of dollar exports to Panama and Costa Rica rise from 68 and 79 percent in 1979 to 71 and 82 percent in 1980 before dropping off again in 1981 to levels of 54 percent and 74 percent, respectively. This follows the general up and down trend for the overall export trade. However, the member carriers' percentage shares of the dollar export trade to Guatemala, Honduras, and El Salvador rise steadily from a 60-71 percent range in 1979 to 71-77 percent in 1980 and to a very impressive range of 74-83 percent in 1981.

22. The inbound side of the trade presents a very different picture. Total U.S. liner imports in tonnage terms are much smaller than total U.S. liner exports to the group of five countries. Furthermore, total imports decline sharply from a level of 559-568,000 tons in 1979-80 to only 275,000 tons in 1981. During this same period, the rate agreement member carriers' share of total import tonnage declined from 68 percent in 1979 to 66 percent in 1980 and only 52 percent in 1981. The member carriers' share of tonnage imports under Agreement 10045 follows the general trend in the export trade. Here, their shares rise from 69 percent in 1979 to 79 percent in 1980 before dropping off to 65 percent last year. These same carriers' share of U.S. imports under Agreement 10105, in terms of tonnage, follows the general downward trend for their share of all U.S. imports, dropping from 68 percent in 1979 to 61 percent in 1980, and only 49 percent by 1981. The similar trends indicated for the member carriers' shares of total U.S. tonnage imports, and those under Agreement 10105, may be explained by the fact that the cargo movements under this agreement tend to be two to four times as large as those under Agreement 10045. The inbound trade from Panama exhibits a different pattern from the up and down trend for the member carriers' share under Agreement 10045. Their share of total tonnage imports from Panama rises sharply upward from 27 percent in 1979 to 44 percent in 1980 and to 66 percent in 1981. However, the tonnage involved in the Panama trade is quite small compared with that moving inbound from Costa Rica--the other country under Agreement 10045. In the instance of Agreement 10105, the member carriers' percentage shares of the inbound tonnage from all three countries--Guatemala, Honduras, and El Salvador--appear to be dropping off sharply in 1981 from high levels in the preceding two years. Their share of the El Salvador tonnage trade inbound actually falls to only 27 percent in 1981 from a level of 65 percent in 1979.

23. Total U.S. liner imports, in value terms, are much smaller than U.S. dollar liner exports to the group of countries. Moreover, total imports, by value drop off dramatically from a level of about $1 billion in 1979-80 to only $414 million in 1981. The percentage shares of the member carriers of total imports, in value terms, actually remained fairly stable in a 65-68 percentage range for all three years, 1979-81. This of course, is a very different trend from that experienced in the tonnage trade, inbound, where the member carriers' share dropped from 68-52 percent between 1979 and 1981. The share of the member carriers of dollar imports under Agreement 10045 rises from 79 percent in 1979 to 84 percent in 1980 and remains stable at 85 percent in 1981. These carriers' share of dollar imports under Agreement 10105 does not follow the same downward trend as their share of tonnage imports under this agreement, but remains at a very stable level of 60-62 percent in 1979-81. Again, the similar trends for member carrier shares

of total U.S. dollar imports, and those under Agreement 10105, may be explained by the fact that cargo movements, in value terms, under this agreement are also two to four times as large as those under Agreement 10045. The inbound trade, by value, from the individual countries does not present a very different trend from that for the member carrier shares of each of the agreements. The carriers' shares of dollar imports from Panama and Costa Rica basically follow the stable trend indicated for Agreement 10045, remaining at very high levels—89 and 83 percent—in 1981. The percentage share of the member carriers of dollar imports from Guatemala, under 10105, remains at a stable level of 65-68 percent for the entire period, 1979-81. Their share of imports from Honduras, in value terms, rose from 58 percent in 1979 to 66 percent in 1980 before dropping off to 63 percent last year. In the case of El Salvador, the members' share of dollar imports declined sharply from 64 to 37 percent between 1979 to 1981.

Major Commodities in the Liner Trade [7]

24. In the inbound side of the trade, it is apparent that the major commodities, as a group, moving under Agreements 10045 and 10105 are declining in both value and volume terms. The totals for 1981 are off by 59-64 percent from the preceding year. During these two years, the shares of the major import commodities held by the member carriers under these respective agreements are also declining in tonnage terms; down from 78 to 60 percent for 10045 in 1981 and from 56 to 42 percent for 10105 last year. On the other hand, the members' shares of this import cargo in value terms rose sharply from 66 percent in 1980 to 85 percent in 1981 under 10045 but appear to have stabilized in the past two years at levels of 57-59 percent for 10105.

25. The principal liner commodites ranked in tonnage terms moving inbound under both agreements during 1979-81 consist of beef, bananas, and coffee. The member carriers' shares of coffee imports are rising rapidly under Agreement 10045 in value and volume terms. Their shares of beef imports under 10045 appear to have stabilized at high levels, while their shares of total banana imports have dropped dramatically from levels of 69 and 78 percent to 20 and 22 percent, in value and volume terms, between 1980 and 1981. The members' shares of total beef imports under 10045, in value and volume terms, stabilized at very significant 84 percent level in 1981—the same levels for 1979. Their shares of total coffee imports under 10045 have risen from 67-69 percent to an impressive 94 percent between 1979 and 1981 in both value and volume terms. The shares of the member carriers of beef and coffee imports under Agreement 10105 are either rising, or have stabi-

[7] For purposes of comparison with prior years, 1979-80, the totals for the major commodities moving under each agreement were doubled to obtain approximate annual trends.

lized at reasonably high levels, while their percentage shares of total banana imports are down from 100 percent of the value and volume in 1979 to 13 and 23, respectively, in 1981. These carriers' shares of beef imports under 10105, by value and volume, appear to have stabilized in a range of 86-94 percent for the entire period, 1979-81, while their share of total coffee imports under this agreement are rising at a steady pace from around 47 percent in 1979 to 55 percent last year in both value and volume terms.

26. The combined totals for the major import commodities moving under each of the agreements indicate the aforementioned declines, in value as well as volume terms, of approximately 60 percent in 1981 compared with the preceding year. The share of the member carriers for the combined agreements has also declined from 70 to 47 percent of the tonnage during 1979-81. However, based on value, it has stabilized at a level of about 64 percent of total imports of the major commodities for the same years.

27. It is obvious that the combined totals for the major export commodities moving under both agreements were declining in 1981—by 13 percent of the tonnage and 36 percent of the value—in comparison with the prior year. The composite share of the member carriers of these commodities—moving under 10045 and 10105—was also down to 19 percent by volume in 1981 from 22 percent the preceding year. In value terms, however, their share of the major commodities for the combined agreements was actually rising steadily from 23 percent in 1979 to 39 percent in 1980 and 45 percent last year. The member carriers' share of the export commodities moving under the agreements was down slightly from the 1980 levels, in volume terms, to 14 percent for 10045 and 22 percent for 10105 in 1981. This is somewhat in contrast to the trend on the inbound side where the much larger member shares of the import tonnage under these agreements were down very sharply in 1981. However, in value terms, the shares of the members of the principal commodity exports moving under the individual agreements were rising at a steady pace between 1979 and 1981. Their shares rose from 27 to 35 percent under 10045 and from 22 to a very impressive 52 percent of the value of major commodity exports under 10105 between those years.

28. The principal outbound liner commodities in both agreement trades include thermoplastic resins, lubricating oils and greases, animal feed, Kraft paper and paperboard, inorganic compounds, wheat and meslin, and iron and steel products. The latter two commodities, while important in these trades, reflect only minor shares held by the member carriers. Resins was an important commodity to the members in both agreement trades in 1979-81. The members' shares of total movements of resins under 10045, in value and volume terms, were up from 46-47 percent to 60-64 percent between 1979-81. Their shares of value and

volume movements of this commodity under 10105 were up to a remarkable 95 percent in 1981 from 44 percent of the volume and 49 percent of the value of shipments in 1979. The members' share of total movements of lubricating oils and greases under these agreements also were rising significantly from about 15 percent of the value and volume under 10045 in 1979 to about 36 percent by 1981. Their shares of this important commodity were even more impressive under 10105 rising from 19 to 62 percent in volume terms between 1979 and 1981 and from 21 to 71 percent of the value during this same period. The shares of the members of movements of inorganic compounds under 10045 were also impressive rising from 18 to 38 percent of the tonnage and 29 to 41 percent of the value from 1979 to 1981. Under 10105, the members' share of movements of inorganic compounds also increased from 25 to 30 percent of the volume during 1979-81—and the tonnage involved was much larger than that under 10045. Their share of the value movements of these chemicals under 10105 increased from 26 to 49 percent between these two years. Another major commodity where the member registered rising shares was Kraft paper and paperboard. Under 10045, the members' shares of this commodity rose from less than one percent in volume terms and 4 percent, by value, in 1979 to 5 and 11 percent shares of a rapidly declining trade for this item by 1981. The situation was much the same under 10105 where the members' shares increased moderately from 6 percent of the tonnage and value trades for Kraft paper and paperboard in 1979 to 12 percent by volume and 20 percent of the value of these shipments in 1981. However, total shipments of paper and paperboard under 10105 were down by more than 80 percent in 1981 compared with the prior year. Finally, movements of animal feed under 10045 offered another instance where the members' value and volume shares were rising dramatically from 4 percent in 1979 to 39 percent of the tonnage and 52 percent of the dollar value in 1981 at a time when total exports of this commodity were declining by almost 90 percent. Total movements of animal feed under 10105 also declined in 1981 compared to shipments that moved in 1979 leaving members' shares of 14 percent of the volume and 20 percent of the value last year—just about where their shares stood in 1979.

Rate History Under the Agreements

29. There is some indication, according to Sea-Land, that overall rate levels in the subject trades were depressed prior to the time that the agreements were expanded in November 1980. Moreover, on a few major commodities, namely, waste paper, paperboard, lubricating oils and products, and resins, Sea-Land still believes rates to be depressed. (Adam, p. 50). Sea-Land has also expressed the opinion that operations to and from Guatemala, Honduras, and El Salvador are not profitable

and that the Costa Rican trade is only marginally profitable. However, there is no evidence of complaints from shippers about rate levels, rate instability, or service. Proponents Pan Atlantic and CCT, while generally agreeing with Sea-Land, do not maintain that overall rate levels are depressed although acknowledging that a few rates are depressed on relief cargo, synthetic resins, and paper products because of competition in the trades. Moreover, according to the Commission's staff, rates on major moving commodities remained firm through the second quarter of 1981. Since approval of the expanded agreements, there have been two general rate increases under Agreement No. 10045 (Panama/Costa Rica) and three under Agreement No. 10105, counting a recent general rate increase of 8 percent in February 1982. The second of these increases under the agreements, however, consisted of the incorporation of a bunker surcharge in the base rates. There is no evidence that these rate increases have caused the member lines to lose cargo. Moreover, according to Pan Atlantic, if cargo would be lost because of any rate increase, the carrier would restudy the matter and re-evaluate the rate. (Answer to Interrogatory No. 22, attached to the Coleman/Tapia testimony).

Utilization of Intermodal Authority and the Effect of Overlapping Conferences

30. Because of peculiar problems relating to inadequate port facilities in Central America and the need for rapid inland movement, the natural flow of cargo is one of through inland movement and the joint tariffs reflect this situation. For example, El Salvador has no Caribbean port and all rates to that country are by necessity intermodal. The same is true also for rates to Guatemala City which is inland. There is no intermodal authority within the United States. There is no evidence in this record which undermines or contradicts the findings on which the Commission relied when granting intermodal authority in its orders of September 15, 1980, in which the Commission acknowledged the inadequacy of port facilities, shipper demand for an intermodal service, the establishment of inland customs facilities to expedite inland movement, the recognition of actual cargo flows, the enabling of proponents to compete with outside carriers offering through services, and the consistency of such intermodal service with proponents' ro-ro and containership services. (See *Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR at 440.)

31. There is no evidence in this record that Sea-Land is participating in two different agreements, namely, No. 10045 (Panama/Costa Rica) and No. 3868 (Atlantic and Gulf/Panama Conference). As a condition for approval of expanded Agreement No. 10045, proponents were instructed to amend their agreement to provide specifically that "Sea-Land Service, Inc. shall not participate in this Agreement with respect

to any ports in Central America within the scope of the Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference (Agreement No. 3868) as long as it is a member of that Conference." (*Conditional Approval,* cited above, 20 SRR at 442). The parties have complied with all of the Commission's conditions of approval and the evidence is that Sea-Land does not participate in the Panama section of Agreement No. 10045. (Tapia/Coleman testimony, p. 9). There is also no evidence that Sea-Land is participating in the Panama Conference in any way which affects its activities in Agreement No. 10045.

The Uniform Tariffs

32. As mentioned earlier, by order of the Commission when it approved the expanded agreements, the parties were supposed to file joint tariffs to replace what would otherwise be three individual tariffs. Such tariffs were prepared over nearly three months' time and were filed in February 1981. The tariffs have brought uniformity in the method of rate quotations. They publish rates on a weight or measurement basis from all South Atlantic and Gulf ports (except Miami). Before, rates were quoted in a wide variety of ways, e.g., by long or short tons, measurement tons, cubic feet, hundredweight, lumpsum, and various per trailer rates. Moreover, all port accessorial charges are identical (except for local wharfage charges in the Gulf) at U.S. and foreign ports. For example, the terminal service charge at Santo Tomas is the same regardless of whether the cargo originates in Jacksonville, Miami, or New Orleans. This was not the case before the expanded agreements were approved nor did shippers know that quoted rates were for the identical services. The benefits of a uniform tariff and the problems stemming from previous individual carrier tariffs were acknowledged by the Commission when it approved the expanded agreements. (*Conditional Approval,* cited above, 20 SRR at 439).

DISCUSSION AND CONCLUSIONS

As mentioned earlier, the Commission instituted this proceeding in order to determine whether the two subject agreements which the Commission had conditionally approved on September 15, 1980, continue to merit approval under the standards enunciated by the Supreme Court in *F.M.C. v. Aktiebolaget Svenska America Linien,* 390 U.S. 238, 243 (1968) (*Svenska*). The Commission furthermore stated that in making its determination as to continued approvability it intended to consider, among other things, four specific factors, namely, the impact of the agreements on rates and cargo shares of the parties, the impact of the agreements on overall rate stability and service in the trades, the utilization of intermodal authority, and the effect, if any, of overlapping conferences. Under the *Svenska* test, the Commission weighs and balances the evidence to determine whether an agreement is required by a serious transportation need, is necessary to secure important public benefits, or will serve a valid regulatory purpose to offset the presumption that agreements which run counter to our national philosophy favoring free and open competition are contrary to the public interest. This test was enunciated by the Commission in two previous decisions [8] and met the approval of the Supreme Court and has been followed by the Commission with court approval ever since in this type of case. See, e.g., *F.M.C. et al. v. Pacific Maritime Association, et al.*, 435 U.S. 40, 53-54 (1978).

In applying the *Svenska* test, other decisions of the Commission and courts have established a number of corollary principles. Thus, it has been held that although proponents must bring forth evidence in support of justification under the *Svenska* test, the scope and depth of proof required for approval varies from case to case depending upon the degree of invasion of the antitrust laws. *Agreement No. 8760-5 - Modification of the West Coast United States & Canada/India, Pakistan, Burma & Ceylon Rate Agreement,* 17 F.M.C. 61, 62 (1973); *Agreement No. 57-96 - Pacific Westbound Conference Extension of Authority for Intermodal Services,* 19 F.M.C. 289, 300 (1975). The Commission has also held that an agreement representing an extension of existing authority rather than a totally new agreement would be held to a less stringent standard of proof. *Agreement No. 57-96,* cited above, 17 F.M.C. at 300. In determining how anticompetitive are the effects of any particular agreement, moreover, the court has recognized that the effects on competition may be more severe under an agreement that is not *per se* unreasonable under the antitrust laws, i.e., that anticompetitive effects are measured by actual impact on transportation, not by theoretical concepts of *per se* unreasonableness under antitrust laws. *See, United States Lines, Inc. v. Federal Maritime Commission,* 584 F.2d 519 (D.C. Cir. 1978). Finally, in a number of cases, the Commission has granted approval of agreements but has limited the term of approval to anything from one year to three or five years for various reasons, e.g., to ensure that a conference will utilize the new intermodal authority or to assess the impact of an agreement when data are not conclusive or there has been insufficient operating experience. See, e.g., the conditional orders of approval in this case, *Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR 437 (one-year term of approval to assess operating results); *Dart Containerline Ltd.,* 21 SRR 605, 609 (1982) (three-year approval of a joint service to give parties an opportunity to conduct operations and demonstrate need beyond that period); *Agreement No. 57-96,* cited above, 19 F.M.C. at 295 (18-month approval of intermodal authority to ensure that conference would utilize it); *Agreement No. 10140-8-Extension of U.S. Gulf/United Kingdom Rate Agree-*

[8] See *Mediterranean Pools Investigation, 9 F.M.C. 264 (1966); Investigation of Passanger Travel Agents,* 10 F.M.C. 7 (1966).

ment, 18 SRR 1563 (1979) reversed and remanded in *United States v. F.M.C.,* 15 SRR 851 (D.C. Cir. 1980) (48-hour rate agreement with intermodal carriers approved for an additional 18 months to facilitate monitoring of proponents' performance and reduce likelihood of abuses); *Atlantic & Gulf/East Coast of South America Conference,* 13 F.M.C. 121 (1969) (conference agreement to file intermodal tariffs approved for 18 months to ensure no blockage of intermodalism by conference); *Agreement No. 10116-1—Extension of Pooling Agreement in U.S. Pacific Coast/Japan Trades,* 21 F.M.C. 775, 782 (1979) (pooling agreement approved for one-year term and then extended *pendente lite* to allow proponents to furnish evidence of need, benefit, or purpose); *American-Flag Common Carrier Charter Agreement,* 21 SRR 189, 190 (1981) (cross-chartering cooperative arrangement approved for five years "to better evaluate their competitive effects in light of actual operating results and current trade conditions"); *Agreement Nos. DC-38 and DC-31-1 Association, Puerto Rico Trades - 1968,* 17 F.M.C. 251, 260-261 (1974) (agreement to establish uniform terminal and accessorial charges and self-policing approved for two-year period and then extended for one year to permit parties to accomplish its purposes); *Agreement No. 10286,* 21 F.M.C. 676 (1979) (pooling agreement approved for three years to develop information showing whether it is effective).

Contentions of the Parties

Both Hearing Counsel and proponents agree that the subject agreements deserve continued approval. The only issue between these parties concerns the recommended term of approval, proponents urging indefinite approval while Hearing Counsel urge a three-year period.

Proponents contend that the agreements provide a "safety-net of stability" in the trades which proponents require in view of outside competition from "controlled" and numerous other carriers who temporarily serve the trade. They argue that the agreements are the only stabilizing element in a politically and economically unstable trade area. They contend that they offer the only regular commercial services which have consistently served the trade over a number of years and that they face not only numerous competing lines but lines which are government-owned or "controlled" and which can compete on the basis of marginal pricing. Proponents point out that they have made substantial investments in the trade amounting to $100 million overall especially in regard to refrigerated equipment and storage facilities which are essential to the businesses of the shippers in this trade. They point out that there have been two general rate increases for one agreement and three for the other since the agreements were expanded to cover rising costs, demonstrating rate stability, that intermodal authority within Central American countries has been implemented, and that there is no effect from Sea-Land's membership in both Agreement No. 10045 and in No. 3868 (the Panama Conference). Because of the fact that trade data from the Census Bureau are not available beyond the first six months of 1981, proponents argue that one cannot determine the impact of the agreements on the cargo shares of the parties at this time. They cite various facts to show that the proponents continue to meet the *Svenska* test, namely, by maintaining continued service with substantial investments, by publishing uniform rates and rate quotations in a joint tariff, by carrying out the only self-policing system under Commission General Order 7 in the trade area, and by enabling Central American exporters to use their services to export major perishable commodities requiring refrigeration so as to earn hard currency which in turn generates American exports to the countries involved.

As to the term of approval, proponents take strong exception to Hearing Counsel's recommended term of three years. Proponents argue that they have demonstrated that their agreements meet the *Svenska* test and that they should not be modified by limiting their term of approval except upon substantial evidence or a substantial likelihood that some provision of their agreements will violate the Act. They point out that the Commission maintains continuing surveillance over all section 15 agreements and can easily institute an investigation seeking to disapprove the agreements under section 15 if they fail to meet the continuing standards of approvability, citing *Agreement No. 9025; Dockage Agreement,* 8 F.M.C. 381, 386 (1965). Proponents contend that there is no evidence of violation or likelihood of violation of the Act if the agreements are approved indefinitely and that the Commission should therefore not modify the agreements by limiting their term of approval.

Hearing Counsel agree that the agreements have shown that they furnish benefits and serve valid regulatory purposes under the *Svenska* standards. They cite the Commission's own findings in *Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR 437, in which the Commission itself found that the agreements provided benefits and served valid purposes in bringing uniformity to the proponents' tariffs and in enabling the parties to combat trade instability which had been demonstrated in the past and which existed potentially in the future. Hearing Counsel expressly acknowledge that "there still exist today the very conditions which prompted the Commission to conclude that the potential for future rate instability existed in the subject trades" and that "indeed, subsequent political and economic turmoil may have exacerbated them." (Opening Brief of Hearing Counsel, pp. 3-4). Hearing Counsel's only major dispute with proponents, as I have noted, concerns the propriety of granting indefinite approval. Hearing Counsel rely upon their expert staff witness's opinion that "pertinent analysis of market share data for the period 1979-1981 may be both inappropriate and premature at this time given the fact that the agreements have been in operation such a very short time." (*Id.*, page 4). Therefore, Hearing Counsel believe that the record as to the effects of the subject agreements is not fully informative and that only tentative conclusions can be drawn from the necessarily incomplete data available. The unavailability of more recent trade data plus the extraordinary political upheaval presently existing in Central America, in Hearing Counsel's opinion, also make it unusually difficult to forecast future conditions. In view of the necessarily limited scope of the record regarding operational data showing the parties' experience since their agreements were expanded in November 1980 and their joint tariffs filed in February 1981, Hearing Counsel believe that the agreements, which are otherwise shown to be beneficial, should continue to enjoy approval but only for a three-year period. Hearing Counsel state that "after expiration of that term, reassessment in light of then prevailing conditions may be appropriate." (*Id.*, p. 5). In response to proponents' contention that the Commission has no basis in fact or in law to limit approval of the agreements, Hearing Counsel cite previous Commission decisions favoring limited terms of approval if supporting evidence itself was limited or if parties to agreements had not had sufficient operational experience under their agreements to show that they were having beneficial effects.[9]

Hearing Counsel explain in greater detail in their reply brief why they believe that a limited three-year term of approval is warranted. Thus, although they fully acknowledge the political and economic instability in the trade region, the probability that certain rates on important commodities are depressed, that tariff uniformity may be beneficial, and that proponents may make their investment decisions on the basis of continued approval of their agreements, they argue strenuously that the present necessarily limited record and limited period of experience under the expanded agreements simply do not justify granting unlimited approval to an essentially rate-fixing agreement. After sufficient time has elapsed, which Hearing Counsel believe to be three years, the Commission will have available a record showing detailed operational experience under the expanded agreements so that a realistic evaluation of the beneficial effects of the agreements may be made. Moreover, at that time, the Commission can see if the present chaotic conditions have continued to disturb the trade. Hearing Counsel refer to the Commission decision in *Mediterranean Pool Investigation,* cited above, 9 F.M.C. at 290, in which the Commission paid particular attention to the question of the existence of adverse trade conditions which would justify approval of an agreement designed to alleviate such conditions and the need for the Commission to have available

[9] In support of this argument to limit the term of approval under such circumstances, Hearing Counsel cite *Canadian-American Working Arrangement et al.,* 16 SRR 733, 737-738 (1976), and *Agreement Nos. DC-38 and DC-38-1 Association, Puerto Rico Trades - 1968,* cited above, 17 F.M.C. 251.

adequate information or data upon which to base an intelligent judgment as to probable future impact of the particular agreement.

What the Term of Approval Should Be

There is no question that the subject agreements deserve continued approval. There is nothing in the record developed in this proceeding which detracts from the findings of the Commission in *Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR 437, when the Commission approved both expanded agreements, with conditions, for a one-year term, effective November 10, 1980. Thus, there still is a history of past rate instability, which although it may have subsided, is still quite able to revive in view of the very substantial competition offered by 16 or so carriers who are not parties to the agreements. The Commission's conclusions in approving the expanded agreements that they "should have a stabilizing effect" and that the agreements represent "a manifestation" of a measure designed to prevent or correct rate instability, a legitimate Shipping Act objective (20 SRR at 439), are still valid today, although the limited record cannot conclusively show that such beneficial effects have resulted in view of the limited operating experience since approval of the expanded agreements. The Commission had also concluded that uniform tariffs would be beneficial but was not convinced that the three-party agreements would solve the problem of multiple rate quotations and methods trade-wide because of the presence of so many outside carriers. (20 SRR at 439). This statement is still true but since the joint tariffs have only been filed in February 1981 and operational data from Census runs to only June 1981, it may be premature to conclude that the agreements will never succeed in attracting additional members or in encouraging outside carriers to publish their own uniform methods of quoting rates and services. This record shows further that the additional benefits and purposes which the Commission found would be produced and served as a result of the expanded agreements, namely, the utilization of needed intermodal inland service within Central America to alleviate the congested port problems there and to meet the needs of Central American shippers for fast-flowing containerized services (20 SRR at 440) are still present a little over one year after approval of the expanded agreements. Because the agreements were expanded from two to three parties with the addition of Sea-Land in November 1980, furthermore, they subscribed to the fully developed self-policing system mandated by the Commission's General Order 7, 46 CFR 528, and have employed a neutral body known as The Adherence Group (T.A.G.) to ensure that the parties adhere to clean practices. This is the only such system in the trades and, in Sea-Land's opinion, has caused a decline in the number of allegations of malpractices.[10] Thus, in addition to the previous benefits found by the Commission, the addition of a full self-policing system must be counted as an important public benefit even if the system applies only to the three carriers who are members of the two agreements. This benefit can be added to the benefits flowing from the new joint tariff and the implementation of inland intermodal authority in the Central American republics which occurred after the expanded agreements were approved.

Having noted that the previous benefits found by the Commission are still present and that several new benefits have followed approval of the expanded agreements, I now address the question of whether there is any evidence in the present record relating to the four specific factors set forth in the Commission's Order of Investigation (p. 3) which would detract from the previous findings that the agreements as expanded are producing benefits and serving valid regulatory purposes. As mentioned above, the Commission wished to consider these four factors together with other evidence when determining whether to grant the agreements continued approval. I find nothing in the present record which would warrant a finding that these benefits and purposes are being offset by harmful consequences.

The four factors deal with the effects of the agreements following approval in November 1980, specifically, on rates and cargo shares, overall rate stability and service, utilization of intermodal authority, and on the existence of an apparently overlapping conference in the Panama trade of which Sea-Land is a member. The latter two factors do not appear on this record to cause any concern whatsoever. Following approval of the expanded agreements, joint tariffs were filed in February 1981 which implement inland intermodal authority within the Central American republics. Thus, there are rates to or from Guatemala City and El Salvador, among other points, which are either inland or have no Caribbean ports, thus requiring inland transportation. Approval of the agreements has therefore in no way stifled the development of the inland services which shippers need and which the Commission found to be warranted. (20 SRR at 440). As to the last factor, *i.e.*, the effect of Sea-land's membership in both Agreement No. 10045 (Panama/Costa Rica) and in Agreement No. 3868 (Panama Confer-

[10] There is no direct evidence that malpractices among the three parties have been rampant, only evidence that allegations have been made and references sent to T.A.G. for appropriate action. However, in view of the substantial volume of outside competition and the declining cargo base and bad year in 1981, the basic elements conducive to malpractices are present. The court and the Commission have recognized that direct evidence of malpractices may not always be available but evidence of allegations combined with underlying trade problems conducive to malpractices may be substantial evidence justifying findings of malpractices which agreements may be approved to correct. See *United States v. F.M.C.*, 15 SRR 927, 934-935 (D.C. Cir. 1980), affirming *Agreement No. 10286, Italy-U.S.A. North Atlantic Pool Agreement*, 21 F.M.C. 676, 679 (1979) (pooling agreement approved for three years to combat malpractices shown by hearsay evidence and evidence of underlying overtonnaging).

ence), this record shows no overlap whatsoever because Sea-Land does not participate in the Panama section of Agreement No. 10045, a previous condition of approval which Sea-Land has met. Nor is there any evidence that Sea-Land's participation in the Panama Conference has any effect on Agreement No. 10045. This leaves the question of the post-approval effects of the expanded agreements on rates, cargo shares, overall rate stability and service. Although the record could not be developed with recent data so as to furnish conclusive answers, the data, limited as they are, and other evidence of record do provide some insights and provide no basis for disapproval of the agreements.

As noted previously, though some rates on certain commodities are considered depressed because of substantial outside competition, there is no evidence of present rate instability or complaints from shippers about rates or services. Rates remained firm at least through the first half of 1981. Furthermore, in the face of all of this outside competition, the parties have been able to institute two general rate increases under Agreement No. 10045 and three under No. 10105 to cover rising costs, the second of these increases, however, merely incorporating a previous fuel surcharge into the base rate structure. There is no evidence of specific losses of cargo to outside competitors because of these general increases but there is evidence that in the event any loss might occur, the particular rate will be re-evaluated. As to effects on service, approval of the expanded agreements has not resulted in curtailment of service. On the contrary, if anything, it has led to uniform intermodal services among the three parties as published in their joint tariffs and has done nothing to encourage the parties to discontinue their investments in the subject trades, which disapproval may do. It is true that the agreements comprise only three carriers out of 20 or so that come and go in these trades. Therefore one cannot expect that the expanded agreements will promptly cure any diaparate rate structures that may exist in the trades. (Cf. Commissioner Teige's concurring opinion in *Conditional Approval of Agreement No. 10045-3*, cited above, 20 SRR at 442 and Commissioner Day's dissent, 20 SRR at 444.) However, as expanded and modified by the Commission, the agreements have led to uniformity in method of rate quotation among the three carriers enjoying significant shares of the carryings in the trade and may, by example, have beneficial effects on outside carriers, possibly even to the extent of persuading them to join the agreements. In any event the failure of the expanded agreements to attract new member carriers or to completely eradicate all differing rate structures published by 16 or so outside carriers does not detract from the other benefits these agreements have produced since approval in November 1980, e.g., the uniform tariff, self-policing system, and uniform intermodal services. Moreover, as more fully discussed below, the experience of the parties under the expanded agreements and under their February 1981 joint tariffs has not been sufficient, in light of the limited trade data available, to come to firm conclusions even if there are at present no signs in this record that outside carriers will be joining the agreements in the near future.[11]

The most difficult question to answer on this record is what has been the effect of the agreements on cargo shares of the parties in the subject trades. There are two reasons for this difficulty. First, the agreements, as modified by the Commission, were approved in November 1980 and the joint tariffs under which the parties were required to operate as one of the conditions of approval were not filed until February 1981. Second, although the agreements have operated under the new tariffs only for over a year now, data showing cargo carryings in the trade were not available from the Census Bureau beyond June 1981, and this data, as noted before, are unadjusted to correlate with Shipping Act common carrier terms. Hence, the record contains only about four months actual historical data covering the life of the new joint tariffs and a little over one half of the previous one-year term of approval granted by the Commission to the expanded agreements, effective November 10, 1980. It is for this reason that Hearing Counsel argue that a firm, conclusive answer to the question as to how the expanded agreements have affected cargo shares cannot be given at this time and, as noted above, why Mr. Adam, the Commission's economist, believes that "any pertinent analysis of market share data for the period 1979-81 may be both inappropriate and premature at this time. . . ." (Adam's testimony, p. 25 n. 14). However, although it is extremely difficult to discern trends after the approval of the expanded agreements, there are some tentative observations that can be made. Thus, it appears that 1981 was a bad year showing a decline in overall trade levels for liner cargo both northbound and southbound and that proponents' percentage shares of the liner trade also declined in 1981 in terms of tonnage. These negative results for 1981 offset the increases that the trade and proponents had enjoyed in 1980 over 1979. A detailed narrative of the various trade analyses performed by Mr. Adam showing cargo carryings overall, proponents' shares in terms of tonnages and cargo value, etc., is provided in my numbered findings of facts above, paragraphs 20 through 28. It is not necessary to repeat the many detailed analyses shown by Mr. Adam and discussed in those paragraphs. However,

[11] It should be noted, however, that despite the presence of the two expanded agreements, two previous member lines have left the trades, Armasal and Uiterwyk Lines. Armasal went bankrupt and Uiterwyk departed, presumably for more lucrative trades. It cannot be established on this record, therefore, that the agreements will preserve shaky carriers. Nor for that matter can it be conclusively argued that the three member carriers have made their subtantial investments in the trade only because of the presence of the two agreements or that they would not have provided independent intermodal services absent approval of the agreements. What the carriers would do to their investments and services if the agreements were to be disapproved is a matter open to conjecture although they strongly suggest that approval of the agreements has been a motivating factor in their continued presence in the trade.

among the many observations are the following: that in the predominant (over two to one) southbound trade, total tonnages fell to less than one million tons after rising from 1.3 million in 1979 and 1.4 million in 1980; that proponents' share of this tonnage dropped off to 39 percent in 1981 after 37 percent in 1979 and 49 percent in 1980; that in terms of value, similarly, total exports (southbound) dropped to $926 million in 1981 after rising to $1.4 billion in 1979 and $1.8 billion in 1980; that proponents' shares of these exports also declined to 70 percent in 1981 after rising from 68 percent in 1979 to 75 percent in 1980; that proponents' shares in terms of value to Panama and Costa Rica also declined in 1981 to 54 percent and 74 percent respectively but rose to Guatemala, Honduras, and El Salvador to a very impressive range of 74-83 percent in 1981; that on the northbound trade (imports), total overall tonnages declined sharply to only 275,000 tons in 1981 from 559-568,000 tons in 1979-1980; that proponents' shares of import cargo in tons dropped to only 52 percent in 1981 from 68 percent in 1979 and 66 percent in 1980; that proponents' shares of imports from Panama rose to 66 percent in 1981 but fell sharply from Guatemala, Honduras, and El Salvador, dropping to only 27 percent in 1981 for El Salvador; that, by value, total imports dropped to only $414 million in 1981 from a level of about $1 billion in 1979-1980; that unlike tonnages, proponents' percentages shares by value of imports remained fairly stable in a 65-68 percentage range for the three years 1979-81; that proponents' shares of imports in value from Panama and Costa Rica remained at very high levels, 89 and 83 percent in 1981, respectively; that their shares also remained stable from Guatemala (65-68 percent) for 1979-81; that their shares, however, dropped from Honduras and El Salvador in 1981 (63 percent and 37 percent respectively); that major commodities imported declined in both value and tonnages, dropping by 59-64 percent in 1981 from the preceding year; that proponents' shares of these commodities also dropped in tonnage terms to 60 percent for Agreement No. 10045 and to 42 percent for Agreement No. 10105 in 1981; that proponents' shares of this cargo in value terms rose to 85 percent for No. 10045 in 1981 and stabilized at levels of 57-59 percent under No. 10105 in the past two years; that combined totals for the major import commodities moving under each of the agreements declined approximately 60 percent in value as well as in tonnages in 1981; that proponents' shares for these commodities declined to 47 percent of tonnages in 1981 but remained stable at about 64 percent in value terms; that combined totals of major exports (southbound) declined in 1981 by 13 percent in tonnages and by 36 percent in value compared to 1980; that proponents' shares of major exported commodities dropped to 19 percent by volume in 1981 from 22 percent the preceding year but that in value terms their share rose to 45 percent of these commodities in 1981.

It is difficult to discern patterns and trends from all of the above data especially since one analysis from time to time seeks to contradict another. Moreover, as mentioned, the limited period of time covered by the data and their unadjusted nature coupled with the unstable political climate in 1981 render predictions rather shaky and tentative. Nevertheless Mr. Adam concludes that while there has been little signicant change in proponents' overall market share of the subject trades during 1979-81, a drop-off in their shares of the southbound and northbound trades is apparent between 1980 and 1981 in both value and tonnage terms. This drop-off, moreover, reflects a corresponding decline in total trade levels, leaving the proponents with "declining shares of a smaller trade pie." (Adam, p. 36). He also concludes that there are some exceptions to the general decline in total trade and proponents' shares, for example, an increase in proponents' shares in exports in 1981 in terms of value of shipments under Agreement No. 10105 and a more impressive share of exports in terms of value than in tons. As for imports, he notes the same decline in 1981 for the total trade and for proponents' shares, although based on value of imports, proponents' shares seem more stable for the period 1979-81. As for major imported commodities, Mr. Adam notes the usual decline in 1981 but also a stable or rising percentage share for proponents during 1980-81 in terms of value. He sees a possible trend for proponents to concentrate on high-value imports such as beef and coffee rather than lower-value items such as bananas. Exported major commodities show usual declines in 1981 as do the proponents' shares. However, in terms of value, proponents' shares increased significantly from 1979 to 1981.

Hearing Counsel, although recognizing the difficulty of drawing firm conclusions from limited data, note a decline in overall trade by tonnages southbound in 1981 after rising in 1980 over 1979 and a corresponding decline in proponents' shares although by value, Hearing Counsel note a rise slightly under Agreement No. 10105 in exports (southbound). Thus, there is a rise-and-fall pattern which overall trade and proponents' percentage shares seem to follow in tonnages and sometime by value. As to imports (northbound), Hearing Counsel note a steady decline overall by value during 1979-81 and by proponents' percentage shares. Generally, then, Hearing Counsel reason that if proponents' shares rise when trade rises and fall when trade falls, "it may be reasonable to expect the Agreements' hoped-for stabilizing effect on the trade to increase when trade levels rise" but if trade fell, so too would the agreements' effect fall. (Opening Brief of Hearing Counsel, pp. 6-7).

I agree with Hearing Counsel that only limited and tentative conclusions can be drawn from the necessarily limited and unadjusted Census data presently available and agree with proponents that the Census data are unadjusted and limited in time and must therefore be treated with caution. However, although it may be premature to make predictions or draw firm conclusions from early tentative trends, nothing in the preliminary data offsets evidence that the agreements have benefits and serve purposes apart from the effects they are having on the trades concerning cargo carryings and shares, namely, by causing uniform tariffs with simplified rate and service quotations, by implementing uniform intermodal services, and by establishing a full self-policing system under General Order 7. Although one may argue that the individual member lines of the agreements could furnish intermodal services and simplify their individual tariffs without the need for the agreements, only by virtue of approval of the expanded agreements could there be a single uniform tariff, a single uniform type of intermodal rate quotation, and a self-policing system complete with a neutral body as enforcer. As the Commission stated in its Order of Investigation (p. 3), it would consider the merits of continued approvability of the subject agreements not merely by reference to factors such as cargo shares and effects on the trade but by other matters as well, and as both parties assert, correctly in my opinion, separate benefits do flow from continuation of these expanded agreements. Since this is so, I see no basis to disapprove either agreement, certainly not on the tentative, inconclusive data and trends shown by unadjusted Census data which cover only the first six months of 1981, i.e., only about four months after the filing of proponents' joint tariffs in February 1981. With demonstrated benefits and with no firm, probative evidence of harmful trends developing in the trades as well as no firm evidence that the agreements will affect or have affected the numerous outside competitors and no protests from outside carriers or complaints from shippers, there is no reason to deny proponents continued approval of their agreements. The only remaining question, however, is how long should the term of approval run. Although this question may seem difficult to answer because proponents' arguments favoring approval without time limits have some appeal, in the last analysis there is simply too much Commission precedent in support of limiting approval to three years so as to allow more reliable data to accumulate consistent with the Commission's manifest desire to "assess the impact the expanded agreement has had on the trade." (*Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR at 439.)

As noted earlier, Hearing Counsel contend that the limited data presently available do not support a grant of indefinite approval of the subject agreements because trends and effects cannot be clearly discerned at this time or relied upon with assurance. In such cases Hearing Counsel note that the Commission has granted only limited terms of approval and Hearing Counsel therefore urge a three-year term to enable the Commission to develop further evidence which will support an intelligent evaluation of the agreements' effects on the trades. Proponents note an absence of any evidence which would support a finding that the subject agreements violate any provision of the Shipping Act and, without such evidence, argue that the Commission has no basis in law or fact to modify the agreements by imposing time limits. As I have discussed earlier, however, the Commission has quite a long history of modifying agreements by limiting them to specified terms ranging from one to five years and very often does this when the evidence is not yet available by which the beneficial effects of agreements can be determined with assurance or when parties to agreements have not yet had an opportunity to demonstrate that their agreements will actually produce the desired beneficial effects. In some cases the Commission has even gone so far as to state that it has a "policy" of imposing time limitations on approval of certain types of agreements, e.g., intermodal agreements or agreements in which evidence of actual operating results and current trade conditions is not yet available. See, e.g., *Agreement No. 57-96,* cited above, 19 F.M.C. at 305-306 ("Hearing Counsel's proposal [to limit term to 18 months] is consistent with Commission policy to avoid granting indefinite and unlimited approval . . . in the intermodal field . . ." and limited approval will "enable the Commission to pinpoint any problems which may develop with the implementation of Agreement No. 57-96."); *American-Flag Common Carrier Charter Agreement,* cited above, 21 SRR at 190 ("The Commission has a policy of requiring most cooperative working arrangements to terminate on a specific date in order to better evaluate their competitive effects in light of actual operating results and current trade conditions."); *Agreement No. 10286, Italy-U.S.A. North Atlantic Pool Agreement,* cited above, 21 F.M.C. at 680 ("A three year period will allow the parties sufficient time to begin pool operations and to develop information which may establish its predicted efficacy."); *Agreement Nos. DC-38 and DC 38-1 Association, Puerto Rico Trades,* cited above, 17 F.M.C. at 260 ("The additional one-year period [added to a previous two-year period of approval], we believe, is sufficient to allow PROSA to take whatever steps are necessary to refine its demurrage collection system . . . and otherwise accomplish the objectives of the Agreement.")

The above cases have similarities to those in the present case. Thus, like the pooling agreement in *Agreement No. 10286,* neither proponents nor the Commission's staff have been able to develop sufficient data to establish the agreements' predicted efficacy. Like the chartering agreement in *Common Carrier Charter Agreement,* there is a need for actual operating results and updated evidence of trade conditions so that the Commission can "better evaluate their competitive effects." Like the agreement in *Agreement No. DC-38,* there has not been sufficient time to determine whether all of the predicted benefits of the agreement will result. Of course, proponents contend that since there is no evidence of harm or violations of law which have resulted from approval of the expanded agreements, there is no basis to limit the term of approvability, which proponents believe to be tantamount to a modification of their agreement requiring specific findings of harm or violations of law. However appealing this argument seems to be, unfortunately for proponents the Commission has not agreed with it when the Commission believes that parties to agreements have not yet been able to demonstrate that their predicted benefits will result or have not had sufficient time to operate. Thus, in *Agreement Nos. DC-38 and DC-38-1, etc.,* cited above, the presiding judge had refused to impose any time limitation on the subject agreement which had previously been approved for a two-year trial period on the same ground argued by proponents here, namely, that the agreement had shown that it produced benefits and served needs but that if circumstances changed, the Commission could at any time cancel or modify the agreement under the procedures established by section 15 of the Act. (17 F.M.C. at 261). As noted above, however, the Commission added another year's approval to permit the parties to accomplish the objectives of the agreement, among other reasons because the parties had not sufficiently demonstrated that the agreement was operating properly or that conditions in the trade warranted unconditional, indefinite approval (17 F.M.C. at 260-261), notwithstanding the fact that the Commission found that the agreement was "required by a serious transportation need and is necessary to secure important public benefits." (17 F.M.C. at 260).

In the present case proponents have shown and Hearing Counsel do not dispute that there have been benefits flowing from the expanded agreements, namely, the uniform tariff, uniform rate quotations and implementation of uniform intermodal authority, and the establishment of a full self-policing system. While other asserted benefits, such as the continued heavy investment in and commitment to the trade and beneficial effects on curbing rate instability are more conjectural or have not yet been shown by operating results in the trades, there is no denying the former, proven benefits and there is no offsetting evidence of harm or violation of law. Therefore, as did the Commission in *Agreement Nos. DC-38 and DC-38-1,* cited above, and in so many other cases also cited above, I conclude that the agreements should be approved for a term of three years from the date of service of the Commission's final action in this proceeding if the Commission finalizes, adopts, or otherwise agrees with my conclusion.[12] Assuming that such Commission

[12] Although Hearing Counsel urge a three-year term of approval, they do not specify when this term is to commence. I have therefore followed the Commission's example of extending approval from the date of the Commission's decision (allowing for the parties to comply with certain conditions) as was done with respect to the present agreements. (See *Conditional Approval of Agreement No. 10045-3,* cited above, 20 SRR 437.)

action would occur some time in September 1982, this would extend the lives of the agreements until September 1985, and would enable the Commission's staff to obtain trade data from Census covering at least the full four year period 1981-1984 despite the six months-or-more time lag which seems to delay the availability of Census data. Such a time period, when tacked onto the 1979-1980 period presently shown in this record, will provide a six-year period in which the Commission's staff can seek to discern trends for the Commission's use in determining the merits of continued approvability beyond that time.

ULTIMATE CONCLUSIONS

The two subject 48-hour rate agreements which had been expanded and approved by the Commission prior to the institution of this proceeding for a one-year term and then further approved *pendente lite*, deserve continued approval for a term of three years following the Commission's final decision in this case. The proceeding was begun in order to permit the parties to develop further evidence concerning the effects of the agreements on the subject trades because sufficient time had not yet elapsed under the agreements to discern such effects. The Commission also expressed interest in determining if intermodal authority had been utilized and whether the existence of an overlapping conference in Panama had any effects. However, these factors were only to be considered among others when determining the merits of continuing approval of the agreements.

The record developed by the parties indicates that benefits have flowed from approval of the expanded agreements in November 1980, such as the publication of a uniform tariff containing uniform methods of rate quotations, the implementation of joint intermodal authority under such tariffs, and the establishment of a full self-policing system under the Commission's General Order. Furthermore, there has been no evidence developed showing harm to shippers or other carriers. Although the record shows that the joint intermodal authority has been utilized and that there is no adverse effect because of Sea-Land's membership in one of the agreements as well as in the separate Panama Conference, the record concerning impact of the agreements on rates, cargo shares, and overall rate stability is less conclusive. There appears to be some additional rate stability as shown by several general rate increases which the parties to the agreements have been able to institute to cover rising costs. However, because of the limited period of time since the expanded agreements have been operating under their joint tariff and because of the unavailability of trade data published by the Census Bureau more recent than the first six months of 1981, and certain infirmities in the Census data, it is too early to come to any firm conclusions or to discern trends in the trade relevant to the issue of continued approvability. However, the data appear to indicate that 1981 was a bad year in the trade overall and that the parties' shares of the trade in terms of tonnages declined in that year to only 39 percent in the predominant export, southbound trade and 52 percent in the import, northbound trade. Their shares declined in value as well, to 70 percent of exports, while remaining fairly stable for imports at 65-68 percent, although there are some exceptions to this general picture. It is therefore still premature to attempt to assess the impact of the two agreements in terms of cargo shares or overall rate stability. A more realistic appraisal should await development of several years operating experience especially since only three carriers out of the 20 or so operating in the trade area involved are parties to the two agreements.

It should be noted that the Commission's findings made in September 1980, when the Commission first approved the expanded agreements, that there was a potential for rate instability caused by the presence of so many outside carriers and that the subject agreements "should have a stabilizing effect" are still true today and may possibly be even more valid in view of current upheaval in the region. In numerous previous agreements, furthermore, the Commission has granted limited terms of approval, frequently three years, to allow parties to show by actual experience that their agreements will produce the desired beneficial effects when experience under the agreements has not been sufficiently lengthy. In this case such a course of action is even more warranted when one considers that the critical data necessary to assess trade-wide impacts come from the Census Bureau and through no fault of the parties to the agreement, are not available for more recent periods of time, and when one considers that, limited though the data may be, they show no harmful trends developing in terms of competitive effects on outside carriers.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-63

WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS, NORTH ATLANTIC RANGE PORTS CONFERENCE (TARIFF RULE NO. 26)

Conference tariff rule filed to replace a rule found violative of Shipping Act sections 17 and 18(b)(1) is cancelled for noncompliance with the Commission's earlier order in this proceeding.

The practice of withholding cargo delivery from a *consignee* until a private penalty is paid to the ocean carrier is an unreasonable practice within the meaning of Shipping Act section 17 when liability for the penalty attaches upon the preparation and submission of incorrect shipping documents by the *shipper.*

Stanley O. Sher and John R. Attanasio for the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference.

John Robert Ewers, Joseph B. Slunt, and *Deana E. Rose* for the Bureau of Hearings and Field Operations.

SECOND REPORT AND ORDER

August 3, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman;* THOMAS F. MOAKLEY, *Vice Chairman;* JAMES JOSEPH CAREY, RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*)

This is a Commission-instituted proceeding directed at tariff provisions employed by the member lines of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference (WINAC or Respondents) which assess a penalty charge for incorrect freight descriptions in the amount of twice the difference in freight due. These provisions were originally contained in WINAC Tariff Rule 26, which was cancelled by the Commission's August 21, 1981, Order.[1] Revised provisions were republished by WINAC as Tariff Rule 27 and filed with the Commission on September 30, 1981. A further show cause order was issued against Rule 27 on December 30, 1981.

Tariff Rule 27 states that the "cargo interests" are liable for penalty charges, but creates a possessory cargo lien to collect these charges

[1] WINAC Tariff Rule 26, 24 F.M.C. 121 (1981), *appeal pending* D.C. Cir. No. 81-2066. The Commission found former Rule 26 deficient for its indefiniteness and for permitting penalties to be collected from persons other than those actually responsible for the cargo misdescription (*i.e.,* "the party at fault"). WINAC's enforcement of a cargo lien by means of a private sale was also found unreasonable. Rule 27 now provides for a public sale of withheld cargo and this matter is no longer in controversy.

only from the consignee. Use of the lien is limited, however, to situations where the carrier has first attempted to collect the penalty from the shipper and has "reasonable ground to believe the consignee is at fault." The point presently at issue is whether Rule 27 permits the ocean carrier to withhold cargo delivery from a consignee which has not prepared or submitted incorrect shipping documents unless the consignee assumes responsibility for penalty charges, and, if so, whether this practice is consistent with the August 21, 1981 Order and section 17 of the Shipping Act, 1916 (46 U.S.C. § 816).[2]

Positions of the Parties

A. *Respondents*

The member lines of the WINAC Conference contend that Rule 27 fully protects innocent U.S. consignees because: (1) the carrier must attempt to collect from the shipper before charging the consignee; [3] (2) the carrier must possess "reasonable grounds" to believe the consignee is at fault; [4] and (3) the consignee may secure release of the cargo by posting a bond if the consignee believes itself to be innocent.[5]

Respondents also claim that Rule 26/27 has caused no unfairness or injustice in actual practice, because cargo sales under the lien provisions and reparations claims seeking the return of incorrectly assessed penalties have been infrequent.

Respondents argue that the collection of penalty charges is a matter of private contract which, unlike the collection of government imposed civil penalties, is not subject to due process standards concerning the determination of "guilt." Alternatively, Respondents claim that: (1) Rule 27 is "basically fair" in the due process of law sense; (2) the imposition of an absolute duty of accuracy would be unreasonable; and

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[2] The second paragraph of section 17 provides that:

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

[3] Respondents state that the consignee will be charged if the shipper "refuses to pay." February 18, 1982 Memorandum at 12.

[4] Respondents state that they have assessed penalties against a consignee only when there was "some evidence" of collusion between the consignor and consignee. February 18, 1982 Memorandum at 13. The type of evidence involved is not described, but Conference Secretary Giovanni Ravera states that he knows of no case in which a "forwarder refused to pay a penalty charge except where the forwarder claimed to have had instructions from the receiver." Affidavit of February 15, 1982 at 4; Affidavit of November 14, 1980 at 13. Thus, it appears that the evidence of collusion customarily relied upon has been the forwarder's (or shipper's) statement that the U.S. consignee insisted upon the use of an incorrect cargo description.

[5] Although the procedures which allegedly protect consignees were not stated in WINAC's tariff Rule 27 took effect on September 30, 1981, the Respondents maintain that these procedures were nonetheless available under Rule 26 as well. February 18, 1982 Memorandum at 12-15.

(3) injured consignees may obtain reparations in an FMC complaint proceeding.[6]

Respondents further contend that: (1) the Commission found their penalty charges to be lawful in principle; (2) commercial law recognizes the use of a possessory cargo lien to collect any lawful charges due an ocean carrier; [7] and (3) a consignee may be assessed certain charges without regard to whether the consignee is guilty of misconduct.[8] It would allegedly be unfair to deny the Respondents a cargo lien covering penalty charges because a lien is the only effective means of collecting such charges, and a direct collection procedure would jeopardize Respondents' ongoing relationship with European shippers. Respondents therefore assert that the option of posting a bond to secure cargo delivery provides a reasonable balance between carrier and consignee interests, especially because Respondents believe a consignee is involved in *all* instances where *freight collect* shipments are misdescribed.[9]

B. *Hearing Counsel*

The Bureau of Hearings and Field Operations (Hearing Counsel) believes Rule 27 complies with the August 21, 1981, Order in all respects, and states that Rule 27

> . . . provides a reasonable basis for determining the party responsible for misdescriptions and for protecting the interests of the "innocent consignee"

Hearing Counsel also argues that Respondents' collection of private penalty charges from consignees for misdescriptions performed by shippers—in circumstances where the carrier "reasonably believes" the consignee was attempting to obtain transportation at less than tariff rates—simply reflects the carrier's statutory duty to make diligent efforts to apply its tariff correctly and is a reasonable method of overcoming certain obstacles imposed by Italian customs laws to inspecting cargo at the port of loading.[10]

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[6] Respondents also state that the need for absolute accuracy in determining when a consignee is "at fault" described in the Commission's "Further Order to Show Cause" is not specifically required by the August 21, 1981, Order.

[7] *E.g., The Eddy,* 72 U.S. 481 (1967). The courts have upheld the use of a cargo lien to collect misdescription penalties. *North-German Lloyd v. Elting.,* 96 F.2d 48 (2d Cir. 1938).

[8] Respondents refer to *Louisville & Nashville R.R. Co. v. Central Iron Co.,* 265 U.S. 60 (1924), a case involving a consignee's liability for freight undercharges on freight prepaid shipments.

[9] February 15, 1982 Affidavit at 3-4. Respondents state that 80% of their cargo moves freight collect, but offer no evidence supporting their claim of consignee involvement in the 149 misdescriptions discovered in 1979, beyond the general observation that the consignee benefits from any reduction in freight charges on freight collect shipments.

[10] This proposition is accompanied by citations to *United States v. Sea-Land Service, Inc.,* 424 F.Supp. 1008, 1011 (D.N.J. 1977), *appeal dismissed,* 577 F.2d 730 (3d Cir. 1978), *cert. den.* 439 U.S. 1072 (1979); *Prince Line v. American Paper Exports,* 55 F.2d 1053 (2d Cir. 1932); *Rates from U.S. to Philippines,* 2 U.S.M.C. 535, 542 (1941); *Ford Co. v. M.C.R.R. Co.,* 19 I.C.C. 507, 511 (1910).

Discussion and Conclusion

A major source of confusion in this proceeding to date has been the Respondents' ambiguous use of the phrase "party at fault." At one point, Respondents agreed with Hearing Counsel to amend former Rule 26 so that penalties would be assessed only against:

> . . . the party responsible for the misdescription or error ("Party at Fault").[11]

The Commission's August 21, 1981, Order erroneously stated that the above *proposed* language was included in the February 12, 1981, version of Rule 26.[12]

Respondents do not claim that Rule 27 limits the collection of penalties from consignees which are "at fault," but merely argue that the new rule reasonably balances the competing interests involved. Accordingly, the Commission concludes that Rule 27 is inconsistent with the August 21, 1981, Order, and with sections 17 and 18(b)(1) of the Shipping Act, 1916, by making "the cargo interests" rather than "the party at fault" liable for penalties; by permitting the carrier to withhold cargo delivery unless the consignee pays penalties for misdescriptions over which it may not have any control; and for not revealing that penalties are only assessed when cargo misdescriptions are discovered after the vessel sails.

Respondents largely reargue points addressed in the August 21, 1981, Order and have still failed to demonstrate that cargo misdescription conspiracies between U.S. consignees and European shippers are commonplace on freight collect shipments. The record contains no specific evidence demonstrating that even one U.S. consignee has conspired with a European shipper to misdescribe cargo.

Respondents' claim that *all* freight collect consignees are guilty of conspiracy in misdescription cases has already been rejected by the Commission. *See* 24 F.M.C. at 124-125. Although the consignee may benefit financially from any undetected undercharges resulting from cargo misdescriptions performed by the shipper, this benefit alone cannot support the conclusion that a conspiracy exists. Consignees may benefit from inadvertent clerical errors as well as intentional misdescriptions of shippers.[13] In addition to a showing of benefit to the

[11] *See* December 31, 1980 Memorandum of Hearing Counsel at 3-4. Respondents ignored this representation in drafting Rule 27, however, which refers more broadly to circumstances where the "consignee is at fault."

[12] The August 21, 1981, Order held that carrier-imposed penalties may be asserted "only against the parties at fault - either ultimately or in the first instance through the use of a cargo lien device . . . ." 24 F.M.C. at 129.

[13] Even if one accepted Respondents' assertion that all misdescriptions in freight collect situations are the result of a conspiracy, there would be no justification for Rule 27's imposition of a cargo lien against the consignee on freight prepaid shipments.

consignee, it is necessary, at minimum, to show that the misdescription was willful, and that the consignee had knowledge of the misdescription and condoned it. Absent *prima facie* evidence of these elements, it is unreasonable for the conference to shift the burden to the consignee to obtain a bond or pursue a reparation action, or both, in order to prove its innocence.

The "reasonable belief" requirement added by Rule 27 is, in light of indications the Respondents will consider the consignee to be "at fault" whenever the shipper refuses to cooperate, an inadequate source of protection for the consignee.

In any case where a conspiracy did exist, both the shipper and the consignee would clearly violate section 16, Initial Paragraph of the Shipping Act, 1916 (46 U.S.C. § 815), a statute which imposes civil penalties for *knowingly* obtaining, or attempting to obtain, transportation at less than tariff rates. Intentional misdescriptions of this nature would be more effectively deterred if the carrier furnished reliable evidence of collusion between shipper and consignee to the Commission for prosecution than by randomly collecting private penalties from some consignees and not others.[14] Reliance on the enforcement scheme established by the Shipping Act adequately protects Respondents' interests because each misdescribed container they discover produces additional freight revenues and the verification charge provided by Rule 27.[15]

Respondents' claim that they actually administer their penalty system in a more flexible, presumably fairer, fashion than is revealed by the language of Rule 27 merely illustrates noncompliance with section 18(b)(1). The Conference Secretary's affidavits indicate that when a carrier discovers a misdeclaration in Europe, the error is simply corrected after consultation with the shipper and penalties are assessed only when the discrepancy is detected *after the vessel sails.*[16] This

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[14] The record does not support a finding that the Respondents' penalty system effectively curtails malpractices in the Italian trade. *See* November 14, 1980 Affidavit at 2-3. *See also United States v. Federal Maritime Commission,* 655 F.2d 247 (D.C. Cir. 1980), regarding the evidence used to justify Agreement No. 10286. Because the Commission lacks personal jurisdiction over European shippers and forwarders without a physical presence in the United States, civil penalty enforcement in conspiracy cases would be concentrated against U.S. consignees against whom there is hard evidence of intentional misconduct. This type of enforcement should minimize the strain on Respondents' ongoing commercial dealings with European entities, the fear of which now leads them to forego the collection of penalties for misdescriptions discovered prior to vessel sailing. Commission enforcement should also be more effective in resolving any problem of *consignee* recidivism which may exist. It may not deter *shipper* recidivism, but neither does the essentially voluntary penalty collection method Rule 27 employs in the case of shippers. If Rule 27 and its predecessors have actually deterred shipper misconduct, such deterrence has only been an indirect result of the pressure placed upon consignees by the cargo lien device. Direct enforcement efforts (*e.g.,* legal action) are apparently not taken against shippers.

[15] The verification charge is intended to recover the cost of inspecting a typical container and is set at $100 per container plus $25 per ton if it is necessary to unpack the container.

[16] *See* November 14, 1980 Affidavit at 9 concerning the Respondents' practice of not imposing penalties against the shipper if the error is discovered prior to sailing.

important fact is not revealed by Rule 27 at all and further indicates that Respondents' use of a cargo lien to collect penalties places the economic burden of misdescription enforcement on U.S. consignees. A tariff provision may not impose liability for misdescription penalties while leaving the type of misdescription and the persons against whom the penalty will be collected to the discretion of the ocean carrier. Such details must be clearly stated in the tariff.

THEREFORE, IT IS ORDERED, That for the reasons stated above and in the Commission's previous orders in this proceeding, Rule 27 of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference Tariff FMC No. 3 is cancelled, such cancellation to take place 30 days from the service date of this Order;

IT IS FURTHER ORDERED, That, effective 30 days from the service date of this Order, the member lines of said Conference shall cease and desist from publishing tariff matter purporting to authorize or otherwise engaging in activities which:

(1) impose private carrier-imposed penalties against consignees on the basis of a presumption that consignees which benefit from a misdescription are parties to a conspiracy to misdescribe cargo;

(2) fail to notify shippers exactly when or where cargo tendered for shipment must be verified to result in the assessment of private, carrier-imposed penalties; or

(3) impose a cargo lien to collect private, carrier-imposed penalties against consignees.

and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

[GENERAL ORDERS 13 AND 38; DOCKET NO. 81-51]

PARTS 531 AND 536 - TIME LIMIT FOR FILING OF OVERCHARGE CLAIMS

August 5, 1982

ACTION: Final Rule

SUMMARY: This amends the Commission's tariff filing requirements to prohibit carriers from imposing certain time limits on shippers' overcharge claims filed with the carriers. The final rule proscribes limits on claims to a period of less than two years after accrual of the cause of action. The two-year period is intended to coincide with the period prescribed in section 22 of the Shipping Act, 1916 for reparations awarded for injuries from violations of the Act. The final rule also prohibits tariff provisions requiring that overcharge claims based on alleged errors in weight, measurement, or description of cargo be filed with the carrier before the cargo leaves the carrier's custody. The effect of the amendment will be to prevent unnecessar administrative proceedings where there is no dispute among the parties, to avoid the unfair and unreasonable burdens imposed on shippers as a result of such rules; and to ensure that violations of section 18(b)(3) of the Shipping Act, 1916 do not go unredressed because of limitations in carriers' tariffs.

DATE: Effective November 8, 1982

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by Notice of Proposed Rulemaking published in the *Federal Register* on August 28, 1981 (46 F.R. 43472) to amend the Commission's tariff filing regulations to prohibit carriers from barring shippers' filing of overcharge claims with the carriers less than two years after accrual of the cause of action. The amendment was intended to obviate unnecessary administrative proceedings before this agency and to further various objectives of the Shipping Act, 1916, *i.e.,* the section 14 Fourth (46 U.S.C. § 812) proscription of unfair treatment of shippers in the adjustment and settlement of claims; the section 15 (46 U.S.C. § 814) requirement that conferences adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints; and the prevention of uncorrected violations by carriers of section 18(b)(3)'s (46 U.S.C. § 817) prohibition against freight overcharges.

Thirty-five comments to the proposed rule have been received.[1] Of the 23 responses from shippers, shipper organizations and an attorney, all but one expressed full and unqualified support for the proposed rule. Of the twelve responses from carriers and conferences, nine were in opposition to the proposed rule and three were partially supportive.

Positions of the Parties

The shippers and parties representing shipper interests generally submitted brief comments of full support for the proposed rule, citing the reasons set forth in the Notice: avoidance of unnecessary administrative proceedings; preventing would-be claimants from becoming discouraged and letting violations go uncorrected; conformity with the two-year statute of limitations in the Shipping Act, 1916; and correction of unfair or unreasonable limitations which conflict with provisions in the Shipping Act.

[1] Parties filing comments were: Ocean Freight Consultants, Inc.; Emerson Electric Co.; Transportation Committee of the Rubber Manufacturers Association; The National Industrial Traffic League; Australia-Eastern U.S.A. Shipping Conference, The "8900" Lines Agreement, Greece/U.S. Atlantic Agreement, Iberian/U.S. North Atlantic Westbound Freight Conference, Italy, South France, South Spain, Portugal/U.S. Gulf and the Island of Puerto Rico (Med-Gulf) Conference, Marseilles North Atlantic U.S.A. Freight Conference, Mediterranean-North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, U.S. Atlantic & Gulf/Australia-New Zealand Conference, U.S. North Atlantic Spain Rate Agreement, U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement, and the West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC); Pacific Westbound Conference, Pacific-Straits Conference, Pacific/Indonesian Conference and Malaysia-Pacific Rate Agreement; United States Atlantic & Gulf-Haiti Conference, United States Atlantic & Gulf-Jamaica Conference, and Southeastern Caribbean Conference, of the Associated Latin American Freight Conferences; Atlantic & Gulf-West Coast of South America Conference and East Coast Colombia Conference, of the Associated Latin American Freight Conferences; Japan/Korea-Atlantic and Gulf Freight Conference, Japan-Puerto Rico & Virgin Islands Freight Conference, New York Freight Bureau, Philippines North America Conference, Thailand Pacific Freight Conference, Thailand-U.S. Atlantic & Gulf Conference, Trans-Pacific Freight Conference of Japan/Korea, Trans-Pacific Freight Conference (Hong Kong) and Agreement Nos. 10107 and 10108; the Far East Conference and Inter-American Freight Conference; the Motor Vehicle Manufacturers Association; the Latin America Pacific Coast Steamship Conference and Pacific Coast River Plate Brazil Conference; E. I. du Pont de Nemours & Company; The Society of the Plastics Industry, Inc.; Gulf United Kingdom Conference, Gulf European Freight Association, Continental/U.S. Gulf Freight Association, U.K./U.S.A. Gulf Westbound Rate Agreement (the "Gulf-Europe Carrier Associations"); United States Lines, Inc.; Sea-Land Service, Inc.; American West African Freight Conference; FMC Corporation; Merck Chemical Manufacturing Division; Uniroyal, Inc.; Hooker International Division; Pacific Coast European Conference, North Europe-U.S. Pacific Freight Conference, and Pacific/Australia-New Zealand Conference; Monsanto Company; Traffic Service Bureau, Inc.; CPC International Inc.; Caterpillar Tractor Co.; William Levenstein, Esq.; Joy Manufacturing Co.; Singer Products Co., Inc.; Johnson & Johnson International; Grain Processing Corporation; Exxon Chemical Supply Company, Inc.; Union Carbide Corporation; and The Shippers National Freight Claim Council, Inc.

Additional comments included that abolition of the six-month rule was necessary because audits - both those performed internally and those contracted out to professional auditors - are time-consuming undertakings which often cannot be completed within the six-month period provided in tariffs. One commentator, CPC International, Inc., alleged that the six-month rule rewards carriers who purposely "drag their feet" in providing information which may give rise to overcharge claims. Another shipper commentator, Emerson Electric Co., requested that the Commission go further in its rules by requiring that the carrier acknowledge receipt of overcharge claims within ten days and dispose of the claims within an additional 120 days.

Emerson also emphasized its opposition to tariff rules requiring that errors in weight or measurement be brought to the carrier's attention before the cargo leaves the carrier's custody. Emerson argues that these types of claims are easily settled between shippers and carriers because they generally consist of computation errors and are easily supported by export packing lists or other data, and that as a practical matter, inland shippers in particular cannot comply with this tariff rule.

Caterpillar Tractor Co., although supporting a proscription of the six-month rule, favors the weight/measurement tariff restrictions, arguing that they deter rebating and encourage shippers to provide accurate weight/measurement data.

Carriers and conferences opposing the proposed rule generally take note of the Commission's previous endeavors in this area, none of which resulted in the complete proscription of the six-month rule. They argue that there is no reason for the Commission to be trying again; that the tariff rules are reasonable, fair, and nondiscriminatory; and that they do not violate any provisions of the Shipping Act. A few carrier commentators argue that the Commission is without authority or jurisdiction to promulgate the proposed rule in the absence of evidentiary findings of Shipping Act violations. Other points made by some carrier interests include that the six-month rule prevents rebating because it avoids informal, unsupervised settlement of claims; that abolition of the six-month rule will impose administrative recordkeeping burdens on carriers; that the Commission's policy of awarding "high" interest on grants of reparation already works a significant hardship on carriers and encourages delay on the part of shippers with overcharge claims; that abolition of the six-month rule will "invite excessive audits"; and that section 18(b)(4) of the Shipping Act authorizes the Commission to reject tariffs only if they fall short of statutory technical or ministerial requirements. Several carrier commentators express particular opposition to the explanation in the Notice that the amended rule is intended to prohibit tariff rules allowing claims of weight/measurement errors only when the cargo is in the carrier's custody. These carriers argue that errors of this kind are impossible to verify once the cargo has left the carrier's custody, and that carriers would be left at the mercy of potentially unscrupulous shippers and shippers' auditors.

Some carriers suggest amendments to the proposed rule, as an alternative to outright adoption. These include specifying when the cause of action begins to accrue (some suggest the date of sailing as opposed to date of payment of freight charges); allowing a time limit for filing of overcharge claims of something less than two years; exempting claims alleging weight, measurement or description errors from any rule restricting carrier-imposed time limits on claims; including any intended restriction on carrier-custody requirements or administration fees in the final rule itself; modifying and streamlining the Commission's regulations concerning overcharge claims; eliminating awards of interest on reparation when an overcharge claim is resolved within the statutory period; and establishing certain required standards by which a claimant must adduce its case. One group of conferences which supports the proposed rule[2] specifically inquires as to whether the rule will be effective prospectively or whether potential claimants who may already be time-barred by a six-month rule will now be able to file their complaint with the carrier if the two-year period has not yet passed. The "Gulf-Europe Carrier Associations," which support the proposed rule in part, request oral argument.

Discussion

The Commission is not unmindful of previous proceedings which addressed the subject of the six-month rule. The Commission's determination in those proceedings not to promulgate rules similar to that proposed in the instant rulemaking does not preclude it from doing so at this time. In those decisions,[3] the Commission determined that the proposed rules were not supported by either the facts or law. At any rate, the Commission in rulemaking is not confined to the redress of demonstrated evils as distinct from the prevention of potential ones.[4] Thus, it is not necessary for the Commission to make specific findings of Shipping Act violations prior to adopting substantive rules, providing that the rules are in furtherance of general Shipping Act objectives. *New York Freight Forwarders and Brokers Assn. v. Federal Maritime Commission*, 385 F.2d 981 (D.C. Cir. 1967); *Pacific Coast European Conference v. Federal Maritime Commission*, 350 F.2d 197, 203-204 (9th Cir. 1965); *Austasia Container Express - Possible Violations of Section*

[2] United States Atlantic & Gulf-Haiti Conference, United States Atlantic & Gulf-Jamaica Conference, and Southeastern Caribbean Conference.

[3] *Proposed Rule Covering Time Limit on the Filing of Overcharge Claims*, 12 F.M.C. 298 (1969), 10 F.M.C. 1 (1966); *Carrier-Imposed Time Limits on Presentation of Claims for Freight Adjustments*, 4 F.M.B. 29 (1952).

[4] *Pacific Coast European Conference v. Federal Maritime Commission*, 376 F.2d 785, 790 (D.C. Cir. 1967).

18(b)(1) and General Order 13, 19 F.M.C. 512, 521 (1977), *rev'd on other grounds, Austasia Container Express v. Federal Maritime Commission,* 580 F.2d 642 (D.C. Cir. 1978). The comments received pursuant to the Notice of Proposed Rulemaking have convinced the Commission that proscription of carrier-imposed time limits is necessary to meet several Shipping Act objectives. At the same time, the arguments against the proposed rule have not been persuasive.

It is not the case, as argued by United States Lines, Inc., that section 18(b)(4) of the Act would prohibit the Commission's proposed exercise of rulemaking power. That statutory provision and the court opinion cited [5] state that only technical defects constitute proper grounds for *rejecting* a tariff. The Commission's proposed action does not involve administrative rejection of newly-filed tariffs; it would proscribe certain tariff provisions as contrary to Shipping Act objectives. The Commission's statutory mandate to implement rules and regulations to carry out the provisions of the Act is not obstructed by section 18(b)(4). *See* 46 U.S.C. 841a.

The Commission disagrees with the argument that evidentiary hearings would be required prior to adoption of the proposed rule. All interested parties have been given sufficient opportunity to provide facts and arguments by commenting on the proposed rule. Moreover, the parties advocating evidentiary hearings have not indicated that there were indeed any factual matters which they have offered to adduce in opposition to the proposed rule. The parties have not raised any issues in their comments which would require or even be served by evidentiary hearings. Under these circumstances, hearings would only delay the process of proscribing tariff rules found to be inconsistent with Shipping Act objectives. This proceeding has been conducted in a procedurally correct manner.

Several carrier commentators indicate that because adoption of the rule will result in more claims being decided by the carriers themselves as opposed to the Commission, there will be a greater likelihood of ill will, discrimination, conflict, prejudice, and rebating. The Commission does not believe that reliance on carriers and shippers to resolve disputes will necessarily result in unlawful activity, either in the form of false shipper claims or unwarranted reparations by carriers. It rejects the proposition that both carriers and shippers need as much supervision as possible because they will act in bad faith at every opportunity, or at least will be tempted to yield to pressure to do so. The Commission expects parties subject to the Shipping Act to comply with it, and will vigorously make use of the statutory remedies for violations of the Act.

[5] *Pennsylvania v. Federal Maritime Commission,* 392 F.Supp. 795 (D.D.C. 1975).

Moreover, the argument for continued Commission resolution of claims after six months appears to be inconsistent with the accusation of a few of the same commentators that the proposed rule constitutes unnecessary government regulation. The proposed rule reflects an awareness that the business community is capable of handling its own affairs within the confines of the law and without unnecessary government supervision. The alleged recordkeeping and administrative burden that would be imposed on carriers if the proposed rule is adopted is not readily discernible. The documents which a carrier would need to respond to an overcharge claim filed with the carrier do not appear likely to differ from those the carrier would rely upon in defending the claim before the Commission. Nor would the administrative burden of responding to direct claims be likely to exceed that of being a respondent in an informal docket proceeding before the Commission. The real administrative burden is imposed on the Commission as a result of the time-limit rules, for they impede the orderly operation of Commission business by unnecessarily diverting Commission resources from other regulatory functions of the agency.

The "excessive audits" alleged to result from abolition of the six-month rule would cause no hardship to carriers. Shipper audits would have a significant effect on carriers only to the extent they result in successful overcharge claims, in which event they must be viewed as an appropriate means by which section 18(b)(3) violations are corrected.

The Commission's policy of granting interest on awards of reparations is beyond the scope of this proceeding. It should be pointed out, however, that award of interest is intended to make whole the shipper for the carrier's use of the shipper's money; it is neither intended to be nor does it actually constitute a hardship or penalty on the carrier. There is, therefore, no merit to one commentator's suggestion that carriers be exempted from the interest requirement if a claim is resolved within the statutory period. Nor is award of interest an incentive to shippers to delay filing their overcharge claims. Interest rates are computed on the basis of six-month U.S. Treasury bill monthly rates for the period in question,[6] and interest is therefore no boon to shippers.

A few commentators claim that the proposed rule would more easily enable a carrier to "stonewall" a claim until the two-year statute of limitations has expired, because claims transmitted just prior to the expiration of the two-year period would be subject to potentially time-consuming consideration by the carrier instead of automatic rejection on the basis of a time-limit rule. Emerson Electric Co. requests that the Commission establish requirements that carriers acknowledge receipt of claims within 10 days and dispose of claims within 120 days. Again, the

[6] 46 C.F.R. § 502.253.

Commission is not persuaded that the perceived threat of unscrupulous carriers justifies the rejection of the proposed rule, nor are additional safeguards against such abuses necessary. Since 1979, Commission regulations have required carriers to acknowledge written overcharge claims within 20 days of receipt and inform claimants of their rights under the Shipping Act, including section 22's two-year statute of limitations. *See* 46 C.F.R. §§ 531.5(b)(8)(xvi) and 536.5(d)(20).

Some commentators request the Commission to specify a date certain at which the cause of action will accrue under the proposed rule. Sea-Land notes that for purposes of overcharge claims, the Commission has found section 22's statute of limitations to begin to run from the date of delivery of cargo to the carrier, the date of shipment, or the date of payment of freight charges, whichever is later. A few commentators request that, in the interest of uniformity and clarity, a date certain be established, such as the date the ship sails. These commentators appear particularly concerned that use of date of payment of freight charges as a criterion encourages late payment and discriminates in favor of late payors by providing them an expanded period in which to file claims with the Commission.

Although the Commission does not wish to encourage late payment of freight charges, the basis for payment as a factor in determining when a cause of action accrues is a rational one: a shipper is not injured until it has paid the unlawful charges. *See Fiat-Allis France Materiels de Travaux Publics, S.A. v. Atlantic Container Line,* 22 F.M.C. 544 at 552 (1980). Although the formulas for determining when a cause of action accrues under section 22 have included date of delivery of the cargo to the carrier,[7] date of time of shipment,[8] and even the date of billing,[9] all have included the date of payment of freight charges. The Commission will not, however, issue a definition on the matter in this particular rulemaking. The bases for determining accrual of a cause of action under section 22 have derived from Commission decisions, not only in the context of section 18(b)(3) proceedings, but in other matters arising out of the statutes the Commission administers. The Commission will continue to let this matter develop through the adjudicatory processes.

A related question raised by one commentator is whether "potential claimants who may already be time-barred by a six-month rule" will be able to file claims directly with a carrier. Once this final rule takes effect, shippers with overcharge claims which have already been reject-

[7] *See Sun Company, Inc. v. Lykes Bros. Steamship Co., Inc.,* 20 F.M.C. 68 at 69, n. 7 (1977); *see also* 46 C.F.R. § 502.302, in the Commission's Rules of Practice and Procedure for the informal adjudication of small claims.

[8] *See Fiat-Allis France Materiels de Travaux Publics, supra,* at 552.

[9] *See United States v. Hellenic Lines, Ltd.,* 14 F.M.C. 254, 260 (1971).

ed on the basis of a six-month rule but which are not yet barred by the two-year statutory limit can still be submitted directly to the carrier.[10]

Several carrier commentators oppose the abolition of carrier-custody rules, and emphasize the difficulty in verifying the weight, measurement or description of cargo after it has left their custody. A few suggest that if the Commission proscribes carrier-custody rules, it should at least establish minimum standards of documentary proof necessary for shippers to meet their burden in asserting this type of claim.

The variations on claims of this nature, and the different means by which weight, measurement and description can be proven, render prohibitive the establishment of specific, enumerated standards of proof. Any such list of documents would, on the one hand, be likely to omit means of proof which in certain circumstances would suffice to make a shipper's case, while on the other hand, include standards which in certain circumstances would be insufficient. Because of the carrier's difficulty in satisfying itself of the validity of claims of this nature, it is incumbent on shippers to document their claims with original or certified documents such as bills of lading, packing lists and weight or measurement certificates. Proscription of carrier-custody rules is not tantamount to a *carte blanche* to shippers to submit and expect payment on all and any weight/measurement/description claims; a claim unsupported by convincing documentation should be denied. Claims are not to be honored on the basis of trust or good will. Documentation must be of sufficient credibility to avoid rebates or inaccurate claims. Shippers can expect carriers to require them to meet the same heavy standard of proof which the Commission would apply.[11]

A survey of the 189 informal docketed proceedings which were noticed for filing or assignment during calendar year 1981 also reveals the impact of the operation of the six-month rule. In 94 of those proceedings (or 49.7% of the time), the records reflect that the shipper claimants were denied their initial claim filed directly with the carrier on the basis of a six-month rule.[12] Of those 94 proceedings, 56 (or 59.6%) were cases in which the respondent carriers offered no defense on the merits; in most cases the carrier concurred that there was an erroneous assessment of freight charges. Additionally, in another 20 proceedings (10.6% of the 189), the shipper's initial claim with the

[10] As heretofore discussed, however, shippers should be aware that a claim filed directly with the carrier does not toll the statute of limitations, and claims should be filed with the Commission if the carrier's processing of the claim is likely to extend to the termination of the two-year period.

[11] The proposed rule referred to carrier-custody rules only in the Supplementary Information section. In the interest of clarity, the final rule adopted herein specifically proscribes carrier-custody rules. The final rule also incorporates a suggestion of the Gulf-Europe Carrier Associations, by adding the words "for private settlement" to distinguish between claims filed with the carrier and those filed with the Commission.

[12] Or a carrier-custody rule or "administrative fee" requirement.

carrier was apparently but not expressly denied on the basis of a time-limit rule (either by a general denial of the claim or the claim being ignored), and an informal docketed proceeding was then initiated in which again the carrier did not dispute the merits of the claim.[13]

The percentage of *undisputed* informal docketed proceedings before the Commission as a result of six-month or carrier-custody rules is therefore at least 39.7%.[14] This requires a considerable expenditure of Commission resources at a time when budgetary restrictions have caused a reduction in Commission staffing and the Commission's other regulatory demands remain pressing. Avoidance of the waste of these resources is hardly an abdication of the agency's regulatory responsibilities, as suggested by some carriers. Rather, it constitutes a recognition that carriers should meet their responsibility where possible to correct freight overcharges without requiring initiation of federal proceedings on the matter, especially where there is no dispute between the parties on the merits of the overcharge claim. Time-limit rules effectively and prematurely transform what is essentially a commercial activity - i.e., resolution of overcharge claims - into a governmental function. It is significant that in addition to shipper support for the proposed rule, there were also favorable comments received from some carriers and conferences.[15]

Conclusion

The Commission is satisfied that the operation of carrier-imposed time limitations on overcharge claims discourages and deters the exercise by shippers of their right to seek reparation pursuant to section 18(b)(3) of the Act. Comments from carriers explaining that six-month rules do not alter shippers' right to seek reparations prompt the Commission to express its cognizance that while not *per se* contrary to section 22's two-year time limit, the rules have the *de facto* effect of restricting shippers' rights under section 22. Despite some commenta-

[13] The remainder of the proceedings were those in which the initial claim filed with the carrier was denied because there was some dispute on the merits of the claim; those in which the initial claim was filed too late in the 2-year period for the carrier to respond to or resolve the claim or else the claim was ignored; and those in which the record does not reflect whether an initial claim was ever filed with the carrier.

[14] This figure is a conservative one because it probably underrepresents the number of undisputed cases attributable to the rule. Many of the proceedings regarded for the purposes of this study as "disputed" were those in which the carrier offered only a *pro forma* argument to the settlement officer - usually extolling the wisdom of its time-limit tariff provisions and complaining about shippers not fulfilling their responsibility to ensure that cargo is described accurately - without ever addressing the evidence presented by the claimant in support of its claim. Also excluded from the tally of undisputed claims attributable to the six-month rule were a dozen proceedings in which the carrier did not contest the merits of the claim but in which the record did not indicate with certainty whether a claim was initially filed with the carrier.

[15] Several commentators have suggested changes in overcharge claim regulations which are outside the scope of this rulemaking. The Commission has referred these matters to its staff for consideration in connection with possible future rulemakings.

tors' claims that time-limit rules are intended to encourage potential claimants to file their claims more promptly, the rules are unlikely to have this effect. Shipper commentators have noted that weight/measurement/description errors are rarely detected before the cargo has left the carrier's custody, and audits are time-consuming exercises, perhaps hindered at times by slow carrier response to inquiries, and cannot often be completed in time for a claim filing in conformity with a six-month rule. As noted in one comment and confirmed by a review of the 1981 proceedings, most claims are filed with the Commission well toward the latter end of the two-year statute of limitations. Thus, the sole object of these rules would appear to be for the convenience of the carriers themselves, not the operation of the claim system as a whole.

Moreover, the alleged benefit to the carriers is not readily apparent. Whatever difficulties carriers might have in evaluating the merits of non-prompt overcharge claims are not abated when shippers are forced to pursue those claims before the Commission, and do not justify rejecting those substantial number of claims in which there is agreement on the merits. It is difficult to comprehend why a carrier would construct grounds for rejecting a claim when the same claim will require a carrier defense in another forum—unless the carriers are relying on shippers not to pursue the matter to that other forum. When this occurs, the overpayment of any freight charges goes uncorrected, and the time-limit rules thereby provide the opportunity for violations of section 18(b)(3) to continue unredressed. Adoption of the proposed rule is therefore necessary to meet the objectives of section 18(b)(3).

Six-month and carrier-custody rules are also found to conflict with the objectives of section 14 Fourth of the Act, which states that a carrier shall not "unfairly treat . . . any shipper in the matter of . . . the adjustment and settlement of claims." As heretofore noted, the time-limit rules impose unnecessary burdens on shippers to file their claims with the Commission. Concomitant with this burden are the expenditures such filings entail. The rules preclude without justification the commercial or private resolution of some claims, and result in the initiation of more costly governmental proceedings instead. The Commission concludes that these unjustified impositions constitute unfair treatment to shippers in the adjustment and settlement of claims, contrary to section 14 Fourth of the Act.

Section 15 of the Act (46 U.S.C. § 814) requires that conferences "adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints." The carriers commenting on the proposed rule have offered no reasonable justification for their time-limit tariff provisions. The burden of filing overcharge claims with the Commission when the carrier does not contest the substance of the shipper's complaint is particularly unfair and unreasonable. And it is uncontrovertible that the rules have the effect, if not also the design, of precluding the prompt consideration of complaints by carriers in many instances. Thus, the rules contravene the objectives of section 15 as well.

The proposed rule indicated the Commission's intention to prohibit the assessment of an "administrative charge" for the processing of overcharge claims. At least one uncontested claim was brought before the Commission last year because of the invocation of this "modified six-month rule." Although a less severe sanction than an outright bar on acceptance of claims, the assessment of a claim fee constitutes a penalty upon seeking correction of a statutory violation. An administrative fee was defended by virtually none of the commentators to the proposed rule.. The Commission concludes that such fees, like the other time-limit tariff provisions, and for the same reasons, are contrary to sections 14 Fourth, 15 and 18(b)(3). In the interest of clarity, administrative fees have been specifically proscribed in the rule adopted herein.[16]

Finally, the Commission finds that this rulemaking is exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 601). Section 601(2) of that Act excepts from its coverage any "rule of particular applicability relating to rates . . . or practices relating to such rates . . . ." As the proposed rule clearly relates to rates and rate practices, the Regulatory Flexibility Act requirements are determined to be inapplicable.

List of subjects in 46 C.F.R.: Maritime Carriers, Tariffs.

THEREFORE, IT IS ORDERED, That pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. § 553) and sections 14 Fourth, 15, 18(b)(3) and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 812, 814, 817, and 841a), Parts 531 and 536 of 46 C.F.R. are amended as follows:

1. In Section 531.5(b)(8)(xvi), add the following new language immediately after the subdivision heading.

§ 531.5 Contents of Tariffs.

* * * * *

(b) * * *

(8) * * *

(xvi) *Overcharge Claims.* No tariff in the domestic offshore commerce shall limit the filing of overcharge claims with a carrier for private settlement to a period of less than two years after accrual of the cause of action, nor shall the acceptance of any overcharge claim be conditioned upon the payment of a fee or charge. No tariff in the domestic offshore commerce shall require that overcharge claims based on alleged error in weight, measurement or description of cargo be filed before the cargo has left the custody of the carrier.

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[16] The Gulf-Europe Carrier Associations' request for oral argument is denied.

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2. In section 536.5(d)(20), add the following new language immediately after the subparagraph heading.

§ 536.5 Contents of Tariffs

* * * * *

(d) * * *

(20) *Overcharge Claims.* No tariff in the foreign commerce shall limit the filing of overcharge claims with a carrier for private settlement to a period of less than two years after accrual of the cause of action, nor shall the acceptance of any overcharge claim be conditioned upon the payment of a fee or charge. No tariff in the foreign commerce shall require that overcharge claims based on alleged error in weight, measurement or description of cargo be filed before the cargo has left the custody of the carrier.

* * * * *

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-12

DART CONTAINERLINE COMPANY, LTD. - POSSIBLE VIOLATIONS OF SECTION 16 SECOND PARAGRAPH AND 18(B)(3), SHIPPING ACT, 1916

NOTICE

August 9, 1982

Notice is given that no appeal has been taken to the June 30, 1982 dismissal of the investigation in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-12

DART CONTAINERLINE COMPANY, LTD. POSSIBLE VIOLATIONS OF SECTIONS 16 SECOND PARAGRAPH, AND 18(B)(3), SHIPPING ACT, 1916

DISMISSAL OF PROCEEDING

Finalized August 9, 1982

On February 28, 1980, the Commission instituted this proceeding based on allegations that the respondent Dart Containerline Company, Ltd., had paid rebates to at least one shipper in the westbound trade from the Iberian Peninsula to the United States.

After the institution of the proceeding, Hearing Counsel "evaluated the availability of witnesses and other evidence to support the Commission's claim." [1] This evaluation led Hearing Counsel to submit a proposed settlement on June 23, 1980.[2] I rejected this settlement proposal and gave Hearing Counsel the option of going to trial or submitting a new proposal for settlement which would contain sufficient information to insure that the Commission's criteria for the settlement of civil penalty cases had been met. (See Rejection of Settlement served September 18, 1980.) After the proposed settlement was rejected Hearing Counsel advised me that they did not intend to submit a new proposal for settlement but would serve formal discovery requests on respondent.[3] On October 29, 1980, I set a schedule for discovery and required Hearing Counsel to submit a schedule for the final disposition of the case. In a status report submitted pursuant to my order, Hearing Counsel advised that its discovery efforts against Dart had been unproductive and after evaluation of the availability of witnesses and other documentary evidence and the resources available to secure such evidence, Hearing Counsel said it had nothing to contribute to the proceeding. Hearing Counsel did not say what disposition was to be made of the case.

On March 24, 1981, Dart moved to dismiss the case on the ground that the record contained no proof that Dart had committed any viola-

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[1] The "allegations" were based on copies of bills of lading, debit notes and bank drafts which showed that for freight charges a shipper was billed $58,286.90 rather than $100,245.78 which should have been billed under the applicable tariff.

[2] Orderly procedure and a more efficient use of resources would dictate that this "evaluation" be made before the institution of the proceeding. Indeed, such an evaluation would seem to be a prerequisite to any determination to recommend the institution of any proceeding.

[3] I had suspended discovery pending the settlement negotiations.

tions of the Shipping Act. Hearing Counsel filed a reply to Dart's motion stating that it had no objection to granting it and I dismissed this proceeding by order served April 14, 1981. However, on August 14, 1981, the Commission rejected my dismissal and remanded the case for further development of the record.

The additional efforts of Hearing Counsel to obtain evidence to support the allegations against Dart are chronicled in their Memorandum in Support of Motion to Dismiss the end result being that they were unable to obtain any additional evidence. Because of this Hearing Counsel now moves to dismiss the proceeding.

In their memorandum supporting the motion Hearing Counsel argue that to require that they "continue this proceeding would not only be an exercise in futility but would be contrary to established law and practice." Their argument is based upon their role as "prosecutors" in proceedings brought to assess civil penalties.[4] With citations to authority Hearing Counsel urge that (1) as prosecutor Hearing Counsel is the "absolute judge of whether a prosecution should be initiated and the first and presumptively last judge of whether a pending prosecution should be terminated," (2) a prosecutor's recommendation to terminate or dismiss a case on the basis that there is insufficient evidence to sustain the charges should be accepted unless it appears that the exercise of the prosecutor's discretion is not in the public interest, and (3) a recommendation to dismiss is against the public interest if the given reason for dismissal is not grounded in fact or is not made in good faith or is designed to harass the defendant by the commencement of another prosecution at a different and more favorable time and place. Hearing Counsel says none of the latter factors are present here so the case should be dismissed.

[4] Senate Report 96-147, 96th Cong. lst. Sess. April 9, 1979 at pp. 18 and 19; House Report 232 96th Cong. lst Sess. June 4, 1979 at pp. 16 and 17, also reprinted in *U.S. Code Congressional and Administrative News*, at pp. 1407 and 1498 (1979).

There is no need to ground dismissal of this proceeding on Hearing Counsel's role as prosecutor and the law attendant to that role. The more immediate ground is that Hearing Counsel has satisfied the Commission's directives on remand. They have pursued all available avenues for obtaining evidence and have come up empty-handed and there is no reason to doubt their position that there is insufficient evidence available to establish or prove the specific allegations of rebating.[5]

The proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

[5] This case is a prime example of the consequences which result from delay in instituting a proceeding. The violations are alleged to have occurred in November and December of 1973 but this proceeding was not instituted until February of 1980. It is readily understandable that witnesses cannot be found or their memories have faded and the records have been destroyed in the ordinary course of business.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-18

UNITED STATES ATLANTIC & GULF/SOUTHEASTERN CARIBBEAN CONFERENCE

v.

TROPICAL SHIPPING & CONSTRUCTION CO., LTD.

NOTICE

August 9, 1982

Notice is given that no appeal has been taken to the July 6, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-18

UNITED STATES ATLANTIC & GULF/SOUTHEASTERN CARIBBEAN CONFERENCE

v.

TROPICAL SHIPPING & CONSTRUCTION CO., LTD.

NOTICE OF DISMISSAL

Finalized August 9, 1982

This order confirms the ruling made at the prehearing conference held June 22, 1982. At the prehearing, complainant withdrew its complaint and the proceeding was then dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-9

PRUDENTIAL LINES, INC.

v.

CONTINENTAL GRAIN COMPANY

ORDER ADOPTING INITIAL DECISION

August 20, 1982

The proceeding is before the Commission on Exceptions to the Initial Decision of Administrative Law Judge Norman D. Kline.

Briefly stated, the controversy arose as a result of a sale of grain by Continental Grain Company (Continental) to the Government of Egypt under the P.L. 480 Program.[1] When the Peralta Shipping Company (agent for the Government of Egypt) nominated Prudential Lines, Inc. (Prudential), LASH vessels to carry a portion of the grain, Continental refused the nomination on the ground that the contract of sale approved by the United States Department of Agriculture (USDA) precluded LASH barges from loading the grain sold to Egypt. The grain was ultimately loaded at the Norfolk & Western Elevator in Norfolk, Virginia (N & W Elevator) on two U.S.-flag deck ships of the Farrell Lines and on three foreign-flag vessels.

The complaint filed by Prudential alleged that: (1) Continental's refusal to permit the loading of Prudential's LASH barges constituted a violation of sections 16, First and 17 of the Shipping Act, 1916; [2] (2) Continental's failure to include in its terminal tariff all its rates, charges, rules and regulations violated General Order 15 of the Commission's Rules and Regulations, 46 C.F.R. § 533; and (3) Continental's participation with other grain terminal operators subject to the Shipping Act in an arrangement restricting access to the terminal to certain types of vessels without having first obtained Commission approval violated

[1] Agricultural Trade Development Assistance Act of 1954, 68 Stat. 455. Pursuant to P.L. 480, the United States Government provides financial aid to assist eligible foreign nations in the purchase and transportation of agricultural commodities. The P.L. 480 Program is administered by the United States Department of Agriculture.

[2] Section 16, First prohibits any person subject to the Act "to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage." 46 U.S.C. § 815, First.

Section 17 provides that every common carrier by water in foreign commerce and "every other person subject to the act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. . . ." 46 U.S.C. § 816.

section 15 of the Act and General Order 15 of the Commission's Rules and Regulations. By reason of these alleged violations, Prudential seeks reparation in the amount of $1,032,135.

The Initial Decision found that although Continental, as operator of the N & W Elevator, was "an other person" subject to the Shipping Act, 1916 (46 U.S.C. § 801, *et seq.*), in refusing to permit the loading of LASH barges at the N & W Elevator it was acting in its capacity as a merchandiser of grain,[3] and, as such, was engaging in an activity not subject to regulation under that Act. Exceptions to the Initial Decision and Replies to Exceptions have been filed by Prudential, Continental and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel). The Commission heard oral argument.

DISCUSSION

The Exceptions of the parties are essentially a restatement of the arguments and contentions already advanced before the Presiding Officer and properly disposed of by him. For the reasons set forth below the Commission adopts the Initial Decision of the Presiding Officer.[4]

A. *Jurisdiction In Personam*

Continental excepts to the Presiding Officer's finding that as operator of the N & W Elevator Continental furnished terminal facilities in connection with four common carriers by water.[5] While Continental does not challenge the common carrier status of those carriers with respect to the carriage of general cargo, it contends that none was a common carrier of bulk grain from the N & W Elevator; that is, none advertised calls at the Elevator as part of its regularly scheduled service, and none held itself out to carry grain in bulk at published rates available to all.

Evidence of record supports the finding that the four named carriers [6] whose vessels loaded grain at the N & W Elevator held themselves out by a course of conduct to perform common carrier service and accept goods for carriage on their vessels, from whomever offered, to the extent of their ability to carry.[7] The Commission therefore rejects Continental's argument to the contrary.

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[3] Consideration of Prudential's request for reparation was deferred until after the determination of the jurisdictional issue.

[4] Arguments and contentions not specifically discussed have nevertheless been carefully considered and found to be without merit.

[5] Section 1 of the Shipping Act, 1916, subjects to regulation under that Act:

> . . . any person carrying on the business of . . . furnishing . . . terminal facilities in connection with a common carrier by water. 46 U.S.C. 801.

[6] These are: Icelandic Steamship Co., Prudential, Central Gulf Lines, and Farrell Lines (hereinafter referred to as "the Carriers"). The Carriers operated under tariffs on file with the Commission.

[7] The Carriers maintained on file with the Commission tariffs of freight rates and charges by which they held themselves out to carry a wide range of commodities for the general public. The tariffs

Continued

The Commission is also not impressed with Continental's contention that the vessels which called at the N & W Terminal loaded grain under individually negotiated contracts and were therefore engaged in "contract" as opposed to "common" carriage.[8] As stated in the Initial Decision, the Shipping Act regulates carriers, not types of carriage. In *Grace Line, Inc. v. Federal Maritime Board*, the court rejected the carrier's argument that because it had always transported a specific commodity on a "contract" basis, it was, as to that commodity, a "contract carrier" not subject to the Shipping Act.[9]

In an attempt to limit the holding in *Grace Line*, Continental asserts that the Initial Decision fails to recognize that because a mixture of "common" and "contract" cargo is not unlawful *per se* the Commission may exercise jurisdiction over contract carriage only "when necessary to prevent evasion of a carrier's duties with respect to common carriage." Neither the Shipping Act nor decisions interpreting that Act recognize such a limitation. Indeed, the court in *Grace Line*, *supra*, when confronted with the very issue being raised here, declined to so narrow the definition of "common carrier" in section 1 of the Shipping Act. 280 F.2d, *supra*, at 792.[10]

Moreover, the absence of published rates for the carriage of Continental's grain did not alter the common carrier status of the Carriers who loaded grain at the N & W Elevator. Because of the exemption

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listed specific ports of loading and discharge on the United States Atlantic Coast and in foreign countries; sailing schedules advertised in trade publications listed the dates on which vessels would call at specific ports, including the Port of Norfolk, Virginia. Moreover, Continental in its loading list characterizes two vessels of the Icelandic Steamship Co. which most frequently loaded grain at the Elevator as "liner." There is evidence that the vessels were only partially loaded with grain so that space was available for other types of cargo.

[8] The Commission's jurisdiction over grain elevator terminals which handle grain exclusively, and where grain is loaded into vessels operated by common carriers by water was upheld in *Agreement Nos. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc.*, 5 F.M.B. 648 (1959), *affirmed sub nom., Greater Baton Rouge Port Commission v. U.S.*, 287 F.2d 86 (5th Cir. 1961), *cert. denied*, 364 U.S. 985 (1962); *see also Rates of Pacific Northwest Elevators Association*, 11 F.M.C. 369 (1968); *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports*, 8 F.M.C. 653 (1965).

[9] *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790, 793 (2d Cir. 1960), *cert. denied*, 364 U.S. 933 (1961), affirming *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 615, 622 (1959), where the Commission in applying Shipping Act standards to the so-called "contract carrier" portion of the voyage stated:

> . . . the Act confers jurisdiction over *carriers*, specifically over "common carriers," as distinguished from the type of *carriage*, i.e., common or contract . . . .

Upon review, the court ruled that a common carrier by water "does not cease to be such because it makes an exception as to a part of the goods it accepts." To the same effect is *Flota Mercante Grancolombiana v. FMC*, 302 F.2d 887 (D.C. Cir. 1962).

[10] Continental no longer relies on the decision in *Fall River Line Pier, Inc. v. International Trading Corp. of Virginia*, 399 F.2d 413 (1st Cir. 1968), in support of its argument that even if the Carriers were identified as common carriers, the low incidence of such carriage would not be of sufficient consequence to warrant assertion of jurisdiction over the N & W Elevator. The Presiding Officer, however, properly distinguished facts of that case from those in the instant proceeding.

Moreover, section 1 of the Shipping Act makes subject to the Act a person "furnishing . . . terminal facilities in connection with *a* common carrier by water." (emphasis added). It would appear, therefore, that jurisdiction attaches as soon as the terminal services one common carrier.

from tariff filing requirements contained in section 18(b)(1) of the Shipping Act, the four carriers were under no obligation to publish rates for the carriage of bulk grain. Nor did such carriage transform them into "contract carriers." [11] As mentioned in the Initial Decision, the legislative history of section 18(b)(1) [12] clearly indicates that the exemption was enacted to enable common carriers to compete with "tramp" operators. Limited as it is to the carriage of cargo in bulk, it leaves unchanged the obligation of the carrier with respect to the carriage of non-exempt cargo.[13]

The evidence of record thus supports the finding in the Initial Decision that Continental, as operator of the N & W Elevator, furnished terminal facilities in connection with common carriers by water and is, therefore, "an other person" subject to the Shipping Act, 1916.

B. *Subject Matter Jurisdiction*

Prudential excepts to the Presiding Officer's conclusion that the LASH barge exclusion originated in a grain selling and trading context and was not therefore subject to Shipping Act jurisdiction. Prudential believes that this exclusion was based solely on terminal considerations, that is, Continental's perception that LASH barges are slower in loading and clearing berth than other vessels, which when considered with the fact that Continental both imposed the restriction and operated the terminal at which the grain was loaded, is sufficient to establish Commission jurisdiction.

Vessel terms are linked to the range of options available to a grain trader in the execution of its obligations under the contract of sale, and may thus affect the price at which grain is traded.[14] In a regular commercial setting, if a purchaser of grain nominates a vessel other than a breakbulk vessel to load the grain, such nomination may be acceptable if an adequate premium can be negotiated. In the context of the P.L. 480 program, a change of vessel terms would have required in

[11] Continental's reliance on *United States v. Stephen Bros. Lines*, 384 F.2d 118 (5th Cir. 1967) and *Investigation of Tariff Filing Practices of Containerships*, 7 F.M.C. 305 (1962) is misplaced. The Carriers here held themselves out by published tariffs and advertising to serve indiscriminately all shippers on their advertised routes.

[12] P.L. 87-346, 75 Stat. 76.

[13] The Carriers maintained sailing schedules advertised in leading trade publications which indicated that the vessels served regular routes, and listed the dates at which the vessels would call at specified ports, including the port of Norfolk. Such advertising, not limited to specific terminals, was sufficient notice to the operators of all wharves, piers and terminals in the Port of Norfolk, as well as to all shippers, including Continental, of the carrier's readiness to accept cargo wherever tendered within the Port of Norfolk complex. Notwithstanding its obligation to operate the N & W Elevator as a public terminal, Continental is the sole shipper from that facility.

[14] As fully explained in the Initial Decision, in the normal course of marketing, grain traders frequently execute their contracts of sale by transferring their contractual obligations to other grain trading companies (commercials) which in turn may pass them on to other commercials in a "string" of transactions. To facilitate such transfers, grain merchandisers, whether or not they operate grain terminals, utilize standard commodity sales contracts which often contain vessel terms.

this instance a renegotiation of the contract with the Government of Egypt and further approval by USDA. Thus, even though it affected the operation of the N & W Elevator, Continental's refusal to permit the loading of LASH barges was based primarily on grain trading factors.[15] The vessel restriction placed in the contract of sale was but one of the conditions upon which Continental sold grain to the Government of Egypt at the price agreed upon.

Hearing Counsel recognizes that the inclusion of the restrictive provision in the commodity sales contract does not fall within the gambit of the Commission's authority, but believes that Continental's refusal to accept the nomination of Prudential's vessels in performance of that contract was in furtherance of its interests as operator of the N & W Elevator.[16] Hearing Counsel, in reliance on a line of cases involving the Commission's authority to regulate the implementation of collective bargaining agreements by persons subject to its regulatory authority, maintains that Continental, as operator of the N & W Elevator, is not necessarily insulated from its Shipping Act obligations because the contract of sale is not subject to scrutiny under that Act.

The Presiding Officer correctly distinguished the facts upon which the decisions involving collective bargaining agreements rest and properly found them inapplicable to the instant case. We therefore affirm his findings and conclusions on this issue.

Moreover, it should be noted that the effect of carrier implementation of rules originating in collective bargaining agreements designed to require the refusal of containers to certain shippers and the unloading and reloading of certain already loaded containers (50 mile rules) was to directly impose on shippers terms and conditions affecting basic common carrier obligations to furnish services to all on a reasonable and nondiscriminatory basis. *See, e.g., Council of North Atl. Shipping Ass'ns. v. FMC*, 672 F.2d 171, 188 (D.C. Cir. 1982), *petition for cert. filed* (U.S. May 29, 1982) (No. 81-2196).[17] Other cases in which the Commission has asserted jurisdiction over labor-related matters have likewise involved the imposition by carriers and other regulated persons

[15] The contract of sale did not specify the N & W Elevator as the port of loading but rather specified ports within a certain range. Nor is it known whether when it entered into the contract of sale Continental intended to load the grain at the N & W Elevator. Moreover, the $150,000 estimate prepared by Continental when attempting to reach an agreement with Prudential on removing the LASH barge restriction, did not reflect terminal costs but rather costs related to grain trading.

[16] In rebuttal to the Presiding Officer's finding that in the absence of a proper booking Continental had no obligation to grant access to the terminal to Prudential's LASH vessels, Prudential and Hearing Counsel maintain that the reason Prudential did not have a proper booking is that Continental refused the nomination of Prudential's LASH vessels from the party authorized to make that booking. Continental, however, refused the nomination in accordance with the terms of the contract of sale which was approved by USDA.

[17] *See also South Atlantic and Caribbean Line, Inc. - Order to Show Cause*, 12 F.M.C. 237 (1960), *affirmed*, 424 F.2d 941 (D.C. Cir. 1970); *United States v. Sea-Land Service, Inc.*, 424 F.Supp. 1008 (D.N.J. 1977), *appeal dismissed*, 577 F.2d 730 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

of certain rates and practices directly and with material effect.[18] Here, Continental's refusal to permit the loading of Prudential LASH vessels at the N & W Elevator was in compliance with its obligations under what was essentially a grain trading transaction and the effect of the grain contract vessel terms on the regulated operations of Continental is, therefore, incidental and nonmaterial.[19] *Cf. United Stevedoring Corp. v. Boston Shipping Assoc.*, 16 F.M.C. 7, 12-15 (1972).

Furthermore, the common carriers who entered into agreements with labor unions were subject to the Commission's jurisdiction when they negotiated and entered into the agreements, whereas Continental sold grain to the Government of Egypt in its capacity as merchandiser of grain, an activity outside the scope of Shipping Act regulation.

In conclusion, the Presiding Officer's findings that Continental as operator of the N & W Elevator is "an other person" subject to the Shipping Act, 1916, and that Continental's refusal to permit the loading of Prudential's LASH barges at the N & W Elevator does not fall within the ambit of the Commission's jurisdiction, are proper and well founded.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is hereby adopted by the Commission and made a part hereof;

IT IS FURTHER ORDERED, That the Exceptions of Prudential, Hearing Counsel and Continental to the Initial Decision are denied;

IT IS FURTHER ORDERED, That the proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[18] See *Volkswagenwerk v. FMC*, 390 U.S. 261 (1968); *New York Shipping Assn. v. FMC*, 495 F.2d 1215 (2nd Cir.), *cert. den.* 419 U.S. 964 (1974); *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40 (1978); *Transamerican Trailer Transport Inc. v. FMC*, 492 F.2d 617 (1974); *New York Shipping Ass'n v. FMC*, 571 F.2d 1231 (1978); *New York Shipping Ass'n v. FMC*, 628 F.2d 253 (1980).

[19] *See* note 15, *supra*.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79-9

PRUDENTIAL LINES, INC.

v.

CONTINENTAL GRAIN COMPANY

Complainant, Prudential Lines, Inc., a common carrier by water operating LASH vessels, alleges that respondent Continental Grain Company, a grain seller and trader, which operates a marine terminal facility at Norfolk, Virginia, known as the N & W Elevator, is subject to the jurisdiction of the Shipping Act, 1916, by virtue of its terminal operations allegedly conducted in connection with common carriers by water. Prudential further alleges that Continental refused to permit Prudential LASH barges to load a shipment of grain at the N & W Elevator on a particular shipment of wheat in July of 1978 and demanded a penalty from Prudential as a condition to permitting LASH barges to load the shipment, actions which are allegedly in violation of sections 16 First and 17 of the Act. On the basis of the evidence developed and applicable principles of law, it is found that:

(1) Continental's operations at the N & W Elevator are those of an other person subject to the Act because the record shows that Continental has served common carriers at the Elevator, that Continental publishes a terminal-tariff filed with the Commission which does not specifically exclude common carriers and even defines "liners," and that its lease requires it to operate a public terminal. Continental's claim that the vessels calling were not in common carriage or that, even if so, they called infrequently, has no legal significance.

(2) Continental's practice of preferring non-LASH vessels which resulted in the exclusion of such vessels in this case, is a practice which is apparently common in the grain industry among major grain traders and sellers. The practice, having originated in that industry, while not totally removed from consideration of marine terminal-efficiencies, is based upon numerous factors which grain sellers and traders consider when formulating their contracts of sale and is thus outside the scope of the Shipping Act or this Commission's expertise. Allegations that major grain companies have concertedly agreed to discriminate against LASH vessels lie within the jurisdiction of the antitrust laws, not the shipping laws.

(3) In the last analysis Prudential is asking the Commission to hold Continental liable for monetary damages because Continental adhered to its rights under its contract of sale of grain and Prudential was seeking to obtain a booking because the buyer's shipping agent had, without authority, induced Prudential to bid on the shipment. While Prudential may have been adversely affected, it cannot obtain relief against a seller of grain merely because the seller also operates a marine terminal and cannot use that fact to project the Commission into the midst of a grain selling practice.

John F. McHugh and *Robert F. Ambross* for complainant Prudential Lines, Inc.

David G. Freidman, Robert H. Huey, Lewis E. Leibowitz, and *Joseph D. Sander* for respondent Continental Grain Company.

John Robert Ewers, Aaron W. Reese, and *Charles C. Hunter* for Office of Hearing Counsel.

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

Adopted August 20, 1982

This proceeding began with the filing of a complaint by Prudential Lines, Inc., served on February 26, 1979, in which complainant alleges that respondent Continental Grain Company, a grain merchandiser and trader operating a marine terminal and grain elevator at Norfolk, Virginia, had excluded Prudential's LASH barges from carrying a shipment of grain which Continental had contracted to sell and deliver during July 1978, refusing to allow Prudential's LASH barges to load the grain at its Norfolk terminal. More particularly, the complaint alleges that on or about June 14, 1978, pursuant to a purchase authorization issued by the Department of Agriculture under the Agriculture and Development Act of 1954 (Public Law 480), an agency of the Egyptian Government issued an invitation to wheat suppliers for 50,000 tons of wheat. Some time thereafter in late June of 1978, Continental bid on the offer and was accepted but, in accepting, specified that LASH barges would not be permitted at the Norfolk Elevator. Nevertheless, on June 26, 1978, the Egyptian Government agency, through its ship broker, Peralta Shipping Agency, invited bids to carry the purchased grain without restricting carriage to any particular type of vessel. The complaint continues alleging that on June 27, 1978, Prudential submitted a bid in response to Peralta's invitation to carry a large portion of the wheat which Prudential believed to be the lowest bid. However, on June 28, 1978, Peralta advised Prudential that Continental, as the successful bidder, had excluded in its bid the use of LASH service at its grain elevator in Norfolk. However, Peralta agreed to keep open its negotiations with Prudential to enable Prudential to reach some type of agreement with Continental. In subsequent meetings between representatives of Prudential and Continental which took place between June 28 and July 5, 1978, Continental allegedly informed Prudential that it would refuse to load LASH barges at the Norfolk Elevator because the slower loading rate for LASH barges compared to bulk vessels adversely affected the productivity and profitability of the Norfolk Elevator. Thereafter Prudential offered to pay a penalty to Continental if its LASH barges were not loaded at a rate equal to that of bulk vessels, up to approximately $50,000 but Continental allegedly advised Prudential that Prudential would have to pay $150,000 outright for the right to have its barges loaded. Meanwhile on June 30, 1978, Peralta agreed to book on Prudential's LASH barges subject to Continental's removing its restrictions on LASH service by July 5, 1978.

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

However, since Continental had not removed the restrictions on that date, Peralta again issued an invitation for ocean transportation and Prudential again bid to carry subject to Continental's removing the LASH restriction, this time by July 7, 1978. However, Continental again refused to lift the restriction. Thereafter, on July 10, 1978, Peralta, for the third time requested bids for ocean transportation of the wheat but this time Peralta excluded LASH service from the invitation. Notwithstanding such exclusion, Prudential again bid to carry and included in its bid an offer to pay a penalty of up to approximately $51,000 if it failed to match the bulk carrier productivity rate. However, in the face of Continental's refusal to permit LASH vessels to handle the shipment, Peralta did not accept Prudential's bid to carry. Consequently, the wheat was ultimately shipped on a foreign-flag bulk vessel which loaded at the Norfolk Elevator without restriction or penalty.

Prudential alleges further that Continental is a marine terminal operator which publishes a tariff setting forth the various rates, charges, rules and regulations concerning the use of vessel berths at its Norfolk Elevator as well as an Elevator Tariff which governs receiving of commodities at the Norfolk Elevator and delivery to barges and vessels. Neither tariff, however, placed any restrictions on the loading of LASH barges. In view of these alleged facts, Prudential asserts that Continental had no right to demand penalties for loading LASH barges which were not published in Continental's tariffs. Prudential claims that this exclusion by Continental subjected Prudential to undue or unreasonable prejudice or disadvantage and gave an undue and unreasonable preference and advantage to Prudential's foreign-flag competitors, all in violation of section 16 First of the Shipping Act, 1916. Moreover, according to Prudential, Continental's repeated refusals to load LASH barges at its Norfolk Elevator in accordance with its marine terminal tariff and its proposal to load barges only if Prudential would pay Continental a charge not specified in such tariff constituted a failure to file with the Commission a tariff showing all its rates, charges, rules and regulations applicable to the Norfolk Elevator, and, furthermore, constituted a wilful failure by Continental to establish and observe fair and reasonable rules and regulations with respect to its Norfolk Elevator, all in violation of section 17 of the Shipping Act, 1916 (which requires terminal operators subject to the Commission's jurisdiction to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.") Prudential alleges, furthermore, that in seeking a penalty from Prudential before allowing it to load the wheat, Continental was not protecting any interest it had as a seller and shipper of grain but rather was acting solely to enhance its position as an elevator operator in a manner contrary to its terminal tariff. Finally, Prudential alleges that by reason of the foregoing conduct of Continental, Prudential lost revenue and paid lay-up expenses for one of its LASH vessels, the *LASH PACIFICO,* in an amount totalling some $1,032,135, for which injury Prudential seeks reparation together with such additional amounts that the Commission may determine to be proper together with an appropriate cease and desist order.

By answer dated March 19, 1979, Continental denies many of the material factual allegations made by Prudential and denies that Continental subjected Prudential to any undue or unreasonable disadvantage or had otherwise violated law. Continental admits that it imposed restrictions on the loading of LASH barges in its terminal tariff and in its contract of sale, but it asserts that the Commission lacks jurisdiction over the subject matter of the complaint.

On April 4, 1979, the Office of Hearing Counsel, Bureau of Hearings and Field Operations (then known as the Bureau of Investigation and Enforcement) petitioned for leave to intervene, asserting important and novel jurisdictional questions concerning the practices of Continental at its elevator and their belief that Continental subjected Prudential to undue and unreasonable prejudice. Hearing Counsel's petition was granted. On January 28, 1980, the Council of American-Flag Ship Operators (excluding its member Prudential), Delta Steamship Lines, Inc., and Waterman Steamship Corporation also petitioned for leave to intervene. The Council, which consists of six American carriers operating U.S.-flag vessels, some of which are LASH or SEABEE barge-carrying types, wished to intervene because of their belief that the jurisdictional issues were of great importance and its belief that Continental's restrictive activities fell within the Commission's jurisdiction and may have been violative of sections 16 and 17 of the Act. However, the Council wished to limit its participation to argument on the jurisdictional issues. On that basis its petition was granted. (See Intervention Granted, March 19, 1980.) However, several months after the trial-type hearing was conducted in this proceeding, the Council and the named lines requested permission to withdraw as intervenors, advising that they no longer wished to participate. Their request was granted on December 22, 1980. (See Request for Order Dismissing Intervenors Granted, that date.)

Some time after the answer was filed, the parties began prehearing inspection and discovery which became rather extensive and consumed many months. Several rounds of interrogatories and requests for production of documents were served and depositions were taken of various knowledgeable persons. The parties exhibited diligence in compiling materials through the discovery process for the purpose of narrowing issues and curtailing the scope of trial-type hearings. In addition, during the discovery process, Continental sought to have the complaint dismissed on jurisdictional grounds, a request which had to be denied because of an incomplete factual record on which to decide complicated and novel jurisdictional issues. After several conferences with the parties were held at which they reported on their progress toward drafting as much of a stipulated record as possible, discovery was virtually completed some time in early 1980 and trial-type hearings scheduled first in March and then in May of 1980. (See notices issued February 1, February 26, March 19, and April 23, 1980.) However, prior to commencement of the hearings, the parties requested an opportunity to begin intensive discussions which they hoped would lead to a comprehensive settlement which would resolve the past controversy and establish new rules for the future, in other words establish a complete commercial resolution. On their representation that such discussions would require much time and would involve complex problems and because of their demonstrated diligence and good-faith efforts to cooperate, I granted them permission to conduct their negotiations but required periodic status reports and imposed a cutoff date for either settlement or commencement of hearings. (See Notice of Final Postponement of Hearing and Order to Report Periodically Regarding Status of Settlement Negotiations, May 7, 1980.) Despite long and hard efforts to fashion a commercial settlement, which occupied the parties from late April through some time in August, they were unable to reach settlement and were therefore forced to proceed into trial-type hearings which began on September 3, 1980, and, with brief interruptions, ran until September 18, 1980, in New York City. The evidentiary record which was developed at that hearing ultimately amounted to 1454 pages of hearing transcript and 99 exhibits. Thereafter, at the request of the parties, who demonstrated a need for more than the normal time for preparation of post-hearing briefs in a case of this size and complexity, especially complainant which had only limited legal resources, a three-stage briefing schedule was established which concluded on April 6, 1981. (See Admission of Late-Filed Exhibits, Closing of Record, and Establishment of Briefing Schedule, October 3, 1980, and Briefing Procedure Adjusted, December 22, 1980.)

FACTUAL BACKGROUND

The following findings of fact are drawn from the proposed findings of fact in the parties' posthearing briefs and statements. Record references contained therein are omitted. The findings are quite detailed and provide a detailed factual background. However, particularly critical findings and additional findings are also discussed in the next section entitled "'Discussion and Conclusions" to the extent that they are necessary to any particular discussion and conclusion. Therefore, the present section is designed to provide an in-depth background which will place the subsequent discussion in a more meaningful context.

The proposed findings of the parties are rather lengthy and often divergent. In some instances they dwell on areas of tangential relevance or are essentially related to situations which seem relevant to laws other than the Shipping Act, for example, Prudential's lengthy proposed findings regarding an understanding among major grain companies to prefer non-LASH vessels in their contracts of sale. I have considered all of these findings and, for the sake of confining the case to material issues under the Shipping Act, have referred to extraneous proposed findings in the following discussion entitled "Discussion and Conclusions." In thus fashioning the numbered findings, I have followed ample case authority which holds that I need not refer to every proposed finding of fact and need only make material findings sufficiently clear to enable one to understand my reasoning and conclusions. See *Adel International Development Inc. v. PRMSA*, 23 F.M.C. 477, 480 (1980); *Colorado Interstate Gas Co. v. Federal Power Commission*, 324, U.S. 581 (1945); *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173 (1959); *Gilbertville Trucking Co. v. United States*, 196 F. Supp. 351, 359 (D. Mass. 1961), modified on other grounds, 371 U.S. 115.

CONTINENTAL GRAIN COMPANY

1. Continental Grain Company (Continental) is a large international merchandiser of grain. In its capacity as such, it purchases and markets grain throughout the world.

2. Continental's World Grain Division is responsible for marketing on an international level grain that is originated throughout the world. Continental's North American Grain Division is responsible for marketing on an international level grain that is originated in the United States and Canada. These divisions constitute the exporting arm of the corporation. They are headquartered in New York, N.Y., and will hereinafter be referred to as Continental (New York).

3. Within Continental's North American Grain Division are six regional offices headquartered in Chicago, Illinois, St. Louis, Missouri, Minneapolis, Minnesota, Portland, Oregon, Kansas City, Missouri, and Winnipeg, Manitoba. These regional offices are responsible for marketing grain that is originated in their respective regions. Each regional office is a profit center within the corporation.

4. Continental's regional offices do not market grain on an international level. If the grain originated by these regional offices is to be sold for export to a foreign government or corporation by Continental, the regional offices must first transfer title to the grain to Continental (New York).

5. In addition to selling grain to Continental (New York), the regional offices trade with one another and with entities outside the corporation.

6. In order to facilitate its grain merchandising activities, Continental operates grain elevators throughout the United States. Included among these grain elevators are "export elevators" at which Continental loads grain for export throughout the world.

7. Included among the export elevators currently operated by Continental on the Atlantic and Gulf coasts of the United States are facilities located in Norfolk, Virginia, Savannah, Georgia, Westwego and Reserve, Louisiana, and Beaumont, Texas. The export elevators located in Reserve, Louisiana, and Beaumont, Texas, do not handle soft red winter wheat. In July, 1978, the Savannah, Georgia, facility was not operating as an export elevator and the Westwego, Louisiana, facility, due to a dust explosion in December, 1977, that crippled the elevator, was only partially operational.

8. The export elevator operated by Continental in Norfolk, Virginia, is the Norfolk and Western Grain Elevator (N&W Elevator). The N&W Elevator reports to the Continental regional office headquartered in Chicago, Illinois.

CONTINENTAL'S GRAIN TRADING ACTIVITIES

9. In order to facilitate its international grain merchandising activities, Continental (New York) maintains an "export book" which references all of the pending commodity purchase and international sales contracts entered into by the corporation. The export book reflects on average approximately 1,500,000 to 1,750,000 tons of grain purchased and 2,000,000 tons of grain sold.

10. The commodity sales contracts which Continental (New York) references in its export book generally require delivery during a specified future range of dates. In the normal course of business, a commodity sales contract may be entered into upwards to a year in advance of the range of dates designated for the execution of that contract.

11. Export contracts provide for a delivery period--a range of dates during which the grain can be delivered--of anywhere from 15 to 60 days. A typical delivery period is 30 days.

12. By entering into a commodity sales contract, Continental (New York) is not marketing an identifiable lot of grain which has been set aside for the express purpose of executing the contract of sale. The merchandising of grain is an extremely fluid process in which the "matching" of physical grain to a commodity sales contract does not occur until a relatively short period of time before the dates designated for the execution of that contract.

13. Because grain is fungible, its price is determined by supply and demand at any given place and time. Export and other sales contracts are for future delivery. Because so many factors influence supply and demand, and because those factors change quickly, prices change quickly and grain trading is an extremely risky business.

14. In order to reduce this risk, grain traders "hedge" by using the futures market. Futures contracts are standard contracts for delivery of grain in the future at designated warehouses. These contracts rarely result in actual delivery of grain; rather, they are traded on an exchange and are "liquidated" when the delivery period comes by making payments representing the difference between the contract price and the actual market price at that time. Trading in contracts for future delivery of the commodity itself is called "cash" trading.

15. "Cash" sales are usually "hedged" with a corresponding purchase of futures for the same delivery period. This hedging limits the maximum possible loss or profit on that one transaction, as the case may be. Similarly, "cash" purchases are offset with a corresponding sale of futures. Profit or loss on the thousands of transactions made by Continental is thus determined by four factors: the price of the purchase contract ultimately used to cover the sale; the price of the corresponding futures sale; the price of the cash sale; and the price of the corresponding futures purchase.

16. Grain is traded on the basis of these "premiums," that is, the difference between the "cash" and futures price for a given delivery month. These premiums reflect the varying perceptions of traders about supply and demand conditions.

17. The standard commodity sales contract entered into by Continental (New York) designates a port at or a coastal range in which the grain sold must be loaded. The terms of delivery specified therein are generally F.O.B. (Free on Board) a designated port or a port within a specified coastal range. Title to the grain sold pursuant to such terms of delivery passes at the end of the loading spout of the export elevator at which the grain is loaded.

18. As a rule, the decision by Continental (New York) as to the port at which the grain will be delivered is not made until after the purchaser of the grain advises Continental (New York) of the identity and readiness to load of the vessel that the purchaser has selected to carry the grain. Such notice is normally provided at least ten days prior to the vessel's estimated time of arrival. Continental is generally not obligated to designate the loading port until the vessel is within 72 hours off the coast of the United States. The designation of the specific loading facility at which the grain will be delivered may be and has been made even after the vessel is in port.

19. The majority of the commodity purchase contracts referenced in the export book maintained by Continental (New York) have been acquired from competing grain merchandisers, hereinafter referred to as other "commercials." The remainder have been acquired "in-house," i.e., from Continental's regional offices. The percentage of purchase contracts involving soft red winter wheat that have been acquired from

other commercials is higher than the percentage of purchase contracts involving other grains that have been acquired from other commercials.

20. Continental (New York), at its option, may execute a commodity sales contract by transferring its contractual obligations to another commercial. Such a transfer may be effectuated by applying a commodity purchase contract acquired previously by Continental (New York) from another commercial to the contract of sale for export. A transfer of contractual obligations may also be accomplished by acquiring a new commodity purchase contract from another commercial through the broker network and applying that contract to the commodity sales contract.

21. If Continental (New York) elects to transfer its contractual obligations to another commercial by either applying a commodity purchase contract referenced in its export book to the commodity sales contract or by repurchasing the necessary grain from that commercial, the grain sold for export by Continental (New York) would be loaded at an export elevator operated by that other commercial unless that commercial elected to transfer its contractual obligations to yet another commercial.

22. Continental (New York) also has the option of executing a commodity sales contract by purchasing the necessary grain in-house. This option would entail applying a commodity purchase contract previously acquired from one of Continental's regional offices to the commodity sales contract or obtaining a new commodity purchase contract for application to the contract of sale from one of these offices. The regional offices, in turn, would originate or would have already secured the necessary grain from the interior or would purchase or would have already obtained that grain from another commercial.

23. If Continental (New York) elects to execute a commodity sales contract by purchasing the necessary grain in-house, the grain sold for export would be loaded at an export elevator operated by one of Continental's regional offices if the Continental regional office from which Continental (New York) purchased the grain had originated the grain from the interior, as opposed to having applied a commodity purchase contract acquired from another commercial.

24. The market conditions that prevail at a given moment determine whether it would be more advantageous for Continental (New York) to execute a commodity sales contract by transferring its contractual obligations to another commercial or by purchasing the necessary grain in-house.

25. In the normal course of marketing grain, commercials, including Continental (New York), frequently execute commodity sales contracts by transferring their contractual obligations to other commercials. This exchange of commodity purchase and sales contracts creates "strings"

of contracts through which contractual obligations pass from the initial seller to the ultimate buyer. Such strings may involve numerous parties.

26. The ability of Continental (New York) to execute commodity sales contracts by transferring its contractual obligations to other commercials is an important aspect of its grain merchandising activities. The degree of flexibility so allowed is essential to the effective management of Continental (New York)'s substantial export book.

27. In order to allow for the direct flow of contractual obligations from the initial seller through the string to the ultimate buyer, the terms of the contracts of purchase and sale which comprise the string must be in conformity with one another.

28. The standard commodity sales contract limits the class of contractually acceptable types of vessels to self-trimming break bulk vessels (bulk carriers). It is a custom of trade in the grain merchandising industry that unless a contract specifies otherwise, a bulk carrier is assumed to be the only type of vessel which may be loaded. Tankers, deck ships and LASH barges are perceived by the industry to be, to a greater or lesser degree, nonconventional types of vessels.

29. The rationale for the custom of trade referred to above is the grain merchandising industry's perception that the efficiencies of loading a bulk carrier are far superior to those of loading other types of vessels.

30. If a commodity sales contract authorizes the loading of a nonconventional vessel, a contract of purchase which does not allow for such a loading could not generally be applied to execute that contract of sale absent renegotiation of the terms of the contract of purchase and the assessment of some form of premium.

31. Execution of a commodity sales contract which sanctions the loading of nonconventional vessels by means of a transferral of the contractual obligations to another commercial would generally be rendered more difficult, and in some instances virtually impossible, by the inclusion of that authorization.

32. In order to execute a commodity sales contract which authorizes the loading of a nonconventional vessel by repurchasing the necessary grain from another commercial, Continental (New York) would generally have to pay a substantially higher price for the grain so purchased.

33. An offer of grain on terms authorizing presentation of a LASH vessel would be made at a higher price than an offer authorizing other vessels.

34. In recent years, U.S. grain exports have increased dramatically, as people throughout the world have looked to U.S. grain suppliers as a source of food. From 1962 to 1978, annual exports of wheat, corn, sorghum, barley, oats and rye increased by 162 percent, from 35.5 million metric tons to 92.7 million metric tons. Annual exports of wheat alone increased during the eight-year period from 1970 to 1978 by 61

percent, from 20.2 million metric tons in 1970 to 32.5 million metric tons in 1978. This growth in exports has created heavy utilization of export facilities.

THE P.L.-480 PROGRAM

35. A major foreign aid program run by the U.S. government is a program authorized by the Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 455, as amended, commonly known as the "P.L.-480 program," under which the U.S. government finances sales of agricultural commodities to eligible foreign governments.

36. The P.L.-480 program is administered by the U.S. Department of Agriculture (USDA). USDA issues a purchase authorization to the government of the purchasing country, indicating the amount which may be spent for commodity purchases, and containing additional terms relating to those purchases. USDA approval is required for commodity sales contracts entered into by foreign governments pursuant to the program.

37. In a P.L.-480 sale, the foreign buyer issues a tender, or an invitation for bids, to sell the commodity and to charter vessels for the ocean transportation of the commodity. All bids are opened in public on the due date. The foreign buyer then decides what bids to accept, and submits those bids to USDA for approval.

38. Pursuant to Section 901(b) of the Merchant Marine Act of 1936, 46 U.S.C. § 1241(b)(1), at least fifty percent of the commodities purchased by each country under the P.L.-480 program must be transported on U.S. flag vessels.

39. An amendment to the P.L.-480 regulations in 1977 changed the prior procedure to require that all purchases under the program be made through public invitations for bids, that the bids be made public and that the lowest responsive bid be accepted. Because of this requirement, P.L.-480 sales represent a departure from normal commercial practice in which individual exporters and buyers are free to negotiate and re-negotiate the terms of export sales contracts.

40. Leo Wallace, the USDA official responsible for approving commodity bids under the P.L.-480 program since 1975, stated: "As we started getting some experience with this new procedure, . . . it became clear that many exporters were basing their prices on bulk carriers, excluding certain types of vessels." Because of this development, it became difficult for USDA to insure that the fifty percent cargo preference requirement was met, given the U.S. flag fleet, "consisting of mostly other than bulk carriers, which are better suited to the carriage of bulk grain."

41. Later in 1977, USDA began including in its purchase authorization forms a provision forbidding commodity sellers to make offers precluding specific types of vessels from lifting the cargo. Wallace

stated that this "effort to avoid exclusions . . . was not working" because:

> [T]he primary result was that the prices offered, including all types of vessels, included a risk factor for loading to slower moving vessels and it appeared that this would be on all offers, not just half of them . . . [T]here was a risk factor that would run anywhere from zero to four, five dollars a ton for the risk of loading slow moving ships so that we had to come up with something else.

42. In the spring of 1978, USDA began inserting in its purchase authorization forms a provision allowing export offers to preclude certain types of vessels from lifting the cargo if the exclusion was approved by USDA.

43. Sometime after June, 1978, as a matter of policy, USDA began to request that exporters make separate offers for each type of vessel that could be presented to lift the grain, although exclusions of particular vessel types were still permitted if approved by USDA. As a result, many offers now contain separate commodity prices for carriage by bulk carriers, tankers, deck ships and LASH and Seabee barges. Commodity offers permitting carriage by LASH and Seabee barges are consistently made at a price higher than offers for any other type of vessel.

44. In a normal commercial contract, in the absence of any provision regarding vessels, it would be implied that LASH barges could not be nominated to lift the grain. In a PL-480 contract, an explicit contractual provision to this effect is desirable, because the commodity price cannot be re-negotiated once the sale is approved by USDA, and hence no premium charged by another commercial for accepting LASH barges can be passed on to the foreign purchaser.

CONTINENTAL'S CONTRACT OF SALE OF WHEAT TO EGYPT

45. On June 14, 1978, the General Authority of Supply Commodities of the Arab Republic of Egypt (Egypt) issued, through the Egyptian Commercial Office, an "Invitation for Bids" for the supply of up to 50,000 metric tons U.S. Wheat. The Invitation for Bids was published in accordance with Purchase Authorization No. EG-7004-A issued by the United States Department of Agriculture (USDA) pursuant to Public Law 480.

46. In addition to listing the description and quantity of the wheat Egypt sought to purchase, the Invitation for Bids specified that the wheat purchased would have to be loaded during the period July 1 through July 31, 1978, and directed that all offers should designate a port at or a range of ports in which that wheat would have to be loaded. It was further specified therein that vessel nominations made by Egypt were not to be irrevocable and that substitutions of vessels for

those initially nominated were not to be subject to the seller's approval. The Invitation for Bids did not contain any provisions restricting the types or classes of vessels into which the wheat purchased could be loaded.

47. On June 21, 1978, Continental (New York) submitted an offer for the supply of wheat in response to Egypt's Invitation for Bids. Continental (New York)'s offer contained six separate bids, each of which specified a quantity and grade of wheat, a loading range or port and a price. Two of the bids designated the Gulf coast of the United States as the loading range; one specified the Atlantic coast of the United States north of Cape Hatteras (USNH), including Savannah, Georgia, but excluding Albany, New York; one designated an elevator operated by Continental in St. Louis, Missouri; another specified the Great Lakes; and the final bid designated Duluth/Superior. All of the bids specified the terms of delivery as "F.O.B. [Free on Board] unstowed, untrimmed." With the exception of the bid that designated Duluth/Superior as the loading area, all of the bids offered to supply soft red winter wheat.

48. Also included in the offer submitted by Continental (New York) was a provision specifying that unless a bid noted otherwise, the wheat offered for sale could not be loaded aboard LASH barges. The bid that designated the elevator operated by Continental in St. Louis, Missouri, as the loading facility was the only bid that authorized the loading of LASH barges. This restrictive provision was Item 7-C.

49. Item 7-C was incorporated into the offer submitted by Continental (New York) by R. Jeffrey Smith, then a Junior Merchandiser with Continental's North American Grain Division after a brief consultation with Richard Carter, then the Vice President in charge of Continental's North American Grain Division's wheat operations.

50. The bids that designated loading ranges on the Gulf and Atlantic coasts of the United States authorized the loading of tankers. Tankers could be loaded on the Gulf coast at a specified premium per metric ton of wheat purchased and on the Atlantic coast at no additional cost. These bids also allowed for loading deck ships at a premium of sorts. It was specified therein that load rate guarantees, i.e., a commitment to load the wheat purchased at the rate designated by the purchaser, would apply only to vessels capable of accepting 20,000 or more metric tons of wheat. The normal deck ship is not capable of transporting such a quantity of wheat.

51. Continental (New York) believed that it was necessary to specifically exclude LASH loadings in the offer it submitted to Egypt, as opposed to relying upon the custom of trade as to contractually acceptable vessels, because of restrictions imposed by USDA on the merchandising of grain under the auspices of the P.L. 480 Program. In a normal commercial setting, if a purchaser elected to nominate LASH barges, as

opposed to a bulk carrier, for the carriage of the grain it had purchased, that nomination might be accepted if a premium could be negotiated. Such a "price sensitive" matter could not be negotiated within the context of the P.L. 480 Program without securing the approval of USDA. Continental (New York) elected not to offer to load LASH barges at a specified premium because at the time it submitted its offer to Egypt it believed that the calculation of such a premium was impossible.

52. The prices specified in the various bids which comprised the offer submitted by Continental (New York) reflected, among other things, Continental (New York)'s perception of the commodities market, the perceived efficiencies of loading contractually acceptable types of vessels and the anticipated ability of Continental (New York) to execute a commodity sales contract that might be entered into with Egypt by transferring its contractual obligations to another commercial.

53. If Continental (New York) had included LASH barges in the category of contractually acceptable vessels, the prices specified in the bids that had excluded LASH barges would have been considerably higher to compensate Continental for the risk that no covering purchase from another commercial grain company could be made or that such a purchase could be made only at an exorbitant premium.

54. Item 7-C was included in the offer submitted by Continental (New York) in order to facilitate the transfer to another commercial of the contractual obligations that would flow from Egypt's acceptance of one or more of Continental (New York)'s bids.

55. A number of other commercials operated export elevators on the Atlantic coast of the United States in July, 1978. Cargill, Inc. operated facilities at the Ports of Albany, New York, Norfolk, Virginia, and Charleston, South Carolina; Bunge Corporation maintained an export elevator at the Port of Philadelphia, Pennsylvania; Tidewater Grain Company owned a facility at the Port of Philadelphia, Pennsylvania; Louis Dreyfus Corporation operated an export elevator at the Port of Baltimore, Maryland. In addition to Continental, a number of other commercials operated export elevators on the Gulf coast of the United States.

56. It was anticipated by Continental (New York) at the time it submitted its offer to Egypt that ports on the Atlantic and Gulf coasts of the United States would be heavily congested and that export elevators in these ranges would be fully utilized during the month of July, 1978. Continental (New York), therefore, perceived that it would have been extremely costly, if not impossible, to execute a contract of sale for export which authorized the loading of LASH barges by transferring Continental (New York)'s contractual obligations to another commercial.

57. It was further anticipated by Continental (New York) that if it authorized the loading of the wheat that it had offered to sell to Egypt aboard LASH barges, any wheat sold would have had to have been loaded at an export elevator operated by one of Continental's regional offices. This meant loading at the Westwego, Louisiana, facility on the Gulf coast and at the export elevator located in Norfolk, Virginia, on the Atlantic coast.

58. By telex addressed to Continental (New York) and dated June 21, 1978, the Egyptian Commercial Office confirmed, subject to USDA approval, that it had agreed to purchase from Continental (New York) 25,000 metric tons of soft red winter wheat to be loaded in the range USNH, excluding Albany, New York, but including Savannah, Georgia, in July, 1978, and 10,000 metric tons of soft red winter wheat to be loaded on the Gulf coast in July, 1978. Egypt's provisional acceptance did not refer to the provision included in the offer submitted by Continental (New York) prohibiting the loading into LASH barges of the wheat offered in the bids that had been accepted.

59. By telex dated June 22, 1978, the Egyptian Commercial Office advised Continental (New York) that USDA had approved Egypt's purchase of 25,000 metric tons of soft red winter wheat to be loaded in the range USNH, excluding Albany, New York, but including Savannah, Georgia, during the month of July, 1978.

60. On that same day, Continental (New York) notified the Egyptian Commercial Office of its confirmation of the sale that had been approved by USDA. In that telex, Continental (New York) reiterated that LASH barges could not be utilized to load the wheat that it had sold to Egypt.

61. By telex dated June 27, 1978, the USDA advised Continental (New York) that its sale of 25,000 metric tons of soft red winter wheat to Egypt had been approved.

62. A commodity sales contract evidencing the sale and purchase of 25,000 metric tons of soft red winter wheat was thereafter entered into by Continental and the General Authority for Supply Commodities, acting on behalf of the Government of the Arab Republic of Egypt. This contract specified that the wheat traded could not be loaded into LASH barges.

63. The commodity sales contract approved by USDA contained the provision excluding LASH barges from carrying the wheat Egypt had purchased from Continental (New York).

HOW PRUDENTIAL WAS UNABLE TO OBTAIN THE BOOKING

64. On June 19, 1978, Peralta Shipping Agency, Inc. (Peralta), acting on behalf of the Egyptian Company for Maritime Transport (Martrans) of the United Arab Republic of Egypt, issued a "Freight Invitation" for

the carriage of up to 50,000 metric tons of wheat to be loaded during the period July 1 through July 25. The's Freight Invitation was issued pursuant to Purchase Authorization No. EG-7004-A. Under the terms of Purchase Authorization No. EG-7004-A, Egypt was to select the vessels that were to transport the wheat it had purchased from Continental (New York).

65. Following notification by telephone of the terms of Peralta's Freight Invitation, Prudential, by telex dated June 20, 1978, offered to transport two parcels of 7,500 metric tons of wheat to be loaded in the range "USNH, not north N.Y.," during the periods July 5 through July 15, 1978, and July 15 through July 25, 1978. Prudential specified that the wheat would be loaded on one or more of the vessels *LASH ATLANTICO, LASH ITALIA* and *LASH PACIFICO.*

66. In response to Prudential's offer, Peralta submitted a counter offer specifying a different quantity and freight rate and designating Charleston, South Carolina, as the port of loading. Following negotiations, Prudential subsequently agreed to and ultimately did carry, pursuant to a booking note dated June 23, 1978, 9,357 metric tons of wheat which were loaded by Cargill, Inc., at the port of Charleston, South Carolina, in late July, 1978. The wheat was loaded aboard and carried on LASH barges.

67. On June 26, 1978, Peralta issued another Freight Invitation for the carriage of up to 25,000 metric tons of wheat to be loaded on the Atlantic coast of the United States between July 1 and July 25, 1978. The Freight Invitation was issued pursuant to Purchase Authorization No. EG-7004-A.

68. The Freight Invitation issued by Peralta did not restrict the type or class of vessels that could be offered to carry the specified quantity of wheat.

69. Following notification by telephone of the terms of Peralta's Freight Invitation, Prudential, by telex dated June 27, 1978, offered to transport 18,000 metric tons of wheat to be loaded in the range "Savannah/Charleston not north N.Y." during the period July 15, through July 25, 1978. Prudential advised that the wheat would be loaded on one or more of three specified LASH vessels.

70. In response to Prudential's offer, Peralta submitted a counter offer specifying a different quantity and freight rate on June 27, 1978. The following morning, prior to receiving Prudential' response, Peralta notified Prudential by telephone that Continental (New York), the supplier of the wheat purchased, had, in its commodity bid, prohibited the loading of that wheat aboard LASH barges.

71. By telephone, Peralta requested that Continental (New York) authorize the loading of the wheat purchased by Egypt into LASH barges. Upon being advised that the commodity sales contract prohibit-

ed such a loading, Peralta requested that Continental (New York) discuss with Prudential the possibility of waiving that prohibition.

72. Daniel J. Cahalane, then the General Traffic Manager, Mediterranean Mid-East Division of Prudential, testified that he believed that Peralta had advised Prudential on June 28, 1978, that the loading of the wheat purchased by Egypt was to be undertaken at the export elevator operated by Continental in Norfolk, Virginia. Mr. Cahalane further testified that Peralta invariably notified Prudential of the port of loading prior to the fixture of the vessel that would transport the grain and that Peralta had, in the past, always correctly identified the port of loading. Mr. Cahalane did not indicate the initial source of the information that he had received from peralta.

73. Mr. Carter testified that he had not so advised Peralta that the wheat Continental (New York) had sold to Egypt would be loaded at the export elevator operated by Continental in Norfolk, Virginia. Mr. Carter further noted that it would have been contrary to the policy of Continental (New York) to so advise Peralta until Continental New York) was contractually obligated to do so. Mr. Smith testified that although he did not specifically recall, he strongly doubted that he would have so advised Peralta that Norfolk, Virginia, was the port at which the wheat purchased by Egypt was to be loaded. Mr. Smith did not believe that the port of loading would actually have been determined prior to the time at which Continental (New York) was contractually obligated to specify the facility at which the grain would be loaded.

74. Mr. Carter further testified that due to difficulties Continental (New York) had experienced in its prior dealings with Peralta, Continental (New York) would not have advised Peralta of the port of loading until it was contractually obligated to do so. Apparently Egypt had on previous occasions nominated vessels that were not available to transport grain it had purchased only to substitute, and perhaps substitute again, different vessels. Mr. Carter noted that due to past nominations of such "phantom" vessels, Continental (New York) would not designate a port of loading until it was assured that the vessels nominated were physically present and would actually load the grain Egypt had purchased.

75. On June 28, 1978, Mr. Cahalane in a discussion with Mr. Carter raised the possibility of loading Prudential's LASH barges at the N & W Elevator. Mr. Cahalane emphasized Prudential's belief that LASH barges could be loaded at rates comparable to those achieved by other types of vessels.

76. Mr. Carter, in turn, advised Mr. Cahalane that Continental's regional office in Chicago, Illinois, had estimated that the rate at which wheat could be loaded aboard LASH barges at the N & W Elevator would be substantially less than that which could be achieved by a bulk

carrier. Mr. Carter indicated further that by loading a vessel that could receive wheat at a slower rate, the productivity of the N & W Elevator would be negatively affected.

77. Representatives of Prudential also discussed the possibility of loading Prudential's LASH barges at the N & W Elevator with Continental personnel in Norfolk, Virginia on June 29, 1978.

78. At Mr. Carter's suggestion, Continental's Chicago, Illinois, regional office attempted to arrange with Cargill, Inc., the loading of Prudential's LASH barges at the export elevator operated by Cargill, Inc., in Norfolk, Virginia. Cargill, Inc., declined to load the LASH barges.

79. On June 30, 1978, Peralta accepted Prudential's offer to transport 17,500 metric tons of the wheat Egypt had purchased from Continental (New York). Peralta's acceptance was made contingent upon Prudential reaching an agreement with Continental (New York) by noon on July 5, 1978, that would allow for the loading of Prudential's LASH barges.

80. On July 5, 1978, Mr. Cahalane contacted Mr. Smith. Mr. Carter was on vacation at this time. Mr. Cahalane proposed a "productivity schedule" under which Prudential would pay Continental at a rate between one cent and ten cents per bushel for the cargo, depending on the extent to which the loading rate of Prudential's LASH barges actually fell below 1000 tons per hour. The proposed schedule did not include any definition of what was meant by "loading hours" and, according to Continental, did not compensate Continental for lost "elevation." Under the proposed schedule, Continental estimated that even if the LASH barges loaded at only 400 tons per hour, Prudential would pay Continental only $38,850 while Continental's estimated "loss" would total $97,125.

81. After consulting with other Continental personnel, Mr. Smith informed Mr. Cahalane that the latter's proposed schedule was not responsive to the problem of Continental's lost "elevation." When Mr. Cahalane continued to seek a solution, Mr. Smith consulted other Continental personnel and advised Mr. Cahalane that loading LASH at the N & W Elevator would force Continental to lose "elevation" estimated at $120,000, incur demurrage liability estimated at $30,000, and possible elevator overtime costs of $5,000 to $10,000. (In earlier discussions on June 28, 1978, between Mr. Cahalane and Mr. Carter, Mr. Cahalane offered to have Prudential pay Continental in advance for all stevedoring and extra labor charges expected to be incurred.) In addition, Mr. Smith advised Mr. Cahalane that confusion about USDA weight and grade inspection procedures applicable to LASH barges required some firm understanding with USDA in advance about the number of weight and grade certificates that would be required. Mr. Smith also told Mr. Cahalane that any contractual change would require USDA approval.

82. Grain is sold by Continental for export F.O.B. end-of-spout, as noted earlier. One measure of the money earned on grain bought and sold by Continental is known as "elevation." Elevation is a theoretical measure of the difference between the market value of grain as received by an elevator on the land side and the F.O.B. export market price. "Elevation" is purely a measure of this difference in market prices; it is neither a charge nor a profit and bears no relation to terminal costs. It is simply one element of the earnings on an export sale. The cost price at which grain was purchased for the Elevator and the F.O.B. price when sold for export are determined by market conditions, i.e., supply and demand.

83. Continental is concerned that its Elevator may become "plugged," i.e., that grain arrives on the land side of the Elevator faster than it can be loaded into vessels. Use of slower-loading vessels increases the risk of plugging. Plugging can result in Continental's losing sales if the grain cannot be loaded at the N & W Elevator and is instead purchased and re-sold by another company. Continental's records show a build up at the N & W Elevator in late June and early July 1978 but this was at a time when supposedly fast loading bulk vessels were in berth. The record shows that LASH barges do not load as slowly as Continental believes and that LASH barges load at about the same rates as deck ships, at least. Also, as Continental concedes, the losses which Continental feared would occur at the N & W Elevator do not pertain to the particular sale to Egypt but to other sales and, as Prudential notes, probably for other types of grain such as corn which were at the Elevator at the time in question. (Prudential's Reply Statement, p. 37 n. 1.)

84. Mr. Smith advised Mr. Cahalane that Continental would consider removing the LASH exclusion if Prudential would pay $150,000 "up front." This figure derives from cost data for the Elevator that had been provided by Continental's Chicago and Norfolk personnel and purportedly related to conditions then obtaining at the N & W Elevator and deal with profit estimates based upon the volume of bushels of grain moving through the Elevator in a specified period of time. Mr. Cahalane rejected Mr. Smith's proposal.

85. On July 5, 1978, Peralta issued another Freight Invitation for the carriage of 22,500 metric tons of the wheat that Egypt had purchased from Continental (New York). The wheat was to be loaded on the Atlantic coast of the United States between July 1 and July 25, 1978. Prudential, by telex dated July 6, 1978, offered to transport 17,500 metric tons of wheat on the terms that Peralta had agreed to previously. Peralta provisionally accepted Prudential's offer and nominated Prudential's LASH vessels to Continental (New York) on July 7, 1978. Continental (New York), by telex dated July 7, 1978, rejected Peralta's vessel nominations as "uncontractual."

86. On July 5, 1978, Peralta nominated two deck ships to transport a total of 9,000 metric tons of the wheat Egypt had purchased from Continental (New York). The vessels so nominated were the *EXPORT BUILDER* and the *EXPORT COURIER* operated by Farrell Lines. These vessels were characterized by Peralta as "U.S. Flag Liners." Peralta confirmed its vessel nominations by telex dated July 6, 1978.

87. On July 5, 1978, Continental (New York) accepted the vessels nominated by Peralta and advised Peralta that the wheat to be carried by these vessels would be loaded at Norfolk, Virginia. By telex dated July 11, 1978, Continental (New York) confirmed its acceptance of the vessels that Peralta had nominated and formally declared Norfolk, Virginia, as the port of loading.

88. On July 10, 1978, Peralta issued another Freight Invitation for the carriage of 17,000 metric tons of the wheat that Egypt had purchased from Continental (New York). The wheat was to be loaded on the Atlantic coast of the United States between July 11 and July 25, 1980. Once again, Prudential offered to transport 17,000 metric tons of wheat on the terms that Peralta bad previously agreed to. Prudential incorporated into its offer the penalty schedule that Mr. Cahalane had previously proposed to Mr. Smith.

89. Peralta did not accept Prudential's offer, but was unable to secure transportation of the remaining wheat purchased by Egypt on a U.S. Flag vessel. On July 17, 1978, Peralta issued yet another Freight Invitation. This Freight Invitation excluded LASH barges and was limited to "non U.S. Flag vessels."

90. On July 19, 1978, Peralta nominated the *SWEDISH WASA*, a British Flag bulk carrier to transport 17,000 metric tons of the wheat that Continental (New York) had sold to Egypt. By telex dated July 19, 1978, Peralta confirmed that nomination and substituted the *EXPORT CHAMPION* for the previously nominated *EXPORT COURIER*.

91. By telex dated July 19, 1978, Continental (New York) requested that Continental's Chicago, Illinois, regional office declare the port at which the grade Continental (New York) had sold to Egypt would be loaded.

92. By telex dated July 19, 1978, Continental (New York) accepted Peralta's vessel nomination and formally declared Norfolk, Virginia, as the port of loading. The wheat purchased by Egypt was transported on the *SWEDISH WASA*, the *EXPORT CHAMPION* and the *EXPORT BUILDER*. These vessels were loaded at the N & W Elevator in July and August, 1978.

93. On at least five separate occasions in 1978, prior to or contemporaneous with the events here in issue, Prudential had loaded bulk grain on LASH barges at other grain export elevators on the East Coast of the United States. These included loadings at the elevators of Cargill, Inc., in Albany, New York, and Norfolk, Bunge's terminal in Philadel-

phia, the State elevator in Charleston, South Carolina, leased and operated by Cargill, and the Davis terminal in Norfolk. Prudential's LASH barges have thus previously had access to grain elevators.

THE N & W ELEVATOR AND THE VESSELS AND CARRIERS IT SERVED

94. The N & W Elevator is a marine terminal facility at which bulk grain is loaded for export aboard vessels operating in the foreign commerce of the United States. At the N & W Elevator, grain which is delivered by truck, barge or rail is weighed, elevated, processed, graded and loaded aboard oceangoing vessels berthed at the facility.

95. Continental has leased and operated the N & W Elevator since May, 1962. Continental leases the terminal from the Norfolk and Western Railroad. Pursuant to its lease, Continental is required to operate the Terminal as a "public terminal open to all parties."

96. Continental utilized and maintained on file with the Federal Maritime Commission during the period October 1, 1974 through October 1, 1978, a marine terminal tariff entitled:

> CONTINENTAL GRAIN COMPANY - OPERATORS NORFOLK AND WESTERN GRAIN ELEVATOR, NORFOLK, VIRGINIA—RULES REGULATING AND RATES APPLYING TO LOADING OF SELF PROPELLED VESSELS

97. The following types and classes of vessels are referred to in the terminal tariff: "self-trimming bulk carriers," "vessels with no tween-deck," "liberty and other similar type vessels with one tween-deck," "vessels with more than one tween-deck," and "tankers." Notwithstanding the tariff title which refers to self-propelled vessels, non-self propelled vessels, specifically LASH barges, have been loaded and charged tariff rates.

98. The terminal tariff which governed the loading of grain aboard vessels at the N & W Elevator during the period October 1, 1974 through October 1, 1978, defined "Liner Vessels" as:

> a vessel sailing under an advertised schedule, and operated by a line maintaining regular sailings from any United States port to named ports and on which the quantity of grain to be loaded shall not exceed one half of the total dead weight tonnage of the vessel.

99. Although the tariff contains a provision that states that " 'Liner Vessels' shall be given preference" under certain conditions, the evidence of record indicates that no such preference had actually been granted. "Liners" are generally defined in the shipping industry to mean vessels that are on an advertised and regular schedule to specific ports and that are held out to the general public for carrying general cargo at regular rates.

100. Effective October 1, 1978, Continental amended its terminal tariff so as to add the following provision regarding the loading of LASH barges:

> Elevator Management reserves the right to reject LASH Barges, if, in its opinion, such vessels interfere with the normal loading process.

101. During the period of June and July of 1978, Continental also maintained on file with the United States Department of Agriculture a tariff for the Elevator as a licensed public grain warehouse containing charges including a per bushel shipping charge for weighing out and delivery of grain to "cars, trucks, barges and vessels." As a licensed warehouseman, Continental was required by a provision of the United States Warehouse Act (7 U.S.C. 254) to receive grain for storage without discrimination.

102. Continental's Port Coordinator, Cowan, indicated that the Terminal tariff was regarded as being a true tariff. The record further reveals that Continental operated its terminal in a fashion generally consistent with its tariff as to charges for services. Detailed billing records show that vessels were charged in accordance with rates published in the tariff.

103. The "Monthly Report of Ship Loading" maintained by Continental in the regular course of business at Norfolk, Virginia, indicates that grain was loaded aboard "liners" at the N & W Elevator on seventeen different occasions during the years 1977 and 1978.

104. The "liners" so loaded at the N & W Elevator during these years were the *SELFOSS* and the *BRUARFOSS* operated by The Icelandic Steamship Company (Icelandic). Subsequent to March 1, 1978, Icelandic has maintained on file with the Federal Maritime Commission Freight Tariff No. FMC-9. Icelandic Freight Tariff No. FMC-9 specifies freight rates and conditions for the carriage of a wide range of cargo shipped from U.S. North Atlantic Ports of the Portland, Maine/Norfolk, Virginia, range to Ports in Iceland. Freight Tariff No. FMC-9 cancelled "Norfolk, Virginia/Iceland Freight Tariff No. FMC-3."

105. Icelandic advertised in *The Journal of Commerce* "regular frequent sailings" of the *BRUARFOSS* and the *SELFOSS* "from Portsmouth, Virginia to Iceland direct." In these advertisements, dates were listed on which these vessels would call at the specified ports of loading and discharge. .

106. During the years 1977 and 1978, neither the *BRUARFOSS* nor the *SELFOSS* received a full shipload of grain at the N & W Elevator. Furthermore, between January 1977 and September 1979 the largest grain shipments carried by the *BRUARFOSS* and the *SELFOSS* were substantially below one half the deadweight tonnage of these vessels. Continental's loading reports refer to these vessels as "liners."

107. The *EXPORT BUILDER* and the *EXPORT CHAMPION*, the vessels on which a portion of the grain purchased by Egypt from Continental (New York) was loaded at the N & W Elevator, were operated at the time of loading by Farrell Lines, Inc. (Farrell). Farrell advertised in *The Journal of Commerce* that the *EXPORT BUILDER* and the *EXPORT CHAMPION* made "regularly scheduled calls" at U.S. Atlantic coast ports, including the Port of Norfolk, Virginia, and numerous specified foreign ports of call, including the Port of Alexandria, Egypt. In its advertisements, Farrell listed dates on which these vessels would call at the specified ports of loading and discharge.

108. Farrell is a member of the North Atlantic Mediterranean Freight Conference (NAMFC). NAMFC has maintained on file with the Federal Maritime Commission "Freight Tariff (13) FMC-8" which specifies commodity rates and conditions governing the carriage of a wide range of cargo from "North Atlantic Ports of the United States in the Hampton Roads/Eastport Range" to specified foreign ports of call.

109. In September, 1977, forty LASH barges that were ultimately carried aboard Central Gulf Line's LASH vessel *DELTA SUD* were loaded with grain at the N & W Elevator. The *DELTA SUD* loaded grain at the N & W Elevator while calling at the Port of Norfolk, Virginia, in accordance with a schedule advertised in *The Journal of Commerce* which specified various ports of call on the Atlantic coast of the United States, including Norfolk, Virginia, and on the Red Sea and the Persian Gulf.

110. Central Gulf Lines has maintained on file with the Federal Maritime Commission "Freight Tariff No. 1, FMC No. 28" which specifies commodity rates and conditions governing the carriage of a wide range of cargo between U.S. ports, including the Port of Norfolk, Virginia, and designated foreign ports of call.

111. LASH barges that were transported on Prudential's LASH vessel *LASH ITALIA* were loaded at the N & W Elevator in June, 1977. The *LASH ITALIA* was calling at the Port of Norfolk, Virginia, in accordance with a regular schedule advertised in leading industry publications. These advertised schedules designated specific ports of loading and discharge in the United States, including the Port of Norfolk, Virginia, and abroad.

112. Prudential has maintained on file with the Federal Maritime Commission "Freight Tariff 1, FMC No. 47" which specifies commodity rates and conditions governing the carriage of a wide range of cargo between U.S. Atlantic Coast ports and designated foreign ports of call on the Mediterranean Sea.

113. The *LASH ITALIA* was only authorized to carry a maximum of thirty-three out of a total complement of seventy-seven LASH barges loaded with bulk wheat. Prudential dedicated the remaining LASH barges to the carriage of general cargo. In the normal course of busi-

ness, Prudential carried parcels of grain to fill empty vessel space. This practice is done in order to "shorten the ship" when cargo is in short supply.

114. During the years 1977 and 1978, approximately 175 vessels were loaded with grain at the N & W Elevator. Twenty-one of these loadings involving the *SELFOSS*, the *EXPORT CHAMPION*, the *EXPORT BUILDING*, the *DELTA SUD* or the *LASH ITALIA*. Approximately seventy-five percent of the vessels so loaded were bulk carriers.

115. The calls made by the vessels or barges sent by the four common carriers discussed above were made pursuant to negotiated rates which are not published in their common carrier tariffs and the vessels, even if calling at the port of Norfolk regularly, do not advertise regular calls at the Elevator. In this case Prudential negotiated rates with Peralta under a particular type of contract of affreightment or booking note which, in some respects, resembles charter clauses for handling bulk commodities. Under this arrangement Prudential dedicates a certain number of barges for the grain, leaving any other barges that would be carried on the mother ship free to carry general cargo. Prudential solicited carriage of bulk grain through brokers and a forwarder who did not book general cargo. Prudential would seek to negotiate profitable rates for carriage of bulk grain but gave priority to its general-cargo business. Continental's policy is to consider vessels non-liner unless they maintain a regularly scheduled service from the N & W Elevator (notwithstanding the literal language of the terminal tariff which mentions "regular sailings from any United States port to named ports. . . .")

DIFFERENT ESTIMATES OF LOADING TIMES FOR LASH AND OTHER SHIPS

116. The parties have made different calculations of loading rates for LASH barges and for other types of ships such as deck or bulk ships. Comparisons are difficult to make because different types of grain were loaded some times and because some of the time spent by the barge or ship on berth is consumed by maneuvering or bad weather which is not reflected in tables showing actual loading times.

117. Continental's own monthly vessel loading reports (Exhibit 54) based upon actual loading time (pouring time) shows that for four LASH barge loadings (including an abnormal rainy loading on January 1974) the actual rate per hour based upon actual pouring time was 15,925 bushels per hour for the LASH barges at the Elevator compared to 14,220 bushels per hour for eight deck ships. Even if adjusted to reflect total stevedoring time spent while the barges or deck ships were at the Elevator rather than merely the actual time in pouring, comparisons between six LASH barges loading corn and wheat during 1972 through 1977 and six deck ships loading corn and soybeans show

LASH to be nearly as productive as deck ships. The average for the LASH loadings was 10.6 thousand bushels of corn or wheat per hour for LASH (11.8 thousand if the abnormal January 1974 loading is omitted) compared to 12.3 thousand bushels per hour for the deck ships. Converted to metric tons, the comparison is a range of 408.3 to 291.2 metric tons per hour (omitting the abnormal January 1974 loading) for LASH barges compared to 498 to 257 metric tons per hour for the deck ships. LASH also did better than the two liner ships *BRUARFOSS* and *SELFOSS* which averaged 7.5 thousand bushels per hour (actual pouring time) for 12 loadings between January 1977 and June 1978.[2]

118. Comparisons of loading rates for bulk ships which are believed to be the fastest loading ships for grain show that based on actual pouring time, bulk ships loaded at an average of 551 metric tons per hour during January through June 1978 whereas four LASH barges loaded at an average rate of approximately 425 metric tons per hour in 1974 and 1977. The range for the bulk vessels was 449 to 635 metric tons per hour (based on actual pouring time).

119. Other data derived from Continental's records shows that the Elevator did not load on an around-the-clock basis. In fact, the Elevator poured grain on the average only about fifty percent of the time each day. On that basis, of course, average hourly rate of loading (as contrasted to rate of loading when grain is actually pouring) is lower. Calculations drawn from Continental's records show an average loading rate on such a total-time basis to be about 263 metric tons per hour based upon total hours in a month. These data call into question Continental's estimate that the Elevator could load 1,000 tons per hour but for LASH barges, a figure Continental utilized when negotiating with Prudential for productivity payments to offset slower loading LASH barges.

[2] Continental challenges the validity of these comparisons between LASH and deck ships and also shows that there is a loss of productivity when loading LASH barges due to time spent in positioning the barges above time spent in actual pouring. Continental also asserts that the LASH and deck ship comparisons are invalid because some barges loaded wheat or corn and the deck ships loaded corn or soybeans. Continental shows that comparing LASH barges loading corn with deck ships loading corn reveals that deck ships averaged 12,375 bushels per hour (total time on berth) while LASH barges averaged only 9,990 bushels per hour. (Continental Posthearing Statement, p. 52.) The record so shows. However, if the abnormally slow LASH loading of January 1974 is omitted, the comparison becomes 12,375 bushels per hour for deck ships compared to 12,350 bushels per hour for LASH barges. Continental does show lost time in loading LASH barges when comparing actual pouring time with total time on berth. (Continental's proposed finding No. 124.) But there is also lost time for the deck ships as the various tables show. There is no comparison of deck ships and LASH barges restricted to wheat loadings as Continental asserts, if total time on berth is used. But Prudential shows that for actual pouring time, a comparison of strictly wheat loadings on three LASH loadings with wheat on four deck ships reveals that LASH did better (16,436 bushels per hour compared to 15,180 for the deck ships). (Prudential Reply Statement, p. 40.)

120. There is evidence that Continental had not employed the most efficient stevedoring techniques in loading LASH barges in their early experiences with LASH on November 1972. Prudential's personnel believe, based upon their experiences at the Albany Elevator, that Prudential had the personnel and tugboats available to load 17,500 tons of wheat at the N & W Elevator at a rate between 500 and 1,000 tons per hour. Prudential had loaded LASH barges at the Cargill elevator in Norfolk in June 1978 at an average loading rate of 463 tons per hour, total time, according to Prudential's Norfolk Terminal Manager who was specifically requested to keep track of the loading rate at a time when Prudential was negotiating with Continental about the shipment in issue.

121. Although the various calculations appear to be confusing, it appears that LASH barges do quite well compared to deck ships when actually pouring or even when total time in berth is considered. There is also considerable lost time surrounding the actual pouring which indicates loss of productivity at the Elevator generally regardless of type of vessel. Bulk ships appear to load faster as far as actual pouring rate is concerned as well as for total time in berth. The bulk ship *SWEDISH WASA*, which ultimately carried a portion of the shipment in question after the LASH vessel nominations were vetoed by Continental under the contract of sale, did load at a rate much faster than any LASH barge had experienced at the terminal (811,36 metric tons per hour based on total time on berth, not pouring time). This rate exceeded Continental's expectations as to what a bulk ship could load by over 200,000 bushels. (Continental had expected that a bulk vessel could load 400,000 bushels of wheat in a 22-hour period; the *SWEDISH WASA* loaded 655,900 bushels in that period.) Nevertheless, as Prudential notes, the total picture at the Elevator should be considered to determine the effects on other loadings if LASH barges were loaded and, at the time in question, relatively low loading generally at the Elevator (240,000 bushels per day) could lessen the impact on other loadings if LASH had been selected.

CUSTOMS IN THE GRAIN INDUSTRY REGARDING USE OF ELEVATORS FOR EXPORTING GRAIN AND VESSEL SELECTION

122. There appears to be a custom among the major grain traders to consider bulk vessels to be "conventional" and all other types of vessels (tankers, deck ship and LASH barges) to be "non-conventional." By a general trade custom or practice, grain companies exporting through their East Coast elevators expect that a bulk vessel will be presented at an elevator under their contract of sale and delivery. If a non-bulk vessel were presented, it would either be rejected or a negotiated premium in the sales price would have to be paid based upon market

differentials at the time. The reason for this custom is the grain companies' belief that non-bulk vessels load more slowly and would cause delays at the various elevators. Such delays would affect the elevators' profitability in addition to whatever effects it might have on other grain sales and on grain companies' ability to cover sales by purchasing from other grain companies.

123. Although there is evidence that grain companies may ignore the standard restrictions in their contracts of sale when attempting to buy grain from each other to cover sales, the custom in the industry appears to be that they prefer standardized contracts which exclude LASH and other non-conventional vessels to avoid possible renegotiations of prices to account for non-conventional vessels or to facilitate purchase from another grain company to cover a sale. In a sale approved under P.L. 480, such as the one in issue in this case, an explicit contractual exclusion of LASH barges is made because the commodity price cannot be renegotiated in the event that the original grain seller transfers the contract to another grain company which would demand a premium for accepting LASH barges. Incidentally, the responsible official of the U.S. Department of Agriculture approved Continental's particular offer to sell in this case with its exclusion of LASH vessels under the erroneous impression that no LASH vessels would be available to handle the shipment.

124. Continental's traders believed that conditions at the various elevators would be crowded during June 1978 and that it would be necessary to cover a sale for delivery on the Atlantic or Gulf coasts with a purchase from another grain company. The record indicates some build-up at the N & W Elevator during late June and early July 1978 while bulk vessels were on berth. However, other evidence indicates that the N & W Elevator was not over-loaded with grain at this time.

125. Notwithstanding Continental's exclusion of LASH vessels in its offer to sell which was accepted by Egypt, another grain company, Cargill, had successfully bid on part of the invitation without excluding LASH vessels. Moreover, even in Continental's contract of sale, Continental did not exclude presentation of other types of "non-conventional" vessels such as tankers or deck ships. Indeed, deck ships of Farrell Lines did carry some of the grain and there is no evidence that the sales price had to be renegotiated because of that fact. However, during the early discussions between Prudential and Continental, when Prudential's Mr. Cahalane sought to have Continental waive its contractual restrictions so as to permit LASH barges to load, Continental sought to cover the sale by purchasing grain from Cargill's Norfolk elevator at a premium which would allow LASH barges to load there. Cargill, however, refused to sell wheat for loading into LASH barges at any premium.

126. The terminal tariffs filed by the various grain companies covering elevators on the East Coast at the time in question contained no special restrictions on LASH vessels except for Cargill's tariff in Norfolk which published a special 5-cent charge per outbound bushel for loading grain into LASH barges or between deckers.

127. Another custom or practice of the grain exporting industry concerns the fact that a person desiring to export grain from the East Coast who does not own or operate an elevator has to purchase the grain at the ocean side of the export elevator. Even grain companies operating elevators must purchase grain from each other F.0.B. end-of-spout. In other words, the grain stored in East Coast elevators operated by grain companies and loaded into vessels belongs to the grain companies operating the elevators, notwithstanding the public warehousemen nature of particular elevators such as the N & W Elevator. Before 1972 there were large government stocks of grain. However, there has been a dramatic change in the grain industry to the point where the grain companies apparently control movement of grain through their elevators so that persons without elevators (e.g., private farmers) cannot simply ship their grain to an export elevator on the East Coast for subsequent export if that elevator is operated by a grain company.

DISCUSSION AND CONCLUSIONS THE ISSUE OF JURISDICTION OVER THE N & W ELEVATOR AS A TERMINAL OPERATOR

Because of the complexity of the issues concerning the Commission's jurisdiction over Continental's terminal operations and over its practices relating to the exclusion of Prudential's LASH barges from carriage of the shipment of wheat in question, the parties agreed that it would be wise to defer litigating the question of reparation, i.e., Prudential's alleged monetary damages, and to concentrate instead on determining whether jurisdiction lies in the Commission and, if so, whether Continental violated section 16 First and 17 of the Act, as alleged by Prudential. Therefore, the first issue to be determined is the question as to whether Continental is subject to the Commission's jurisdiction because of its operations at the N & W Elevator.

As to this issue, Continental contends that it does not furnish terminal facilities in connection with common carriers by water so that it cannot fall under section 1 of the Shipping Act, 1916, which defines "an other person subject to this [A]ct" as a person who "carries on the business of . . . furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water." Act, section 1, 46 U.S.C. 801. Continental argues that the vessels calling at the N & W Elevator have been operated as bulk ships in contract carriage pursuant to specially negotiated arrangements with shippers and consignees. Thus, even when ships operated by apparent common carriers such as

Icelandic Steamship Co., Prudential, Central Gulf Lines, and Farrell Lines called at the N & W Elevator, according to Continental, they did so in contract carriage or else, as in the case of 32 out of 36 loadings of non-bulk ships during 1976 through 1978 at the Elevator on the Icelandic ships *BRUARFOSS* and *SELFOSS*, it was Icelandic's owners who purchased the grain, not a shipper. None of these non-bulk ships carried under tariffs which published grain rates, contends Continental, and even Prudential, which admittedly is a common carrier otherwise, tried to book the wheat shipment under specially negotiated rates without publishing such rates in its common-carrier tariff. Also, the vessels calling at the N & W Elevator did so without advertisements showing regular calls at the Elevator. Finally, even if some of the vessels calling at the Elevator did act as common carriers when so doing, Continental argues that the common carriage involved was of minimal consequence compared to the many vessels in noncommon carriage calling at the Elevator. Hence, Continental argues that the Elevator is essentially not furnishing services in connection with common carriers, or, if so, the Elevator has minimal impact on common carriers, thereby justifying a finding that there is no jurisdiction under the Act as was held in *Fall River Line Pier, Inc. v. International Trading Corp. of Virginia*, 399 F. 2d 413 (1st Cir. 1968), and under the reasoning of *Bethlehem Steel Corp. v. Indiana Port Commission*, 21 F.M.C. 629 (1979) (Opinion on remand), affirmed per curiam, 642 F.2d 1215 (D.C. Cir. 1980).

Both Hearing Counsel and Prudential refute the above contentions with citations to evidence of record and to previous court and Commission decisions. They cite numerous cases holding that grain elevator operators who make their facilities available to common carriers by water are subject to Shipping Act jurisdiction. They point to evidence of record showing that ships operated by common carriers have called at the N & W Elevator and that Continental's terminal tariff does not exclude common carrier vessels, that its lease from the Norfolk & Western Railroad specifies that the Elevator will be operated as a "public terminal open to all parties," that it is not common carriage but common carriers that the Shipping Act specifies when defining regulated terminal operators, that common carriers do not lose that status because some of their ships or portions of the ships are operated in noncommon carriage pursuant to contracts and without published tariff rates on bulk commodities, and that the doctrine by which status is determined on the basis of a count of the number of common carrier calls is not valid and is not followed by the Commission.

I find that both the evidence and the legal precedent cited confirm that Prudential and Hearing Counsel are correct in arguing that Continental's N & W Elevator must be found to be within Shipping Act jurisdiction.

The Commission has long regulated grain terminal elevators which handle grain exclusively but load grain in vessels operated by common carriers and many tariffs are filed by such elevators with the Commission. See, e.g., *Rates of Pacific Northwest Elevators Association*, 11 F.M.C. 369, 373 (1968); *California Stevedore and Ballast Co. v. Stockton Port District*, 7 F.M.C. 75, 81 (1962); *D. J. Roach, Inc. v. Albany Port District et al.*, 5 F.M.B. 333, 334 (1957); *Agreements No. 8225 and 8225-1, Between Greater Baton Rouge Port Commission and Cargill, Inc.*, 5 F.M.B. 648, 649, 653-654 (1959), affirmed under the name of *Greater Baton Rouge Port Commission v. U.S.*, 287 F. 2d 86, 90-92 (5th Cir. 1961); cert. denied, 368 U.S. 985 (1962); *Investigation Wharfage Charges on Bulk Grain at Pacific Coast Ports*, 8 F.M.C. 653, 656 (1965). In the present case, Continental claims that it is not furnishing terminal services in connection with common carriers by water. There are a number of valid answers to this contention which Prudential and Hearing Counsel have raised, however.

Much attention has been given to the type of vessel and carrier which have been shown on the record to have called at the N & W Elevator. This is because section 1 of the Act requires terminal operators to furnish their facilities "in connection with a common carrier by water." If this is critical to a determination of the Elevator's status under the Act, then the record supplies the answer. On at least 21 occasions during the years 1977 and 1978 Continental furnished terminal facilities in connection with at least six vessels that were operated by four different common carriers by water (Central Gulf, Icelandic, Prudential, and Farrell Lines). The carriers involved filed tariffs holding themselves out to transport general commodities and advertised calls at Norfolk. Evidence of record further indicates that some or all of these vessels were not fully loaded with grain and that common carriers had the practice of carrying both grain and general cargo in the same vessel to "shorten the ship," that is, to fill empty space during seasons of the year when other cargo was in scarce supply.[8] Prudential itself had loaded grain on its LASH vessels from the N & W Elevator on four prior occasions, most recently in June of 1977, and had been billed at the terminal tariff rates. Moreover, even Continental's own terminal records identify two of the common carriers' vessels which had loaded at the Elevator as "liners" and its own terminal tariff during

[8] Prudential had the practice of filling barges with grain to supplement general cargo on the same voyages which advertised calls at Norfolk. (See Prudential Opening Statement, p. 39 n. 1, and record citations therein.) Other common carriers may have done the same thing. The Icelandic ships *BRUARFOSS* and *SELFOSS* which called at the N & W Elevator and which, Continental argues, loaded grain for their owners, as the record shows (Tr. 1146), did not load enough grain to fill half their deadweight tonnage. Continental's own monthly reports of ship loadings characterize the Icelandic ships as "liners" (See Prudential Posthearing Statement, pp. 38-39, proposed findings 60 and 61 and record citations therein.)

the years 1977 and 1978 even defined "Liner Vessels" as vessels operating "under an advertised schedule" by a line "maintaining regular sailings" and on which the quantity of grain to be loaded "shall not exceed one half of the total dead weight tonnage of the vessel."

Continental does not argue that it was not serving oceangoing vessels nor does it dispute the fact that Central Gulf, Farrell, Prudential, and Icelandic may be common carriers with filed tariffs. What it does argue, however, is that regardless of the ordinary status of these carriers, they operated as non-common carriers when they sent their vessels or barges to the N & W Elevator to pick up grain. Secondarily, Continental argues that even if common carriers called at the Elevator, the low incidence of such calls meant that the Elevator was essentially not furnishing terminal facilities in connection with a common carrier under the doctrine of the *Fall River Line Pier* case, cited above. These defenses, however, do not withstand scrutiny and are outweighed by critical evidence as to the Elevator's public holding out.

The four carriers that called at the N & W Elevator (Central Gulf, Icelandic, Farrell, and Prudential) cannot reasonably be found to be other than common carriers. They operated under advertised schedules, filed tariffs, and held themselves out generally to carry commodities for the general public. These facts are sufficient to establish them as common carriers under numerous decisions of the Commission and the courts. See, e.g., *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 63-65 (1965); *Investigation of Tariff Filing Practices*, 7 F.M.C. 305, 320-321 (1962); *McCallister Brothers, Inc. v. Norfolk & Western Railway Company*, 20 F.M.C. 52, 65-66 (1977); *Possible Violations of Section 18(a) of the Shipping Act, 1916*, 19 F.M.C. 43, 50-51 (1975); *United States v. Stephen Brothers Lines*, 384 F. 2d 118 (5th Cir. 1967). However, Continental argues that whenever the vessels or barges of these carriers called at the N & W Elevator, they did so under special contracts and were thus not operating in common carriage. There are several valid answers to this argument raised by Prudential and Hearing Counsel. First, even if a part of the vessel or barge sent by the common carrier was involved in contract carriage rather than common carriage, this does not mean that the common carrier which operated the ship lost its status as a common carrier or that the Elevator was not serving common carriers. As Hearing Counsel note, the Shipping Act is concerned with regulation over carriers, not with the type of carriage. Thus, the Commission noted in *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 615, 622 (1959), affirmed under the name *Grace Line, Inc. v. Federal Maritime Board*, 280 F. 2d 790 (2nd Cir. 1960), cert. denied, 364 U.S. 933 (1961):

> [t]he Act confers jurisdiction over carriers, specifically over "common carriers," as distinguished from types of carriage, i.e., common or contract. . . .

Furthermore, when common carriers have in fact utilized portions of their vessels in common carriage of general commodities but have segmented other portions of their vessels in so-called "contract carriage" on the same voyages, the Commission has not only continued to find the carrier to be a common carrier but has even applied Shipping Act standards to the so-called "contract carriers" portion of the voyage. For example, in the famous banana case cited above, *Grace Line, Inc. v. Federal Maritime Board*, 280 F. 2d 790, Grace Line had argued that its contract carriage of bananas was exempt from regulation notwithstanding its status as a common carrier for other commodities on the same vessels. The Court, however, refused to grant any partial exemption or to redefine Grace's common carrier status, holding, on the contrary, that a common carrier by water does not cease to be such because it chooses to make an exception as to a part of the goods it accepts. To this regard the Court stated:

> The Grace Line's argument presupposes not only that these duties [imposed by the Shipping Act] are limited to "common carriers by water," as of course they are, but also that they are limited to such carriers while they are carrying goods as to which they have "held themselves out as common carriers." We can see no reason to impute such a limitation upon the definition of common carriers in § 801.
>
> * * *
>
> As we have just said, a "common carrier by water" does not cease to be such because it chooses to make an exception as to a part of the goods that it accepts. 280 F. 2d at 792, 793.

Similarly, in *Flota Mercante Grancolombiana v. F.M.C.*, 302 F. 2d 887 (D.C. Cir. 1962), the court again refused to distinguish between a common carrier's activities as carrier of general cargo from its activities in so-called "contract carriage" of bananas and affirmed the Commission's finding of common carrier status for purposes of applying Shipping Act standards to the carrier's practices in handling contract shipments of bananas.

The cases just discussed show that a common carrier cannot divest itself of its status as such or avoid regulation under the Act by segmenting its vessel operations so long as a part of the operations on its vessels are those practiced by common carriers. Therefore, whatever were the terms under which the four common carriers' vessels or barges picked up grain at the N & W Elevator, they were still sent and operated by acknowledged common carriers. Unless section 1 of the Act is to be rewritten to specify that terminal operators subject to regulation under the Act are those persons furnishing terminal facilities only in connection with "cargo loaded in common carriage," one is left with the definition as written, namely the furnishing of such facilities in connection with "a common carrier by water," and there is no way in which the four common carriers named can be found on this record to be other than common carriers. Continental, however, emphasizes another fact in reliance on its contract-carriage argument. That is its argument that since Prudential and other common carriers customarily negotiate special rates for the carriage of bulk grain, which rates are not published in the carriers' tariffs, this fact again illustrates that Continental's N & W Elevator was not serving common carriers. Even if the lack of tariff filing of bulk commodity rates did signify that this portion of Prudential's business was not common carriage, I have just explained that it makes no difference since Prudential would remain a common carrier in the eyes of the law. However, the argument is not valid for two other reasons. First, common carriers were specifically exempted from the requirement that they file bulk commodity rates in their tariffs so that they could better compete with unregulated "tramp" carriers and could fill out their vessels with bulk cargo to supplement general cargo. Thus, instead of proving that Prudential or any other common carrier is not a common carrier merely because it does not file a negotiated bulk commodity rate, the argument corroborates the fact that Prudential and possibly the other common carriers were only trying to compete with "tramp" vessels and to fill out their vessels, or "shorten the ship" as Prudential calls this practice. This point is made very clear in the legislative history to P.L. 87-346, which added section 18(b) to the Shipping Act in 1961, the provision of law which governs tariff filing in foreign commerce. The testimony of then Chairman Stakem of the Federal Maritime Board (the Commission's predecessor agency) clearly describes the purpose of the bulk commodity tariff exemption as relating to the need for common carriers to be free to compete with "tramp" operators by quoting special rates without being encumbered with tariff-filing regulations. See Hearings Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries on H.R. 4299, 87th Congress, First Session, March 20, 1961, pp. 26, 36.[4]

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[4] Chairman Stakem testified in pertinent part as follows:

> We suggest that cargo loaded in bulk without mark or count be excluded from the filing and other requirements of section 3 of the bill. Since such cargoes are normally carried by "tramps" which are exempt from regulation under the 1916 Act, common carriers subject to the act should be free to change their rates in order to compete for these cargoes.
>
> * * *
>
> As you know, the bulk cargo is usually an open rate item for most of the conferences, and the liner ships are in competition with the tramps to put this cargo in as filler cargo. It seems to us that it is the type of commodity that we could not necessarily require an advance filing of rates on.
>
> I think it would be a little bit impossible in the light of the fact that the tramps are free to do as they please and quote as they please, and it would put the liners in a very bad position in connection with the bottom cargo that they constantly seek.

Second, the Commission has already rejected Continental's argument that the ships or barges sent by Prudential or the other three common carriers were operating under special contractual arrangements with shippers and thus cannot be considered to be operating as common carriers. In *Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 58, 64 (1965), the Commission rejected the argument as follows:

> In *Investigation of Tariff Filing Practices*, 7 F.M.C. 320 (1962), a carrier contended that it was not offering common carrier service since it did not advertise, solicit, or publish a sailing schedule and carried cargo only after it had secured a negotiated written transportation agreement with the shipper. The Commission rejected all these contentions and stated with respect to the last:
>
>> It cannot be successfully contended at this late date that a carrier may avoid common carrier status by insisting on a transportation agreement with each shipper. All cargo carried for compensation moves on some form of transportation agreement, express or implied. 7 F.M.C. at page 321.
>
> In *General Practices in Rates* (1961), 7 F.M.C. 260, 280 (1962), the Commission stated that a special arrangement to secure the business of a shipper did not of itself convert the arrangement into one of contract carriage. (Citations omitted.)
>
> The Commission has recognized that under some circumstances, a common carrier may execute contracts with particular shippers for the carriage of large volumes of cargo. This system does not abrogate common carrier status. The contracts are actually forward booking agreements. (Citations omitted.)

The previous discussion shows that the evidence of record which indicates that at least four common carriers sent vessels or barges to be loaded with grain at the N & W Elevator during 1977 and 1978 cannot be discounted merely because the four carriers may have negotiated special rates or may have carried bulk grain in a manner different from that in which they carried general cargo, even if it could be found that the four carriers conducted "contract carriage" or non-common carriage with respect to their booking of bulk grain. Continental, however, has another argument, namely, that even if on the occasions in which the four common carriers called at the N & W Elevator and loaded grain, they did so as common carriers and as common carriage, the relatively small number of these calls compared to all calls at the N & W Elevator removes the Elevator from Commission jurisdiction because the effects on common carriers are so minimal. Continental relies upon the case of *Fall River Pier, Inc. v. International Trading Corporation of Virginia, Inc.*, cited above 399 F. 2d 413, and to a lesser extent on *Bethlehem Steel Corp. v. Indiana Port Commission*, cited above, 21

F.M.C. 629 (1979) (opinion on remand), affirmed per curiam, 642 F. 2d 1215 (D.C. Cir. 1980). Continental argues that in the *Fall River Line Pier* case, the pier had unloaded common carriers on only four occasions out of the 33 unloadings which had occurred during the two years prior to the case. (Continental's Posthearing Statement, p. 66.) Continental argues that even assuming that all the vessels alleged to be operating as common carriers which had called at the N & W Elevator during a three-year period prior to this suit were in fact common-carrier vessels, they only amounted to 36 loadings out of 271 occurring during that time period. (*Id.*) Thus, according to Continental, the percentage of common-carrier loadings or unloadings compared to total loadings or unloadings in both cases is almost identical (12.1 percent in *Fall River Line Pier* compared to 13.3 percent in the present case). Moreover, in the present case, Continental argues, as in the *Fall River Line Pier* case, there is little or no impact on common carriers because Prudential's attempts to book the grain involved only contract carriage. Continental sums up its contention by stating that "the lesson of that case [i.e., *Fall River Line Pier*] is that a terminal at which common carriers have called on only a few occasions is not subject to the Commission's jurisdiction in its dealings with a contract carrier, absent a showing that the common carriage was affected." (Continental Posthearing Statement, p. 69.) Both Hearing Counsel and Prudential, however, in my opinion, have persuasively explained how the *Fall River Line Pier and Bethlehem Steel Corp.* cases cannot be used to support Continental's contentions. *Fall River Line Pier* is a peculiar case. Complainant, a contract importer of bagged cement at the Fall River Line Pier which, during the period in question, primarily served only two cement importers who used contract carriers, filed its complaint with the Commission alleging discriminatory storage charges and practices and ultimately obtained an order of the Commission against respondent terminal operator calling for the payment of approximately $12,000 in reparation. (See *International Trading Corp. v. Fall River Line Pier, Inc.*, 7 F.M.C. 219 (1962); and 8 F.M.C. 145 (1964).) A District Court enforced the Commission's order but on appeal, the 1st Circuit reversed, finding that the Commission had no jurisdiction over the respondent terminal operator. The basis for the Court's decision was its finding that although on some occasions vessels carrying general cargo had called at the piers, the case "involves vessels having no connection with the merchant marine, and only incidentally concerned with common carriage as distinguished from the extensive common carriage operations of the Grace Line, see *Banana Distributors, Inc. v. Grace Line, Inc.*, 5 F.M.B. 617 (1959)." (399 F. 2d at 416.) The Court went on to say that "[a]t a minimum there should have been a finding, or a factual basis supporting a finding, that the common carriage here was of sufficient consequence to be affected by the contract carriage." *Id.* Hearing

Counsel point out several distinguishing factors between *Fall River Line Pier* and the present case, note that the Commission has not followed the case in subsequent decisions, and question whether it was correctly decided. Prudential also questions whether the case was correctly decided (noting that no one appeared before the Court on behalf of the party asserting Commission jurisdiction) but more importantly showing that the present case is one in which a common carrier complainant alleges substantial effects on its operations unlike *Fall River Line Pier* where the effects on common carriage were supposedly minimal. Prudential also cites the latter case of *Bethlehem Steel Corp.* in which the Commission rejected the *Fall River Line Pier* rationale in finding jurisdiction over the respondent terminal operator.

Fall River Line Pier stands out peculiarly and has not been followed by the Commission. It involved a small pier dealing essentially with two contract cement importers and with vessels that only rarely discharged general cargo. The court's decision acknowledges that some general cargo had been discharged by one barge and three vessels and mentions a carrier known as "Thorden Line" which had discharged cement and office furniture at Fall River but also miscellaneous general cargo at New York, Philadelphia, and other ports. (399 F. 2d at 415.) At best there were only about four general cargo vessel calls at Fall River as opposed to the present case in which there were 21 or 36 loadings on vessels operated by common carriers at the N & W Elevator depending on whether one counts a two-year or three-year period prior to the loading involved in the present case. In the present case, moreover, four known common carriers (Central Gulf, Farrell, Prudential, and Icelandic) sent vessels or barges to the N & W Elevator. The main problem with *Fall River Line Pier*, however, is that it rests upon a counting or consequences theory. In other words, the Court deemed impressed that so few common carrier calls were made at the pier in Fall River compared to the overwhelming number of calls of contract carriers unloading bagged cement. Since there were so few calls by general-cargo vessels, the court could not find much impact on common carriers. In this case, the impact on common carriers is clear. Prudential is an acknowledged common carrier, as were the other three mentioned above and, even if one accepts Continental's argument that the ships these common carriers sent to the Elevator were not acting under common carriage, the record shows that Prudential at least customarily sought grain to "shorten the ship," i.e., to supplement common carriage cargo by filling in with grain. It is difficult, therefore, to argue that these four carriers' vessels calling at the Elevator were only "incidentally concerned with common carriage." Again, note that the Court seems to confuse "common carriage" with "common carriers" as if section 1 of the Shipping Act defined other persons subject to the Act as those persons furnishing terminal facilities in connection with "common carriage" rather than in connection with "a common carrier by water.") Whatever the merits of the Court's "incidental" or "insufficient consequences" test, however, it has not been followed by the Commission, which, it should be noted, was not a party before the Court.[5] As shown by the *Bethlehem Steel Corporation* decision, the Commission does not engage in a counting exercise to determine the number of common carriers that call at a particular pier before finding jurisdiction over terminal operators. In *Bethlehem Steel Corp. v. Indiana Port Commission*, complainant had alleged that respondent's assessment of a harbor service charge was unreasonable, in violation of section 17 of the Act. Early in the proceeding respondent Port Commission moved for a dismissal contending that "its services in connection with common carriers by water have been 'insubstantial and of insufficient consequence' to establish a basis for the Commission's jurisdiction." (12 SRR at 1080.) Specifically, the respondent Port Commission had argued that it had served only one common carrier vessel, the *URANUS*, on two occasions, which vessel had been engaging in foreign commerce. (Respondent had also argued that its service to common carriers in interstate as opposed to foreign commerce should not be counted.) The presiding officer rejected the counting theory, stating (12 SRR at 1061):

> The concept advocated by the Port which relates jurisdiction to the number of times a common carrier is served is rejected. It would be anomalous with the Commission's duty to regulate terminals serving common carriers by water to exempt a terminal from the duties and prohibitions imposed upon an "other person" in even one incident.

As he further stated (12 SRR at 1061):

> The finding that the Port served common carriers by water is sufficient to support the Commission's jurisdiction.

On appeal, the ruling of the presiding officer was adopted by the Commission. (13 SRR 22 (1972).) The Commission made the following remarks:

> The record shows that Respondent has furnished services to several common carriers by water in interstate commerce and

[5] The effect of a decision by a Court of Appeals on the Commission is unclear when, as in *Fall River Line Pier*, the Commission was not a party and the Court had heard no argument from the Commission. There is some doubt as to the validity of a Court's reversing a Commission decision unless the Court reviews that decision under the so-called Hobbs Act (28 U.S. 2341 et seq.) instead of by means of reviewing a District Court's order of enforcement of a Commission order. See *Marine Terminal v. Rederi. Transatlantic*, 400 U.S. 62 (1970), holding such action of the Court of Appeals (again the 1st Circuit) to be improper. See also *Sanrio Company Ltd. v. Maersk Line*, 23 F.M.C. 154, 199 (I.D. 1980), adopted by the Commission, 23 F.M.C. 150 (1980), in which the Commission noted a decision of the Fifth Circuit Court of Appeals which contravened Commission decisions without the Commission's participation before the Court, which decision the Commission therefore declined to follow.

> on two occasions has served the Uranus, a vessel engaged in foreign commerce. Respondent holds itself out to the public that it "is readily accessible to overseas vessels with limited use of tugs." (13 SRR at 23.)

The Commission therefore did several things in the cited case. Fully aware of the *Fall River Line Pier* decision four years earlier, the Commission rejected the notion that its jurisdiction over terminal operators depended upon the number of times that a common carrier's vessels called at a terminal, showed no interest in determining whether a vessel owned by a common carrier had actually operated in common carriage when it called at the terminal, and was not apparently concerned with how large or how small the consequences or effects on common carriers happened to be but seemed more concerned with the holding out of the terminal to all vessels. I conclude, on the basis of the *Bethlehem Steel Corp.* case, that the Commission does not follow the rationale of the *Fall River Line Pier* decision.[6] In a fairly recent article concerning the Commission's jurisdiction over terminal operators, moreover, the author apparently agrees with this conclusion.[7] He interprets the *Bethlehem Steel* ruling of the Commission to mean that "[e]stablishing jurisdiction did not depend upon a showing that some threshold proportion of the Indiana Port Commission's terminal services were furnished to common carriers." [8] He also comments on the fact that the Commission has not followed the *Fall River Line Pier* case, stating: [9]

> There have been no cases decided since Fall River in which the Commission required a showing that a threshold proportion of a terminal's services were furnished to common carriers as a prerequisite to the FMC asserting jurisdiction. The Fall River standard has been abandoned in favor of an "even one common carrier" standard.

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[6] Continental questions the validity of the Commission's rulings on jurisdiction in the *Bethlehem Steel* case because of later developments in that case. Hearing Counsel, however, as well as Prudential, have shown that these later developments do not affect the jurisdictional rulings. (See especially Hearing Counsel's Reply Brief, pp. 15-16 n. 5.) These subsequent developments had nothing to do with the status of respondent Port Commission as an "other person subject to this [A]ct." They rather had to do first with the lawfulness and later the jurisdictional status of the Port's "Harbor Service Charge." After the Commission had found the subject charge to be unlawful under section 17 of the Act (17 F.M.C. 266 (1974)), the Court of Appeals set aside. that finding and remanded with instructions to determine reasonableness of the charge on the basis of the contributions of the parties to harbor development and of the benefits derived by the parties from use of the harbor. (See *Indiana Port Commission v. F.M.C.*, 521 F. 2d at 285). In its opinion on remand (21 F.M.C. at 633), the Commission affirmed its earlier jurisdictional ruling but found the particular charge to be unrelated to terminal activities and thus to be outside the Commission's jurisdiction under section 17 of the Act. This decision was affirmed without opinion by the Court. 642 F. 2d 1215 (D.C. Cir. 1980.)

[7] See Buchwald, *Federal Maritime Commission Jurisdiction Over Terminal Operators*, 12 Journal of Maritime Law and Commerce 209 (January 1981).

[8] *Ibid.*, p. 228.

[9] *Id.*

For another ruling in which jurisdiction was found over one furnishing terminal facilities without requiring a showing of any particular number of common carriers calling at the terminal, see *Louis Dreyfus Corp v. Plaquemines Port, Harbor, and Terminal District,* 19 SRR 749, 750 (Morgan, J. 1979).

The prevailing view of the Commission, therefore, appears to be that Shipping Act jurisdiction will not be renounced merely because the number of common carriers calling at a terminal is minimal or the particular vessels calling at the terminal are not themselves operating in common carriage although they are owned by common carriers.

Continental's Holding Out as a Public Terminal

The previous discussion deals with Continental's arguments that would deny Commission jurisdiction over its N & W Elevator by considering the number of vessels sent to the Elevator by common carriers, the supposedly small impact on common carriers, and the argument that the vessels were acting as contract carriers, not in common carriage when they arrived at the Elevator. Although superficially appealing, I cannot find these various arguments to be persuasive either in fact or in law. In fact four common carriers did send vessels or barges to be loaded at the N & W Elevator and Prudential, at least, followed the practice of adding grain to its general-cargo carryings when cargo was short. Moreover, the Commission seems to have specifically rejected the determination of jurisdiction by counting numbers of common carrier calls at terminals or by measuring impacts on common carriers so long as it appears that one or more common carriers have called. However, if the question is still considered close and Continental's arguments are found appealing, one final category of evidence which has not yet been considered tips the scales in favor of finding Continental's N & W Elevator to be a regulated marine terminal. This evidence has to do with Continental's public holding out as shown by its tariff filed with the Commission and its lease with the Norfolk & Western Railroad. As both Hearing Counsel and Prudential note, Continental has filed a terminal tariff with the Commission since at least October 1974 which Continental's own witness testified was regarded as a true tariff and which was utilized in billing carriers loading at the Elevator. Moreover, the tariff, while apparently limiting service to "self-propelled vessels" (which LASH is not) did not in fact bar LASH barges which had been loaded at the Elevator in the past.[10]

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[10] There is evidence that Continental did not follow its tariff regarding its purported limitation to self-propelled vessels since it had loaded LASH barges in the past. Moreover, there is also some evidence that despite the publication of "liner preference" in the tariff, no such preference was granted in fact. (See Prudential's Posthearing Statement, p. 39, and proposed finding 62 with record citations.) In

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More importantly, perhaps, the tariff did not exclude common carriers' vessels. On the contrary, it even specifically defined "liner" vessels, as I noted earlier, as vessels on advertised schedules and regular sailings which did not load more than one half of the deadweight tonnage of the vessel with grain. Furthermore, the tariff also provided for "liner preference" although there is testimony that such preference was not actually granted in practice. Finally, Continental operates the N & W Elevator under a lease from the Norfolk & Western Railroad, which lease provides that the purpose of the operation is to conduct its business on the premises as "a public terminal open to all parties." No matter how Continental tries to persuade one that its N & W Elevator was not a regulated marine terminal because ships calling at the Elevator were not really acting in common carriage although they may have been sent by common carriers (and such arguments are not really persuasive, although superficially appealing, as I have shown), how can Continental dispute its public holding out when its own tariffs and the very lease under which it operates demonstrate such a holding out? Such a holding out, I believe, is significant.

The Commission regards terminal operators under its jurisdiction in the same light as public utilities or common carriers. See *Investigation of Free Time Practices - Port of San Diego*, 9 F.M.C. 525, 547-548 (1966); *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 444 F. 2d 824, 828 (D.C. Cir. 1970); *Chr. Salvesen & Co., Ltd. v. West Mich. Dock & Market Corp.*, 12 F.M.C. 135, 141 (1968); *A.P. St. Philip, Inc. v. Atlantic Land & Improvement Co.*, 13 F.M.C. 166, 174 (1969). However, the essence of a public utility or common carrier is its public holding out. Thus, although the filing of a tariff, the regularity of schedules, the carriage of general cargo for several shippers, and similar factors all have a bearing on the ultimate determination of the status of a common carrier, as the Commission has noted (*Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 56, 65 (1965)), the ultimate test is the carrier's holding out, i.e., whether it is public or private or limited. Thus, as the Commission stated in *Tariff Filing Practices of Containerships Inc.*, 9 F.M.C. at 62:

> The Commission has examined the indicia of "common carrier at common law" on numerous occasions. The most frequently mentioned characteristic is that a common carrier by a course of conduct holds himself out to accept goods from whomever offered to the extent of his ability to carry.

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case of conflict between what the tariff states and what the terminal operator actually does in any particular instance, the Commission has indicated that the actual practice will be controlling. See *In the Matter of Agreement No. T-2719*, 16 F.M.C. 318, 325 (1973). This does not mean, however, that the tariff is to be disregarded as evidence of a public holding out.

See also *American Export-Isbrandtsen lines, Inc. v. F.M.C.*, cited above, 444 F. 2d at 831. A preponderance of the evidence in this case shows that Continental held out to load grain on all carriers' vessels, and even though its tariff supposedly excluded non-self propelled vessels such as LASH barges, it loaded them as well. (Indeed, after the events that transpired in this case concerning the exclusion of Prudential's LASH barges from the N & W Elevator, Continental amended its terminal tariff in October 1978, reserving the right to "reject LASH barges, if, in its opinion such vessels interfered with the normal loading process.") This public holding out shown in the tariff and lease together with the fact that at least four common carriers did send vessels and barges to load at the Elevator, which vessels did not necessarily load exclusively with grain, the literal language of section 1 of the Act, the legislative intent to establish a comprehensive regulatory scheme extending beyond vessels into terminal operations incidental to common carriers' vessels, and the recognition of the public-utility-like aspect of marine terminal operations, provide adequate support for me to conclude that Continental's N & W Elevator was operating as an "other person subject to this [A]ct." To reinforce this conclusion, I note that other grain companies wishing to remove their elevators from Commission regulation have done so simply by specifically excluding common carriers in their tariffs. See, e.g., *New Orleans Steamship Association v. Bunge Corp.*, 8 F.M.C. 687, 694 (1965); *Agreement No. T-2719*, 16 F.M.C. 318, 321 (1973), in which it was held that a terminal operator may remove itself from Commission jurisdiction by explicitly announcing in its tariff that it no longer serves common carriers. As the Commission stated in the Bunge case (8 F.M.C. at 694):

> We, therefore, find that since November 22, 1961, the day Bunge barred common carriers from calling at its Destrehan facility, we have had no jurisdiction over its operations there.

In the present case, therefore, having chosen not to exclude common carriers from its N & W Elevator by tariff or otherwise, Continental has gained the benefits of serving common carriers as well as contract carriers. It cannot, therefore, renounce its status as a public terminal operator unless and until it specifically discontinues service to common carriers in its tariff and adheres to such publication.[11]

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[11] Continental cites one other case to support its contention that it was not operating a terminal in connection with common carriers. That case is *McAllister Brothers, Inc. v. Norfolk & Western Railway Company*, 20 F.M.C. 62 (1977). In that case the Commission affirmed a finding by the presiding judge that respondent N & W Railway Company had not operated a regulated terminal facility at particular coal piers in Norfolk. The decision distinguished between the coal piers which handled coal exclusively in connection with chartered coal vessels which had no resemblance to common carriers as compared to a general merchandise pier serving other vessels. As Hearing Counsel correctly note (Hearing Counsel Reply Brief, p. 10) the vessels calling at the coal piers carried shiploads of coal, not mixtures

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THE ISSUE OF JURISDICTION OVER CONTINENTAL'S DECISION NOT TO LOAD LASH BARGES

The second general issue to be determined concerns the question of whether the Commission's jurisdiction extends into the particular exclusion which Prudential experienced. Prudential and Hearing Counsel contend that Continental's refusal to load Prudential's LASH barges at the N & W Elevator constituted a violation of section 16 First and 17 of the Act because it subjected Prudential to undue and unreasonable prejudice and disadvantage and constituted an unreasonable practice related to the receipt, handling, storing, and delivering of property. Both Prudential and Hearing Counsel believe that Continental's activities as a seller of grain and its exclusion of LASH barges from the particular contract of sale that was involved in this case do not exempt it from Commission regulation when it decided not to load LASH barges at its N & W Elevator. At that time, more or less, these parties believe that Continental was merely furthering its interests as a terminal operator rather than conducting a grain selling and merchandising business. Therefore, they argue, its conduct falls within Shipping Act concern. Prudential goes further by alleging that Continental and other major grain companies have engaged in a concerted effort to discriminate against LASH vessels in their contracts of sale, in violation of section 15 of the Act. Finally, Prudential believes that Continental unlawfully attempted to extract a penalty from Prudential before agreeing to permit Prudential to send its LASH barges to the N & W Elevator to load the grain in question.

Hearing Counsel, while generally agreeing with Prudential, argue that Commission jurisdiction attaches under sections 16 First and 17 of the Act because the grain was ultimately loaded at Continental's N & W Elevator and the interests of Continental as a grain seller and as a terminal operator became, for all intents and purposes, the same, although Hearing Counsel deny that Commission jurisdiction extends into the original contract of sale of the grain between Continental and Egypt or into the provision in that contract excluding LASH vessels. Moreover, Hearing Counsel believe that Commission jurisdiction is shown because of the ultimate effect on the operations of the N & W Elevator stemming from exclusion of LASH vessels.

Continental believes that the particular practice complained of, namely, exclusion of LASH vessels from the carriage of the wheat shipment in question, is part and parcel of Continental's grain selling

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of common and contract carrier cargoes and such vessels never published tariffs, advertised sailing schedules, or held themselves out as common carriers. The case is unlike the present one in several key respects since in this case common carriers have sent vessels to the N & W Elevator and have not exclusively loaded with grain. In *McAllister*, furthermore, there was no evidence of any public holding out by the coal piers to common carriers.

and merchandising business, not its terminal operations. Continental argues that the exclusion of LASH was determined in its contract of sale with Egypt, which the Commission has no legal authority to regulate under the Shipping Act, and that the reasons for this exclusion in that contract relate to the intricacies of the grain trading and selling business. Continental argues, in effect, that Prudential would have the Commission rewrite its contract of sale to permit Prudential to obtain a booking to which it was not entitled by contract. Such modification, furthermore, would have several serious adverse effects on Continental's grain selling and trading business because it would interfere with its options to fill sales and with its "elevation," i.e., the market differential between the price of grain received at the N & W Elevator and the FOB export price. The practice of excluding LASH vessels from this contract of sale or from other sales contracts is thus, according to Continental, a practice of the grain selling and trading business, not the terminal business. To illustrate this contention, Continental argues that it could not publish a provision in its terminal tariff to offset these problems caused by utilization of LASH barges instead of faster-loading bulk vessels because it cannot anticipate the many fluid factors in the grain commodity market, all of which are considered by Continental when selecting the grain to fill a contractual commitment. Continental believes that Hearing Counsel's argument that Continental was not subject to Commission regulation when entering into the contract of sale but did become subject when it declined to modify the contract to allow LASH to load the grain at its N & W Elevator is absurd.[12]

The arguments of Prudential and Hearing Counsel have some appeal, I must admit. It seems unfair that Prudential, which submitted an acceptable bid to Peralta, the Egyptian buyer's shipping broker, should be excluded from carriage merely because it operates LASH vessels and its barges are supposed to be slower loading than the grain industry's preferred bulk vessels. This also seems unfair when the record shows that LASH barges are not so slow in loading as Continental believes, load about as fast as "deck ships," and that with a little more effort and diligence, greater productivity in loading can probably be

[12] Hearing Counsel admit to difficulties in their position, namely, the problem of identifying that point in time when Continental, the grain seller, began to act like Continental, the terminal operator, or in other words, when did Continental begin to further its interests as a terminal operator rather than as a grain seller. Hearing Counsel admit that "the exact point at which Continental (New York) determined to load the. wheat . . . at the N & W Elevator cannot be ascertained from the evidence of record with any degree of certainty." (Hearing Counsel's Opening Brief, p. 61.) Therefore, Hearing Counsel admit that "it is difficult to determine in what capacity Continental (New York) was acting and what interests it sought to further by so acting, when it declined to accept Peralta's nomination of Prudential's LASH vessels." (*Ibid.*, p. 62). However, since the wheat was ultimately loaded at the N & W Elevator, Hearing Counsel argue that Continental's interests as grain seller and terminal operator became "indistinguishable" when Continental declined to accept LASH vessels and, furthermore, argue that its rejection of LASH had a "significant effect upon the operation of the N & W Elevator." (*Ibid.*, p. 63).

achieved at the N & W Elevator, based upon Prudential's experience. It also seems that since Continental publishes a terminal tariff and holds out to any type of vessel either in its tariff or in practice, that Prudential ought not to have been barred from loading grain at the N & W Elevator on the particular sale to Egypt. After all, isn't a terminal supposed to be akin to a public utility observing non-discriminatory practices to all who use its services? Moreover, isn't the problem here, to some extent, the fact that LASH barges supposedly load more slowly than bulk vessels causing other vessels to back up and costing the terminal in vessel demurrage charges or overtime, as even Continental acknowledges to be the case? If so, isn't this a terminal cost problem, not a grain selling problem, and cannot Continental protect itself by publishing an offsetting charge in its terminal tariff so that it could still accept LASH barges without loss? Moreover, how fair is it for the major grain companies to adopt a form contract and a custom to prefer bulk vessels over LASH and then to defend any particular Elevator's refusal to load LASH on the ground that the grain company operating the Elevator could not transfer the sale to another grain company's elevator because that company also followed the industry's non-LASH restrictive practice? There are still other facts which Prudential points out in its Reply Statement (pp. 23-24) which sometimes contradict Continental's factual assertions and indicate, for example, that LASH barges can be loaded about as fast as deck ships, which ships Continental in fact loaded for part of the wheat shipment to Egypt at the N & W Elevator, that the Department of Agriculture approved the P.L. 480 purchase and exclusion of LASH in the erroneous belief that all LASH vessels had been otherwise accounted for, that grain elevators on the East Coast were not as congested as Continental would have one believe, that Continental had made known that the N & W Elevator would be the point of loading possibly as early as June 28, 1978, when Prudential first tried to negotiate with Continental, or even June 27, when Peralta advised Prudential, that in other loadings, Norfolk had been named much earlier than Continental claims to be the practice, that Continental's offer to sell the grain in question has permitted deck ships and tankers as well as bulk vessels without additional increase in the sales price to Egypt, that congestion problems at the N & W Elevator had to do with loading efficiencies and slow loading rates of bulk vessels, that lost sales alleged by Continental as a result of an attempt to substitute LASH barges for bulk vessels would affect not the sale to Egypt but sales of corn which was also stored at the N & W Elevator during the relevant time period, and that transference of the sale to another grain company would not be impeded because of the standard contract of sale which precluded LASH because that contract had often been ignored in practice by grain companies.

All of these foregoing arguments and asserted facts would seem to indicate that this case calls for relief which the Commission can somehow grant under sections 16 First and 17 of the Act. However, I believe that the very size of the record and the complexity of the facts serve to conceal the fact that the case primarily involves a contract of sale of grain and only secondarily deals with the duties of a regulated terminal operator under the Shipping Act. If anything, the root cause of the problem which Prudential and other LASH vessel operators face is the fact that grain companies observe peculiar practices in their multifarious and complex grain trading and selling businesses which ultimately affect LASH operators but which have their source in grain merchandising, not terminal matters. In other words, the exclusion of LASH from carriage of the shipment in question originated in a grain selling and trading context, not in a terminal context, although ultimately the grain company's elevator was affected because bulk or other non-LASH vessels loaded. Therefore, attempts to insert the Shipping Act so as to affect the decision of Continental as seller of grain under its contract with Egypt would mean regulation of grain merchandising practices through the back door of the grain company's N & W Elevator. It makes little sense, in my opinion, to argue that the Commission has no jurisdiction over a contract of sale of grain which contains an exclusionary clause but somehow the Commission gains jurisdiction whenever the parties to that contract attempt to carry out that contractual provision. This, in effect, means that the Commission is regulating the contract because the Commission would be rendering the particular provision regarding selection of vessels void.

Another problem I find with the argument that the Commission can give Prudential relief from the terms of the contract of sale on the ground that the seller also operates the terminal through which the grain happened to pass is that such relief presupposes that Prudential had a right to the booking of the grain in the first place and that it was deprived of the booking by unlawful interference of a regulated terminal operator. In point of fact, however, it was Peralta, the booking agent of the Egyptian buyer, which violated its principal's contract with Continental, the seller of grain, by twice inducing Prudential to bid on the carriage of the shipment. This conduct by Peralta set in motion the unfortunate chain of events by misleading Prudential into believing that it could obtain a booking. Moreover, as Hearing Counsel acknowledge, it is somewhat inequitable for Peralta to seek to obtain cheap LASH rates for transporting the wheat after Continental had sold it at a price which was based upon use of different vessels and then force Continental, in the name of Prudential, to modify its contract regardless of any particular financial harm that may result to Continental. Furthermore, whatever the duties of a regulated terminal operator, they certainly do not require such operator to provide loading or other services to any vessel which shows up at the terminal and demands to be loaded even if such vessel has no booking. In other words, a carrier cannot show up at a regulated terminal and demand that the terminal operator load its ship when the cargo at the terminal has already been booked on another ship by the shipper merely because the terminal operator has a tariff on file with the Commission and holds itself out to load vessels. In short, we have here a carrier, Prudential, which had no booking but which had been misled by a booking agent, Peralta, into thinking that it could obtain a booking contrary to the terms of a private contract of a seller and buyer of grain, attempting to be permitted to send its LASH barges to the terminal at which the grain was to be loaded even without a booking. A brief analysis of pertinent facts and case law will illustrate support for the foregoing conclusions.

It is true that terminal operators subject to Commission jurisdiction are held to high duties similar to those of public utilities and common carriers so that they cannot unfairly discriminate among their customers. See, e.g., *Chr. Salvesen & Co. Ltd. v. West Mich. Dock & Market Corp.*, cited above, 12 F.M.C. at 141; *Investigation of Free Time Practices - Port of San Diego*, cited above, 9 F.M.C. at 547-548; *A. P. St. Phillip, Inc. v. Atlantic Land & Development Co.*, cited above, 13 F.M.C. at 174. But those and similar cases involve situations in which shippers sought to have cargo loaded or unloaded or sought other services pursuant to proper booking contracts or vessels called in response to a terminal tariff that held out to service vessels desiring unloading services or were denied use of alternative tugboat service without justification. In other words, the customer of the terminal who sought a tariff service had some proper reason to be at the terminal and sought a service that fell squarely within the four corners of the holding out in the tariff or the duty of the terminal operator. In none of those cases did a shipper appear at a terminal and demand that the terminal load its cargo on a ship for which it had no booking or a vessel call and demand to be loaded without having first acquired a booking. Moreover, even in those cases in which shippers have a legitimate reason to seek terminal services, the terminal operator is not required to provide services over and above those specified in its tariff. For example, shippers cannot deposit their cargo on piers and expect free warehousing or storage services. See, e.g., *Free Time and Demurrage Charges on Export Cargo*, 13 F.M.C. 207, 215, 245-246, 247 (1970); *Free Time and Demurrage Practices at N.Y. Harbor*, 11 F.M.C. 238, 253, 259 (1967). In short, terminal operators hold out to perform services under a tariff and to perform the services specified in the tariff fairly and without unreasonable discrimination. They do not hold themselves out to provide services for persons having no previously acquired right to appear at the terminal to seek its services. Nor are the terminal operators required to furnish extra non-terminal services by providing free warehousing or free storage or by acting as a booking agent for carriers or shippers. Nor, because they operate terminals, does the Commission regulate everything they do without regard to what and where the activity is. See e.g., *Bethlehem Steel Corp. v. Indiana Port Commission*, cited above, 21 F.M.C. 629 (Commission has no jurisdiction over a "Harbor Service Charge" imposed by a terminal operator which is related to navigation and not to the physical handling of cargo); *New Orleans Steamship Association v. Bunge Corp.*, cited above, 8 F.M.C. 687 (Commission has no jurisdiction over a Louisiana terminal merely because the same company operates a regulated terminal in Philadelphia); *Agreement Nos. T-1685 and T-1685-6*, 16 SRR 887 (1976), adopted on this point, 19 F.M.C. 440, 457-458 (1977) (no Commission jurisdiction over terms of a lease of backup terminal facilities when terminal operator acted as lessor of facilities only); *Levatino & Sons v. Prudential-Grace Lines*, 18 F.M.C. 82, 84-85, 108-112 (1974) (warehouse agreement between carrier and other person subject to Act outside section 15); *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports*, 8 F.M.C. 653, 656 (1965) (no Commission jurisdiction over terminal operator's grain storage activities); *United States v. American Union Transport, Inc.*, cited above, 327 U.S. at 453 ("The original congressional purpose [of section 1 of the Act] clearly was to reach all who carry on the *specified* activities whether in or out of affiliation with a carrier." (Emphasis added.))

But, argue Hearing Counsel and Prudential, Continental does operate a terminal (the N & W Elevator) and, therefore, it cannot discriminate among vessels merely because of a contract of sale which its grain selling division entered into. Moreover, the Commission has held that a regulated person cannot segment its operations so as to avoid regulation when such segmentation results in unjust discrimination. Hearing Counsel cite a long line of cases in which common carriers by water have been required to treat their customers fairly notwithstanding contrary pressures from underlying labor agreements.[13] But analysis of these cases shows that they directly involved the common carriage operations and duties of carriers not to discriminate while serving shippers, a fundamental duty long established in transportation law and one which this Commission quite properly and readily enforced. A typical

[13] These cases are collected on page 19 of Hearing Counsel's Reply Brief. They are: *South Atlantic and Caribbean Line, Inc. - Order to Show Cause*, 12 F.M.C. 237 (1969), affirmed, 424 F. 2d 941 (D.C. Cir. 1970); *Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc. - Proposed ILA Rules on Containers*, 21 F.M.C. 1 (1978), appeal docketed, No. 72-1776 (D.C. Cir.); *Pacific Maritime Association v. F.M.C.*, 543 F. 2d 395 (D.C. Cir. 1976), reversed on other grounds, 435 U.S. 40 (1978); *United States v. Sea-Land Service, Inc.*, 424 F. Supp. 1008 (D. N.J. 1977), appeal dismissed, 577 F. 2d 730 (3rd Cir. 1976), denied, 439 U.S. 1072 (1979); and *Consolidated Express, Inc. v. Sea-Land Service, Inc.*, Denial of Motion to Dismiss, 16 SRR 817 (1976).

case is *South Atlantic and Caribbean Line, Inc. - Order to Show Cause*, 12 F.M.C. 237 (1969), affirmed, *South Atlantic and Caribbean Line, Inc. v. Federal Maritime Commission*, 424 F. 2d 941 (D.C. Cir. 1970), in which the Commission refused to allow a carrier to "embargo" certain containerized cargo within 50 miles of a particular port without complying with applicable tariff law, although the carrier claimed that the restrictive practice was mandated by an underlying labor contract. The Commission rejected the contention, stating:

> We are not here concerned with the ultimate validity of clause 19 [in the labor contract]. Such a determination is beyond our jurisdiction and is within the province of the National Labor Relations Board. But whatever its validity, we cannot permit the mere execution of a collective bargaining agreement to override the clear requirements of a statute we are charged to administer. Statutes controlling the activities of common carriers and the obligations of those carriers are not subordinate to the requirements of labor contracts. (Citation omitted.) (12 F.M.C. at 241.)

The *South Atlantic and Caribbean Line* case and the other labor-related cases cited by Hearing Counsel involved carriers operating as common carriers in a manner directly contrary to their common-carrier duties under fundamental transportation law.[14] But in the present case Hearing Counsel and Prudential are asking the Commission to impose common-carrier or public-utility-type duties in areas beyond Continental's terminal. Specifically, they want the Commission, in effect, to extend itself into Continental's grain selling and merchandising practices, specifically, the practice of utilizing contracts of sale in which ships other than LASH are preferred for reasons relating, to some extent, to exceedingly complex market factors affecting the constantly changing price of grain, the need to maintain options in filling orders until the last feasible moment, the need to strive for a favorable "elevation" when the grain is actually loaded, etc. As the record shows, the world of grain trading and selling is a unique and complex world unto itself, one that an agency with expertise in regulating ocean shipping and practices of carriers and marine terminals is ill equipped to deci-

[14] One of the labor-related cases cited by Hearing Counsel is somewhat different, however. That is *Federal Maritime Commission v. Pacific Maritime Association et al.*, 435 U.S. 40 (1978). That case had to do with labor agreements between various steamship lines and marine terminal operators and others on management side and a longshoremen's and warehousemen's labor union on the employees' side. The Court held that the Commission had jurisdiction over the agreements under section 15 of the Act notwithstanding the fact that the agreements were part of collective bargaining and might otherwise have involved antitrust law. The Court agreed that the agreements had competitive effects as regards other ports outside the collective bargaining unit and that the Commission could determine these effects in the shipping industry under section 15 of the Act. Although found in labor contracts, the carrier and terminal-operator members of PMA were apparently attempting to impose certain labor terms on non-member ports so as to remove competitive advantages which PMA members believed the non-member ports had enjoyed.

pher. To argue, as do Hearing Counsel, that the Commission isn't really being asked to extend itself into the murky world of grain trading because the Commission would not be nullifying the restrictive non-LASH provision in Continental's contract of sale with Egypt but would only be acting when that provision is implemented by Continental at the Elevator seems terribly unrealistic and illogical. If the provision in the contract of sale can be blocked by this Commission at any time after a party to the contract strives to follow it and this Commission so holds, what good would it do for Continental or its foreign buyer to insert such a provision into a contract of sale? How could anyone reasonably argue that the Commission would not be affecting the contract of sale itself?

But, as mentioned above, Hearing Counsel and Prudential argue that the Commission would really only be regulating Continental's terminal operations, not its grain business, and that this is necessary because one cannot allow a regulated person to segment his operations so as to avoid regulation if by so doing the person causes unjust discrimination. This analysis, however, does not hold up under scrutiny. First, does anyone really believe that a giant grain company like Continental is deliberately segmenting its grain business so as to avoid regulation by the Maritime Commission? There is no evidence that Continental began its business as a regulated terminal operator at a grain elevator and later expanded into the grain trading which it is now attempting to segregate from its terminal operations in order to avoid regulation under the Shipping Act, a law which was never intended to apply to the grain business in the first place. In reality Continental is a grain trader and merchandiser, and is quite a well known and mammoth one at that, and it happens to operate a number of grain elevators at various ports, as do other giant grain companies like Cargill and Bunge.

Second, to argue that the Commission would only be regulating the terminal operations of Continental, rather than the grain trading operations, is rather unrealistic. Such a contention makes the terminal tail wag the grain company dog. In other words, Hearing Counsel and Prudential believe that the Commission would merely be enforcing nondiscriminatory Shipping Act standards on Continental's terminal operations notwithstanding restrictive practices under Continental's grain selling contracts. But the primary business of Continental is grain trading and merchandising, not elevator operating. The practices complained of did not really originate at the N & W Elevator although their effects were felt there. They originated back in the grain trading offices when grain companies, including Continental, formulated standardized contracts of sale and trade customs which often preferred non-LASH vessels. It is one thing to order a common carrier by water to stop discriminating against types of shippers in its common-carriage business and to disregard contrary rules in underlying labor contracts and quite another thing to order a grain company to stop drafting contracts of sale which discriminate against types of vessels merely because the grain company operates a terminal which is subject to Shipping Act regulation. A common carrier cannot generally discriminate among its shipper customers under its tariff. Such conduct falls directly within the parameters of the common carrier's ancient holding out to carry fairly. However, there is no ancient law which requires a grain trader to fashion its terms of sale so as to ensure that it will purchase the services of every type of vessel willing to carry the grain. In the labor-related common carrier cases, the Commission had little difficulty in ordering the common carriers involved to terminate an embargo, file a correct tariff provision, or cease and desist from carrying out discriminatory practices among shippers. Such orders were well within the Commission's authority and expertise. But what kind of order is the Commission supposed to fashion in a case such as the present one in which the discriminatory practice originated in the grain selling business? How is the Commission supposed to order Continental to allow its buyers to select LASH vessels without restraint in its contracts of sale and do so by means of Continental's terminal tariff? As Continental noted (Continental's Posthearing Statement, p. 92 n. 13), its N & W Elevator tariff did not preclude loading of LASH barges when sales contracts had not excluded them from carriage. Moreover, there would be no reason to impose charges other than normal tariff charges for loading LASH barges if Continental's contract of sale had permitted LASH barges to load and they loaded at one of its elevators. This illustrates the point that the exclusionary practice of which Prudential complains originated in a sales contract long before any ship presented itself at a grain elevator and sought loading services. In other words, the discriminatory practice did not fall within the holding out of the terminal which merely loads any vessel having a proper booking on equal terms under a tariff.[15] Again it illustrates how Prudential and Hearing Counsel are asking the Commission to use the terminal tail to wag the grain company dog. The situation is similar to telling a common carrier which is preparing to load shipper A's cargo for export to a foreign buyer that the carrier must instead load and carry shipper B's cargo to the same buyer because shipper B complains that it should have gotten the order from the foreign buyer and would have but for shipper A which happens to be the carrier's parent corporation.

[15] Indeed, as the record shows, all the grain which is stored in Continental's N & W Elevator and is loaded into vessels for export belongs to Continental itself, title not passing to the buyer until pouring into the vessel is completed. Continental's marine terminal tariff at the Elevator, therefore, really constitutes a holding out to provide loading and related services to any vessel which has acquired a booking to carry the grain and to charge all vessels the same tariff rates for these services. In a sense, then, Continental's grain business predominates even at the Elevator and its marine terminal business does not even begin until a vessel calls and begins to receive the loading and related services.

Moreover, if the carrier refuses to load B's cargo to the exclusion of A, B will sue the carrier, claiming unjust discrimination and that the carrier is really furthering the interests of the carrier and not the interests of shipper A. (It might be different, however, if the common carrier refused to load shipper B's cargo after shipper B had made the sale to the foreign buyer in order to allow shipper A to snatch the sale away from Shipper B. In such a scenario the common carrier is violating its clear duty to serve any shipper tendering cargo without discrimination. In the present case it is not the N & W Elevator which conceived the idea of refusing to load LASH barges under the original bid to Egypt; it was rather the grain selling and trading offices of Continental.)

No matter how earnestly Prudential and Hearing Counsel urge the Commission to find that Continental furthered its terminal interests rather than its grain selling and trading business when it insisted on its rights under the contract of sale to exclude use of LASH barges, I find that the situation really involves a grain trading practice and a contract of sale, that the restrictive practice originated not at the terminal but in the grain selling offices of Continental, and that the attempt to eliminate such practices by regulating Continental's N & W Elevator tariff is an unrealistic attempt to thrust the Commission outside the parameters of the Elevator's holding out into the world of grain trading and merchandising, an example of using the tail to wag the dog.

Finally, a look at another terminal case, in which the Commission held that no violation of sections 16 First, 17, or 15 of the Act had occurred, is helpful. This is the case of *D. J. Roach, Inc. v. Albany Port District et al.*, 5 F.M.B. 333 (1957). In that case a stevedore complained that respondent Port District and Cargill, both subject to the Act, had entered into an agreement providing for exclusive stevedoring by one stevedore at the Albany grain elevator which barred complainant from competing. The Commission found no violation of law in this arrangement despite the exclusion of the complaining stevedore because Cargill "held itself out to perform, and through contracts with vessels agreed to perform, stevedoring services, and merely subcontracted certain of its stevedoring operations to other stevedoring contractors who, in turn, performed the work for Cargill and not for the vessel or the cargo." (5 F.M.B. at 335.) Thus, although the Commission had found that Cargill was a regulated terminal operator under the Act (5 F.M.B. at 334-335), and although, in the performance of Cargill's grain-loading duties, it barred all but one stevedore, the Commission found that this was merely a subcontracting arrangement between Cargill and the preferred stevedore and therefore one beyond the scope of sections 16 First or 17. It would appear that if, in the performance of vessel-loading services as a terminal operator, the terminal operator is free to prefer a stevedore although this precludes other stevedores from doing business at the elevator, that Continental, in the present case, which is primarily a grain seller and trader, is free to prefer vessels in a contract of sale which does not originate at the terminal, although ultimately a vessel is precluded from calling and having grain loaded at the terminal.

Prudential's Allegations Regarding Concerted Restrictive Practices in the Grain Trading Industry

Prudential has striven to develop a record showing concerted restrictive practices of grain companies, harming not only LASH operators but private grain exporters, as well as showing Continental's mistaken notions of low productivity of loading of LASH barges. Prudential believes that it has shown that Continental, as well as other grain companies operating elevators, are also violating the various terminal tariffs which they file with the Commission and that its actions in demanding penalties or "premiums" at its N&W Elevator for loading Prudential's LASH barges show that it was really furthering its terminal business by carrying out these restrictive activities. The heart of Prudential's arguments are found in its proposed findings of fact, Nos. 41-52 (Prudential Posthearing Statement, pp. 22-34). Although I see some merit to Prudential's arguments showing that the grain companies follow an indusry practice preferring bulk vessels, exercise a peculiar control over grain exports through their elevators, and have a somewhat shortsighted view of LASH productivity, all of this evidence seems more relevant to antitrust law, i.e., to the prohibitions against combinations or conspiracies in restraint of trade than to the Shipping Act. If, moreover, there is a peculiar restriction against use of grain companies' elevators by private farmers or grain exporters outside of the grain company clique, I am not sure why such restrictions do not similarly fall under the proscriptions of antitrust law or perhaps under Department of Agriculture jurisdiction over public grain warehousing, rather than under the Shipping Act, if they are indeed unlawful. Prudential has shown so much that it has perhaps shown grounds to pursue the matter in greater depth under antitrust law or perhaps the U.S. Warehouse Act. However much these facts may gain sympathy for Prudential and other LASH operators, this does not mean that the Commission was given jurisdiction to correct the various inequities, if such they be.

Briefly, Prudential argues on the basis of evidence of record which it developed at the hearing, that despite the public warehouse nature of their elevators, the various grain companies have developed an industry understanding and practice that bulk vessels are to be preferred on sales of grain overseas and that LASH vessels will be excluded from grain elevators operated by these companies, or, if not refused, will be loaded only upon payment of "a heavy premium in the sales price as a condition of lifting the refusal to accept LASH barges." (Prudential Posthearing Statement, pp. 23-24.) Furthermore, the grain companies control the use of the export elevators on the East Coast by excluding private grain exporters or farmers from storing grain at an elevator which they operate and from exporting therefrom. Prudential asserts that under a "long-established trade restriction in effect since 1978 and earlier, a person desiring to sell grain for export from the U.S. East Coast was required either to load it through his own export elevator or to purchase the grain at the ocean side of an export elevator operated by a grain company which was itself engaged in the grain export business." (Prudential Posthearing Statement, p. 23.) In other words, Prudential is saying that the grain companies control the exportation of grain through the U.S. East Coast because they operate all the grain elevators there and do not permit anyone to ship grain through the elevators but themselves. Therefore, if any person desires to export grain through the U.S. East Coast, if he does not have his own export terminal facility, he must buy the grain from a grain company operating the elevator F.O.B. end of spout on the vessel. Thus, Continental and other grain companies, by an unlawful conspiracy, control grain exports through the East Coast and do so with restrictive provisions excluding LASH ships, which restrictions are contrary to their terminal tariffs and also to their status as licensed warehousemen. However, if Continental or any member of this group of grain companies decides to allow a LASH barge to load at one of the elevators on the East Coast, it may do so but will extract a penalty or "premium" from the LASH opeator without tariff authority. Moreover, even if one grain company were disposed to accept LASH barges for loading under a contract of sale, the existence of the industry practice to exclude LASH would probably mean that the grain company would ultimately refuse LASH because no other grain company would fill the contract under LASH terms.

Even if we accept all of Prudential's contentions as proven (and there is record support for them), these allegations seem to relate to a combination in restraint of trade under antitrust law far more than an unfiled agreement in the shipping industry among carriers or terminal operators under section 15 of the Act. Again the root cause of the problem of which Prudential complains is a practice which originated in the grain industry, not the terminal business. A concerted refusal to deal, if that is what this is, is a classic type of antitrust violation, i.e., a group boycott which is considered to be per se unlawful.[16] If Pruden-

[16] If a group of competitors agree not to deal with a person outside the group or agree to deal only on certain terms, this is a restrictive combination violating section 1 of the Sherman Act. See *Klors Inc. v. Broadway-Hale Storage, Inc.*, 359 U.S. 207 (1959), *Paramount Famous Lasky Corp. v. U.S.*, 252

Continued

tial is correct in arguing that the grain companies have engaged in such a boycott, the obvious remedy is an antitrust, not a Shipping Act suit. This again illustrates the point that Prudential's problems originated not at the N & W Elevator but in Continental's grain trading offices so that this Commission cannot effectively grant relief. To demonstrate this point, one need only consider that Continental and the other grain companies having tariffs on file with this Commission can quite easily remove themselves from all Commission regulation even at their terminals merely by specifying in their tariffs that they no longer hold out to serve common carriers. That is exactly what happened in *New Orleans Steamship Association v. Bunge Corp.*, cited above, 8 F.M.C. at 694, and *Agreement No. T-2719,* 16 F.M.C. at 321, cited above. (Also, as mentioned above, even if the grain companies do not cancel their holding out, there is no practical Shipping Act solution to Prudential's problem since there is no realistic amendment to the terminal tariff which could account for the continually changing market conditions in the grain selling and trading industry.) [17]

Another aspect of Prudential's allegations concerns Continental's purported refusal to handle any grain other than its own at its N & W Elevator. (According to testimony of the former manager of the N & W terminal, Mr. Winnie, the nature of the grain exporting industry has changed since 1972 when the Government had large surpluses of grain. Presently no person other than Continental apparently exports grain through the N & W Elevator. See Prudential Posthearing Statement, p. 26, and record references therein quoted.) This non-handling of a private person's grain at the N & W Elevator, Prudential suggests, is also contrary to Continential's duties as a licensed public grain warehouse publishing a warehouse tariff and operating under section 254 of the United States Warehouse Act (7 U.S.C. 241 et seq.) If so, however, such a matter is obviously the business of the agency that administers that Act, not the Federal Maritime Commission, which has specifically stated that it does not regulate grain storage practices under the jurisdiction of another agency. *Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports,* cited above, 8 F.M.C. at 656; cf. *Agreements 8225 and 8225-1,* cited above, 5 F.M.B. at 653-654; *California Stevedore & Ballast Co. v. Stockton Port District,* cited above, 7 F.M.C.

U.S. 30 (1930); *U.S. v. First National Pictures, Inc.*, 282 U.S. 44 (1940). Such restrictive group agreements are deemed inherently harmful and cannot be justified under antitrust law, i.e., they are per se violations of that law. *Paramount Famous Lasky Corp. v. U.S.*, cited above.

[17] One of the grain company's Elevator tariffs does specify a special charge for loading LASH barges as well as "tween-decker" ships (5 cents per outbound bushel). This is Cargill's Norfolk tariff. Apparently all other elevator tariffs make no such special provision for LASH. (See Prudential's Posthearing Statement, pp. 31-32 n. 1.) This fact by itself, however, does not establish that there is a practical tariff charge that can deal with such matters as "elevation," current commodity market conditions, and lost sales, which Continental claims to be involved when LASH instead of bulk vessels are allowed to load at an elevator that expected bulk vessels to call.

at 81. See also *New Orleans Steamship Association v. Bunge Corp.*, cited above 8 F.M.C. at 694-695.

Finally, Prudential argues that Continental is really furthering its terminal intertest, not its grain selling interests by excluding LASH barges from its N & W Elevator and furthermore excludes the barges under a mistaken idea that LASH barges' loading productivity is lower than all other vessels. To support this contention, Prudential points to evidence showing that when it negotiated with Continential's grain selling executives in New York, seeking to pay some sort of penalty or "premium" in order to load the grain at the N & W Elevator despite the contract of sale excluding LASH, Continental's suggested figures were based upon terminal cost considerations and Continental's mistaken estimates of slow productivity of LASH barges. The record does show that Continental took an unnecessarily dim view of LASH loading productivity since LASH could be loaded about as fast as deck ships which Continental's contract of sale did not exclude, and Continental had not exercised all the diligence that it might have done in an effort to increase the loading rate of LASH barges at the N & W Elevator. As I have also discussed earlier, the record is full of evidence showing various loading rates of LASH barges at the N & W Elevator and elsewhere as compared to loading rates for other types of ships such as bulk and deck ships. It is rather involved and complex but does indicate that LASH barges did rather well in loading when compared to deck ships and liner vessels and that there is considerable loss of time at the N & W Elevator when no pouring occurs regardles of which type of ship is on berth. Bulk ships do appear to load faster than any other type even if not exactly at the four-to-one ratio compared to LASH that Continential believes, but the considerable lost time when the Elevator is not pouring resulting in slow productivity generally should be considered when evaluating the impact of loading LASH barges on other loadings. A clear answer to the question whether Continential's negotiations with Prudential leading to a possible "penalty" payment relates to the terminal business or to the grain selling business is not possible. It appears that there are elements of both. It seems true enough that Continential was, to some extent, basing its end of the negotiations with Prudential on assumed productivity rates of LASH barges compared to bulk vessels. This could translate into additional costs at the terminal, for example, labor overtime or vessel demurrage with Continential would have to pay to other vessels backed up and waiting for LASH barges to complete loading. These factors seem to relate to the desire of Continential to increase productivity at the terminal. But, as Continential argues, there are other factors that enter into the attempt to substitute LASH barges for bulk vessels which are not compensated by a productivity penalty and relate to the grain selling business. Mainly these are lost "elevation" and loss of sales that could have been made while barges were loading. These factors, it would appear, pertain to the state of the grain market.

Perhaps Continential's fears that its N & W Elevator would become "plugged" if LASH barges had been allowed to substitute for bulk vessels was mistaken and probably its views as to the rate of LASH loadings were too pessimistic. Therfore perhaps Continential should reconsider the grain industry practice of excluding LASH from the terms of its contract of sale with Egypt and risk problems if it had to transfer the sale to another grain company which also followed the restrictive practice. However, even if it seems unfair for Continental to follow a discriminatory provision in contracts of sale against LASH barges which do no load as slowly as Continental apparently thinks, one again must face the fact that the restrictive provision against LASH originated in Continental's contract of sale and is apparently often followed by other grain companies in their contracts of sale. Therefore, to grant Prudential the relief it seeks, the Commission would have to hold Continental liable for refusing to depart from its contract of sale which it made as a seller of grain. Furthermore, if the Commission orders Continental to refrain from preferring bulk vessels in its contracts of sale or from barring LASH vessels in those contracts when Continental wishes to base its sales price in consideration of the use of bulk vessels or in consideration of the need to maintain flexibility in filling the order without fear of losing "elevation" because of slower-loading LASH barges, the Commission is obviously interfering with Continental's grain trading and selling business no matter how well motivated the Commission may be in seeking to remove an unwarranted stigma from LASH vessels. Although there do appear to be aspects of the terminal business which entered into Continental's thinking when it negotiated with Prudential regarding a possible penalty payment and perhaps even some concern over terminal productivity generally even when the contract of sale was formulated because of a belief that LASH productivity was relatively slow, this entire controversy seems to boil down to the question of whether this matter is essentially one involving the grain selling business and the rights of Continental under its contract of sale or whether it involves a terminal matter and the terminal's duty to serve its customers without discrimination. I believe that a preponderance of the evidence shows that the case primarily involves grain trading and selling and related practices of that business and that the relief which Prudential seeks, namely a cease and desist order and monetary damages because of Continental's refusal to waive its rights under its contract of sale, simply lies beyond the Shipping Act and this Commission's jurisdiction. If the restrictive practices against LASH vessels of which Prudential complains did originate in 1978 or earlier among various grain companies and those companies continue concertedly to place such restrictions in their contracts of sale, as

Prudential contends, then it would appear that Prudential ought to seek relief under that body of law which deals directly with concerted refusals to do business and similar restraints of trade, namely, the antitrust laws. I do not believe that this Commission is authorized by law to change a practice in the grain industry which is intertwined with complex market considerations, by looking at grain elevator tariffs and trying to extend obligations of common carriers into grain selling practices or by holding Continental's terminal operating personnel responsible for vessel booking practices of its grain traders and salesmen.

Prudential's Allegations of a Section 15 Violation and of Continental's Status as a Carrier

Since Prudential added two more allegations during the course of this proceeding, I believe some mention of them should be made. The first concerns Prudential's allegation that Continental and other grain companies have violated section 15 by entering into agreements which discriminate against LASH vessls. This allegation was not made in the original complaint nor in Prudential's Rule 95 prehearing statement but appeared in Prudential's Posthearing Statement (pp. 75-77). The second concerns Prudential's allegation that Continental, which itself sometimes has acted as a carrier competing with Prudential ought not to be allowed to use its terminals to exclude other carriers. (See Prudential's Posthearing Statement, p. 71.) I find neither allegation sufficient to alter my decision.

As to the first allegation regarding an unfiled section 15 agreement, I find several deficiencies in both law and fact. The first problem is procedural because of lack of notice of such an issue in the original complaint which was confined to allegations of violations of sections 16 and 17 of the Act. It is procedurally improper and untimely to attempt to litigate an issue which broadens the original complaint at such a belated point in time. A similar problem arose in *Levatino & Sons v. Prudential-Grace Lines,* cited above, 18 F.M.C. 82, when the Initial Decision in that case had found violations by respondent carrier because of shutouts of cargo although the original complaint and the hearing had given notice only of unjust discrimination. Although the finding of violation was made under the same sections of law (sections 14 Fourth and 16 First) as involved in the matter of discrimination, the Commission found the finding to be improper because of inadequate notice ot respondent. The Commission stated:

> As to shutouts, at issue in this proceeding was only Levatino's charge that Grace had violated sections 14 Fourth, 16 First and 17 of the Act by failing to provide Lavatino with space accommodations for Levatino's cargoes which Grace had contracted to carry. While we do not insist upon overnice limitation of issues to those framed in the various pleadings, we are

> of the opinion that the extension of this claim to a general investigation of a course of conduct pursued by Grace with respect to many other shippers was unwarranted. (18 F.M.C. at 86.)

A second problem also concerns the question of notice. This has to do with the fact that Prudential, in its Posthearing Statement, is charging that Continental has entered into unfiled agreements with other grain companies operating terminal elevators on the East Coast. However, these other companies were never named as respondents in the original complaint and are only referred to generally or occasionally in Prudential's Posthearing Statement. If the Commission is expected to find that grain companies operating elevators on the East Coast have entered into agreements which make them subject to the requirements of section 15, much more notice would be necessary under basic principles of administrative law. The alleged companies would have to be named as respondents in the complaint and given an opportunity to answer and defend the charges. None of this was done. Accordingly, this proceeding cannot make findings under section 15. See Administrative Procedure Act, 5 U.S.C. 554(b); *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 141 (1965); see also *Agreement No. T-2880, as Amended,* 14 SSR 1567, 1568 (1975) (question of jurisdiction under section 15 requires full hearing).

The final problem with findings under section 15 concerns the fact that parties to agreements subject to that law must be subject to the Act in the first place and their agreements must fall under one of the subject matter categories of the law. Grain companies are not ordinarily subject to the Act and, as I have discussed above, the subject matter of the purported restrictive agreements originated in the grain trading and selling industry, not at marine terminals. As I have discussed earlier, not every activity or arrangement even of regulated persons is subject to Commission jurisdiction. See, e.g., *Agreement Nos. T-1685 and T-1685-6,* cited above, 19 F.M.C. at 457-458; *Levatino & Sons v. Prudential Grace Lines,* cited above, 18 F.M.C. at 84-85.

Prudential's final agrument is that since Continental sometimes charters ships itself which load grain at its Elevator, it has operated as a carrier itself at the Elevator. If so, Prudential asserts that Continental "should not be allowed to use its public terminals to exclude competing carriers from the trade." (Prudential's Posthearing Statement, p. 71.) This argument I find to be exceedingly weak. If a terminal operator under Shipping Act jurisdiction has a duty to service all customers having a legitimate reason to call at the terminal to be loaded or unloaded, as indeed it does, preferring one carrier's vessels over another would violate that duty. See *Chr. Salvesen & Company Ltd. v. West Mich. Dock & Market Corp.,* cited above, 12 F.M.C. 135. However, there is no evidence that Continental gave special preferences to vessels which it had itself chartered over any other vessels. Moreover, it is not even clear from the limited record on this point what kind of carrier Continental is even if it can be found to be some type of carrier. A similar argument was made in *New Orleans Steamship Association v. Bunge Corp.,* cited above, 8 F.M.C. at 693-694. In that case complainant argued that the Bunge Corp. had provided ships to load and carry grain for a variety of buyers and therefore was itself a common carrier. The Commission quickly rejected the argument, finding that Bunge's operations did not constitute "the undertaking to carry for hire for those seeking to employ the carrier" (8 F.M.C. at 693) and that "[a]ll of Bunge's shipments are in fulfillment of contracts for the sale of grain. Bunge does not undertake to carry for anyone; it does not sell ocean transportation; it merely delivers grain in chartered vessels to its customers." (8 F.M.C. at 694.) I therefore find no merit to the argument.

ULTIMATE CONCLUSIONS

Continental Grain Company is, first and foremost, a grain selling and trading organization. It operates the N & W Grain Elevator at Norfolk and, in so doing, furnishes terminal facilities "in connection with a common carrier by water," thereby bringing its N & W Elevator under the jurisdiction of the Shipping Act, 1916. Its arguments that it does not fall under such jurisdiction because it does not serve common carriers or vessels in common carriage and, even if it does, it does so infrequently, do not withstand scrutiny. The record shows that common carriers have sent vessels or barges to the N & W Elevator for loading and that Continental publishes and files a terminal tariff which does not exclude common carriers from the Elevator and even defines "liner" vessels and operates under a lease which calls for Continental to maintain a "public terminal open to all parties." The doctrine that Continental should not be found subject to the Act because of relatively infrequent calls by common carriers or by vessels of common carriers was enunciated in a decision of the United States Court of Appeals for the First Circuit in a case in which the Commission was not a party and which has not been followed by the Commission.

Although Continental does operate the N & W Elevator as a person subject to the Act, not everything the grain company does is subject to that Act. Specifically, Continental's practice, which appears to be a grain industry practice as well, in specifically preferring non-LASH vessels in its contracts of sale of grain, originated in the complex world of grain selling and trading for reasons which, while not totally removed from consideration of terminal efficiencies, are based upon the numerous factors which grain traders consider when formulating their contracts of sale. Therefore, the practice, while ultimately affecting Prudential adversely, is one which lies outside the scope of the Shipping Act and the expertise of the Commission. Evidence, which Prudential developed, that this exclusionary practice is common in the grain industry or that it violates Continental's status as a licensed warehouseman regulated by the Department of Agriculture deals with matters within the jurisdiction of the antitrust laws or the Department of Agriculture.

The situation in which Prudential found itself commands considerable sympathy since Prudential was precluded from carriage of a sizable shipment of wheat merely because it operates LASH vessels and barges and the loading rate of those barges at grain elevators is not as slow as Continental believes. However, Prudential was seeking to obtain a booking which was not permitted in Continental's contract of sale and was induced to do this by the actions of the Peralta shipping agency which had no authority to go outside the provisions of the contract of sale. Therefore, no matter how the case is analyzed, it comes down to the fact that Prudential was asking Continental to give up its contractual rights as a grain seller and now wants the Commission to hold Continental liable for monetary damages merely because Continental also operates the N & W Elevator through which this particular shipment moved but which it did not necessarily have to move. The argument that the Commission would not really be regulating a provision in a contract of sale of grain but would really be confining its regulation to Continental's terminal operations is not realistic. This argument would not only have the tail wag the dog but would ignore the fact that the practice complained of originated not at the terminal but in the grain selling and trading industry and that the Commission would be attempting to extend its shipping expertise into a totally different industry.

NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-59

GENERAL TRANSPAC SYSTEM - POSSIBLE VIOLATIONS OF SECTION 15 SHIPPING ACT, 1916

NOTICE

August 23, 1982

Notice is given that no exceptions have been filed to the July 16, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-59

GENERAL TRANSPAC SYSTEM - POSSIBLE VIOLATIONS OF SECTION 15, SHIPPING ACT, 1916

Respondent found to have violated section 15 by entering into an unfiled cooperative working arrangement with another non-vessel operating common carrier.

No penalty found to be warranted.

George J. Gmelch for General Transpac Systems.

John Robert Ewers, Joseph B. Slunt, and *Aaron W. Reese* for Office of Hearing Counsel, Bureau of Hearings and Field Operations.

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

Finalized August 23, 1982

The respondent General Transpac System is a Nevada corporation which during the period relevant here operated as a non-vessel operating common carrier (NVOCC). Mr. George J. Gmelch was Chairman of the Board and Chief Executive Officer of General Transpac and Mr. Herb Pierce was its Vice President. Sometime prior to April 30, 1976, Mr. Pierce came to Mr. Gmelch with a problem. Under General Transpac's tariff (Transpac Container Freight, Guam Freight Tariff No. 5, FMC No. 6) a shipper, in order to determine the total cost of a shipment, had to add to the port-to-port rate charges for such things as wharfage, handling, container stuffing, and delivery at destination. A number of General Transpac's customers wanted a single, all-inclusive, "door-to-door" rate. Gmelch suggest that they simply publish such a rate in General Transpac's existing tariff. However, Pierce had been in touch with someone at the Commission's San Francisco field office and was told that General Transpac could not publish its all-inclusive or door-to-door rate in its tariff so long as it retained the port-to-port rate in the same tariff.[2] Gmelch had Pierce check again with the San Francisco office and its position remained the same.

At this time Gmelch was the sole owner of Transpacific Freighting Corporation. Transpacific's activities ranged from owning a vineyard in Napa Valley to operating a steamship agency in San Francisco. Trans-

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

[2] The record is not clear on either the person contacted at the San Francisco office or the particular question put to that person. The general basis for the position of the San Francisco office seems to have been that a tariff could not contain two different rates for the same commodity and service.

pacific was incorporated in California in 1955 to operate chartered vessels, primarily in the bulk trade from the West Coast. It became more or less dormant in 1957 or '58 and the vessels it was operating were redelivered. It was around this time that Gmelch acquired an interest in Transpacific. In 1971 Gmelch acquired the remaining shares and became the sole owner. In 1974 Transpacific "sought steamship agency activity and representation," because Gmelch, no longer employed by Pacific Far East Line, "had friends or connections in the shipping industry and . . . felt that there was a need for a steamship agency representation on the West Coast." Transpacific had no salaried employees and while the corporation's official address was 956 Sacramento Street (a residence), Gmelch used General Transpac's office to conduct operations. It was Transpacific that Gmelch used to resolve what he saw as the dilemma presented by the need for a door-to-door rate and the position of the Commission's San Francisco office on the inclusion of that rate in General Transpac's tariff. On April 30, 1976, Transpacific Freighting Corporation published "A Non-Vessel Operating Common Carrier" Tariff No. 2.[3]

From the beginning Transpacific was a "paper" carrier. Aside from distributing a circular giving a summary of the services it offered, Transpacific's "advertising" as an NVOCC was restricted to a telephone listing. Transpacific's function was to serve as a kind of second choice offered to shippers who when contacted by General Transpac said they were only interested in an all-inclusive or door-to-door rate. The arrangement between General Transpac and Transpacific is contained in two memoranda. Under it General Transpac paid all expenses and performed all services connected with Transpacific cargo. Transpacific was then "invoiced" for "their pro-rata share of the expenses" and for "80% of the container profit to cover handling costs." On January 1, 1977, General Transpac and Transpacific entered into an agency agreement under which General Transpac appointed Transpacific its agent in California and Guam. General Transpac was to bear the expenses of the agency and "Transpacific was to pay 99.5% of the ocean freight revenue generated under its Polypac Container Service for services rendered" under the agreement.[4]

Sometime after Transpacific's tariff became effective, Mr. Louis A. Hammond, a General Investigator from the Commission's San Francisco office visited the offices of General Transpac and Transpacific. The purpose of the visit was to determine whether Transpacific had handled

[3] Tariff No. 1 was rejected by the Commission for reasons not stated in the record. Transpacific was known by the trade name "Polypac Container Freight".

[4] The "invoicing" of Transpacific for 80% of the freight was an initial step only and Transpacific's total compensation for its activities as an NVOCC and agent was one-half of one percent of the revenue generated on its shipments.

any shipments prior to April 30, 1976, when its tariff went into effect. Mr. Hammond found no violations and in the course of discussions with Messrs. Gmelch and Pierce restated the position that a carrier could not have two different rates for the same commodity.[5] In addition Mr. Hammond expressed his opinion that there was still some question as to the validity of the two rates even though they were published in separate tariffs. It was his idea that "two NVO's or carriers working through a single agent" could not "have two tariffs for the same commodities and the same service." [6] Confronted with the proposition that it might still be in violation of the law, Transpacific ultimately cancelled its tariff in August of 1977 and General Transpac amended its tariff to include the door-to-door rate as it had wanted to do from the beginning.

His investigation completed, Mr. Hammond prepared a draft of his report on the matter and it was at this time that his superiors raised the question of a possible violation of section 15 based upon the existence of two separate corporations and the apparent lack of any agreement between them which had been filed with and approved by the Commission as required by that section. The possible violation of section 15 was included in the report, but no mention of it was made to anyone at General Transpac or Transpacific.[7]

On February 9, 1981, Commission's Bureau of Hearings and Field Operations asserted a claim of $20,000 against General Transpac for carrying out an unfiled section 15 agreement with Transpacific during the period April 30, 1976 through August 15, 1977. General Transpac rejected the claim and this proceeding was instituted.

DISCUSSION AND CONCLUSIONS

The issues to be resolved here are:

1. Whether General Transpac System violated section 15, Shipping Act, 1916, by carrying out an unfiled cooperative working arrangement with Transpacific Freight Corporation subject to section 15 of the Shipping Act, 1916; and
2. Whether civil penalties should be assessed against General Transpac System pursuant to 46 U.S.C. 831(e), for violations of section 15 of the Shipping Act, 1916, and, if so, the amount of any such penalty which should be imposed taking into consideration factors in possible mitigation of such a penalty.

[5] There were qualifications to this flat prohibition which are not relevant here.

[6] Other portions of Mr. Hammond's deposition make it clear that he thought that General Transpac and Transpacific were "one entity" and that the two corporations were a "fiction". At this time Gmelch owned 43% of General Transpac and effectively controlled it.

[7] When asked why no further contact was made with respondent Mr. Hammond explained that the two tariffs had been discontinued and a modified single tariff substituted for them and that this eliminated the problem as far as he was concerned.

That there was an agreement between General Transpac and Transpacific is admitted by respondent. The dispute arises over whether the agreement had to be approved by the Commission under section 15 which in relevant part provides:

> Every common carrier by water . . . shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another carrier or person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part . . . providing for an exclusive preferential working arrangement.

Transpacific published and filed with the Commission a tariff under which it held itself out to perform all the services of an NVOCC. It issued its own bills of lading and so far as the shipping public had any reason to know, Transpacific was an NVOCC. While it is true that Transpacific did not actually perform as an NVOCC, leaving to General Transpac the performance of those functions, it was not by its own characterization of its activities a "mere agent" of General Transpac. The agreement between General Transpac and Transpacific was a cooperative arrangement between two NVOCC's and should have been filed with the Commission.[8] *York Forwarding Corp., J. B. Wood Shipping Co., Inc. and Edwards Fuge Corp.*, 15 F.M.C. 114 (1972).

Even if the arrangement here were a pure agency arrangement, respondent's contention that the Commission's exemption of agency agreements from the requirements of section 15 in 1981 demonstrates that agency agreements were never intended to be filed under section 15 is without merit. The Commission did not exempt agency agreements between "common carriers".[9] (See 46 CFR 502.11.) But respondent argues that in refusing to exempt agency agreements between carriers, the Commission gave as its reason the "potential" for "conflicts of interests as well as possible market sharing" in such agreements. Since the agreement between General Transpac and Transpacific involve neither, respondent says it is not within section 15. It hardly seems necessary to point out that the Commission *did not* say that only those agency agreements between common carriers which contained conflicts of interests or included market sharing were within section 15. The Commission made it quite clear that all agency agreements between common carriers had to be filed with and approved by the Commission under section 15 of the Act. (See Order adopting the exemption, 24 F.M.C. 301 (1981).)

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[8] Respondent argues that even if there was a violation it was a "technical" one. This argument goes only to the amount of any penalty which might be assessed because of the violation, not to whether a violation occurred.

[9] NVOCC's are "common carriers". See e.g., *Bernhard Ullmann v. Puerto Rican Express Co.*, 3 F.M.B. 771 (1952).

Where two separate corporations each holding itself out to the public as NVOCC's enter into an agreement whereby one assumes responsibility for, conducts the operations of, and reaps profit from the other, that agreement is a cooperative working arrangement subject to section 15 of the Shipping Act, 1916. Since respondent was a party to such an agreement it was in violation of section 15 for the life of that agreement.

The remaining issue is whether civil penalties should be assessed and if so the amount of the penalty taking into consideration possible factors in mitigation. The Office of Hearing Counsel, Bureau of Field Operations (the Bureau) recommends that a penalty of $5,000.00 be assessed. The basis for this amount is (1) The Agreement which violated section 15 was in effect from April 30, 1976 through August 15, 1977, and (2) The penalty for violating section 15 is $1,000 per day for each day the violation continues, and the agreement generated revenues of $57,600. From this the Bureau concludes that a penalty of "$5,000 would be reasonable considering the nature of the violation and the extent of the operations under the cooperative working arrangement."

Respondent, somewhat indignantly, urges that even if it did violate section 15 the imposition of any penalty would be "unconscionable" because, "If there was ever a case where a company did its best to follow FMC advice and was clobbered by doing so this is it." Stated briefly, respondent's position is that a person should not be punished if by accepting and acting upon representations of an official of the Commission, that person commits a technical violation of the Shipping Act. The Bureau rejects this contention and argues that any discussions between the Commission's Investigator, Mr. Hammond, and Messrs. Gmelch and Pierce are irrelevant "to the issue to be resolved here . . . whether [General Transpac] violated section 15. . . .[10] This may well be true, but there are two issues in the case and "the discussions" dismissed by the Bureau as irrelevant are directed to the second issue--whether a civil penalty should be assessed and if so how much should it be. The Commission's order calls for the consideration of factors in mitigation in answering the question of whether a civil penalty should be imposed and if so the amount of the penalty. However, the Bureau

[10] The additional argument is made that "Whatever the reason for TFC (Transpacific) becoming an NVOCC, even assuming but not conceding, that it was the result of misleading information from Commission personnel, it cannot be conceived that Commission personnel, directly or indirectly misled GTS (General Transpac) into making and carrying out a cooperative working arrangement in violation of section 15." It is difficult to decide just what to make of this. If we assume that Transpacific became an NVOCC because of "misleading information from Commission personnel" then "Commission personnel directly or indirectly misled" Transpacific. If the proposition is that Commission personnel did not deliberately mislead General Transpac nobody is arguing that they did. Finally, if the position is that the misleading information need not have lead to a violation of section 15, this may be true, i.e., respondent may have had other options open to it. But this does not alter the fact that the representations did create the circumstances which prompted respondent to do what it did.

does not discuss a single one in arriving at its recommended figure of $5,000 and the respondent simply offers without citation or reference to authority, the proposition that because it was misled it should not be punished.

General Order 30 (46 CFR Part 505) sets out in some detail the procedures to be followed in the "compromise, assessment, and settlement of civil penalties"; but when it deals with the standards or criteria to be applied in determining the amounts of penalties when they are compromised, assessed or settled, the Order simply says ". . . for the purpose of this part, the criteria for compromise, settlement, or assessment may include, but need not be limited to, those which are set forth in 4 CFR Part 101-105." The regulations contained in Parts 101-105 were issued jointly by the Comptroller General and the Attorney General under section 3 of the Federal Claims Collection Act of 1966, 80 Stat. 309 and their purpose was to "prescribe standards for the administrative collection compromise, termination of agency collection, and the referral to the General Accounting Office and to the Department of Justice for litigation of civil claims by the Federal Government for money or property." The standards stop short of any prescriptions for the assessment of penalties in formal proceedings such as this. Civil penalties as distinguished from "debts" are dealt with specifically in only two instances: (1) Agencies seeking "the collection of statutory penalties or forfeitures . . . will give serious consideration to the suspension or revocation of licenses . . . for any inexcusable, prolonged or repeated failure of a debtor to pay . . . a claim" (46 CFR 102.7),[11] and (2) Section 103.5 provides:

> Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised . . . if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future will be adequately served by acceptance of the sum to be agreed upon. Mere accidental or technical violations may be dealt with less severely than willful and substantial violations (46 CFR 103.5).

While section 102.7 is inapplicable here, section 103.5 can, with little change and for such help as it gives, be applied to the assessment as well as the compromise or settlement of civil penalty claims. But aside from this, there are no other published standards clearly applicable to the assessment of civil penalties.

The imposition of civil penalties is obviously designed to serve the generic goal of promoting or furthering a statute's regulatory objectives. Penalties can do this in at least two ways. The first, and the most widely accepted way, is the motivation of future behavior or "deter-

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[11] There is no license to suspend or revoke here and the "debtor" would seem to be one against whom a civil penalty has already been assessed but who refuses to pay.

rence." The prospect of punishment, it is thought, will foster the behavior the agency wants to encourage and discourage behavior the agency wants to inhibit. The second, and one which is not really relevant here, is compensation. Almost by definition a civil money penalty does not serve the specific compensatory function of making whole an identifiable individual who has been injured by the wrongful act or violation. However, it is sometimes argued that civil penalties can be viewed as compensation to society at large for the harm it has suffered at the hands of the violator.[12]

That the motivation of behavior or deterrence is the overriding if not the only purpose of the civil penalties imposed by the Shipping Act was most recently illustrated in the enactment of P.L. 96-25, the statute under which this proceeding was brought. Among other things, P.L. 96-25 amended the Shipping Act to increase the amount of penalties that could be assessed against carriers for illegal rebating and gave the Commission the authority to assess the increased penalties itself.[13] In explaining the need for the increased penalties, the House said:

> The penalties for rebating under existing provisions of the Shipping Act, 1916, have not been sufficient to take the profit out of rebating, and the difficulty of enforcing those penalties often makes rebating worth the risk. (House Rep. 96-232, Shipping Act Amendments, 1979, 96th Cong. 1st Sess. 1979, page 8.)

In a similar vein the Senate said:

> The bill substantially increases the monetary penalties and adds a new penalty of tariff suspension for rebating violations. The Committee shares the Commission's belief that these penalties will be far more effective as a deterrent than the rather nominal penalties now in the Shipping Act, 1916. (Sen. Rep. 96-147, Shipping Act Amendments, 1979, 96th Cong. 1st Sess., 1979, page 9.)

Whatever may be the purposes of particular civil penalties, the need for standards in their imposition is widely recognized. The Administrative Conference of the United States, now a permanent agency of the Government, whose purpose it is to develop and recommend improvements in the legal procedures by which Federal agencies administer regulatory and benefit programs, dealt with the assessment of civil

[12] Translating compensation into a set of standards presents unique difficulties even in cases where it has been specifically recognized as a legitimate objective of money penalties. Since money penalties serve a general rather than a specific compensatory function, the agency must, in theory, measure the nonspecific *social* harm caused by the illegal activity--a difficult enough task in environmental cases such as air or water pollution but virtually an impossible one in cases of Shipping Act violations. How is the social harm of an unfiled section 15 agreement measured?

[13] P.L. 96-25 amended section 32 of the Act to authorize the Commission to assess its own penalties instead of referring the case to the Department of Justice for prosecution in the Federal District Courts.

penalties in Recommendation 79-2 (1 CFR 305.79-2). The Conference recommended that "Agencies enforcing regulatory statutes, violation of which is punishable by a civil money penalty, should establish standards for determining appropriate penalty amounts in individual cases." [14] Admitting the need, there remains the problem of just what standards are appropriate to the assessment of penalties under the Shipping Act. Fortunately, we have the benefit of the current views of two committees of Congress.

Section 13(c) of H.R. 4374, a bill which would make major revisions of the Shipping Act, 1916, provides:

> Assessment Procedure--Every civil penalty provided for in this Act may be assessed by the Commission after notice and opportunity for hearing. In determining the amount of penalty, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and with respect to the violator, the degree of culpability, history of prior offenses, ability to pay and such other matters as justice may require. . . .

Identical language appears in section 15(c) of S. 1593, the Senate version of H.R. 4374.[15] In its Report the Senate Committee on Commerce, Science and Transportation made no mention of the civil penalty provision and the House Committee referring to section 13 merely states, "This section also provides the manner in which a civil penalty will be assessed and the things that must be considered in arriving at the amount of the penalty to be assessed." [16] While not yet the law, the criteria or standards which appear in S. 1593 and H.R. 4374 are a clear expression of Congressional attitude toward the assessment of penalties by the Commission.[17] The Commission is, of course, free to adopt these standards whatever the fate of S. 1593 and H.R. 4374, unless of course one of the grounds for the defeat of either bill is the rejection of the standards--a highly unlikely event. In any event, I find these standards to be the best available guide for deciding what if any penalty is appropriate here.

The record demonstrates that had not a representative of the Commission questioned General Transpac's plan to publish a second all-inclusive or door-to-door rate in its tariff the chain of events leading to

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[14] See also *Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies,* 79 Column L. Rev. 1435, 1457 (1979).

[15] Senate Report No. 97-414, 97th Congress, 2d Sess. 1982.

[16] House Report No. 97-611, Part 1, 97th Congress, 2d Sess. 1982.

[17] This Congressional attitude is not new nor is it restricted to the Commission. Section 503 of the Federal Communications Act requires the FCC, when setting penalty amounts, to "take into account the nature and circumstances, extent and gravity of the prohibited acts committed and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay and such other matters as justice may require." (47 U.S.C. 503(b)(2)).

this proceeding would not have occurred.[18] It was Mr. Hammond's position that General Transpac could not have the two rates in its tariff that led Mr. Gmelch to use Transpacific as an NVOCC to publish the second rate. This in turn led to the arrangement found here to be in violation of section 15. Thus the circumstances surrounding the violation to some degree were created by the Commission itself through its representative.[19]

The violation began on April 30, 1976, and continued until August 15, 1977. This proceeding was instituted under sections 15, 22, 32 and 44 of the Shipping Act, 1916. Section 32 authorizes the Commission to assess civil penalties "*Provided, however,* That in order to assess such-penalties a formal proceeding under section 22 of this Act shall be commenced within five years from the date when the violation occurred." This proceeding was begun on September 30, 1981, so that some 45 days of the violation were excluded from prosecution by section 32(c). The Bureau in apparent recognition of this problem introduced as Exhibit 1 a document entitled "Waiver of the Period Within Which to Institute Civil Penalty Claim Action." This document states that the Commission has reason to believe that General Transpac may have violated one or more sections of the Shipping Act, 1916, and that "during the period that may be required to investigate such violations and to negotiate a possible settlement thereof, the Statute of Limitations (28 U.S.C. 2462) may operate to bar or prevent the recovery of civil penalties . . ." and that having had an opportunity to confer with counsel General Transpac agrees that it "will not interpose the Statute of Limitation as a bar to any civil penalty claim undertaken pursuant to Public Law 92-416 [20] prior to September 30, 1981." [21] Mr. Gmelch signed this waiver on April 10, 1981.

[18] At the time that Transpacific canceled its tariff, General Transpac amended its tariff to do what it wanted to do in the first place and this amendment was accepted by the Commission.

[19] I am in no way suggesting that the Commission is "estopped" from imposing a penalty in this case, although there are some authorities to that effect. (See Davis, 1982 Supplement to Administrative Law Treatise, pp. 247-257 and authorities cited therein.) I am suggesting that role of the Commission's representative is a factor to be considered in determining the amount of the penalty if any is to be assessed.

[20] In Exhibit 1 there is an asterisk after Public Law 92-416 and there is a footnote at the bottom of the page: "Public Law 92-416 provides 'Any civil penalty provided herein may be compromised by the Federal Maritime Commission, or may be recovered by the United States in a civil action.' "

[21] The avowed purpose of the waiver is to afford additional time "to investigate such violations and to negotiate a possible settlement" before the statute of limitations bars the claim. While, admittedly, too much could be made of the situation, one cannot help but wonder at the need for an investigation at this late stage of the civil penalty process. The claim letter for a civil penalty of $20,000 was sent on February 9, 1981. If an investigation was still necessary, what was the basis for the amount claimed? It seems to me that all necessary investigations should precede the claim not follow it. See my Dismissal of Proceeding in Docket No. 80-12 served June 30, 1982. On the general question of the forfeiture of a violator's rights in exchange for an offer of mitigation see *Nelson, Administrative Blackmail, The Remission of Penalties*, 4 W. Pol. L.Q. 610 (1951).

By its terms the waiver is inapplicable to this proceeding since it is an agreement by Mr. Gmelch not to interpose the bar of the Statute of Limitations (section 2462) in either a compromise by the Commission or in a civil action by the United States, neither of which is involved here. The statute applicable to this proceeding is not 28 U.S.C. 2642 but section 32 of the Shipping Act. Thus for the purposes of this proceeding the violation took place between September 30, 1976 and August 15, 1977.

During the life of the agreement the Bureau says that it generated $57,600 in revenue. This amount is based upon the statement by respondent that Transpacific's one-half of one percent under the agreement amounted to $288. The $57,600 does not represent profit to General Transpac since freight charges had to be paid to the underlying carriers. The record does not show what these charges were or what other expenses were attendant to the shipments in question.

There is no evidence in the record that the agreement between General Transpac and Transpacific affected third parties in any way except perhaps to give those few shippers using the Transpacific tariff the convenience of a single all-inclusive rate. The agreement, so far as the record here shows did not unjustly discriminate against carriers, shippers, exporters, importers or ports or between exporters from the United States and their foreign competitors, it did not operate to the detriment of the commerce of the United States, nor was it contrary to the public interest. Thus, if a measure of the gravity of a section 15 violation is its effect on third parties (persons not party to the agreement) then this is the kind of "accidental or technical violation" which is to be contrasted and dealt with less severely than "willful and substantial violations." (46 CFR 103.5).

Culpability is most often associated with criminal offenses, e.g., *Black's Law Dictionary*, Fifth Edition, speaks only in terms of a person's "criminal culpability" which "requires a showing that he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense." The Shipping Act is not of course a penal statute and its offenses are civil not criminal. However, by analogy "civil" culpability would require a showing that the person acted knowingly, recklessly, or negligently as the Shipping Act requires with respect to each element of the offense alleged.

Respondent here is charged with and found in violation of section 15 of the Act for its failure to file the cooperative working arrangement with Transpacific. The single element of the violation is the failure to file, and it remains only to determine whether section 15 requires knowledge, recklessness, or negligence or some other state of mind to establish culpability. In contrast to section 16 First which requires that the prohibited act be "knowingly and willfully" done, section 15 places the affirmative duty upon all parties to an agreement to file it with the Commission. The language of the section requires neither knowledge of the requirement to file nor an intent to violate its terms. *Unapproved Section 15 Agreements—South African Trade,* 7 F.M.C. 159 (1962). In *Unapproved Section 15 Agreement—Coal to Japan/Korea,* 7 F.M.C. 295 (1962), the Commission said at page 304:

> It is not necessary under section 15 to impute an evil motive. For the purpose of this statute nonfeasance is as objectionable as malfeasance. There is little if any excuse for failure to file with the Commission, or at least make inquiry of it as to whether an agreement comes within the scope of section 15, and therefore must be filed and approved.

Thus section 15 would seem to impose an absolute liability to file an agreement with the Commission and the question of culpability is not relevant to the question of whether a violation has occurred. However, the Commission was careful to distinguish between the question of whether there has been a violation of section 15 and the question of the penalty to be imposed. In dealing with a finding by the Administrative Law Judge (the Hearing Examiner) that the violation of section 15 was "purely technical," the Commission in *Coal to Japan/Korea, supra,* said at page 303:

> We shall not pursue the point further because it is associated in any event with an immaterial issue as to the respondents' motives. We suppose there could be an occasion where the parties' motive or intent is useful to the proper disposition of an investigation by this Commission of unlawful conduct. But where as here, the objective is only to show a so-called "technical violation" it is irrelevant . . . [P]roceedings by this Commission inquiring into allegedly unlawful activity are regulatory in nature not penal. . . .
>
> Here the Examiner, after finding that the violations were "technical," indulged in respondents' fundamental misconception that the Commission could excuse them from any penalty . . . But the Commission, as we have said, lacks the power to assess penalties . . . Prosecution and the assessment or waiver of penalties are matters that rest within the province of the Attorney General and the Courts. (7 F.M.C. at page 303.)

With the passage of Public Law 96-25 the "assessment and waiver of penalties" are now matters that rest within the province of the Commission and questions of "motive and intent" are relevant to the determination of the amount, if any, of the penalty to be assessed a violator.

On the record here the degree of culpability was slight indeed. In converting Transpacific into an NVOCC and creating the arrangement between it and respondent, Mr. Gmelch was reacting to the representations of an official of the Commission. Moreover, and wrongly as it turned out, Mr. Gmelch viewed the arrangement between General

Transpac and Transpacific as an agency agreement which he mistakenly believed did not need to be filed under section 15. While none of this excuses the violation, it goes a long way in mitigation of the penalty when considered together with the other circumstances of the violation, e.g., its lack of impact on third parties.

The record here is devoid of any evidence of prior offenses by General Transpac which could be taken into consideration in fixing the amount of penalty to be assessed. As for General Transpac's ability to pay a civil penalty it says "The Respondent is in deep financial trouble and is struggling for its survival." The Bureau on the other hand argues that the only evidence in support of this assertion is General Transpac's 1980 Federal Income Tax Return and an unaudited consolidated balance sheet dated June, 1981 and that the tax return reveals that General Transpac spent in excess of $41,000 for travel and entertainment; and "A minor curtailment of these activities would offset the civil penalty we recommend be assessed in this proceeding." Whatever the wisdom of this expenditure, the money has already been spent and the ability to pay is determined by the current posture of the company. Here again there is little help in the record and were ability to pay a crucial factor in the decision here, additional evidence would have to be obtained.[22]

After careful consideration of the circumstances surrounding the violation, the extent and gravity of it and the degree of culpability and the lack of prior offenses on the part of respondent, it is my conclusion that a penalty is neither dictated by the respondent's past actions resulting in the violation nor warranted as a deterrent to future unlawful activity by the respondent.[23]

The proceeding is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

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[22] There is from this record no way of telling what benefit General Transpac derived from the money spent for travel and entertainment and there is the question of whether, absent fraud, concealment, gross negligence or the like, consideration of a violator's ability to pay legitimately includes an inquiry into the efficiency of the past management or business methods of the violator.

[23] In the almost four years from the cessation of the violation found here and the claim for penalties because of it, the respondent, so far as this record shows, has engaged in no unlawful activity. There is no reason to believe that this will change in the future.

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

[GENERAL ORDER 29; DOCKET NO. 82-16]

PART 549 - INDEFINITE SUSPENSION OF REGULATIONS GOVERNING LEVEL OF MILITARY RATES

August 25, 1982

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: This rule suspends the regulations governing rates quoted for the transportation of U.S. Defense Department cargoes pursuant to Military Sealift Command requests for proposals for an indefinite period. This action is taken in light of the determination that military rates are no longer so low as to be detrimental to the commerce of the United States, and with a view towards lessening the regulatory burden on U.S. flag operators.

DATE: Effective on October 1, 1982

SUPPLEMENTARY INFORMATION:

Notice is hereby given that the Federal Maritime Commission is extending the suspension of its regulations governing the level of military rates established in Part 549 of Title 46 of the Code of Federal Regulations, Federal Maritime Commission General Order 29, for an indefinite period. The suspension currently in effect will expire on September 30, 1982.

The Commission's General Order 29 (46 C.F.R. 549) governing the level of military rates was published in the *Federal Register* on December 2, 1972 (47 FR 25720). The Commission's proposal to temporarily suspend General Order 29, and the reasons therefor, were published in the *Federal Register* on February 4, 1981 (46 FR 10767). The final rule suspending General Order 29 during the period October 1, 1981 through September 30, 1982 was published in the *Federal Register* on April 3, 1981 (46 FR 20199). On March 23, 1982, a proposed rule to make the suspension permanent through the removal of 46 C.F.R. Part 549 was published (47 FR 12367).

Four parties commented on the proposed rule. The Military Sealift Command (MSC) supported the rule, asserting that General Order 29 was unworkable and burdensome. Sea-Land Service, Inc. (Sea-Land)

and E.I. Dupont de Nemours and Company (Dupont), concerned with a reoccurrence of the abuses which led to the promulgation of General Order 29, recommended that its suspended status be continued. Such action would provide regulatory relief, while maintaining the Commission's ability to react to events which may occur in the future. The Del Monte Corp. stated that the regulations made a positive contribution to the current reasonable level of military rates.

The Commission has concluded that the contention of Sea-Land and Dupont that this action, as opposed to outright elimination of the regulations, has considerable merit. It will accomplish the goal of reducing the regulatory burden imposed on U.S. flag carriers, while providing the salutary effect of demonstrating a continued interest in rates offered for the carriage of Defense Department cargoes. Should the Commission, at some point, terminate the suspension, steps will be taken to improve the effectiveness of the regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Commission certifies that the proposed rule will not, if adopted, have a significant economic impact on a substantial number of small entities. The primary impact of this proposed rule will be carriers publishing military cargo rates and the Military Sealift Command, none of which are generally considered to be small entities within the meaning of the Act.

List of subjects in 46 C.F.R. - Rates, Maritime Carriers.

Therefore, pursuant to section 18(b)(5) and 43 of the Shipping Act, 1916 (46 U.S.C. 817 and 841(a)), the Commission amends section 549.9, Part 549 of Title 46 C.F.R. to read as follows:

"§ 549.9 Suspension.

The provisions of this Part are suspended for an indefinite period."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 502

GENERAL ORDER 16, AMENDMENT NO. 42; DOCKET NO. 82-21

IMPROVEMENTS IN PREHEARING AND DISCOVERY PROCEDURES

September 7, 1982

AGENCY: Federal Maritime Commission

ACTION: Final rules

SUMMARY: The rules of procedure relating to discovery are revised to require more prompt commencement and completion of discovery, require the establishment of reasonable discovery plans, secure prompt rulings in case of disputes, eliminate time-consuming procedural formalities, provide for protective orders and supplementary responses, and otherwise simplify procedures and promote ease of usage of the rules. This action will simplify and expedite the discovery phase of Commission proceedings.

DATE: Effective as to all adjudicatory proceedings under section 22 of the Shipping Act, 1916, which commence after October 15, 1982.

SUPPLEMENTARY INFORMATION

On April 6, 1982, the Commission published a Notice of Proposed Rulemaking in the *Federal Register* (46 F.R. 14734) which proposed to revise its rules of procedure relating to prehearing discovery promulgated in Subpart L of Part 502 of Title 46 of the Code of Federal Regulations. The proposed revisions were substantial and would effectuate major changes in the existing discovery rules in order to simplify discovery procedures and assist parties in formal Commission proceedings to complete discovery with minimal delay. Thus, under the proposed rules, parties would be required to begin discovery with the filing of their initial pleadings in complaint cases and would be required to complete discovery within 120 days after service of the complaint or after service of the Commission's order initiating a proceeding. Parties would also be required to meet early in the proceeding to plan for the completion of discovery within the required time period. Provision was made for conferences with the presiding officer who would issue such rulings as might be necessary to resolve disputes and enable the discovery plan formulated by the parties to succeed in meeting the required deadlines. The entire discovery procedure would, moreover, be simplified by providing an alternate to the present system whereby discovery is conducted in a series of "waves" and parties must file formal motions seeking compulsory orders whenever disputes occur. Other reforms in discovery procedures were proposed in accordance with the modern federal rules of discovery currently in effect in civil proceedings before the courts, such as the provision for telephonic depositions, for issuance of detailed protective orders, and the requirement that parties furnish supplementary responses under certain circumstances. The Commission also proposed to simplify the present rules dealing with discovery requests directed to persons or documents located in foreign countries by allowing initial rulings by the presiding officer subject to appeal to or review by the Commission. Finally, the Commission proposed to rearrange and otherwise simplify the form of the rules to promote ease of usage.

Comments to the Notice of Proposed Rulemaking were submitted by the Maritime Administrative Bar Association (MABA), the law firm of Lillick, McHose & Charles, and by Sea-Land Service, Inc., a carrier by water subject to the jurisdiction of the Shipping Act, 1916. All of the commentators support the proposed rules. However, MABA and the Lillick firm propose several changes. These proposed changes are addressed below.

I. *Commencement of Discovery*

MABA suggests that the proposed rules are not clear regarding what is meant by the commencement of discovery and suggests the addition of a new section, 502.201(b)(3), which would provide that the prompt-commencement requirements of sections 502.201(b)(1) and (2) would be satisfied when a party undertakes discovery under sections 502.205 and/or 502.206. MABA further suggests that the new section make clear that the parties may provide for further discovery at the conference of the parties required by section 502.201(d). While the proposed rules require the prompt commencement of discovery, they do not specify which type of discovery a party must utilize or whether a party must utilize all types of discovery at the outset of the proceeding in order to satisfy the rules concerning commencement. Therefore, the Commission agrees that clarification is desirable. However, MABA's proposed subsection 502.201(b)(3) is too narrowly drawn because it is restricted to interrogatories (§ 502.205) and requests for production (§ 502.206). The rules, however, cover not only interrogatories and requests for production but depositions and requests for admissions. Furthermore, depositions are a discovery device that may be employed with respect to persons who are not parties to a proceeding. Accordingly, MABA's suggestions will be adopted but its proposed section

502.201(b)(3) will be expanded to include any discovery device including discovery that may commence with respect to persons who are not parties to the proceeding.

II. *Establishing a Fixed Date for a Discovery Conference and Otherwise Clarifying the Purpose of that Conference*

MABA suggests that proposed section 502.201(d), which would require parties to confer as soon as possible after certain events in order to provide for the completion of discovery within 120 days after service of the complaint or the Commission's order initiating the proceeding, needs clarification and certain improvements. MABA suggests that the parties be required to meet on a definite date, i.e., within 15 days after service of the answer to a complaint or service of discovery requests in a Commission-instituted proceeding. MABA also suggests that the rule specify that the parties are under a duty to establish a schedule for the completion of discovery within the prescribed time limit and to resolve disputes to the fullest extent possible by the use of admissions, stipulations and other techniques. Finally, MABA suggests that the proposed rule unnecessarily refers to "attorneys" as well as the parties.

The Commission agrees that the establishment of a date certain would promote the basic purposes of the discovery rule revisions, i.e., simplification and expedition, and that the specification of the duty of the parties to establish a discovery schedule and to utilize available devices to eliminate disputes also serves these purposes. Furthermore, the Commission agrees that the reference to the parties' attorneys is unnecessary in the context of the particular rule. Accordingly, MABA's suggested improvements and clarification will be adopted in the final rule. However, to ensure that the changes that will now be incorporated in the final rule do not contribute to delay, the Commission will specify in the final rule that the establishment of a fixed date should not be construed to preclude the parties from holding an earlier meeting. Finally, provision will be made for the submission of any discovery schedule to the presiding officer so that the presiding officer can monitor the course of the discovery phase of the proceeding and issue rulings when necessary to carry out the purposes of these rules.

III. *Proposals to Alter the Discovery Schedule*

MABA believes that proposed section 502.201(e) which requires any party unable to complete discovery within the 120-day period to propose an alternate schedule within 60 days after service of the complaint or after the order instituting the proceeding, does not provide sufficient time and suggests a 90-day period instead. MABA states that the parties may not know whether additional time to complete discovery is necessary in such a short period especially if there are clients located overseas and for other reasons. The Lillick firm also comments that the 60-

day period is too short and that it fails to account for the possibility that unforeseen events may require an extension of the normal 120-day period for completion of discovery at any time during the 120-day period. The Lillick firm suggests that the presiding officer be authorized to extend that period for good cause shown at any time during that period.

The Commission finds merit to the contention that in some cases involving complicated discovery, parties may not be able to determine within 60 days whether problems will arise subsequently which will prevent them from completing discovery within the prescribed 120-day period and recognizes furthermore that unforeseen events may arise at any time throughout this period. The main purpose of section 502.201(e) was to require the parties to notify the presiding officer promptly if such problems arose which would prevent timely completion of discovery and to propose appropriate alternative schedules for the presiding officer's approval. Rather than select any one point in time for such notification, such as 60 days or 90 days, however, the Commission believes that the purposes of the particular rule in question would be served if the parties were required to submit periodic status reports to the presiding officer on a monthly basis or at such other times as the presiding officer may require or circumstances may warrant and concluding on the final day of the discovery schedule. Requests for changes in the schedule can be made by means of such reports. The first such report should be made to the presiding officer not later than 30 days after the parties submit their discovery plan and schedule pursuant to section 502.201(d) unless the presiding officer otherwise directs. However, by permitting parties to submit such reports and to propose alternative schedules when necessary, the Commission does not mean to imply that parties may relax their diligence or may propose alternative schedules for frivolous reasons and therefore will make clear that proposals for changes in discovery schedules must be approved by the presiding officer. Accordingly, the Commission is revising proposed section 502.201(e) to require such status reports to be submitted in the manner described.

IV. *Provision for Written Rulings after Completion of Informal Conferences*

In order to resolve discovery disputes promptly and at minimal cost, the proposed rules authorize the presiding officer to conduct conferences which may be formal, on-the-record or informal when no reporter is present. See proposed sections 502.201(f) and (g). As an example of the latter type conference, the presiding officer may conduct a telephonic conference call, thereby saving considerable time and expense if the parties are located in widely scattered parts of the country. MABA believes that where possible, discovery disputes should be resolved informally by the presiding officer. However, to avoid subsequent misunderstanding and confusion, MABA believes that written rulings are necessary and suggests that the parties should be responsible for submitting within three work days after the conference a joint memorandum upon which the written rulings of the presiding officer can be based, unless the presiding officer grants additional time.

The Commission agrees that informal conferences with the presiding officer by telephone or otherwise can save time and unnecessary expense but that such conferences may be discouraged if no provision for adequate recording of the rulings and for written confirmation is made in the rules. Therefore, the Commission agrees with MABA's suggestion that the parties furnish a joint written memorandum of the rulings made at informal conferences. Of course, if one or more of the parties do not wish to undertake the responsibility of furnishing such a memorandum or if the presiding officer finds that an informal conference would not be suitable in any particular instance, the presiding officer may still summon a formal, on-the-record conference or may require written pleadings to resolve discovery disputes. Accordingly, MABA's suggestions, as incorporated in its proposed additions to section 502.201(f), will be adopted.

V. *Permission to File Written Replies to Discovery Objections*

As proposed, the rules provide for written objections to interrogatories and to requests for production of documents. See proposed sections 502.205(a) and 502.206(b). MABA states that unless there is a provision for the filing of written replies to such objections, each side does not have an equal opportunity to state its case and that the record on which the presiding officer will rule would not be complete. Also, MABA suggests that written expression of each party's position may also facilitate settlements. Therefore, MABA suggests that proposed sections 502.205(b) and 502.206(b) be amended by adding language permitting the filing of written replies to objections but with the caveat that such filings shall be permitted only to the extent that the discovery schedule previously established under section 502.201(d) is not delayed.

Although the proposed rules strive for as much simplicity and informality as possible, as seen from the previous discussion in regard to the holding of informal conferences, it is conceivable that there may be occasions when written expressions of positions on both sides of a discovery dispute are necessary to offset any possible disadvantage to a party who is restricted to oral presentation only. Furthermore, a more adequate record may be necessary to assist the presiding officer in reaching a just and reasonable decision in a complicated discovery matter. If the discovery schedule is not disturbed by the filing of an additional pleading, then there are benefits to such a procedure with no corresponding harm. Accordingly, the Commission agrees with MABA's suggestions and they will be adopted.

VI. *Specification of Sanctions for Violations of Protective Orders*

MABA suggests that the rules should outline specific sanctions for violations of protective orders issued by presiding officers under section 502.201(i) and recommends adoption of a new section 502.210(d) which would authorize sanctions ranging from private warnings to financial penalties and institution of disciplinary proceedings against attorneys and practitioners. MABA concedes that the language of its proposed new rule has not been noticed in the *Federal Register* but contends that the Commission has discretion to adopt the suggested amendments which MABA believes to have a "reasonable nexus" between the rules originally proposed and those finally adopted.

The Commission does not agree that this proceeding is the proper place to consider MABA's proposals. Not only are the suggested amendments well beyond the scope of the notice provided in the *Federal Register* but they impose several, severe sanctions on attorneys and other persons who have had no opportunity to comment and, additionally, raise legal questions as to the extent of the Commission's authority to issue such rules. Accordingly, while the Commission believes that the integrity of its proceedings must be protected and that violations of protective orders are serious matters, which are to be discouraged, the Commission believes that the matter of sanctions must be carefully considered under proper procedures and, if further amendments to the rules are believed to be necessary, will institute an appropriate rulemaking proceeding.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. §§ 601 et seq.), the Commission certifies that adoption of the rules herein discussed will not have a significant impact on a substantial number of small entities.

List of subjects in 46 C.F.R. Part 502: Administrative Practice and Procedure

THEREFORE, pursuant to the Administrative Procedure Act (5 U.S.C. § 553), sections 22, 27, and 43 of the Shipping Act, 1916 (46 U.S.C. §§ 821, 826, and 841a), the Commission is revising Subpart L of Part 502 of Title 46 C.F.R. to read as follows:

SUBPART L—DEPOSITIONS, WRITTEN INTERROGATORIES, AND DISCOVERY

§ 502.201 General provisions governing discovery
§ 502.202 Persons before whom depositions may be taken
§ 502.203 Depositions upon oral examination
§ 502.204 Depositions upon written interrogatories
§ 502.205 Interrogatories to parties
§ 502.206 Production of documents and things and entry upon land for inspection and other purposes

SUBPART L—DEPOSITIONS, WRITTEN INTERROGATORIES, AND DISCOVERY

§ 502.201 General provisions governing discovery.

(a) *Applicability.* The procedures described in this subpart are available in all adjudicatory proceedings under section 22 of the Shipping Act, 1916. Unless otherwise ordered by the presiding officer, the copy requirements of § 502.118(b)(3)(i) shall be observed.

(b) *Schedule for use.* (1) *Complaint proceedings.* Any party desiring to use the procedures provided in this subpart shall commence doing so at the time it files its initial pleading, e.g., complaint, answer or petition for leave to intervene. Discovery matters accompanying complaints shall be filed with the Secretary of the Commission for service pursuant to § 502.113 of this part.

(2) *Commission instituted proceedings.* All parties desiring to use the procedures provided in this subpart shall commence to do so within 30 days of the service of the Commission's order initiating the proceeding.

(3) *Commencement of discovery.* The requirement to commence discovery under sections 502.201(b)(1) and (2) shall be deemed satisfied when a party serves any discovery request under this Subpart upon a party or person from whom a response is deemed necessary by the party commencing discovery. A schedule for further discovery pursuant to this Subpart shall be established at the conference of the parties pursuant to section 502.201(d).

(c) *Completion of discovery.* Discovery shall be completed within 120 days of the service of the complaint or the Commission's order initiating the proceeding.

(d) *Duty of the Parties.* In all proceedings in which the procedures of this Subpart are used, it shall be the duty of the parties to meet or confer within 15 days (1) after service of the answer to a complaint or (2) after service of the discovery requests in a Commission instituted proceeding: to establish a schedule for the completion of discovery within the 120-day period prescribed in section 502.201(c); to resolve to the fullest extent possible disputes relating to discovery matters; and to expedite, limit, or eliminate discovery by use of admissions, stipulations and other techniques. The schedule shall be submitted to the presiding officer not later than five days after the conference. Nothing in this rule should be construed to preclude the parties from meeting or conferring at an earlier date.

(e) *Submission of status reports and requests to alter schedule.* The parties shall submit status reports concerning their progress under the discovery schedule established pursuant to section 502.201(d) not later than 30 days after submission of such schedule to the presiding officer and at 30-day intervals thereafter, concluding on the final day of the discovery schedule, unless the presiding officer otherwise directs. Requests to alter such schedule beyond the 120-day period shall set forth clearly and in detail the reasons why the schedule cannot be met. Such requests may be submitted with the status reports unless an event occurs which makes adherence to the schedule appear to be impossible, in which case the requests shall be submitted promptly after occurrence of such event.

(f) *Conferences.* The presiding officer may at any time order the parties or their attorneys to participate in a conference at which the presiding officer may direct the proper use of the procedures of this subpart or make such orders as may be necessary to resolve disputes with respect to discovery and to prevent delay or undue inconvenience. When a reporter is not present and oral rulings are made at a conference held pursuant to this section or section 502.201(g), the parties shall submit to the presiding officer as soon as possible but within three work days, unless the presiding officer grants additional time, a joint memorandum setting forth their mutual understanding as to each ruling on which they agree and as to each ruling on which their understandings differ, the individual understandings of each party. Thereafter, the presiding officer shall issue a written order setting forth such rulings.

(g) *Resolution of disputes.* After making every reasonable effort to resolve discovery disputes, a party may request a conference or rulings from the presiding officer in such disputes. Such rulings shall be made orally upon the record when feasible and/or by subsequent ruling in writing. If necessary to prevent undue delay or otherwise facilitate conclusion of the proceeding, the presiding officer may order a hearing to commence before the completion of discovery.

(h) *Scope of examination.* Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(i) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery may be conducted with no one present except persons designated by the presiding officer; (6) that a deposition after being sealed be opened only by order of the presiding officer; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer. If the motion for a protective order is denied in whole or in part, the presiding officer may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Rulings under this paragraph shall be issued by the presiding officer at a discovery conference called under § 502.201(f) or, if circumstances warrant, under such other procedure as the presiding officer may establish.

(j) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the party's responses to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement responses with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at a hearing, the subject matter on which such person is expected to testify, and the substance of the testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the presiding officer or by agreement of the parties, subject to the time limitations set forth in § 502.201(c) or established under § 502.201(e). [Rule 201.]

§ 502.202 Persons before whom depositions may be taken.

(a) *Within the United States.* Within the United States or within a territory or insular possession subject to the jurisdiction of the United

States, depositions shall be taken before an officer authorized to administer oaths under the laws of the United States or of the place where the examination is held.

(b) *In foreign countries.* In a foreign country, depositions may be taken (1) on notice, before a person authorized to administer oaths in the place in which the examination is held, either under the law thereof or under the law of the United States, or (2) before a person commissioned by the Commission, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under the rules in this subpart. [See 22 CFR 92.49-92.66.]

(c) *Disqualification for interest.* No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

(d) *Waiver of objection.* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(e) *Stipulations.* If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions. [Rule 202.]

§ 502.203 Depositions upon oral examination.

(a) *Notice of examination.* A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to such person and to every other party to the action. The notice shall state the time and place for the taking of the deposition and the name and address of each person to be examined if known, or if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs.

The notice shall also contain a statement of the matters concerning which each witness will testify. The attendance of witnesses may be compelled by subpena as provided in Subpart I of this part. If a subpena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpena shall be attached to or included in the notice. All errors and irregularities in the notice or subpena for taking of a deposition are waived unless written objection is promptly served upon the party giving the notice. Examination and cross-examination of deponents may proceed as permitted at the hearing under the provisions of § 502.154.

(b) *Record of examination; oath; objections.* The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. Objections shall be resolved at a discovery conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim. The parties may stipulate or the presiding officer may upon motion order that a deposition be taken by telephone or other reliable device.

(c) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the presiding officer may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in paragraph (b) of this section. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the presiding officer. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. Rulings under this paragraph shall be issued by the presiding officer at a discovery conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish.

(d) *Submission to witness; changes; signing.* When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless upon objection, the presiding officer holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(e) *Certification and filing by officer; copies, notice of filing.* (1) The officer taking the deposition shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. The officer shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the Secretary of the Commission by hand or registered or certified mail.

(2) Interested parties shall make their own arrangements with the officer taking the deposition for copies of the testimony and the exhibits.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(f) *Effect of errors and irregularities.* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under this § 502.203 and § 502.204 are waived unless a motion to suppress the deposition or some part thereof is made within ten (10) days of filing. [Rule 203.]

§ 502.204 Depositions upon written interrogatories.

(a) *Serving interrogatories; notice.* A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter, a party so served may serve cross interrogatories upon the party proposing to take the deposition. All errors and irregularities in the notice are waived unless written objection is promptly served upon the party giving the notice.

(b) *Officer to take responses and prepare record.* A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly in the manner provided by § 502.205 (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) *Notice of filing.* When the deposition is filed, the party taking it shall promptly give notice thereof to all other parties. [Rule 204.]

§ 502.205 Interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Any party desiring to serve interrogatories as provided by this section must comply with the applicable provisions of § 502.201 and make service thereof on all parties to the proceeding. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, on all parties to the proceeding under the schedule established pursuant to § 502.201. The presiding officer, for good cause, may limit service of answers.

(b) *Objections to interrogatories.* All objections to interrogatories shall be resolved at the conference or meeting provided for under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Written replies to objections to interrogatories shall be permitted only to the extent that the discovery schedule previously established under section 502.201(d) is not delayed.

(c) *Scope, time, number and use.* Interrogatories may relate to any matters which can be inquired into under § 502.201(h), and the answers may be used to the same extent as provided in § 502.209 for the use of the deposition of a party. Interrogatories may be sought after interrogatories have been answered, but the presiding officer, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the presiding officer may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

(d) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. [Rule 205.]

§ 502.206 Production of documents and things and entry upon land for inspection and other purposes.

(a) *Scope.* Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, sound or video recordings, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of § 502.203(a) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property of any designated object or operation thereon, within the scope of § 502.203(a).

(b) *Procedure.* The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Responses shall be served under the schedule established pursuant to § 502.201. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. Objections to requests for production of documents shall be resolved at the conference or meeting required under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Written replies to objections to requests for production of documents shall be permitted only to the extent that the discovery schedule previously established under section 502.201(d) is not delayed. [Rule 206.]

§ 502.207 Requests for Admission.

(a)(1) A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of § 502.203(a) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Any party desiring to serve a request as provided by this section must comply with the applicable provisions of § 502.201.

(2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the presiding officer may allow pursuant to § 502.201, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's attorney. If objection is made. the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that reasonable inquiry has been made and that the information known or readily obtainable is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; a party may, subject to the provisions of § 502.207(c) deny the matter or set forth reasons why it cannot be admitted or denied.

(3) The party who has requested the admissions may request rulings on the sufficiency of the answers or objections. Rulings on such requests shall be issued at a conference called under § 502.201(f) or, if circumstances warrant, by such other procedure as the presiding officer may establish. Unless the presiding officer determines that an objection is justified, the presiding officer shall order that an answer be served. If the presiding officer determines that an answer does not comply with the requirements of this rule, the presiding officer may order either that the matter is admitted or that an amended answer be served. The presiding officer may, in lieu of these orders, determine that final

disposition of the request be made at a prehearing conference or at a designated time prior to hearing.

(b) *Effect of admission.* Any matter admitted under this rule is conclusively established unless the presiding officer on motion permits withdrawal or amendment of the admission. The presiding officer may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the presiding officer that withdrawal or amendment will be prejudicial in maintaining the party's action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending proceeding only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

(c) *Expenses on failure to admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under § 502.207(a), and if the party requesting the admission thereafter proves the genuineness of the document or the truth of the matter, that party may apply to the presiding officer for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. Such application must be made to the presiding officer before issuance of the initial decision in the proceeding. The presiding officer shall make the order unless it is found that (1) the request was held objectionable pursuant to § 502.207(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that it might prevail on the matter, or (4) there was other good reason for the failure to admit. [Rule 207.]

§ 502.208 Use of discovery procedures directed to Commission staff personnel.

(a) Discovery procedures described in §§ 502.202, 502.203. 502.204, 502.205, 502.206, and 502.207, directed to Commission staff personnel shall be permitted and shall be governed by the procedures set forth in those sections except as modified by paragraphs (b) and (c) of this section. All notices to take depositions, written interrogatories, requests for production of documents and other things, requests for admissions, and any motions in connection with the foregoing, shall be served on the Secretary of the Commission.

(b) The General Counsel shall designate an attorney to represent any Commission staff personnel to whom any discovery requests or motions are directed. The attorney so designated shall not thereafter participate in the Commission's decision-making process concerning any issue in the proceeding.

(c) Rulings of the presiding officer issued under § 502.208(a) shall become final rulings of the Commission unless an appeal is filed within ten (10) days after date of issuance of such rulings or unless the Commission on its own motion reverses, modifies, or stays such rulings within twenty (20) days of their issuance. Replies to appeals may be filed within ten (10) days. No motion for leave to appeal is necessary in such instances and no ruling of the presiding officer shall be effective until twenty (20) days from date of issuance unless the Commission otherwise directs. [Rule 208.]

§ 502.209 Use of depositions at hearings.

(a) *General.* At the hearing, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or duly authorized agent of a public or private corporation, partnership, or association which is a party, may be used by any other party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer finds: (i) That the witness is dead; or (ii) that the witness is out of the United States unless it appears that the absence of the witness was procured by the party offering the depositions; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, any other party may require introduction of all of it which is relevant to the part introduced, and any party may introduce any other parts.

(5) Substitution of parties does not affect the right to use depositions previously taken; and, when a proceeding in any hearing has been dismissed and another proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former proceeding may be used in the latter as if originally taken therefor.

(b) *Objections to admissibility.* Except as provided in this paragraph, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under § 502.204 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross interrogatories.

(c) *Effect of taking or using depositions.* A party shall not be deemed to make a person its own witness for any purpose by taking such person's deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by any other party of a deposition as described in subparagraph (2) of paragraph (a) of this section. At the hearing, any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party. [Rule 209.]

§ 502.210 Refusal to comply with orders to answer or produce documents; sanctions; enforcement.

(a) *Sanctions for failure to comply with order.* If a party or an officer or duly authorized agent of a party refuses to obey an order requiring such party to answer designated questions or to produce any document or other thing for inspection, copying or photographing or to permit it to be done, the presiding officer may make such orders in regard to the refusal as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facta shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence or an order that with respect to matters regarding which the order was made or any

other designated fact, inferences will be drawn adverse to the person or party refusing to obey such order;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment by default against the disobedient party.

(b) *Enforcement of orders.* In the event of refusal to obey an order, the affected party or the Commission may apply for enforcement to a district court having jurisdiction of the parties, provided that the affected party seeks court enforcement within 20 days of the date of refusal to obey the order in question. Failure to seek enforcement in timely fashion will result in a waiver of the affected party's rights to enforcement of the subject order.

(c) *Persons and documents located in a foreign country.* Orders of the presiding officer directed to persons or documents located in a foreign country shall become final orders of the Commission unless an appeal to the Commission is filed within ten (10) days after date of issuance of such orders or unless the Commission on its own motion reverses, modifies, or stays such rulings within twenty (20) days of their issuance. Replies to appeals may be filed within ten (10) days. No motion for leave to appeal is necessary in such instances and no orders of the presiding officer shall be effective until twenty (20) days from date of issuance unless the Commission otherwise directs. [Rule 210.]

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 942

APPLICATION OF TRANS FREIGHT LINES, INC. FOR THE BENEFIT OF MILITZER & MUENCH U.S.A., INC. AS AGENT FOR LODGEGREEN, LTD.

ORDER OF PARTIAL ADOPTION

September 8, 1982

The Commission has determined to review an Initial Decision issued in this proceeding by Administrative Law Judge William Beasley Harris. The Administrative Law Judge granted permission pursuant to section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. § 817(b)(3) and Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.92(a), to Trans Freight Lines, Inc., to refund a portion of the freight charges collected from Lodgegreen, Ltd., on the shipment of a containerload of mixed paper products from Baltimore, Maryland, to Liverpool, United Kingdom. The Presiding Officer found that Trans Freight Lines had inadvertently failed to file, as intended, a special rate for the shipment and that the application meets all the statutory requirements.[1] However, in the belief that the carrier had initially charged less than the applicable rate, the Presiding Officer granted a refund of $1,040.40. This exceeds by $131.75 the amount requested in the application.

The question of whether the shipment should have been assessed a higher rate is irrelevant to refunds or waivers as provided for by section 18(b)(3). The refund cannot exceed the difference between the amount the shipper Lodgegreen actually disbursed and the amount payable under the rate set forth in the amended tariff. In this instance, the shipper paid $2,674.53 in freight charges. The freight computed on the containerload rate set forth in the corrected tariff amounts to $1,765.88. The difference between these figures is $908.65 and not $1,040.40, as stated in the Initial Decision. Trans Freight Lines, therefore, is granted permission to refund to the shipper the amount of $908.65.

[1] Section 18(b)(3) of the Shipping Act, 1916, gives the Commission discretion to permit a carrier to refund or waive collection of a portion of freight charges where it finds that there is

> an error in the tariff due to inadvertence in failing to file a new tariff . . . .

THEREFORE, IT IS ORDERED, That Trans Freight Lines, Inc., is granted permission to refund a portion of the freight charges collected from Lodgegreen, Ltd., in the amount of \$908.65.[2]

IT IS FURTHER ORDERED, That, except as herein modified, the Initial Decision issued in this proceeding is adopted by the Commission and made a part hereof.

IT IS FURTHER ORDERED, That Trans Freight Lines, Inc., shall promptly publish in its tariff the following notice:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 942, that effective February 12, 1982, through March 4, 1982, for purposes of refund or waiver of freight charges, the rate for containerloads of mixed paper products, viz: napkins, invitations, plates, tablecloths, candy cups, is \$1,700.00, per 20 ft. container, subject to all applicable rules, regulations, terms and conditions of said rate and tariff.

IT IS FINALLY ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[2] *Militzer & Muench U.S.A.* are directed to certify to the Commission within 45 days from the date of this Order that it has remitted to Lodgegreen the refund or explain why such remittance has not been made.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 942

APPLICATION OF TRANS FREIGHT LINES, INC. FOR THE BENEFIT OF MILITZER & MUENCH U.S.A., INC. AS AGENT FOR LODGEGREEN, LTD.

PERMISSION GRANTED TO REFUND A $1,040.40 PORTION OF AGGREGATE OCEAN FREIGHT CHARGES OF $2,806.28.

Rose Murphy, Rate Analyst, Trans Freight Lines, Inc., for carrier—applicant.

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

Partially Adopted September 8, 1982

This is a special docket application pursuant to section 18(b)(3) of the Shipping Act, 1916, as amended, and Rule 92 of the Commission's Rules of Practice and Procedure, 46 CFR 502.92. The application contains a certification of having been mailed June 23, 1982, to the Secretary of this Commission. Under those circumstances and the Act and Rule above, the date of the filing of this application is June 23, 1982.

On February 10, 1982, the carrier-applicant received, through Rose Murphy, a rate request from Fritz Oltman of Forwarder Militzer & Muench U.S.A. Inc. (FMC #1664), for mixed containerload of paper products consisting of Napkins, Invitations, Plates, Tablecloths, and Candy Cups. This request was brought before Trans Freight Lines, Inc.'s Pricing Committee on February 11, 1982, and it was agreed to offer Lump Sum rate of $1,700.00 plus T.H.C.—$2.50 M (per 40 cft.) and this was quoted by Rose Murphy to Fritz Oltman. The following day Mr. Oltman contacted Rose Murphy to file the agreed rate.

At the above time, Rose Murphy was involved in preparing for a General Rate Increase in Trans Freight Lines, Inc.'s tariffs. The request to file the rate was misplaced in a dead file.

Trans Freight Lines, Inc.'s Bill of Lading No. 191721, dated February 26, 1982, shows 1 X 20 Ft. H/H Container No. INTU 245654, said to contain Mixed Lot Party Items, viz (Napkins, Table Cloths, Party Plates, Cups & Invitations), Gross Weight 9916 lbs; measurement 1054.4

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

cft., was loaded at Baltimore on the vessel SS *TFL - Adams*, Voyage 11E, for discharge at Felixstowe for delivery to Liverpool. "Freight payable at destination." The shipment sailed February 28, 1982.

The application shows the original charge as:

$99.00 M (per 40 cft.) at 1054 cft.	=	$2,608.65
plus T.H.C. - $2.50 (per 40 cft.)	=	65.88
		$2,674.53

The B/L 191721 shows the same charge. However, there is no support showing the $99.00 M rate, but the $104 rate.

The application states that the rate applicable at the time of shipment was $104.00, Min. 800 cft. per H/H Ctr. (Exhibit No. 3). Exhibit No. 3 is a copy of Trans Freight Lines, Inc.'s Tariff No. 39, FMC-39, From: United States Atlantic Ports in the Eastport, Me/Hampton Roads, Va Range To: Ports of Call in England, Scotland, Wales, Northern Ireland, and Erie, 2nd Revised Page 185, effective date February 22, 1982, showing Item No. 931.6001.001—Commodity—Party Decorations & Favors, VIZ: Napkins, Cups, Plates, Ribbons, Wrappings, Paper Tablecloths, Party Favors, Stationery, Books, Candles, Vinyl Plaques, Puzzles, Desk Accessories; Packed. Minimum 800 cft. per H/H Container Rate $104.00 (M).

On this rate, the charges would be:

$104.00 M (per 40 cft.) at 1054 cft.	=	$2,740.40
plus T.H.C. - $2.50 (per 40 cft.)	=	65.88
		$2,806.28

This $2,806.28 charge is $131.75 more than the charge shown in the application and that on the B/L No. 191721 of $2,674.53.

The rate sought to be applied is Lump Sum per 20 ft. H/H Ctr.—$1,700.00. The 4th Revised Page 185, effective date March 9, 1982, ((1)(R) effective 3/4/82 per telex to FMC 3/4/82) shows Item No. 931.6002.001 (1) Mixed Containerloads of Paper Products, VIZ: Napkins, Invitations, Plates, Tablecloths, Candy Cups (R) Per 20 ft. H/H Ctr. (thru 4/3/8) Rate Basis LS $1,700.00. At this rate, the sought charges are:

Lump Sum	=	$1,700.00
Plus T.H.C. - $2.50 (per 40 cft.)	=	65.88
		$1,765.88

Charges sought to be refunded in the application are stated as $908.65, but the calculation made above under the difference between the $99.00 rate and the $104 rate, revealing the $131.75 error, added to the $908.65, makes the refund total $1,040.40.

DISCUSSION

The carrier-applicant asserts there are no other docket applications or formal proceedings involving the same rate situation presently before the Commission; that there were no other shipments of the same commodity by other than the shipper for whose benefit the refund is sought during the same period of time at the rate applicable at time of the involved shipment.

The sought to be applied rate was agreed to February 12, 1982. The request to file the agreed-upon rate was misplaced in a dead file. On March 4, 1982, the shipper stated that the cargo moved on February 26, 1982, and that the consignee was overcharged in excess of the agreed rate. The carrier-applicant filed the agreed rate effective March 4, 1982, via temporary filing to the Commission, which was before this application was filed on June 23, 1982. The application was filed within 180 days of the February 28, 1982, sailing of the involved shipment.

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* that the carrier-applicant has conformed to and complied with section 18(b)(3) of the Shipping Act, 1916, as amended, and Rule 92 referred to above and that permission to refund should be granted.

Wherefore, it is *ordered*, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure, that

(A) Trans Freight Lines, Inc., be and hereby is granted permission to refund a $1,040.40 portion of aggregate ocean freight charges of $2,806.28 for the benefit of Militzer & Muench U.S.A., Inc., as Agent for Lodgegreen, Ltd.

(B) Trans Freight Lines, Inc., shall make any adjustments in compensation necessitated by this refund and notify the Commission thereof.

(C) The carrier-applicant shall publish an appropriate notice of this decision in the applicable tariff.

(D) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-17

AROUNDWORLD SHIPPING & CHARTERING, INC. LICENSE NO. 1860

AND JOHN TARNOWSKI APPLICANT FOR A LICENSE AS AN INDEPENDENT

OCEAN FREIGHT FORWARDER

NOTICE

September 9, 1982

Notice is given that no exceptions have been filed to the July 28, 1982 initial decision in this proceeding and the time within which the Commission could determine to review that decision has expired. No such determination has been made and accordingly, that decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-17
AROUNDWORLD SHIPPING & CHARTERING INC. LICENSE NO. 1860 AND JOHN TARNOWSKI APPLICANT FOR A LICENSE AS AN INDEPENDENT OCEAN FREIGHT FORWARDER

Aroundworld Shipping & Chartering, Inc., found to have violated certain sections of General Order 4; to have turned in its independent ocean freight forwarder license; and to be insolvent, and therefore that no civil penalty should be assessed against ASC. John J. Tarnowski found to have violated a section of General Order 4; and fit to be licensed as an independent ocean freight forwarder.

Duane E. Crowley, Jr., and *Alvin C. Askew, Jr.*, for respondent, Aroundworld Shipping & Chartering, Inc.

Eliot P. Tucker for respondent, John Tarnowski.

John Robert Ewers, Joseph B. Slunt, Alan J. Jacobson, and *Stuart James* as Hearing Counsel.

INITIAL DECISION [1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Finalized September 9, 1982

This proceeding [2] is an investigation instituted by the Commission to determine whether one of the two respondents, Aroundworld Shipping & Chartering, Inc. (ASC), a licensed independent ocean freight forwarder, had violated certain sections of the Commission's General Order 4 (46 CFR 510); whether a civil penalty should be assessed against ASC pursuant to section 32(e) of the Shipping Act, 1916 (the Act), and if so, the amount of any such penalty; and whether ASC's independent ocean freight forwarder license No. 1860 should be suspended or revoked pursuant to section 44(d) of the Act.

This proceeding also ordered an investigation and hearing as to the respondent Tarnowski, as follows:

> IT IS FURTHER ORDERED, that pursuant to the above cited sections of the Shipping Act, 1916, this proceeding also determine whether John J. Tarnowski, in light of the evidence adduced pursuant to the first, second, third and fourth issues,

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

[2] This proceeding was reassigned to Administrative Law Judge Charles E. Morgan after the Administrative Law Judge who had presided at the hearing transferred to another agency.

> together with any other evidence adduced, possesses the requisite fitness within the meaning of section 44(b) Shipping Act, 1916, to be licensed as an independent ocean freight forwarder.
>
> IT IS FURTHER ORDERED, that Aroundworld Shipping & Chartering Inc. and John J. Tarnowski be made Respondents in this proceeding.

The matter of ASC will be taken up herein first. The issues relating to ASC were itemized in the order of investigation, as follows:

> THEREFORE IT IS ORDERED, that pursuant to sections 22, 32 and 44 (USC 821, 831 and 841(b)) of the Shipping Act, 1916, and section 510.9 of General Order 4 (46 CFR 510.9) a proceeding is hereby instituted to determine:
>
> 1. Whether ASC has violated section 510.5(c) of the Commission's General Order 4 by failing to inform the Commission of changes in its management and location within the thirty day time limit;
> 2. Whether ASC has violated section 510.23(a) of General Order 4 by permitting its license to be used by a person not in its employ to perform ocean freight forwarding services on 16 shipments from December 17, 1979 through January 25, 1980;
> 3. Whether ASC violated section 510.23(f) of General Order 4 by failing to promptly refund monies due one shipper in March 1978;
> 4. Whether ASC has violated sections 510.23(d), 510.23(e) and 510.23(j) of General Order 4 by incorrectly invoicing shippers for the cost of cargo insurance and accessorial services on at least 31 instances during the period September 15, 1977 through March 1, 1979;
> 5. Whether a civil penalty should be assessed against ASC pursuant to section 32(e), Shipping Act, 1916, for violations of sections 510.5(c) and 510.23(a), (d)(e)(f) and (j) of the Commission's General Order 4 and, if so, the amount of any such penalty
> 6. Whether ASC's independent ocean freight forwarder license should be suspended or revoked, pursuant to section 44(d) of the Shipping Act, 1916 for:
>   a. willful violations of the sections of the Commission's General Order 4 listed in subparagraph 5 above; or
>   b. such conduct as the Commission shall find renders ASC unfit to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

An opening brief was filed by Hearing Counsel on behalf of the Bureau of Hearings and Field Operations, in which it proposed numerous findings of fact. ASC did not file a reply brief, but instead on November 20, 1981, turned in its forwarder license to the Commission, along with a letter stating that ASC had become insolvent and would no longer be an active participant in this proceeding.

Because ASC did not reply, in general the proposed findings of fact of Hearing Counsel herewith are adopted subject to any mathematical or other necessary corrections. The facts show that ASC experienced a number of changes in its location and its management during the last few years, and the Commission was not promptly advised of the changes as required by section 510.5(c) of General Order 4. ASC moved its Houston branch office from 609 Fannin Building, Houston, to 16515 Hedgecroft, Houston, on March 24, 1978, but the Commission was not advised until much later, on December 28, 1978.

The principal headquarters of ASC in Washington, D.C., ceased operating on November 1, 1978, and the Commission was advised on December 28, 1978. On the same date, John Tarnowski, the qualifying officer of ASC's Houston office, advised the Commission of the resignation of ASC's president, Reginald Slocombe, on November 1, 1978. There were other such occasions of failure by ASC to promptly advise within the 30-day period required by General Order 4. John Tarnowski, in time, became acting president of ASC, and he also failed to advise the Commission within the 30-day period of changes in ASC's location and management.

ASC did not promptly refund to E. Systems, Inc., on a shipment handled by Delta Line, when E. Systems had overpaid ASC for ocean freight on the shipment. Delta Line had issued a corrected manifest for the shipment on June 27, 1978, but it was not until March 28, 1979, that ASC refunded the amount owed to E. Systems, Inc. A prompt refund was required by section 510.23(f) of General Order 4.

Between September 15, 1977, and March 1, 1979, ASC improperly invoiced six of its clients on nine occasions for wharfage or terminal charges on shipments which ASC forwarded in amounts greater than the amounts entitled to ASC. Also in this same period, ASC improperly invoiced ten of its clients on 13 occasions for insurance charges stating premium rates greater than the rates billed to ASC. Sections 510.23(d), (e) and (j) of General Order 4 required that ASC bill the proper charges.

During the period December 17, 1979, through January 15, 1980, sixteen shipments were billed by Robert Tinder under the name of Professional Freight Forwarder International (P.F.F.I.), using the forwarder license number of ASC. Tinder's relationship with ASC was not as an employee.

John Tarnowski drafted the contract with Robert Tinder, and Tinder had complete control over the two accounts (clients) with whom he dealt. Tinder worked out of his own separate location. Tarnowski had no knowledge of how Tinder was billing the accounts, further proof that Tinder was not an employee of ASC. Also Tinder was not on ASC's payroll, but operated strictly on a commission basis. The two clients of Tinder were his before he established any relationship with ASC. It is concluded that ASC violated section 510.23(a) of General Order 4, which provides that no licensee shall permit his name to be used by any person not an employee of the licensee.

Hearing Counsel originally recommended that ASC should be assessed a civil penalty in the amount of $15,000 in view of certain mitigating circumstances. Much of ASC's billing problems occurred as a result of its Washington headquarters closing down, with the confusion associated with a transfer of records to Houston. Hearing Counsel state that ASC realized $4,424.71 from its improper invoicing methods, and that in view of this and of all of ASC's violations, that $15,000 is proper, considering also the institution of corrective measures by ASC to prevent future violations. These views and the $15,000 fine recommendation were contained in Hearing Counsel's opening brief, received prior to the time that ASC turned in its forwarder license on November 30, 1981.

Since that time, at the request of the formerly presiding Administrative Law Judge, Hearing Counsel has provided additional information and has withdrawn the recommendation for a $15,000 fine.

By motion dated May 12, 1982, Hearing Counsel request that certain documentation attached to said motion be received, and that their revised recommendation be adopted. Said motion to receive the additional documentation hereby is granted. It includes ASC's financial statements, an analysis of said statements by the Commission's Office of Financial Analysis (OFA), a statement of the attorney for ASC, and a statement of a certified public accountant (CPA). The financial statements are unaudited, and the CPA expresses no opinion or any form of assurance in them. The CPA has withdrawn its further services because ASC has been unable to pay it the $7,000 plus balance already due to the CPA.

ASC's attorney points out that since the date of the financial statements, September 17, 1981, both of the two primary customers of ASC have been lost, one filing for bankruptcy, and one transferring its business to another forwarder. A comparison of current assets and current accounts payable of ASC shows more payable. Furthermore, one account receivable is in the doubtful category.

The Commission's Office of Financial Analysis on review believes that ASC cannot afford a fine. Based on ASC's insolvency, Hearing Counsel assert that assessing a fine would be an exercise in futility, and now recommend that no civil penalty be assessed against ASC.

As to ASC, it is concluded and found that ASC violated sections 510.5(c), 510.23(a), 510.23(d), 510.23(e), 510.23(f) and 510.23(j) of the

Commission's General Order 4; that ASC has turned in its independent freight forwarder's license and accordingly this action has made moot the issue of whether ASC's forwarder license should be suspended or revoked; and that while a fine of $15,000 would be justified for the said violations, no fine should be assessed ASC because of its insolvency and inability to pay.

Attention is now directed to the issue of the fitness of John J. Tarnowski to be licensed as an independent ocean freight forwarder.

As seen, from the facts found with regard to ASC, some of these also pertain to Tarnowski, because he was the Houston office manager and a vice-president of ASC since December 21, 1976. Tarnowski was president and a director of ASC from January 16, 1979, until he was removed from his position of president of ASC on June 10, 1981. Tarnowski made the arrangements with Tinder to use ASC's license number, but Tarnowski took the position that Tinder became an employee of ASC, even though Tinder operated out of a separate location and with a separate freight forwarder name. Tinder had complete control over the two accounts which he handled.

A civil lawsuit is pending in the state District Court in Harris County, Texas, in which Aroundworld Shipping & Chartering, Inc., is the complainant and John J. Tarnowski is the defendant. Because of the backlog of cases in Harris County, apparently a trial on a jury case, as is this one against Mr. Tarnowski, will not occur sooner than 2-1/2 to 3-1/2 years from the filing date of the suit. Also, more time might be involved should appeals be filed with higher courts.

The above suit in Harris County and counterclaims are based on alleged facts said to have occurred during Mr. Tarnowski's tenure as president of Aroundworld Shipping & Chartering, Inc.

The order of investigation herein with regard to Tarnowski names certain specific matters to be considered to determine the fitness of Tarnowski. But, the order is not limited to these specifics inasmuch as it contemplates consideration of "any other evidence adduced" in the proceeding. Further, section 44(b) of the Act sets the requirements necessary to be met for the issuance of a license, including a finding that the applicant is fit.

Any applicant, whose past conduct shows him to be not fit, shall not be issued a license as a freight forwarder; and any applicant who receives such a license and subsequently is shown to be unfit shall have his license revoked.

On the other hand, an applicant is entitled to a reasonably prompt ruling on his application.

The former presiding Administrative Law Judge apparently was faced with reconciling the above two general principles, when he ruled at the oral hearing in this proceeding, denying the request of Hearing Counsel for more time to develop certain facts as to Mr. Tarnowski's conduct as president of ASC. In effect, since the matter was pending in Harris County, it was ruled out of the present case before the Federal Maritime Commission. As shown on the transcript, page 29, the former presiding Administrative Law Judge asked if what Hearing Counsel were suggesting was a collateral investigation concurrent with that of the Harris County Court. The answer was yes, and the motion of Hearing Counsel was denied.

An offer of proof was made that an investigator employed by the Federal Maritime Commission would have testified that during his investigation of ASC, he was shown and obtained copies of ledger pages indicating payments to J & E Enterprises, totalling $37,328.28 paid by checks number 1140, dated May 29, 1979, and ending with check number 3727, dated May 29, 1981; and that when the investigator questioned Mr. Tarnowski about these findings on July 28, 1981, Mr. Tarnowski advised that his attorneys had advised him not to comment on this topic.

In their first brief in this matter, Hearing Counsel on page 21 state, "While there are a number of allegations concerning John Tarnowski, which the Commission is aware of, which might affect his fitness, these allegations are not involved in this proceeding and this recommendation is made based only on the facts of record and the issues in the Order of Investigation as interpreted by the Presiding Administrative Law Judge.[2]" Footnote 2 on this page states that, "Hearing Counsel intend to except to the Administrative Law Judge's decision which bars any examination of these allegations, as they relate to John Tarnowski's fitness in this proceeding."

The recommendation of Hearing Counsel, with the caveat above, is, "After examining the facts of record in this proceeding Hearing Counsel contend that John Tarnowski is fit to be licensed as an Independent Ocean Freight Forwarder."

Hearing Counsel state that denial of such a license is an extreme sanction, and that John Tarnowski on this record has not evidenced any unwillingness to comply with the Commission's rules and regulations in the future.

In all of the above circumstances, and especially in view of the long time which apparently would have been necessary to determine the facts as to the matters pending in the Harris County Court, there appears no good reason now to reconsider the ruling of the former Administrative Law Judge. While Hearing Counsel asked him to reconsider, which motion he denied, and while Hearing Counsel stated they intended to except to his decision which bars any of the allegations related to the Harris County case, Hearing Counsel have not asked the present Administrative Law Judge to reconsider that ruling, although they have had ample opportunity to do so.

Accordingly, it is ruled that the record must stand as it is, and there is no good cause for reopening this record.

As to Mr. Tarnowski, it is concluded and found that he violated section 510.5(c) of the Commission's General Order 4, by failing promptly to advise the Commission of change in the location of ASC's Houston office, and of change in its officers and directors.

No civil penalty is recommended to be assessed against Mr. Tarnowski, and based upon the limited facts of record herein, Mr. Tarnowski is found fit to be licensed as an independent ocean freight forwarder.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 507]

[GENERAL ORDER 39, DOCKET NO. 82-31]

ACTIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE FOREIGN TRADE OF THE UNITED STATES

September 9, 1982

ACTION: Removal of Part 507

SUMMARY: This removes regulations designed to meet or adjust conditions unfavorable to shipping in the United States/Guatemalan trade resulting from a since repealed Guatemalan decree.

DATE: September 14, 1982

SUPPLEMENTARY INFORMATION:

On June 28, 1982, the Commission issued a notice of proposed rulemaking requesting comments on the proposed removal of Part 507 of Title 46 of the Code of Federal Regulations (47 F.R. 27875). No comments were received in response to the Commission's Notice.

Part 507 was promulgated, pursuant to section 19 of the Merchant Marine Act of 1920 (46 U.S.C. § 19(1)(b)), to offset the discriminatory effects of a Guatemalan decree on the United States foreign commerce. Because the Guatemalan Decree has now been repealed, there is no longer any need for the regulations in Part 507.

THEREFORE, IT IS ORDERED, That, pursuant to 5 U.S.C. § 553 and section 43, Shipping Act, 1916 (46 U.S.C. § 841(a) and section 19(1)(b)), Merchant Marine Act, 1920 (46 U.S.C. § 876(1)(b)), Part 507 of Title 46 of the C.F.R. is removed.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-72

SEALD-SWEET INTERNATIONAL, INC.

v.

SEA-LAND SERVICE, INC.

ORDER ADOPTING INITIAL DECISION

September 10, 1982

This proceeding is before the Commission upon its determination to review the Initial Decision of Administrative Law Judge William Beasley Harris finding for Complainant and against Sea-Land Service, Inc. The Initial Decision also ordered:

> Sea-Land Service, Inc., shall publish in the applicable tariff an appropriate notice of the decision in this proceeding so that shippers similarly situated during the time period involved are not discriminated against and receive the same treatment, if eligible, as the complainant.

Initial Decision, at 10-11.

Publication in a tariff of notice of a Commission decision concerning that tariff is a Special Docket procedure. It has not been a requirement in misclassification proceedings arising under section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817). In the instant proceeding, the phrase "shippers similarly situated during the time period involved" could be interpreted as including shippers already time-barred by the two-year statute of limitations prescribed at 46 U.S.C. § 821. Although there may be some benefit in the notice requirement for shippers who are not time-barred, the possibility of unintended implications and confusion regarding the statute of limitations outweighs the usefulness of such publication. The Initial Decision shall therefore be adopted except for the notice requirement prescribed in paragraph (3) of the Presiding Officer's conclusions and paragraph (B) of the ordering language.

THEREFORE, IT IS ORDERED, That the Initial Decision is adopted to the extent indicated above; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-72

SEALD-SWEET INTERNATIONAL, INC.

v.

SEA-LAND SERVICE, INC.

Besides admission by the parties, the record clearly evinces a course of conduct strongly indicating that both the carrier and the shipper understood that the commodity Fruits, Citrus, N.E.S. VIZ: Temperature Controlled, Fibre Cartons, Minimum 950 cartons per container (thru March 31, 1980) EA (R) 3.65, Item No. 051.0005.803 in SANE Tariff No. 5, FMC 13, 11th Revised Page 138, effective December 17, 1979, would be applicable to all these shipments.

The conflicting interpretation of the applicable tariff by the complainant shipper and respondent carrier points up a definite ambiguity in the tariff, as demonstrated by the fact that respondent itself at first applied the interpretation the complainant did of 950 4/5 bushel cartons or 2/5 bushel cartons bundled together or not totalling 950 4/5 bushel cartons to a container. However, subsequently in supplemental billings respondent interpreted the tariff as requiring that a 2/5 bushel carton be counted as one carton.

The action of the carrier and the shipper are factors to be considered in determining what was a fair and reasonable interpretation of an ambiguous tariff item. The ambiguity is resolved against the carrier and in favor of the shipper.

The carrier should remove any ambiguity as to the tariff Item No. 051.0005.503 by making its tariff specific and plain.

Michael Joseph and *Timothy Trushel* of Kominers, Fort, Schlefer & Boyer for the complainant.

Claudia E. Stone and *John M. Ridlon* for the respondent.

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

Adopted September 10, 1982

The complainant Seald-Sweet International, Inc., alleges a charge and demand by the respondent Sea-Land Service, Inc., for a greater compensation for the transportation in containers of oranges packed in 2/5 bushel cartons bundled together, than the rates and charges specified in Sea-Land's tariff. Seald-Sweet alleges this is a violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. § 817(b)(3) and an

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

unjust discrimination between shippers in violation of section 17 of the same Act, 46 U.S.C. § 816.

This proceeding, as requested by the complainant and agreed to by the respondent was conducted under shortened procedure without oral hearing pursuant to 46 CFR 502.181, et seq.

The Presiding Administrative Law Judge from the record herein finds the following facts:

FACTS

There are seven (7) involved shipments of U.S. #1 Fresh Temple Oranges from Jacksonville, Florida, to Rotterdam, Holland. Two (2) of the seven (7) shipments sailed under the following Bills of Lading on the vessel *Producer*, Voy. 66 East:

(1) B/L No. 971787210-3 dated 1/6/80 - 1,634 2/5 Bushel Cartons - Gross Weight 32,680 lbs.; Freight and Charges Prepaid $4,307.79.

(2) B/L No. 971787411-3 dated 1/6/80 - 1,573 2/5 Bushel Cartons - Gross Weight 31,460 lbs., Freight and Charges Prepaid $4,301.67.

The remaining five (5) of the seven (7) shipments sailed under the following Bills of Lading on the vessel *Economy*, Voy. 119 East:

(1) B/L No. 971787456-3 dated 1/10/80 - 1900 2/5 Bushel Cartons - Gross Weight 38,000 lbs.; Freight and Charges Prepaid $4,334.52.

(2) B/L No. 971787457-4 dated 1/10/80 - 1900 2/5 Bushel Cartons - Gross Weight 38,000 lbs.; Freight and Charges Prepaid $4,334.52.

(3) B/L No. 971787484-3 dated 1/10/80 - 1900 2/5 Bushel Cartons - Gross Weight 38,000 lbs., Freight and Charges Prepaid $4,334.52.

(4) B/L No. 971787485-4 dated 1/10/80 - 2,600 2/5 Bushel Cartons - Gross Weight 32,020 lbs.; Freight and Charges Prepaid $4,304.38.

(5) B/L No. 971787486-5 dated 1/10/80 - 1,601 2/5 Bushel Cartons - Gross Weight 32,020 lbs.; Freight Charges Prepaid $4,304.48.

The tariff applicable here is that of South Atlantic-North Europe Rate Agreement FMC No. 9984 (SANE) Tariff No. 5 FMC-13 From: South Atlantic Ports of the United States below Hampton Roads, Virginia, to and including Key West, Florida, To: Antwerp, Rotterdam, Amsterdam, Hamburg, Bremen, Bremerhaven and French Atlantic Ports in the Bordeaux/Dunkirk Range. Each involved shipment moved under the Tariff Item No. 051.0005.803, 11th Revised Page 138, effective December 17, 1979, Commodity Fruits, Citrus, N.E.S., VIZ:

Temperature Controlled Fibre Cartons:

				Item No.
Up to/incl. 1′ 4″ cft each	EA		6.65	051.0005.477
Minimum 950 Cartons per container				
(Thru March 31, 1980)	EA	(R)	3.65	051.0005.503
(Eff. April 1, 1980)	EA	(A)	4.05	051.0005.803

Complainant Seald-Sweet International, Inc., is a Florida corporation with principal place of business in Tampa, Florida, engaged in the exporting of citrus fruit.

Respondent Sea-Land Service, Inc., is a common carrier by water engaged in transportation between ports on the South Atlantic Coast of the United States and ports in North Europe, and as such is subject to the provisions of the Shipping Act, 1916, as amended.

The majority of Seald-Sweet's shipments consisted of approximately 950 packages each comprised of one 4/5 bushel carton, for which Seald-Sweet was charged, for example, 950 cartons at $3.65 per carton, or $3,467.50 per container.

Respondent admits to carrying 7 shipments between January 6 and 11, 1980, for the complainant which consisted of approximately the same volume of oranges but were shipped in approximately 950 packages, each consisting of two 2/5 bushel cartons bundled together, for which Seald-Sweet has been charged, for example, 1,900 cartons at $3.65 per carton, or $6,935.00 per container.

In each of the seven involved shipments the oranges were packed in single cartons each comprised of two 2/5 bushel cartons bundled together. Freight charges were computed on the basis of the 950-carton minimum for each.

By means of seven freight bills dated January 30, 1980, Sea-Land charged and demanded that Seald-Sweet pay supplemental billings in the aggregate amount of $23,806.43, reflecting charges of $3.65 for each 2/5 carton in each shipment plus currency surcharges.

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

The respondent seeks to apply the rate applicable to the cargo which moved on the basis of the number of "cartons" which were transported on behalf of the complainant irrespective of whether they were bundled or single individual cartons. The respondent asserts it is required to apply the tariff as it seeks to do here; that the applicable tariff provision specifies clearly that it refers to "cartons" up to and including 1′ 4″ cft each, without specificity as to the manner of packaging.

The complainant contends, "The facts alleged in the complaint establish that, consistent with the fair import of the language of the tariff, Sea-Land routinely accepted standard 4/5 bushel cartons, including half-cartons bundled together, for shipment as 'cartons' under Item No. 051.0005.803 of the tariff. For a typical containerload under that item, where the container was sufficiently filled (or deemed to be filled) to meet the 950-carton minimum incentive rate, freight was customarily and properly charged for 950 cartons at $3.65, totalling $3,467.50, regardless whether the cartons used were single cartons of 4/5 bushel capacity or were half-cartons bundled together. By attempting to charge Seald-Sweet for the number of half-cartons shipped in excess of

950 in each of seven shipments, Sea-Land takes the position that SANE Tariff No. 5 should be construed to require that a shipment of 950 single cartons, notwithstanding that each pair of bundled half-cartons is less than the maximum dimension allowed in the tariff for each 'carton.' Such a reading of Tariff No. 5 according to the complainant is supported neither by its language nor by common sense."

The complainant asserts the case of *Joseph P. Sullivan & Co. v. Sea-Land Service, Inc.*, Docket No. 571(F), 21 F.M.C. 734, 18 SRR 1493 (1979), is directly on point with the instant case. The complainant shipper had shipped 13 containers under tariff items described as:

Apples: Temperature Controlled
In Wooden Boxes or Fibreboard Cartons or in
Cartons Bundled Two Together: Viz:
Not Exceeding 1′ 2″ - EA. 1.45
Not Exceeding 2′ 2″ - EA. ---
Not Exceeding 2′ 2″
Minimum 725 Packages per Container - EA. 2.90

"The shipments consisted of, by way of illustration, 615 full cartons (2′ 2″) and 200 *unbundled* half-cartons (1′ 2″) of apples. The respondent carrier, Sea-Land, was willing to count individual half-cartons as 'cartons' for the purpose of the 725-carton minimum and charged the shipper $2.90 each for 725 cartons (actually 615 full cartons and 110 half cartons) plus $1.45 each for the remaining 90 half cartons. The shipper's reasonable interpretation was that while pairs of half cartons, bundled or not, should be counted as 'cartons' for purposes of the 725-carton minimum, nothing in the tariff authorized application of the full carton rate to individual half cartons. The Commission upheld the shipper's interpretation. The complainant argues that, if for the purposes of an item described as wooden boxes or fibreboard cartons or in cartons bundled together, a pair of unbundled half cartons is to be deemed a carton then, *a fortiori*, for the purposes of an item described as fibre cartons: Up to/incl. 1′ 4″ cft. each/minimum 950 cartons per container, a pair of half cartons bundled together must be considered to be a "carton," so long as the maximum dimension of "1′ 4″" cft is not exceeded.

Respondent in its January 15, 1982, answering memorandum (p. 12) asserts "It is abundantly clear from the Complaint, the Exhibits, and the Argument of Complainant that the entire proceeding before the Commission in this case rests upon a single dispute as to the interpretation and application of a particular tariff rate. In its barest form, the dispute may be resolved into a disagreement between the parties as to its applicability of a particular rate to 'cartons.' It is clearly the position of Complainant that its use of 2/5 bushel capacity 'cartons' when bundled together into a single package, constitutes a single carton rather than two cartons forming one package."

Asked to explain in more detail whether or not the case of *Joseph P. Sillivan & Co. v. Sea-Land Service, Inc.*, Docket No. 571(f), 21 F.M.C. 734, 18 SRR 1493 (1979), is directly on point with the instant case, the complainant stated the case is directly on point with the instant case on the facts, in that it was there held that pairs of half-cartons of fruit must be counted as "cartons" where the applicable tariff does not clearly call for different treatment, and it is directly on point on the law in that it applied the principle that ambiguities in a tariff are to be construed against the carrier. The respondent says the *Sullivan* case, *supra*, although facially similar is distinguishable in law and fact and is thus not controlling of the instant case. In both cases, the commodity at issue was fruit. Similarly, both cases involved shipments of fruit in cartons. In both cases the issue was one of tariff application. However, at that point the cases diverge. The respondent says in the tariff at issue in the *Sullivan* case the relevant wording of the commodity description read: "In Wooden Boxes or Fibreboard Cartons or in Cartons Bundled Two Together," rated on a half carton basis (not exceeding 1′ 2″ each) or rated on a full carton basis (not exceeding 2′ 2″ each, subject to a minimum of 725 packages per container). The issue in the *Sullivan* case was whether half cartons were required to be bundled together to obtain the half carton rate. Thus, the case concerned an ambiguous tariff item. In the subject proceeding, according to the respondent, however, no ambiguity exists with respect to the tariff provision applicable to a commodity description. The respondent continues, the tariff item at issue in this docket applies to "Fibre Cartons" rated on a per carton basis as the "EA" designation states. If an ambiguity exists, it is in the shipper's commodity description of the contents of the container. In the instant case, there is no tariff provision for "cartons bundled two together" nor is there a rate for half cartons. There is only a rate on cartons applicable to each carton. Moreover, the *Sullivan* case provided for a rate based on cartons or cartons bundled together and limited by a minimum of 725 packages to obtain the rate for full cartons. The subject tariff description at issue here rates cargo on the basis of each *carton* and contains a 950 *carton* minimum.

In short, says the respondent, the *Sullivan* case is not directly on point with the subject proceeding.

The Presiding Administrative Law Judge finds that he does agree with the complainant that the *Sullivan* case applied the principle that ambiguities in a tariff are to be construed against the carrier; and the Presiding Judge also does agree with the respondent that the *Sullivan* case is distinguishable and not controlling of this case. The parties are in conflict as to their interpretation of the *Sullivan* case. As to the instant case, too, they conflict on tariff interpretation. The conflicting interpretation of the applicable tariff by the complainant shipper and respondent carrier points up a definite ambiguity in the tariff, as demonstrated by the fact that the respondent itself at first applied the interpretation the complainant did of 950 4/5 bushel cartons or 2/5 bushel cartons bundled together or not totalling 950 4/5 bushel cartons to a container. However, subsequently in supplemental billings respondent interpreted the tariff as requiring that a 2/5 bushel carton be counted as one carton. The conflicting interpretation points up a definite ambiguity in the tariff. *Peter Pratti Associates, Inc. v. Prudential Lines, Inc. & WINAC*, Docket No. 1172; *Hellenic Lines & WINAC*, Docket No. 1173, 8 F.M.C. 375 (1965).

This action of the carrier and the shipper is a factor to be considered in determining what was a fair and reasonable interpretation of an ambiguous tariff item. See *Aleutian Homes, Inc. v. Coastwise Lines, et al.*, Docket No. 799, 5 F.M.B. 602, 609 (1959). Also, the respondent and complainant both say the applicable tariff does not include a definition of the term "carton"; and, Seald-Sweet is aware of no understanding of the term "carton 1′ 4″ cft" among those involved in shipping; the respondent cannot state precisely what is meant by "carton 1′ 4″ cft" as used in the applicable tariff and adds that on information and belief, this language was added to the tariff at the request of a shipper of citrus fruit but respondent cannot reconstruct the source of such request.

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* in addition to those heretofore found and concluded, that:

(1) There is an ambiguity as explained above in the applicable tariff.

(2) The ambiguity is resolved against the carrier in favor of the shipper. This ambiguity with the resulting supplemental billings in the aggregate amount of $23,806.43 if allowed to stand, under the circumstances of this case, would be violative of section 18(b)(3) of the Shipping Act, 1916, and section 17 of that Act. Sea-Land is to rescind such supplemental billings.

(3) To avoid discrimination among shippers Sea-Land shall publish an appropriate notice in the applicable tariff so that shippers similarly situated during the time period involved herein may also utilize the results hereof.

(4) The carrier-respondent should remove any ambiguity as to its tariff.

Wherefore, it is *ordered*, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure:

(A) Due to the ambiguity in the applicable tariff as explained above, the ambiguity is resolved against the carrier and in favor of the complainant shipper. The carrier Sea-Land Service, Inc., is directed to rescind the supplemental billings in the aggregate amount of $23,806.43.

(B) Sea-Land Service, Inc., shall publish in the applicable tariff an appropriate notice of the decision in this proceeding so that shippers similarly situated during the time period involved are not discriminated against and receive the same treatment, if eligible, as the complainant.

(C) Sea-Land Service, Inc., shall clear up any ambiguity as to the Tariff Item No. 051.0005.803 by making its tariff specific and plain.

(D) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-45

PACIFIC LUMBER & SHIPPING COMPANY, INC., ET AL.

v.

STAR SHIPPING A/S

NOTICE

September 14, 1982

Notice is given that no appeal has been taken to the August 5, 1982 order of dismissal in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-45

PACIFIC LUMBER & SHIPPING COMPANY, INC. ET AL.

v.

STAR SHIPPING A/S

UNOPPOSED MOTION FOR DISMISSAL WITH PREJUDICE GRANTED

Finalized September 14, 1982

This proceeding was commenced by complaint served by the Federal Maritime Commission on July 2, 1981, asserting violations of section 14, Third and Fourth and section 16 of the Shipping Act, 1916. A cause of action under section 18 of the Shipping Act, 1916 was later added by amended complaint.

Initiation of the administrative proceeding followed and arose from the initiation of a Federal District Court action commenced in Seattle, Washington on or about February 8, 1979. That action was styled *Pacific Lumber & Shipping Co., Inc., et al. v. Star Shipping A/S and the M.S. Star Clipper*, No. C79-140B. At the time of filing of this motion neither the District Court proceeding nor the administrative proceeding have gone to final hearing, although the administrative proceeding has been set by procedural order of the Presiding Officer for September 24, 1982.

On or about July 1, 1982 Complainants and Respondent entered into an agreement to settle the District Court action. That settlement agreement is conditional upon payment of an agreed sum and upon the "closing" of the administrative proceeding. In order to meet the latter condition Complainants file this Unopposed Motion for Dismissal with Prejudice for the approval of the Presiding Officer.

In support of their motion the Complainants cite several cases which indicate that the settlement of administrative proceedings is favored by the Congress, the Courts and the Administrative Agencies themselves.[1] Further, as to the basis of the settlement, they state that:

> . . . It is based upon the sound commercial judgment of the parties that continued litigation would cause greater expense

[1] *Quality Food Corporation v. Tropical Shipping Co. Ltd.*, 23 F.M.C. 602 (1980); see also the authorities summarized in *Ellenville Handle works, Inc. v. Far Eastern Shipping Co.*, 23 F.M.C. 707 (1981); and *Old Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978).

to all parties than any recovery on the merits, that settlement of both proceedings at this stage would avoid months, and perhaps years of continued wasteful litigation at tremendous expense to the parties, and that insofar as the compromise is based upon the foregoing factors, it embodies no intention to contravene either the law or policy generally, or the provisions of any of the applicable shipping statutes.

Wherefore, in view of the above and the entire record so far made in this case, it is,

Ordered that the Complainants' Unopposed Motion for Dismissal With Prejudice is hereby granted.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-27

BURLINGTON INDUSTRIES, INC.

v.

THE ITALIAN LINE STEAMSHIP CO.

NOTICE

September 14, 1982

Notice is given that no appeal has been taken to the August 6, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-27

BURLINGTON INDUSTRIES, INC. (ACTING ON BEHALF OF WHOLLY OWNED SUBSIDIARY, KLOPMAN INTERNATIONAL S.P.A., PROSINONE, ITALY)

v.

THE ITALIAN LINE STEAMSHIP COMPANY

MOTION FOR DISMISSAL OF COMPLAINT AND APPROVAL OF SETTLEMENT GRANTED

Finalized September 14, 1982

This action began as the result of a complaint filed by Burlington Industries against Italian Lines Steamship Company, served on May 14, 1982. Answer to the complaint was filed on June 16, 1982.

On June 27, 1982, the parties jointly filed a Joint Motion for Dismissal of Complaint and Approval of Settlement. Accompanying the Motion was an Agreement of Settlement and Mutual Release and a Joint Affidavit in Support of Settlement Agreement.

It is clear from the reading of the above documents that the settlement effected by the parties, whereby the plaintiff is to receive $18,000 from the respondent in return for the respondent's agreement to forebear, is a commercial one. As the parties state, "In due course it readily became apparent that litigation of the involved issues would be both complex and costly * * *. Accordingly, in an effort to resolve their differences in a commercially reasonable manner and without the expense and uncertainty of further litigation, the parties have, after arms-length negotiations, reached * * * the settlement agreement * * *."

In view of the above, and in light of the cases and argument set forth in the Motion, it is

Ordered that the Joint Motion for Dismissal of Complaint and Approval of Settlement, is hereby granted and the instant proceeding is dismissed with prejudice.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-15

KERR STEAMSHIP COMPANY, INC.

v.

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS AND

RYAN-WALSH STEVEDORING CO., INC.

NOTICE

September 16, 1982

Notice is given that no appeal has been taken to the August 10, 1982 order styled "Withdrawal of Complaint" in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-15

KERR STEAMSHIP COMPANY, INC.

v.

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS

AND RYAN-WALSH STEVEDORING CO., INC.

WITHDRAWAL OF COMPLAINT

Finalized September 16, 1982

By motion dated and served July 21, 1982, the complainant in this proceeding moves for leave to withdraw its complaint and for an order of dismissal without prejudice.

The complainant points out that a suit has been filed in the United States District Court for the Eastern District of Louisiana, New Orleans Division, entitled, "The Board of Commissioners of the Port of New Orleans v. Kerr Steamship Co., Inc., and Ryan-Walsh Stevedoring Co., Inc., Civil Action 81-4691." This suit concerns certain demurrage charges, and crossclaims have been filed by Kerr Steamship Co., Inc., in such suit.

The complainant states that since liability for the demurrage charges will be decided by the United States District Court in this named suit, that the expenses to all parties in the present proceeding before the Federal Maritime Commission (No. 82-15) will in all probability be not justified. Therefore the complainant in No. 82-15 desires withdrawal of the complaint in No. 82-15 without prejudice.

One respondent, the Board of Commissioners of the Port of New Orleans (the Board), opposes the motion, and alternatively suggests, or moves, that the complaint be dismissed with prejudice, or that the motion to withdraw without prejudice be granted only upon the two conditions, that Kerr pay the Board its costs and expenses and that Kerr covenant not to bring an action against the Board on this matter in the future. The Board points out that the parties are exchanging written testimony and an oral hearing has been scheduled, and that the Board has incurred costs in defending itself in the subject case, No. 82-15.

Also, since it appeared that the proceeding in the District Court might not settle all the matters raised in the complaint in No. 82-15, particularly regarding the allegation of a violation of section 17 of the

Shipping Act, Kerr's request made at the prehearing conference, for a stay then was denied.

Insofar as the Board suggests withdrawal with prejudice, this amounts to a motion by the Board, to which other parties would be entitled to reply.

No response to Kerr's motion for leave to withdraw the complaint, has been made by Ryan-Walsh Stevedoring Co., Inc., nor by Hearing Counsel.

It is now not certain whether the District Court case will resolve all of the questions brought in No. 82-15, but there is some probability that the ruling of the District Court may make it unnecessary for the complainant to pursue its complaint in No. 82-15. Therefore, in view of this possibility, it is concluded that the complainant's motion should be granted subject to condition.

Complainant's motion hereby is granted and it is allowed to withdraw its complaint without prejudice but subject to the condition, that any party may file an appropriate motion for or against reopening the complaint in No. 82-15, depending upon the outcome of the proceeding before the District Court in its Civil Action 81-4691, with such motion for or against reopening in No. 82-15 to be filed within 30 days following the ruling of the District Court.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-25

SUN CHEMICAL EXPORT CORPORATION

v.

LYKES BROTHERS STEAMSHIP CORP.

NOTICE

September 16, 1982

Notice is given that no appeal has been taken to the August 12, 1982 order of discontinuance in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the order has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-25

SUN CHEMICAL EXPORT CORPORATION

v.

LYKES BROTHERS STEAMSHIP COMPANY

NOTICE OF (1) WITHDRAWAL OF COMPLAINT (2) CANCELLATION OF TUESDAY, AUGUST 17, 1982, HEARING (3) DISCONTINUANCE OF PROCEEDING

Finalized September 16, 1982

A letter, dated August 2, 1982 (received August 5, 1982), to the Presiding Administrative Law Judge, states:

Reference the subject Docket.

> Mr. Anthony J. Calzaretta of our company had no authority to file this complaint.
>
> I have communicated with Mr. David W. Gunther, Manager-Traffic Advisory Services of Lykes Bros. Steamship Co., Inc., stating that Sun Chemical Corporation is withdrawing the above complaint and will not file future complaints on the same matter.
>
> *Yours truly,*
> (S) JERRY R. BOLZAK
> *Jerry R. Bolzak*
> *Director of Corporate*
> *Transportation & Distribution*

Upon consideration of the above, it is *ordered* that:

(A) The complaint herein is withdrawn.

(B) The hearing in this proceeding, set for Tuesday, August 17, 1982, is cancelled.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-35

LUIS A. AYALA COLON, SUCRS., INC.

v.

BENEDICT SHIPPING INTERNATIONAL, INC.

NOTICE

September 17, 1982

Notice is given that no appeal has been taken to the July 14, 1982 Order of Discontinuance as reconsidered by order served August 12, 1982 in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-35

LUIS A. AYALA COLON, SUCRS., INC.

v.

BENEDICT SHIPPING INTERNATIONAL, INC.

NOTICE ON MOTION FOR RECONSIDERATION AND REQUEST VOLUNTARY DISMISSAL OF COMPLAINT

Finalized September 17, 1982

On July 14, 1982, the Presiding Administrative Law Judge served an order discontinuing this proceeding for failure of the complainant to comply with a proper order of this Commission (to submit a status report on or before July 1, 1982) and to prosecute diligently the complaint.

In the instant motion served August 3, 1982 (received August 9, 1982), the complainant states, among other things, that the case in the U.S. District Court for the District of Puerto Rico, Civil Action 81-0786 consolidated with Civil Action 81-1712, unfortunately, for reasons beyond the control of the complainant or its legal representative said case has been delayed more than expected; that the complainant's failure to file a status report was not deliberate or intentional as the parties had not yet received a decision from the U.S. District Court Judge which was expected at any moment; that to continue this complaint before the Commission would achieve no justiciable purpose.

The complainant requests it be allowed to voluntarily dismiss its claim and to discontinue the present case without prejudice.

DISCUSSION

The complainant served the instant motion within 20 days of the July 14, 1982, order requested to be reconsidered (the motion was received within 26 days). The motion did not answer why the lawyer could not have filed the requested status report within the time ordered. It is possible he was confused prosecuting the cause in this Commission and the Court in Puerto Rico. Because of the possible confusion, and less than 30 days have passed since the July 14, 1982, order, the said order has been reconsidered. The request of the complainant to be allowed to voluntarily dismiss its claim will be granted. The request to discontinue the present case without prejudice is made in the face of the fact that the complaint in this case was served May 19, 1981, so that the present case will be discontinued only.

Upon the reconsideration and consideration of the above the July 14, 1982, order herein having been reconsidered, said order will be vacated. The motion to voluntarily dismiss the claim herein is granted and the proceeding discontinued.

Wherefore, it is *ordered,* subject to review by the Commission, as provided in the Commission's Rules of Practice and Procedure, that:

(A) The July 14, 1982, order herein discontinuing the proceeding for failure to prosecute, is reconsidered and upon reconsideration is vacated.

(B) Complainant's motion for its voluntary dismissal of the complaint is granted.

(C) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-35

LUIS A. AYALA COLON, SUCRS., INC.

v.

BENEDICT SHIPPING INTERNATIONAL, INC.

Jose F. Sarraga for complainant.

Harry A. Ezratty for respondent.

PROCEEDING DISCONTINUED FOR FAILURE TO PROSECUTE

Finalized September 17, 1982

By notice served May 26, 1982, the parties were ordered to file on or before Thursday, July 1, 1982, an up-to-date status report and include therein reasons for the continuance of this Docket No. 81-35, as well as a schedule for proceeding, should proceeding be desired. The respondent served a status report July 1, 1982 (received July 6, 1982), which is really a motion to dismiss and for reconsideration of May 26, 1982 order. The complainant has not submitted the requested status report.

Upon consideration of the above, the record herein and that the complaint herein was served May 19, 1981, the Presiding Administrative Law Judge *finds* and *concludes* that the complainant has failed to comply with a proper order of this Commission and has failed to prosecute diligently in this Commission the complaint; that as a result thereof this proceeding should be discontinued.

Wherefore, it is *ordered*, subject to review by the Commission as provided in the Commission's Rules of Practice and Procedure, that:

This proceeding is discontinued for failure of the complainant to prosecute its claim diligently in this Commission.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-43

INDEPENDENT FREIGHT FORWARDER LICENSE NO. 1483, TOKYO EXPRESS CO., INC. AND KOZO AND KATHLEEN KIMURA D/B/A COSMOS TRADING COMPANY

ORDER ADOPTING INITIAL DECISION

September 17, 1982 (Finalized November 8, 1982)

This proceeding was initiated by Order of Investigation and Hearing served July 7, 1981 to determine whether Tokyo Express Co., Inc.: (1) violated section 16, Initial Paragraph, Shipping Act, 1916, 46 U.S.C. § 815, by obtaining transportation at less than applicable tariff rates through the device of collecting "compensation" on the shipments of Cosmos Trading Company, a company owned by Tokyo's principals; (2) violated section 16, Initial Paragraph, by obtaining transportation at less than applicable tariff rates by falsely declaring cargo measurements to ocean carriers; (3) violated sections 510.23(d), (e), (j) and (k) of Commission General Order 4, 46 C.F.R. § 510.23 (1980), by withholding information from its principals, by marking up the ocean freight and other charges without separately invoicing the shipper for actual cost and by failing to maintain books and records in accordance with the requirements of the Commission's General Order 4; (4) should have its license suspended or revoked because it is no longer "fit" to carry on the business of forwarding; and (5) should be assessed civil penalties pursuant to section 32(e) of the Shipping Act, 46 U.S.C. § 831(e) for any violations of the Act found.

On April 20, 1982, Administrative Law Judge Charles E. Morgan served his Initial Decision which: (1) approved the settlement agreement between Tokyo and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel), but increased the civil penalty settlement from $15,000 to $20,000; and, (2) found that the revocation or suspension of Tokyo's ocean freight forwarder license is not warranted by the record in this proceeding. This decision is before the Commission on Tokyo's Exceptions, and Hearing Counsel's supporting Reply, to the Presiding Officer's increase of the civil penalty.

BACKGROUND

The record before the Presiding Officer consisted of Hearing Counsel's request for admissions to Tokyo, Tokyo's admissions, uncontested affidavits, confidential financial data, and a Settlement Agreement, the essential parts of which are summarized below.

Tokyo is a California corporation, 80% of which is owned by Kozo and Kathleen Kimura. Mrs. Kimura is employed part-time as the company's secretary, while Mr. Kimura is President and works full-time. Toshinori Saiki owns 20% of Tokyo, is Vice President, and is employed full-time.

The Kimuras were also co-owners of Cosmos Trading Company from 1975 to 1979, at which time the company appears to have been dissolved. Mr. Kimura admitted that Cosmos was a purchasing agent for his brother's Japanese electrical contracting company as well as purchasing agent for Nippon Ace, Ltd. of Okinawa, Japan. During the period November 29, 1977 to June 15, 1979, Mr. Kimura acted as purchasing agent and forwarder on 29 shipments for the above-mentioned companies. Cosmos was named as the shipper on the bills of lading and Tokyo invoiced the consignees for the freight and other charges. Tokyo invoiced approximately $14,000 in excess of the actual freight charges, as well as approximately $2,500 in excess of actual drayage charges on these shipments.[1] In addition, Tokyo invoiced the consignees for a total of approximately $500 in forklift charges when no such charge was assessed on any of the shipments. Tokyo also misdeclared the cubic measurements of the 29 shipments.[2] Tokyo received a total of $276 in freight forwarder compensation on these shipments.

In the Settlement Agreement, Tokyo admitted that it engaged in activities that may be violative of section 16, Initial Paragraph, and General Order 4, as alleged in the Order of Investigation. To avoid the expense of litigation, Tokyo agreed to pay a civil penalty of $15,000 by executing a promissory note in favor of the Commission. The Agreement provides that Tokyo will pay $1,500 within 30 days of its approval by the Commission and the balance in installments of $2,250 at 6 month intervals. Tokyo also agreed to take reasonable measures to avoid any future unlawful conduct and to inform owners, directors, officers and employees of the Settlement Agreement's terms.

INITIAL DECISION

The Presiding Officer found that the Settlement Agreement is generally fair and consistent with the public interest, except for the penalty amount which he increased to $20,000. He based the increase in penalty on findings that Tokyo had realized between $16,500 and $25,000 in additional revenue as a result of the alleged unlawful activity, and that

[1] Tokyo paid approximately $27,000 in freight charges and $823 in drayage. The Presiding Officer found approximately $2,000 in drayage overcharges. The record, however, indicates a total of $2,512 in such overcharges.

[2] The record does not indicate the freight savings that Tokyo realized from the misdeclarations. However, Hearing Counsel alleges that Tokyo's activities generated approximately $25,000 in profit. The overcharges to shippers total approximately $17,000. It appears therefore that the misdeclarations amounted to $8,000.

Tokyo's salary increases undermined its claim of financial hardship resulting from its 1981 operations. Tokyo's corporate officers, rather than the employees, were deemed the recipients of the salary increases, because Tokyo's expenses for employee benefits were decreasing during the period relevant to this proceeding.[3] The Presiding Officer found that the stockholders' current equity and increases in entertainment and travel expenses also warranted an "upward adjustment in the proposed settlement figure of $15,000".[4] The penalty was therefore increased from $15,000 to $20,000 by the addition of two installments of $2,500.

Finally, the Presiding Officer found that the revocation or suspension of Tokyo's license was not warranted under the circumstances presented in this case.

POSITION OF THE PARTIES

Tokyo and Hearing Counsel urge the Commission to approve the proposed civil penalty because it is within a "zone of reasonableness" and allegedly meets the Commission's criteria for approving settlements. These criteria are said to include the furtherance of the Commission's enforcement policy, the respondent's ability to pay, the respondent's cooperation with the Commission's staff and the taking of remedial action.

Respondent and Hearing Counsel point out that Tokyo took immediate corrective action when it became aware of the alleged unlawful activity and that it fully cooperated with the Commission's staff throughout this proceeding. In addition, the $15,000 penalty and the legal expenses associated with this proceeding are said to have "eliminated any economic benefit that might have enured from the violations." Respondent also notes that the Presiding Officer did not find that salary expenses were so "unreasonably high" that they warranted an increase of the penalty. In the absence of such a finding, and given the confidential exhibits which allegedly demonstrate that Tokyo would suffer "serious financial hardship" if the penalty amount is increased, Tokyo urges the Commission to approve the $15,000 penalty.

Finally, the parties point out that the Commission has indicated that it will engage in every presumption which favors a finding that a settlement is fair, correct and valid. In this regard, Hearing Counsel argues that the Commission should not adopt the increased penalty because to do so could create the impression "that amounts agreed to

[3] In 1979, 1980 and 1981 Tokyo had salary expenses of approximately $110,853, $167,000 and $195,864, respectively. In 1980, the only year for which exact figures were presented, Mr. Kimura received a salary of $52,400, Mr. Saiki, $39,300 and Mrs. Kimura, $13,400. Cost for employee benefits declined from $9,546 in 1980 to $1,230 in 1981. Mr. Kimura, in a July 27, 1981 letter to Hearing Counsel, advised that Tokyo had six employees, including himself and his wife.

[4] Tokyo's travel and entertainment expenses increased from $10,075 in 1979, to $17,175 in 1980, to $29,016 in 1981.

during settlement will be subjected to adjustment by Administrative Law Judges even when the amount is fair and reasonable to both parties to the dispute."

DISCUSSION

Upon review of the record and Tokyo's Exceptions, the Commission finds that the Respondents' arguments generally constitute matters presented to and properly disposed of by the Presiding Officer. The Commission further finds that the Presiding Officer did not abuse his discretion by conditioning his approval of the proposed Settlement. The Commission will therefore adopt the Presiding Officer's Initial Decision in this proceeding.

Tokyo's only exception to the Initial Decision challenges the Presiding Officer's increase in the civil penalty agreed to between it and Hearing Counsel. After carefully considering the matter, the Commission finds that the Presiding Officer's action is both procedurally proper and substantively correct under the circumstances.

Section 32(e) of the Shipping Act, 1916, 46 U.S.C. § 31(e), authorizes the Commission to assess or compromise all civil penalties provided for in that Act. Pursuant to this authority, the Commission has adopted procedural regulations which authorize Hearing Counsel, as the prosecutor in assessment proceedings, to enter into stipulations and proposed settlements of the civil penalties that could be levied.[5] However, the settlement of a formal assessment proceeding must, in the first instance, be approved by the presiding officer.

While settlements are generally presumed to be fair, correct and valid, presiding officers are not compelled to accept the offer of settlement against their better judgment. *Pinkus v. Reilly*, 178 F.Supp. 399 (1959). On the contrary, a presiding officer has an obligation to ensure that the proffered settlement is consistent with the regulatory objectives of the Shipping Act, 1916, including its penalty provisions. The legislative history of section 32 indicates that the Act's penalty provisions are designed to ensure a sufficient penalty to deter the offender or others from transgressing the Act and the Commission's regulations.[6] The penalty amount necessary to achieve these objectives turns, in part, on the nature of the violation and the financial benefit derived, as well as the factors presented in mitigation.[7]

In this proceeding, the record supports the Presiding Officer's adjustment of the proposed settlement. First, Tokyo has realized some

[5] See 46 C.F.R. § 505.3 (1981); 44 F.R. 67660 (1979).

[6] Senate Report 92-1014, 92nd Cong., 2d Sess., reprinted in [1972] *U.S. Code Cong. and Ad. News*, 3121; House Report No. 96-232, 96th Cong., 1st Sess., reprinted in [1979] *U.S. Code Cong. and Ad. News 302.*

[7] *Behring International Inc. - Independent Ocean Freight Forwarder License No. 910* - Initial Decision served March 17, 1981, Notice of Administrative Finality served June 30, 1981 (23 F.M.C. 973).

$25,000 in profit from its activities, and there is no evidence of record which would indicate that Tokyo has made restitution to the affected shippers. Second, the serious nature of the violations warrants the increased penalty proposed by the Presiding Officer. Tokyo has not only admitted misdeclaring cargo measurements, but also invoicing its principals for charges that either were not incurred or were in excess of those actually incurred.

The Commission does not believe that a $20,000 penalty will cause the "serious financial hardship" that Tokyo alleges. Stockholders' equity and increased entertainment and salary expenses evidence Tokyo's ability to bear a $5,000 increase in the penalty. Moreover, the payment procedure derived by the Presiding Officer, *i.e.* adding two additional installments rather than increasing the installment payments already provided, should serve to minimize the impact of the increased penalty.

THEREFORE, IT IS ORDERED, That Tokyo's Exceptions in this proceeding are denied.

IT IS FURTHER ORDERED, That the Settlement Agreement arrived at in this proceeding is approved on the condition that:

1. It be modified as provided for in the Presiding Officer's Initial Decision; and
2. The Commission receive within 45 days of the service of this Order an executed copy of the Settlement Agreement and promissory note modified as required above.

IT IS FURTHER ORDERED, That if the above conditions are met the Commission will adopt the Presiding Officer's Initial Decision and discontinue this proceeding.

IT IS FURTHER ORDERED, That if the above conditions are not met, these proceedings will be remanded to the Presiding Officer for further hearings on the merits of the issues raised in this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-43
INDEPENDENT FREIGHT FORWARDER LICENSE NO. 1483
TOKYO EXPRESS CO., INC., AND KOZO AND KATHLEEN KIMURA D/B/A COSMOS TRADING COMPANY

Settlement jointly proposed by the Bureau of Hearings and Field Operations and by the respondents approved in principle; provided that the conditions of settlement include, among others, payment of $20,000 by Tokyo Express, rather than the $15,000 proposed by the parties, to compromise, pursuant to section 32(e) of the Shipping Act, 1916, 46 U.S.C. section 831(e), all civil penalty claims arising from certain violations of the Shipping Act and of General Order 4 of the Commission.

Tokyo Express found to have taken corrective steps to effect its present and future compliance with the Act; and under the circumstances, revocation or suspension of its ocean freight forwarder license not warranted.

Eliot J. Halperin for the respondents.

John Robert Ewers, Joseph B. Slunt and *Janet F. Katz* as Hearing Counsel.

INITIAL DECISION [1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Adopted September 17, 1982

Before considering the issues in this proceeding, there is one preliminary matter. It concerns the motion for a protective order filed by the respondents, relative to certain confidential exhibits submitted by the respondents in support of the proposed settlement herein. The data submitted concerns only respondents' ability to pay a penalty, and does not bear on any other matters in issue. The data consists of copies of financial statements, including balance sheets, income statements, changes in financial position, and an income tax return. Hearing Counsel do not oppose the motion. Inasmuch as the data largely is sensitive private information, and because it does not bear upon the allegations of violation of the Shipping Act, the motion to treat the said data as confidential hereby is granted. Rule 167 of the Commission's Rules of Practice and Procedure (46 CFR 502.167). This rule in part provides that any information given pursuant thereto may be used by the presiding officer or by the Commission if it is deemed necessary to a correct decision in the proceeding.

[1] This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

This proceeding was instituted by order of investigation and hearing served July 7, 1981, pursuant to sections 1, 16, 22, 32 and 44 of the Shipping Act, 1916 (the Act), and section 510.9 of General Order 4 (46 C.F.R. 510.9), to determine:

1. Whether Tokyo Express' relation with Cosmos was of such a nature that Tokyo Express and Kozo and Kathleen Kimura, through their ownership of Cosmos, violated section 16, Initial Paragraph, by obtaining transportation by water for property at less than the rates and charges which would otherwise be applicable through the device of collecting "compensation" on shipments on which Tokyo Express was the forwarder and Cosmos was the shipper.

2. Whether Tokyo Express violated section 16, Initial Paragraph, by obtaining transportation by water for property at less than the rates and charges which would otherwise be applicable through the device of falsely declaring the cargo measurements to ocean common carriers.

3. Whether Tokyo Express violated section 510.23(d) of General Order 4 by charging shipper clients other than actual ocean freight, drayage and accessorial service.

4. Whether Tokyo Express violated section 510.23(e) of General Order 4 by withholding information relative to a forwarding transaction from clients in regard to charges.

5. Whether Tokyo Express violated section 510.23(j) of General Order 4 by not using invoices that stated separately as to each shipment actual charges for ocean freight, insurance and accessorial service.

6. Whether Tokyo Express violated section 510.23(k) of General Order 4 by failing to maintain records and books of account in the required manner.

7. Whether civil penalties should be assessed against Tokyo Express and Kozo and Kathleen Kimura pursuant to section 32(e) of the Shipping Act, 1916, for violations of section 16 of the Shipping Act, 1916, and/or the Commission's rules and regulations and, if so, the amount of any such penalty which should be imposed.

8. Whether Tokyo Express' independent ocean freight forwarder license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916, for:

a. willful violations of section 16, Initial Paragraph, of the Shipping Act, 1916, and/or sections 510.23(d), (e), (j) or (k) of the Commission's Rules and Regulations; or

b. such conduct as the Commission finds renders Tokyo Express unfit to carry on the business of forwarding in accordance with section 510.9(e) of the General Order 4.

In lieu of a hearing, and in order to avoid the delays and expenses of extended litigation, the parties agreed upon a settlement. The formal record herein, in addition to the proposed settlement, includes Hearing Counsel's request for admission dated August 7, 1981, and the record includes Tokyo Express' answer dated August 18, 1981, confirming the truth of 80 of the 81 proposed facts. As to the other item, fact number 8, the answer was that Kozo and Kathleen Kimura *were* co-owners of Cosmos Trading Company (Cosmos), but that Cosmos was no longer in existence.

The record also includes the affidavit of Mr. Kozo Kimura, president of Tokyo Express, and the affidavit of Lyndon E. Berezowsky, a former investigator for the Commission. Finally, the record includes the financial data referred to above and ruled confidential of Tokyo Express Co., Inc.

The stipulated facts show that Kozo Kimura and his wife Kathleen own 80 percent of Tokyo Express. He is president and she is secretary. He works full time, and she part time. Toshinori Saiki owns 20 percent, is vice president, and works full time.

The Kimuras were co-owners of Cosmos Trading Company from 1975 to some time in 1979, when Cosmos became no longer in existence. Using the Cosmos name, Kozo Kimura became purchasing agent for his brother, who owned a Japanese electrical contracting company. Mr. Kimura also became purchasing agent for Nippon Ace, Ltd., in Okinawa, Japan. Kimura made purchases for his brother's company (Nakae Denki Kenetsu Co., Ltd.), as well as for Nippon Ace, with checks drawn on Tokyo Express. Later such checks were drawn on Cosmos beginning on or about November 1, 1977.

The stipulation states that Mr. Kimura acted as purchasing agent for 30 shipments during the period November 29, 1977, to June 15, 1979. Actually, a close check of listed invoice numbers shows 29 shipments.

On these 29 shipments, Tokyo Express acted as the freight forwarder, and Cosmos was listed as shipper on the bills of lading.

On the shipments, Tokyo Express paid the ocean carriers a total for ocean freight of $23,400.60. However, Tokyo Express, as freight forwarder, invoiced the actual shippers (not Cosmos) a total of $37,322.68 for ocean freight, or a total overcharge of $13,922.08.

Similarly, for drayage, Tokyo paid out a total of $823.00, but invoiced the shippers $2,885.00, or a total overcharge of $2,062.00.

Similarly, for forklift charges, Tokyo paid out nothing, but invoiced $550.00 total, all overcharges.

The composite total for ocean freight, cartage, and forklift charges charged by Tokyo Express for these 29 shipments was $40,757.68, with $24,223.60 paid for such services, and a composite overcharge of $16,534.08.

Hearing Counsel state as one of their criteria for settlement that ". . . the excess profit generated by the activities of Tokyo Express was approximately $25,000 . . . ." Hearing Counsel do not explain what other shipments or activities may have been included in their $25,000 calculation. Counsel for Tokyo Express do not offer any comparable figures, but do state that the relevant criteria for settlement include respondents' inability to pay, cost of collecting the claim, effect on enforcement policy, among others.

Further stipulated facts include that Tokyo Express did not maintain receipts and documents to support the charges on the above 29 shipments, and Tokyo Express declared cubic measurements which were less than the actual measurement of the cargoes.

Mr. Kimura, in his affidavit, states that Tokyo Express is a small company doing business primarily in the Japanese community of San Francisco, that it has always sought to deal fairly with its clients and has fully cooperated with the Federal Maritime Commission, and that as soon as he learned of the impropriety of Tokyo Express' relationship with Cosmos, that the operations of Cosmos were terminated immediately. Tokyo Express has only a "few employees, including me and my wife."

Kimura states also that he wishes to continue the employment of these few employees and that any settlement amount greater than the agreed $15,000 would impose a severe burden, especially in view of the currently depressed conditions, and the considerable legal fees already incurred.

Mr. Kimura's salary in 1980 was $52,400, Vice President Saiki's was $39,300, and Mrs. Kimura's was $13,400, the first two working full time, and Mrs. Kimura part time. Also in 1980, other salaries and wages (of non-officers) were $61,975, making the total compensation of officers and others $167,075.

In 1979, the comparable total was $110,853.23. In 1981, total salaries were $195,864.34.

There is no explanation why salaries jumped to such a total in 1981, as compared with 1980, especially in view of the fact that Tokyo Express' profit in 1980 disappeared in 1981. Because there were only a few employees besides the officers and because employee benefits were only $1,230 in 1981, compared with $9,546 in 1980, and $10,075.30 in 1979, it is reasonable to conclude that Tokyo Express had at the most the same and probably a lesser number of employees in 1981 compared with 1980 and 1979. In view of this conclusion, it is further concluded that the officers' compensation paid to the Kimuras and to Saiki in total was increased very considerably in 1981. (All figures for 1981 are shown as unaudited.)

It is concluded further that the financial results of Tokyo Express would have been better in 1981 than as shown in the confidential data, were it not for such increases in officers' compensation in 1981.

In view of the above facts regarding officer compensation, also the large increase in 1981 in entertainment and travel expenses, the present stockholders' equity in Tokyo Express, and especially in view of the fact that Tokyo Express was enriched by its unlawful activities to the extent of $16,534 to $25,000, it would seem that some upward adjustment should be made in the proposed settlement figure of $15,000.

In mitigation of Tokyo Express' past illegal activities is the statement of former District Investigator Berezowsky, that Mr. Kimura told him that Kimura had no beneficial interest in the shipments forwarded to his brother's company in Japan, that Kimura had begun a separate operation (from his freight forwarder business) as a tariffed non-vessel operating common carrier for household goods under the name, Tokyo Express Shipping Company, Inc. (the forwarder business operates under the name Tokyo Express Co., Inc.), that under this new tariff, there have been no misdeclarations of cargo measurements to the ocean carriers, that ocean freight charges were itemized to the shippers in the NVOCC bill of lading and the tariff rate was properly applied, that other ancillary charges, including packing, crating and drayage to the warehouse were itemized on a Tokyo Express invoice, that Mr. Kimura made available for inspection documentation on all other shipments of Tokyo Express, that Mr. Kimura maintained copies of bills of lading and invoices in both chronological and alphabetical orders.

Mr. Berezowsky concluded that a review of 20 complete shipment files from July 1, 1980, to January 1, 1981, showed that the files were complete and were maintained in an orderly manner, that there was no evidence of misdeclarations, and that all charges were itemized properly on invoices to shippers. Mr. Berezowsky found no violations of the Commission's General Order 4 or of the Act during this period of 1980.

The proposed settlement includes provision for payment to the Federal Maritime Commission by Tokyo Express of the sum of $15,000, in installments. The first installment of $1,500 is due on or before 30 days following approval by the Commission of the proposed settlement. Thereafter, $2,250 would be paid every six months, for a period of 36 months.

It is concluded and found that the proposed settlement terms are generally fair and consistent with the public interest, *except* that the payment to the Commission by Tokyo Express should be $20,000 (in lieu of the proposed $15,000). The first installment will remain $1,500; the next six installments will remain $2,250 for each six months for 36 months, for a subtotal of $15,000; and there will be two further installments of $2,500, each of which shall be due at six month intervals following the originally provided installment payments. These last two installments of $2,500 each will be due respectively, 42 months, and 48 months, following the approval by the Commission of the proposed settlement as herein modified. Thus, the effect of the revision approved herein will merely add two installment payments and Tokyo Express will have another year to pay.

Revocation of the existing license of Tokyo Express as an independent ocean freight forwarder would be an extreme sanction. Tokyo

Express has not evidenced an intent presently or in the future to engage in conduct violative of the Shipping Act. Rather, Tokyo Express has taken steps to comply with the Act. It further is concluded and found that revocation or suspension of Tokyo Express' ocean freight forwarder license is not warranted.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 919

APPLICATION OF PACIFIC WESTBOUND CONFERENCE ON BEHALF OF KOREA MARINE TRANSPORT CO., LTD. FOR THE BENEFIT OF MITSUI AND COMPANY (U.S.A.), INC.

Initial Decision denying permission to waive collection of a portion of freight charges reversed. Application for permission to waive collection of $143,610.40 from the shipper granted.

Open minimum established by Conference for individual rates of member carriers may not serve as basis for computing freight charges.

Carrier's consistent requests for the filing and application of rates at minimum level evince intent of having on file a rate matching the open minimum established by the Conference at any given time.

In order to avoid discrimination among shippers similar relief will be extended to earlier shipments.

Mark R. Weaver for Korea Marine Transport Co., Ltd.

Patricia Petzar for Pacific Westbound Conference.

REPORT AND ORDER

September 24, 1982

BY THE COMMISSION: (ALAN GREEN, JR., *Chairman*; THOMAS F. MOAKLEY, *Vice Chairman*; JAMES JOSEPH CAREY, RICHARD J. DASCHBACH AND JAMES V. DAY, *Commissioners*)

This proceeding, instituted pursuant to the provisions of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)), and Rule 92(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.92(a)), is before the Commission on Exceptions filed by Korea Marine Transport Co., Ltd. (KMTC) and the Pacific Westbound Conference (PWC) to the Initial Decision of Administrative Law Judge William Beasley Harris, denying permission to waive collection of $143,610.40 in freight charges [1] on two shipments of woodpulp from Seattle, Washington to Kaohsiung, Taiwan.

[1] Pacific Westbound Conference Local and Overland Tariff No. 11-FMC 19.

BACKGROUND

Effective February 1, 1981, PWC opened its rate on woodpulp thereby permitting individual carriers to establish their own rates, subject to a specified minimum established by the Conference.[2] On March 31, 1981 KMTC, a PWC member line, instructed PWC's tariff compiler to file a rate for woodpulp to Kaohsiung/Keelung at the minimum level allowed by the Conference of $51.00 WT,[3] which was to become effective April 1, 1981. Due to error, no such rate was filed until April 7, 1982, when a tariff supplement showing a rate of $67.00 WT was filed by PWC on behalf of KMTC.[4]

The Mitsui and Company (U.S.A.), Inc. shipments at issue moved on December 5, 1981. In the absence of a specific commodity rate, freight charges in the amount of $196,023.60 were assessed on the basis of the PWC "Cargo NOS" rate of $250.00 W/M. Mitsui prepaid $52,413.20, computed on the basis of a $64.00 WT rate, which reflected the open minimum in effect at the time of shipment. KMTC now seeks permission to waive collection of the remaining balance of $143,610.40.

The application furthermore seeks permission:

> to waive the assessment of the "Cargo NOS" rate of $250.00 WT erroneously applicable to Kaohsiung/Keelung from the dates of April 1 through July 4, 1981 (when the rate should have been $51.00 WT), July 5, 1981 through October 31, 1981 (when the rate should have been $53.00 WT), and November 1, 1981 through March 31, 1982 (when the rate should have been $64.00 WT), and April 1, through April 5, 1982 (when the rate should have been $67.00 WT, the error being corrected on April 6, 1982), per 17th revised page 835.

DISCUSSION

Section 18(b)(3) grants the Commission discretion to permit a carrier or conference of carriers to waive collection of a portion of the freight charges payable under the tariff in effect at the time of shipment where it appears that there is an error in the tariff due to inadvertence in failing to file a new tariff, provided, that prior to applying for a refund or waiver, the carrier filed a tariff upon which such refund or waiver would be based, that the application be timely filed and that grant of a waiver will not result in discrimination among shippers.[5]

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[2] 10th Rev. Page No. 285, effective February 1, 1981.

[3] Individual rates are filed by PWC on behalf of its members in separate supplements to the tariff.

[4] The open minimum of $48.00 WT for Woodpulp (Not over 1.56 m^3/KT), destination Kaohsiung/Keelung set by PWC on February 1, 1981, rose by April 1, 1982 to $67.00 WT.

[5] The Presiding Officer denied the application on the theory that there was a $64.00 rate on file on December 5, 1981, which obviated the need for a waiver. However, the $64.00 rate which appears in the tariff on 6th revised page 285A, effective November 15, 1981, was not a commodity rate but the minimum established by the Conference for rates to be filed by individual carrier members. Therefore, it cannot serve as a basis for computing freight. *Chevron Chemical International, Inc. v. Barber Blue Sea*

Continued

KMTC requested the filing of a $51.00 WT rate.[6] The application seeks a waiver on the basis of a $64.00 WT rate. The corrected tariff sets forth a rate of $67.00 WT. The issue therefore becomes what was the rate KMTC intended to have on file before the shipments moved, and whether the corrected tariff reasonably reflects that rate.

It should be noted that subsequent to the Conference opening its rate on woodpulp, KMTC requested the filing of a rate at the level of the open minimum in effect on March 31, 1981, *i.e.* $51.00 WT. Likewise, the $64.00 WT rate KMTC now seeks permission to apply, matches the minimum in effect on December 5, 1981, the date the shipment moved.[7] This indicates KMTC's intent to take advantage of the open rate provision by having on file a rate at the minimum level allowed by the Conference at the time of shipment.

With respect to the $67.00 WT rate which appears in the amended tariff, the application states that it includes a 10% general rate increase which went into effect in April, 1982. Under Rule 3.1.2 of the conference tariff,[8] this increase was inapplicable to cargo received by a conference carrier prior to the effective date of the increase. The shipments here moved on December 5, 1981. Applying the provisions of the rule, and disregarding the general rate increase, the rate set forth in the amended tariff amounts, therefore, to $64.00, the rate upon which the request for a waiver is based.

Even disregarding the general rate increase, the waiver would be based on a $53.00 or $64.00 rate (after the incorporation of the bunker surcharge),[9] but not on the $51.00 rate originally requested to be filed by KMTC. However, in *Nepera Chemical, Inc. v. Federal Maritime Commission*, 662 F.2d 18 (D.C. Cir. 1981), the court, in reversing the Commission's denial of a waiver, noted that while the corrected tariff

Line, 20 F.M.C. 594 (1978); *Petition for Reconsideration denied*, 20 F.M.C. 806 (1978); *affirmed without opinion sub nom. Chevron Chemical International, Inc. v. FMC*, 600 F.2d 279 (D.C. Cir. 1979) (Table). He also denied the request for waivers relating back from April 1, 1981, to April 5, 1982, on the basis of the 180-day limitation of section 18(b)(3) for applying for refunds and waivers.

[6] The tariff page which set forth the $51.00 open minimum, also projected an increase in this minimum to $53.00, effective July 2, 1981. KMTC thus was on notice that the $51.00 rate would no longer be applicable on July 2, 1981. *Furthermore, as explained in the application*, the open minimum of $64.00 in effect at the date of shipment does not represent an increase in the $53.00 minimum, but results from the incorporation of $11.00 from the bunker surcharge of $13.00 which was then in effect. 13th rev. page 285 effective April 1, 1981. This reduced the bunker surcharge to $2.00. Freight computed on the basis of either $53.00, plus $13.00 bunker surcharge per ton, or $64.00, plus a $2.00 bunker surcharge yields the same amount.

[7] While KMTC had no rate for woodpulp to Kaohsiung/Keelung it has had a rate on file to Busan since February 1, 1981. The rate to Busan shows increases which reflect the Conference's open minimum from $48.00 on February 1, 1981, to $51.00 on April 1, 1981, to $53.00 on July 2, 1981, to $64.00 on November 1, 1981 and to $67.00 by April 1, 1982. Thus, *the changes in the rates to Busan would* also confirm the intent of the carrier to take advantage of the minimum level established by the Conference for *filing an independent rate*.

[8] 5th Rev. Page 58, effective August 1, 1979.

[9] See note 6, *supra*.

must reflect a rate "which was intended to be applicable by both shipper and carrier," the legislative history of section 18(b)(3) is "silent on the issue of whether the intended and filed rates need be precisely equivalent." Although mindful that the remedy not be used as a means for obtaining rebates or result in discrimination among shippers, the court suggested that in view of its remedial purpose the statute should be given a reasonable construction.[10]

In conclusion, it appears that from April 1, 1981 KMTC intended to have a rate on file which would meet the Conference's open minimum, which at the time of the shipment here was set at $64.00 and that, after the deduction of the 10% general rate increase from the $67.00 rate, the amended tariff does set forth the rate of $64.00, as intended. *Japan Line (USA) Ltd., for the Benefit of Nomura (America) Corp.*, 22 F.M.C. 825 (1980). Hence, the requirements of the statute have been met.

Finally, in order to avoid any discriminatory treatment of shippers, the rate upon which the waiver is based is made applicable to shipments which took place at the time the rate should have been filed. *See Application of Pacific Westbound Conference on Behalf of Sea-Land Service, Inc., for the Benefit of Minnesota Minning & Manufacturing Co.*, 21 S.R.R. 793 (1982). As explained, the rate set forth in the amended tariff reflects the $53.00 minimum which went into effect on July 5, 1981. This $53.00 rate represents a $2.00 projected increase over the $51.00 minimum in effect on April 1, 1981, which KMTC had requested be filed. Consequently, the rate upon which the waiver is based will relate back to April 1, 1981.

THEREFORE, IT IS ORDERED, That the Exceptions of Pacific Westbound Conference are granted;

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is reversed;

IT IS FURTHER ORDERED, That Korea Marine Transport Co., Ltd. is granted permission to waive collection from Mitsui and Company (USA), Inc., of $143,610.40 of the freight charges payable on the two shipments of woodpulp which moved on December 5, 1981.

IT IS FURTHER ORDERED, That the Pacific Westbound Conference shall promptly publish in its tariff as a supplement on behalf of Korea Marine Transport Co., Ltd., the following notice:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 919 for the purposes of refund or waiver of freight charges on any

[10] See note 6 *supra*. There is no reason to believe that the waiver here has been requested as a means of obtaining rebates. The carriers were free to establish their own rates within the open minimums in effect from time to time which were well below the previous Conference rate of $94.00. The $64.00 rate which appears in the amended tariff reflects, as mentioned, the $53.00 rate, the open minimum in effect on July 5, 1981.

shipments of woodpulp (not over 1.56 m^3K/T) to Kaohsiung/Keelung, from April 1, 1981, through July 4, 1981, the rate is \$51.00 WT; from July 5, 1981, through October 31, 1981, the rate is \$53.00 WT; from November 1, 1981 through March 31, 1982, the rate is \$64.00 WT; and from April 1, 1982 through April 6, 1982 the rate is \$67.00 WT, applicable to KMTC, subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary