FEDERAL MARITIME COMMISSION

DOCKET NO. 83–47
AGREEMENT NO. 10467: LATIN AMERICAN CHARTER AGREEMENT; AGREEMENT NO. 10468: LATIN AMERICAN DISCUSSION AGREEMENT

NOTICE

June 12, 1984

Notice is given that no exceptions were filed to the May 10, 1984, 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.

Proponents of Agreement No. 10467 shall amend this agreement as set forth in the initial decision, and shall ensure that the Commission receives this modified agreement, appropriately signed by all parties, no later than June 15, 1984. The modified agreement will be deemed approved as of the date the agreement, appropriately modified, is received by the Commission.

(S) FRANCIS C. HURNEY
Secretary

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AGREEMENT NO. 10467: LATIN AMERICAN CHARTER AGREEMENT; AGREEMENT NO. 10468: LATIN AMERICAN DISCUSSION AGREEMENT

Five carriers operating between U.S. Atlantic and Gulf ports and ports and points in five South American countries filed a space-charter Agreement and a discussion Agreement seeking approval under section 15 of the Shipping Act, 1916. The Agreements generated four protests on the grounds that they were not necessary and were not justified and could be harmful in connection with South American cargo reservation laws. Proponents withdrew the discussion Agreement but contended that the space-charter Agreement was justified by trade conditions and would benefit shippers and carriers. Proponents also agreed to amend the space-charter Agreement by adding certain clarifying language, following which all active protests were withdrawn and Hearing Counsel expressed support for the Agreement. It is held:

(1) The space-charter Agreement is a simple, voluntary, open arrangement which does not authorize rate-fixing or joint activities of any kind and would have minimal anticompetitive effects.

(2) There is evidence that the Agreement would benefit shippers and carriers by enabling the parties to provide service to shippers which would otherwise be disrupted and by enabling carriers to make better utilization of unused vessel space.

(3) There is no countervailing evidence showing that the Agreement would harm any interest or would work in conjunction with South American cargo reservation laws to harm anyone and it appears that the protests were based upon misunderstandings and fears that the Agreement would operate with the withdrawn discussion Agreement to cause harm.

(4) The Agreement is approved provided that proponents file certain clarifying amendments and furnish periodic reports which they have already agreed to do.

Nathan J. Bayer for proponents.

Richard W. Kurrus and *Paul G. Kirchner* for protestants Ecuadorian Line and CCT.

Andrew M. Parish and *Beth Ring* for protestant Florida Customs Brokers and Forwarders Association, Inc.

Arturo J. Abascal for protestant Navicon.

John Robert Ewers and *William D. Weiswasser* for Hearing Counsel.

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

Adopted June 12, 1984

This proceeding began with the issuance of an Order of Investigation and Hearing by the Commission on October 5, 1983, in order to determine whether two agreements should be approved under the standards of section 15 of the Shipping Act, 1916, 46 U.S.C. §814. Both agreements had originally been filed with the Commission on January 31, 1983. The first agreement (No. 10467) was a relatively simple space-charter arrangement among five carriers operating in the trade between U.S. Atlantic/Gulf ports (and U.S. points) and ports and points in Bolivia, Chile, Peru, Ecuador, and Columbia. The five carriers were prominent operators in the trade, consisting of two U.S.-flag carriers, Delta Steamship Lines, Inc. (Delta) and Lykes Bros. Steamship Co., Inc. (Lykes), and three leading national-flag carriers of the South American countries involved, Compania Peruana de Vapores (Peruvian-flag), Transportes Navieros Equatorianos (Ecuadorian flag), and Compania Sud Americana de Vapores (Chilean flag). The purpose of the Agreement was to authorize each of the carriers to charter space to each other on vessels operated by them when needed on a space-available basis with no requirement that any party request space or reserve space for any other party. It was characterized by proponents of the Agreement as a "casual space charter" arrangement without any fixed requirements and was compared to another such arrangment, albeit one more complicated, Agreement No. 10420, the American Flag Common Carrier Charter Agreement, approved by the Commission. The subject Agreement would expire on June 30, 1987, unless four members withdrew earlier.

Proponents of this space-charter Agreement maintained that the Agreement was required by a serious transportation need, would secure important public benefits, and was in furtherance of a valid regulatory purpose. Specifically, proponents argued and presented evidence in support of their contentions that the subject trade was seriously overtonnaged, that cargo had declined, that severe rate instability existed in the trade, that costs of providing service had increased, that some carriers had suffered bankruptcies and had to withdraw from the trade, and that certain excessive competitive practices had severely destabilized the trade. Proponents contended that their Agreement would benefit the trade by allowing for maximum equipment utilization, conserve energy, maintain the quality and quantity of service that shippers had come to expect, add to stability in the trade, and have little anticompetitive effect since participation in the arrangement was entirely voluntary.

At the same time that the above five proponents filed their space-charter agreement (No. 10467) with the Commission, the same five carriers plus

[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).

a sixth carrier, Flota Mercante Grancolombia, S.A., filed a so-called "discussion agreement" (No. 10468) by which the six carriers would confer for the purpose of developing, exchanging, and discussing trade data and information. The six carriers believed that this latter Agreement would serve as a forum to discuss the problems affecting the trade adversely, mentioned above, and would enhance their ability to reach helpful economic decisions on modernization and fleet deployment as well as commercial solutions to conflicting cargo promotion laws and policies.

The filing of the two Agreements generated four protests filed by three carriers and an association of customs brokers and freight forwarders, namely, Naviera Continental, NAVICON, C.A. (Navicon); Ecuadorian Line, Inc. (Ecuadorian); Coordinated Caribbean Transport, Inc. (CCT); and the Florida Customs Brokers and Forwarders Association (Brokers and Forwarders Association). These protestants disputed proponents' contentions that the trade was overtonnaged, contended that the space-charter Agreement was unjustified, extremely anticompetitive, and was a first step towards a consortium, and raised the question of possible impact of the cargo reservation laws in the various South American countries on the subject Agreement. Two of the protesting parties, CCT and the Brokers and Forwarders Association, also protested approval of the discussion Agreement (No. 10468) reiterating similar objections.

After consideration of the proponents' submissions seeking approval, the protests, and proponents' replies to the protests, the Commission determined that the nature of the contentions and factual disputes required that the Commission institute a formal proceeding in which these issues could be determined properly, consistent with the Commission's duty to examine competitive consequences of agreements, weigh the purported benefits against possible competitive harm, and determine whether the Agreements served needs or purposes which would offset their inroads on antitrust policies, as required by principles of law prevailing under the 1916 Act. See *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968); *United States Lines* v. *F.M.C.,* 584 F. 2d 519 (D.C. Cir. 1978); *Marine Space Enclosures, Inc.* v. *F.M.C.,* 420 F. 2d 577 (D.C. Cir. 1969).

The formal proceeding was launched, as noted above, by the service of the Commission's order on October 5, 1983. The Commission set forth the basic issue as to whether the two Agreements should be approved, disapproved, or modified under the standards of section 15 of the 1916 Act. In addition, the Commission framed three specific issues for determination relating to the competitive effects of the Agreements, either alone or together, the effects of South American cargo preference laws, the inter-

action of the two Agreements, and the scope of the second Agreement, No. 10268.[2]

Developments Following Issuance of the Commission's Order

The first major development occurring after institution of the formal proceeding was the withdrawal of Agreement No. 10468, the discussion agreement, by the parties thereto. This withdrawal was effectuated by letter of counsel dated November 3, 1983, and was confirmed by my ruling on November 7, 1983. The withdrawal of the discussion Agreement served to remove from the proceeding all issues pertaining solely to that Agreement, specifically an issue pertaining to joint competitive effects resulting from the interplay of the two Agreements, trade conditions and problems which might be alleviated by the discussion Agreement, interaction of the two Agreements, and the scope and membership limitations of the discussion Agreement. Justification for the remaining space-charter Agreement (No. 10467) of course, remained to be shown under the standards of section 15 of the 1916 Act.

Shortly after withdrawal of the discussion Agreement, the parties commenced to utilize the Commission's prehearing discovery processes. Proponents of the space-charter Agreement served interrogatories and requests for production of documents on protestants and Hearing Counsel and Hearing Counsel served corresponding materials on proponents. In addition, proponents took the deposition of the President of Protestant Ecuadorian Line. Several prehearing conferences were conducted in an effort to bring the proceeding to a prompt conclusion.

During the course of this prehearing activity, discussions began between proponents and the three active protestants, Ecuadorian Line, CCT, and the Brokers and Forwarders Association, in an effort to narrow or eliminate issues among these parties. (The remaining protestant, Navicon, although kept apprised of developments by counsel for proponents, by Hearing Counsel, and by notices which I issued, took no part in prehearing activity, did not appear at any of the prehearing conferences or at the hearing, and notified Hearing Counsel that it was declining participation because

[2] The specific issues framed in the Commission's Order (p. 4) were as follows:

1. What competitive effect will the Agreements, either individually or together, have on the trade, and what conditions in the trade (footnote omitted) would justify any anticompetitive effect the Agreements may be found to have?
2. What are the terms of the South American cargo preference laws that apply to the trades within the geographic scope off the Agreements, and what effect will these laws have on the implementation of the Agreements and the trade?
3. How will Agreement Nos. 10467 and 10468 interact with each other and other approved section 15 agreements in the trade? Why should Agreement No. 10468 membership be limited to the national flag carriers of the countries involved, and why should that agreement include matters that are within the scope of other approved section 15 agreements to which Proponents are party?

In the footnote to issue no. 1 omitted above, the Commission instructed proponents to submit evidence supporting their allegations that trade conditions were unstable and other matters and to show how the Agreements would alleviate such conditions.

it was being purchased by an Ecuadorian concern and had no instructions. I issued no sanctions against Navicon but noted its absence and cautioned that the proceeding could not be delayed and its allegations would not be proven by its continued lack of participation.)[3]

The result of the discovery and discussions among the parties concerned was the withdrawal of two protests, those by CCT and the Ecuadorian Line, in return for certain amendatory or clarifying language which proponents agreed to insert in their Agreement. (Later, as I discuss, a third protestant, the Brokers and Forwarders Association, also withdrew their protest in return for certain clarifying statements by proponents, and Hearing Counsel expressed support for approval of the Agreement on certain conditions relating to reporting requirements and minor language changes.)

Both CCT and the Ecuadorian Line had protested approval of the subject Agreement, contending that proponents had not shown the requisite need or justification for such an Agreement. They disputed proponents' contentions that there was an overtonnaging problem in the trade, that cargo had declined, and that severe rate instability existed and disputed proponents' contentions that activities at the Port of Miami causing shift of cargo to that port required any remedial action and were concerned that the subject Agreement might be aimed at diverting cargo away from Miami and harming carriers serving that port such as CCT and Ecuadorian Line. CCT was especially concerned that the subject space-charter Agreement might work in conjunction with the now-withdrawn discussion Agreement to create a consortium with monopolistic effects, and both CCT and Ecuadorian Line were worried about any possible effects of the subject Agreement on South American cargo reservation laws. (See affidavits of Vlada and Calderon, Attachments G and H to Ex. 1.) Furthermore, according to a deposition taken of Mr. Dennis A. Meenan, President, Ecuadorian Line, that Line also feared that the subject space-charter Agreement authorized joint rationalization of sailings, coordination of sailings, possible elimination of some ports of direct call, joint advertising and joint cargo solicitation, and did not provide for other carriers serving the trade to become parties to the Agreement. (Exs. 2 and 3).

Whatever the concerns of the two protestants, CCT and Ecuadorian Line, they appear to have been alleviated considerably by a further understanding of the Agreement which resulted from discussions with proponents and by proponents' willingness to amend the original Agreement with clarifying language. Specifically, to remove any ambiguity as to the meaning and intention of the parties to the Agreement, proponents submitted the following

[3] See letter dated November 15, 1983, from Mr. Arturo J. Abascal, Marketing Manager of Navicon, to Hearing Counsel; Notice of Further Prehearing Conference and Related Rulings, March 2, 1984, p. 3 n. 1; transcript of prehearing conference, March 1, 1984, pp. 5–10. I note that the Commission has made clear that it expects parties protesting approval of agreements to come forward with information in support of the allegations in their protests and that failure to do so may result in approval of an agreement notwithstanding the protest. See, e.g., *Agreement No. 9955–1*, 18 F.M.C. 426, 470 (1975); Agreement No. 9905, 14 F.M.C. 163, 165 (1970).

clarifying language, adding new paragraphs "(d)" and "(e)" to Article 1 of the Agreement and a new paragraph "21." (Ex. 1A). The new language reads as follows:

> (d) Carriers shall not agree among themselves nor jointly coordinate vessel sailings nor shall they arrange, except on a vessel-by-vessel basis, for the charter of space.
>
> (e) A Carrier seeking to charter space from another carrier party to this agreement at a particular port must serve that port, through cargo solicitation and regular vessel calls at that port, in order to charter space on the vessel of a carrier party calling at that port.
>
> 21. Any common carrier by water operating vessels in the Trade may become a party to this agreement by signing a counterpart signature page to this agreement. Changes in membership shall be reported to the Federal Maritime Commission.[4]

As explained by Mr. David Flint, Director of Pricing for Delta, a party to the Agreement, parties to the Agreement met with representatives of protestants CCT and Ecuadorian Line in order to explain the proposed operation of the Agreement with the hope that the protestants would perhaps join the Agreement themselves or at least withdraw their protests. Proponents discussed the various concerns expressed by protestants, explained that the Agreement was not intended to operate in the manner feared by protestants, and agreed to furnish amendatory or clarifying language to the Agreement to make clear that protestants should no longer be concerned about the Agreement. (Ex. 2). Thus, the clarifying language quoted above is designed to answer and satisfy the various concerns. As seen by paragraph "(d)," the proponents specifically disable themselves from coordinating vessel sailings or engaging in joint activities. (Ex. 2, p. 4). Furthermore, to emphasize the fact that the Agreement is intended to be merely a casual space-charter arrangement when the need arises for a carrier to utilize space of another carrier's vessel calling at a particular port when the first carrier's vessel, for some reason, cannot call at that port, paragraph "(e)" specifically requires that the first carrier must regularly serve the port through solicitation and regular vessel calls in order to be able to charter space on another carrier's vessel. In order to allay any fears that the Agreement would be anticompetitive, new Article 21

[4] This last sentence regarding reporting of changes in membership to the Commission was added to the original amendatory language at the hearing held on April 19, 1984, at the request of Hearing Counsel, to which request counsel for proponents had no objection. Proponents agreed to certain other clarifying amendments to the language of the Agreement at the hearing on April 19, 1984. Thus, they agreed to delete the words "U.S. Flag and reciprocal national flag" from the preamble to the Agreement qualifying the parties so that the Agreement would ensure that it is open to all carriers serving the trade. In addition, in Article 17 of the Agreement (Reporting Requirements), proponents agreed to minor word changes to clarify the fact that they would be submitting periodic reports "detailing" rather than summarizing their carryings and would submit those reports "in the form set forth by the Federal Maritime Commission." Proponents agreed to amend their Agreement to insert these quoted words and phrases in Article 17.

to the Agreement specifically provides that membership in the Agreement is open to any carrier serving the trade.

After discussing their Agreement with the two protesting carriers, proponents believed that they had satisfied those carriers' concerns and expected the two carriers to withdraw their protests provided that the amendatory language quoted above would be included in the Agreement. (Ex. 2, pp. 3–4; Ex. 1A). Counsel for the two lines thereafter notified me that the amending language satisfied "many of the major concerns of the Ecuadorian" Line (Ex. 2A) or "the major concerns of CCT as to the possible injurious consequences of the Agreement." (Ex. 2B). Accordingly, both of these lines withdrew their protests although not supporting approval of the Agreement and still questioning some of proponents' arguments in favor of approval. (Exs. 2A, 2B).[5]

In addition to satisfying many or all of the major concerns of the two lines and of the Brokers and Forwarders Association, proponents made an effort to answer Hearing Counsel's concerns as well. Hearing Counsel's concern was that somehow the space-chartering Agreement could reduce the amount of cargo available to carriers not parties to the Agreement in conjunction with cargo reservation laws of the destination countries in South America and expressed certain other concerns about how the Agreement would operate as to compensation to the carrier leasing space to another carrier, as to reporting requirements, and as to explicit reference to the rights of other carriers to join the Agreement. These concerns were satisfied in the following manner.

As to clarification of the rights of other carriers to join the Agreement, as seen, new Article 21 makes clear that "any common carrier operating vessels in the trade may become a party . . ." Furthermore, in response to Hearing Counsel's request that the Commission be informed of changes in membership, proponents agreed at the hearing on April 19, to add language to Article 21 requiring the parties to notify the Commission of any such changes. Mr. Flint of Delta, furthermore, explained how the compensation provision of the Agreement was intended to operate. As explained by him, a carrier who charters space from another carrier under the Agreement will carry the cargo under the first carrier's bill of lading

[5] Ecuadorian Line stated that it was withdrawing as a protestant because the "potential negative consequences of the Agreement for Ecuadorian do not justify the time and expense of further participation in this proceeding." (Ex. 2A). Ecuadorian expressed confidence that the Commission would review the Agreement and its justification under the Commission's statutory responsibilities and questioned proponents' contentions that certain activities at the Port of Miami justified approval of the Agreement. Similarly, CCT withdrew its protest but also questioned proponents' arguments that certain activities at the Port of Miami justified approval of the Agreement. (Ex. 2B). It is understandable why these two carriers, which serve Miami, would take exception to any aspersions cast upon that port. Another protestant, the Brokers and Forwarders Association, also serving Miami, took similar exception to proponents' adverse comments upon practices at that port. Later, however, at the hearing in this proceeding, counsel for proponents explained that proponents had no intention of singling out or criticizing law-abiding forwarders operating at Miami. Furthermore, since there is sufficient justification for the Agreement without casting aspersions at practices at Miami, it is not necessary to utilize any evidence relating to alleged practices at Miami to which any of these parties excepted in finding that the Agreement warrants approval.

and tariff rates. Furthermore, the carrier seeking the space on the other carrier's vessel will negotiate compensation with the carrier offering the space and the amount of compensation which the latter carrier will require will vary depending upon loading costs to the vessel-operating carrier at the particular port and other cost factors including the cost of shifting other cargo to accommodate the cargo booked by the carrier which obtained the space and any costs relating to the nature of the cargo itself. (Ex. 2, pp. 5–6).

The major concern of Hearing Counsel (and it was a concern of all the protestants, including the two carriers and Association who withdrew their protests) was that the cargo reservation laws of the five South American countries involved (Bolivia, Chile, Peru, Ecuador, Colombia) would somehow work in conjunction with the Agreement to oust non-member carriers from cargo carryings. Proponents have throughout the proceeding consistently and vehemently denied that their spacechartering Agreement had any relationship to cargo reservation laws or that the parties to the Agreement had any intention or any thought of using the Agreement to benefit themselves by means of rights granted under those laws. Nevertheless, because protestants had expressed concern over possible interrelationships between those laws and the subject Agreement, the Commission instructed the parties to address the issue, namely, what are the terms of the various laws and what effect will they have on the implementation of the subject Agreements, one of which, the discussion Agreement, as I have mentioned above, has been withdrawn.

Whatever the concerns of the original protesting parties and of the Commission regarding these laws, there is absolutely no evidence that the subject Agreement was designed to benefit from those laws, would benefit by them, or would give the parties to the Agreement any special privileges or advantages compared to carriers not parties to the Agreement. After several months were expended by Hearing Counsel in prehearing discovery in an effort to determine if these laws had any bearing on the subject Agreement, Hearing Counsel concluded that the laws in question are a veritable maze of confusion and inconsistent and uncertain application and that further time and effort in seeking to translate and analyze those laws in detail would be unwarranted.[6] Furthermore, not only is there no evidence whatsoever that the subject Agreement has anything to do with South American cargo reservation laws, but the record shows that all the carriers

[6] A list of the various decrees and laws was provided by Hearing Counsel. (Ex. 5). Hearing Counsel, who is fluent in Spanish, stated that he could not justify consuming more time in litigation to furnish the translated texts of all of these laws and decrees in view of proponents' willingness to furnish periodic reporting of their activities under the Agreement. It was also Hearing Counsel's understanding that the various laws and decrees were not administered consistently. There is no evidence that these laws and decrees have anything to do with the subject space-charter Agreement. The evidence, especially that of Mr. Flint of Delta, who is experienced in the subject trade area, amply confirms this conclusion. Under the authority given me by the Commission to alter or delete issues that proved to be "irrelevant or immaterial to the ultimate question presented" (Order, p. 3 n. 7), as requested by Hearing Counsel, I ruled that the issue concerning cargo reservation laws would accordingly be considered to be deleted.

serving the subject trade areas are either national-flag carriers or associates so that they are all generally eligible to carry cargo to particular South American countries involved, and there is no basis to fear that a carrier member of the Agreement would "waive" cargo to another carrier-member of the Agreement to the detriment of outside, non-member carriers. (Ex. 2, pp. 5, 6). Certainly the Agreement nowhere authorizes any such preferential treatment to carrier members, the parties stoutly deny that they ever intended any such thing, and any carrier member as well as non-member carrier has rights to carry cargo to the South American countries depending upon its flag or associate status and not by anything in the subject Agreement. In short, as Mr. Flint states:

> With respect to the cargo reservation law issue, it is my understanding of these laws based on my personal experience in each country involved in the trade that this Agreement is neutral with respect to those laws. By that I mean that it neither enlarges nor restricts the rights of any carrier to serve any country in the trade. (Ex. 2, p. 6).

In lieu of pursuing the issue in further detail fruitlessly, Hearing Counsel stated that the Commission's time could be spent much more profitably by monitoring the Agreement to determine if any trends could be discerned in cargo carryings in the trade. Therefore, Hearing Counsel urged and proponents agreed that the parties should furnish periodic reports of utilization and bookings, which reports are almost identical to reports which carrier members of other spacecharter agreements have been required to furnish to the Commission on a semi-annual basis.[7] After proponents agreed to file the clarifying language to their Agreement, as quoted above, furnished explanations as to the operations of the Agreement, furnished additional evidence showing that the Agreement had nothing to do with South American cargo reservation laws, and agreed to provide the Commission with semiannual reports very similar to reports which members of other agreements have been furnishing so that the Commission can monitor operations under the Agreement, Hearing Counsel stated at the hearing on April 19, that they supported approval of the Agreement.

[7] The semi-annual reports of utilization and capacity (Ex. 4) are adopted almost verbatim from reports which the Commission has required to be filed by the carriers who are members of the American-Flag Common Carrier Charter Agreement (No. 10420), a five-party space-chartering arrangement approved by the Commission on December 11, 1981. Utilization reports have also been required in much less complicated agreements such as Agreement No. 10254, a simple non-exclusive transshipment and chartering agreement between American Export Lines, Inc. and Zim Israel Navigation Co., Ltd., approved January 25, 1977, agreement canceled, August 27, 1982. See also the reports in *Agreement No. 10364*, 19 SRR 1323, 1327 (1980). Such reporting should enable the Commission to determine if overtonnaging or underutilization continues to be a problem since proponents offer overtonnaging as one of the reasons for the need for their Agreement. The reports, especially Table No. 3, which deals with a report of cargoes booked by one member with another member should help indicate whether the Agreement is being used casually as proponents state is intended rather than as a means for a particular party to cease serving a particular port. Thus, the reporting serves useful purposes.

The only other active party to the proceeding, the Brokers and Forwarders Association, as I briefly mentioned above, withdrew their protest although they did not withdraw from the proceeding, after counsel for proponents had assured the Association on the record at the hearing that proponents had no intention of questioning the reputation or impugning the valuable contributions of the law-abiding licensed forwarders serving the Port of Miami. As I mentioned above, furthermore, I find enough justification on the record for approval of the Agreement without having to evaluate proponents' original evidentiary submissions concerning alleged questionable practices at the Port of Miami and determining whether any such practices, even if they existed, were relevant to the question of approvability of the subject space-chartering Agreement, especially since that evidence seems far more relevant to the now withdrawn discussion Agreement (No. 10468). Suffice it to say that the record shows benefits that may reasonably be expected to flow from the space-chartering Agreement which outweigh any harmful effects, as to which the evidence of record is essentially speculative, as I briefly discuss below. Consequently, with no active protests, with the support of Hearing Counsel, and with the evidence of justification present in the record, which evidence is not refuted, I find the subject Agreement should be approved provided that the clarifying language quoted above is filed with the Commission and subject to the reporting requirements discussed.

DISCUSSION AND CONCLUSIONS

The ultimate issue to be determined is whether the space-chartering Agreement (No. 10467) meets the standards of approvability under section 15 of the Shipping Act, 1916. Subsidiary issues framed by the Commission are to determine what competitive effects the Agreement will have, whether there are any conditions in the trade which would justify any anticompetitive effects, and whether South American cargo preference or reservation laws have any effects on the space-chartering Agreement.[8]

As discussed above, proponents of the subject Agreement contended that their Agreement was justified because of problems in the trade relating to overtonnaging, unstable rates, decline in cargo, and purported questionable activities at the Port of Miami, and submitted that the Agreement was minimally anticompetitive and would produce benefits to the trade. As also discussed, four protestants, three who have withdrawn their protests and one of whom has been totally inactive in the proceeding, contended that the Agreement was unjustified, extremely anticompetitive, and of uncertain relationship with South American cargo reservation laws. They contested proponents' evidence concerning overtonnaging, cargo decline, rate instability and other matters and feared that the Agreement would harm

[8] Withdrawal of Agreement No. 10468, the discussion Agreement, removes a third issue framed by the Commission from the proceeding concerning how the two Agreements would interact with themselves and other agreements and why the discussion Agreement was limited in membership and scope.

them or the Port of Miami and would authorize joint activities that would enhance the anticompetitive effects of the Agreement. Hearing Counsel also expressed some concern that the space-chartering Agreement might be used in conjunction with cargo reservation laws to give parties to the Agreement an advantage over non-parties.

As I discussed above, most of the concerns of the protestants and of Hearing Counsel were ameliorated or eliminated by clarifying language which proponents agreed to insert in their Agreement, by a better understanding of the intended operations of the Agreement, by the total lack of evidence that parties to the Agreement would enjoy any special privilege or advantage over any outside carrier because of cargo reservation laws, and, finally, by the proponents' agreeing to furnish reports periodically so that the Commission could monitor the operations under the Agreement, which reporting is customary in agreements of this type and is patterned after similar reporting required by the Commission in other such agreements. Consequently, as I discuss below, I find justification for the Agreement, no countervailing probative evidence of harm, and recommend approval provided that the clarifying language quoted above is filed with the Commission and that, as agreed, proponents furnish periodic reports to the Commission. I now explain.

Applicable Principles of Law

Under the standards of section 15 of the 1916 Act, proponents of agreements seeking approval must come forward with evidence of needs, benefits, or regulatory purposes which their agreements provide or serve, and the Commission essentially weighs the potential benefits against possible harmful effects of the agreements, considering, in addition, the extent to which the proffered agreements violate the policies of the antitrust laws. See *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* cited above, 390 U.S. 238; *United States Lines* v. *F.M.C.,* cited above, 584 F. 2d 519; *Marine Space Enclosures, Inc.* v. *F.M.C.,* cited above, 420 F. 2d 577; *Isbrandtsen Co., Inc.* v. *United States,* 211 F. 2d 51, 57 (D.C. Cir. 1954); *Agreement Nos. 9718–3 & 9731–5,* 19 F.M.C. 351, 371 (1976).

Although proponents of agreements submitted under the 1916 Act are supposed to bring forward evidence justifying approval of their agreements in order to offset the fact that their agreements are normally contrary to the policies of the antitrust laws favoring free and open competition, the Commission has held that the degree and extent of their proof varies depending upon the extent to which the agreement invades those policies. In other words, a minimally anticompetitive agreement may require less proof than one which contains substantial anticompetitive or monopolistic effects. See, e.g., *Agreement No. 9955–1,* 18 F.M.C. 426, 462 (1975); *Agreement No. 8760–5,* 17 F.M.C. 61, 62 (1973). Finally, the Commission expects parties protesting agreements to come forward with evidence supporting their allegations and will not decide cases on the basis of "specula-

tive possibilities," i.e., in the absence of facts and reasonable deductions to be drawn therefrom. *Agreement No. 9955–1*, cited above, 18 F.M.C. at 470; *Alcoa SS. Co., Inc.* v. *Cia. Anonima Venezolana*, 7 F.M.C. 345, 361 (1962).

The Evidence Favoring Approval

In the present case, I note at the outset that there are no active protests to the Agreement and that Hearing Counsel, after examining the various South American cargo reservation laws and obtaining clarifications to the Agreement and proponents' expression of willingness to furnish customary periodic reports of operations under the Agreement, support approval. Furthermore, in the absence of viable protests or evidence tending to show that the Agreement would have harmful effects, there is little or nothing to offset evidence of expected benefits. Furthermore, the Agreement appears to be what its proponents state it to be, namely, a simple, casual space-charter arrangement open to any carrier serving the trade with no fixed minimum or maximum requirements or obligations of a carrier to make space available if the carrier's vessel does not have available space. (Ex. 1, Attachment D, Affidavit of Joseph T. Lykes, pp. 9–10). It has nothing to do with rate-fixing, joint solicitation, or joint activities of any kind. Very simply, if a carrier who is a party to the Agreement books cargo at a port but for some operational reason[9] its vessel cannot call at the port, the carrier can seek to carry the cargo on another carrier's vessel calling at the port if space is available on that vessel. Thus, the shipper's cargo need not be left at the pier. Furthermore, rather than abandoning a particular port, if a carrier books cargo at that port but its vessel cannot call there, the carrier will arrange to carry it under its own booking and bill of lading on the space of another carrier-party's vessel which can call at the port, if space is available. Since the Agreement is open to any carrier who wishes to join and enables any party to provide service which it might not otherwise be able to provide if its vessel cannot make a direct call at a particular port and since there is no joint activity, i.e., no joint solicitation, advertising, coordination or rationalization of sailings, it is difficult to see how the effects of the Agreement on competition are more than minimal or how the policies of the antitrust laws are significantly contravened.[10] Furthermore, there is no evidence which would support

[9] According to Joseph T. Lykes, Vice President-Pricing of Lykes Bros., a party to the Agreement, cancellations or delays of vessel sailings occur for reasons such as severe weather during the hurricane season causing vessel deviation or because of congestion at the Panama Canal which may require alteration of sailing schedules. Such cancellations or alterations can have adverse effects on the businesses of shippers and consignees who book cargo long in advance of the sailings. The Agreement, however, would enable the parties to it to secure vessel space and serve the shippers or consignees who might otherwise be adversely affected. (Ex. I, Attachment D, pp. 7–8.)

[10] To show how little the anticompetitive effects on the trade should be, evidence submitted by proponents showing overtonnaging also shows that there are 19 carriers serving the subject trade area, nine of whom

any of the apprehensions of any of the protestants concerning possible harmful effects of the Agreement on any particular port or carrier or as to special privileges or advantages to parties to the Agreement that might arise under South American cargo reservation laws, as to which the Agreement is strictly neutral.

The record shows that there are operational benefits and that there is no probative evidence of harmful effects. It also indicates that the fears of possible harm are essentially speculative or are based largely upon previous misunderstandings of the intentions of the parties to the Agreement and upon misunderstandings as to how the Agreement is to operate as well as concern that the Agreement would work in conjunction with the now-withdrawn discussion Agreement (No. 10468) to lead to a "consortium" or other harmful entity in the trade. Significantly, once these misunderstandings were eliminated, the discussion Agreement was withdrawn, and proponents submitted clarifying language and other explanations, all the active protestants withdrew their protests. Thus, it would appear that there is as much or even more reason to approve this simple space-charter Agreement than there was in *Agreement Nos. 10186 et al.*, 25 F.M.C. 538 (1982), in which the Commission approved a more complicated space-charter agreement (No. 10364) which was also a chartering arrangement on a space-available basis without provision for rate-fixing, coordination of sailings or joint solicitation, but with a maximum limitation which is not present in the subject Agreement No. 10467. As the Commission stated in *Agreement Nos. 10186 et al.*, (25 F.M.C. at 547):

> Agreement No. 10364 is nothing more than an arrangement whereby the parties charter space on each other's vessels on a space available basis subject to a maximum. There is no provision authorizing the fixing of rates, coordination of sailings, joint solicitation of cargo or joint bills of lading. The vessel owner retains full control over the vessel. In short, the space charter places little or no restriction on the competition between the parties. Nor has it been shown, to the extent it was even argued, (footnote omitted) that the agreement will adversely affect other operators in the trade competitively.
>
> On the other hand, proponents of Agreement No. 10364 have come forward with evidence indicating that the agreement will allow for more direct calls, prevent the introduction of additional tonnage to the trade and result in a generally more efficient transportation service to the shipping public. The Commission is satisfied that these benefits outweigh any anticompetitive features of the agreement . . . It will, accordingly, be approved.

Even if the operational benefits enabling parties to serve shippers and ports under the Agreement when they would otherwise be disabled from

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entered the trade within the last four years. The subject Agreement, however, consists of only five carriers. (Ex. I, Attachments A, C, pp. 2–3, and table mentioned therein.)

doing so were not shown, however, there are other benefits and purposes of the Agreement which would justify approval, as proponents have shown. Thus, if a vessel sailing is cancelled for some operational reason, as mentioned above, a carrier-party to the Agreement may still be able to carry the cargo under its own bill of lading on another carrier's vessel. Because the evidence shows significant overtonnaging, a fact to which the parties at the April 19 hearing stipulated,[11] space on a vessel that might otherwise be unused could be utilized by a carrier whose vessel sailing at the port had to be cancelled. (Ex. 1, Attachment C, p. 5, Affidavit of John M. Dillon). The Agreement will therefore help promote better utilization of vessel space while at the same time providing service to shippers whose businesses might otherwise be disrupted because of vessel cancellation or delays. Furthermore, unrefuted evidence shows overtonnaging, the presence of numerous independent carriers, a certain degree of trade instability, and increased costs for carriers wishing to provide a high quality of liner services. The space-charter Agreement, however, will provide a greater degree of operating flexibility and enhance the capability of each party to the Agreement to satisfy the requirements of shippers and consignees without diminishing competition among carriers. (Ex. 1, Attachment C, p. 5). Thus, while the space-charter Agreement may not be the answer to all the problems besetting the trade (which problems it appears that the withdrawn discussion Agreement (No. 10468) was also intended to address), the voluntary space-chartering arrangement can help a member-carrier's utilization and reduce costs by avoiding the need to reschedule a vessel to call at a particular port for relatively small amounts of cargo when the vessel has otherwise been delayed or its itinerary has had to be changed. In such instances, the carrier-party to the Agreement can book the cargo on another carrier-member's vessel calling at the particular port if space is available.

ULTIMATE CONCLUSIONS

The space-charter Agreement appears to have negligible anticompetitive effects, and there is no evidence that it was intended to or would harm any port, shipper, or carrier, or confer any special privilege or advantage on parties to it because of South American cargo reservation laws. Opposi-

[11] Proponents furnished a considerable body of evidence showing overtonnaging in the trade area and other conditions tending to promote unstable conditions. As noted earlier, 19 carriers serve the trade area. Other carriers have been forced to leave the trade for financial reasons. Southbound, evidence shows that 12 of the 19 carriers alone offer an aggregate capacity of approximately 224.2 million cubic feet whereas cargo moving comprises only 120 million cubic feet. If the remaining seven carriers' capacities were known and added, obviously the aggregate utilization factor would be considerably less than 50 percent. Northbound the situation is even worse (only approximately 36 million cubic feet of cargo moving compared to the same aggregate vessel capacity of 224.2 million cubic feet). (Ex. 1, Attachment C and tables mentioned therein; Attachment D). Evidence concerning capacity utilization for the five parties to the Agreement was also furnished on a confidential basis and tends to confirm significant underutilization of vessel capacity. (Confidential Ex. 1). On the basis of such evidence, the parties at the hearing (Hearing Counsel, proponents, and the Brokers and Forwarders Association) stipulated that considerable overtonnaging exists).

tion to the Agreement has virtually disappeared now that the intentions of the parties to it have been clarified, a companion discussion Agreement has been withdrawn, and they have agreed to furnish the customary reports to the Commission to ensure that the authority conferred under it will be used as intended. Under such circumstances, applicable principles of law under the 1916 Act do not require an inordinate amount of evidence showing benefits to be gained by approval of the Agreement. However, the record does show benefits to shippers and ports which would result when a carrier member of the Agreement could serve the port even when its vessel could not call at the port and further benefits in the form of cost reductions and efficiencies derived from greater flexibility in vessel deployment. The space-chartering Agreement is extremely simple and voluntary among the parties and does not authorize joint solicitation, advertising, coordination or rationalization of sailings. It is thus less restrictive than or similar to numerous other space-chartering agreements which the Commission has approved after finding that expected benefits would outweigh any possible harmful effects. See, e.g., *Agreement No. 10186–3,* 19 SRR 1611 (1980); *Agreement Nos. 10186 et al.,* cited above, 25 F.M.C. 538; *Agreement No. 10364,* 19 SRR 1323 (1980).

Agreement No. 10467 is therefore approved provided that proponents file with the Commission and the Commission receives the amendatory language discussed above, signed by the parties or their duly authorized representatives, within 30 days of the date of service of the Commission's notice rendering this Initial Decision administratively final or such other time as the Commission may direct upon review of this Decision.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–3
SOUTH ATLANTIC-NORTH EUROPE RATE AGREEMENT
(AGREEMENT NO. 9984–23)
GULF EUROPEAN FREIGHT ASSOCIATION (AGREEMENT NO. 10270–2)

ORDER

June 15, 1984

On February 28, 1984, the Commission served an Order Reopening The Record in the above-captioned proceeding in order to provide the parties to the Gulf-European Freight Association (GEFA) with an opportunity to supplement the record in support of the agreement's microbridge authority. The Commission indicated in its Order that information concerning actual operations under the GEFA microbridge tariff would be relevant to a determination as to whether GEFA's U.S. microbridge authority had been adequately justified under the standards set forth in *U.S. Atlantic & Gulf/ Australia-New Zealand Conference (Agreement No. 6200–20—Intermodal Authority)*, 21 S.R.R. 89 (1981) *(Agreement No. 6200–20)*. The Order also stated that GEFA might submit any other information which it believed would be relevant to the issue of whether continuation of GEFA's U.S. microbridge authority had been justified.

On March 28, 1984, Proponents filed a four volume submission together with a confidential exhibit, a time/volume contract with a shipper. These documents provide the following information concerning U.S. microbridge service under the GEFA tariff. Approximately 98 commodities have been shipped under the tariff. An additional 18 commodities have moved at open rates. Approximately 125 points are served under the microbridge tariff. GEFA has made a cumulative total of 240 separate arrangements with 24 different railroad companies and 78 different trucking companies to operate as participating U.S. inland carriers in connection which shipments moving under GEFA's microbridge tariff. In addition, data provided by GEFA show that the demand for GEFA's microbridge service is increasing. During the first quarter of 1984, 12,000 tons of cargo were carried as compared to 4,000 tons in the final quarter of 1983. Finally, GEFA has submitted, as a confidential exhibit, a currently effective time/volume contract with a major shipper.

This information concerning GEFA microbridge service, increases in GEFA microbridge cargo, and a GEFA contract commitment, would appear to indicate that GEFA now has in operation a viable microbridge service

that is meeting an actual, although limited, demand by shippers. Based on the additional information provided upon reopening the record, and the relevant information previously introduced into the record in this proceeding, the Commission concludes that continued approval of GEFA microbridge authority is warranted.

Approval of Agreement No. 10270–2, however, shall be subject to modifications to the Preamble and to Article 5.3 of Agreement No. 10270, which were adopted by the members of Agreement No. 10270 during the course of the proceeding. These modifications were required to define more precisely the scope of Agreement No. 10270 in response to the Commission's Order of Investigation which noted certain deficiencies in the Agreement's definitions. In addition, the approval granted here is also subject to the deletion of GEFA's minibridge authority, which GEFA has advised its members no longer seek. Agreement No. 10270 is deemed to be amended to incorporate these modifications as of the date of approval. These modifications shall be included in the Agreement at the time that GEFA next files an amendment to Agreement No. 10270, as stated below.

THEREFORE, IT IS ORDERED, That Agreement No. 10270–2 is approved;

IT IS FURTHER ORDERED, That the parties to Agreement No. 10270 shall include in the Agreement the following modifications at the time that they next file an amendment to Agreement No. 10270:

1. The Preamble of Agreement No. 10270 shall be amended to read as follows:

> The undersigned common carriers by water (the "Members"), regularly operating trans-Atlantic vessels, hereby associate themselves in a cooperative arrangement known as the Gulf-European Freight Association ("GEFA") for the purpose of establishing, maintaining and enforcing agreed and otherwise lawful tariffs or rates, charges, and rules governing the transportation of cargo, whether moving in all water or intermodal service, or under through bills of lading or otherwise, in the trade by water from or via U.S. Gulf coast ports, except as excluded under Article 5.3 of this Agreement, to European Continental ports in the Bordeaux/Hamburg range and to ports in Scandinavia and on the Baltic Sea, and to interior and coastal points via such Continental, Scandinavian and Baltic ports (the "trade"). As used in this Preamble, the term "ports" includes ports and points on inland waterways tributary to all U.S. Gulf and European ports within the above described trade.
>
> For the purposes of this Agreement, the term "points" means "coastal points" (*i.e.* points in port communities) and "interior points" (*i.e.* all points other than coastal points); and the terms "coastal points" and "interior points" are mutually exclusive. Also for the purposes of this Agreement, the term "intermodal service" means service (1) from U.S. points via U.S. Gulf ports

to European ports or via such ports to European points, all within the scope of this Agreement; and (2) from U.S. Gulf ports to European points via European ports, all within said scope. Provided, further, that transport by Seabee/Lash barge operated by members constitutes all water service.

2. Article 5.3 of Agreement No. 10270 be amended to read as follows:

5.3 Notwithstanding any other provisions hereof, the intermodal authority established by this agreement shall not extend to any joint Motor or Rail/Ocean minibridge service from U.S. Pacific or Atlantic Coastal port cities via U.S. Gulf ports and operated by any Member Line under tariffs naming through single factor Motor or Rail/Ocean rates filed with the Federal Maritime Commission and Interstate Commerce Commission. This agreement does not cover cargo moving on a through bill of lading which is transshipped at a port within the scope of the agreement and which has a prior or subsequent movement by water from or to a port not within the scope of this agreement.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–54

AGREEMENTS NOS. 9718–7, 9718–8, 9731–8, 9835–5, 9975–7, 10116–4 AND 10274–1—SPACE CHARTER AND CARGO REVENUE POOLING AGREEMENTS IN THE UNITED STATES/JAPAN TRADES

NOTICE

June 15, 1984

The initial decision in this proceeding was served June 1, 1984. This decision ordered all parties to advise the Commission within five days of that date whether or not they intended to file exceptions. This action was taken to facilitate final disposition of the proceeding prior to the effective date of the Shipping Act of 1984 (i.e., June 18, 1984). All parties advised the Commission that they would not be filing exceptions.

The Commission's 30-day period to request review of this decision, pursuant to 46 CFR 502.227, is currently scheduled to expire on July 2, 1984. However, given the Commission's objective to finalize as many formal proceedings as possible and feasible prior to June 18, 1984, the Commission has considered the involved initial decision and has determined that it will not review it. Accordingly, the initial decision in this proceeding has become administratively final.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–54

AGREEMENTS NOS. 9718–7, 9718–8, 9731–8, 9835–5, 9975–7, 10116–4 AND 10274–1—SPACE CHARTER AND CARGO REVENUE POOLING AGREEMENTS IN THE UNITED STATES/JAPAN TRADES [1]

1. Where four space charter agreements have been amended and filed as a result of settlement negotiations between the Proponents and the Protestants, as well as the Hearing Counsel of the Federal Maritime Commission, and where the record evidences that such agreements are required by a serious transportation need, are necessary to secure public benefits and are in furtherance of a valid regulatory purpose, the requirements of section 15 of the Shipping Act have been satisfied and the agreements must be approved.
2. Where four space charter agreements have been amended and filed and two pooling agreements have been withdrawn as a result of settlement negotiations between the parties in a formal proceeding originating in the Federal Maritime Commission, and where their negotiations are on the record and the filed agreements fully reflect what the parties agreed to and intended, there are no other agreements which are required to be filed with the Federal Maritime Commission within the ambit of section 15.
3. Where a formal proceeding is begun as a result of a remand from a Circuit Court of Appeals which directs that a hearing be conducted on the "*disputed* material issues of fact," raised by the Protestants in this proceeding, and where the parties have agreed that there are no longer any "disputed issues of material fact," insofar as the amended agreements are concerned and Hearing Counsel also agrees, the specific issues on remand and in the Commission's Order of Investigation and Hearing need not be considered from the aspect of "disputed" issues of material fact. Instead the provisions of the agreements must generally satisfy the requirements of section 15 and the applicable case law.

Charles Warren, George A. Quadrino and *David M. Dunn* for Proponents. *Edward M. Shea* and *John E. Vargo* for Protestant Sea-Land Service, Inc. *Kevin O'Rourke, Daniel W. Lenehan, Russell T. Weil* and *James W. Pewett* for Protestant United States Lines, Inc.

Robert Basseches, David B. Cook and *I. Michael Greenberger* for Protestant American President Lines, Ltd.

William H. Fort and *J. Alton Boyer* for Protestant Lykes Bros. Steamship Co., Inc.

George F. Mohr for Intervenor Delaware River Port Authority.

R. Moriconi for Intervenor Massachusetts Port Authority.

J. Robert Ewers, Alan Jacobson and *Stuart James* as Hearing Counsel.

[1] The Commission's Order of Investigation and Hearing on Remand originally related to the seven agreements that are enumerated in the caption in this case. As will be seen, as a result of settlement negotiations the Proponents of these agreements withdrew them from consideration. Two were not resubmitted at all and the others were proffered as amended agreements. The two agreements which were withdrawn are Agreement Nos. 10116–4 and 10274–1, respectively. The remaining agreements were revised to become 9718–10, 9731–10, 9835–7 and 9975–9.

INITIAL DECISION[2] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized June 15, 1984

BACKGROUND INFORMATION

This proceeding began as an Investigation and hearing on remand instituted under the provisions of sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. §§814 and 821), to determine whether Agreement Nos. 9718–7, 9718–8, 9731–8, 9835–5, 9975–7, 10116–4 and 10274–1 should be approved, disapproved or modified.[3] The pertinent parts of the Order of Investigation and Hearing on Remand are set forth in the Findings of Fact. The Order listed the Proponents and Protestants as follows:

Proponents	Protestants
Japan Line, Ltd.	Sea-Land Service, Inc.
Kawasaki Kisen Kaisha, Ltd.	United States Lines, Inc.
Mitsui O.S.K. Lines, Ltd.	American President Lines, Ltd.
Yamashita-Shinnihon Steamship Co., Ltd.	Lykes Bros. Steamship Co., Inc.
Nippon Yusen Kaisha	
Showa Shipping Co., Ltd.	

After the Commission's Order was served there were two Motions to Intervene. As a result, the Delaware River Port Authority and the Massachusetts Port Authority were allowed to intervene for limited purposes subject to the discretion of the Administrative Law Judge.[4] Also, one of the original protestants, United States Lines, Inc., was allowed to withdraw as a party.[5]

Once the case was docketed there was extensive discovery. There were several motions filed regarding discovery which resulted in prehearing conferences that disposed of discovery problems and allowed for certain procedural scheduling to move the case forward. Also, there were several motions and much discussion regarding confidentiality which resulted in the adoption of an Order Regarding Confidential Materials.[6] The parties throughout the pendancy of this proceeding have designated certain material as being confidential in accordance with the order of confidentiality.

Finally, after several prehearing conferences this proceeding was set down for hearing on December 6, 1983, at which time the parties indicated

[2] 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).

[3] All of the agreements except 9718–8 were published in the *Federal Register* on April 29, 1980. 45 Fed. Reg. 28, 487 (1980). Agreement No. 9718–8 was filed because the Commission Order of January 16, 1981, limited the total container capacity sought in Agreement No. 9718-7. Agreement No. 9718–8 sought to raise that capacity and was published in the *Federal Register* on July 8, 1981. It became the subject of the Commission's Order of Investigation served on December 14, 1981. FMC Docket No. 81–74, *Agreement No. 9718–8—California-Japan/Korea Space Charter Agreement*, 46 Fed. Reg. 61723 (1981).

[4] The Orders granting the motions to intervene were served on March 11, 1983 and April 14, 1983, respectively.

[5] The Procedural Order was served on April 26, 1983.

[6] The Order was served on May 2, 1983.

a basis of settlement had been reached. Their subsequent actions were in furtherance of that settlement.

Findings of Fact

It is appropriate to note that the references to Exhibits 1, 2 and 3 in the following portions of these findings refer to the written testimony of K. Kawamura, Seiichi Hirano and Douglas C. Tucker, respectively, which is attached to the "Brief of Proponents" filed on March 7, 1984, and which is hereby made a part of the evidentiary record of this proceeding.

I. On November 19, 1982, the Federal Maritime Commission (the "Commission") served an Order of Investigation on Remand which reads in pertinent part, as follows:

> On July 13, 1982, the U.S. Court of Appeals for the District of Columbia Circuit remanded the Commission's order of January 16, 1981 (January Order) conditionally approving, pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. §814, a series of space charter and revenue pooling agreements among Japanese-flag lines in the United States/Japan trades. *Sea-Land Service, Inc. v. United States,* 683 F.2d 491 (D.C. Cir. 1982). The Court directed the Commission to conduct further evidentiary hearings on certain issues raised by four U.S.-flag carriers who had protested the agreements. This Order of Investigation and Hearing is issued in compliance with the Court's decision.

The Order, in pertinent part, directs that:

> THEREFORE, IT IS ORDERED, That pursuant to sections 15 and 22 of the Shipping Act, 1916 (46 U.S.C. §§814 and 821), a proceeding is hereby instituted to determine whether Agreements Nos. 9718–7, 9718–8, 9731–8, 9835–5, 9975–7, 10116–4 and 10274–1 are unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the commerce of the United States, contrary to the public interest, or violative of the Shipping Act, 1916, and therefore, whether they should be approved, disapproved, or modified; and
>
> IT IS FURTHER ORDERED, That the parties, in addressing the approvability of the Agreements under the standards of section 15, shall specifically address the following issues consistent with the discussion of them in this Order:
>
> (1) whether the Japanese lines have engaged in bloc voting within the shipping conferences to which they belong and, if so:
>
> (a) the extent of such bloc voting;
>
> (b) whether such bloc voting occurred on significant conference matters;
>
> (c) whether such bloc voting was caused, directly or indirectly, by actions of the Japanese government;

(d) whether such bloc voting was caused, in whole or in part, by economic relationships between the Japanese lines, on the one hand, and Japanese trading companies and other shipping interests, on the other hand; and

(e) the effects of such bloc voting on the trades and other carriers;

(2) whether the Japanese lines should be considered to operate as a joint service or joint services in some or all of the trades which they serve;

(3) whether the Japanese lines have economic relationships with Japanese trading companies and other shipping interests which, when coupled with the Agreements under investigation, render the Agreements unjustly discriminatory or unfair between carriers or contrary to other section 15 standards;

(4) whether the service market areas served by the Japanese lines should be measured by:

(a) each agreement considered individually;

(b) each of the four space charter agreements;

(c) each of the two pooling agreements;

(d) all six agreements considered collectively; or

(e) some variation of the above;

(5) Whether the service market areas served by the Japanese lines should be measured in terms of:

(a) ports served;

(b) actual points of cargo origin and destination; or

(c) some combination thereof;

(6) The market share held by the Japanese lines in those market areas;

(7) The vessel utilization factors experienced by both the Japanese lines and the protestants in those market areas;

(8) whether those market areas are overtonnaged and the potential impact of these Agreements on any such overtonnaging;

(9) the projected rates of cargo growth over calendar years 1983, 1984 and 1985 in those market areas;

(10) whether the geographic scope, pooling limits and reporting requirements in the Agreements are adequate and have been complied with;

(11) whether provisions of the Agreements are unacceptably vague; and

(12) whether there is inadequate forty-foot and reefer container service in the market area served by Agreements Nos. 9718–7 and 9718–8 and, if so, the potential impact of Agreement No. 9718–8 on this problem; * * *

* * *

IT IS FURTHER ORDERED, That the record developed in FMC Docket No. 81–74, *Agreement No. 9718–8—California*

> *Japan/Korea Space Charter Agreement* is made a part of the record in this proceeding; and
>
> * * *

2. The Commission Order originally related to the seven agreements that are enumerated in the caption of this case. As a result of settlement negotiations between the parties, Agreement Nos. 10116 and 10274, respectively, which are pooling agreements, were completely withdrawn. The other agreements, which are space charter agreements were proffered as new agreements numbered 9718–10, 973110, 9835–1 and 9975–9, respectively.[7]

3. The remand mentioned in the Commission's November 19, 1982, Order is from the United States Court of Appeals for the District of Columbia Circuit. It is reported as *Sea-Land Service Inc., et al.* v. *United States,* 683 F.2d 491 (D.C. Cir., 1982). In reviewing the Commission's Order of January 16, 1981, wherein the Commission extended the agreements involved here through August 22, 1983, and concluded that a hearing was not necessary, the Circuit Court stated:

> We disagree with the Commission's characterization of the issues here as questions of law or policy. Our review of the record convinces us that a number of issues raised by petitioners clearly involve questions of fact which require an evidentiary hearing. To illustrate this point we will briefly detail the material disputes presented by the parties.

and further:

> Accordingly we remand to the Commission with directions to conduct a hearing on the disputed material issues of fact raised by the petitioners, including the following: (1) the occurrence and effects of bloc voting within conferences that include signatories to the agreements; (2) potential anticompetitive effects of the agreements resulting from preexisting economic relationships among the signatories; (3) the observance by the signatories of the geographic limitations, pooling limits, and reporting, requirements specified in the agreements; (4) the occurrence and effects of overtonnaging in the trades covered by the agreements and the potential impact the agreements will have on this problem; and (5) the extent and significance of any involvement of the Japanese government in formulating the policies and practices of the signatories. The Commission should also consider any other material issues of disputed fact raised by petitioners that constitute more than bare allegations.

4. On August 19, 1983, the Commission served an "Order Amending Order of Investigation and Conditionally Approving Certain Agreements

[7] The old and new agreements have been filed with the Commission's Secretary and have also been submitted by the Proponents as appendices to various documents. They are incorporated herein by reference.

Pendente Lite," wherein it approved the agreements in issue subject to certain conditions.[8]

5. Following many months of intensive litigative efforts and after several pretrial hearings, the case came on for hearing on December 6, 1983. At that time counsel for the Proponents indicated that, "the parties on both sides are in a position at this time to resolve their differences. The proponents accordingly have made the decision to revise their agreements forthwith, being of the view that if these revisions are appropriately made that they will satisfy the objections of the protestants." The Protestants agreed that the statement was correct.

6. In accordance with the agreement of the parties in this proceeding the Proponents filed four amended space charter agreements designated respectively, as Nos. 9718–10, 9731–10, 9835–7 and 9975–9. Also, in accordance with the agreement of the parties the Proponents withdrew their two revenue pooling agreements. Also, on January 16, 1984, 'the Proponents filed a motion in the United States Circuit Court of Appeals for the District of Columbia to dismiss their Petition for Review of the Commission's August 19, 1983, Order. The Proponents' Motion was granted by the Appeals Court on January 27, 1984. Finally, on February 13, 1984, the Proponents further amended their space charter agreements at the behest of Hearing Counsel. The agreements were not renumbered as a result of these further changes.

7. On February 22, 1984, the Proponents filed a motion with the Commission, entitled "Motion to Amend Order of Conditional Approval *Pendente Lite* and to Expedite Consideration Thereof." In the motion the Proponents requested that the Commission increase, pending final resolution of this proceeding, the limitations on total fleet capacities placed on them in the Commission's August 19th Order. At the same time Proponents withdrew various other motions that were then pending with the Commission.

8. On May 1, 1984, the Commission issued an "Order Further Amending Order of Investigation and Conditionally Approving Certain Agreements *Pendente Lite.*" In its order the Commission terminated its prior *pendente lite* approval of Agreements Nos. 9718–9, 9731–9, 9835–6 and 9975–8, respectively, and then approved *pendente lite* Agreements Nos. 9718–10, 9731–10, 9835–7 and 9975–9, respectively, subject to certain conditions, including specific limitations on total liner container vessel capacities deployed in each trade. By amendments received on May 3, 1984, the Proponents complied with the conditions set down in the Commission Order regarding total liner container vessel capacities.

9. Agreement Nos. 9718–10, 9731–10, 9835–7 and 9975–9 (collectively, "the Agreements") are space chartering and vessel coordination arrangements which provide for the employment of containership vessels in the Japan-United States trades. In the case of Agreement No. 9718–10, vessels

[8] Reported at 22 Pike & Fischer, Shipping Regulation Reports (SRR) 307.

may also be employed in the Korean-U.S. trade. Ex. 1, para. 7; Ex. 2, paras. 7–8.

10. The Agreements contain virtually the same provisions, their earlier prototypes having been sequentially filed with, and approved by, the Commission over a period of years. Once the structure was devised for the first of the agreements in 1968, the basic format of that agreement was thereafter followed. Ex. 1, para. 8; Ex. 2, para. 6.

11. The article entitled "Sailings" authorizes the coordinated scheduling and advertising of sailings as to promote optimum utilization. The article entitled "Containerized Cargo" clarifies that only container cargo is the cargo subject to the Agreements, but that the parties are not precluded from carrying on their agreement vessels other available cargo. The article entitled "Solicitation" assures that the parties will solicit cargo only for their own separate accounts and not jointly. The article entitled "Bills of Lading" assures that bills of lading will be issued separately by each of the parties and not on a common basis. The article entitled "Charterage" authorizes the shipment of loaded and empty containers on each other's vessels and the chartering to and from each other equal blocks of space (in the case of Agreement No. 9731, "certain" blocks of space) on terms as the parties may agree. The article also authorizes the chartering to one another of additional space should a party need more space than the space it has on a particular vessel. The article entitled "Accountings" prohibits the pooling of revenues or sharing of operational expenses except, in the case of jointly-owned vessels, operational expenses may be shared. The article permits the sharing of administrative expenses. In view of the exchange of containers in equal blocks, no accountings are contemplated. Accountings are contemplated in respect to the chartering of additional space. Adjustments in accounts are also contemplated in the case of force majeure situations. The article entitled "Container Interchange" permits the interchange of empty containers and/or related equipment on terms as may be agreed. In addition, there are articles entitled "Modifications," "Withdrawal" and "Duration" which allow changes in the Agreement terms, withdrawal on 90 day's prior notice and provide for a five year term effective to and including August 22, 1988. Ex. 1, paras. 10–16, 18–19; App. 1; Ex. 2, paras. 8–13, 15, App. 1.

12. A final article entitled "Conditions" imposes maximum capacity levels, transshipment levels (except under Agreement No. 9975) and comprehensive reporting requirements. Paragraph (A) of the article sets forth the total annual capacity of the vessels which are to be operated in any calendar year, all of which may be cross-chartered among the parties. Beyond this space, which is based upon standard operating capacities, additional space may be used when operating conditions permit. Paragraph (A) also allows the parties, in their non-agreement containership services, to call at Japan and thus to compete to a limited extent with their Agreement services. Paragraph (B) explicitly clarifies what has long been an accepted

practice, the loading and discharging of transshipmertt cargo "irrespective of its origin or destination." The paragraph imposes limitations on the parties' carryings, however, in respect to cargo originating or terminating only in Indonesia, Malaysia, Singapore or Thailand (except under Agreement No. 9975). Paragraph (C) of the article imposes a comprehensive reporting requirement to be accomplished semiannually in accordance with an attached format. Ex. 1, paras. 17, 21; Ex. 2, paras 14, 15.

13. Japan Line, "K" Line, Mitsui-OSK and Y–S Line are parties to Agreement No. 9718–10; NYK and Showa are parties to Agreement No. 9731–10; all six Japanese lines are parties to Agreement No. 9835–7; and all but Showa are parties to Agreement No. 9975–9. Ex. 1, paras. 29, 34; Ex. 2, para. 5.

14. Agreement No. 9718–10 permits the employment of the parties' vessels in the trades between ports in Japan and Korea and California; Agreement No. 9731–10 permits the employment of the parties' vessels in the trade between Japan and California, Hawaii and Alaska; Agreement No. 9835–7 permits employment of the parties' vessels in the trade between Japan and Oregon and Washington ports; and Agreement No. 9975–9 permits the employment of the parties' vessels between ports in Japan and ports on the U.S. Atlantic Coast of North America. Additionally, it authorizes the utilization of U.S. documented feeder vessels and/or barges at U.S. Atlantic ports. Ex. 1, paras. 20, 29, 34; Ex. 2, paras. 7–8.

15. The sense of each Agreement is that the parties may agree to operate, utilize or substitute such vessels as they may see fit, but within, and not in excess of, the capacity levels as the particular Agreement sets forth. Ex. 1, paras. 21, 74–76, App. 1; Ex. 2, paras. 16, 41–42, App. 1.

16. As far back as 1968, the Agreements have been the subject of continuing governmental direction by the Japanese Ministry of Transport. The Ministry's role has been limited to assuring that its broad policy objectives are carried out, the basic objective relating to the achievement of stable trading conditions in the relevant Agreement trades. Ex. 1, paras. 55–57; Ex. 2, para. 34.

17. Originally, the Commission's approvals limited the number of vessels which could be operated on a coordinated basis. By order of January 16, 1981, the Commission discontinued this limitation on vessels and substituted a limitation on the TEU space which could be cooperatively chartered. Under the Commission's *pendente lite* order of August 19, 1983, an additional limitation was temporarily imposed on the parties' total vessel capacities, sized to the total capacities which had, at the time, been employed on the vessels operated under each Agreement. The latest agreements would in lieu thereof impose limits on the annual TEU capacity which could be operated under each Agreement during a calendar year. Ex. 1, para. 21, App. 1; Ex. 2, para. 6, App. 1.

18. The Agreements, as revised, differ from those which the parties initially filed in the following manner: A third Whereas Clause clarifies

that the vessels which may be operated are those which the parties may agree upon subject to the annual TEU capacity levels as stated in each Agreement. A fourth Whereas Clause provides that the services offered will be the parties' exclusive services in the Japan trade, subject to certain limited independent vessel callings at Japan. The group concept under Agreement Nos. 9718 and 9835 has been deleted. The authority under Agreement Nos. 9731 and 9835 reposed in NYK and Showa to share agents has been deleted. The authority to share operational expenses in the case of jointly-owned vessels has been clarified, and such authority has been added as a clarification under Agreement No. 9975. A requirement to report the essential terms of space chartering and, if requested, the level of compensation, has been added. The authority to substitute vessels in the event of labor disturbances has been deleted as unnecessary. A requirement to report the essential terms of interchanges has been added. A new provision, entitled "Conditions," has been added, specifying annual capacity levels under the Agreements and of Japan cargo which may be carried outside the Agreements calling at Japan. Also, under the provision, explicit clarifying authority to carry transshipment cargo has been provided, together with certain limits on the parties' transshipment carryings to or from certain named countries. Finally, the provision adds new comprehensive reporting requirements. Ex. 1, paras. 11–121, App. 1; Ex. 2, paras. 16, App. 1.

19. Some of the aforementioned revisions were prompted upon the parties' own initiative. Others were included upon the instance of the Commission's staff, including the Office of Hearing Counsel. And, still others were adopted by the parties in deference to the concerns of one or more of the protestants. The latter category of revisions followed informal discussions among the attorneys for proponents and protestants held for the purpose of identifying each party's particular concerns in the proceeding. As a consequence of revising the Agreements, each of the protestants no longer opposes the Agreements, and, therefore, does not contest the issues specifically assigned by the Commission for investigation resulting from the remand by the U.S. Court of Appeals for the District of Columbia Circuit, these being issues which had been raised by the protestants. Moreover, as proponents' revisions have also operated to satisfy the concerns of Hearing Counsel, the parties have agreed that other issues raised by the Commission are now moot. Ex. 1, paras. 22–23; Ex. 2, para. 17.

20. Although proponents have adopted revisions to the Agreements as initially filed, and although each protestant has elected not to oppose the revised Agreements, all parties to this proceeding agree that there is no continuing agreement among them, which would prevent the proponents from further modifying the agreements or from seeking authority to operate under new and different arrangements in the future. Ex. 1, para. 23; Ex. 2, paras. 17, 43.

21. Under Agreement No. 9718, the parties operate an eight vessel container service; under Agreement No. 9731, they operate a four vessel service; under Agreement No. 9835, they operate a six vessel service; and under Agreement No. 9975, they operate an eight vessel service—a total of 26 Agreement vessels in the U.S. trades. Ex. 1, paras. 24–25, 27–29; Ex. 2, para. 18.

22. Under their Government's 38th and 39th Shipbuilding Programs, the parties considered it essential to replace a number of their older vessels which were between 10 and 15 years old and which had been overtaken by technological advances and were no longer cost competitive in the trade with their major competitors. Plans were made and approvals and financing were obtained (from our Government through the Japan Development Bank) to replace a total of 10 vessels between 1981 and 1985. Five vessels were planned for Agreement No. 9718, two for Agreement No. 9731 and three for Agreement No. 9835. Subsequent review of capacity requirements and utilizations, however, have shown there is now a greater need for additional capacity under Agreement No. 9835. Hence, the present deployment calls for only three vessels for Agreement No. 9718, only one vessel for Agreement No. 9731, and a total of six for Agreement No. 9835 where current capacity is already fully utilized.

23. The capacity increases, which arise as a result of the replacement of larger, more economical vessels, and which are the first significant increase since 1974, are as follows:

Agreement No. 9718—2,815 TEU's
Agreement No. 9731—971 TEU's
Agreement No. 9835—2,982 TEU's

Although no replacements have been carried out in the case of Agreement No. 9975 operations, the capacity level stated in Article 14 of that Agreement represents a 15 percent increase over the current annual capacity level. Overall, capacity under the four Agreements will increase by approximately 30 percent by 1985, more than half of which is already in service *pendente lite*. Ex. 1, paras. 74–77; Ex. 2, paras. 36, 43.

24. By space chartering and vessel coordination, competitive service is made possible under each Agreement which would not be possible with the limited number of vessels absent the Agreements. The service frequency is as follows:

Agreement No. 9718—semiweekly
Agreement No. 9731—weekly
Agreement No. 9835—five days
Agreement No. 9975—weekly

Ex. 1, paras. 24, 32, 33, 37; Ex. 2, para. 24.

25. The Agreements have materially reduced the need for adding additional vessels. Since 1974, no vessels have been added under the Pacific

Coast space charter operations, and only one vessel was added in 1976 for their Atlantic Coast operations, although older vessels have been, and are being, replaced from time to time. Service to shippers under the Agreements has been stable and unvarying since the parties' fleets were completed in the mid-1970's, the parties having uniformly provided reliable service levels to their customers:

Agreement No. 9718—89–93 annual sailings
Agreement No. 9731—46–49 annual sailings
Agreement No. 9835—67–73 annual sailings
Agreement No. 9975—48–52 annual sailings

Ex. 1, paras. 31–32, 34, 40–41, 74; Ex. 2, paras. 18, 21, 23.

26. The space chartering and vessel coordination features of the Agreements have also enabled the parties, using a limited number of vessels, to serve a large number of ports. Ports which have been served regularly and occasionally include:

Agreement No. 9718—Oakland, Los Angeles/Long Beach—Kobe, Tokyo, Nagoya, Shimizu, Busan.
Agreement No. 9731—Oakland, Los Angeles—Kobe, Tokyo, Nagoya, Shimizu.
Agreement No. 9835—Portland, Seattle, Vancouver—Kobe, Tokyo (or Yokohama), Nagoya, Shimizu.
Agreement No. 9975—Kobe, Tokyo, Nagoya, Shimizu—Baltimore, Boston, Jacksonville, New York, Norfolk, Philadelphia, Savannah, Wilmington.

Ex. 1, para. 29, App. 3,
Ex. 2, para. 20, App. 3.

27. The ability to charter a predetermined amount of space on one another's vessels under the Agreements produces a larger number of shipping opportunities with the deployment of a minimum of capital resources. For example, by space chartering, the individual carrier parties are thereby placed in a position to offer a frequency of service which they could not offer absent the introduction of a substantially greater number of vessels. This conservation of resources and offering of competitive service by six individual carriers is beneficial to the trade, as a whole. Similarly, the ability to coordinate the sailing schedules of the parties' vessels is indispensable to assuring regular and evenly-spaced competitive service frequency upon which shippers rely. These are the principles which underlie the chartering and vessel coordination provisions of the Agreements. Ex. 1, paras. 31–33, 35, 37–40; Ex. 2, paras. 23, 26, 28.

28. Experience, over many years, in implementing the current and earlier prototypes of the Agreements shows that under these provisions the parties have had a high degree of frequent and regular sailings and without major service interruptions, thereby holding any inconvenience to shippers at a

minimum. Efficient, frequent and regular service has thus been provided under the Agreements. Ex. I, paras. 31–34, 36–37; paras. 22–24.

29. Without the Agreements, many of the benefits-efficient, reliable and regular competitive service—could not be achieved absent the development of individual fleets sized to produce individual competitive services. As the parties cannot be expected to abandon their national trade with the United States if the Agreements were not approved, more ships would be added and this would produce more tonnage in the trade. Ex. 1, paras. 38, 40–42; Ex. 2, paras. 21–22, 26.

30. Despite a mild down turn in cargo in 1982 and a temporary decline in utilizations, the ability to rationalize through space chartering and vessel coordination has enabled the parties to remain committed to offering full service at a broad range of ports. Despite the "ups and downs," the Agreements help to provide a reliable service commitment. This is particularly made possible by the ability to schedule and coordinate sailings, as shippers can rely on fixed arrivals and departures, thus allowing them flexibility in planning their future transportation needs. The ability just to space charter is not enough, as there could be no assurance when a ship would arrive or depart. In these circumstances, the parties would be disadvantaged in competing against other carriers. Ex. 1, paras. 36–38, 59–60, App. 13; Ex. 2, paras, 28, 34.

31. Without vessel coordinating authority, a natural decision of a vessel owner would be to schedule its vessel late in the month at Japanese ports, thus causing a bunching of sailings with wide gaps at other times. This is because there is an established tendency of cargo from Japan to increase near the end of the month as letters of credit expire. Ex. 1, para. 39; Ex. 2, para. 28.

32. As Japan is an island nation with limited resources, the nation is extremely dependent on its national flag ocean liner services to assure that the lines of commerce will remain open. Therefore, any disruption in proponents' space chartering and vessel coordination would impact adversely upon these channels of commerce. Ex. 2, para. 33.

33. With fewer vessels, operations under the Agreements require less fuel to serve the same routes with the same schedules. Fuel savings are believed to be very substantial. The ability to utilize fewer vessels also serves to reduce marine and air pollution. Ex. 1, paras. 43–46; Ex. 2, paras. 22, 30–32.

34. The ability to coordinate sailings under the Agreements has served, and will serve, to reduce port and terminal congestion, as departures and arrivals at or about the same time would be eliminated. Terminal congestion has been, and will continue to be, reduced, as space chartering enables the use of a single terminal facility. Even if the same terminal facility were used, the impact on terminal use would be negative if there were no vessel coordination. In such a case, schedules would conflict and overlap, leading to delays in berthing and, at other times, the idleness of port

facilities. Reducing terminal and port congestion also decreases the risks of marine collisions. Under the Agreements, Portland and Oakland terminal facilities have experienced less congestion and greater efficiencies. Ex. 1, paras. 47–52, Apps. 9, 10, 10A; Ex. 2, paras. 22, 31–32.

35. Not only have and will the Agreements enhance the efficient deployment of vessels and the use of resources, the regularity and dependability of service they provide enable shippers to reduce their equipment inventory requirement, thus reducing the time that cargo sits idle while awaiting shipment. This, in turn, reduces problems with cash flow which shippers may experience while cargo remains idle. Ex. 1, para. 53; Ex. 2, para. 22, 32.

36. As a general principle, reducing capital expenditures encourages higher quality service and technological innovations. Ex. 1, para. 54; Ex. 22, para. 32.

37. The nature of U.S. ocean shipping is that, from time to time, the foreign waterborne trades are subject to overtonnaging in one degree or another. This is true in the case of the Japan-U.S. trade and the Far East-U.S. trade. The Far East-U.S. Pacific Coast trade is a very cyclical trade, particularly Eastbound. Beginning with 1979 and into 1980, declining cargoes coupled with capacity expansions resulted in depressed utilizations and serious overtonnaging. By late 1980 and through 1981 cargoes rebounded, capacity stabilized and utilizations improved. The second half of 1982 then witnessed more capacity increases and a slowing of growth. By 1983, however, strong cargo growth had again produced an equilibrium of capacity and cargo availability. Ex. 1, paras. 59–61; Ex. 2, paras. 34–39; Affidavit of Mr. Tucker (hereafter Ex. 3), pages 22–24.

38. The nature of the trade is such that shipowners must size their operations in a manner which will enable them to accommodate peak cargo situations, as well as foreseeable market growth. In this regard, all carriers, including parties operating under section 15 agreements, must be in a position to respond to trade fluctuations and improvements brought on by economic uprisings in the market. The parties' current inability under Agreement No. 9835 to meet the capacity needs of PNW (Pacific Northwest) shippers is a case in point. Ex. 1, paras. 61, 62, Apps. 11, 12; Ex. 2, paras. 34, 43; App. 7; Ex. 3, pp. 4, 19.

39. Currently (1983 second half), the parties' Eastbound carryings have strongly rebounded with the worldwide recovery:

Agreement	July–Dec., 1982	July–Dec., 1983	Increase
9718	40,386	55,088	36%
9731	18,538	25,405	37%
9835	36,220	45,344	27%

Ex. 1, para. 63; Ex. 2, para. 37.

40. A natural phenomenon of replacing a fleet with larger vessels is to experience some immediate decline in utilizations. This is what happened

when the parties began their replacement program in 1981. Had the vessels not been introduced, the parties would have been close to overbooked. Even so, by the second half of 1983, the parties' utilizations were strongly up, although five of their ten replacement vessels were already in place:

Agreement	Utilization
9718	85%
9731	80%
9835	98%

The remaining replacements will increase total Pacific Coast capacity by only 13.7 percent. Ex. 1, paras. 60, 75, App. 2–5; Ex. 2, para. 36; Ex. 3, p. 19.

41. A further factor in adjudging utilizations relates to the volume of cargo which may be carried on a particular leg of the movement. While in the California trades, Westbound utilizations have remained in the 60–70 percent range, the parties' Eastbound utilizations have, as indicated, been considerably higher. This is because there is a traditionally higher volume of cargo which moves from the Far East encouraged by the continued strength of the U.S. dollar. In considering utilizations and the need for replacing capacity, carryings on the dominant leg must be the controlling consideration, although this is moderated somewhat by the preponderance of heavy, dense cargoes Westbound which cause the parties' vessels to "Weigh out" prior to reaching their standard TEU capacity. In the PNW trade, Westbound utilizations have remained at 90 percent for the past four years despite the dollar's strength and the parties' replacement of two vessels under Agreement No. 9835. Ex. 1, para. 61; Ex. 2, para. 36; Ex. 3, p. 20.

42. In the period 1980–1982, APL, Sea-Land and U.S. Lines have all experienced relatively high utilizations in the Pacific trades, and, with the current cargo recovery, it is probable they and other carriers are continuing to enjoy increased carryings. Further, confidence in trade growth has been shown over the past year by several new carriers entering the trades and by a number of existing carriers, including APL, Lykes, U.S. Lines, Evergreen, Maersk and Zim, expanding their capacity or announcing plans shortly to do so. Ex. 1, paras. 66, 76; Ex. 2, para. 34; Ex. 3, p. 23.

43. As there has been less fluctuation in the Atlantic Coast trade under Agreement No. 9975, and as there are fewer carriers offering a direct all-water service to the Atlantic, the parties over many years have consistently been in a position to achieve Eastbound utilizations approaching 100 percent. Ex. 1, para. 65.

44. According to U.S. Maritime Administration statistics, Far East-U.S. cargo growth for 1983 should total between 10–15 percent. For 1984–85, Mr. Tucker, proponents' economist, has predicted 9 percent growth for the Far East Eastbound trades as a whole, but with Japan growth, after 1984, leveling off a 3.5 percent annually. After 1985, Far East origin

cargoes, other than Japan cargo, are expected to return to past growth factors or approximately 6 percent annually. Throughout, Pacific Coast cargoes are expected to outperform the Atlantic, as they have over the last decade. Comparing the cargo predictions of Mr. Tucker with the remaining capacity increases under the revised agreements, there is every indication proponents' utilizations should continue to improve in both the Eastbound and Westbound directions, and that a return to serious overtonnaging is not expectable. Ex. 1, para. 64; Ex. 2, paras. 38, 40; Ex. 3, pp. 5–19.

45. There is no overall coordination among the parties to the various Agreements, and so far as the record in this proceeding shows, the decisions that affect any one Agreement are made only by the parties to that particular Agreement, each Agreement involving different operational considerations, different trades (for the most part), and not all of the same parties. For market purposes, therefore, each Agreement must be viewed individually. Ex. 1, para. 69; Ex. 2, para. 40.

46. As much as one-third of the cargo moving Eastbound under the Agreements originates in the Far East other than Japan. This trend is expected to continue as non-Japanese Far East cargo develops. This non-Japanese cargo is carried on Agreement vessels on a transshipment basis, as has been the practice since inauguration of operations. These countries include Hong Kong, Taiwan, the Philippines and other Far East and Southeast countries. The relevant market to measure the Agreements is, therefore, the entire Far East trading area which is served by the parties and which is the trading area of their competitors. As the parties compete in that trade not only with conference carriers but with other competitors who operate outside of conferences, the relevant Far East market necessarily includes the tradewide liner market. Ex. 1, paras. 70–72; Ex. 2, paras. 48–49; Ex. 3, p. 5–7.

47. As is shown in the Affidavit of Mr. Tucker, the Eastbound Far East-United States Pacific Coast market share of the parties under the Agreements steadily declined through 1981, as third flag and developing national flag fleets have emerged, but has stabilized since that time at 24–25 percent. Ex. 2, paras, 40; Ex. 3, pp. 20–22.

48. The primary purpose of the Agreements is to enable the parties to charter space on each other's vessels. This is how the Agreements were permitted to operate in the beginning before the Commission's January 16, 1981 order freezing the space which could be chartered at levels which had prevailed since 1974 in the Pacific and 1976 in the Atlantic. The replacement of Agreement vessels with larger vessels starting in 1981, however, and the inability to charter their full capacity has created operational problems for the individual vessel owners and has served to deny the parties the right to rationalize the full capacity of their vessels. The annual capacity levels under the Agreements are based upon the maximum number of sailings contemplated times the capacities of the vessels now

in operation, taking into consideration the vessels being replaced. This, in a very practical sense, may render it unnecessary to place limitations upon the space which can be chartered. Ex. 1, para. 78; Ex. 2, paras. 41.

49. The capacities of the vessels upon which the annual capacity levels are based are stated on the basis of the vessels' standard operating capacities which normally means loading up to the third tier. The Agreements permit the parties to use, however, the space above the third tier when operating conditions permit. This will enable an efficient use of the full capacity of the vessels. As the space above the third tier fluctuates from sailing to sailing depending upon operational considerations, it is not practical to include it in the annual capacity levels named in the Agreements. It is, moreover, an accepted industry practice to size the capacity of a vessel on the basis of its standard operating capacity, as it is to calculate utilizations on the basis of the containers which are loaded aboard a vessel as a percentage of the vessel's standard operating capacity. Ex. 1, paras. 81–85, App. 15; Ex. 2, paras. 44–46, App. 7.

50. During the period the space charter program has been in operation, no party has had a serious need to operate a containership in the Japan trade independent of the coordinated services, although several lines have introduced separate Far East-U.S. Pacific Coast services. For the future, however, one or more of the parties will call at Japan on an individual basis. However, in order to safeguard the benefits derived from space chartering, the parties have restricted the cargo which is carried outside of the Agreements to 3 percent of the capacity authorized under their space charter operations. Ex. 1, para. 86; Ex. 2, para. 47.

51. Although there is no TEU limitation on transshipment cargo carried to or from other Far East countries, the Pacific Coast Agreements limit such carryings of the parties in the Indonesia, Malaysia, Singapore and Thailand trades. The limits are based upon the parties' historical carryings and Mr. Tucker's projections of market growth in those trades. The parties decided to impose the limits in these trades because of the concerns identified by one of the protestants which actively serves these trades. Ex. 1, paras. 17, 21, 88–89, App. 1; Ex. 2, paras. 14, 16, 49, App. 1; Ex. 3, pp. 11–12, 13–14, 16–19.

52. Only a few Agreement vessels are jointly-owned by some of the parties. Certain instances of joint ownerships arose early in the formation of the Agreements and represented an effort to conserve capital resources. When other vessels were added and it became possible for each party to operate its own vessel, most of the joint ownerships were abandoned. There remain at present only six jointly owned vessels, four under Agreement No. 9731, one under Agreement No. 9835 and the other under Agreement No. 9975. Accordingly, clarifying authority to share operational expenses between the owning parties has been included under each Agreement, although the parties consider such expenses necessarily may be appropriately

shared between joint owners. Ex. 1, paras. 21, 87; Ex. 2, paras. 12, 16, 50.

Ultimate Findings of Fact

53. On the basis of the record in this proceeding, the Proponents have sustained their burden of proof that the space charter and vessel coordination provisions of the agreements in issue will provide substantial public benefits which outweigh any possible negative antitrust considerations.

54. The discussions among Proponents' and Protestants' counsel, whose purpose was to reach a basis of settlement on the issues involved in this proceeding do not require a separate section 15 filing. Such discussions do not constitute new "agreements" within the meaning of section 15 of the Shipping Act, and are adequately explained in the record of this case.

55. Since the parties have agreed that there are no disputed material issues of fact the specific areas set forth on remand and in the Commission's Order of Investigation and Hearing need not be considered from the specific points of view set forth in the remand. Instead, the issue involved is whether or not on the record made the requirements of section 15 and the pertinent case law have been satisfied so as to warrant approval of the agreements.

Discussion and Conclusions

I. *Preliminary Matters*

It should be noted at the outset that throughout the pendancy of this proceeding both in the Commission and in the Circuit Court of Appeals there have been many actions of an interim nature, such as *pendente lite* orders, oral argument before the Commission, etc. To the extent we deemed them material and relevant to the decision made here we have included them in the findings of fact. However, we chose not to chronicle every action taken since to do so would unduly burden the record and was not necessary to the decision itself.

It is also important to note that on May 10, 1984, a Procedural Order was promulgated by the Administrative Law Judge wherein he ordered that the latest agreements filed by the Proponents in this proceeding be published in the *Federal Register* so as to allow, within 10 days, any comments, protests and requests for hearing *relating to those portions of the agreements which represent an expansion of the authority* sought in the prior agreements filed by the Proponents. This was done as a precaution to forestall any questions which might arise because of the holding in *Sea-Land Service, Inc.* v. *Federal Maritime Commission*, 653 F.2d 544

(D.C. Cir., 1981).[9] There, the Court held that where changes expand the authority sought notice is necessary, but where changes restrict rather than expand, additional notice is not necessary. In ordering the 10 day *Federal Register* notice we sought to avoid any potential problems that might later arise and to expedite this Initial Decision. Our action should not be contrued as a determination that the new agreements represent an enlargement of the authority sought in the old agreements. That question only need be addressed if it arises within the 10 day notice period.

II. *Filing of Agreements Under Section 15*

Section 15 provides that:

> Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements. * * *

We hold that in this proceeding there are no agreements, other than those already on file, which need to be filed within the ambit of section 15. Specifically, we hold that the decision in *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82 (1970), is inapplicable to this proceeding because the record in the instant case is materially distinguishable from *Isbrandtsen* on the facts. In *Isbrandtsen, supra,* the Commission held that where parties to a case brought before the Maritime Subsidy Board of the Maritime Administration entered into a settlement agreement, the agreement was subject to section 15 jurisdiction because it provided for a cooperative working arrangement, constituted a special privilege or advantage and controlled or regulated competition. Here, unlike *Isbrandtsen,* the litigation originated in the Commission precisely because the original agreements were filed with the Commission and other parties protested their implementation. While the agreements have been amended since they were originally filed, the latest agreements reflect a settlement of a formal docketed Commission

[9] While the new agreements generally represent a diminution of requested authority, establishing capacity levels on an annual TEU basis, which total capacity limitations were required by the Commission in its *pendente lite* orders, does have the effect of increasing previous space charter capacities.

proceeding resulting from negotiations amongst counsel for the litigating parties. We hold that given those facts and the record in this proceeding the "agreements" which are subject to section 15 scrutiny here are the written agreements which already have been filed and not the discussions engaged in by counsel.[10]

III. *The Remand From the D.C. Circuit Court of Appeals and the Order of Investigation and Hearing*

As is set forth in the Findings of Fact, this proceeding originated on remand from the Court of Appeals.[11] In its decision the Appeals Court listed a series of disputed factual issues on which it directed the Commission to conduct hearings. The Commission in turn, ordered that hearings be held by the Administrative Law Judge on specific issues which it felt were relevant to the disposition of the disputed factual issues raised by the Appeals Court. Of course, underlying any action was the Appeals Court's direction "to conduct a hearing on the *disputed material issues of fact raised by the petitioners.*" (Emphasis supplied.)

The present state of the record in this proceeding is that the Proponents of both pooling agreements, Nos. 10116 and 10274, respectively, have withdrawn them so as to make unnecessary determination of several of the "disputed" material issues referred to by the Appeals Court. Further, and more importantly, all of the Protestants have withdrawn any objection to the four space charter agreements now on file, and Hearing Counsel raises no objection to them, so that there are no "disputed" material issues remaining. We hold, therefore, that the issues raised on remand need not be specifically determined. Further, we hold that since the Circuit Court did not remand the record in the case to the Commission, it did not retain jurisdiction over the case.[12] In essence, the settlement amongst the parties and the filing of the new agreements renders inapplicable the issues raised in the remand from the District of Columbia Circuit Court of Appeals and the related issues contained in the Commission's Order of Investigation and Hearing. Such holding, of course, does not obviate the need to determine whether or not the agreements in question are approvable within the general standards set forth in section 15 and the applicable case law.

IV. *The "Svenska" Criteria*

Section 15 of the Shipping Act, 1916, requires the Commission to disapprove agreements which are found "contrary to the public interest."

[10] See the Commission's "Order Partially Adopting Initial Decision," served on February 29, 1984, in Docket No. 83-28, *In Re Agreement Nos. 10457, et al.* 26 F.M.C. 191.

[11] *Sea-Land Service, Inc.* v. *USA and FMC et al.*, 683 F.2d 491 (D.C. Cir., 1982).

[12] See Rule 13(d), U.S. Court of Appeals for the District of Columbia Circuit. Further, the pertinent parties have indicated they did not dismiss the Circuit Court action as part of the overall settlement because they believed the Circuit Court did not retain jurisdiction over the matter.

In *FMC* v. *Aktiebolaget Svenska Amerika Linien*, 389 U.S. 816 (1967), the Supreme Court stated:

> The antitrust standard imposed by the Commission in *Svenska* required the carriers to justify an anticompetitive agreement which was a *per se* violation of the anti-trust laws by demonstrating that it was "required by a serious transportation need, necessary to secure important public benefits, or in the furtherance of a valid regulatory purpose of the Shipping Act," *U.S. Lines* v. *FMC*, 584 F.2d 519, 528 n. 28 (D.C. Cir. 1978). (Citations omitted.)

Once the proponents of agreements seeking approval do come forward with evidence to support their burden of proof the Commission generally weighs the potential benefits against the possible harmful effects of the agreements, and in the process must consider the extent to which the agreements violate anti-trust laws and policies. In weighing the pros and cons of agreements the Commission recognizes that the extent of the proponents burden will vary in accordance with the type and scope of the agreement under consideration. In Agreement *No. 57–96, Pacific Westbound Conference—Extension of Authority for Intermodal Services*, 19 F.M.C. 289, 300 (1976), the Commission stated:

> [T]he extent of the justification that need be shown for such approval will, of course, vary from case to case with the intensity of the otherwise "illegal restraint" involved. Thus, the "legitimate commercial objectives" which the Commission will accept as evidencing the necessity for restraint will generally be determined by the type and scope of the agreement under consideration.

See also *Agreement No. 8760–5—Modification of the East Coast United States and Canada/India, Pakistan, Burma and Ceylon Rate Agreement*, 17 F.M.C. 61, 62 (1973).

In applying the above criteria to the instant proceeding, we begin by disregarding both pooling agreements which have been withdrawn. Their withdrawal removes the most objectionable and anti-competitive arrangements from our consideration altogether. What remains are four space chartering agreements which limit total capacity by inclusion of annual TEU capacity levels, and which impose other limits on transshipment and non-agreement carryings, eliminate sub-groups within an agreement, delete the right to share agents in certain cases, and require comprehensive semi-annual reporting.

The benefits accruing from the four agreements have been found as fact from the uncontroverted evidence submitted by Messrs. Kawamura (Ex. 1), Hirano (Ex. 2) and Tucker (Ex. 3). For example, by space chartering and vessel coordination, competitive service is made available, which service would not be possible with the limited number of vessels absent the agreements; the need for additional vessels has been reduced and service to

shippers under the agreements has been stable since reliable service levels have been provided; the parties have been able to serve a large number of ports using a limited number of vessels; despite normal "ups" and "downs" the agreements help provide a reliable service commitment. Further, the ability to coordinate sailings reduces port and terminal congestion and because fewer vessels are needed under the agreements less fuel is required to service the same routes. The regularity df service also enables shippers to reduce their equipment inventory and capital expenditures.

Finally, with respect to overtonnaging, it is true that the nature of U.S. ocean shipping is that from time to time declining cargoes coupled with capacity expansion result in overtonnaging. This was true in the case of the Japan-U.S. trade and the Far East-U.S. trade in the 1979–1980 period. Since 1981, however, cargoes rebounded, capacity stabilized and utilizations improved. By 1983, strong cargo growth had again produced an equilibrium of capacity and cargo availability. Given the cargo predictions of the Proponents' witness it is likely that their utilizations should continue to improve in both the Eastbound and Westbound directions, and that a return to serious overtonnaging will not occur.

In the face of the above, as well as many other factors which lead one to conclude the public benefits from these agreements far outweigh any anticompetitive consequences which might violate anti-trust laws or policies, the record in this case is devoid of any evidence which would justify any other conclusion. Indeed, all of the primary Protestants, who presumably are also the Proponents' major competitors, agree that the latest agreements should be approved. Sea-Land in its legal memorandum states:

> The actions which Proponents took to satisfy the concerns of Sea-Land and/or other Protestants were detailed in Proponents' filing, and they need not be detailed again here. Briefly stated, those actions consisted of the following:
>
> imposition of effective and realistic capacity limitations upon each of the four space charter agreements;
>
> designation of the space charter agreement services as essentially Proponents' sole containership services in the Japan-U.S. trades;
>
> establishment of a limitation on the carriage of transshipment cargo to/from four important Far East markets in the three West Coast space charter agreements; and
>
> elimination of the revenue pooling agreements.
>
> * * *
>
> In making the determination not to oppose the amended agreements, the key considerations for Sea-Land were, quite obviously, (1) the fact that the actions taken by Proponents will serve to diminish their competitive impact upon Sea-Land, and (2) the fact that continuing to oppose the agreements would involve a further expenditure of time, money and effort in a proceeding which has already been a lengthy and expensive one, and the

outcome of which is by no means certain. The first of these considerations was by far the more important of the two, and it should be elaborated upon, particularly from the point of view of how the actions taken by Proponents address Sea-Land's past concerns regarding their agreements.

b. Actions of Proponents Addressing Specific Sea-Land Concerns.

First, the prior filings of Sea-Land regarding Proponents' agreements are permeated with concern over overtonnaging in the Transpacific trades, and the fact that the space charter agreements under which Proponents had been operating did not contain any provision effectively limiting the amount of vessel capacity which Proponents could deploy thereunder.[8] The annual capacity limitations which Proponents have decided to include in each of their amended space charter agreements are real and effective ones, and thus they go a long way toward satisfying those concerns. The further step taken by Proponents of designating their agreement services as essentially their exclusive containership services in the Japan-U.S. trades serves to ensure that the capacity limitations will not be undermined by the initiation of non-agreement services in those trades. (Carriage of small amounts of cargo to/from Japan by non-agreement containerships is permitted to enable Proponents to meet extraordinary situations.)

While the capacity limitations included in the agreements would permit Proponents to deploy more capacity than they are now deploying, it must be kept in mind that the agreements have a five year term, through August 22, 1988. To be realistic, the limitations must take into account the amount by which cargo is expected to grow during the period that the agreements are in effect. In this connection, the affidavits submitted by Proponents' witnesses establish that the limitations are indeed realistic ones when their own forecasts of cargo growth are taken into account. Thus Mr. Kawamura, one of Proponents' company witnesses, states at ¶77 (p. 44) of this affidavit:

> Based on our assessment of current and foreseeable market conditions, we anticipate these planned increases [in capacity] under Agreement Nos. 9731, 9835, and 9975 will be sufficient to enable us to carry our existing market share for the duration of the Agreements.

The affidavit of Mr. Hirano, Proponents' other company witness, includes a similar statement at ¶43 (p. 24). Those statements are fully confirmed by the comparison of projected cargo growth and the growth in Proponents' capacity done by Mr. Tucker,

[8] Capacity limitations of this nature were, however, required by the Commission's Order of August 19, 1983, in this proceeding as a condition of *pendente lite* approval of the space charter agreements. Those Commission-mandated limitations are currently in effect.

Proponents' economic witness, which appears at page 19 of his affidavit.

That testimony of Proponents' witnesses establishes, in our view, that Proponents will not have any need to seek any increase in the capacity limitations during the term of the agreements, unless cargo growth is greater than Mr. Tucker forecasts, or there is some other unforeseen change in market conditions. To be sure, as Messrs. Kawamura and Hirano also state in the above cited paragraphs, the parties have made no commitment not to seek further revisions in their capacities. Be that as it may, the addition of unwarranted capacity to the trades by Proponents would be contrary to their own and the trades' interests, and we expect the Commission would not countenance such significantly anti-competitive activity. To reiterate, Sea-Land's position in this regard is based on what Proponents have themselves said in their affidavits as cited above.

The capacity limitations, in addition to serving to mitigate overtonnaging, also provide Sea-Land with a benchmark by which it can plan its own operations in the Transpacific trades. Considering the highly influential role which Proponents collectively play in the Transpacific trades, the importance to other carriers of having this benchmark should not be understated. Put another way, the capacity limitations provide an important measure of certainty in an area in which there was none before, and thus they will also further stability in the Transpacific trades.

Another longstanding concern of Sea-Land has been Proponents' carriage in their space charter agreement operations of cargo to and from Far Eastern countries other than Japan. Because those operations are essentially limited to calls at Japan in the Far East,[9] nearly all of this carriage is done on a transshipment basis. Proponents' decision to amend their West Coast space charter agreements to include limitations on the carriage of transshipment cargo to/from Indonesia, Malaysia, Singapore and Thailand addresses this concern. While the limitations apply only with regard to those four Far Eastern countries, those countries are rapidly growing markets and are also ones which Proponents serve on a non-conference basis Eastbound. Also, those limitations, like the overall capacity limitations, provide Sea-Land with an important benchmark by which it can plan its own operations.

In the memorandum of American President Lines it states:

Capacity limitations. The limitations on agreement capacity and non-agreement Japan calls were central to APL's decision in that regard. APL believes that it would be clearly inconsistent with the stated purpose of restraining overtonnaging if proponents were to seek to amend their agreements during their five-year terms

[9] Only Agreement 9718 authorizes calls at a Far East country other than Japan, its scope having been expanded to include calls at Korea on a limited basis.

to allow the operation of greater capacity unless actual trade growth exceeds their expert economist's projections (which show a correlation between the capacity increases allowed under the revised agreements and trade growth through 1988).[5] As to the capacity increases authorized under the revised agreements, APL has, in contemplation of the following, determined that non-objection at this time is preferable to continuation of the litigation:

(i) Each of the three Pacific agreements has an annualized capacity limitation that is clearly derived from a maximum number of annual sailings by specifically identified vessels (albeit there is no prohibition on varying vessels or sailings within the annual limit).

(ii) Each of the vessels so identified is already in service in the Pacific or already under construction or firm order pursuant to the previously announced Japanese Government shipbuilding program.

(iii) While the identified vessels include all ten of the announced larger replacement vessels for the Pacific, the operation of half of those ships was allowed by the Commission's August 19, 1983 *pendente lite* Order and hence is, for practical purposes, a *fait accompli.*

(iv) The agreements have five-year terms (of which about four and one-half years remain).

(v) Proponents' expert economist has forecast that, given his projections concerning market growth and assuming no increase in proponents' market share, the allowed capacity should be sufficient through the end of the agreements' terms. See Proponents' Exhibit No. 3 at 18–19.

(vi) Proponents' designated spokesmen have similarly stated that, based on their assessment of current and foreseeable market conditions, the allowed capacity should be sufficient for the full term of the agreements (again assuming no increase in market share). See Proponents' Exhibits Nos. 1 (¶77) and 2 (¶43).

(vii) The capacity limitations apply to all standard operating capacity on the vessels; *i.e.,* they apply to space allocated to the vessel owner as well as to space allocated to other agreement parties.

(viii) There is a requirement that space in excess of standard operating capacity be identified for each vessel.

Other factors. In addition to the above-noted factors concerning agreement capacity, the following factors also were important to APL's determination that non-objection to the revised agreements is preferable to continuation of the litigation: (i) the limitation of non-agreement containership Japan cargo to 3% of allowed agreement capacity; (ii) the withdrawal of the pooling agreements,

[5] See Proponents' Exhibit No. 3 at 19.

thus to some extent lessening the unitary tendencies of the arrangements; (iii) a desire to avoid the costs, burdens, risks, and friction of further litigation; and (iv) the uncertainties created by the prospect—and now the eventuality—of new legislation governing future agreements among carriers.

In the Lykes Bros. Steamship Co., Inc., memorandum it is stated:

> Among the important considerations which led Lykes to oppose the now-withdrawn agreements was Lyke's position that agreements of this nature had not in the past always served to ameliorate overtonnage, a principal justification advanced by proponents in support, and that for this and other reasons the Commission should adopt certain policies in approving such agreements, including (1) placing limits on the trade areas served and the capacity which may be offered under such agreements, (2) approving such agreements for limited durations, (3) imposing detailed reporting requirements on the parties, and (4) conditioning further extension of such agreements upon a demonstration that the trade served will grow sufficiently to absorb any proposed capacity increases.
>
> Lykes notes that the amended agreements are in some measure responsive to each of these concerns. It notes particularly proponents' statements (*e.g.*, Kawamura Affidavit, ¶'s 76 and 77; Tucker Affidavit, pp. 18–19; and Proposed Finding No. 36) to the effect that the capacity increases provided in the amended agreements compare favorably with proponents' projections of expected increases in the liner trade over the term of the amended agreements. The amended agreements thus provide a capacity limit for an extended period, consistent with proponents' planned vessel replacement program and expectations of trade growth. Lykes would regard with very serious concern any proposed increases in capacity beyond those currently provided, and would regard as objectionable future capacity increases under the agreements inconsistent with actual trade growth.
>
> In arriving at its position on the amended agreements Lykes has also considered the existence of independent (*i.e.*, non-agreement) services operated by proponents in some of the same trade areas covered by the amended agreements (see, *e.g.*, Proposed Finding No. 42). Lykes's position of non-opposition to the amended agreements has been formulated in consideration of the present deployment and capacity offered in these non-agreement services, and on limitations in the amended agreements upon employment of these vessels in the Japan/U.S. trades. Should changes in these services occur or should new or different services be commenced by proponents, such action could significantly alter the competitive environment in the trade and would be cause for reassessment of Lykes's views on the amended agreements.

Finally, in its memorandum (reply) Hearing Counsel stated:

With the withdrawal of the two pooling agreements and the substantial modifications made to the space-charter agreements, the agreements currently before the Commission are significantly different than those agreements remanded to the Commission. So different, in fact, that the very Protestants, on whose behalf the court acted, have now announced they will not oppose the current agreements. Thus, Protestants are no longer pressing the issues they raised before the Court of Appeals.

Indeed, many of the issues listed on pages 16–18 of the Order of Investigation and Hearing on Remand have been rendered moot by Proponents' pooling agreement withdrawals and space charter agreement modifications. Thus, issues 1 (bloc voting), 2 (joint service), and 3 (trading house relations), relate more to the agreements as previously existed. Issues 10 and 11, relating to the terms of the agreements, have also been resolved by Proponents' modifications and extensive reporting provisions.

Now that new agreements are before the Commission and the Protestants do not press the issues they raised regarding the predecessor agreements, it only remains for Proponents to justify the new agreements under *Svenska* type standards. This, Hearing Counsel submit, Proponents have done in their March 6, 1984, Brief.

Accordingly, Hearing Counsel support approval of Agreements Nos. 9718–10, 9731–10, 9835–7, and 9975–9 as now on file.

In view of the above, we hold that the Proponents have sustained the burden that is theirs under *Svenska, supra*, of justifying the agreements involved here as required by a serious transportation need, necessary to secure important public benefits and in furtherance of valid regulatory purposes.[13] Since the record is devoid of any evidence to the contrary the agreements are approved.

V. Miscellaneous Conclusions

The parties in this proceeding have all expressed the view that despite their settlement of the issues in this proceeding as reflected in the filing of the latest agreements there is no tacit or express agreement among them as to future conduct or positions. The Proponents have made no commitment of any kind to refrain from seeking to amend their agreements in the future and the Protestants would be entirely free to oppose any such amendments in whatever manner it chooses to do so. We so hold.

The Protestants in this proceeding have also expressed some concern as to the application of the doctrine of *res judicata* or collateral estoppel to each or all of them. While the record in the case does not contain

[13] See *Agreement No. 9835*, 14 F.M.C. 203 (1971); *Agreement Nos. 9718–3, 973–5*, 19 F.M.C. 351, 365 (1976); *Agreement No. 10422 United States-East Asia Space Charter Agreement*, 21 SRR 686, 691 (FMC 1982), for cases where the Commission approved space charter and vessel coordination agreements because they afforded transportation benefits in terms of cost as well as ameliorating overtonnaging.

any written agreement to that effect the Proponents have orally agreed that in any future proceeding they would not invoke the doctrine of *res judicata* or collateral estoppel against any of the Protestants in this proceeding.

During the pendency of this proceeding certain intervenors were allowed to intervene for limited purposes, subject to the discretion of the Administrative Law Judge. As the case progressed toward settlement they did not appear at the prehearing conference or at the hearing itself. However, they did speak with the Administrative Law Judge by telephone and it is his understanding they have no objection to any of the latest agreements filed.[14] In any event should that not be the case, it is hereby held that any objection made by any intervenor is untimely, and in the discretion of the Administrative Law Judge such intervenor will no longer be allowed to intervene for that purpose.

With respect to the fact that the parties have expressed a desire to expedite this proceeding and to allow the Commission discretion in its review of the Initial Decision and related matters, it is hereby ordered that the parties to this proceeding advise the Commission in writing whether or not they intend to file any exceptions to the Initial Decision within five days of the date of service of the decision. Of course, since the parties have withdrawn their objections to the agreements it is hoped that no exceptions will be filed in which case the Commission may approve the agreements before June 18, 1984, which is the effective date of the Shipping Act of 1984, if it so desires.

Finally, in view of all of the above and the holding in this proceeding, it is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[14] The Delaware River Port Authority so indicated by letter dated March 23, 1984.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–1
TRANSEUROPE SHIPPING, INC.

NOTICE

June 15, 1984

Notice is given that no exceptions were filed to the May 9, 1984, 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) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–1
TRANSEUROPE SHIPPING, INC.

Held:

1. Where the Respondent, Transeurope Shipping, Inc., was in the business of freight forwarding, and where overcharges occurred regarding eight outbound shipments in 1979-1980, such overcharges were the responsibility of Transeurope for which it might be held liable and subject to penalty under the provisions of the Shipping Act, 1916, as amended, and the provisions of the Federal Maritime Commission's General Order 4 (46 CFR 510.1 et seq.).
2. Where Transeurope contended the wrongdoing was the fault of disloyal and dishonest former employees, and Hearing Counsel asserted it was engaged in at the behest of Transeurope's owner, the trial hazard related to a determination of the factual discrepancy as well as other surrounding circumstances justifies a settlement setting a penalty of $5,000.00. Such a penalty gives due consideration to mitigating circumstances and is within that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others, and which will secure compliance with the law and the Commission's rules and policies.
3. Where the Respondent as well as its affiliates, owner and directors surrenders its freight forwarder license and agrees not to reapply for such license for a period of three years, the issue regarding revocation of the respondent's freight forwarder license raised in the Commission's Order of Investigation becomes moot.

R. Frederic Fisher, Charles L. Coleman and *Laurence N. Minch* for respondent, Transeurope Shipping, Inc.

Joseph B. Slunt, James S. Oneto and *John Robert Ewers,* Hearing Counsel.

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

Finalized June 15, 1984

PRELIMINARY MATTERS

By Order of Investigation and Hearing served on January 14, 1983, the Commission ordered that pursuant to sections 22, 32, and 44 of the Shipping Act, 1916, as amended (46 U.S.C. 821, 831 and 841(b)), a proceeding be instituted to determine:

1. Whether Transeurope Shipping, Inc. violated the Commission's General Order 4 (46 CFR 510 (1980)), section 510.23(e), withholding information; section 510.23(d), due diligence; section 510.23(j),

[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).

invoices; section 510.23(k), records required to be kept; and/or section 510.23(l), failure to make records available;

2. Whether civil penalties should be assessed against Transeurope Shipping, Inc., pursuant to section 32 of the Shipping Act, 1916, (46 U.S.C. 831(e)), if found to be in violation of the Commission's regulations and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty; and

3. Whether the license of Transeurope Shipping, Inc. to act as an independent ocean freight forwarder should be revoked or suspended pursuant to Section 44(d), Shipping Act, 1916, and/or section 510.17 of Revised General Order 4 (46 CFR 510.17 (1981)) for:

a. willfully violating section 510.23(e), 510.23(d), 510.23(j), 510.23(k), and/or 510.23(l) of General Order 4 (46 CFR 510 (1980)); or

b. conduct which the Commission determines renders the licensee unfit or unable to carry on the business of forwarding.

As a result of the above Order the parties initially began discovery and then asked for time to settle the issues involved. The settlement negotiations were protracted and involved several proposals, none of which were acceptable to the undersigned. Ultimately, the matter was set for trial at which time the parties submitted the joint settlement proposal which is attached.

Findings of Fact

The parties in this proceeding never submitted a stipulation of facts. Instead, in making their settlement proposal they did submit what they termed "Proposed Stipulations and Statements of Position," which, together with other documentary evidence contained in the record, serves as a basis for the following findings of fact:

1. By letter dated April 23, 1980, the Federal Maritime Commission (the "Commission") was informed by the former New Jersey Office traffic manager of Transeurope Shipping, Inc. (Transeurope), that he "was fired because I complained constantly of the unfair practive of over-charging on Ocean Freight." The letter enclosed "photostats given to me by the former Traffic Manager . . . "who had also been fired because of the same reasons."

2. By letter dated May 2, 1980, the Commission was informed by a former employee of Transeurope that he left the Carson, California, Office of the company because:

> In order to keep my job with this Company, I was forced to continuously increase the measurements billed to our customers,

even though Transworld Shipping, GMBH in Hamburg had increased the measurements already up to 13 CBM.
Due to this fact, more and more customers complained, or discontinued our service. The general practice was to declare minimum measurements to the shipping lines and to charge out maximum rates to our customers. It also was common practice to charge conference rates while shipping with non-conference vessels.
Since this business practice came to this extent, I saw no other way but to leave this Company in order not to destroy my own reputation, which I built up in the last few years.

3. The receipt of the above letters was predated by a routine postlicensing compliance check commenced by the Commission's Los Angeles Office in February of 1980. The check related to the freight forwarder operations of Transeurope, License Number 2064, which was issued on April 3, 1978. The check involved the interview of Transeurope's Vice-President who sent the letter referred to in paragraph (2) above. No questionable practices were noted during the compliance check.

4. On June 2, 1980, Commission investigators interviewed Transeurope's Vice-President referred to in paragraph 3 above. At the interview Mr. _____:[2]

* * * explained that on inbound shipments, Transworld would instruct Transeurope how much to collect from consignees on its behalf. The amount to be collected would sometimes be inflated by increasing the cubic measurement of the freight shipped more than that declared to the ocean carrier. Transworld would send Transeurope a handwritten worksheet indicating the true cube shipped as well as the amount of the increased cube. Transeurope would also increase the freight charges to be collected from the consignees in order to further overcharge the consignees. Mr. _____ stated that the increase to the consignee on the part of Transeurope was not a set amount of percentage, but just what he thought the traffic would bear. Mr. _____ also stated that Mr. _____, the owner of Transeurope and Transworld, had instructed him to also start increasing the costs on Transeurope's outbound shipments sometime in June or July of 1979. He ignored this instruction until late 1979, when Mr. _____ demanded that he start increasing the charges on outbound shipments. He increased the amount of ocean freight, bunker surcharges and currency adjustment factor charges in fear of being fired by Mr. _____. He stated that to the best of his knowledge there were approximately eight or ten outbound shipments where the ocean freight charges' were increased from a total of twenty-five outbound shipments handled by Transeurope. Since the compliance check of February, 1980 had shown no discrepancies in

[2] Specific names of the parties involved are being deleted herein since they are not necessary to the decision.

Transeurope's records regarding the increase in ocean freight, Mr. _____ was asked to explain the reason these increases did not appear in Transeurope's records. Mr. _____ stated that false invoices and false ledger sheets were provided to the Commission investigator during the compliance check. The true invoices were kept in a notebook marked "TWS". Mr. _____ informed the investigators of the location of the notebook within Transeurope's office.

5. The allegations noted in paragraph (4) above were investigated by the Commission staff, which found that in eight instances Transeurope had billed its forwarding clients inflated ocean freight charges, bunker surcharges and currency adjustment factor charges. Hearing Counsel was prepared to present evidence to show that the records for six of the eight shipments supported the statement regarding the two sets of invoices on outbound shipments, and that Transeurope would also sometimes increase the cube itself. Hearing Counsel alleges that the evidence would show that Transworld (apparently a subsidiary of Transeurope, or in some way a related foreign company), also misdescribed the goods being shipped to ocean carriers in order to obtain lower freight charges. Hearing Counsel further alleges that Transeurope purged its files in an attempt to cover up the above practice.

6. On December 1, 1981, Commission investigators interviewed the new Qualifying Officer for Transeurope. Ten current outbound shipments were reviewed with no violations noted. Copies of Transeurope's balance sheet as of 10/31/81 were also obtained. It indicated current assets of $141,180.92 and liabilities of $127,620.74.

7. Transeurope alleges it did not commit the violations alleged by Hearing Counsel except for the eight instances occurring in 1979 and January of 1980, which it believed were "technical" violations. It alleges the violations were committed by a disloyal, dishonest former employee without the company's or its owner's knowledge. Further, it alleges two of its employees (the authors of the letters referred to in paragraphs (1) and (2) above) were secretly involved in the unauthorized diversion of the respondent's assets to a business or businesses of their own, which included the setting-up of a competing concern aimed at respondent's customers.

8. Transeurope admits that the letters referred to in paragraphs (1) and (2) above were written by its former employees. It alleges that before the letters were written both employees had been fired and that criminal complaints had been filed against them for the unlawful diversion of company assets. It asserts that except for the eight export shipment violations, none of the violations alleged by Hearing Counsel occurred, and in any event the alleged violations were part of its employees own mismanagement of the business, not known or condoned by its owner.

9. The respondent alleges that one of its former employees admitted the improper use of its funds and entered into a promise to repay the respondent on which promise he defaulted.

10. The respondent denies that there was an "increase in cube" or any misdescription to ocean carriers, and points out that there is no such showing after its employee was fired. It also denies any "purging" of documents.

11. The respondent alleges that in inbound trades, it is not acting as a freight forwarder and has not acted in any trades as an NVOCC, and further, that all actions of Transeurope and its affiliates in inbound trades were at all times lawful and proper.

12. The respondent notes that its files have always been available to the Commission, except for the 1979 and 1980 shipments handled by its fired, former employee. It asserts it is involved in freight forwarding on a very small scale, that it lost $14,761.00 in 1982, and $15,686.00 in the first seven months of 1983, and was in a negative working capital posture.

13. The respondent alleges that in 1979–80, its owner spent substantial time outside of the United States and left the day-to-day management of Transeurope to its former employee, who was responsible for any wrongdoing that may have occurred.

14. During the pendency of this proceeding several joint settlement proposals were offered by the parties. In those proposals a sum of $1,000.00 was offered in settlement of the penalty provisions of the Shipping Act, 1916. The proposed settlements were justified in part by citing the financial statements of the respondent and its inability to pay any more than the $1,000.00. The proposed settlements were rejected by the Administrative Law Judge and subsequently the respondent's financial statement was reviewed by the Commission's staff which concluded:

> We have reviewed the financial data on the subject company accompanying your memorandum to the Chief, Office of Financial Analysis dated November 3, 1983. This review was conducted with a view towards determining Transeurope's ability to pay a penalty in excess of $1,000.
>
> Although the financial information submitted was not prepared by independent auditors and does not constitute financial statements in conformance with generally accepted accounting principles, we were able to reach certain conclusions regarding the company's operations. According to data submitted, Transeurope had cash in the bank in excess of $20,000 on August 31, 1983. Its working capital (current assets less current liabilities) was almost $3,000 on that date. This calculation was made excluding a loan to one of the owners which, in our opinion, cannot be properly classified as a current liability. The company's net worth (total assets less total liabilities) was approximately ($700) on

August 31, 1983. It is also notable that the company has no long-term debt other than the loan from the owner.

Included in the information furnished your Bureau was a summary of income (losses) for the twelve months ending August 31, 1983. This summary showed that operations during the period resulted in a net loss of more than $17,000. However, an income statement covering seven months ending on that date showed legal expense of more than $13,000. It is our understanding that this expense is directly related to the matter before the Commission, and should not be considered an expense incurred in the ordinary course of business.

Taking into account all of the foregoing, it is our opinion that Transeurope has the ability to pay a fine in excess of $1,000. A penalty of $5,000 would not be unreasonable. We do not feel that an on-site review of Transeurope's accounting records would serve a useful purpose.

15. When this proceeding was called for hearing the parties presented an offer in settlement wherein the respondent agreed to pay $5,000.00 on the installment basis in settlement of the pertinent penalty provisions of the Shipping Act, 1916.[3] In return the Commission among other things released the respondent from any claims, penalties or liability for any penalties or sanctions under the Shipping Act, 1916, or any other pertinent statute, in connection with any of the activities described in the Order of Investigation and Hearing occurring prior to December 31, 1981.

Ultimate Facts

16. The eight violations which occurred in 1979–1980 were not merely technical in nature but were material violations of the Shipping Act, 1916, for which the respondent was responsible and might be held liable and subject to penalty.

17. The record in this proceeding justifies a settlement whereby the respondent pays $5,000.00 to the Commission. Such a settlement 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, and which will secure compliance with the law and the Commission's rules and policies.

Discussion and Conclusions

1. *Settlement of Civil Penalties*

[3] The settlement agreement also contains a provision that "neither Transeurope, nor its affiliates, owners or directors shall apply to the Commission for an ocean freight forwarder's license within three years after this agreement becomes final." This provision is in furtherance of revocation of the respondent's license to which it agreed thereby making the fitness issue raised in the Order of Investigation and Hearing moot.

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,[4] 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.

Further, the Commission has by rule encouraged settlement[5] and has often favorably looked upon them as a matter of policy.[6]

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[4] 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 lifeblood 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.

[5] Rule 91 of the Commission's Rules of Practice and Procedure, 46 CFR 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 CFR 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 CFR 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.

[6] See *Perry Crane Service* v. *Port of Houston Authority, of Port of Houston, Texas (Approval of Settlement)*, FMC Docket No. 75-51, served June 21, 1979, Administratively Finalized, July 27, 1979; 22 F.M.C. 31 *Del Monte Corp.* v. *Matson Navigation Co. (Approval of Settlement)*, FMC Docket No. 79-11, served

As to the propriety of the settlement itself in this case, there is no question that at least eight violations were involved respecting overcharges in outbound shipments. We do not believe those overcharges were merely "technical" in nature. This is especially so since the facts in the record established that they were serious enough that Hearing Counsel alleges former employees quit Transeurope because they were forced to engage in the wrongdoing, and the respondent argues they were part of a scheme by the former employees to enrich themselves. Under either premise the violations can hardly be termed "technical." Further, there are allegations of a cover-up by way of maintaining a set of duplicate records.

It is clear from the record in this case that the single most important aspect of it is the discrepancy in facts. There is a direct conflict between Hearing Counsel's position that the wrongdoing was ordered by and known to Transeurope's President, and the respondent's position that its former employees engaged in the wrongful acts and that Transeurope's owner neither asked them to commit the wrongs nor even knew of them. At first the trial hazard described above was not really addressed in terms of settlement. Instead $1,000.00 was offered on the basis of inability to pay. This was rejected when the Commission's staff reviewed the respondent's financial statements and called into question the conclusions made from those statements. However, the present offer of $5,000.00 represents a substantial increase over the original offer, and given the trial hazard previously described is a fair and reasonable figure, considering further the cost of trial and the likelihood of a judgment for a higher monetary figure.

Therefore, it is held that the settlement of the civil penalties proposed by the parties is fair and equitable and in light of the facts and circumstances involved, is in the public interest and is approved. A copy of the settlement agreement is attached.

2. *Fitness*

The respondent has surrendered its freight forwarder license. It has agreed not to reapply for at least three years, as have its affiliates, officers and directors. The respondent's actions make moot the fitness issue raised in the Commission's Order of Investigation and therefore, no decision relating to such issue is warranted here.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

November 20, 1979, Administratively Finalized, December 27, 1979 (22 F.M.C. 364): *Merck, Sharp & Dohme* v. *Atlantic Lines*, 17 FMC 244 (1973).

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–1
TRANSEUROPE SHIPPING, INC.

PROPOSED SETTLEMENT

This Proposed Settlement has been entered into between the Bureau of Hearing Counsel, Federal Maritime Commission, and Respondent, Transeurope Shipping, Inc., an ocean freight forwarder. 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 503.3 of the Commission's General Order 30, 46 C.F.R. 505.3, and is to be incorporated into the Final Order in this proceeding if so approved.

WHEREAS, by Order of Investigation and Hearing served January 14, 1983, the Federal Maritime Commission instituted the present proceeding to determine whether "Transeurope Shipping, Inc. (Respondent), violated the Commission's general Order 4 (46 C.F.R. 510. (1980)), section 510.23(e), withholding information; section 510.23(d), due diligence; section 510.23(j), invoices; section 510.23(k), records required to be kept; and/or section 510.23(l), failure to make records available," and whether "civil penalties should be assessed against the Respondent, pursuant to section 32 of the Shipping Act, 1916, (46 U.S.C. 831(e)), if found to be in violation of the Commission's regulations and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible mitigation of such a penalty;" and whether "the license of the Respondent to act as an independent ocean freight forwarder should be revoked or suspended pursuant to section 44(d), Shipping Act, 1916, and/or section 510.17 of Revised General Order 4 (46 C.F.R. 510.17) (1981)), for willfully violating section 510.23(e), 510.23(d), 510.23(j), 510.23(k), and/or 510.23(l) of General Order 4 (46 C.F.R. 510 (1980)), or conduct which the Commission determines renders the licensee unfit or unable to carry on the business of forwarding;" and

WHEREAS, Hearing Counsel have identified eight shipments in U.S. outbound trades and nine shipments in U.S. inbound trades during 1979 and early 1980, which Hearing Counsel allege involve violations of Commission regulations; and

WHEREAS, the Respondent denies such allegations but is unwilling to expend the sum necessary to continue with discovery proceedings and the cost of litigating its defenses; and

WHEREAS, Hearing Counsel and the Respondent, in order to avoid the delays and expense which would be occasioned by litigation of the issues specified in the Order of Investigation and Hearing, are desirous

of settling expeditiously the issues of violations and the appropriate amount to be paid by the Respondent 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 claims set forth herein, the parties agree as a condition of this settlement to comply with all the requirements set forth hereinafter, subject to the stipulations, conditions, and terms of settlement contained herein.

1. Within fifteen (15) days of the date this Agreement becomes final by final Commission Order in this proceeding, Transeurope Shipping, Inc. will voluntarily surrender to the Commission its freight forwarder's license No. 2064 and pay the sum of one thousand dollars ($1,000.00) to the Commission and tender to the Commission a duly executed promissory note in the amount of four thousand dollars ($4,000) plus simple interest at 12 percent per annum, payable to the Commission in two installments of two thousand dollars ($2,000) on July 1, 1984 and two thousand dollars ($2,000) on December 31, 1984.

2. Neither Transeurope Shipping, Inc. nor its affiliates, owners or directors, shall apply to the Commission for an ocean freight forwarder's license within three years after this Agreement becomes final.

3. Upon satisfaction of the undertakings in paragraph 1, Transeurope Shipping, Inc., is released from any claims, penalties or liability for sanctions or penalties of any kind under the Shipping Act, 1916, or any other statute administered by the Commission, in connection with any of the activities or subject matter described in the Commission's Order of Investigation and Hearing instituting this (Docket No. 83–1) which occurred prior to December 31, 1981 or as to which evidence had, as of the date of the settlement agreement, been brought to the Commission's attention in the course of its administrative investigation herein.

4. This Agreement shall not constitute an admission by Transeurope Shipping, Inc., or any affiliate, owner, officer, director, or employee of Transeurope Shipping, Inc., that any of the allegations set forth in the Order of Investigation and Hearing are true. Except as provided in paragraph 3, it is understood by the Respondent that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or by any other department or agency of the United States Government for conduct engaged in by the Respondent. However, based on information available to the Commission as of September 20, 1983, the Commission has no evidence of violations of the Shipping Act, 1916, by Respondent that are not released under paragraph 3 and no intentions as to further enforcement actions as to Respondent.

Respondent acknowledges that it has voluntarily entered into this Agreement and states that no promises or representations have been made to it, other than the agreements and consideration herein expressed.

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

5. This Agreement becomes final on the service date of the Order in which the Commission declines to review the order of the Presiding Administrative Law Judge approving the Agreement or on the service date of the final Order of the Commission, whichever is later. If for any reason this Agreement is not approved as provided above, it shall be of no force and effect, and may not be used by any person for any purpose.

Transeurope Shipping, Inc.

By: _____
Peter K. Laser, President

Date: January 19, 1984

_____
R. Frederic Fisher
Lillick McHose & Charles
Counsel for Respondent

Federal Maritime Commission

_____
Joseph B. Slunt, Hearing Counsel

_____
James S. Oneto, for Hearing Counsel

_____
John Robert Ewers, Director,
Bureau of Hearing Counsel

Date: January 17, 1984

FEDERAL MARITIME COMMISSION

DOCKET NOS. 83–9 AND 83–12
PRUDENTIAL LINES, INC.

v.

FARRELL LINES, INC.

Respondent Farrell Lines, Inc., found to have operated a service beyond the scope of its agreement authority and thus in violation of the tariff requirements of section 18(b)(1) and (3) of the Shipping Act, 1916.

Complainant Prudential Lines, Inc., denied reparation for failure to show causal connection between violation and alleged injury or injury in fact caused by Farrell Lines, Inc.'s violation of the statute.

Cease and desist order denied as moot.

Terrance J. Ingrao, Assistant General Counsel, Prudential Lines, Inc., *John L. Morris,* Prudential Lines, Inc., Director of Traffic, *Mark E. Schaefer,* Prudential Lines, Inc., Pricing Manager, for Complainant.

Edward Aptaker, Lynn Kormondy, of Schmeltzer, Aptaker and Sheppard for Respondent.

REPORT AND ORDER

June 15, 1984

BY THE COMMISSION: (Alan Green, Jr., *Chairman;* James J. Carey, *Vice Chairman;* James V. Day, Thomas F. Moakley and Robert Setrakian, *Commissioners*)

These consolidated proceedings [1] came before the Commission on Exceptions from Complainant Prudential Lines, Inc. (PLI) to the Initial Decision of Administrative Law Judge William Beasley Harris (Presiding Officer), finding that a service of Farrell Lines, Inc. (Farrell), whereby Farrell transported cargo overland from South Atlantic ports for ocean carriage from North Atlantic ports, had not been shown to violate the Shipping Act, 1916 (46 U.S.C. 801 *et seq.*). He therefore denied reparation and discontinued the proceeding. Farrell filed a Reply to PLI's Exceptions. The Initial Decision of the Presiding Officer is reversed insofar as the finding of violation is concerned, but reparation is denied for failure to show either a causal connection between the violation and the alleged injury or injury in fact.

[1] The complaints in Docket 83–9 and Docket 83–12, filed on February 9 and February 25, 1983, respectively, involve the same parties and substantially the same issues. The Presiding Officer consolidated the two proceedings and subsequently permitted the filing of an amended complaint.

BACKGROUND

The material facts are not in dispute. PLI and Farrell are U.S.-flag common carriers by water operating in the foreign commerce of the United States between U.S. Atlantic Coast ports and ports in the Mediterranean. Both participate in the carriage of United States preference cargo.

Both carriers were members of the U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement No. 10261 ("Agreement"). The Agreement had on file with the FMC its Agreement No. 10261, Freight Tariff No. 1, FMC No. 1 applicable to transportation of cargo between South Atlantic ports south of Cape Hatteras and Mediterranean ports (Tr. 119, 132). PLI withdrew from the Agreement in 1981 (Tr. 20).

Agreement No. 10261's tariff is a port-to-port tariff (Tr. 120). The Agreement has only authority to fix rates from port to port and has no intermodal authority. (Tr. 41, 43).

Prior to February 1982, Farrell's vessels called regularly at Savannah, Georgia and Charleston, South Carolina, and less frequently at other U.S. South Atlantic ports. (Tr. 20).

Between February 1983 and April 1983 Farrell vessels did not call at South Atlantic ports. (Ex. 7). Claiming authority under the Agreement and the Agreement's tariff, Farrell accepted cargo for shipment to Mediterranean ports at Savannah, Georgia, Charleston, South Carolina, and other South Atlantic ports, and transported it overland by rail and truck at its own expense to Norfolk or Newport News, Virginia, North Atlantic ports not within the origin ports of the Agreement. Farrell issued port-to-port bills of lading at the South Atlantic ports which were stamped "on board" when the cargo had been loaded onto vessels at North Atlantic ports. (Exs. 7, 8, 11, Tr. 19–20, 35, 117–119, 132–133). Effective April 30, 1983, Farrell withdrew from the Agreement (Tr. 47).

Farrell has on file with the Commission an independent tariff, Farrell Tariff No. 1, FMC No. 136, which became effective May 1, 1983, upon Farrell's withdrawal from the Agreement.[2] It contains rules and rates for port-to-port transportation of cargo between South Atlantic ports and Mediterranean ports by direct or transshipment service. Farrell also has on file Eastbound Intermodal Freight Tariff No. 302, FMC No. 46, pursuant to which, since May 1, 1983, it has transported cargo which it has received at Charleston and Savannah for overland transportation to Norfolk and ocean transport to Mediterranean ports by Farrell vessels.

PLI alleges that Farrell's above-described operation between February, 1982 and April, 1983 was unauthorized by the applicable tariff and thus was in violation of sections 16, 17, and 18(b) (1) and (3) of the Shipping

[2] PLI and the Initial Decision erroneously state that Farrell's independent port-to-port tariff became effective on February 8, 1984. The Commission's tariff filings show that the tariff was several times postponed so as not to become effective prior to Farrell's withdrawal from the Agreement.

Act, 1916, as well as the Commission's tariff filing rules. PLI asks that Farrell be ordered to cease and desist from operating the described service and that "sanctions" be imposed against it. It also seeks cancellation of Farrell's independent tariff and reparation for injury caused by Farrell's alleged violations.

Farrell admits that it carried cargo from South Atlantic ports in the manner described by PLI but maintains it did so under the authority of the Agreement and the Agreement Tariff.

DISCUSSION

The Presiding Officer discontinued the proceeding for PLI's failure to prove by a preponderance of the evidence that Farrell had violated the Shipping Act. The Presiding Officer also found that PLI had not proven that it is entitled to reparation and concluded that the reparation issue had been abandoned since PLI had not pressed it after the first prehearing conference on April 21, 1983.

PLI excepts to the Initial Decision insofar as it finds that no evidence exists that Farrell operated without vessels calling at South Atlantic ports. PLI maintains that record evidence, both documentary and testimonial, is to the contrary. PLI points to Journal of Commerce printouts showing cargo moved by Farrell from Hampton Roads, and Lloyd Register summaries showing no Farrell vessel calls at South Atlantic ports, as well as a bill of lading which shows receipt by Farrell of cargo at Savannah for transportation overland to Norfolk for loading on a Farrell ship for carriage to the Mediterranean. PLI points out that Farrell admits that this was not an isolated incident but rather represents the manner in which all shipments delivered to South Atlantic ports were carried by Farrell during the February, 1982-April, 1983 period.

PLI also excepts to the Presiding Officer's conclusion that it is not entitled to reparation. PLI maintains it is legally entitled to reparation because it would have carried the shipments complained of had not Farrell transported those shipments by rail or truck from South Atlantic ports for loading in North Atlantic ports. PLI expresses uncertainty as to whether the Presiding Officer's finding on the lack of evidence to support an order granting reparation refers to PLI's entitlement to reparation or to the exact quantum of PLI's damages. If the Presiding Officer's finding addresses the exact quantum of damages PLI sustained, PLI asserts that the lack of evidence on this issue results from his refusal to order Farrell to produce documents identifying the shipments in question. In support of this contention PLI excepts to certain rulings of the Presiding Officer, *i.e.:*

(a) The denial of PLI's Motion to Compel Production of Documents or Answers to Interrogatories dated June 23, 1983;

(b) The denial of PLI's Motion to modify the July 26, 1983 Order to Produce Documents dated August 10, 1983;

(c) The denial of PLI's Motion to Postpone the Hearing also dated August 10, 1983;

(d) The denial of PLI's Motion for Sanctions dated August 16, 1983.

Lastly, PLI excepts to the limitation placed on cross-examination of Farrell's witness at the hearing held August 16, 1983 with respect to Farrell's independent port-to-port tariff.

Farrell maintains that both the Agreement and Agreement tariff provide for transportation "either direct or by transshipment," which term has been construed to comprise the transfer of cargo in the manner utilized by Farrell here. It also asserts that the "Alternate Port" service provision of the agreement authorizes its service. Because Farrell admits that from February 1982 through March 30, 1983, it made no direct calls with its vessels at any ports on the U.S. South Atlantic Coast range south of Cape Hatteras, the question before the Commission is whether the overland carriage of cargo from the South Atlantic to the ports of Norfolk and Newport News in the North Atlantic range was lawful.

There is nothing in the Agreement that authorizes Farrell's service here in issue. Article 1, which defines the scope of the trade covered by the Agreement, provides for transportation "either direct or by transshipment *. . . to the extent cargo moves through ports covered by this agreement.*" (Emphasis supplied). Under its service, however, Farrell moves the cargo overland to ports in the North Atlantic range not covered by the Agreement. Farrell's position is that the limitation in the Agreement refers to ports of origin only, and not to intermediate ports of transshipment. The Agreement, however, contains no language to that effect. The words "either direct or by transshipment" in Article 1 of the Agreement are conditioned by the words "to the extent cargo actually moves through ports covered by this agreement."[3] The Agreement tariff could not lawfully expand this scope, because the Agreement's approval limits trading to the area specified in the Agreement.[4] The argument, therefore, that the "either direct or by transshipment" provision of Rule 1A authorizes any transshipment is without merit,[5] especially in light of the Agreement tariff (Rule 13) which

[3] Article 1 in full provides:

The said parties intend, under this agreement, to confer with each other through their representatives and to discuss together in meetings, by telephone conversations or polls or by correspondence, from time to time, all matters pertaining to rates and charges for the carriage of cargo and rules and regulations governing the application thereof and defining the service to be rendered therefor all in connection with such carriage of cargo, either direct or by transshipment, by the parties in the trade from the U.S. South Atlantic ports (including all ports south of Cape Hatteras and including Key West, Florida) to Spanish, Portuguese and Moroccan Atlantic Ports and to ports on the Mediterranean Sea, Black Sea, Sea of Marmara, Adriatic Sea and Gulf of Taranto and to all points in Europe, Morocco and all points in all countries bordering the Mediterranean Sea, Sea of Marmara, Adriatic Sea and Gulf of Taranto, whether moving on a through bill of lading or otherwise, to the extent cargo actually moves through ports covered by this agreement.

[4] *Swift Co.* v. *FMC*, 306 F.2d 277, 280–281 (D.C. Cir. 1962); *Disposition of Container Marine Lines*, 11 F.M.C. 476, 485–492 (1968). *See also, Baton Rouge Marine Contractors* v. *FMC*, 530 F.2d 1062, 1066–1068 (D.C. Cir. 1976).

[5] Rule 1A of the Agreement tariff reads:

precludes the application of the Tariff to shipments "from . . . ports of call outside the scope of this tariff."[6] Farrell concedes that with respect to the trade in question, its vessel actually "calls" only at North Atlantic ports outside the scope of the Agreement.

Moreover, Farrell's service does not appear to be the "Alternate Port" service contemplated in Article 3.2 of the Agreement, because the clear language of that agreement authorizes such service only between "ports of discharge" and only if a tariff establishing such service has been adopted by the members and published.[7] Any "Alternate Port" service here takes place between "origin," not "discharge" ports, and, at any rate, no tariff authorizing any such service has been approved by the members or published.

Because the Agreement did not authorize Farrell's service, the service could not be supported by the Agreement tariff. To the extent that Farrell's service, however described, was not lawfully set forth in a tariff on file with the Commission at the time of the shipments, the proper definition of the service as "transshipment" or "Alternate Port" service is irrelevant. Consequently, Farrell's operation of a transportation service between February 1982 and April 1983 without a proper tariff on file with the Commission and the collection of freight charges on shipments carried without a tariff so on file was in violation of section 18(b) (1) and (3) of the Shipping Act, 1916 (46 U.S.C. § 817).[8] *See Intermodal Service to Portland,*

Rates and conditions herein named apply only to shipments from South Atlantic Ports of the United States including all ports south of Cape Hatteras to and including Key West, Florida either direct or via transshipment to all ports served in Spain, Portugual, Morocco and on the Mediterranean Sea, of the Sea of Marmara and the Black Sea.

[6] Rule 13 of the Tariff states that:

Unless otherwise agreed, rates in this tariff do not apply on shipments moving under thru bills of lading from or to ports of call outside the scope of this tariff.

[7] Article 3.2 of the Agreement provides:

The parties may by majority vote agree upon and file, cancel, or modify tariff provisions permitting, prohibiting or limiting Alternate Port Service by Land. As used herein, "Alternate Port Service by Land" shall mean the movement of cargo by land, at the party's expense, from a port within the scope of this Agreement at which the cargo is discharged from a vessel to a port within the scope of this Agreement named as the port of discharge in the bill of lading. Not withstanding any provision of this Agreement, including Article 2, no party to this Agreement shall perform Alternate Port Service by Land between ports located in different countries. Rules governing Alternate Port Service by Land and the ports at which it is authorized shall be published in the Rate Agreement tariff. There is no "substituted service" rule, as such, in Farrell's independent port-to-port tariff.

[8] Section 18(b)(1) requires:

Every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission . . . tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route . . . Such tariffs shall plainly show the places between which freight will be carried . . .

Section 18(b)(3) states in part:

No common carrier by water in foreign commerce . . . shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property . . . than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time . . .

Oregon, 17 F.M.C. 106, 118–119, 137 (1973); *Cf. Disposition of Container Marine Lines, supra*, 11 F.M.C. at 485–486.

PLI's contentions under sections 16 and 17 of the Shipping Act, 1916, (46 U.S.C. §§815, 816) appear to have been abandoned. (*See* Transcript of Prehearing Conference, July 26, 1983, 14, where PLI's counsel stated: "The allegations in the amended complaint are confined to the 18(b)(1) and (b)(3) violations.") At any rate, its Exceptions to the Initial Decision make no arguments based on any section other than section 18, and the record contains no evidence of anything other than simple tariff violations.

PLI has not been prejudiced by the Presiding Officer's refusal to permit it to cross-examine Farrell's witness with respect to Farrell's service under its independent port-to-port tariff. Farrell represents that it purported to operate during the entire period here in issue under authority of the Agreement tariff, and the record shows that such authority did not exist.

The complainant in a proceeding before the Commission has the burden of proof with respect to each element of its case. See 46 C.F.R. §502.155 (1982); *Boston Shipping Ass'n* v. *FMC*, 706 F.2d 1231, 1239 (1st Cir. 1983). Moreover, an essential element in a complaint's case for reparation is a demonstration of injury and the statutory violation as proximate cause of such injury. See *e.g.*, *West Indies Fruit Co.* v. *Flota Mercante Grancolombiana*, 7 F.M.C. 66, 70 (1962); *Ballmill Lumber & Sales Corp.* v. *The Port of New York Authority*, 11 F.M.C. 494, 510–511 (1968).

PLI bases its claim for reparation solely on its assertion that Farrell's service was unlawful and that but for Farrell's service it would have carried the cargo which Farrell carried. But by PLI's own admission, whether or not PLI would have carried the cargo depended upon what other carriers operated competitive services, what the frequency of those services was, and what PLI's rates were on the particular cargo involved. (*See* Transcript of Prehearing Conference, April 21, 1983, 45–55).

PLI was specifically advised at the first prehearing conference that it would have to establish its entitlement to reparation (Tr. 49–56). PLI knew that it would be difficult for it to establish such entitlement and indicated what was necessary to show that entitlement. (*See* Transcript of Prehearing Conference, April 21, 1983, 45–55). PLI had access to the relevant data with respect to its own operations and the extent to which they competed with those of Farrell, but failed to produce them.

Although Farrell was less than cooperative in furnishing information to PLI, PLI has not been injured by this lack of cooperation. The sole purpose for the information which PLI requested was to prove the extent of the violation. (*See* Motion for Certification and Appeal to the Federal Maritime Commission, August 25, 1983, 3–4). PLI recognized that the materials it requested, even if produced by Farrell, would only have shown the extent of the violation, which we have found to have existed over the entire period in question. (*See* Transcript of Prehearing Conference, April

21, 1983, 45–55; Transcript of Prehearing Conference, July 26, 1983, 14–15).

Untariffed carriage alone does not create injury. See *e.g., Genstar Chemical Ltd.* v. *ICC,* 665 F.2d 1304, 1308–1310 (D.C. Cir. 1981), *cert. denied sub nom. Nitrochem, Inc.* v. *ICC,* 456 U.S. 905 (1982); *Southern Transportation Co.* v. *Norfolk & W. Ry. Co.,* 147 I.C.C. 29, 36–37 (1928); *Increase In Freight Rates and Charges—1973,* 365 I.C.C. 426, 428 (1981); *Lowe Paper Co.* v. *Kaydeross R. Corp.,* 167 I.C.C. 700, 701 (1930). To establish injury, at the very least PLI would have to show that it would have carried the cargo. The record does not show this to be true. In fact, the record indicates the existence of other carriers who may have been able to carry the cargo (see *e.g.,* Tr. 87–93; 95–98). There is, moreover, no necessary causal relationship between a failure to have a lawful tariff on file and a failure of a competitor to carry cargo. Here it is conceded that transportation was carried out at the rates in the Agreement tariff which, although not legally applicable, was on file with the Commission and known to all competing carriers. It is difficult to see how there is any causal connection between the failure to have a valid tariff on file in this instance and PLI's failure to carry the cargo, and PLI must bear the consequences of the failure to show such connection. *Cf. Puget Sound Tug & Barge Co.* v. *Foss Launch & Tug Co.,* 5 S.R.R. 67, 75, 77 (I.D. 1964, subsequently discontinued following withdrawal of complaint); *Prudential Lines, Inc.* v. *Farrell Lines, Inc., et al.,* 26 F.M.C. 497 (1984).

Had PLI at least established that it would have carried the cargo absent Farrell's tariff violations, further inquiry might have been warranted. As provided by our Rules of Practice and Procedure, an opportunity is to be given a complainant to show the extent of reparation to which he is entitled *if* he has established violations, injury, and right to reparation.[9] Here, however, despite adequate opportunity such proof is lacking, and reparation is denied.[10]

CONCLUSION

(1) Farrell's service here in issue is found to have violated sections 18(b) (1) and (3) of the Shipping Act, 1916.

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[9] Title 46 CFR § 502.251, Proof on Award of Reparation, provides:

If many shipments or points of origin or destination are involved in a proceeding in which reparation is sought, the Commission will determine in its decision the issues as to violations, injury to complainant, and right to reparation. If complainant is found entitled to reparation, the parties thereafter will be given an opportunity to agree or make proof respecting the shipments and pecuniary amount of reparation due before the order of the Commission awarding reparation is entered. In such cases, freight bills and other exhibits bearing on the details of all shipments, and the amount of reparation on each, need not be produced at the original hearing unless called for or needed to develop other pertinent facts. [Rule 251.]

[10] Section 22 of the Shipping Act, 1916 (46 U.S.C. § 821) provides in part:

(a) That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water . . . and asking reparation for the injury, if any, caused thereby. The board, . . . may direct the payment . . . of full reparation to the complainant *for the injury caused by such violation.* (Emphasis added).

(2) The present record does not show that PLI is entitled to reparation. Although Farrell is found to have violated section 18 of the Shipping Act, 1916, there has been no showing that there was a causal connection between that violation and any "injury" PLI may have suffered thereby. There is no showing that Farrell's failure to have a lawful tariff on file prevented PLI from carrying the cargo, nor that PLI would have carried the cargo in any case.

(3) No order to cease and desist need be issued. Farrell has withdrawn from the Agreement and no longer utilizes the Agreement tariff. As far as appears from the record herein, it has never utilized its port-to-port tariff, and the service which Farrell presently performs pursuant to its intermodal tariff is not challenged. Farrell is cautioned, however, that its independent port-to-port tariff, which still appears to be in effect, should not be used for services covered by its intermodal tariff, or *vice versa.* The type of tariff applied in any particular instance will, of course, depend upon the contractual arrangements between Farrell and inland carriers. See *e.g., Alaska S.S. Co.* v. *FMC,* 399 F.2d 623 (9th Cir. 1968); *Sea-Land Service, Inc.* v. *FMC,* 404 F.2d 824 (D.C. Cir. 1968); *IML Sea Transit, Ltd.* v. *U.S.,* 343 F.Supp. 32 (N.D. Ca. 1972), *aff'd* 404 U.S. 1002 (1972).

THEREFORE, IT IS ORDERED, That Prudential Lines, Inc., is denied reparation;

IT IS FURTHER ORDERED, That the issuance of a cease and desist order is denied as moot;

FINALLY, IT IS ORDERED That these proceedings are discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1102

APPLICATION OF UNITED STATES ATLANTIC & GULF-JAMAICA AND HISPANIOLA STEAMSHIP FREIGHT ASSOCIATION AND SEA-LAND SERVICE, INC., FOR THE BENEFIT OF UNITED BRANDS FOR CHIQUITA INTERNATIONAL TRADING CO.

ORDER PARTIALLY ADOPTING INITIAL DECISION

June 15, 1984

This proceeding is before the Commission pursuant to Rule 227(d) of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.227(d)) upon its own motion to review the Initial Decision of Administrative Law Judge Charles E. Morgan granting an application to refund freight charges pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)).

BACKGROUND

On November 9, 1983, Sea-Land Service, Inc. (Sea-Land), as a member of the United States Atlantic & Gulf-Jamaica and Hispaniola Steamship Freight Association (Freight Association), filed an application pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.92(a)), on behalf of United Brands of Chiquita International Trading Co., requesting permission to refund $6,181.50 in freight charges on 38 shipments of pineapples. The shipments departed Elizabeth, New Jersey on April 9, April 30, May 7 and May 14, 1983, for Haina, Dominican Republic. Only five of these shipments, those on May 14, 1983, occurred within 180 days of the filing of the petition.

Based upon an alleged "mistaken assumption" that Sea-Land's 35-foot containers had a maximum capacity of 27,000 pounds, the Freight Association established a rate on pineapples of $101 per ton, 27,000 pound minimum, plus ancillary charges. This replaced rates of $130 per ton, any quantity, and $115 per ton, 30,000 pound minimum. These earlier rates included most ancillary charges, and were subject to a maximum charge limit of $1,463 per 35-foot container. Because the maximum loadability of the 35-foot containers is actually over 30,000 pounds, the new rate method resulted in an increase in the shipper's total costs. On May 15, 1983 the base rate was reduced to $91 per ton. The aggregated difference in freight charges on all 38 shipments is $6,181.50.

DISCUSSION

Jurisdiction

The Presiding Officer permitted applicant Sea-Land to refund freight charges on shipments which occurred more than 180-days prior to the filing of the application for refund. He held that such relief is proper "on a stream of shipments provided that some of the later shipments fall within the 180-day period." The Presiding Officer's stated reason for allowing this "relation back" is to prevent discrimination "among shipments," citing *PWC for the Benefit of Minnesota Mining & Manufacturing Co.*, 21 S.R.R. 793 (1982).

In *Minnesota Mining* it was held that section 18(b)(3) special docket relief can be afforded to shipments occurring more than 180-days prior to the filing of an application in order to prevent "discrimination among similarly situated shipments." While that case did address a "stream of shipments," the out-of-time shipments also involved charges due for a general rate increase that was imposed without the required 30-day statutory notice. Accordingly, relief was "technically granted only for the four shipments falling within that [180-day] period of time." 21 S.R.R. at 798.

In *PWC for the Benefit of Mitsui and Co.*, 21 S.R.R. 1275 (1982), the Commission allowed the "intended rate" to "relate back" beyond 180-days prior to the filing of the application to a date when the rate "should have been filed" to avoid any discriminatory treatment of other shippers of the same commodity shipped after the "intended filing" date. The Commission cited *Minnesota Mining* in support of its decision.

The "relation back" theory expressed in *Minnesota Mining* and applied in *Mitsui & Co.* must be limited to preventing discrimination *among shippers.*[1] The Initial Decision here would extend the 180-day period stated in section 18(b)(3) unreasonably. Because the 180-day limit is jurisdictional, relief in this case will be granted only on the five shipments made on May 14, 1983.

Administrative/Clerical Error

The Presiding Officer held that a "mistaken assumption" as to the maximum loadability of a 35-foot container is an administrative error contemplated by section 18(b)(3), citing *Schenectady Midland, Ltd.* v. *Gulf/United Kingdom Conference*, 21 F.M.C. 459 (1978). In that case, the carrier had deleted a tariff item covering a chemical commodity under the "mistaken assumption" that it was covered by another tariff item. The retained tariff item was limited to the chemical shipped "in drums" while the actual shipment was made "in bags." An administrative error contemplated by section 18(b)(3) was found to exist.

[1] As noted by the Presiding Officer here, section 18(b)(3) prohibits discriminatory treatment "among shippers" and not "among shipments."

Whether the "mistaken assumption" relating to the stowage capacity of Sea-Land's 35-foot container is the type of administrative or clerical error contemplated by section 18(b)(3) is a close question.[2] Although the Commission has reservations concerning the alleged error in this case, the Presiding Officer's determination that there was a *bona fide* administrative error will be adopted in light of the liberal interpretation generally accorded special docket cases.

THEREFORE, IT IS ORDERED, That the Initial Decision is reversed with respect to the refund of freight charges on the shipments on April 9, April 30 and May 7, 1983 and adopted in all other respects, and IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

[2] In *South African Marine Corp. for the Benefit of Valmont Int'l. Inc.*, 20 S.R.R. 4 (1980) it was held that, when converting from imperial to metric measure, a rounding off of the metric measurement that "inadvertently" resulted in a higher rate is not an administrative error upon which relief could be granted. The assertion of "inadvertence" was determined to be contrary to the long term tariff practices of the carrier in rounding off measurement conversions. The Commission could, on the basis of Valmont, find that Sea-Land's prior experience with 35-foot containers militates against finding such an error here.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1102

APPLICATION OF UNITED STATES ATLANTIC & GULF-JAMAICA AND HISPANIOLA STEAMSHIP FREIGHT ASSOCIATION AND SEA-LAND SERVICE, INC. FOR THE BENEFIT OF UNITED BRANDS FOR CHIQUITA INTERNATIONAL TRADING CO.

Application for permission to refund a total of $6,181.50 of the applicable freight charges on 38 shipments granted.

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

Partially Adopted June 15, 1984

By application mailed on November 9, 1983, the applicant, Sea Land Service, Inc., for the benefit of United Brands for Chiquita Int'l Trading Co., seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 18(b)(3) of the Shipping Act, 1916 (the Act), to refund a total of $6,181.50 of the applicable freight charges on 38 shipments of pineapples, N.O.S., fresh, from Haina, Dominican Republic, to Elizabeth, New Jersey, sailing dates, April 9, 1983 (five shipments), April 30, 1983 (thirteen shipments), May 7, 1983 (fifteen shipments), and May 14, 1983 (five shipments).

Most of the above shipments occurred more than 180 days prior to the mailing date of this application. Only the last five shipments of the 38 are within the statutory 180-day period. However, the Commission has found, to prevent discrimination among *shipments*, that relief is proper on a stream of shipments provided that some of the later shipments fall within the 180-day period. *Pacific Westbound Conference for the Benefit of Minnesota Mining & Mfg. Co.,* Special Docket Nos. 890 and 893, initial decision served April 7, 1982 (finalized May 14, 1982), 21 SRR 793.

In both the above cited cases and in the present case, all of the shipments were made by *one shipper,* whereas the first proviso of the special docket provision of section 18(b)(3) of the Act refers to refunds or waivers which "will not result in discrimination among *shippers.*" *Emphasis supplied.*

Following the reasoning in Special Dockets 890 and 893 above, all 38 of the present shipments will be considered as subject to the granting of relief under section 18(b)(3) of the Act.

[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).

The United States Atlantic & Gulf-Jamaica & Hispaniola Steamship Freight Association (the Association) joins in the present application.

The applicable rate on the 38 shipments was $101 per ton of 2,000 pounds, TL minimum 27,000 pounds, plus ancillary charges.

These additional charges include a terminal delivery charge of $4 per ton (W), an arrimo charge in the Dominican Republic of $1.50 per 1,000 kilos, a customs charge of $19.75 per shipment, a Dominican documentation charge of $5 per shipment, and a CFS cargo handling charge of $5 per shipment. These ancillary charges listed next above are not in issue, that is, these ancillary charges are the same as originally billed and as sought under this application. All of the shipments weighed either 30,888 pounds or 27,896 pounds each. Thus, the terminal delivery charges were based on either 15.44 tons or 13.94 tons. The shipments weighed either 14.01 kilo tons or 12.65 kilo tons for the computation of arrimo charges.

Another ancillary charge was a gross receipts surcharge of 5.7 percent of the basic freight charges. This charge varies between the charges billed and the charges sought, inasmuch as the sought basic freight rate is $91 per ton of 2,000 pounds, TL minimum 27,000 pounds, plus ancillary charges.

The charges as originally billed, and as sought, are shown in detail for the 38 shipments on Exhibit No. 8. The aggregate charges originally billed and collected on the 38 shipments, based on the basic freight rate of $101 a ton, were $66,467.76, and the aggregate charges sought based on the lower basic freight rate of $91 a ton are $60,286.26. Thus, $6,181.50 is sought to be refunded by this application.

Sea-Land Service is a member of the Association and participates in the Association's tariff No. 4, N.B. SDM-19, F.M.C. No. 4, for shipments from ports in the Dominican Republic to U.S. Atlantic and Gulf Coastal Ports.

Prior to April 8, 1983, the applicable rates on fresh pineapples were $139 per ton (W), any quantity, and $115 per ton (W) in minimum lots of 30,000 pounds, inclusive of all other charges, except arrimo and gross receipts surcharge.

At the April 6, 1983, meeting of the Association, the members agreed to convert the then applicable maximum charges of $1,463 per 35-foot container and $1,776 per 40-foot container, both subject to specified additional charges, to a revenue ton/TL minimum based on the maximum loadability in a 35-foot container, said rate to be published subject to all additional charges.

The maximum loadability for a 35-foot container was stated as 27,000 pounds, and the members approved a rate of $101 on fresh pineapples, minimum 27,000 pounds.

Shortly thereafter, the Association's members realized the maximum loadability of a 35-foot container was 30,888 pounds, not 27,000 pounds, which resulted in an unintentional increase in the shipper's cost.

At the May 5, 1983, meeting, the Association's members rectified their mistaken assumption by agreeing to reduce the rate to $91 a ton (W), minimum 27,000 pounds. This $91 rate was made effective May 15, 1983.

During the period from April 9, 1983, through May 14, 1983, the period in issue herein, the 38 shipments herein sailed.

It is the position of Sea-Land Service and the Association that the members' mistaken assumption as to the maximum loadability of pineapples in a 35-foot container is the type of administrative error contemplated by section 18(b)(3) of the Act. They cite *Schenectady Midland, Ltd.* v. *Gulf/United Kingdom Conference*, 21 F.M.C. 459 (1978), which dealt "with the mistaken assumption that a tariff covered butyl "in bags" as well as "in drums."

Accordingly, Sea-Land Service and the Association request, for the mistaken assumption above, that the rate of $91 a ton (W), TL minimum 27,000 pounds, be allowed to be assessed on all 38 shipments herein, and that permission be granted to refund a total of $6,181.50.

The application contains the statement that there were no other shipments of the same or similar commodity moved by members of the Association during the period in issue herein.

The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by the members of the Association in calculating and publishing the applicable rate of $101 for the shipments herein, whereas their true intention was to calculate and publish the rate of $91; that their intended rate of $91 was published to be effective after the shipments herein moved, and prior to this application; that the application was timely mailed as to five of the 38 shipments, and that the application constructively is considered as timely filed for the other 33 shipments in this continuous stream of shipments herein; and that the authorization of a refund will not result in discrimination among shippers.

The applicant, Sea-Land Service, Inc., is authorized to refund a total of $6,181.50 of the applicable charges on these 38 shipments. An appropriate notice of this matter and of the details of the refund shall be published in the pertinent tariff of the Association.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SUBCHAPTER B—REGULATIONS AFFECTING OCEAN FREIGHT FORWARDERS, TERMINAL OPERATIONS AND PASSENGER VESSELS

[46 CFR PARTS 526, 533, 540, 550 AND 551]

DOCKET NO. 84–18

INTERIM RULES TO IMPLEMENT THE SHIPPING ACT OF 1984

AGENCY: Federal Maritime Commission.

ACTION: Interim Rules and Request for Comments.

SUMMARY: On March 20, 1984, the President signed the Shipping Act of 1984, which will become effective on June 18, 1984. The Commission hereby issues interim rules to implement the Shipping Act of 1984 by its effective date and requests public comment on these rules for the purpose of their potential revision as final rules superseding the interim rules by December 15, 1984. The parts amended (and redesignated) by this rulemaking are Part 526 [free time and demurrage—new part 525]; Part 533 [filing of tariffs by terminal operators—new part 515]; Part 540 [security for the protection of the public on passenger vessels]; Part 550 [filing of tariffs by terminal barge operators in Pacific Slope States—new part 520]; and Part 551 [truck detention at New York—new part 530].

DATES: Interim Rules effective on June 18, 1984. Comments at any time but no later than June 4, 1984.

SUPPLEMENTARY INFORMATION:

The following summarizes the background for this rulemaking, sets forth the intended structure of the subchapter in which these rules will be included, and analyzes related proceedings and the interim rules themselves.

The Shipping Act of 1984; interim authority; request for comments.

The Commission is issuing these interim rules to implement the Shipping Act of 1984, Pub. L. 98–237, 98 Stat. 67 (46 U.S.C. app. 1701–1720), which was signed on March 20, 1984 and becomes effective on June 18, 1984. In order that the Commission can properly implement this major legislation, Congress provided interim rulemaking authority under section 17(b) of that statute which is effective immediately. These rules are issued pursuant to that section in order that the Commission can perform its essential regulatory functions on and after June 18.

The interim authority provided under section 17(b) of the 1984 Act exempts the Commission from compliance with the notice and comment requirements of section 553 of Title 5, United States Code. In order to have its essential regulations in place by June 18, the Commission must utilize this authority bestowed by Congress.

At the same time, however, section 17(b) provides that all rules and regulations issued under the interim authority shall expire no later than 270 days after enactment, i.e., December 15, 1984, unless superseded by final rules which are not exempt from the requirements of 5 U.S.C. 553.

To provide for the basic notice and comment provisions of the Administrative Procedure Act, therefore, the Commission requests comments on these interim rules to assist it in developing final rules to supersede and, where necessary modify, these interim rules by December 15, 1984. Accordingly, the public is provided with thirty days within which to comment on the interim rules but, if anyone believes that there are serious problems created by these rules which should be addressed immediately, the Commission urges them to bring their concerns to the attention of the Commission, without prejudice to subsequently filing additional comments within the thirty day comment period.

Structure: Terminal operations, passenger vessels and freight forwarders.

The implementation of the Shipping Act of 1984 requires the Commission to develop new parts to the CFR. The Commission retains, however, regulatory functions under the revised Shipping Act, 1916, the Intercoastal Shipping Act, 1933 and other statutes, which also must continue to be implemented by regulations. In order to synthesize all of its regulations into a more coherent and usable format and to correct style and typographical errors, the Commission is taking this opportunity to review all of its regulations and to restructure and improve them.

The entire intended reorganization has been set forth in the previous rulemaking for Subchapter A [Parts 500, 501, 502, 503, 504 (Old 547), and 505], as well as in the Commission's press release NR. 84–22. Briefly, however, it provides for all administrative matters to go into Subchapter A; all purely domestic regulations into Subchapter C; all purely foreign matters into Subchapter D; and the rules, here, into Subchapter B, "Regulations Affecting Ocean Freight Forwarders, Terminal Operations and Passenger Vessels".

An interim rule amending Part 510, "Licensing of Ocean Freight Forwarders", is being published separately.

This rulemaking provides full "coverage" of Subchapter P (except for other rulemakings that may be necessary from time to time) by providing the Commission with interim rules, in place by June 18, 1984, for the following new parts, listed in the intended structural organization for Subchapter B:

Part 510 Licensing of Ocean Freight Forwarders (separate rulemaking)

Part 515 Filing of Tariffs by Terminal Operators (Old part 533)

Part 520 Filing of Tariffs by Terminal Barge Operators in Pacific Slope States (Old part 550)

Part 525 Free Time and Demurrage Charges on Import Property applicable to all Common Carriers by Water (Old part 526)

Part 530 Truck Detention at the Port of New York (Old part 551)

Part 540 Security for the Protection of the Public.

The rules in these listed parts attempt to put into place all the Commission's basic regulations for freight forwarders, passenger vessel operators and terminal operations, except for agreements which will be issued later under Subchapter C and/or D.

The Port Inquiry, Docket 83–38.

Oral hearings in various port cities have recently been held in Docket No. 83–38, *Notice of Inquiry and Intent to Review Regulations of Ports and Marine Terminal Operators,* presided over by Commissioner Robert Setrakian.

The issues in that proceeding may eventually affect marine terminal operations, both tariffs and agreements, as well as other matters within the Commission's jurisdiction.

At this time, however, the Commission is issuing these interim rules to ensure that existing Commission surveillance over marine terminal-related practices continues to the extent necessary. Any changes resulting from the marine terminal inquiry will be the subject of later rulemaking(s).

Analysis of the Interim Rules.

While the new organization has been set forth above, the order of the rule changes herein follows current numbering in the CFR (October 1, 1983, edition).

The major change intended to be effectuated by this rulemaking is to provide the Commission with the necessary statutory authority to continue its regulation of terminal-related practices under the Shipping Act of 1984. This we have done in these rules by adding the pertinent provisions of that statute to the "Authority" sections of parts 526, 533, 540, 550, and 551. This results in dual authority for these parts, i.e., the Shipping Act, 1916 (46 U.S.C. app. 801, *et seq.*) for the domestic aspect, and the Shipping Act of 1984 for the foreign aspect.

In providing for the new statute, penalty provisions and other technical language have also been conformed in sections 533.1; 533.2; 533.4; 533.5; and 550.1(c).

For terminal tariffs (part 533), the Commission is continuing to require the filing of such tariffs but has excluded from this requirement the filing of tariffs on forest products, bulk cargo and recyclable metal scrap, waste paper and paper waste (part 533, amendment #5), consistent with sections

8(a)(1) and 8(c) of the Shipping Act of 1984, and the Conference Report on this statute. See H.R. Rep. No. 98–600, 98th Cong., 2nd Sess.

Other amendments herein involve nomenclature changes resulting from reorganizations: Part 533—amendment #2; part 540—amendments #'s 2, 3, 4, 5, 6, 7 and 8.

In part 540, the forms in Appendixes A and B have been slightly revised to reflect organization changes and current language usage.

All other changes in this rulemaking involve minor corrections or redesignations resulting from the reorganization of Title 46, Chapter IV.

The Federal Maritime Commission has determined that this interim rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Federal Maritime Commission certifies that this interim rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

LIST OF SUBJECTS:

46 CFR Parts 526, 533, 550, 551.

Barges; Cargo; Cargo vessels; Harbors; Imports; Maritime carriers; Motor carriers; Ports; Rates and fares; Trucks; Water carriers; Waterfront facilities; Water transportation.

46 CFR Part 540

Rates and fares; Passenger vessels; Surety bonds.

For the reasons set out in the preamble, Parts 526, 533, 540, 550 and 551 of Title 46 of the Code of Federal Regulations are amended as follows:

1. Revise the title of Subchapter B to read: "SUBCHAPTER B—REGULATIONS AFFECTING OCEAN FREIGHT FORWARDERS, TERMINAL OPERATIONS AND PASSENGER VESSELS"

Amend and redesignate the following parts in Subchapter B as follows:

PART 526—FREE TIME AND DEMURRAGE CHARGES ON IMPORT PROPERTY APPLICABLE TO ALL COMMON CARRIERS BY WATER

1. In Part 526, the authority citation appearing after the table of contents is revised to read as follows and all other authority citations are removed.

> AUTHORITY: 5 U.S.C. 553; secs. 17 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 816, 841a); secs. 10 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709 and 1716).

2. In § 526.1(c), remove "§§ 551.3(e)(2), 551.4(e), and 551.4(g) of Part 551" and insert "§§ 530.3(e)(2), 530.4(e), and 530.4(g) of this Chapter".

3. Part 526 of 46 CFR, Chapter IV, is redesignated as Part 525 and all internal references are changed.

PART 533—FILING OF TARIFFS BY TERMINAL OPERATORS

1. In Part 533, add O.M.B. clearance numbers and revise the authority section to read as follows:

> AUTHORITY: 5 U.S.C. 553; secs. 17, 21, 43 of the Shipping Act, 1916 (46 U.S.C. app. 816, 820, 841a); secs. 10, 15, 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709, 1714, 1716). [The Information collection requirements contained in this part have been approved under O.M.B. number 3072–0002.]

2. In Part 533, remove "Bureau of Domestic Regulation" everywhere it appears and Insert "Bureau of Tariffs".

3. Amend § 533.1, by removing "in the foreign commerce of the United States or in interstate commerce on the high seas or the Great Lakes." and inserting.

"in the foreign or domestic offshore commerce of the United States."

4. § 533.2 is revised to read:

> § 533.2 Purpose
>
> The purpose of this part is to enable the Commission to discharge its responsibilities under section 17 of the Shipping Act, 1916 and section 10 of the Shipping Act of 1984, by keeping informed of practices, rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices. Compliance is mandatory and failure to file the required tariffs may result in a penalty of not more than $5,000 for each day such violation continues. Additionally, if willful and knowing, the Shipping Act of 1984 provides a civil penalty of not more than $25,000 for each day a violation continues.

5. In § 533.3, add at the beginning the following:

> "Except with regard to bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste,"

6. Amend § 533.4 by removing "agreements approved pursuant to section 15" and inserting:

> "agreements approved pursuant to section 15 of the Shipping Act, 1916 and/or effective under section 6 of the Shipping Act of 1984."

7. Amend § 533.5 by removing "approved section 15 agreements" and inserting:

> "agreements approved under section 15 of the Shipping Act, 1916 and/or effective under section 6 of the Shipping Act of 1984."

8. Part 533 of 46 CFR, Chapter IV, is redesignated as Part 515.

9. Redesignate all internal cross-references to sections of present part 533 as cross references to the same numbered sections of new part 515. Such cross-references are found in §§ 533.3 and 533.4.

PART 540—SECURITY FOR THE PROTECTION OF THE PUBLIC

1. In Part 540, add O.M.B. clearance numbers and the authority citation appearing after the table of contents is to read as follows and all other authority citations are removed.

> AUTHORITY: 5 U.S.C. 552, 553; secs. 2 and 3, Pub.L. 89–777, 80 Stat. 1356–1358 (46 U.S.C. app. 817e, 817d); sec. 43 of the Shipping Act, 1916 (46 U.S.C. app. 841a); sec. 17 of the Shipping Act of 1984 (46 U.S.C. app. 1716).
>
> [The information collection requirements contained in this part have been approved under O.M.B. numbers 3072–0011 and 3072–0012.]

2. In Part 540, Remove "Bureau of Investigation and Enforcement" everywhere it appears and insert "Bureau of Hearing Counsel".

3. In § 540.4(a), in the last sentence, remove "and" and the period and add at the end:

> Miami, Fla.; Los Angeles, Calif.; Hato Rey, P.R.; and Chicago, Ill.

4. In § 540.5(a)(1), remove "1321 H Street, N.W." and insert "1100 L Street, N.W."

5. Remove paragraph § 540.9(i).

6. In § 540.23(a), in the last sentence, remove "and" and the period and add at the end:

> Miami, Fla.; Los Angeles, Calif.; Hato Rey, P.R.; and Chicago, Ill.

7. In § 540.24(a)(1), remove "1321 H Street, N.W." and insert "1100 L Street, N.W."

8. Remove paragraph § 540.27(i).

9. Part 540, APPENDIX A, is revised to read:

APPENDIX A—EXAMPLE OF SETTLEMENT AGREEMENT TO BE USED UNDER 46 CFR §§ 540.30–540.36

SETTLEMENT AGREEMENT FMC FILE NO._____

This Agreement is entered into between:

(1) the Federal Maritime Commission and,

(2) _____ hereinafter referred to as respondent.

WHEREAS, the Commission is considering the institution of an assessment proceeding against respondent for the recovery of civil penalties provided under the _____ Act _____, for _____ alleged violation(s) of Section(s)_____.

WHEREAS, this course of action is the result of practices believed by the Commission to have been engaged in by respondent to wit;

_____

_____

WHEREAS, the parties are desirous of expeditiously settling the matter according to the conditions and terms of this Agreement and wish to avoid the delays and expense which would accompany agency litigation concerning these penalty claims; and,

WHEREAS, Section _____ of the _____ Act _____ authorizes the Commission to collect and compromise civil penalties arising from the alleged violation(s) set forth and described above; and,

WHEREAS, the respondent has terminated the practices which are the basis of the alleged violation(s) set forth herein, and has instituted and indicated its willingness to maintain measures designed to eliminate, discourage and prevent these practices by respondent or its officers, employees and agents.

NOW THEREFORE, in consideration of the premises herein, and in compromise of all civil penalties arising from the violation(s) set forth and described herein that may have occurred between (date) _____ and (date) _____, the undersigned respondent herewith tenders to the Federal Maritime Commission a bank cashier's check in the sum of $_____, upon the following terms of settlement:

1. Upon acceptance of this agreement of settlement in writing by the Director of the Bureau of Hearing Counsel of the Federal Maritime Commission, this instrument shall forever bar the commencement or institution of any assessment proceeding or other claims for recovery of civil penalties from respondent arising from the alleged violations set forth and described herein, that have been disclosed by respondent to the Commission and that occurred between (date) _____ and (date) _____.

2. The undersigned voluntarily signs this instrument and states that no promises or representations have been made to the respondent other than the agreements and consideration herein expressed.

3. It is expressly understood and agreed that this Agreement is not to be construed as an admission of guilt by undersigned respondent to the alleged violations set forth above.

4. Insofar as this agreement may be inconsistent with Commission procedures for compromise and settlement of violations, the parties hereby waive application of such proeedures.

(S) By: _____

Title: _____

Date: _____

Approval and Acceptance

The above Terms and Conditions and Amount of Consideration are hereby Approved and Accepted:

By the Federal Maritime Commission:

(S)_____
(Hearing Counsel)

_____
Director, Bureau of Hearing Counsel

Date _____

10. Part 540, Appendix B is revised to read:

APPENDIX B—EXAMPLE OF PROMISSORY NOTE TO BE USED UNDER 46 CFR § 540.36
PROMISSORY NOTE CONTAINING AGREEMENT FOR JUDGMENT
FMC FILE NO._____

For value received, _____ promises to pay to the Federal Maritime Commission (the Commission) the principal sum of $_____($_____) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

$_____($_____) within _____ months of execution of the settlement agreement by the Director of the Bureau of Hearing Counsel;

$_____($_____) within _____ months of execution of the agreement;

$_____($_____) within _____ months of execution of the agreement;

[Further payments if necessary]

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 of this execution of this Promissory Note by the Director of the Bureau of Hearing Counsel, and be computed at the rate of [_____percent (_____%) per annum.]

If any payment of principal or interest shall remain unpaid for a period of ten (10) days after becoming due and payable, the entire unpaid principal amount of this 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 this Promissory Note, (Respondent)_____ does hereby authorize and empower any U.S. attorney, any of his assistants or any attorney of any court of record, Federal or State, to appear for him, and to enter and confess judgment against (Respondent) _____ 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 (Respondent) _____ 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.

(Respondent)_____ 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 Respondent by bank cashier's or certified check at any time, provided that approved interest on the principal amount prepaid shall be paid at the time of the prepayment.

(S) By:_____

Title: _____

Date: _____

PART 550—FILING OF TARIFFS BY TERMINAL BARGE OPERATORS IN PACIFIC SLOPE STATES

1. From table of contents, remove "§ 550.3 Effective Date".

2. In Part 550, the authority citation appearing after the table of contents is revised to read as follows and all other authority citations are removed.

AUTHORITY: 5 U.S.C. 553; secs. 18(a) and 43 of the Shipping Act, 1916 (46 U.S.C. app. 817(a) and 841(a)); sec. 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 844); and secs. 8 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707 and 1716).

3. In § 550.1(c), remove the period and add at the end:

"and/or the Shipping Act of 1984."

4. In § 550.2(a), remove "General Order 13 (46 CFR Part 536)" and insert "part 580 of this Chapter".

5. In § 550.2(b), remove "Tariff Circular 3 (46 CFR Part 531)" and insert "part 550 of this Chapter".

6. Remove § 550.3.

7. In § 550.2(c), remove "§ 550.2(a)" and insert "520.2(a)".

8. Part 550 of 46 CFR, Chapter IV, is redesignated as Part 520 and all internal references are changed.

PART 551—TRUCK DETENTION AT THE PORT OF NEW YORK

1. In part 551, add O.M.B. clearance numbers and revise the authority section to read as follows:

AUTHORITY: 5 U.S.C. 553; secs. 17 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 816 and 841a); secs. 10 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1709 and 1716).

[The information collection requirements contained in this part have been approved under O.M.B. number 3072–0010.]

2. In § 551.3(e)(1), remove "General Order 8, § 526.1(c)" and insert "§ 525.1(c) of this Chapter".

3. In § 551.7(e), remove "§ 551.4(1)" and insert "§ 551.4(i)".

4. Part 551 of 46 CFR, Chapter IV, is redesignated as Part 530.

5. Redesignate all internal cross-references to sections of old part 551 as cross references to the same numbered sections of new part 530. Such cross-references are found in §§ 551.1(m), 551.2(b)(11), 551.2(c)(14); 551.2(g); 551.3(c)(2); 551.3(d)(1); 551.3(d)(2); 551.4(c); 551.4(d); 551.5(b); 551.6(a) [two references]; 551.7(b); 551.7(c); 551.7(d); 551.7(e) [two references]; 551.7(g); and 551.8(e)(1) [three references].

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 510]

[GENERAL ORDER 4, REVISED, DOCKET NO. 84–19]

LICENSING OF OCEAN FREIGHT FORWARDERS

AGENCY: Federal Maritime Commission.

ACTION: Interim Rules and Request for Comments.

SUMMARY: On March 20, 1984, the President signed the Shipping Act of 1984, which will become effective June 18, 1984. The Commission hereby issues interim rules and requests comments on those changes to its General Order 4 (46 C.F.R. Part 510) that are required by the new legislation. Also included herein are interim rules revising certain other sections of General Order 4 which the Commission had under consideration at the time the Shipping Act of 1984 was signed.

DATES: *Effective Date:* Interim Rules effective June 18, 1984. Comments due on or before June 4, 1984.

SUPPLEMENTARY INFORMATION:

On March 20, 1984, the President signed the Shipping Act of 1984, which will become effective June 18, 1984. This legislation substantially alters the regulatory responsibilities of the Commission and directly impacts on the Commission's regulations pertaining to the ocean freight forwarding industry, General Order 4. A number of changes to General Order 4 are required by this new legislation. While most of the changes are technical in nature, some will have a significant impact on the industry.

Last August, the Commission issued a notice of proposed rulemaking in the *Federal Register* (48 F.R. 167 at p. 38856, Docket No. 83–35) proposing to revise certain provisions of General Order 4. In response to that notice, comments were received and evaluated by the staff. In view of the new legislation recently signed, the Commission has withheld adoption of final rules concerning those proposed changes noticed last August, and the Commission will again notice them as interim rules, as amended herein, for additional possible comment along with the changes required by the new legislation. It should be noted that the comments submitted in Docket No. 83–35, Proposed Revisions to General Order 4, will be incorporated into the record of this proceeding and it will not be necessary for commenters to submit their previous comments again in connection with this rulemaking proceeding.

The Commission's ultimate goal will be a single, comprehensive rule which will include all amendments required by new legislation as well as the changes noticed last August.

So as not to confuse issues, we discuss the changes to General order 4 required by new legislation under Part A, "Legislative Changes," of the Supplementary Information. In Part B, "Other Changes," we discuss the proposals previously noticed last August.

These interim rules will take effect on June 18, 1984, the effective date of the Shipping Act of 1984. If individuals believe that there are serious problems created by these interim rules which should be addressed immediately, they are free to bring their concerns to the attention of the Commission without prejudice to subsequently filing additional comments within the thirty day comment period. In any event, all interested parties have been provided thirty days to comment on the interim rules.

PART A—LEGISLATIVE CHANGES

The Shipping Act of 1984 has made several substantial changes in the regulation of the forwarding industry. The definition of an ocean freight forwarder is changed to mean any person in the United States who dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and processes the documentation or performs related activities incident to those shipments. Thus, there will be no prohibition against export shippers, sellers, consignees and purchasers of goods from the United States obtaining an ocean freight forwarder license as there currently is. Any class of person can obtain a license as an ocean freight forwarder if found qualified.

The qualifications for licensing will be changed from a fit, willing and able standard to an experience and character standard. We see, however, no great difference between the two standards. It appears that someone found unfit under the old standard would not possess the proper character to be licensed under the new standard.

The Commission will be able to revoke or suspend a license, after notice and hearing, where it finds that an ocean freight forwarder is not qualified to render forwarding services, or that it willfully failed to comply with a provision of the new Act or with a lawful order, rule, or regulation of the Commission (this would also include failure to honor financial obligations to the Commission such as for civil penalties). The Commission may also revoke a license for failure to maintain a surety bond. Again, we see no drastic differences between the old law and the new law in this area.

The payment of ocean freight forwarder compensation is still the prerogative of the carrier, although no conference or group of two or more carriers may deny in the export foreign commerce of the United States compensation to a forwarder or limit that compensation to less than a reasonable amount. On the issue of what is "reasonable", the Conferees' report accompanying the new legislation states:

> Rather than specify the limitation at 1¼ percent of the freight charge, as was done in the Senate version, the Conferees agree to proscribe any denial of compensation at less than a reasonable amount. "Reasonable" has been determined by the Federal Maritime Commission in those cases at which limitation of compensation was at issue to be no less than 1¼ percent. The Conferees view the approach taken by the Federal Maritime Commission as consistent with their continuing regulatory responsibility and assume that the Commission will be guided by its past actions when determining what a reasonable amount" will be.

An ocean freight forwarder is still required to provide the carrier with a certification that it is entitled to the payment of compensation. However, the form of the certification has been changed to require that the forwarder (1) engage, book, secure, reserve, or contract directly with the carrier or its agent for space aboard a vessel or confirm the availability of that space, and (2) prepare and process the ocean bill of lading, dock receipt, or other similar document with respect to the shipment. Carriers may not pay compensation for services described above more than once on the same shipment. Compensation may only be paid in accordance with the carrier's tariff provisions. No ocean freight forwarder may receive compensation on a shipment on which the ocean freight forwarder has a direct or indirect beneficial interest.

Section 20 of the new legislation, Repeals and Conforming Amendments, does not provide for the licensing of forwarders in the U.S. domestic off-shore trades. Hence, a person engaging in the business of ocean freight forwarding in the U.S. domestic off-shore trades will not be required to obtain a license from the Commission. Furthermore, General Order 4 (Part 510) will not apply to such activity.

The foregoing briefly outlines how the new legislation will impact on the forwarding industry. The Commission's regulations require changes to implement the new legislation. What follows is identification of the changes, section-by-section, required in General Order 4 to conform it with the new legislation. There are, however, several changes which occur throughout the rule that are better dealt with apart from the section-by-section analysis. These are:

1. Reference to "Independent Ocean Freight Forwarder" shall be changed to "Ocean Freight Forwarder".
2. Reference to the "Shipping Act, 1916" shall be changed to the "Shipping Act of 1984".
3. References to specific sections of the Shipping Act, 1916 shall be changed to the appropriate sections of the Shipping Act of 1984.
4. Reference to "oceangoing common carrier" shall be changed to "common carrier".

5. Reference to "Bureau of Certification and Licensing" shall be changed to "Bureau of Tariffs". This is required by internal reorganization and not by new legislation.
6. Any reference to the U.S. domestic off-shore trades shall be deleted.
7. The Authority shall be The Shipping Act of 1984.

Section 510.1 Scope

In paragraph (b), add language indicating that if a violation is willfully and knowingly committed the amount of the civil penalty may not exceed $25,000 for each violation. Also revise the lower range of penalties to specify such penalty may not exceed $5,000 instead of $1,000.

Add language to provide that each day of a continuing violation shall constitute a separate offense.

Section 510.2 Definitions

Add a definition for common carrier" as defined in the Shipping Act of 1984 (The Act). This term will include both vessel-operating common carriers and non-vessel-operating common carriers.

Delete the definition for "freight forwarder" as it is not necessary.

Amend paragraph (i) by eliminating reference to the domestic trades.

Delete the language in paragraph (j) and replace it with the definition of "ocean freight forwarder" contained in The Act.

Amend paragraph (l) so it comports with the definition of a non-vessel-operating common carrier contained in The Act.

Substitute the definition for "ocean common carrier" in The Act for the language contained in paragraph (n).

Add the definition for "shipment" in The Act.

Add the definition for "shipper" in The Act.

Substitute the definition of the "United States" in The Act for the language contained in paragraph (s).

Section 510.11 Basic requirements for licensing: eligibility

Amend paragraph (a) to indicate that the basic requirement will now be experience and character of the applicant and the filing of an appropriate bond.

Section 510.12 Persons not eligible

Delete the entire section as it is no longer necessary.

Section 510.14 Investigation of applicants

Delete the phrase "and independence" in paragraph (c).

Delete paragraph (e).

Section 510.15 Surety bond requirements

Delete the language contained in the third sentence in paragraph (a) and substitute statutory language that the surety company be acceptable by the Secretary of the Treasury.

Section 510.16 Denial of license

Amend the language so that the grounds will now be:

1. does not possess the necessary experience or character to render forwarding services;
2. has failed to respond to any lawful inquiry of the Commission; or
3. has made any willfully false or misleading statement to the Commission in connection with its application.

Section 510.17 Revocation or suspension of license

In subparagraphs (a)(l) and (a)(2), add "order" of the Commission. In subparagraph (a)(4), amend the language to indicate that a ground for revocation or suspension shall be where the Commission finds the licensee is no longer qualified to render freight forwarding services. Delete language in subparagraph (a)(5) and substitute language regarding a licensee's financial obligations to the Commission.

Section 510.18 Application after revocation or denial

Delete any reference to "unfit" or "lack of fitness" contained in this section and substitute "not qualified" or some variations thereof.

Section 510.19 Issuance and use of license

Amend language of this section by deleting references to fit, willing and able and substitute the necessary experience and character criteria. Also add language concerning the filing of the required surety bond.

Section 510.20 Changes in organization

Delete reference to "see section 15 of the Act" contained in paragraph (a)(6).

Section 510.21 Branch offices; interim operation

Although not affected by the new legislation, this section is no longer necessary, thus it will be deleted.

Section 510.32 Forwarder and principal; fees

Paragraph (a) is deleted as under the new legislation this prohibition will no longer be applicable.

Section 510.33 Forwarder and carrier; compensation

In paragraph (a), delete the first sentence. Amend the remaining language to clarify that the identity of the actual shipper must be disclosed on the bill of lading and in instances where the licensee is not also the actual shipper, the licensee's name may appear after the shipper's name.

In paragraph (c) amend the language of the certification to comply with the language contained in the new legislation.

In paragraph (d) add language that conferences or groups of carriers shall not deny compensation or limit the level to less than a reasonable amount.

In paragraph (f) amend language so it comports with the language contained in the new legislation.

In paragraph (9) make several technical changes to clarify that it applies only to non-vessel-operating carriers.

Section 510.35 Reports required to be filed

Paragraph (a) currently requires each licensee to file copies of its office stationery and invoice forms within sixty days of licensing. Although not affected by the new legislation, we do not believe that this requirement is necessary and, in order to reduce the burden on the industry, we are deleting the requirement.

In view of the proposed deletion of section 510.36 (see below), paragraph (b) of section 510.35 is deleted, as it contains reference to section 510.36.

Section 510.36 Section 15 Agreements

Under the new legislation, forwarders are not required to file any of their agreements in the U.S. foreign commerce with the Commission. Thus, this section is deleted in its entirety.

PART B—OTHER CHANGES

As indicated earlier, the changes discussed under this part were originally noticed for comment last August. In its notice of proposed rulemaking, the Commission had proposed nine areas of change to the current rules. Our discussion addresses the comments on each area of change separately and, in accordance therewith, we are adopting interim rules along with the changes discussed under Part A that are required by new legislation.

1. *Protecting the Shipping Public*

(The language changes for the specific rules addressed under this topic appear in Amendments Nos. 11 (section 510.13(e)) and 20 (section 510.31(b).)

The Commission proposed that forwarders who are affiliated with export shippers or sellers of goods from the United States be required to give notice on their office stationery and billing invoices that they are affiliated with one or more shippers or sellers of goods from the United States

and, upon request, the forwarder would be required to identify such affiliations in writing. It was the Commission's belief that such notification would give potential clients the opportunity to choose whether or not to employ certain forwarders who may be controlled by or otherwise affiliated with a potential competitor of the client.

The comments generally favor the proposal and support the intent of the Commission in proposing the change. Two forwarders, however, oppose the proposal. Davidson Forwarding Company, (FMC License No. 1086) believes that the proposal would harm small forwarders which have no shipper affiliations. This forwarder feels that shippers would lean more toward forwarders that are affiliated. It suggests that forwarders be required to make annual certifications stating their affiliations similar to the annual anti-rebate certification. NAVTRANS International Freight Forwarding, Inc. (FMC License No. 2522) argues that the prohibition contained in section 20 of the Shipping Act, 1916, which prohibits the disclosure of any information concerning a shipment which may be used to the detriment of the shipper/consignee or may improperly disclose the business transaction to a competitor, is sufficient and, in the absence of any showing to the contrary, it would seem somewhat capricious at best to simply dismiss section 20 of that Act as ineffectual or insufficient. It sees the proposal as an attempt to artificially restrain competition among freight forwarders.

With respect to NAVTRANS' argument that section 20 of the 1916 Act is sufficient to protect the shipping public, we would point out that the Shipping Act of 1984 contains no counterpart for section 20 of the 1916 Act which pertains to ocean freight forwarders. Hence, the notification of shipper affiliations becomes all that more important in alerting unknowing shippers that the forwarder they deal with may be a potential competitor. Furthermore, in light of the removal of the prohibition against shippers obtaining an ocean freight forwarder license by the new legislation, we are modifying our proposal to require notification of the fact that the forwarder is an export shipper.

The National Customs Brokers & Forwarders Association of America, Inc. (hereinafter referred to as the National Association) has suggested a further revision to the notice requirement proposal. It recommends that the Commission require that the type size for the notice be the same as other portions of the forwarder's stationery. It fears that forwarders will put the notice in the smallest type possible. We do not believe the National Association's suggestion is practical as a forwarder's stationery may contain several different type sizes. Thus, we will not adopt the suggestion in our revised rule.

Also in this area, the Commission proposed to amend the rules to require forwarders to report to the Commission any changes in fact contained in the forwarder's original application form within thirty days. This rule is meant to rectify an oversight that occurred when the rules were revised in 1981. No commenter objected to the proposal.

In view of the favorable comments submitted regarding the proposals in this area, we will adopt the proposals, as modified above.

2. *The Invoicing Rules*

(See Amendments Nos. 21 (section 510.32(h) and 23 (section 510.34(b))

With regard to the invoicing rules, the Commission proposed three alternatives: (a) retain the current rules with no change; (b) delete the rules entirely; or (c) any modification falling between alternatives (a) and (b), including a rule that would allow a forwarder to provide a lump sum invoice but, at the same time, require the forwarder, upon request of its principal, to provide copies of any or all pertinent documents (such as invoices for trucking, warehousing, insurance, etc.) pertaining to the forwarder's invoice.

No commenter supported alternative (a), i.e., make no change. The overwhelming sentiment was that the Commission should delete all requirements pertaining to how forwarders should invoice their clients. Given the possibility that the Commission probably would not adopt final rules which would eliminate the invoicing rule, the commenters generally support changes in the current rules which would allow forwarders to provide lump sum billing with no breakout of costs. Further, it is suggested by the commenters that, where a forwarder chooses to utilize an itemized invoice, the forwarder be allowed to show only the total cost to the client for accessorial services, such as inland freight, insurance, warehousing, etc., instead of having to break out the forwarder's cost for the accessorial service and its markup on the accessorial service.

We are amending the current invoicing rule to permit forwarders to provide lump sum billing on their invoices to their shipper-clients without breaking out specific costs.

However the rule will require that the forwarder, upon request of its shipper-client, must provide a break out of costs and a copy of any pertinent document relating to the invoice, for example, invoices from third parties. We also are requiring a notice to this effect be placed on each invoice the forwarder renders to its shipper-clients. We believe the shipper-client should have a way of determining for itself whether the charges billed by the forwarder are reasonable and acceptable to it.

Additionally, to make it clear which particular documents a forwarder is required to retain in its files, we are amending section 510.34(b) to identify more specifically the types of documents, such as invoices for any service arranged by the forwarder and performed by others, that are to be retained by the forwarder.

3. *Sale or Transfer of Stock*

(See Amendment No. 18 (section 510.20(a)(5))

Section 510.20(a)(5) currently requires the Commission's prior approval of the sale or transfer of five percent or more of a forwarder's stock

to ensure that licensees remain independent of shipper connections. With the passage of the Shipping Act of 1984, the need for the prior approval of sale/transfer of stock in a forwarder no longer exists, as forwarders are allowed by law to be shippers or shipper-connected. Therefore, we are deleting this requirement.

We would point out that forwarders will still be required to notify the Commission of any stock sale or transfer for our information under the adopted revision discussed earlier. See revised section 510.13(e).

4. *Arrangements with Unauthorized Persons*

(See Amendment No. 20 (section 510.31(e))

It was proposed to clarify section 510.31(e) to allow forwarders to hire and compensate bona fide sales agents for services rendered, provided that such services are restricted to soliciting and obtaining business for the forwarder and are not otherwise prohibited by law or regulation. Also, the Commission wished to clarify that the rule's intent is that when a forwarder is employed for the transaction of forwarding business by a person who is not the person responsible for paying the forwarding charges, the forwarder shall transmit to the person paying the forwarding charges a copy of its invoice for services rendered.

Comments received on the proposed clarifications were favorable. Hence, we adopt these clarifications as interim rules.

5. *Anti-Rebate Certification*

(See Amendments Nos. 20 (section 510.31(h) and 22 (section 510.33(c))

To obtain as much comment as possible, the Commission proposed two alternatives dealing with the issue of requiring forwarders to place an anti-rebate policy declaration on each invoice to a shipper-client and on each certification for freight forwarder compensation to an oceangoing common carrier: First, that no change be made in the current rule as it serves to reinforce the Commission's policy against rebates among carriers, forwarders and shippers and, second, that the rule be deleted leaving only the annual certification as suggested by the National Association.

Comments on the proposals support the deletion of the rule as it is perceived as burdensome to stamp each such document. The National Association further argues that Shipping Act, 1916, does not require forwarders to continuously certify an anti-rebate policy. It is generally felt by the commenters that the annual certification is sufficient. One forwarder, however, did suggest that the annual certification requirement be deleted and that the supposed burden of stamping each document can be alleviated by simply having documents preprinted with the required statement.

We agree with the one forwarder's comment that if the notice is preprinted there is no continual burden, and we would urge all forwarders to have their documents preprinted. This policy declaration is but one means of insuring that the Commission's policy against rebates is dissemi-

nated to unknowing shippers and it is consistent with the intent of section 15 of the new legislation. However, we do not believe it is necessary for forwarders to declare this policy to carriers, as the carriers are fully aware of the Commission's policy; in fact, carriers file annual certifications similar to those filed by forwarders. Therefore, we are amending section 510.31(h) to the extent that forwarders now be required to provide the anti-rebate policy declaration only to their shipper-clients and not additionally to carriers. We would point out that, in view of the foregoing rule, a conforming amendment to section 510.33(c) will be necessary to delete the reference to section 510.31(h) contained therein, and it is, therefore, included.

We would emphasize that the change here would not in any way affect the annual anti-rebate certification as each forwarder will still be required to file its annual certification of its policies against rebating as required by section 510.35(c) of General Order 4.

6. *Accounting to Principal*

(See Amendment No. 21 (section 510.32(k))

In lieu of requiring forwarders to obtain written consent to offset funds on each and every shipment, the Commission proposed that the forwarder either execute a written agreement with its principal which would allow the forwarder to offset funds on all of the principal's shipments, or obtain oral consent on each shipment.

The general view of the comments on this issue is best expressed by the comments of the National Association. It is argued that the licensing statute did not create a fiduciary relationship with the exporter and that the forwarder should not be considered as an agent of the shipper but rather as an independent contractor. The forwarder should be allowed to offset funds without the principal's consent just like other business persons. It adds, however, that if the Commission does not agree with its position, it would support the proposed changes.

We see the interim rules here as a compromise between retaining the current rule and doing away with the requirement entirely. As such, we believe that the changes will benefit all parties involved as they provide the forwarder with an option that can be employed as conditions dictate and, in the case of a written agreement, they leave no doubt between a forwarder and its client of what can be expected in situations concerning offsetting obligations.

7. *Section 15 Agreements, Exemptions*

(See Amendment No. 27 (section 510.36))

The Commission had earlier proposed to amend the rules to delete the requirement that non-exclusive cooperative working agreements between forwarders be reduced to writing.

In view of the fact that agreements between forwarders are not required to be filed with the Commission under the new legislation, we have decided earlier to delete section 510.36 in its entirety.

8. *Port-Wide Exemptions*

(See Amendment No. 22 (section 510.33(e))

The Commission proposed to modify section 510.33(e) to allow compensation to be paid to a forwarder who requests that the carrier or its agent perform some of the forwarding functions, if such carrier or agent is a licensed independent ocean freight forwarder, or if no other licensee is willing and able to perform such services. With this allowance, the current port-wide exemption provision contained in the section would be unnecessary and hence would be deleted.

Comments directly addressing this issue favor the proposed changes. Several commenters apparently did not understand completely the intent of the current rule and they strayed off onto a discussion of why carriers and agents should not be licensed.

In view of the favorable comments, we are adopting the proposed changes.

9. *Publication of Orders of Revocations*

(See Amendment No. 15 (section 510.17(c))

The Commission proposed that, instead of publishing the entire order of revocation in the *Federal Register*, a simple notice of such action be published.

The comments support this change. Therefore, we adopt the proposal.

Pursuant to 5 U.S.C. 601 *et seq.*, the Commission certifies that the interim rules published herein will not have a significant economic impact on a substantial number of small entities. The interim rules are intended to bring the Commission's regulations in line with new legislation. Further, they tend to lessen the regulatory burden upon the forwarding industry and they should have a cost-saving impact on daily operations.

Collection of information requirements contained in this regulation have been approved by the Office of Management and Budget under provisions of the Paperwork Reduction Act of 1980 (P.L. 96–511) and have been assigned control numbers 3072–0004 and 3072–0018.

List of Subjects in 46 CFR part 510:

Freight forwarders, Maritime carriers, Rates, Surety bonds, Exports.

THEREFORE, pursuant to 5 U.S.C. 553; sections 8, 10, 15, 17 and 19 of the Shipping Act of 1984 (46 U.S.C. app. 1707, 1709, 1714, 1716 and 1718), the Commission is amending 46 CFR Part 510, as follows:

1. In part 510, add O.M.B. clearance numbers, and the authority citation appearing after the table of contents is revised to read as follows and all other authority citations are removed.

AUTHORITY: 5 U.S.C 553; secs. 8, 10, 15, 17 and 19 of the Shipping Act of 1984 (46 U.S.C. app. 1707, 1709, 1714, 1716 and 1718).

[The information collection requirements contained in this part have been approved under O.M.B. numbers 3072–0004 and 3072–0018.]

2. References to "Independent Ocean Freight Forwarder", wherever they appear, shall be changed to "Ocean Freight Forwarder".

3. References to "Shipping Act, 1916", wherever they appear, shall be changed to "Shipping Act of 1984".

4. References to "Oceangoing Common Carrier", wherever they appear, shall be changed to "Common Carrier".

5. References to "Bureau of Certification and Licensing", wherever they appear, shall be changed to "Bureau of Tariffs".

6. In § 510.1, paragraph (b) is revised to read as follows:

§ 510.1 Scope.

* * * * *

(b) Information obtained under this part is used to determine the qualifications of freight forwarders and their compliance with shipping statutes and regulations. Failure to follow the provisions of this part may result in denial, revocation or suspension of a license for freight forwarding. Persons operating without the proper license may be subject to civil penalties not to exceed $5,000 for each violation unless the violation is willfully and knowingly committed, in which case, the amount of the civil penalty may not exceed $25,000 for each violation; for other violations of the provisions of this part, the civil penalties range from $5,000 to $25,000 for each violation. Each day of a continuing violation shall constitute a separate violation.

7. In § 510.2, remove paragraphs (f), (i), (j), (1), (n), and (s). In § 510.2(d), remove "§ 510.2(m) of this part" and insert "the definition of 'Ocean freight broker' in this section". In § 510.2(g), remove "freight forwarding services as specified in § 510.2(h) of this part" and insert" 'freight forwarding services' ".

8. In § 510.2, remove paragraph designations appearing before each definition; arrange definitions in alphabetical order. In definition of "freight forwarding services", redesignate paragraphs (1)–(13) as paragraphs (a)–(m), and add the following definitions in alphabetical order, to read as follows:

§ 510.2 Definitions.

* * * * *

"Common Carrier" means any person holding itself out to the general public to provide transportation by water of passengers

or cargo between the United States and a foreign country for compensation that:

(a) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(b) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

* * * * *

"From the United States" means oceanborne export commerce from the United States, its territories, or possessions to foreign countries.

* * * * *

"Non-Vessel-Operating Common Carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

"Ocean Common Carrier" means a vessel-operating common carrier; but the term does not include one engaged in ocean transportation by ferry boat or ocean tramp.

* * * * *

"Ocean Freight Forwarder" means a person in the United States that:

(a) Dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and

(b) Processes the documentation or performs related activities incident to those shipments.

* * * * *

"Shipment" means all of the cargo carried under the terms of a single bill of lading.

"Shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

* * * * *

"United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions.

9. In § 510.11, revise paragraph (a) to read as follows:

§ 510.11 Basic requirements for licensing; eligibility.

(a) *Necessary qualifications.* To be eligible for an ocean freight forwarder's license, the applicant must demonstrate to the Commission that:

(1) It possesses the necessary experience, that is, its qualifying individual has a minimum of three (3) years experience in ocean freight forwarding duties in the United States, and the necessary character to render forwarding services; and

(2) It has obtained and filed with the Commission a valid surety bond in conformance with § 510.15.

* * * * *

10. § 510.12 is removed.

11. In § 510.13, revise paragraph (e) to read as follows:

§ 510.13 Application for license.

* * * * *

(e) *Changes in facts.* Each applicant and each licensee shall submit to the Commission, in duplicate, an amended Form FMC–18 Rev., advising of any changes in the facts submitted in the original application, within thirty (30) days after such change(s) occur. In the case of an application for a license, any unreported change may delay the processing and investigation of the application and may result in rejection or denial of the application. No fee is required when reporting changes to an application for initial license under this section.

12. In § 510.14, remove the phrase "and independence" in paragraph (c) and remove paragraph (e).

13. § 510.15 is amended by revising paragraph (a), Introductory text, to read as follows:

§ 510.15 Surety bond requirements.

(a) *Form and amount.* No license shall be issued to an applicant who does not have a valid surety bond (FMC–59 Rev.) on file with the Commission in the amount of $30,000. The amount of such bond shall be increased by $10,000 for each of the applicant's unincorporated branch offices. Bonds must be issued by a surety company found acceptable by the Secretary of the Treasury. Surety Bond Form FMC–59 Rev. can be obtained in the same manner as Form FMC–18 Rev. under § 510.13(a), and shall read as follows:

* * * * *

14. § 510.16 is revised to read as follows:

§ 510.16 Denial of license.

If the Commission determines, as a result of its investigation, that the applicant:

(a) Does not possess the necessary experience or character to render forwarding services;

(b) Has failed to respond to any lawful inquiry of the Commission; or

(c) Has made any willfully false or misleading statement to the Commission in connection with its application,

a letter of intent to deny the application shall be sent to the applicant by certified U.S. mail, stating the reason(s) why the Commission intends to deny the application. If the applicant submits a written request for hearing on the proposed denial within twenty (20) days after receipt of notification, such hearing shall be granted by the Commission pursuant to its Rules of Practice and Procedure contained in Part 502 of this chapter. Otherwise, denial of the application will become effective and the applicant shall be so notified by certified U.S. mail. Civil penalties for violations of the Act or any Commission order, rule or regulation may be assessed in any proceeding on the proposed denial of a license or may be compromised for any such violation when a proceeding has not been instituted in accordance with Part 505 of this chapter.

15. In § 510.17, paragraphs (a) introductory text, and (a)(l), (a)(2), (a)(4), (a)(5) and (c) are revised to read as follows:

§ 510.17 Revocation or suspension of license.

(a) *Grounds for revocation.* Except for the automatic revocation for termination of a surety bond under § 510.15(d), or as provided in § 510.15(c), a license shall be revoked or suspended after notice and hearing for any of the following reasons:

(1) Violation of any provision of the Act, as amended, or any other statute or Commission order or regulation related to carrying on the business of forwarding;

(2) Failure to respond to any lawful order of or inquiry by the Commission

* * * * *

(4) Where the Commission determines that the licensee is not qualified to render freight forwarding services; or

(5) Failure to honor the licensee's financial obligations to the Commission, such as for civil penalties assessed or agreed to in a settlement agreement under Part 505 of this chapter.

* * * * *

(c) *Notice of Revocation.* The Commission shall publish in the *Federal Register* a notice of each revocation.

16. § 510.18 is revised to read as follows:

§ 510.18 Application after revocation or denial.

Whenever a license has been revoked or an application has been denied because the Commission has found the licensee or applicant to be not qualified to render forwarding services, any

further application within 3 years of the date of the most recent conduct on which the Commission's notice of revocation or denial was based, made by such former licensee or applicant or by another applicant employing the same qualifying individual or controlled by persons on whose conduct the Commission based its determination for revocation or denial, shall be reviewed directly by the Commission.

17. In § 510.19, paragraph (a) is revised to read as follows:

§ 510.19 Issuance and use of license.

(a) *Qualification necessary for issuance.* The Commission will issue a license if it determines, as a result of its investigation, that the applicant possesses the necessary experience and character to render forwarding services and has filed the required surety bond.

* * * * *

18. In § 510.20, remove paragraph (a)(5) and in paragraph (a)(6), remove the phrase: "(see section 15 of the Act)".

19. Remove § 510.21.

20. In § 510.31, paragraphs (b), (e) and (h) are revised to read as follows:

§ 510.31 General duties.

* * * * *

(b) *Stationery and billing forms; notice of shipper affiliation.*

(1) The name and license number of each licensee shall be permanently imprinted on the licensee's office stationery and billing forms. The Commission may temporarily waive this requirement for good cause shown if the licensee rubber stamps or types its name and FMC license number on all papers and invoices concerned with any forwarding transaction.

(2) When a licensee is a shipper or seller of goods exported from the United States or affiliated with such an entity, the licensee shall have the option of either identifying itself as such or its affiliations on its office stationery and billing forms, or including the following notice on such items:

This company is a shipper or seller of goods exported from the United States or affiliated with such an entity. Upon request, a general statement of its business activities or that of its affiliations, along with a written list of the names of such affiliates, will be provided.

* * * * *

(e) *Arrangement with unlicensed persons.* No licensee shall enter into an agreement or other arrangement (excluding sales agency arrangements not prohibited by law or this part) with an unlicensed person so that any resulting freight forwarding fee, compensation, or other benefit inures to the benefit of the unlicensed person.

When a licensee is employed for the transaction of forwarding business by a person who is not the person responsible for paying the forwarding charges, the licensee shall transmit to the person paying the forwarding charges a copy of its invoice for the services rendered.

* * * * *

(h) *Policy against rebates.* The following declaration shall appear on all invoices under § 510.32(h):

(Name of firm) has a policy against payment, solicitation, or receipt of any rebate, directly or indirectly, which would be unlawful under the United States Shipping Act of 1984.

21. In § 510.32, paragraph (a) is removed and paragraphs (h) and (k) are revised to read as follows:

§ 510.32 Forwarder and principal; fees.

(a) [Reserved.]

* * * * *

(h) *Invoice; documents available upon request.* Licensees shall not be required to itemize the components of charges on shipments. However, upon request of its principal, each licensee shall provide a complete breakout of such components of its charges and a true copy of any underlying document or bill of charges pertaining to the licensee's invoice. The following notice shall appear on each invoice to a principal:

Charges indicated herein may include a markup. Upon request, we shall provide a detailed list of the components of these charges and a true copy of any pertinent document relating to the charges contained in this invoice.

* * * * *

(k) *Accounting to principal.* Each licensee shall account to its principal(s) for overpayments, adjustments of charges, reductions in rates, insurance refunds, insurance monies received for claims, proceeds of c.o.d. shipments, drafts, letters of credit, and any other sums due such principal(s). These sums shall be forwarded promptly to the principal or, with the principal's consent, may be used to offset the licensee's outstanding receivables due from such principal. A memorandum of such consent shall be retained by the licensee in each shipment file. Alternatively, the licensee may execute a written agreement with its principal which would authorize the licensee to offset funds on all the principal's shipments handled by the licensee.

22. In § 510.33, paragraphs (a), (c), (d), (e), (f) and (g) are revised to read:

§ 510.33 Forwarder and carrier; compensation.

(a) *Disclosure of principal.* The identity of the actual shipper must always be disclosed on the bill of lading. The licensee's name may appear after the name of the actual shipper, but the licensee must be identified as the shipper's agent.

* * * * *

(c) *Form of certification.* Prior to receipt of compensation, the licensee shall file with the carrier a signed certification as set forth below on one copy of the relevant ocean bill of lading which indicates performance of the listed services:

> The undersigned hereby certifies that neither it nor any holding company, subsidiary, affiliate, officer, director, agent, or executive of the undersigned has a beneficial interest in this shipment; that it is the holder of valid FMC license No._____ issued by the Federal Maritime Commission and has performed the following services:
>
> (1) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space, and
>
> (2) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the shipment.
>
> A copy of such certificate shall be retained by the licensee pursuant to § 510.34.

(d) *Compensation pursuant to tariff provisions.* No licensee, or employee thereof, shall accept compensation from an ocean-going common carrier which is different than that specifically provided for in the carrier's effective tariff(s) lawfully on file with the Commission. No conference or group of common carriers shall deny in the export commerce of the United States compensation to an ocean freight forwarder or limit that compensation to less than a reasonable amount.

(e) *Compensation for services performed by underlying carrier.* No licensee shall charge or collect compensation in the event the underlying common carrier or its agent has, at the request of such licensee, performed any of the forwarding services set forth in § 510.2(h) unless such carrier or agent is also a licensee, or unless no other licensee is willing and able to perform such services.

(f) *Duplicative compensation.* A common carrier shall not pay compensation for the services described in § 510.33(c) more than once on the same shipment.

(g) *Licensed nonvessel-operating common carriers; compensation.* A nonvessel-operating common carrier by water or person related thereto licensed under this part may collect compensation when, and only when, the following certification is made on the "line copy', of the underlying ocean common carrier's bill of lading, in addition to all other certifications required by this part:

The undersigned certifies that neither it nor any related person has issued a bill of lading or otherwise undertaken common carrier responsibility as a nonvessel-operating common carrier for the ocean transportation of the shipment covered by this bill of lading.

Whenever a person acts in the capacity of a nonvessel-operating common carrier by water as to any shipment, such person shall not collect compensation, nor shall any underlying ocean common carrier pay compensation to such person for such shipment.

* * * * *

23. In § 518.34, paragraphs (b) and (e) are revised to read as follows:
§ 510.34 Records required to be kept.

* * * * *

(b) *Types of services by shipment.* A separate file shall be maintained for each shipment. Each file shall include a copy of each document prepared, processed, or obtained by the licensee, including each invoice for any service arranged by the licensee and performed by others, with respect to such shipment.

* * * * *

(e) *Agreements to offset funds.* Any written agreement, or a memorandum of any oral agreement, with a principal to offset funds, as provided in § 510.32(k), shall be retained by the licensee.

24. In § 510.35, remove paragraphs (a) and (b).

25. In § 510.35(c), remove "section 21(b) of the Shipping Act, 1916" and insert "section 15(b) of the Shipping Act of 1984".

26. In § 510.35(c), remove "46 CFR parts 510 and 552" and insert "46 CFR parts 510 and 582".

27. Remove § 510.36.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 536]

DOCKET NO. 84–21

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES—SERVICE CONTRACTS AND TIME/VOLUME CONTRACTS

AGENCY: Federal Maritime Commission.

ACTION: Interim Rule and Request for Comments.

SUMMARY: This rule governs the form and use of service contracts, authorized by the Shipping Act of 1984, as well as the use of time/volume contracts. It is proposed that both types of contracts be accorded similar regulatory treatment and be integrated with existing regulations relating to time/volume rates. The existing time/volume rules would also be expanded to permit time/revenue contracts.

DATES: Interim Rule effective on June 18, 1984 except paragraph (f) of § 536.7 which is under OMB review. Comments on Interim Rule due within 90 days after publication in the *Federal Register.*

SUPPLEMENTARY INFORMATION:

This rule is intended to implement the provisions of the Shipping Act of 1984 (the Act) relating to service contracts between shippers or shippers' associations and ocean common carriers or conferences. The relevant statutory provisions relating to service contracts appear at sections 3(21), 4(a)(7), and 8(c) of the Act (46 U.S.C. app. 1702(21), 1703(a)(7), and 1707(c)). Section 3(21) defines a service contract as an agreement between a shipper and a carrier or conference wherein the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period and the carrier commits to a certain rate or rate schedule and a defined service level. Section 4(a)(7) brings conference agreements to regulate or prohibit service contracts within the scope of the Act. Section 8(c) provides that service contracts that are not otherwise exempted must be filed in confidence with the Commission and that their essential terms must be filed with the Commission and made available in tariff format to all similarly situated shippers. The exclusive remedy for a breach of a service contract is an action in an appropriate court, unless the parties agree otherwise.

In light of the similarity between service contracts authorized by the Act and time/volume rate contracts provided for in the Commission's existing regulations (46 CFR § 536.7), the Commission believes that these two

types of rate contracts should be accorded similar treatment. The Commission therefore proposes to carry forward most of its existing requirements relating to time/volume contracts and apply them to service contracts. It should be noted, however, that because of the statutory definition of "service contract," such contracts have been restricted to "ocean common carriers" while time/volume contracts are available to all "common carriers," including as a result, non-vessel operating common carriers.

In addition, it is proposed that volume incentive arrangements, such as the ones recently investigated by the Commission in Docket No. 83–31, be considered as a type of time/volume contract (wherein freight revenues rather than volume of cargo are used as the basis for a discount) and treated accordingly under the rule.[1]

This rule covers the use of time/volume contracts, although the Act expressly provides only for service contracts and addresses time/volume only in terms of rates.[2] Time/volume contracts are a traditional form of shipper-carrier cargo transportation arrangement presently authorized by the Commission's rules and actively engaged in by the ocean shipping industry.[3] They have not been expressly precluded by the Act. In fact, the definition of "loyalty contract" clearly recognizes the concept of a "contract based upon time-volume rates" (section 3(14)). Moreover, the legislative history of the Act indicates that Congress was aware that time/volume rates have historically been predicated upon underlying contract commitments.[4] We presume that Congress also recognized that these contracts are presently sanctioned by the Commission. Finally, time/volume contracts differ from service contracts in that the former do not contractually obligate the carrier/conference to any particular level of service or by their terms otherwise impose any other service commitment. The rule therefore provides for the filing of both time/volume and service contracts. In the event, however, that a carrier or conference chooses to offer a time/volume *rate* in its tariff, without basing that rate on an underlying contractual arrangement, the provisions of the rule would not apply. Offerings of time/volume rates not based upon contracts are governed by section 8(a) of the Act.

The Act requires that service contracts be filed in confidence with the Commission and that their essential terms be published in tariff format.

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[1] The volume incentive arrangements under review in Docket No. 83–31 provided discounts or refunds to shippers if their freight revenues exceeded a stated minimum over a fixed time. Administrative Law Judge Joseph N. Ingolia (Presiding Officer) found that these volume incentive arrangements did not violate certain provisions of the Shipping Act, 1916. *Volume Incentive Program—Possible Violations of the Shipping Act, 1916*, 26 F.M.C. 219 (1984). In a related matter, the Presiding Officer concluded that although rulemaking may be advisable with respect to volume incentive programs, no rulemaking was necessary in that particular proceeding, especially in light of the enactment of the Shipping Act of 1984. *Volume Incentive Program—Possible Violations of the Shipping Act, 1916*, 26 F.M.C. 307 (1984).

[2] Section 8(b) of the Act states:

> Time-Volume Rates—Rates shown in tariffs filed under subsection (a) may vary with the volume of cargo offered over a specified period of time.

[3] *See Time/Volume Rate Contracts*, 25 F.M.C. 1 (1982); 46 CFR 536.7.

[4] H.R. Rep. No. 53, Part 1, 98th Cong., 1st Sess. 34 (1983).

It appears that there is no regulatory purpose to be served by treating time/volume contracts any differently. The rule therefore accords similar treatment to time/volume contracts, *i.e.* they must be filed with the Commission on a confidential basis with their essential terms made available to similarly situated shippers.

The Act does not specifically require that the essential terms of service contracts be set forth in tariffs filed with the agency, but rather states only that they be published in "tariff format." However, the legislative history of the Act does indicate that Congress contemplated that the essential terms of service contracts would be published in tariffs. The Senate Committee on Commerce, Science and Transportation, in commenting on a provision identical to section 8(c), noted:

> For public information, however, all "essential terms," as specifically enumerated, shall be published and filed in tariffs to ensure that such essential terms shall be available to all shippers similarly situated. This objective is consistent with the rationale for tariff publication and, accordingly, the essential terms must be stated with sufficient specificity to serve that purpose.

S. Rep. No. 3, 98th Cong., 1st Sess. 31 (1983). This is further supported by the statement of the House Merchant Marine and Fisheries Committee that: "It is hoped that the requirement that a service contract's essential terms be *filed publicly* so that those terms are available to all other shippers who may wish to use them, will preserve an important element of the common-carriage concept that the bill is based on." H.R. Rep. No. 53, at 17 and 34 (emphasis added). The Conference Report (H.R. Rep. No. 600, 98th Cong., 2nd Sess. (1984)) does not contradict the House and Senate Committees' stated intention that the essential terms of service contracts be publicly available in tariffs. It would appear, therefore, that a public filing appended to a tariff is not only consistent with the relevant legislative history but also may be the only practical method by which the Commission can ensure that the Congressional objective is met and that service contracts are in fact offered to all similarly situated shippers. The rule therefore requires that the essential terms of service and time/volume contracts be published in a special appendix to tariffs on file with the Commission.

The requirement that a service contract's "essential terms" be appended to a conference's tariff should not suggest the application of independent action required by section 5(b)(8) to such contracts. Conferences have specifically been provided the authority to regulate or prohibit the use of service contracts (section 4(a)(7)). Moreover, the Conference Report makes it clear that independent action was not meant to apply to service contracts by stating:

> Section 8(a) does not require that service contracts be filed in a tariff. Consequently, section 5(b)(8) does not require conferences

> to permit their members a right of independent action on service contracts. The conferees agree that section 8(c) of the bill, which authorizes the use of service contracts, cannot be read as undermining the authority of a conference to limit or prohibit a conference member's exercise of a right of independent action on service contracts. However, conference agreements must permit independent action on time-volume rates in section 8(b), since time-volume rates must be filed under section 8 (a).

H.R. Rep. No. 600, at 29.[5]

The rule may, in certain circumstances, result in the publication of contract terms beyond those delineated as "essential" in the statute. Essential terms numbered (d)(1) through (d)(7) are the basic essential terms listed in the Act. The additional terms (numbered (d)(8) and (d)(9)) are further elaborations on these essential terms. They are not, however, mandatory in all contracts, but rather may or may not apply depending on the agreement reached between the initial contracting parties. These additional terms are based upon experience gained in the administration of time/volume contracts, which contained similar provisions and, to the extent they are part of the contract, they should be made available to all other similarly situated shippers.

It should also be noted that, rather than require a statement of the "linehaul rate," the rule requires a statement of "the contract rate, rates or rate schedule, including whether any ancillary charges shall apply." This is consistent with Congress' intent that the essential terms include "all compensation to be paid." S. Rep. No. 3, at 31, 32.

It is proposed that time/volume and service contract terms be located in a special appendix to a tariff, so that the essential terms of the time/volume and service contracts will be readily available and identifiable to all shippers. The rule will also require that tariffs specify in the "Index of Commodities" the existence of any time/volume or service contract applicable to any commodity listed. In addition, the rule will require that contracts (both time/volume and service) be assigned a number and bear a cross-reference to the applicable tariffs to which the "essential terms" are attached so that a comparison can be made between the terms in the confidential contracts and those published in the appendix.

In the past the Commission has rejected amendments to time/volume contracts in instances where the amendment would have resulted in a retroactive adjustment in the original contract terms. The rule continues this policy. Once a time/volume or service contract is effective, any modification of its terms is treated as a new contract subject to the filing and publication requirements of this regulation, and is limited to prospective application. Carriers and conferences should draft their contract terms accordingly. Fail-

[5] This rule does not address the issue of how the Act's mandatory independent action requirement affects time/volume rates and time/volume contracts. These matters will be considered in the Commission's rulemaking governing agreements subject to the Act, which will be published soon after this rule.

ure to adhere to the terms of a service or time/volume contract could violate some of the prohibited acts set forth in section 10 of the Act (46 U.S.C. app. 1709).

The record keeping requirement contained in paragraph (f) of the rule contemplates a retention of shipping documents, such as bills of lading and disability notices, and the designation of a resident agent as a repository. The designation of an agent and the retention of records are designed to allow ready access to carrier records to ensure that contract rate deficiencies can be promptly addressed. These requirements have proven to be a minimal burden under the existing time/volume contract regulation. We believe that they are necessary to enable the Commission to adequately carry out its policing and surveillance functions under the new Act, particularly as it relates to ensuring that the essence of shipper-carrier contracts are made available to all shippers similarly situated. In addition, the records retained under this section should assist the Commission to carry out its obligations under section 18 of the Act (46 U.S.C. app. 1717).

The Commission has had no prior experience dealing with service contracts, since such arrangements have only recently been legitimized by the new Act. This rule is, therefore, based in large part on the Commission's experience with time/volume contracts, a shipper/carrier arrangement with which the Commission is more familiar. This approach is intended to reflect the Congressional concern that the use of service contracts ". . . not be employed so as to discriminate against all who rely upon the common carrier tradition of the liner system," and the expectation that ". . . the FMC . . . be cognizant of the effects of common carriage that abuse of service contracting may occasion." H.R. Rep. No. 53, at 17. The Commission recognizes that some adjustments in the rule may have to be made and, accordingly, seeks guidance from all interested persons.

This rule is being published as an interim rule with opportunity for comment. It will serve as an interim rule until such time as a final rule is adopted.[6] This interim rule will take effect on June 18, 1984, the effective date of the Shipping Act of 1984, unless otherwise modified. All interested persons have been provided 90 days to comment on the proposed rule. This interim rule and all comments filed within the 90-day period will be used as the basis for a final rule pursuant to the requirements of the Administrative Procedure Act (5 U.S.C. 553). If individuals believe that there are serious problems created by this interim rule which should be addressed immediately, they should submit these concerns in writing to the Commission without prejudice to subsequently filing additional comments within the 90-day comment period.

This interim rule is being added to current Part 536, the rest of which will be the subject of a separate rulemaking, which will result in the

[6] The Commission was given the authority to prescribe interim rules, without adhering to notice and comment requirements, by section 17(b) of the Shipping Act of 1984.

redesignation of Part 536 as Part 580 in Subchapter D, "Regulations Affecting Maritime Carriers and Related Activities in Foreign Commerce." When all the separate rulemakings affecting current Part 536 are finalized, it may be necessary to reorganize that Part so that the definitions appearing in paragraph (a) of the attached section 536.7 are worked into the definitions' section of current Part 536, *i.e.*, section 536.2, and are renumbered appropriately.

The Commission finds that this amendment to its rules is exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). Section 601(2) of the Act excepts from its coverage any "rule of particular applicability relating to rates . . . or practices relating to such rates . . ." As the instant rule relates to particular applications of rates and rate practices, the Regulatory Flexibility Act requirements are inapplicable.

The collection of information requirements contained in this rule have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3504 (h)). Comments on the information collection aspects of this rule should be submitted to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Federal Maritime Commission. List of subjects in 46 CFR Part 536:

Maritime Carriers, Rates

Therefore, pursuant to 5 U.S.C. 553 and sections 8 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707 and 1716), the Federal Maritime Commission proposes to amend Title 46, CFR Part 536, as follows:

1. Remove paragraph (p) of § 536.2;
2. Revise § 536.7 to read as follows:

§ 536.7—SERVICE CONTRACTS AND TIME/VOLUME CONTRACTS

(a) *Definitions.* The following definitions shall apply for purposes of this section:

(1) "contract party" means a party signing a contract as shipper or carrier and any parent, subsidiary, or other related company or entity including the membership of any shippers' association, conference, or agreement who may engage in the shipment of commodities in the trade covered by the contract.

(2) "geographic area" means the general location from which or to which contract cargo will move in intermodal service, the scope of which will vary depending on the size of a particular country.

(3) "port range" means those ports in the countries of loading or unloading of the contract cargo that are regularly served by the contracting carrier or conference, as specified in the tariff applicable to the service in which the contract is to be employed, even if the contract itself contemplates use of but a single port within that range.

(4) "service contract" means a contract between a shipper or shippers' association and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

(5) "shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(6) "time/volume rate" means a freight rate which varies with the volume of cargo offered or freight revenues received over a specified period of time.

(7) "time/volume contract" means a contract between a shipper or shippers' association and a common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo or freight revenues, over a fixed time period, and the common carrier or conference commits to a certain rate or rate schedule.

(b) *Filing Requirements.* Except for contracts relating to bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, every ocean common carrier or conference which enters into a service contract or every common carrier or conference which enters into a time/volume contract with a shipper or shippers association shall file with the Director, Bureau of Tariffs a true and complete copy of each contract prior to its effective date. Such contract shall clearly state:

(1) the contract parties;

(2) the essential terms;

(3) a contract number bearing the prefix "SC" for service contract or "TV" for time/volume contract; and

(4) the applicable tariff identified by its Commission tariff number, to which the essential terms have been appended.

(c) *Confidentiality.* All service contracts and time/volume contracts filed with the Commission will, to the full extent permitted by law, be held in confidence.

(d) *Publication of Essential Terms.* The essential terms of all service and time/volume contracts required to be filed with the Commission shall be made available to all shippers or shippers' associations under the same terms and conditions for a period of at least thirty (30) days from filing. The essential terms for service and time/volume contracts shall be located in a separate appendix to tariffs on file with the Commission and shall bear a reference

to their respective contract numbers. Every commodity listed in the "Index of Commodities" section of each tariff to which a time/volume or service contract applies shall be annotated to indicate the existence of such contract. The essential terms shall include, where applicable, the following:

(1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;

(2) the commodity or commodities involved;

(3) the minimum quantity of cargo or freight revenue necessary to obtain the rate or rate schedule;

(4) the contract rate, rates or rate schedule, including whether any ancillary charges shall apply;

(5) the effective time period of the contract;

(6) carrier or conference service commitments;

(7) liquidated damages for nonperformance, if any; or where the volume requirement will not be met during the contract period in situations other than those described in paragraph (d)(9) below, the rate, charge, or rate basis which will be applied;

(8) an identification of the shipment records which will be maintained to support the contract; and

(9) a clear description of any circumstance which will permit:

(i) a reduction in the quantity of cargo or amount of revenues required under the contract,

(ii) an extension of the contract period without any change in the contract rate or rate schedule,

(iii) a discontinuance of the contract, or

(iv) other deviations from the terms of the contract.

(e) *Contract Modifications.* Amendments to contracts on file with the Commission shall be treated as new contracts subject to the filing and publication requirements of this section. No new contract or contract modification may retroactively modify the terms or effects of a previously filed contract.

(f) *Resident Agent.* Every common carrier and conference shall designate a resident representative in the United States who shall maintain contract shipment records for a period of five years from the completion of each contract.

(g) *Rejection of Essential Terms.* Within 15 days of filing, the Commission may reject the statement of essential terms for any service or time/volume contract for failure to conform to the requirements of this section.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 587]

DOCKET NO. 84–22

ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

AGENCY: Federal Maritime Commission.

ACTION: Interim Rule and Request for Comments.

SUMMARY: This rule implements section 13(b)(5) of the Shipping Act of 1984. The Shipping Act of 1984 will become effective on June 18, 1984. The rule describes the procedures to be followed when undue impairment of the access of a vessel documented under the laws of the United States (U.S.-flag vessel) to an ocean trade between foreign ports is alleged to exist and the actions which the Commission may take to address such conditions.

DATES: Interim Rule effective June 18, 1984. Comments on Interim Rule due August 14, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (the Act) was enacted on March 20, 1984 with an effective date of June 18, 1984. Section 13(b)(5) (46 U.S.C. app. 1712(b)(5)) of the Act provides that:

> If, after notice and hearing, the Commission finds that the action of a common carrier, acting alone or in concert with any person, or a foreign government has unduly impaired access of a vessel documented under the laws of the United States to ocean trade between foreign ports, the Commission shall take action that it finds appropriate, including the imposition of any of the penalties authorized under paragraphs (1), (2), and (3) of this subsection [13(b)].[1]

This rule will implement section 13(b)(5) of the Act, and will constitute a new part, 46 CFR Part 587, entitled: *Actions to Address Conditions Unduly Impairing Access of U.S.-Flag Vessels to Ocean Trade Between Foreign Ports*, which will be included in new *SUBCHAPTER D—REGULA-*

[1] These penalties include suspension of the tariffs of a common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member, and the imposition of a civil penalty of not more than $50,000 per shipment for the acceptance or handling of cargo for carriage under a tariff that has been suspended or after the common carrier's right to utilize that tariff has been suspended. *See* 46 U.S.C. app. 1712(b)(1)(2)(3).

TIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES IN FOREIGN COMMERCE.

Section 13(b)(5) derives in part from section 14a of the Shipping Act of 1916 (46 U.S.C. 813) which empowered the Commission to investigate arrangements which unfairly excluded U.S.-flag carriers in foreign-to-foreign trades.[2] Section 14a was not considered adequate to protect U.S.-flag carriers in the new international ocean shipping environment. Section 13(b)(5) is intended to provide this needed protection and more specifically to address situations that may arise when contracting parties implement the United Nations Conference on Trade and Development Code of Conduct for Liner Conferences (UNCTAD Code). The UNCTAD Code, among other things, provides for a cargo sharing framework for conferences between contracting nations. Because the United States is not a contracting party to this Code, protecting the right of access of U.S.-flag carriers to trades where the UNCTAD Code will apply has been a central issue in maritime discussions with other nations of the Organization for Economic Cooperation and Development.[3] Section 13(b)(5) protects such rights in all cross trades, on a basis of reciprocity and thereby is consistent with one of the stated goals of the Act to encourage the development of an economically sound and efficient U.S.-flag liner fleet.

This rule delineates the procedures to be followed when an allegation of undue impairment of the access of a U.S.-flag vessel to a cross trade is made. It describes the kinds of information deemed relevant to a decision concerning such allegations, and the actions which the Commission may take in response, should it determine that conditions unduly impairing access of a U.S.-flag vessel to a trade between foreign ports exist.

In some respects, the section 13(b)(5) rule is similar to that implementing section 19 of the Merchant Marine Act of 1920 (46 U.S.C. 876(1)(b)).[4] Section 13(b)(5), however, specifically requires that notice and opportunity for hearing be afforded. The proposed rule fashions a procedure which is intended to fulfill this requirement and at the same time preserve the flexibility of the Commission to act expeditiously to address conditions of unduly impaired access. Such flexibility is necessary in order to assure that a U.S.-flag carrier does not suffer harm before remedial action is taken.

The Commission anticipates that problems relating to alleged impairment of U.S.-flag vessel access to cross trades will arise primarily in connection with foreign government laws and practices. However, section 13(b)(5) also empowers the Commission to take action where such undue impairment stems from commercial practices. The Commission does not propose to

[2] *See* H.R. Rep. No. 53, 98th Cong., 1st Sess. 22–23 (hereinafter referred to as House Report); S. Rep. No. 3, 98th Cong., 1st Sess. 38 (1983) (hereinafter referred to as Senate Report).

[3] *See* House Report at 23 and Senate Report at 38.

[4] The Commission's rules implementing section 19 presently may be found at 46 CFR Part 506. Part 506 is to be redesignated as 46 CFR Part 585 and transferred to new Subchapter D of the Commission's rules.

exclude alleged impaired access due to foreign government implementation of bilateral or multilateral treaties or other international agreements from its consideration under this rule. The Commission interprets the phrase "ocean trade between foreign ports" in section 13(b)(5) to include foreign-to-foreign ocean trade involving intermodal movements.

Section-by-Section Discussion

Section 587.1 states the purpose of this part which is to protect U.S.-flag carriers from being excluded or denied reasonable access to trades between foreign countries. The rule preserves the Commission's flexibility to act swiftly when harm to a U.S.-flag carrier is imminent. This rule, however, is not intended to interfere with the normal forces of competition in the marketplace. This section therefore states that a condition of unduly impaired access will be found only where it is shown that a U.S.-flag carrier has the ability to enter a particular trade or where actual participation in a trade by a U.S.-flag carrier is being eroded for reasons other than its commercial ability to compete. Finally, this section recognizes that U.S. maritime policy, U.S. Government shipping arrangements with other nations, and the degree of reciprocal access afforded in U.S. foreign trades to the carriers of the countries against whom action is contemplated, must be weighed when the Commission considers action under section 13(b)(5).

Section 587.2 sets forth those factors which would indicate the existence of conditions of unduly impaired access. This section makes clear that it is not necessary for a U.S.-flag carrier to suffer irreparable harm before relief under section 13(b)(5) may be granted. Such relief is available where it is shown that impairment of access is presently occurring or will likely occur because of existing or proposed government or commercial actions.

Section 587.3 identifies those persons who may file a petition for relief under section 13(b)(5) and provides for the filing of such a petition with supporting affidavits of fact and memoranda of law with the Commission Secretary. This section also describes the contents of a petition for relief. Petitions which are deficient shall be returned with an explanation of the reason for rejection. Only petitions which meet these requirements will be noticed in the *Federal Register* to ensure the consideration of only *bona fide* petitions. This procedure is intended to discourage the filing of frivolous petitions and the abuse of these procedures for competitive and other reasons.

Section 587.4 is intended to provide further guidance as to the kind of information which the Commission regards as relevant to its consideration of matters arising under section 13(b)(5). The Commission may receive such relevant information from any reliable source. Such information shall be made part of the record and may be commented upon by any interested persons. Petitions and responses thereto and any accompanying affidavits and documents shall also be part of the record. The record established

in a proceeding may provide the basis for Commission decision, including the imposition of sanctions.

Section 587.5 provides for notice to the Secretary of State of pending section 13(b) (5) matters. The Commission may, at its discretion, simultaneously initiate a proceeding under this part. Alternatively, the Commission may allow diplomatic negotiations to proceed or be completed before initiating any proceeding under this part.

Section 587.6 establishes procedures for hearing, either upon the filing of a petition which meets the requirements of section 587.3 or by the Commission upon its own motion. The Act does not specify any particular hearing procedure to be followed in section 13(b)(5) proceedings. Such proceedings could, depending on the circumstances, be limited to written submissions. The Commission may also undertake more formal procedures. Adversely affected parties will, however, be provided an opportunity to respond to any allegations of unduly impaired access under whatever procedure is used in a particular situation.

Section 587.7 enumerates sanctions which the Commission may impose when and where conditions of unduly impaired access of a U.S.-flag vessel are determined to exist. The Act gives the Commission broad authority in this regard. In addition to the specific penalties authorized under section 13(b) (1), (2) and (3), the Act empowers the Commission to take other action that it considers appropriate. This section provides for publication in the *Federal Register* of any decision imposing sanctions issued under this part. This order will generally be made effective 30 days after publication. This period is intended to accommodate the 10-day statutory review period provided the President, and allow a final opportunity for diplomatic resolution of the matter prior to the imposition of sanctions.

Section 587.8 implements the requirement under section 13(b)(6) of the Act that any order under section 13(b) be submitted to the President.

Section 587.9 makes explicit the Commission's power to suspend, discontinue or postpone proceedings under section 13(b)(5). This section also recognizes the importance of national defense and foreign policy concerns and provides for postponement, discontinuance or suspension if the President informs the Commission that such actions are required for reasons of national defense or the foreign policy of the United States.

This rule is being published as an interim rule with opportunity for comment. It will serve as an interim rule until such time as a final rule is adopted.[5] This interim rule will take effect on June 18, 1984, the effective date of the Shipping Act of 1984, unless otherwise modified. All interested persons have been provided 90 days to comment on the proposed rule. This interim rule and all comments filed within the 90-day period will be used as the basis for a final rule pursuant to the requirements of

[5] The Commission was given the authority to prescribe interim rules, without adhering to notice and comment requirements, by section 17(b) of the Shipping Act of 1984.

the Administrative Procedure Act (5 U.S.C. 553). If individuals believe that there are serious problems created by this interim rule which should be addressed immediately, they should submit these concerns in writing to the Commission without prejudice to subsequently filing additional comments within the 90-day comment period.

The Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) that the proposed rule will not if promulgated have a significant economic impact on a substantial number of small entities, within the meaning of that Act. The primary economic impact of the proposed rule would affect common carriers by water, which generally are not small entities. A secondary impact may fall on shippers, some of which may be small entities, but that impact is not considered to be significant.

LIST OF SUBJECTS IN 46 CFR PART 587:

Foreign relations, Foreign trade, Maritime carriers, Rates and fares.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 13(b)(5), 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1712(b)(5), 1714 and 1716), the Federal Maritime Commission hereby proposes to amend Title 46, Code of Federal Regulations, by adding new Part 587 to Subchapter D to read as follows:

PART 587—ACTIONS TO ADDRESS CONDITIONS UNDULY IMPAIRING ACCESS OF U.S.-FLAG VESSELS TO OCEAN TRADE BETWEEN FOREIGN PORTS

Sec.

AUTHORITY: 5 U.S.C. 553; secs. 13(b)(5), 15 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1712(b)(5), 1714, and 1716).

§ 587.1 Purpose.

(a) It is the purpose of the regulations of this part to enumerate certain conditions resulting from the action of a common carrier acting alone or in concert with any person, or a foreign government, which unduly impair the access of a vessel documented under the laws of the United States (hereinafter "U.S.-flag vessel") to ocean trade between foreign ports, and to establish procedures by which the owner or operator of a U.S.-

flag vessel (hereinafter "U.S.-flag carrier") may petition the Federal Maritime Commission for relief under the authority of section 13(b)(5) of the Shipping Act of 1984 (46 U.S.C. app. 1712(b)(5)). It is the further purpose of the regulations of this part to indicate the general circumstances under which the authority granted to the Commission under section 13(b)(5) may be invoked, and the nature of the subsequent actions contemplated by the Commission. This part also furthers the goals of the Act with respect to encouraging the development of an economically sound and efficient U.S.-flag liner fleet as stated in section 2 (46 U.S.C. app. 1701).

(b) The rules of this part implement the statutory notice and hearing requirement and ensure that due process is afforded to all affected parties. At the same time, the rules allow for flexibility in structuring proceedings so that the Commission may act with expedition whenever harm to a U.S.-flag carrier resulting from impaired access to cross trades has been demonstrated. The provisions of 46 CFR Part 502 shall not apply to this part except for those provisions governing *ex parte* contacts and as the Commission may otherwise determine by order.

(c) The condition of unduly impaired access will be found only where a U.S.-flag carrier is fit, willing and able to enter a trade in which its access is being unduly impaired, or where actual participation in a trade by a U.S.-flag carrier is being eroded for reasons other than its commercial ability or competitiveness. However, the procedures of this part are not an instrument for harassment of foreign-flag carriers operating in the U.S. foreign trades.

(d) In examining conditions in a trade between foreign ports, and in considering appropriate action, the Commission will give due regard to U.S. maritime policy and U.S. Government shipping arrangements with other nations, as well as the degree of reciprocal access afforded in U.S. foreign trades to the carriers of the countries against whom Commission action is contemplated.

§ 587.2 Factors Indicating Conditions Unduly Impairing Access.

For the purpose of this part, factors which would indicate the existence of conditions created by foreign government action or action of a common carrier acting alone or in concert with any person, which unduly impair access of a U.S.-flag vessel engaged in or seeking access to ocean trade between foreign ports, include, but are not limited to:

(a) Imposition upon U.S.-flag vessels of fees, charges, requirements, or restrictions different from those imposed on other vessels, or which preclude or tend to preclude U.S.-flag vessels from competing in the trade on the same basis as any other vessel;

(b) Reservation of a substantial portion of the total cargo in the trade to national flag or other vessels which results in failure to provide reasonable competitive access to cargoes by U.S.-flag vessels;

(c) Use of predatory practices, including but not limited to closed conferences employing fighting ships or deferred rebates, which unduly impair access of a U.S.-flag vessel to the trade;

(d) Any government or commercial practice that results in, or may result in, unequal and unfair opportunity for U.S.-flag vessel access to port or intermodal facilities or services related to the carriage of cargo inland to or from ports in the trade;

(e) Any other practice which unduly impairs access of a U.S.-flag vessel to trade between foreign ports.

§ 587.3 Petitions for Relief.

(a) *Filing.* Any owner or operator of a liner, bulk, tramp or other vessel documented under the laws of the United States who believes that its access to ocean trade between foreign ports has been, or will be, unduly impaired may file a written petition for relief under the provisions of this part. An original and fifteen copies of such a petition shall be filed with the Secretary, Federal Maritime Commission, Washington, D.C. 20573.

(b) *Contents.* Petitions for relief shall include the following:

(1) The name and address of the petitioner;

(2) The name and address of each party (carrier, person, or foreign government agency) against whom the petition is made;

(3) A concise description and citation of the foreign law, rule or government or commercial practice complained of;

(4) A certified copy of any law, rule, regulation or other document concerned and, if not in English, a certified English translation thereof;

(5) Any other evidence of the existence of such government or commercial practice;

(6) A description of the service offered or proposed, to which petitioner is alleging harm, supported by affidavits of fact, including information which indicates the ability of the petitioner to participate in the trade;

(7) A clear description, in detail, supported by affidavits of fact, of the harm already caused, or which may reasonably be expected to be caused, to the petitioner for a representative period, including:

(i) statistics documenting present or prospective cargo loss due to discriminatory government or commercial practices if harm is alleged on that basis; such statistics shall include figures for the total cargo carried or projected to be carried by petitioner in the trade for the period, and the sources of the statistics;

(ii) evidence documenting how the petitioner is being prevented from entering a trade, if injury is claimed on that basis;

(iii) statistics or other evidence documenting the impact of discriminatory government or commercial practices resulting in an increase in costs, service restrictions, or other harm on the basis of which injury is claimed, and the sources of the statistics; and

(iv) a statement as to why the period is representative;

(8) A memorandum of law addressing relevant legal issues; and

(9) A recommended action, rule or regulation, the result of which will, in the view of the petitioner, address the alleged conditions unduly impairing the access of petitioner to the affected trade.

(c) *Deficient petition.* A petition which substantially fails to comply with the requirements of paragraph (b) of this section shall be rejected and the person filing the petition shall be notified of the reasons for such rejection. Rejection is without prejudice to filing of an amended petition.

§ 587.4 Receipt of Relevant Information.

(a) In making its decision on matters arising under section 13(b)(5), the Commission may receive and consider relevant information from any owner or operator, or conference in an affected trade or from any foreign government either directly or through the Department of State or from any other reliable source. Relevant information may include, but is not limited to:

(1) statistics, with sources, or if unavailable the best estimates pertaining to:

(i) the total cargo carried in the affected liner or bulk trade by type, source, value, tonnage and direction;

(ii) cargo carried in the affected trade on vessels owned or operated by any person or conference, by type, source, value, tonnage and direction;

(iii) the percentage such cargo carried is of the total affected liner or bulk trade, on a tonnage and value basis;

(iv) the amount of cargo reserved by a foreign government for national-flag or other vessels in the affected trade, on a tonnage and value basis, and a listing of the types of cargo and specific commodities which are reserved for national-flag or other vessels;

(2) information on the operations of vessels of any party serving the affected trade, including sailings to and from ports in the trade, taxes or other charges paid to foreign authorities, and subsidies or other payments received from foreign authorities;

(3) information clarifying the meaning of the foreign law, rule, regulation or practice complained of, and a description of its implementation;

(4) complete copies of all conference and other agreements, including amendments and related documents, which apply in the trade.

(b) Once introduced or adduced, information of the character described in paragraph (a), and *bona fide* petitions and responses thereto, shall be made part of the record for decision and may provide the basis for Commission findings of fact and conclusions of law, and for the imposition of sanctions under this part.

§ 587.5 Notice to Secretary of State.

When there are indications that conditions unduly impairing the access of a U.S.-flag vessel to trade between foreign ports may exist, the Commission shall so notify the Secretary of State and may request that the Secretary of State seek resolution of the matter through diplomatic channels. If request is made, the Commission will give every assistance in such efforts, and the Commission may request the Secretary to report the results of such efforts within a specified time period.

§ 587.6 Hearing.

(a) Upon the filing of a petition which meets the requirements of section 587.3, or upon the Commission's own motion when there are indications that conditions unduly impairing the access of a U.S.-flag vessel to trade between foreign ports may exist, the Commission shall institute a proceeding pursuant to this part.

(b) Notice of the institution of any such proceeding shall be published in the *Federal Register* and interested, or adversely affected, persons will be allowed a period of time to reply to the petition by the submission of written data, views or legal arguments. Factual submissions shall be supported by affidavits and sworn documents.

(c) Following the close of the initial response period, the Commission may issue a final determination or order further hearings if warranted. If further hearings are ordered, they shall be conducted pursuant to procedures to be outlined by the Commission in its order.

§ 587.7 Decision; Sanctions; Effective Date.

(a) Upon completion of any proceeding conducted under this part, the Commission may issue a decision containing its findings and conclusions.

(b) If the Commission finds that conditions unduly impairing access of a U.S.-flag vessel to ocean trade between foreign ports do exist, the following actions may be taken:

(1) Imposition of equalizing fees or charges applied in the foreign trade of the United States;

(2) Limitation of sailings to and from United States ports, or of amount or type of cargo carried, during a specified period;

(3) Suspension, in whole or in part, of any or all tariffs filed with the Commission for carriage to or from United States ports, including the carrier's right to use any or all tariffs of conferences of which it is a member for any period the Commission specifies, or until such time as unimpaired access is secured for U.S.-flag carriers in the affected trade. Acceptance or handling of cargo for carriage under a tariff that has been suspended, or after a common carrier's right to utilize that tariff has been suspended pursuant to rules of this part will subject a carrier to the imposition of a civil penalty as provided under the Act (46 U.S.C. app. 1712(b)(3)) of not more than $50,000 per shipment.

(4) Any other action the Commission finds necessary and appropriate to address conditions unduly impairing access of a U.S.-flag vessel to trade between foreign ports.

(c) A decision imposing sanctions shall be published in the *Federal Register* and, except where conditions warrant and for good cause, shall become effective 30 days after the date of publication.

§ 587.8 Submission of Decision to the President.

Concurrently with the submission of a decision for publication in the *Federal Register* pursuant to section 587.7, the Commission shall transmit that decision to the President who may, within ten days after receiving the decision, disapprove it if the President finds that disapproval is required for reasons of the national defense or the foreign policy of the United States.

§ 587.9 Postponement, Discontinuance, or Suspension of Action.

The Commission may, on its own motion or upon petition, postpone, discontinue, or suspend any and all actions taken by it under the provisions of this part. The Commission shall postpone, discontinue, or suspend any or all such actions if the President informs the Commission that postponement, discontinuance, or suspension is required for reasons of the national defense or the foreign policy of the United States.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 CFR PARTS 536, 538

DOCKET NO. 84–23

FILING OF TARIFFS AND DUAL RATE CONTRACT SYSTEMS IN THE FOREIGN COMMERCE OF THE UNITED STATES

ACTION: Interim Rule and Request for Comment.

SUMMARY: This implements the Shipping Act of 1984 as it applies to loyalty (dual rate) contracts by removing regulations contained in Part 538 governing the present use of such contracts and by amending the regulations contained in Part 536 governing the filing of tariffs by carriers and conferences of carriers by (1) providing that any new loyalty contract will be permitted to be included in tariffs after June 18, 1984 only to the extent supported by a Business Review Letter issued by the Department of Justice, and (2) prohibiting the use of an existing loyalty contract after September 18, 1984 unless likewise supported by such a Business Review Letter.

DATES: Interim rule effective on June 18, 1984. Comments on Interim Rule due July 16, 1984.

SUPPLEMENTARY INFORMATION:

Section 14b of the Shipping Act, 1916 (46 U.S.C. 813a) permits the use of contracts which provide for lower rates to a shipper or consignee who agrees to give all or a fixed portion of its patronage to a carrier or conference of carriers. In addition, section 14b sets forth certain requirements applicable to such contracts. The Shipping Act of 1984 (46 U.S.C. app. 1701–1720, *et seq.*), which will become effective on June 18, 1984, repeals section 14b. (*See* section 20(a), 46 U.S.C. app. 1719(a).)

The provisions of the Shipping Act of 1984 (the Act) relating to loyalty contracts (or dual rate contracts as they are referred to in the Shipping Act, 1916) were the result of a compromise between the House Merchant Marine and Fisheries Committee and the House Judiciary Committee. As part of the compromise, section 6 of H.R. 1878, as reported out of the House Merchant Marine and Fisheries Committee, which was similar to section 14b of the Shipping Act, 1916, was deleted from the bill which eventually passed the House. Section 10, "Prohibited Acts," was amended to provide that no carrier may "use a loyalty contract, except in conformity with the antitrust laws." (*See* section 10(9)(a) [now found at 46 U.S.C. app. 1709(b)(9)] I.) The antitrust immunity for loyalty contracts, which appeared in section 7(a)(3) of H.R. 1878 as reported out by the Merchant Marine and Fisheries Committee, was also deleted from the final version

of the bill, "in view of the broader proscription on the use of loyalty contracts in section 9(b)(9)." [Now section 10(b)(9).] Explanation of the Changes in the Amendment to H.R. 1878, the Shipping Act of 1983, 129 Cong. Rec. H8125 (daily ed. October 6, 1983).

Section 20(d) of the Shipping Act of 1984 (46 U.S.C. app. 1719(d)) continues contracts previously approved under the Shipping Act, 1916, "as if approved or issued under this Act." Although there is no antitrust immunity for new loyalty contracts, it appears that existing loyalty contracts have antitrust immunity by virtue of section 7(a)(6) of the Act (46 U.S.C. app. 1706(a)(6)), which states that the antitrust laws do not apply to:

> (6) . . . any agreement, modification, or cancellation approved by the Commission before the effective date of this Act under section 15 of the Shipping Act, 1916, or permitted under section 14b thereof, and any properly published tariff, rate, fare, or charge, classification, rule, or regulation explanatory thereof implementing that agreement, modification, or cancellation.

Notwithstanding section 7(a)(6), the Commission has the authority to disapprove, cancel or modify such contracts to assure compliance with section 10(b)(9) under procedures provided in section 11(c) of the Act. The House Judiciary Committee observed that section 7(a)(7) [now section 7(a)(6)], which extends antitrust immunity to agreements previously approved under sections 15 and 14b of the Shipping Act, 1916,

> . . . must be read in light of the continuing authority of the Commission to disapprove, cancel, or modify an agreement pursuant to Section 11, or to seek an injunction against operation of an agreement pursuant to section 5(g). The antitrust immunity extended by subsection (a)(7) does not run beyond the validity of the agreement itself.

H.R. REP. No. 53, 98th Cong., 1st Sess. 33 (1983).

Within the context of section 10(b)(9) of the Shipping Act of 1984, the question then becomes whether and to what extent the use of loyalty contracts violates the antitrust laws. The explanation on the floor of the House indicates that while "loyalty contracts involving a single carrier would probably be lawful," any "concerted use of loyalty contracts by carriers is likely to violate the antitrust laws." 129 Cong. Rec. at H8125.

This rule therefore provides that existing loyalty contracts will be prohibited after September 18, 1984,[1] unless the carrier or conference can demonstrate to the Commission that use of its loyalty contract will not violate the antitrust laws. A Business Review Letter from the Department of Justice (DOJ), stating that the DOJ does not intend to challenge the use of a

[1] The Commission is allowing this 90-day grace period beyond June 18, 1984 to accommodate the shipper/consignee termination notice requirement embodied in existing contracts and to permit an orderly phasing out of such contracts where necessary.

loyalty contract, will create a presumption that the use of that contract is in compliance with the antitrust laws.[2] This is without regard to the legality of such loyalty contracts under any other prohibited act listed in section 10 of the Shipping Act of 1984. *See Federal Maritime Board v. Isbrandtsen Co.*, 354 U.S. 481 (1958).

By separate rulemaking, the Commission is making other changes to its foreign tariff rules, Part 536 (to be included in subchapter D and redesignated as Part 580). That rule governs the filing and form of tariffs generally and will contain the definition of "Loyalty Contract" in section 536.2(k) as follows:

> (k) *Loyalty contract.* A contract with an ocean common carrier or conference by which lower rates are obtained in exchange for a commitment of all or a fixed portion of a shipper's cargoes. A loyalty contract does not require a specific quantity of cargo to be shipped over a stated period of time, nor does it commit a common carrier or conference to a given or specific level of service or performance.

In this rulemaking, we are providing for the rejection of any newly-filed loyalty contract for failure to include in the contract itself and in the tariff rules governing the availability of contract rates the required reference to a DOJ-issued Business Review Letter. Additionally, new paragraph (c) of section 536.16 provides that any loyalty contract in effect on June 18, 1984, must similarly be justified or be prohibited after September 18, 1984.

The Federal Maritime Commission has determined that this interim rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1984, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Federal Maritime Commission certifies that this interim rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

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[2] See 28 CFR § 50.6. Only the Department of Justice, which is charged with the enforcement of the antitrust laws, can provide carriers with some assurance that they will not be prosecuted under the antitrust laws for use of a loyalty contract. In this regard, it should be noted that private suits for damages under the antitrust laws will no longer be permitted when the injury is the result of conduct prohibited by the Shipping Act of 1984 (*see* section 7(c)(2) (46 U.S.C. app. 1706(c)(2)). H.R. REP. No. 600, 98th Cong., 2d Sess. 40 (1984).

This rulemaking contains no additional information collections requirements requiring approval by the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects: 46 CFR Parts 536 and 538, Antitrust; Contracts, Maritime Carriers; Rates.

For the reasons set out in the preamble, Parts 536 and 538 of Title 46 of the Code of Federal Regulations are amended as follows:

1. Part 536 is amended by adding § 536.16 to read as follows:

§ 536.16 Loyalty Contracts

(a) A sample of any loyalty contract, as defined in this part, must be filed in the applicable tariff together with rules which set forth the scope and application of the contract system.

(b) Every sample loyalty contract and applicable rule filed for inclusion in a tariff under paragraph (a) of this section shall make specific reference to a Business Review Letter, issued pursuant to 28 CFR § 50.6, indicating no objection to the use of that contract. A copy of the Business Review Letter shall be simultaneously furnished to the Commission's Director, Bureau of Tariffs. Failure to comply with these requirements will result in the rejection of the contract and the applicable rules pursuant to § 536.10(d).

(c) The use of any loyalty contract in effect prior to June 18, 1984 shall be prohibited after September 18, 1984 unless supported by a Business Review Letter issued pursuant to 28 CFR § 50.6. Such Business Review Letter shall be furnished to the Director, Bureau of Tariffs.

2. Part 538 is removed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 536 AND PART 580]

GENERAL ORDER 13, REVISED, DOCKET NO. 84–24

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

ACTION: Interim Rules and Request for Comments.

SUMMARY: The Commission is revising its foreign tariff filing rules to bring them into conformity with the Shipping Act of 1984 and contemporary tariff filing practices. These interim new rules modify and add to definitions contained in the existing tariff filing rules, amend rules governing the filing of intermodal tariffs, delete references to dual rate contracts, make provision for time/volume and related contracts and implement the statutory exemptions. Additionally the tariff rules reflect previously applicable interpretations of the Shipping Act, 1916, as they pertain to tariffs filed pursuant to the Shipping Act of 1984.

DATES: Interim Rules effective June 18, 1984. Comments due on or before June 22, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (1984 Act) was enacted on March 20, 1984 and becomes effective on June 18, 1984, except for sections 17 and 18 thereof which became effective on enactment. Section 17 authorizes the Federal Maritime Commission to prescribe rules and regulations and interim rules and regulations to carry out the 1984 Act.

The 1984 Act requires both substantive and technical modifications to the Commission's tariff filing regulations, contained in 46 CFR Part 536. These modifications require revision of various other provisions of the Commission's rules and interpretations, such as the Commission's Interpretations and Statements of Policy (46 CFR Part 530].

The Commission is, therefore, issuing these-interim rules to implement the Shipping Act of 1984, Pub. L. 98–237, 98 Stat. 67 (46 U.S.C. app. 1701–1720]. These rules are issued pursuant to section 17(b) of the 1984 Act in order that the Commission can perform its essential regulatory functions on and after June 18.

The Commission is requesting comments on these interim rules to assist it in developing final rules to supersede and, where necessary modify these interim rules. Accordingly, the public is provided with thirty days within which to comment on the interim rules but, if anyone believes that there are serious problems created by these rules which should be addressed

immediately, the Commission urges them to bring their concerns to the attention of the Commission, in writing, without prejudice to subsequently filing additional comments within the thirty day comment period.

The 1984 Act has made several substantial changes in the regulation of the oceanborne foreign commerce of the United States. The most substantive changes, insofar as they relate to tariff filing, involve through and exempt transportation, service and time/volume arrangements, loyalty contracts, penalty provisions and the statute of limitations for filing claims or complaints.

The filing of service contracts, time/volume contracts, time/revenue contracts is the subject of a separate rulemaking proceeding. Likewise, although this rule contains a definition of "loyalty contract," a rule pertaining to the use and filing of such "loyalty contracts" is the subject of a separate rulemaking proceeding. This proceeding will focus on the balance of the tariff filing rules.

The 1984 Act contains definitions for: common carrier, forest products, nonvessel-operating common carrier, ocean common carrier, person, shipment, shipper, through rate and through transportation. These definitions, as appropriate, are being added to the Commission's tariff filing rules.

Subtantial modifications to the intermodal tariff filing rules have been made to accommodate the statutory scheme. Eliminated are any provisions which required a tariff to "breakout" or disclose the charge, rate or division for the inland transportation portion of a through intermodal or joint through rate or service. These proposals were previously advanced by the Commission in the now discontinued proceeding, Docket No. 84–3, *Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States; Intermodal Tariff Filing Requirements—Exemption From Certain Statutory Requirements and Amendment of Tariff Filing Regulations,* (49 F.R. 7609, March 1, 1984] which should be referred to for further information.

The 1984 Act contains an exemption from tariff filing for cargo loaded and carried in bulk without mark or count. These provisions are identical to the exemption from tariff filing formerly contained in section 18(b)(1) of the Shipping Act, 1916 (1916 Act). The Commission has previously interpreted these provisions insofar as they apply to bulk cargo loaded into and carried in intermodal equipment (see 46 CFR § 530.15). This interpretation has been incorporated into this rule.

Section 8(a)(1) of the 1980 Act expands the current tariff filing exemption for softwood lumber to include the broader category of forest products as defined in the statute and adds a new exemption for recyclable metal scrap, waste paper and paper waste. These changes have been incorporated into the rules.

The revised tariff filing rules also preserve previous exemptions granted from time to time by the Commission pursuant to section 35 of the 1916 Act. These exemptions were previously contained in § 536.1 and covered:

foreign transshipped cargo (§ 536.1(a)); carriage of vehicles, passengers, buses and personal effects on vessels operated by the State of Alaska (§ 536.1(b)(1–2)); transportation of mail (§ 536.1(b)(3)); transportation by Incan Superior, Ltd. of cargo moving in railroad cars (§ 536.1(b)(4)); transportation by water of cargo moving in rail cars between British Columbia and United States ports and points (§ 536.1(b)(5)); transportation by water of cargo moving in bulk with count in rail cars between British Columbia, Canada and United States ports on Puget Sound (§ 563.1(b)(6)); transportation of used military household goods by non-vessel operating common carriers (§ 536.1(b)(7)); and controlled carriers when specific conditions are met (§ 536.1(d)). To these previous exemptions the Commission is proposing to add an exemption to permit points to be added to intermodal tariffs without providing the otherwise required thirty day notice. The new exemption will also be available to controlled carriers on a limited basis.

The Commission notes the similarity between sections 35 of the 1916 Act and section 16 of the 1984 Act. Section 16 contains all of the former criteria of section 35 and adds the requirement that any exemption will not result in a "substantial reduction in competition." The 1984 Act criteria are met with respect to all of these exemptions. The removal of the requirement that carriers or conferences provide thirty days' notice prior to naming new intermodal points in their tariffs, will enable such carriers and conferences to promptly address changing transportation conditions without delay.

A number of technical modifications have been made in the tariff filing rules to conform them to either the new statutory provisions or to contemporary tariff filing practices. The modifications include: elimination of all references to temporary tariff amendments which have been abolished; elimination of the requirement for tariffs to contain a check sheet (a check sheet serves no regulatory purpose); deletion of the project rate provisions (they are now subsumed in either service or time/volume arrangements); and the elimination of any references to the 1916 Act. In addition, rules pertaining to the filing of per-container rates which were promulgated and subsequently suspended in Docket No. 81–50, *Per-Container Rates—Tariff Filing Requirements Applicable to Carriers and Conferences in the Foreign Commerce of the United States*, have been removed inasmuch as that proceeding has been discontinued.

This rule also reflects certain interpretations and clarifications contained in 46 CFR Part 530. The affected CFR provisions are: sections § 530.7 (carrier admission to a conference—new/initial rates); § 530.14 (disputes regarding the exercise of the right of independent action in tariff filing); and § 530.15 (bulk cargo in intermodal equipment).

The 1984 Act also increases the time period for filing complaints or overcharge claims with the Commission from two to three years. These changes are also reflected in the rules.

A new § 580.91 has been added to display the Office of Management and Budget's clearance numbers for information collection requirements. These are currently displayed in tabular form in § 503.91 of Title 46, Code of Federal Regulations, but the new separate section should be convenient, especially after the part is redesignated.

The Commission has determined that this interim rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with Foreign-based enterprises in domestic or export markets.

The Commission certifies that this interim rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

The collection of information requirements contained in paragraphs 580.8(b) and 8(c) of this rule have been submitted to the Office of Management and Budget for review under section 3504(b) of the Paperwork Reduction Act (44 U.S.C. 3504(h)). Comments on the information collection aspects of this rule should be submitted to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for the Federal Maritime Commission.

List of Subjects in 46 CFR Part 536:

Cargo; Cargo vessels; Exports; Harbors; Imports; Maritime carriers; Rates and fares; Reporting and record keeping requirements; Water carriers; Water transportation.

For the reasons set out in the *Supplementary Information*, Part 536 of Title 46 of the Code of Federal Regulations is transferred to Subchapter D, redesignated, and amended as follows:

PART 536—PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

1. Part 536 of 46 CFR, Chapter IV, is redesignated as Part 580 and added to Subchapter D and all internal references are changed.
2. In Part 580, revise the authority citation to read as follows and remove all other authority sections:

   Authority: 5 U.S.C. 553; secs. 4, 5, 6, 8, 9, 10, 15, 16, and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1703–1705, 1707, 1708, 1709, and 1714–1716).
3. Insert the word "common" before the word "carrier" or "carriers" wherever it appears in part 580.

4. In § 580.0(a) remove "Shipping Act, 1916" and insert: "Shipping Act of 1984".

5. In § 580.0(b):

   a. Remove "Section 18(b) of the Shipping Act," and insert "section 8 of the Shipping Act of 1984,";

   b. Remove, "sections 14(b) and 18(c)" and insert "sections 9, 10 and 16";

   c. Remove "reasonable" and insert "unreasonable" and

   d. Remove "Shipping Act sections 15, 16 and 17." and insert "section 10 of the Shipping Act of 1984."

6. In § 580.0(c) remove "day the violation continues (46 U.S.C. 817(b)(4), (b)(6))," and insert "violation unless the violation was willfully and knowingly committed, in which case the amount of civil penalty may not exceed $25,000 for each violation. Each day of a continuing violation constitutes a separate offense. Additionally, the Commission may suspend any or all tariffs of the common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member, for a period not to exceed 12 months."

7. In § 580.1 redesignate paragraphs (a)–(d) as paragraphs (b)–(e) and add a new paragraph (a) to read as follows:

   § 580.1 Exemptions and exclusions.

   (a) This part does not apply to bulk cargo, forest products, recyclable metal scrap, waste paper and paperwaste.

* * * * *

8. In § 580.1(b)(6) remove "Shipping Act, 1916" and insert "Shipping Act of 1984".

9. In § 580.1(d)(1)(iii) remove "Shipping Act section 18(b)" and insert "the Shipping Act of 1984".

10. In § 580.1(e)(1)(iii) remove "approved under section 15 of the Act."

11. Revise § 580.2 to read as follows:

§ 580.2 Definitions.

The following definitions of terms shall apply unless otherwise indicated by the context of this part.

(a) *Act.* The Shipping Act of 1984.

(b) *Bulk cargo.* Cargo that is loaded and carried in bulk without mark or count. Bulk cargo loaded into intermodal equipment is subject to mark and count and is therefore, subject to the tariff filing requirements of this part.

(c) *Class rates.* Rates applicable to all articles which have been grouped or "classified" together in a classification tariff or a classification section of a rate tariff.

(d) *Commodity rates.* Rates applying on a commodity or commodities specifically named or described in the tariff in which the rate or rates are published.

(e) *Common carrier.* A person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(1) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and

(2) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(f) *Conference.* An association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff; but the term does not include a joint service, consortium, pooling, sailing, or transshipment arrangement.

(g) *Controlled carrier.* An ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by the government under whose registry the vessels of the carrier operate; ownership or control by a government shall be deemed to exist with respect to any carrier if:

(1) a majority portion of the interest in the carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(2) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer, or the chief executive officer of the carrier.

(h) *Forest products.* Forest products in an unfinished or semi-finished state that require special handling moving in lot sizes too large for a container, including, but not limited to lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper board in rolls, and paper in rolls.

(i) *Joint rates.* Rates or charges established by two or more common carriers for ocean transportation over the combined routes of such carriers.

(j) *Local rates.* Rates or charges for transportation over the route of a single common carrier (or any one common carrier participating in a conference tariff), the application of which is not contingent upon a prior or subsequent movement.

(k) *Loyalty contract.* A contract with an ocean common carrier or conference by which lower rates are obtained in exchange for a commitment of all or a fixed portion of a shipper's cargoes. A loyalty contract does not require a specific quantity of cargo to be shipped over a stated period of time, nor does it commit a common carrier or conference to a given or specific level of service or performance.

(l) *Nonvessel-operating common carrier.* A common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

(m) *Ocean common carrier.* A vessel-operating common carrier; but the term does not include one engaged in ocean transportation by ferry boat or ocean tramp.

(n) *Ocean freight forwarder.* A person in the United States that:

(1) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and

(2) processes the documentation or performs related activities incident to those shipments.

(o) *Open rate.* A rate on a specified commodity or commodities over which a conference suspends its rate making authority, thereby permitting each individual common carrier member of the conference to fix its own rates on such commodity or commodities.

(p) *Open for public inspection.* The maintenance of a complete and current set of the tariffs used by a common carrier, or to which it is a party, in each of its offices and those of its agent in any city where it transacts business involving such tariffs.

(q) *Person.* Includes individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country.

(r) *Proportional rates.* Rates or charges assessed by a common carrier for transportation services, the application of which are conditioned upon a prior or subsequent movement.

(s) *Shipment.* All of the cargo carried under the terms of a single bill of lading.

(t) *Shipper.* An owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(u) *Tariff.* A publication containing the actual rates, charges, classifications, rules, regulations, and practices of a common carrier or conference of carriers. For the purposes of this part, the term "practice" refers to those usages, customs or modes of operation which in any way affect, determine or change the transportation rates, charges or services provided by a common carrier, and, in the case of conferences, must be restricted to activities authorized by the basic conference agreement.

(v) *Tariff filing.* Any tariff, or modification thereto, which is received by the Commission as filed pursuant to these rules.

(w) *Tariff filing, Electronic.* The transmission of tariff filings to the Commission through the use of commercial data processing terminals. The data processing receiving terminal(s) are to be located in the Commission's Washington, D.C. offices. Tariff material filed electronically must conform to all the regulations applicable to permanent tariff filings, except as follows:

(1) Electronically filed tariff pages received from data processing terminals may be used for filing with the Commission; and

(2) Electronically filed tariff matter shall be accompanied by an electronically filed letter of transmittal.

(x) *Through rate.* The single amount charged by a common carrier in connection with through transportation.

(y) *Through transportation.* Continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port.

12. In § 580.3(e) remove "except temporary filings as permitted hereinafter in § 580.10(c)(1),".
13. In § 580.3(f) remove "including temporary filings by mail pursuant to § 580.10(c)(1) of this part," and, "Provided, however, that temporary filings made by telegraph or cable pursuant to § 580.10(c)(1) need not be submitted in duplicate or triplicate" and remove the semicolon at the end of "triplicate" and insert a period.
14. In § 580.3(i) remove "section 18(b)" and insert "section 8(a)(1)".
15. In § 580.3(j) remove "section 18(b)" and insert "section 8(a)," and remove "approved" wherever it appears.
16. In § 580.3(j) remove the last sentence.
17. In § 580.3(l) remove "sections 14(b), 18(b), or 18(c) of"
18. In § 580.4(e) remove "each vessel operating common carrier's" and insert, "the".
19. In § 580.4(e) remove "United States Shipping Act, 1916," and "Shipping Act Amendments of 1979, Pub. L. 96–25, 93 Stat. 71, and the regulations of the Commission set forth in 46 CFR Part 552." and insert "Shipping Act of 1984."
20. Amend § 580.4(f) by removing "Check Sheet." and adding at the end of the paragraph, "Appendices of Essential Terms for Service Contracts/Time Volume Contracts."
21. Amend § 580.5(a)(1) by removing "approved under section 15 of the Act," and in the third sentence removing "section 18(c)" and inserting "section 9".
22. Amend § 580.5(c)(2) by removing "United States Shipping Act, 1916," and "Shipping Act Amendments of 1979, Public Law 96–25, 93 Stat. 71, and the regulations of the Commission set forth in 46 CFR 552." and inserting "Shipping Act of 1984."
23. Remove § 580.5(d)(13) and (d)(14).
24. In § 580.5, paragraph (d), redesignate (d)(15)–(d)(18) as paragraphs (d)(13)–(d)(16).
25. Amend § 580.5(d)(19) as follows:

a. Revise the heading to read: "*Shippers requests, consultations and complaints.*"

b. Remove "with § 527.6 of the Commission's rules," and insert "with the effective agreement's provisions,";

c. Add after "complaints," the phrase "and so they may engage in consultation under section 5(b)(6) of the Act."

d. Redesignate § 580.5(d)(19) as "§ 580.5(d)(17)."

26. Redesignate § 580.5(d)(20) as "§ 580.(d)(18)," and remove in the first sentence of the introductory text "two years" and insert "three years".

27. Amend § 580.5(d)(18)(i) by removing "section 22 of the Shipping Act, 1916 (46 U.S.C. 821)" and inserting "section 11(g) of the Shipping Act of 1984," in the first sentence, and by removing "two" and inserting "three," in the second sentence.

28. Amend § 580.5(d)(18)(ii) by removing "Shipping Act, 1916." and inserting "Shipping Act of 1984."

29. Amend § 580.5(e) by removing ", commencing with number 21." and inserting a period.

30. Amend § 580.6(n) by removing "section 18(c) of the Shipping Act, 1916," and inserting "section 9 of the Shipping Act of 1984," in the last sentence.

31. Amend § 580.6(o) by removing the word "Temporary," and capitalizing "Special" in the introductory text.

32. Remove § 580.6(o)(2).

33. Revise § 580.8 to read as follows:

§ 580.8 Intermodal Tariffs.

(a) *Definitions.* The following definitions shall apply for purposes of this section

(1) *Contracting Carrier.* A carrier which performs part of a through intermodal service in the capacity of a subcontractor on behalf of and in the name of a common carrier which is subject to the Act.

(2) *Joint through intermodal rate.* A single charge jointly established by two or more carriers, one of which is a common carrier subject to the Act, for through transportation over the combined routes of such carriers, between (i) points in the United States and ports in a foreign country; (ii) points in the United States and points in a foreign country; or (iii) ports in the United States and points in a foreign country. Tariffs which name joint rates must also list the participating carriers.

(3) *Participating Carrier.* A carrier that holds itself out to perform a portion of a joint through intermodal service.

(4) *Through intermodal rate.* A single charge established by a common carrier(s) subject to the Act, which covers a through service, part of which is performed by a contracting carrier or carriers, for through transportation over the combined routes of such carriers, between (i) points in the United States and ports in a foreign country; (ii) points in the United States and points in a foreign country; or (iii) ports in the United States and points in a foreign country.

(5) *Through route.* An arrangement for the continuous carriage of goods between points of origin and destination either or both of which lie beyond port terminal areas.

(b) *Intermodal tariff filing requirements.* Every common carrier and conference subject to the Act, which establishes through intermodal rates and/or joint through intermodal rates, shall file tariffs stating all such rates and related charges, rules, regulations, privileges or facilities, granted or allowed. Such tariffs shall be filed and maintained in the manner set out in the Act, and in accordance with the rules of this part. Intermodal tariffs shall be filed in the name of the common carrier or conference subject to the Act. Intermodal tariffs shall be initially filed on thirty days' notice as provided by section 8 or 9 of the Act, unless a shorter notice is permitted pursuant to special permission. In addition, such tariffs shall contain the following provisions:

(1) A notation on the Title Page that the publication contains through intermodal rates and/or joint through intermodal rates. Also, an identification of the modes of service, i.e., rail-water, water-motor, etc., shall be shown.

(2) A list, either on the Title Page or on an interior page referenced on the Title Page, of all ports or points to, from and between which the rates apply and the ports through which cargo originating or terminating in such places shall move. Each port or point served shall be described by its commonly used geographic name. When rates are established which apply from, to, or between all points within a named region; for example, a county, township, parish or province, such region must be identified with the state, province, and country in which the region is located.

(3) A contract of affreightment clearly setting forth through liability which is consistent with the holding out provided by the application of the rates and conditions of the tariff.

(4) In the case of joint through intermodal rates, the names of all participating carriers and a clear description of the services performed by such participating carriers which are included in the through rates. Points served by each participating carrier must be so specified.

(c) *Amendments to intermodal tariffs.* Common carriers and conferences of such carriers publishing amendments to intermodal tariffs which provide for new or initial joint through intermodal rates and/or through intermodal rates are exempt from the 30 day filing notice requirements of sections 8 or 9 of the Shipping Act of 1984. Provided, however, that amendments filed pursuant to this exemption shall not become effective earlier than upon publication and filing or some time interval less than 30 days. Provided, further that amendments filed by controlled carriers, subject to section 9, Shipping Act of 1984 may be filed only when such amendments provide for rates which meet but do not go below those previously established by non-controlled carriers. Each amendment filed by a controlled carrier under authority of this exemption shall bear the following notation: "Filed pursuant to 16 CFR § 580.8(c)."

34. Amend § 580.10(a)(2) by removing its second sentence.
35. Amend § 580.10(a)(3) by removing "section 18(c) of the Shipping Act, 1916" in the last sentence and inserting "section 9 of the Shipping Act of 1984".
36. Amend § 580.10(b)(4) by removing "section 18(b) and 18(c)" and inserting "sections 8 and 9".
37. Remove § 580.10(b)(10).
38. Amend § 580.10(d)(1) and (d)(2) in the introductory text by removing "sections 18(b), 18(c) and 14b of".
39. Remove § 580.12.
40. Amend § 580.15(a) by removing in the first sentence, "section 18(b)," and inserting "section 8(d)".
41. Amend § 580.15(a) by removing, in the second sentence "Section 18(c)(3)," and inserting "Section 9(c)".
42. Add § 580.91 to read as follows:

§ 580.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork

Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
580.3	3072–0009
580.8 through 580.15	3072–0009

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 552 AND 582]

DOCKET NO. 84–25

CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

ACTION: Interim Rule and Request for Comments.

SUMMARY: The Commission is modifying its rules on the filing of certifications of company practices to combat rebating in the foreign commerce of the United States to bring them into conformity with the Shipping Act of 1984. The modification expands the application of the annual certification requirement from vessel operating common carriers to all common carriers.

DATES: Interim Rule effective on June 18, 1984. Comments at any time but no later than July 30, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984 (1984 Act) (46 U.S.C. app. 1701–1720) was enacted on March 20, 1984 and becomes effective on June 18, 1984, except for sections 17 and 18 thereof which became effective on enactment. Section 17(b) authorizes the Federal Maritime Commission to prescribe interim rules and regulations to carry out the Act, which rules can become effective notwithstanding the nature and comment provisions of the Administrative Procedure Act (5 U.S.C. 553) but must be superseded by final rules subject to the A.P.A.

Section 15(b) of the 1984 Act (46 U.S.C. app. 1714(b)) makes substantive changes to the previous requirements of section 21(b) of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. 820(b)), regarding the certification of company policies and efforts to combat rebating in the foreign commerce of the United States. The fundamental change is the expansion to all common carriers from the former limited application to vessel operating common carriers only. Although the statute imposes a new and mandatory reporting requirement for domestic as well as foreign NVOCCs, the Commission is allowing for comments from this affected class to determine the best method and procedure for assuring compliance.

These rules contain technical amendments to reflect certain changes in definitions and application contained in the 1984 Act. For instance, the 1916 Act permits the Commission to require an anti-rebating certification from any "consignor, consignee, forwarder, broker, other carrier, or other person subject to the Shipping Act, 1916." Section 15(b) of the 1984 Act alters the statutory scheme to permit the Commission to require certifi-

cation from "any shipper, shippers' assocation, marine terminal operator, ocean freight forwarder or broker." This rule does not, however, require certifications from entities other than those mandated by statute. The requirement for certifications from ocean freight forwarders is continued in Docket No. 84–19, *Licensing of Ocean Freight Forwarders.*

Other amendments to the required certification are of the same genus, such as the amendments to the statutory references and *Code of Federal Regulations* citations.

To provide for the basic notice and comment provisions of the Administrative Procedure Act, therefore, the Commission requests comments on these interim rules to assist it in developing final rules to supersede and, where necessary modify, these interim rules by December 15, 1984. Accordingly, the public is provided with sixty days within which to comment on the interim rules but, if anyone believes that there are serious problems created by these rules which should be addressed immediately, the Commission urges them to bring their concerns to the attention of the Commission, without prejudice to subsequently filing additional comments within the sixty-day comment period.

A new § 582.91 is being added to display the Office of Management and Budget's clearance number for information collection requirements. These are currently displayed in tabular form in § 503.91 of Title 46, Code of Federal Regulations, but the new separate section should be convenient, especially after the part is redesignated.

The Federal Maritime Commission has determined that this interim rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of Subjects in Parts 552 and 582: Cargo; Cargo vessels; Exports; Foreign relations; Freight forwarders; Imports; Maritime carriers; Rates and fares; Reporting and recordkeeping requirements; Water carriers; Water transportation.

For the reasons set out in the preamble, Part 552 of Title 46 of the Code of Federal Regulations is redesignated as Part 582, included in Subchapter D, and is revised to read as follows:

PART 582—CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

Sec.

Authority: 5 U.S.C. 553; secs. 2, 3, 8, 10, 13, 15, 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1707, 1709, 1712, 1714, 1715, and 1716).

§ 582.1 Scope.

(a) The requirements set forth in this part are binding upon every common carrier and, at the discretion of the Commission, will be applicable to any shipper, shippers' association, marine terminal operator, ocean freight forwarder, or broker.

(b) Information obtained under this part will be used to maintain continuous surveillance over common carrier activities and to provide a deterrent against rebating practices. Failure to file the required reports may result in a civil penalty of not more than $5,000, or if willfully and knowingly committed, not more than $25,000, for each day such violation continues.

§ 582.2 Form of certification.

The Chief Executive Officer (defined as the most senior officer within the company designated by the board of directors, owners, stockholders or controlling body as responsible for the direction and management of the company) of each common carrier and, when required, at the discretion of the Commission, the Chief Executive Officer of any shipper, shippers' association, marine terminal operator, ocean freight forwarder or broker, shall file a written certification, under oath, as set forth in the format in Appendix A attesting to the following:

(a)(1) That it is the stated policy of the filing company that the payment, solicitation or receipt of any rebate, by the company which is unlawful under the provisions of the Shipping Act of 1984, is prohibited; and

(2) That such company policy was promulgated recently (together with the date of such promulgation) to each owner, officer, employee, and agent thereof; and

(b) The details of the efforts made within the company or otherwise to prevent or correct illegal rebating; and

(c) That the filing company will fully cooperate with the Commission in its efforts to end those illegal practices.

§ 582.3 Tariff notification.

(a) Each common carrier shall file a provision in each of its tariffs that shall read substantially as follows:

> (Name of Company) has a policy against the payment of any rebate by the company or by any officer, employee, or agent, which payment would be unlawful under the Shipping Act of 1984. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act of 1984 and the regulations of the Commission set forth in 46 CFR Part 582.

(b) When the common carrier's tariff is a conference/rate agreement tariff, the common carrier shall ensure that the conference or rate agreement publishes the common carrier's tariff provision set forth in § 582.3(a) in the conference/rate agreement tariff.

(c) The anti-rebate tariff provision, as set forth in § 582.3(a), shall be effective upon filing.

(d) Every common carrier tariff must contain the anti-rebate tariff provision set forth in § 582.3(a) by September 18, 1984.

§ 582.4 Change of Chief Executive Officer.

Every common carrier and any other person required by the Commission to file a certification in accordance with § 582.2 shall notify the Secretary, Federal Maritime Commission, of the identity of any new Chief Executive Officer within thirty (30) days of such appointment. Each new Chief Executive Officer shall file a certification as required by § 582.2 of this part within thirty (30) days of appointment.

§ 582.5 Reporting requirements.

(a) Every common carrier required by this part to submit a written certification as provided for in § 582.2 to the Secretary, Federal Maritime Commission, shall submit such certification on or before May 15 of each year.

(b) Every person other than a common carrier who is required by the Commission to submit a written certification under § 582.2 of this part shall submit the initial certification to the Secretary, Federal Maritime Commission, on the date designated by the Commission and, thereafter, as the Commission may direct.

§ 582.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control numbers assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980,

Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement.

Section	Current OMB Control No.
582.2 through 582.5	3072–0028

APPENDIX A TO 46 CFR 582.3—(NAME OF FILING COMPANY), CERTIFICATION OF COMPANY POLICIES AND EFFORTS TO COMBAT REBATING IN THE FOREIGN COMMERCE OF THE UNITED STATES

Pursuant to the requirements of section 15(b) of the Shipping Act of 1984, and Federal Maritime Commission regulations promulgated pursuant thereto, (46 CFR 582), I, _____, Chief Executive Officer of (name of company) state under oath that:

1. It is the policy of (name of company) that the payment, solicitation, or receipt of any rebate which is unlawful under the provisions of the Shipping Act of 1984 is prohibited.

2. On or before , 19 , such company policy was promulgated to each owner, officer, employee and agent of (name of company) who is directly or indirectly connected with commercial ocean shipping, import or export sales or purchasing.

3. [Set forth the details of measures instituted by the filing company or otherwise to eliminate or prevent the payment of illegal rebates in the foreign commerce of the United States].

4. (Name of company) affirms it will fully cooperate with the Federal Maritime Commission in any investigation of illegal rebating and with the Commission's efforts to end such illegal practices.

Signature

Subscribed and sworn before me this _____ day of _____ 19____.

Notary Public

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

ACTION: Interim Rules With Request For Comments.

SUMMARY: These rules implement those provisions of the Shipping Act of 1984 which govern agreements by or among ocean common carriers and other persons in the foreign commerce of the United States. The statute authorizes the Commission to prescribe rules as necessary to effectuate the Act, including the issuance of interim rules. The Commission is also authorized to prescribe by rule the form and manner in which an agreement shall be filed and to obtain information needed to evaluate agreements. These rules set forth those agreements which are subject to the requirements of the Act, enumerate those agreements which are exempt from certain requirements of the Act, prescribe the form of agreements. and the information which shall be filed, establish procedures for processing agreements, set forth record retention and reporting requirements, and establish certain transitional rules for existing agreements.

DATES: Interim Rule effective on June 18, 1984. Comments on or before August 27, 1984.

SUPPLEMENTARY INFORMATION:

I. Background

On March 20, 1984, President Ronald Reagan signed into law the Shipping Act of 1984, Public Law 98–237, 98 Stat. 67, 46 U.S.C. app. 1701–1720 (hereinafter referred to as "the Act" or "the 1984 Act"). The Act, among other things, establishes a new regulatory regime governing agreements by or among ocean common carriers and other persons subject to the Act in the foreign oceanborne commerce of the United States. Section 3 of the Act (46 U.S.C. app. 1702) defines an "agreement" and certain other terms. Section 4 (46 U.S.C. app. 1703) sets forth those types of agreements that are within the scope of the Act. Section 5 (46 U.S.C. app. 1704) requires parties to an agreement to file a true copy of the agreement together with relevant information and specifies certain provisions which must be contained in particular types of agreements. Section 6 (46 U.S.C. app. 1705) establishes procedures under which the Commission shall

review and take action upon an agreement. Section 16 (46 U.S.C. app. 1715) establishes the authority of the Commission to exempt any class of agreements from any requirement of the Act. Under section 7 of the Act (46 U.S.C. app. 1706), agreements which have been filed and become effective, or which are exempt from filing, are not subject to the federal antitrust laws. Section 15 (46 U.S.C. app. 1714) authorizes the Commission to require periodical or special reports as well as the filing of conference minutes.

The purpose of these rules is to implement those sections of the Act that govern agreements. These rules are being issued pursuant to the general rulemaking authority provided under section 17(a) of the Act (46 U.S.C. app. 1716(a)). Certain sections of these rules are also issued pursuant to the Commission's specific authority under section 5(a) of the Act to prescribe the form and manner in which an agreement shall be filed and to obtain the information and documents necessary to evaluate an agreement (46 U.S.C. app. 1704(a)). The rules are also issued pursuant to the Administrative Procedure Act (APA) and thereby are subject to the normal notice and comment procedures of the APA (5 U.S.C. 553). These rules are intended to serve as interim rules until such time as final rules are adopted. Specific authority to prescribe interim rules without adhering to notice and comment requirements is contained in section 17(b) of the Act (46 U.S.C. app. 1716(b)). These interim rules will take effect on June 18, 1984, the effective date of the Shipping Act of 1984. If persons believe that there are serious problems created by these interim rules which should be addressed immediately, they may bring their concerns to the attention of the Commission in writing without prejudice to subsequently filing additional comments within the 90-day comment period. In any event, all interested persons have been provided 90 days to comment on these rules.

These rules are organized as a single Part 572 of Title 46 of the Code of Federal Regulations. Subpart A states the authority, purpose and policies of these rules and defines certain terms used in the Act and these rules. Subpart B sets forth those types of agreements which are within the scope of the Act as well as those categories of agreements to which these rules do not apply. Subpart C contains procedures for requesting and granting exemptions for agreements from any requirement of the Act, lists certain kinds of agreements which are excluded by statute from filing requirements, and enumerates certain classes of agreements which the Commission proposes to exempt from certain requirements of the Act. Subpart D states rules for filing, the form in which agreements shall be filed, and the information which shall be submitted with certain agreements. Subpart E sets forth requirements as to organization and content of agreements and includes mandatory provisions for conference agreements. Subpart F establishes procedures for action on agreements prior to implementation. Subpart G contains rules setting forth certain reporting and record retention requirements. Subpart H contains transitional rules affecting existing agreements.

Subpart I states penalty rules. An Information Form to be completed and filed with certain agreements subject to the Act is attached as an Appendix A to Part 572. The following is a section-by-section discussion of proposed Part 572 of the Code of Federal Regulations which is to be included in new "Subchapter D—Regulations Affecting Maritime Carriers and Related Activities in Foreign Commerce."

II. Section-By-Section Discussion of Part 572 and the Information Form

SUBPART A OF THE RULES—GENERAL PROVISIONS

This subpart contains provisions which apply generally to the rules throughout Part 572.

Section 572.101—Authority

This section recites the statutory authority for the rules of Part 572.

Section 572.102—Purpose

This section states the purpose of the rules of this part, namely to implement those provisions of the Act which govern or affect agreements.

Section 572.103—Policies

The policies underlying the rules of this part are set forth in this section.

Section 572.104—Definitions

This section includes definitions of terms used in the Act and those rules which are relevant to agreements.

Section 572.104(a)—Agreement

The definition of the term "agreement" is based on the definition contained in section 3(1) of the Act.

Section 572.104(b)—Antitrust Laws

The term "antitrust laws" is defined in section 3(2) of the Act.

Section 572.104(c)—Appendix

The definition of the term "appendix" is new.

Section 572.104(d)—Assessment Agreement

The term "assessment agreement" is defined in section 3(3) of the Act.

Section 572.104(e)—Common Carrier

The term "common carrier" is defined in section 3(6) of the Act.

Section 572.104(f)—Conference Agreement

The definition of the term "conference agreement" is based upon and further clarifies the definition contained in section 3(7) of the Act.

Section 572.104(g)—Consultation

The definition of the term "consultation" is new.

Section 572.104(h)—Cooperative Working Agreement

The definition of the term "cooperative working agreement" is new.

Section 572.104(i)—Effective Agreement

The definition of the term "effective agreement" is new.

Section 572.104(j)—Equal Access Agreement

The definition of the term "equal access agreement" is new.

Section 572.104(k)—Independent Neutral Body

The definition of the term "independent neutral body" is new.

Section 572.104(l)—Information Form

The definition of the term "Information Form" is new.

Section 572.104(m)—Interconference Agreement

The definition of the term "interconference agreement" is based on section 5(c) of the Act.

Section 572.104(n)—Joint Service/Consortium Agreement

The definition of the term "joint service/consortium agreement" is new.

Section 572.104(o)—Marine Terminal Facilities

The definition of the term "marine terminal facilities" is new.

Section 572.104(p)—Marine Terminal Operator

The term "Marine Terminal Operator" is defined in section 3(15) of the Act. The term includes any person, firm, company, corporation or

government subdivision furnishing marine terminal facilities or marine terminal services, or which owns, leases or operates property used as a marine terminal facility. The term "marine terminal operator" includes, but is not limited, to:

(i) Ports;

(ii) Commercial operator's of public general cargo marine terminal facilities;

(iii) Operators of shipside grain elevators, bulk loaders, tank farms and lumberyard facilities handling cargo in connection with ocean common carriers;

(iv) Stevedores when engaged in performing any of the duties of a marine terminal operator;

(v) Operators of off-dock container freight stations handling cargo in connection with ocean common carriers, even when such facilities are not located at or proximate to the waterfront;

(vi) Carloaders and unloaders, truckloaders and unloaders, when furnishing equipment or labor;

(vii) Railroads which provide marine terminal facilities;

(viii) Any other person subject to the Commission's marine terminal tariff filing requirements.

The term marine terminal operator does not include persons engaged solely in the business of stevedoring and which furnish no marine terminal facilities or services.

Section 572.104(q)—Maritime Labor Agreement

The term "maritime labor agreement" is defined in section 3(16) of the Act.

Section 572.104(r)—Modification

The definition of the term "modification" is new.

Section 572.104(s)—Nonvessel-Operating Common Carrier

The term "nonvessel-operating common carrier" is defined in section 3(17) of the Act.

Section 572.104(t)—Ocean Common Carrier

The term "ocean common carrier" is defined in section 3(18) of the Act.

Section 572.104(u)—Ocean Freight Forwarder

The term "ocean freight forwarder" is defined in section 3(19) of the Act.

Section 572.104(v)—Person

The term "person" is defined in section 3(20) of the Act.

Section 572.104(w)—Pooling Agreement

The definition of the term "pooling agreement" Is based on the definition in the Commission's current agreement regulations at 46 CFR 522.2(a)(3).

Section 572.104(x)—Port

The definition of the term "port" is new.

Section 572.104(y)—Sailing Agreement

The definition of the term "sailing agreement" is new.

Section 572.104(z)—Service Contract

The term "service contract" is defined in section 3(21) of the Act.

Section 572.104(aa)—Shipper

The term "shipper" is defined in section 3(23) of the Act. The term is inclusive of the ordinarily used terms, "consignee" and "cargo interest" and is used interchangeably.

Section 572.102(bb)—Shippers' Association

The term "shippers' association" is defined in section 3(24) of the Act.

Section 572.104 (cc)—Shippers' Requests and Complaints

The definition of the term "shippers' requests and complaints" is new.

Section 572.104(dd)—Space Charter Agreement

The definition of the term "space charter agreement" is new.

Section 572.104(ee)—Through Transportation

The term "through transportation" is defined in section 3(26) of the Act.

Section 572.104(ff)—Transshipment Agreement

The definition of the term "transshipment agreement" is new.

SUBPART B OF THE RULES—SCOPE

Subpart B contains rules defining scope which are based on sections 3, 4, 5 and 7 of the Act. It recites the language of the Act regarding agreements by or among ocean common carriers. Agreements which fall within any one of seven designated categories are subject to the Act. These categories generally derive from section 15 of the Shipping Act, 1916 (46 U.S.C. 814). One new category of agreement, i.e., an agreement that regulates or prohibits the use of service contracts, is created under the 1984 Act.

Subpart B sets forth the Commission's Interpretation of the scope of the 1984 Act insofar as marine terminal operator agreements involving foreign commerce are concerned. The Commission interprets the language of sections 4(b) and 5(a) of the 1984 Act, when read in conjunction with the Act's legislative history, as reflecting clear Congressional intent to carry forward under the 1984 Act the same areas of concerted marine terminal activity previously covered under the 1916 Act, with three exceptions. First, marine terminal agreements involving ocean transportation strictly in United States interstate commerce, which remain under the jurisdiction of the 1916 Act, are outside the scope of the 1984 Act. Second, agreements among common carriers subject to the 1984 Act to establish, operate or maintain a marine terminal in the United States are not subject to the 1984 Act. Third, pooling agreements between marine terminal operators are not included, but marine terminal operators are permitted to enter into arrangements with vessel operators which vary rates with the volume of cargo offered. *See* 129 Cong. Record 51782 (daily ed. Feb. 28, 1983) (statement of Mr. Gorton). Most marine terminal operators (and therefore the involved facility or service agreements and terminal conferences) simultaneously handle cargo moving in both interstate and foreign commerce. Indeed, the terminal facilities and services furnished to cargo and vessels are generally indistinguishable on the basis of the ultimate (i.e., foreign or domestic) origin or destination of the cargo or vessel concerned. In short, marine terminal operations are one area in the maritime industry wherein a virtually seamless operational interface exists between U.S. foreign commerce and interstate commerce.

The Commission has given careful consideration to formulating an interpretation of the relationship between the scopes of the two Shipping Acts in a practical manner insofar as marine terminal operator agreements are concerned. Certainly, the legislative history of the 1984 Act does not support a conclusion that Congress intended that marine terminal operator agreements which involve both streams of commerce be simultaneously subjected to the regulatory regimes of both the 1916 and 1984 Acts. Consequently, the Commission is adopting the position set forth in sections 572.202 and 572.203 of this part, whereby it interprets the 1984 Act as extending to marine terminal operator agreements which relate to terminal facilities and/or services which, either wholly or in part, handle or are held out

to handle foreign commerce, either directly or by transshipment, including: (1) agreements involving both foreign and interstate commerce; and (2) agreements relating to facilities and/or services dedicated to interstate commerce which handle transshipment cargo moving under a through bill of lading to or from foreign ports or points.

Finally, in the interest of clarity, Subpart 9 explicitly states certain categories of agreements which are wholly outside the scope of these rules. Section 4 of the Act places acquisitions of voting securities or assets outside the scope of the Act as does section 5(e) of the Act with regard to maritime labor agreements. In addition, Subpart 9 recognizes that two categories of agreements, those involving nonvessel-operating common carriers and those involving ocean freight forwarders, which were formerly within the jurisdiction of the 1916 Act, are not covered by the 1984 Act.

Section 572.201—Agreements by or Among Ocean Common Carriers

This section recites the language of section 4(a) of the Act regarding agreements by or among ocean common carriers. Agreements which embrace any of the seven categories of activities enumerated here are subject to the requirements of these rules.

Section 572.202—Marine Terminal Operator Agreements Involving Foreign Commerce

This section recites the language of section 4(b) of the Act with regard to agreements involving marine terminal operators. The Commission interprets section 4(b) to include all marine terminal operator agreements which involve foreign commerce of the United States.

Section 572.203—Marine Terminal Operator Agreements Exclusively in Interstate Commerce

This section is intended to further clarify the Commission's jurisdiction under the Act. Where a marine terminal operator agreement involves interstate commerce exclusively, these rules do not apply.

Section 572.204—Common Carrier Terminal Agreements

Agreements between common carriers to operate marine terminals in the United States are outside the scope of these rules. Under section 5(a) of the Act such agreements do not have to be filed. Moreover, such agreements do not have antitrust immunity as indicated in section 7(b)(3) of the Act. The effect of these statutory provisions is to remove these agreements from the scope of the Act.

Section 572.205—Nonvessel-Operating Common Carrier Agreements

The purpose of this section is to make clear that such agreements are outside the scope of these rules.

Section 572.206—Ocean Freight Forwarder Agreements

The purpose of this section is to make clear that such agreements are outside the scope of these rules.

Section 572.207—Maritime Labor Agreements

This section recites the language of section 5(e) of the Act. The Act excludes maritime labor agreements from filing requirements and from review by the Commission. Consequently, the Part 572 rules do not apply to maritime labor agreements. However, while a maritime labor agreement itself is outside the scope of these rules, activities pursuant to a maritime labor agreement are subject to other provisions of the Act and other statutes administered by the Commission. Thus, rates, charges, regulations, or practices of a common carrier that are required to be set forth in a tariff, whether or not those rates, charges, regulations, or practices arise out of, or are otherwise related to, a maritime labor agreement will nevertheless be subject to scrutiny under other provisions of the Act.

Section 572.208—Acquisitions

This section recites the language of section 4(c) of the Act. Such transactions are outside the scope of these rules.

SUBPART C OF THE RULES—EXEMPTIONS AND EXCLUSIONS

Subpart C contains rules which partially implement the Commission's exemption authority under section 16. This subpart establishes general procedures for granting or revoking an exemption for an agreement or class of agreements. The formalization of these procedures by rule is new but is based on past Commission practice in considering exemption matters. In addition to formalizing exemption procedures by rule, Subpart C would continue to exempt under the 1984 Act certain classes of agreements which are presently exempt under the 1916 Act. The substantive standard for granting an exemption under section 16 of the Act has been expanded slightly from the section 35 standard of the 1916 Act to include a finding that the exemption does not result in a substantial reduction in competition. Moreover, the effect of an exemption under the 1984 Act differs from an exemption under the 1916 Act inasmuch as an exemption under the new statute confers antitrust immunity. The Commission has evaluated the current exemptions under the 1916 Act and believes that continuation of certain of these existing exemptions under the new Act is warranted. The current exemption for military household goods agreements, however, is

not continued because such agreements between nonvessel-operating common carriers are outside the scope of the 1984 Act. Interested persons will have an opportunity to comment on the continuation, discontinuation or modification of the exemptions.

Sections 7(a)(4) and 7(a)(5) of the 1984 Act exclude foreign inland transportation agreements and foreign marine terminal agreements from the filing requirements of the Act and extends antitrust immunity to these agreements. For the purposes of clarity, Subpart C includes sections which restate these statutory exclusions.

Subpart C rules should be consulted to determine whether an agreement falls into a class which is excluded by statute or exempt by rule from filing or other requirements. However, in order to remove any uncertainty which a party may have as to the applicability of an exemption to an agreement, the rules of Subpart C allow for the optional filing of an exempt agreement.

Subpart C is organized so that the general procedures for applying for and granting exemptions are stated first. This is followed by a separate section for each exclusion or exemption. Organizing all exclusions and exemptions under a single subpart eliminate some redundancy in the current rules, and provides for the orderly addition of any new class of agreements which may be exempt in the future. The purpose of this subpart is to remove or minimize the delay in implementation of routine agreements and to avoid unnecessary costs.

Section 572.301(a)—Authority

This section of the rules is based on section 16 of the Act and recites the language of the Act which authorizes the Commission to exempt certain classes of agreements from any requirement of the Act. This section implements only the authority to exempt any class of agreements and does not implement the Commission's authority to exempt any specific activity of persons subject to the Act. This section recites the finding which the Commission must make in order to grant an exemption, namely, that the exemption will not substantially impair effective regulation, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce.

Section 572.301(b)—Optional Filing

Section 572.301(b) provides for the optional filing of an exempt agreement. The purpose of this paragraph is to enable parties who are uncertain of the application of an exemption to their agreement to file the agreement and thereby remove that uncertainty. Such optional filing of an exempt agreement, however, must be accompanied by the Information Form.

Section 572.301(c)—Application for Exemption

Section 16 of the Act provides that persons may apply for an exemption of any agreement or class of agreement from any requirement of the Act or may seek revocation of an existing exemption. Section 572.301(c) restates that right to file such an application. Section 572.301(c) specifies the particular requirements of such an application including a requirement that information provided be relevant to the finding which must be made in order to grant or continue an exemption.

Section 572.301(d)—Participation by Interested Persons

This section restates the language of section 16 which affords interested persons an opportunity for hearing regarding any proposal to adopt or revoke an exemption. The Act does not define the meaning of "opportunity for hearing." The appropriate "opportunity for hearing" will be decided on a case-by-case basis. In some cases the opportunity to comment on an exemption proposal in response to *Federal Register* notification may be sufficient.

Section 572.301(e)—*Federal Register* Notice

Section 16 of the Act provides that no exemption may be adopted or revoked, in whole or in part, by the Commission unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States. This section establishes notice in the *Federal Register* as the means for informing interested persons. The *Federal Register* notice shall contain sufficient information concerning the exemption to enable interested persons to submit relevant comment.

Section 572.301(f)—Retention of Agreement by Parties

Under this section parties are not required to file a copy of an exempt agreement, but merely to retain a copy of the agreement and make it available upon request by the Commission. This requirement is necessary in order to ensure that the Commission fulfills its monitoring responsibilities with regard to such agreements.

Section 572.302—Foreign Inland Transportation Agreements—Exclusion

Section 5(a) of the Act states, in part, that agreements related to transportation to be performed within foreign countries are not required to be filed with the Commission. Section 7(a)(4) provides that the antitrust laws do not apply to "any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade." The effect of these provisions is to extend antitrust immunity to a class of agreements that is excluded

by statute from filing rquirements. This section restates this statutory exclusion.

Section 572.303—Foreign Marine Terminal Agreements—Exclusion

This section makes explicit the exclusion of foreign marine terminal agreements from the filing and Information Form requirements of the Act and these rules. Such agreements may be viewed as a specific type of foreign transportation agreement and thereby excluded from filing by section 5(a) of the Act. Foreign marine terminal agreements are specifically referred to and given antitrust immunity in section 7 (a)(5).

Section 572.304—Non-substantive Modification to Existing Agreements—Exemption

This section continues, in a modified form, the present exemption of non-substantive agreements contained in 46 CFR 524.2 and exempts such agreements pursuant to section 16 of the 1984 Act. Paragraphs (d)(1) and (d)(2) of the current exemption are removed.

Section 572.305—Husbanding Agreements—Exemption

This section clarifies and continues the exemption of husbanding agreements presently contained in 46 CFR 520 and exempts such agreements pursuant to section 16 of the 1984 Act.

Section 572.306—Agency Agreements—Exemption

This section clarifies and continues the present exemption for agency agreements contained in 46 CFR 520 and exempts such agreements pursuant to section 16 of the 1984 Act.

Section 572.307—Equipment Interchange Agreements—Exemption

This section continues the present exemption of equipment interchange agreements contained in 46 CFR 524 and exempts such agreements pursuant to section 16 of the 1984 Act.

Section 572.308—Joint Policing Agreements—Exemption

This section continues, on an interim basis, the present exemption of joint policing agreements contained in 46 CFR 524. The Commission, however, proposes to terminate this exemption 30 days from the issuance of a final rule. The Commission believes that such agreements should be filed and reviewed because of their potential for adverse effects upon shippers.

Section 572.309—Credit Information Agreements—Exemption

This section continues, on an interim basis, the present exemption for credit information agreements contained in 46 CFR 524. The Commission, however, proposes to terminate this exemption 30 days from the issuance of a final rule. The Commission believes that such agreements should be filed and reviewed because credit is an important factor in price competition and should be placed under regulatory scrutiny.

Section 572.310—Non-Exclusive Transshipment Agreements—Exemption

This section continues, in a modified form, the present exemption for non-exclusive transshipment agreements contained in 46 CFR 524. The modifications refine the description of the type of agreement which is exempt''. This will permit inclusion of matters in the agreement which are more fully representative of the usual actual arrangement of the parties for the conduct of commercial transshipment activities. The modifications permit inclusion in the arrangement of any specifics of equipment interchange, service rationalization and agency arrangements as may be necessary to complete the contemplated carriage. Additionally, these agreements now will be exempt from filing, but only if limited in scope to the provisions set forth. The exemption from filing eliminates the need to continue the requirement of a specified form of agreement.

SUBPART D OF THE RULES—FILING AND FORM OF AGREEMENTS

Section 5 of the Act establishes a requirement that every agreement subject to the Act shall be filed with the Commission. A special provision makes assessment agreements effective upon filing. The Commission is empowered under section 5(a) to prescribe by rule the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate an agreement.

Subpart D contains rules implementing section 5 filing requirements. These rules contemplate that new agreements and modifications to existing agreements shall be filed in looseleaf, notebook-style format. These requirements are designed To facilitate the necessary expedited processing of agreements, upgrade the Commission's agreement record keeping process and enhance its data retrieval ability. The requirements are developed from, and based upon, past Commission experience in these areas and the recognition of the difficulties encountered under former procedures.

The establishment of a loose-leaf, notebook style requirement for filing of agreements is considered necessary for standardization and maintenance of the agency's record systems and their ultimate conversion to more automated storage and retrieval. It will also facilitate expedited review of agreements. The loose-leaf form is not a new notion with respect to agreement filings. It is presently used by some major conference agreements on their

own initiative. Its convenience of use and maintenance should he apparent to the parties.

Subpart D also implements the information requirements under section 5 by requiring the filing of an Information Form with certain agreements. The purpose of the Form is to provide the Commission with the information needed to evaluate an agreement. Only that information which is needed for the Commission's initial substantive review shall be required. A more complete discussion of the basis and purpose of the Information Form appears below. The Information Form requirement is not being imposed on assessment or terminal agreements.

Section 572.401—Filing of Agreements

All agreements shall be filed with the Secretary of the Commission. The Commission will require a true copy and 15 additional copies of an agreement and the Information Form. This number of copies will be needed to enable the various involved offices of the Commission to review a filed agreement. The requirements specifying who may file an agreement and how it is transmitted are designed to avoid delays in the agreement reception process and to minimize the number of rejections. This section shall apply to all agreements and modifications filed on or after June 18, 1984.

Section 572.402—Form of Agreements

This section states certain technical requirements as to form. The purpose of the proposed loose-leaf style filing is to ensure compatability of agreements' documents with the Commission's records systems, and to ensure the legibility and durability of these documents. The specifications are modeled on those used in tariff publication. This system should also facilitate the modification of agreements and reduce the burden on parties filing modifications to their agreements. This section shall apply to all new agreements, other than assessment or marine terminal agreements, filed on or after June 18, 1984. It is not mandatory that modifications of existing agreements filed during the pendency of this rulemaking meet these requirements but the parties may do so if the modifications are incorporated in a restatement of the entire agreement. Upon completion of this rulemaking proceeding and final issuance of these provisions, all existing agreements will be required, within a reasonable period of time to be specified, to be refiled to meet the form requirements then imposed. Parties are invited to comment on the period of time to be specified.

Section 572.403—Modification of Agreements

This section provides guidance for the filing of modifications to agreements. Modifications to agreements must include an Information Form where the modification may result in a reduction in competition.

Section 572.404—Application for Waiver

This section provides procedures for the waiver of the form requirements of this subpart upon a showing of good cause.

Section 572.405—Information Form

Section 5(a) of the Act authorizes the Commission to prescribe by rule the additional information and documents necessary to evaluate an agreement. The legislative history to section 6 of the Act (H.R. Rep. No. 98-600, 98th Cong., 2d Sess. 30 (1984)) indicates that the agreement review procedure established under the Act is modeled upon the Hart-Scott-Rodino procedures governing clearance of proposed acquisitions and mergers (Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a). Pursuant to its Hart-Scott-Rodino authority, the Federal Trade Commission has developed a reporting form to aid its review of proposed mergers. Section 572.401 of these rules implements the Commission's authority under section 5(a) of the Act by requiring the filing of an Information Form with certain agreements. The Information Form is intended to enable the Commission to obtain the information needed to carry out its responsibility to review an agreement under the substantive standard set forth in section 6(g). The information requested on the Form does not seek all information which may be relevant to an agreement. Rather it requires only that information which would enable the Commission to expeditiously perform its responsibilities under section 6(g) of the Act. Parties to an agreement will therefore not be burdened with supplying any more information than is necessary for the Commission to conduct its initial substantive review. Use of the Form should also benefit the parties by removing any uncertainty about the depth of information which the Commission believes is necessary and relevant to its initial substantive review of an agreement. Only agreements where some further need for information is warranted would therefore be subject to a request for additional information. Parties also have the option of filing any additional information and documents which they believe may be relevant to the Commission's review of an agreement.

This section provides that where parties are unable to complete a particular item on the Form, they will not be deemed to be in non-compliance with these rules, provided that an adequate explanation for the incomplete item is submitted. This procedure is intended to fulfill the directives of the legislative history that information requirements should not be unduly burdensome and should be within the parties' grasp. The explanation of

an incomplete item is intended to enable the Commission to determine whether compliance would be unduly burdensome or unreasonably beyond the information available to the parties. This procedure applies to each incomplete response on the Form.

SUBPART E OF THE RULES—CONTENT AND ORGANIZATION OF AGREEMENTS

Sections 5 (b) and (c) of the Act require certain mandatory provisions in conference and interconference agreements. Subpart E implements these requirements and contains certain rules which establish a standard organization for agreements. Specific language is not required by these rules. Parties to agreements will retain the full measure of flexibility in fashioning their commercial arrangements. The purpose of these minimal organizational requirements is to facilitate the Commission's preliminary review to determine whether an agreement meets technical filing requirements and the substantive review of an agreement under the general standard set forth in section 6(g) and the prohibited acts listed in section 10. Moreover, as with the Subpart D requirements regarding form, these content and organization requirements will enhance the Commission's data retrieval capabilities without imposing any significant burden on parties to agreements. In fact, these minimal requirements as to agreement organization may be of assistance to the parties in preparing their agreements.

As in the case of Subpart D form requirements, the organization and content requirements of Subpart E will apply immediately to all new agreements filed on or after June 18, 1984, except assessment or marine terminal agreements. Parties filing modifications to existing agreements may restate their agreements to conform to Subpart E requirements. Upon completion of this proceeding, parties to existing agreements will be given a reasonable period of time in which to meet the requirements of this subpart.

Section 572.501—Agreement Provisions—Organization

This section sets forth certain basic articles which are required in most agreements. The purpose of this requirement is to facilitate review of the essential terms of an agreement. This section does not require specific language. The parties therefore are not restricted in establishing their commercial relationships. Since each of these nine articles may be found in virtually all agreements and since the articles are limited to what may be considered the essential terms of any agreement, the burden on agreement parties is minimal. Persons are encouraged to comment on the desirability of including additional specified provisions in the standardized organization set forth in this section. In the case of conference agreements, certain additional provisions are required by section 5(b) of the Act.

Section 572.502—Organization of Conference and Interconference Agreements

This section specifies certain additional provisions required of conference, interconference, freight conference, and passenger conference agreements.

SUBPART F OF THE RULES—ACTION ON AGREEMENTS

Section 6 of the Act establishes procedures under which agreements shall be reviewed and acted upon by the Commission. A strict schedule for processing agreements is mandated. Section 6 provides for public notice of filed agreements and for rejection of agreements that fail to meet technical filing requirements. Filed agreements will go into effect in 45 days unless a request for expedited approval is granted or the Commission seeks additional information or injunctive relief. Section 6 contains the substantive standard under which agreements are reviewed and authorizes the Commission to bring suit to enjoin an agreement and to seek court enforcement of its information requests. Section 6 also preserves the confidentiality of information submitted with agreements.

Subpart F contains rules implementing the provisions of section 6. A fundamental purpose of section 6 is to streamline the processing of agreements filed with the Commission and to ensure that agreements will be acted upon in an expeditious manner. The model for Commission review of agreements is that portion of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1390, governing premerger clearance of proposed acquisitions and mergers. In most cases, agreements will become effective following the observance of a 45-day waiting period. The rules in Subpart F are intended to establish clear procedures for the processing of agreements, so that the Commission may be able to review agreements based on necessary and relevant information within the time allowed by the statute.

Section 572.601—Preliminary Review—Rejection of Agreement

Section 6(a) of the Act provides that any filed agreement which fails to meet the requirements of section 5 of the Act shall be rejected. The first step in the processing of an agreement is a preliminary review to determine whether the agreement and accompanying Information Form meet the technical filing requirements of the Act and these rules. Where an agreement fails to provide for required statutory provisions or to meet the requirements of these rules, or where the Information Form is incomplete and an adequate explanation is not provided, the agreement shall be rejected. Parties will be notified in writing of the rejection of an agreement and the reasons for rejection. Along with the notice of rejection, the agreement, the Form, and all accompanying materials shall be returned to the parties. When an agreement is rejected, the running of the waiting period terminates.

Should the parties refile, the refiled agreement would be subject to the full waiting period required under the Act.

Section 572.602—*Federal Register* Notice

Section 6(a) of the Act requires the Commission to transmit notice of the filing of an agreement to the *Federal Register* within seven days of receipt. This section implements that requirement. The Commission will transmit such notice immediately upon completion of its preliminary review. The content of the *Federal Register* Notice is based on the Commission's current rule at 46 CFR 522.6.

Section 572.603—Comment

This section provides for comment by any interested person on an agreement. Comments may include documentary or other information. Such comments and information shall be accorded the full measure of confidentiality permitted by law.

Section 572.604—Waiting Period

Section 6 requires that parties to agreements observe a waiting period, usually 45 days, prior to implementing a filed agreement. This section sets forth certain technical provisions which make clear when the waiting period commences, when it may be tolled, when it is resumed, and when it terminates.

Section 572.605—Requests for Expedited Approval

Section 6 of the Act allows parties to an agreement to request expedited approval of an agreement. Section 572.605 sets forth grounds and procedures for applying for and granting expedited approval. The rule makes clear that such requests will generally be granted only in exceptional circumstances.

Section 572.606—Requests for Additional Information

Section 6(d) of the Act authorizes the Commission to issue requests for additional information. Section 572.507 implements that section of the Act.

Section 572.607—Failure to Comply With Requests for Additional Information

Section 6(i) of the Act authorizes the Commission to seek court enforcement of its information requests. This section is based on that provision of the Act.

Section 572.608—Confidentiality of Submitted Material

Section 6(j) of the Act provides that all information submitted by a filing party other than the agreement itself shall be exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). This section of the rules implements the Act's confidentiality provision.

Section 572.609—Negotiations

The section makes clear that the negotiation process may take place at any time after the filing of an agreement up to the conclusion of an injunctive proceeding. The negotiation process will thus be available throughout the pendency of an agreement to resolve differences over an agreement. Where more expeditious, alternative solutions may be found, the parties and the Commission may avoid the cost of litigation. The negotiation process is limited to the filing party and Commission personnel. Shippers, other government departments or agencies, and other third parties may not participate in negotiations.

SUBPART G OF THE RULES—REPORTING AND RECORD RETENTION REQUIREMENTS

Section 15 of the Act authorizes the Commission to obtain reports from any common carrier subject to the Act. The Commission may also require a conference to file conference minutes with the Commission. Subpart G contains rules which implement the various record retention and reporting requirements under the Act. Some types of data, such as conference minutes, must be submitted directly to the Commission. Other Information is required to be kept by the carrier and an index of the records is required to be filed with the Commission. The Commission seeks to ensure that sufficient information is available to satisfy its statutory responsibility to adequately monitor the concerted activities of regulated parties.

Section 572.701—General Requirements

This section contains certain general requirements which apply to all reports required by this subpart.

Section 572.702—Filing of Reports Related to Shippers' Requests and Complaints and Consultations

The Act requires conferences to provide for a consultation process and to establish procedures for considering shippers' requests and complaints. This section requires the filing of annual reports which will enable the Commission to determine whether conferences are fulfilling their responsibilities under the Act. This section reduces current requirements for shipper

requests and complaints and establishes new requirements for reporting on consultations.

Section 572.703—Filing of Minutes

This section requires certain agreements to file minutes of meetings. Discussions of certain matters, however, are exempt from the filing requirement of this section. This section is essentially a continuation of current requirements.

Section 572.704—Index of Documents

This section requires that certain agreements maintain an index of certain documents distributed to member lines. Its purpose is to further assist the Commission in fulfilling its monitoring responsibilities under the Act. The index of documents is essential to the maintenance of effective surveillance over concerted ocean carrier activities. The Commission merely seeks the identity of the documents, rather than copies of the documents themselves.

Section 572.705—Waiver of Reporting and Record Retention

This section provides for waiver of any of the provisions of this subpart.

SUBPART H OF THE RULES—TRANSITION RULES

This subpart establishes rules dealing with certain transitional matters involving agreements in existence prior to the effective date of the 1984 Act. One purpose of this subpart is to bring existing conference agreements into conformance with the mandatory provisions for conference agreements set forth in section 5(b) of the Act. Section 20(d) of the Shipping Act of 1984 (46 U.S.C. app. 1719(d)) continues conference agreements previously approved under section 15 of the Shipping Act, 1916, "as if approved or issued under this Act." Even though conference agreements remain in effect and retain antitrust immunity, the legislative history of the Act supports Commission action to assure that such agreements meet certain requirements of the Shipping Act of 1984. H.R. REP. No. 53, Part 2, 98th Cong., 1st Sess. 33 (1983).

Conference agreements already contain provisions relating to their purpose and the admission, readmission and withdrawal of members which meet or may even exceed the requirements of section 5(b) in these areas. Model provisions implementing these statutory requirements, therefore, are not necessary. However, no conference agreement approved under section 15 of the Shipping Act, 1916 fully complies with all of the requirements of section 5(b). Although conferences are free after June 18, 1984 to file amendments in order to comply with section 5(b) and implementing rules issued by the Commission, any amendment will only become effective

45 days after filing. (*See* section 6 (46 U.S.C. app. 1705)). During the interim, conferences could be in violation of section 5(b). In order to alleviate this potential problem, the Commission is prescribing model provisions to be incorporated in existing conference agreements during this interim period. Rather than requiring conferences to file an amendment containing the model provisions, the Commission is permitting conferences simply to file a telex followed by a letter, or a letter, signed by all parties or their duly authorized representatives, evidencing the adoption of the mandatory provisions contained herein. It is not necessary for the parties to recite verbatim the mandatory provisions contained in §§ 572.801(a) through 572.801(e). It is sufficient to state that the conference adopts as a modification to its agreement §§ 572.801(a) through 572.801(e). The deadline for adoption is June 18, 1984.

Section 572.801—Mandatory Provisions in Existing Conference Agreements

Section 5(b) of the Act sets forth certain required provisions for all conference agreements. This section provides certain model mandatory provisions which, if adopted, assure that existing conference agreements shall be fully in conformance with the Act on June 18, 1984 and will continue to remain in effect pursuant to section 20(d) of the Act.

Section 5(b)(4) of the Act requires conferences, at the request of any member, to require an independent neutral body to police the obligations of the conference and its members. Section 572.801(a) assures compliance with this statutory requirement by including such a provision in a conference agreement. The Commission is removing its current self-policing regulations contained in 46 CFR Part 528 from application to agreements subject to the 1984 Act and is merely requiring the statement in section 572.801(a) to assure compliance with the 1984 Act. To the extent that conferences do have neutral body policing, those provisions are integral to the agreement and such authority and procedures must be included in the agreement.

Section 5(b)(5) of the Act requires conferences to contain a provision which states that the conference is prohibited from engaging in conduct prohibited by section 10(c) (1) or (3) of the Act. Section 572.801(b) assures compliance with this requirement.

Sections 5(b)(6) and 7 of the Act require conferences to provide for consultation procedures and procedures dealing with shipper's requests and complaints. Sections 572.801(c) and 572.801(d) assure compliance with this requirement.

Section 5(b)(8) of the Act requires every conference agreement to contain a provision permitting any member to take independent action on any rate or service item in the conference tariff, on not more than 10 days' notice to the conference. Section 572.801(e) of the rules implements the independent action requirement of the statute by mandating an independent action provision. The provision makes it clear that once proper notice is received, the conference must include the new rate or service item

in its tariff within 10 days, or a lesser time if the conference so decides. Other conference members must then be provided the opportunity to adopt the independent rate or service item on or after its effective date. The provision also prohibits a conference member from taking independent action on a conference service contract or time/volume contract, unless the conference agreement specifically provides otherwise. Unless otherwise provided in its agreement, the conference may regulate or prohibit its members from unilaterally entering into such contracts and may also prevent any member from taking independent action on any service contract and any time/volume contract offered by the conference. Section 5(b)(8) requires a right of independent action only as to those rate or service items "required to be filed in a tariff under section 8(a) of [the] Act." Since service contracts are governed by section 8(c) of the Act and are not required to be filed in tariffs, conference members need not be provided the right to take action independent of them. Consequently, the Commission has accorded the same treatment to time/volume contracts because they are conceptually so similar to service contracts and to do otherwise might frustrate the compromise apparent in the statute concerning conference control over the use of service contracts. The Commission's interim rule on contract arrangements does not require time/volume contracts to be published in tariffs and this rule does not require independent action on a conference time/volume contract unless otherwise provided by the conference. Time/volume rates published in tariffs without any underlying contract are subject to the independent action requirements of the rule.

Section 572.802—Mandatory Provision in Existing Interconference Agreements

This section recites the requirement of section 5(c) of the Act that all interconference agreements must provide for the right of independent action. However, given the fact that existing interconference agreements contain such a provision, such agreements are in conformance with the 1984 Act and do not require any modification in order to conform to section 20(d) of the Act.

Section 572.803—Expiration Dates in Existing Agreements

Existing agreements with specified terms, either agreed to by the parties or previously required by the Commission, shall remain in effect after the effective date of the Act, June 18, 1984. Action to renew or eliminate the termination date is subject to the waiting period required in section 6(c) of the Act. Parties are advised to file modifications for renewal or elimination of a termination date sufficiently in advance to guarantee expiration of the waiting period during the term of the existing agreement, in order to avoid any lapse in authority.

SUBPART I OF THE RULES—PENALTIES

This subpart provides for the application of penalties for certain violations of the rules of this part pursuant to section 13(a) of the Act.

Section 572.901—Failure to File

Failure to file an agreement is a violation of section 5(a) of the Act and the rules of Subpart C. Such failure is subject to the penalties of section 13(a) of the Act. Maximum penalties are $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the maximum penalty is $25,000 for each violation.

Section 572.902—Falsification of Reports

Falsification of any report required by the Act and these rules, including falsification of any item on the Information Form, will be subject to the civil penalties set forth in section 13(a) of the Act. Such violations may also be subject to criminal sanctions under 18 U.S.C. 1001.

APPENDIX A TO THE RULES—INFORMATION FORM

Parties to agreements, referenced in Section 572.201 (excluding assessment agreements, marine terminal agreements, and those agreements exempted from the filing of the Information Form pursuant to Subpart C of these rules), by or among ocean common carriers, shall be required to file with each agreement an Information Form (Form). The Information Form is attached as Appendix A to Part 572.

Section 6(g) of the Act states that the Commission may file suit to enjoin an agreement if it determines "that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation costs." The legislative history provides guidance on the kind of analysis which Congress expected the Commission to make under the general standard, H.R. Rep. No. 98–600, 98th Cong., 2d Sess. 33–37 (1984). Such an analysis may include a consideration of the relevant market, including all competitive transportation alternatives, and the share of that market possessed by the parties. The Commission is required to consider the likely impact of the agreement on costs and services to shippers and to ports, and to weigh any negative impact on costs or services against other offsetting benefits, such as any efficiency-creating aspects of the agreement and the ability of a conference to address problems of overcapacity and rate instability. In general, Congressional intent is clear that before the Commission intercedes under the general standard, the likely reduction in competition resulting from the agreement should be substantial.

The Information Form is intended to furnish the Commission with the information necessary to make the initial substantive review of an agreement under the general standard. Given the statutory 45-day period before a

filed agreement becomes effective and limited Commission resources, the Form was designed to capture information that would enable the Commission to perform its responsibilities expeditiously under section 6(g) of the Act. The Form is not intended to elicit all potentially relevant information concerning an agreement, but only that information which is necessary, limited to the issues at hand and not unduly burdensome. The nature of a particular agreement will determine the extent of information required. Relevant information not specifically requested by any part of the Form may be obtained, where necessary, by a request for additional information under section 6(d) of the Act. The Commission recognizes that the amount of information requested on the Information Form is significant. These information needs may be refined as the Commission gains experience under the general standard and determines what is relevant and essential to that review. In addition, the Commission plans to develop its own internal sources of trade information and as this information becomes available may be able to reduce the amount of information required on the Form. The Commission wishes to emphasize that the quantum of information required on the Form is not meant to shift the burden of proof to the parties to an agreement. The Commission fully recognizes that the statute places the burden of proof on the Commission in any injunctive proceeding under the general standard. At this point, the Form reflects the Commission's preliminary determination as to the information it will need to carry out the review functions under the Act. Finally, it should be noted that where the parties are unable to complete a particular item, the rules provide that completion of that item will not be required provided that an adequate explanation is given.

A completed Form must accompany all agreements, referenced in Section 572.201 (excluding assessment agreements, marine terminal agreements, and those agreements exempted from the filing of the Information Form pursuant to Subpart C of these rules), by or among ocean common carriers that are required to be filed with the Commission. Agreements that do not provide for rate fixing (i.e., concerted actions fixing or agreeing on rates), pooling, or joint-services/consortia, are not required to complete Parts III and IV, which seek information on market shares and market competition. These three types of agreements, of all agreements historically filed with the Commission, are the most likely to trigger the 6(g) standard because of their potential to create excessive market power. Market power is the ability to set and maintain prices that yield above-normal profits over a sustained period of time. Where new and evolving forms of cooperative conduct cause substantial anticompetitive effects that exceed their benefits, it is believed that either rate fixing, pooling or a joint-service/consortium, or some combination thereof, will be involved. This does not, however, preclude the Commission from assessing the anticompetitive consequences of other types of agreements and taking the appropriate action under the general standard.

While there may be occasions when rate fixing, pooling, joint-service/consortium, or other types of agreements may lead to excessive market power raising substantial issues of unreasonably anticompetitive effects, excessive market power is most likely to occur in trades where foreign governments restrict entry to the trade or access to cargoes. Given the contestability of markets in the liner shipping Industry—where contestability in the liner industry is indicated by the industry's history of frequent entry and exit and the mobility of its resources from one trade to another—in all but the rarest cases, only government laws, decrees, rules, regulations or other governmental actions can effectively block entry to a trade. Accordingly, Part VI of the Form requests information that would permit the Commission to assess the extent of foreign government involvement in the liner market.

Part V requests information about U.S. ports proposed to be served under the agreement and any reduction in service frequency or the elimination of service to certain U.S. ports. Part V is intended to address that aspect of the section 6(g) general standard concerning certain agreements that might "produce an unreasonable reduction in transportation service."

Part VII of the Form requests information on any benefits resulting from the agreement that may accrue to the parties, the shipping public, or to U.S. commerce generally. This part is included in the Form in response to congressional intent that the Commission, in its review of an agreement under the section 6(g) general standard, should consider that increases in efficiency may offset a reduction in competition.

III. Conclusion.

The rules contained in Part 572, and the accompanying Information Form, are intended to establish a comprehensive regulatory framework which fulfills the purposes of the Shipping Act of 1984. The rules are intended to facilitate the filing of agreements by parties and the review of agreements by the Commission with a minimum of government intervention and regulatory cost.

The Chairman of the Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that these rules will not have a significant economic impact on a substantial number of small entities, within the meaning of that Act. The primary economic impact of these rules would be on ocean common carriers which generally are not small entities. A secondary impact may fall on shippers, some of whom may be small entities but that impact is not considered to be significant.

The collection of information requirements in these rules and the Information Form have been submitted to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504(h)). Comments on the information collection as-

pects of the rules should be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, Attention: Desk Officer for the Federal Maritime Commission.

List of subjects in 46 CFR Part 572, Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

THEREFORE, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 2, 3, 4, 5, 6, 7, 8, 10, 11, I3, 15, l6, 17, and 18 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716 and 1717), the Federal Maritime Commission hereby amends Title 46, Code of Federal Regulations, by adding new Part 472 to Subchapter D to read as follows:

PART 572—AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

Subpart A—General Provisions

Sec.

Subpart B—Scope

Subpart C—Exemptions and Exclusions

Subpart I—Penalties

Appendix A to Part 572

Authority. Sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716 and 1717).

Subpart A—General Provisions

§ 572.101 Authority.

The rules in this part are issued pursuant to the authority of section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18 of the Shipping Act of 1984 ("the Act").

§ 572.102 Purpose.

These rules implement those provisions of the Act which govern agreements by or among ocean common carriers and other entities subject to the filing requirements of the Act and set forth more specifically certain procedures provided for in the Act.

§ 572.103 Policies.

(a) The Shipping Act of 1984 requires that agreements be processed and reviewed according to strict statutory deadlines. These rules are intended to establish procedures for the orderly and expeditious review of filed agreements in accordance with the statutory requirements.

(b) The Act requires that agreements be reviewed in accordance with a general standard as set forth in section 6(g) of the Act and empowers the Commission to obtain certain information to conduct that review. These rules set forth the kind of information for particular types of agreements which the Commission believes relevant to that review. Only that information which is relevant to a 6(g) review is requested. It is the policy of the Commission to keep the costs of regulation to a minimum and at the same time obtain information needed to fulfill its statutory responsibility.

(c) In order to further the goal of expedited processing and review, agreements are required to meet certain minimum requirements as to form. These requirements are intended to ensure expedited review and should assist parties in preparing agreements. These requirements as to form do not affect the subtance of an agreement and are intended to allow parties the freedom to develop innovative commercial relationships and provide efficient and economic transportation systems.

(d) The Act itself excludes certain agreements from filing requirements and authorizes the Commission to exempt other classes of agreements from any requirement of the Act or these rules. In order to minimize delay in implementation of routine agreements and to avoid the private and public cost of unnecessary regulation, the Commission is exempting certain classes of agreements from the filing or information requirements of these rules.

(e) Under the new regulatory framework established by the Act, the role of the Commission as a monitoring and surveillance agency has been enhanced. The Act favors greater freedom in allowing parties to form their commercial arrangements. This, however, requires greater monitoring of agreements after they have become effective. The Act empowers the Commission to impose certain recordkeeping and reporting requirements. These rules identify those classes of agreements which require specific record retention and reporting to the Commission and prescribe the applicable period of record retention, the form and content of such reporting, and the applicable time periods for filing with the Commission. These rules assure that Commission monitoring responsibilities will be fulfilled.

(f) The Act requires that conference agreements must contain certain mandatory provisions. These rules provide a means for immediate compliance and grandfathering of existing agreements on the effective date of the new statute by a simple acceptance of model provisions by letter or telex on or before June 18, 1984. These rules also provide that conferences may file their "own" modifications to meet these statutorily mandated provisions on or after June 18, 1984. As the conference "sponsored" modifications or agreements become effective after the statutory review period, the model provisions would be superseded.

§572.104 Definitions.

When used in this part:

(a) *Agreement.* The term "agreement" means an understanding, arrangement or association, written or oral (including any modification or appendix) entered into by or among ocean common carriers and/or marine terminal operators, but does not include a maritime labor agreement.

(b) *Antitrust Laws.* The term "antitrust laws" means the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act (38 Stat. 717), as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), as amended; the Antitrust Civil Process Act (76 Stat. 548), as amended; and amendments and Acts supplementary thereto.

(c) *Appendix.* The term "appendix" means a document containing additional material of limited application and appended to an agreement, distinctly differentiated from the main body of the basic agreement.

(d) *Assessment Agreement.* The term "assessment agreement" means an agreement, whether part of a collective bargaining agreement or negotiated separately, to the extent that it provides for the funding of collectively

bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized.

(e) *Common Carrier.* The term "common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that: (1) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (2) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

(f) *Conference Agreement.* The term "conference agreement" means an agreement between or among two or more ocean common carriers or between or among two or more marine terminal operators for the conduct or facilitation of ocean common carriage and which provides for: (1) the fixing and adherence to uniform rates, charges, practices and conditions of service relating to the receipt, carriage, handling and/or delivery of passengers or cargo for all members; (2) the establishment of a central organization to conduct the collective administrative affairs of the group; and may include (3) the filing of a common tariff in the name of the group and in which all the members participate, or, in the event of multiple tariffs, each member must participate in at least one such tariff. The term does not include consortium, joint service, pooling, sailing or transshipment agreements.

(g) *Consultation.* The term "consultation" means a process whereby a conference and a shipper confer for the purpose of resolving commercial disputes or preventing and eliminating the occurrence of malpractices.

(h) *Cooperative Working Agreement.* The term "cooperative working agreement" means an agreement which establishes exclusive, preferential, or cooperative working relationships which are subject to the Shipping Act of 1984, but which do not fall precisely within the arrangements of any specifically defined agreement.

(i) *Effective Agreement.* The term "effective agreement" means an agreement approved pursuant to section 15 of the Shipping Act, 1916 or filed and effective pursuant to sections 5 and 6 of the Act.

(j) *Equal Access Agreement.* The term "equal access agreement" means an agreement between ocean common carriers of different nationalities, as determined by the incorporation or domicile of the carriers' operating companies, whereby such common carriers associate for the purpose of gaining reciprocal access to cargo which is otherwise reserved by national decree, legislation, statute or regulation to carriage by the merchant marine of the carriers' respective nations.

(k) *Independent Neutral Body.* The term "independent neutral body" means a disinterested third party, authorized by a conference and its members to review, examine and investigate alleged breaches or violations by

any agreement member of the conference agreement and/or the agreement's properly promulgated tariffs, rules or regulations.

(l) *Information Form.* The term "Information Form" means the form containing economic information which must accompany the filing of certain kinds of agreements.

(m) *Interconference Agreement.* The term "interconference agreement" means an agreement between conferences serving different trades.

(n) *Joint Service/Consortium Agreement.* The term "joint service/consortium agreement" means an agreement between ocean common carriers operating as a joint venture whereby a separate service is established which: (1) holds itself out in its own distinct operating name; (2) fixes its own rates, charges, practices and conditions of service; (3) publishes its own tariff(s) in its own operating name; (4) issues its own bills of lading; and (5) acts generally as a single carrier. The common use of facilities may occur and there is no competition between members for traffic in the agreement trade; but they otherwise maintain their separate identities.

(o) *Marine Terminal Facilities.* The term "marine terminal facilities" means one or more structures (and services connected therewith) comprising a terminal unit, including, but not limited to docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers or the interchange of same between land and ocean common carriers or between two ocean common carriers. This term is not limited to waterfront or port facilities and includes so-called off-dock container freight stations at inland locations and any other facility from which inbound waterborne cargo may be tendered to the consignee or outbound cargo is received from shippers for vessel or container loading.

(p) *Marine Terminal Operator.* The term "marine terminal operator" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.

(q) *Maritime Labor Agreement.* The term "maritime labor agreement" means a collective-bargaining agreement between an employer subject to this Act or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or an agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing or administration of a multiemployer bargaining group; but the term does not include an assessment agreement.

(r) *Modification.* The term "modification" means any change, alteration, correction, addition, deletion, cancellation or revision of an existing effective agreement (including such changes to appendices to an agreement).

(s) *Non-Vessel-Operating Common Carrier.* The term "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation portion is provided, and is a "shipper" in its relationship with an "ocean common carrier."

(t) *Ocean Common Carrier.* The term "ocean common carrier" means a vessel-operating common carrier, but the term does not include one engaged in ocean transportation by ferry boat or an ocean tramp.

(u) *Ocean Freight Forwarder.* The term "ocean freight forwarder" means a person in the United States that (1) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers, and (2) processes the documentation or performs related activities incident to those shipments.

(v) *Person.* The term "person" means individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

(w) *Pooling Agreement.* The term "pooling agreement" means an agreement between ocean common carriers which provides for the division of cargo carryings, earnings, or revenue and/or losses between the members in accordance with an established formula or scheme.

(x) *Port.* The term "port" means the place at which an ocean common carrier originates or terminates (and/or transships) its actual ocean carriage of cargo or passengers as to any particular transportation movement.

(y) *Sailing Agreement.* The term "sailing agreement" means an agreement between ocean common carriers which provides for the rationalization of service by establishing a schedule of ports which each carrier will serve and/or the frequency of each carrier's calls at those ports.

(z) *Service Contract.* The term "service contract" means a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

(aa) *Shipper.* The term "shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(bb) *Shippers' Association.* The term "shippers' association" means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(cc) *Shippers' Requests and Complaints.* The term "shippers' requests and complaints" means a communication from a shipper to a conference requesting a change in tariff rates, rules, regulations, or service; protesting or objecting to existing rates, rules, regulations or service; objecting to

rate increases or other tariff changes; and/or protests against allegedly erroneous tariff implementation. Routine information requests are not included in the term.

(dd) *Space Charter Agreement.* The term "space charter agreement" means an agreement between ocean common carriers whereby a carrier (or carriers) agrees to provide vessel capacity for the use of another carrier (or carriers) in exchange for compensation or services. The arrangement may include arrangements for equipment interchange and receipt/delivery of cargo.

(ee) *Through Transportation.* The term "through transportation" means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is an ocean common carrier, between a United States point or port and a foreign point or port.

(ff) *Transshipment Agreement.* The term "transshipment agreement" means an agreement between an ocean common carrier serving a port or point of origin and another such carrier serving a port or point of destination, whereby cargo is transferred from one carrier to another carrier at an intermediate port served by direct vessel call of both such carriers in the conduct of through transportation. Such an agreement does not provide for the concerted discussion, publication or otherwise fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the transshipment service offered, the port of transshipment and the participation of the nonpublishing carrier.

Subpart B—Scope

§ 572.201 Agreements By or Among Ocean Common Carriers.

These rules apply to agreements by or among ocean common carriers to:

(a) Discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(b) Pool or apportion traffic, revenues, earnings, or losses;

(c) Allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(d) Limit or regulate the volume or character of cargo or passenger traffic to be carried;

(e) Engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel-operating common carriers;

(f) Control, regulate, or prevent competition in International ocean transportation; and

(g) Regulate or prohibit their use of service contracts.

§ 572.202 Marine Terminal Operator Agreements Involving Foreign Commerce.

These rules apply to agreements (to the extent the agreements involve ocean transportation in the foreign commerce of the United States) among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to:

(a) Discuss, fix, or regulate rates or other conditions of service; and

(b) Engage in exclusive, preferential, or cooperative working arrangements.

§ 572.203 Marine Terminal Operator Agreements Exclusively in Interstate Commerce.

These rules do not apply to agreements by or among marine terminal operators which exclusively and solely involve transportation in the interstate commerce of the United States.

§ 572.204 Common Carrier Terminal Agreements.

These rules do not apply to agreements among common carriers to establish, operate, or maintain a terminal in the United States.

§ 572.205 Nonvessel-Operating Common Carrier Agreements.

These rules do not apply to agreements by or among non-vessel-operating common carriers.

§ 572.206 Ocean Freight Forwarder Agreements.

These rules do not apply to agreements by or among ocean freight forwarders.

§ 572.207 Maritime Labor Agreements.

These rules do not apply to maritime labor agreements.

§ 572.208 Acquisitions.

These rules do not apply to an acquisition by any person, directly or indirectly, of any voting security or assets of any other person.

Subpart C—Exemptions and Exclusions

§ 572.301 Exemption Procedures.

(a) *Authority.* The Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this Act from any requirement of the Act if it finds that the exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in substantial reduction in competition, or be detrimental to commerce. The antitrust laws do not apply to any agreement exempted from any requirement of the Act, including filing and Information Form requirements.

(b) *Optional Filing.* Notwithstanding any exemption from filing, Information Form, or other requirements of the Act and these rules, any party to an exempt agreement may file such an agreement with the Commission.

(c) *Application for Exemption.* Any person may apply for an exemption or revocation of any class of agreements or an individual agreement pursuant to section 16 of the Act and the rules of this subpart. An application for exemption shall state the particular requirement of the Act for which exemption is sought. The application shall also include a statement of the reasons why an exemption should be granted or revoked and shall provide information relevant to any finding required by the Act. Where an application for exemption of an individual agreement is made, the application shall include a copy of the agreement.

(d) *Participation by Interested Persons.* No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States.

(e) *Federal Register Notice.* Notice of any proposed exemption or revocation of exemption, whether upon application or upon the Commission's own motion, shall be published in the *Federal Register.* The notice shall include:

(1) A short title for the proposed exemption or the title of the existing exemption;

(2) The identity of the party proposing the exemption or seeking revocation;

(3) A concise summary of the agreement or class of agreements for which exemption is sought, or the exemption which is to be revoked;

(4) A statement that the application and any accompanying information are available for inspection in the Commission's offices in Washington, D.C.; and

(5) The final date for filing comments regarding the application.

(f) *Retention of Agreement by Parties.* Any agreement which has been exempted by the Commission pursuant to section 16 of the Act and any agreement excluded from filing by the Act shall be retained by the parties and shall be available upon request by the Bureau of Agreements and Trade Monitoring for inspection during the term of the agreement and for a period of three years after its termination.

§ 572.302 Foreign Inland Transportation Agreements—Exclusion.

(a) A foreign inland transportation agreement is any agreement concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.

(b) A foreign inland transportation agreement is excluded from the filing and Information Form requirements of the Act and these rules.

§ 572.303 Foreign Marine Terminal Agreements—Exclusion.

(a) A foreign marine terminal agreement is any agreement to provide or furnish wharfage, dock, warehouse, or other terminal facilities outside the United States.

(b) A foreign marine terminal agreement is excluded from the filing and Information Form requirements of the Act and these rules.

§572.304 Non-substantive Modifications to Existing Agreements—Exemption.

(a) A non-substantive modification to an existing agreement is an agreement between ocean common carriers and/or marine terminal operators, acting individually or through approved agreements, which concerns the procurement, maintenance, or sharing of office facilities, furnishings, equipment and supplies, the allocation and assessment of the costs thereof, or the provisions for the administration and management of such agreements by duly appointed individuals.

(b) A copy of the non-substantive modification shall be submitted for information purposes in the proper format but is otherwise exempt from the Information Form, notice, and waiting period requirements of these rules.

§572.305 Husbanding Agreements—Exemption.

(a) A husbanding agreement is an agreement between a principal and an agent both of which are subject to the Act, which provides for the agent's handling of routine vessel operating activities in port, such as notifying port officials of vessel arrivals and departures; ordering pilots, tugs, and linehandlers; delivering mail; transmitting reports and requests from the Master to the owner/operator; dealing with passenger and crew matters; and providing similar services related to the above activities. The term does *not* include an agreement which provides for the solicitation or booking of cargoes, signing contracts or bills of lading and other related matters, nor does it include an agreement that prohibits the agent from entering into similar agreements with other carriers.

(b) A husbanding agreement is exempt from the filing and Information Form requirements of the Act and these rules.

§572.306 Agency Agreements—Exemption.

(a) An agency agreement is an agreement between a principal and an agent, both of which are subject to the Act, which provides for the agent's solicitation and booking of cargoes and signing contracts of affreightment and bills of lading on behalf of an ocean common carrier. Such an agreement may or may not also include husbanding service functions and other functions incidental to the performance of duties by agents including processing of claims, maintenance of a container equipment inventory control system, collection and remittance of freight and reporting functions.

(b) An agency agreement between persons subject to the Act except those: (1) where a common carrier is to be the agent for a competing carrier in the same trade; or (2) which permit an agent to enter into similar agreements with more than one carrier in a trade, is exempt from the filing and Information Form requirements of the Act and these rules.

§ 572.307 Equipment Interchange Agreements—Exemption.

(a) An equipment interchange agreement is an agreement between two or more ocean common carriers for the exchange of empty containers, chassis, empty LASH/SEABEE barges, and related equipment; and for the transportation of the equipment as required, payment therefor, management of the logistics of transferring, handling and positioning equipment, its use by the receiving carrier, its repair and maintenance, damages thereto, and liability incidental to the interchange of equipment.

(b) An equipment interchange agreement is exempt from the filing and Information Form requirements of the Act and these rules.

§ 572.308 Joint Policing Agreement—Exemption.

(a) A joint policing agreement is an agreement:

(1) Between or among: (i) two or more common carriers by water; (ii) two or more associations of common carriers by water each operating pursuant to an effective agreement subject to the Act; or (iii) one or more common carriers by water and one or more such associations; and

(2) Which provides that its parties may discuss and agree upon any of the following: (i) the employment of cargo inspection and/or self-policing services; (ii) the establishment of rules and procedures relating thereto (including the collection of delinquent freight and other tariff charges); (iii) the allocation of the costs of such services; and (iv) the administration and management of cargo inspection and/or self-policing.

(b) A joint policing agreement is exempt from the filing and Information Form requirements of the Act and these rules.

(c) This exemption shall expire 30 days from the issuance of the final rule which supersedes this interim rule.

§ 572.309 Credit Information Agreements—Exemption.

(a) A credit information agreement is an agreement between ocean common carriers or their duly appointed representatives which provides for the collection, compilation and exchange of credit experience information.

(b) A credit information agreement is exempt from the filing and Information Form requirements of the Act and these rules, subject to the condition contained in § 572.309(c).

(c) Under such an agreement, the parties cannot discuss or agree on any matter which is required to be published in a tariff pursuant to the Shipping Act of 1984 or any rule published pursuant thereto.

(d) This exemption shall expire 30 days from the issuance of the final rule which supersedes this interim rule.

§ 572.310 Nonexclusive Transshipment Agreements—Exemption.

(a) A nonexclusive transshipment agreement is an agreement by which one ocean common carrier serving a port of origin by direct vessel call and another such carrier serving a port of destination by direct vessel

call provide transportation between such ports via an intermediate port served by direct vessel call of both such carriers and at which cargo will be transferred from one to the other and which agreement does not: (1) prohibit either carrier from entering into similar agreements with other carriers; (2) guarantee any particular volume of traffic or available capacity; or (3) provide for the discussion or fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the service offered as being by means of transshipment, the port of transshipment and the participation of the nonpublishing carrier.

(b) A nonexclusive transshipment agreement is exempt from the filing and Information Form requirements of the Act and these rules provided that the tariff provisions set forth in § 572.310(c), and the content requirements of § 572.310(d) are met.

(c) The applicable tariff or tariffs shall provide:

(1) The through rate;

(2) The routings (origin, transshipment and destination ports) additional charges, if any (*i.e.* port arbitrary and/or additional transshipment charges); and participating carriers; and

(3) A tariff provision substantially as follows: The rules, regulations, and rates in this tariff apply to all transshipment arrangements between the publishing carrier or carriers and the participating, connecting or feeder carrier. Every participating connecting or feeder carrier, which is a party to transshipment arrangements, has agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement between the parties.

(d) Nonexclusive transshipment agreements must contain the entire arrangement between the parties, must contain a declaration of the nonexclusive character of the arrangement and may provide for:

(1) the identification of the Parties and the specification of their respective roles in the arrangement;

(2) a specification of the governed cargo;

(3) the specification of responsibility for the issuance of bills of lading (and the assumption of common carriage-associated liabilities) to the cargo interests;

(4) the specification of the origin, transshipment and destination ports;

(5) the specification of the governing tariff(s) and provision for their succession;

(6) the specification of the particulars of the nonpublishing carrier's concurrence/participation in the tariff of the publishing carrier;

(7) the division of revenues earned as a consequence of the described carriage;

(8) the division of expenses incurred as a consequence of the described carriage;

(9) termination and/or duration of the agreement;

(10) intercarrier indemnification or provision for intercarrier liabilities consequential to the contemplated carriage and such documentation as may be necessary to evidence the involved obligations;

(11) the care, handling and liabilities for the interchange of such carrier equipment as may be consequential to the involved carriage;

(12) such rationalization of services as may be necessary to ensure the cost effective performance of the contemplated carriage; and

(13) such agency relationships as may be necessary to provide for the pickup and/or delivery of the cargo.

(e) No subject other than as listed in paragraph (d) of this section may be included in exempted nonexclusive transshipment agreements.

Subpart D—Filing and Form of Agreements

§ 572.401 Filing of Agreements.

(a) All agreements subject to these rules shall be submitted during regular business hours to the Secretary, Federal Maritime Commission, Washington, D.C. 20573. Such filing shall consist of a true copy and 15 additional copies of the agreement and, where applicable, the accompanying completed Information Form. Agreements must be filed by a responsible official whose authority is expressly provided for in the agreement or by an agent appointed by the agreement. When an agent is employed, an appropriate delegation of authority must either be on file with the Commission or be submitted with the agreement matter being tendered for filing.

(b) A filing shall also include a letter of transmittal which summarizes the agreement's contents. In the case of a modification to an existing basic agreement, the letter shall include the full name of the agreement and Commission assigned number of the basic agreement and the revision, page, or appendix number. The letter of transmittal shall be signed by the filing party, and shall show immediately below the signature the name, position, business address and telephone number of the filing party.

(c) Any agreement and accompanying Information Form which does not meet the requirements of filing shall be rejected in accordance with 572.601.

(d) Assessment agreements shall be filed and shall become effective upon filing. Assessment agreements need not be accompanied by an Information Form.

§ 572.40 Form of Agreements.

The requirements of this section apply to all agreements except for marine terminal agreements and assessment agreements.

(a) Agreements shall be clearly and legibly typewritten on one side only of 8½ inch by 11 inch durable white loose-leaf paper, providing a margin of not less than three-quarters of an inch on all edges.

(b) The first page of every agreement and/or appendix shall be the Title Page and all pages subsequent to the Title Page shall be consecutively numbered beginning with Page 1. The first edition of any one page shall be designated in the upper right-hand corner as: "Original Page No. _____." The Title Page shall contain:

(1) the full name of the agreement;

(2) once assigned, the Commission-assigned agreement number;

(3) the generic classification of the agreement in conformity with the definitions in 572.104;

(4) the date on which the entire agreement was last republished as required by 572.403(g);

(5) if applicable, the currently effective expiration date of the agreement and/or any specific provision.

(c) Face agreement page (including appendices) shall be identified by printing the agreement's "doing business as" name and, once assigned, the applicable Commission-assigned agreement number at the top of the page.

(d) Each agreement, appendix and/or modification filed will be accompanied by a separate signature page, appended as the last page of the item, which is signed in the original by each of the parties personally or by an authorized representative, providing immediately below each such signature, the typewritten full name of the signing party and their position, including organizational affiliation.

(e) The body of the agreement shall contain:

(1) Immediately following the Title Page, a Table of Contents providing for the location of all agreement provisions.

(2) Following the Table of Contents, the body of the agreement setting forth the operative provisions of the agreement in the order prescribed by 572.502. Any additional material/provisions shall be set forth as consecutively numbered articles.

(f) Any nonsubstantive provisions, as defined in 572.304 of this part, may be separated from the main body of the agreement text by the inclusion of an Appendix to the agreement. Such appendices must comply with the format requirements of paragraphs (a) and (c) of this section. Such appendices are to be serialized alphabetically with the first such Appendix being designated on its first page as "Appendix A."

§ 572.403 Modification of Agreements.

The requirements of this section apply to all agreements except for marine terminal agreements and assessment agreements.

(a) Agreement modifications shall be: filed in accordance with the provisions of § 572.401; in the format specified in § 572.402 and this section; and accompanied by an Information Form. The Information Form shall be completed as it pertains to significant modifications of the agreement. Significant modifications, for the purposes of this section, are those that may result in a reduction in competition. Such modifications include, but are not limited to, changes in geographic scope, additions to the number of parties, reductions in service levels, changes in the allocation of pooled revenues or cargoes, or changes in pool penalty provisions or carrying charges.

(b) Agreement modifications shall be made by reprinting the entire page on which the matter being changed is published. Such modified pages shall be designated as "revised pages" and shall publish in the upper right-hand corner of the new page the consecutive denomination of the revision, *e.g.*, "1st Revised Page 5."

(c) If a modification exceeds the page being modified and the parties do not wish to modify the entire agreement, the additional material may be published on an original page, designated with the same number as the page being modified and an alphabetical suffix, i.e. "Original Page 5a."

(d) The language being modified shall be indicated as follows:

(1) language being deleted or replaced shall be indicated by being struck through; and,

(2) new and initial or replacement language shall immediately follow the language being superseded and be underlined.

(e) When a revised or new page is revised, or the entire agreement is reissued, the change indications in paragraphs (d) (1) and (2) of this section are to be deleted from the republished pages.

(f) If a modification requires the relocation of the provisions of the agreement, such modification shall be accompanied by a revised Table of Contents page which shall report the new location of the agreement's provisions.

(g) Not later than two years after the last modification to the agreement, the entire agreement shall be republished, incorporating such modifications as have been made and superseding the previous edition of the agreement. Such republished agreement will be filed with the Commission in accordance with the filing (except as hereinafter noted), format and content requirements of this part and shall contain nothing other than the previously effective language and such nonsubstantive modifications as are necessary to accomplish the republication. It is not required that the filing of such republished agreements be accompanied by the Information Form or that they be filed in more than an executed original true copy.

§ 572.404 Application for Waiver.

(a) Upon a showing of good cause, the Commission may waive the form requirements of §§ 572.401, 572.407 and 572.403.

(b) Requests for permission to depart from the form requirements of this subpart must be submitted in advance of the filing or submission of the materials to which the requested waiver would apply and must state: the specific regulation from which relief is sought; the special circumstances requiring the requested relief; and, the beneficial results anticipated to be obtained from the requested waiver.

§ 572.405 Information Form.

(a) Except for marine terminal agreements and assessment agreements, the information required by the Commission for review of an agreement shall be provided in the Information Form set forth in the Appendix to this part. The filing party to an agreement subject to the Act shall complete and submit the Information Form, or a photostatic or equivalent reproduction thereof, at the time that an agreement is filed. The Information Form shall be completed in accordance with the instructions therein and these rules. Copies of the Form may be obtained in person at the Office of the Secretary or by writing to the Secretary of the Commission.

(b) A complete response shall be supplied to each item on the Information Form. Whenever the party completing the Information Form is unable to supply a complete response, that party shall provide, for each item for which less than a complete response has been supplied, either estimated data (with an explanation of why precise data are not available) or a detailed statement of reasons for noncompliance and the efforts made to obtain the required information.

(c) Any party filing the Information Form may supplement that Form with any other information or documentary material.

(d) The Information Form and any additional information, submitted by a filing party under this section shall not be disclosed except as provided in § 572.608.

Subpart E—Content and Organization of Agreements

§ 572.501 Agreement Provisions—Organization.

(a) All agreements, except for marine terminal agreements and assessment agreements, shall be organized and shall include the content as provided by this section. Article numbers are reserved for the particular provision or authority as indicated in this section.

(b) All agreements shall organize and number the following articles in the following order and shall observe the guidelines as to content as provided in this section.

(1) Article 1—Full Name of the Agreement.

(2) Article 2—Purpose of the Agreement. State the objectives or ends to be attained through the conduct of the agreement.

(3) Article 3—Parties to the Agreement: List the current parties to the agreement to include for each participant: (i) the full legal name of the party; (ii) the address of its principal office (to the exclusion of the address of any agent or representative not an employee of the participating carrier or association); and (iii) nationality as determined by the incorporation or domicile of the carrier's operating companies.

(4) Article 4—Geographic Scope of the Agreement: State all U.S. and foreign port ranges served by the membership pursuant to the authority of the agreement. In the event of an inland scope, state the points or geographic areas of origin and destination together with the ports or ranges or ports at which the ocean transportation begins and ends.

(5) Article 5—Agreement Authority: State the authority of the parties pursuant to the agreement to engage in the joint activities set forth in §§ 572.201 and 572.202 of this part (*E.g.*, Article 5 of a conference agreement shall include a statement of authority of the conference to establish rates, service contracts, practices, terms and conditions of service, credit terms, freight forwarder compensation, etc.).

(6) Article 6—Officials of the Agreement and Delegations of Authority: Indicate the administrative and executive officials and those persons with authority to file or to delegate such authority to file agreements or modifications to agreements. This article shall also specify any designated U.S. representative(s) of the agreement required by this chapter.

(7) Article 7—Membership, Withdrawal, Readmission and Expulsion: Specify the terms and conditions for admission, withdrawal, readmission and expulsion to or from membership in the agreement, including membership fees, refundable deposits and other fees or charges associated with membership.

(8) Article 8—Voting: Specify the procedures, including quorum requirements, by which the agreement membership exercises its collective authority to choose, endorse, decide the disposition of, defeat, or authorize any particular matter, issue or activity.

(9) Article 9—Duration and Termination of the Agreement: Specify, where applicable, the date on which the agreement terminates and describe the procedures to be followed to terminate the agreement.

§ 572.502 Organization of Conference and Interconference Agreements.

(a) Each conference, freight conference or passenger conference agreement filed on or after June 18, 1984, in addition to Articles 1 through 9 contained in § 572.501, shall include the following articles:

(1) Article 10—Neutral Body Policing: State that at the request of any member the conference shall engage the services of an independent neutral body to fully police the obligations of the

conference and its members. Include a description of any such neutral body authority and procedures related thereto.

(2) Article 11—Prohibited Acts: State affirmatively that the conference shall not engage in conduct prohibited by section 10(c)(1) or 10(c)(3) of the Act.

(3) Article 12—Consultation, Shippers' Requests and Complaints. Specify the procedures for consultation with shippers and for handling shippers' requests and complaints.

(4) Article 13—Independent Action. Specify the independent action procedures of the conference. Such procedures shall provide that any conference member may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of the Act upon not more than 10 calendar days' notice to the conference and shall otherwise be in conformance with section 5(b)(8) of the Act.

(b) Each interconference agreement filed on or after June 18, 1984, in addition to Articles 1 through 9 contained in § 572.501, and Articles 10, 11, and 12 contained in § 572.502(a) shall include the following article: "Article 13—Independent Action" which specifies the independent action procedures of the agreement.

Subpart F—Action on Agreements

§ 572.601 Preliminary Review—Rejection of Agreements.

(a) The Commission shall make a preliminary review of each filed agreement to determine whether the agreement is in compliance with the filing requirements of the Act and these rules and whether the Information Form is complete, or where not complete, the deficiency is adequately explained.

(b) The Commission shall reject any agreement that fails to comply with the filing and information requirements under the Act and these rules. The Commission shall notify in writing the person filing the agreement of the reason for rejection of the agreement. The entire filing, including the agreement, the Information Form and any other information or documents submitted, shall be returned to the filing party. Should the agreement be refiled, the full waiting period must be observed.

§ 572.602 *Federal Register* Notice.

(a) Any filed agreement which is not rejected pursuant to § 572.601 will be transmitted to the *Federal Register* within seven days of the date of filing.

(b) The notice will include:

(1) A short title for the agreement;

(2) The identity of the parties;

(3) The Federal Maritime Commission agreement number;

(4) A concise summary of the agreement's contents;

(5) A statement that the agreement is available for inspection at the Commission's offices; and

(6) The final date for filing comments regarding the agreement.

§ 572.603 Comment.

(a) Persons may file with the Secretary a written statement regarding a filed agreement. Such comments are not subject to any limitations except the time limits provided in the *Federal Register* notice. If requested, comments and any accompanying material shall be accorded confidential treatment to the fullest extent permitted by law.

(b) The filing of a comment does not entitle a person to: (1) reply to the comment by the Commission; (2) institution of any Commission or court proceeding; (3) discussion of the comment in any Commission or court proceeding concerning the filed agreement; or (4) participation in any proceeding which may be instituted.

§ 572.604 Waiting Period.

(a) The waiting period before an agreement becomes effective shall commence on the date that an agreement is filed with the Commission.

(b) Unless tolled by a request for additional information or extended by court order, the waiting period terminates and an agreement becomes effective on the later of the 45th day after the filing of the agreement with the Commission or on the 30th day after publication of notice of the filing in the *Federal Register.*

(c) The waiting period is tolled on the date when the Commission, either orally or in writing, requests additional information or documentary materials pursuant to section 6(d) of the Act. The waiting period resumes on the date of receipt of the additional material or an adequate statement of the reasons for noncompliance, and the agreement becomes effective in 45 days unless the waiting period is further extended by court order.

§ 572.605 Requests for Expedited Approval.

Upon written request of the filing party, the Commission may shorten the review period. Accompanying the request, the filing party should provide a full explanation, with reference to specific facts and circumstances, of the necessity for a shortened waiting period. If the Commission decides to approve an abbreviated waiting period, the term will be decided after consideration of the parties' needs and the Commission's ability to perform its review functions under a reduced time schedule. In no event, however, may the period be shortened to less than fourteen days after the publication of the notice of the filing of the agreement in the *Federal Register.* When a request for expedited approval is denied by the Commission, the normal waiting period specified in § 572.604 will apply. Such expedition will not be granted routinely and will be granted only in exceptional circumstances which include but are not limited to: the impending expiration of the agreement; operational urgency; Federal or State imposed time limitations;

or other reasons which, in the Commission's discretion, constitute grounds for granting the request.

§ 572.606 Requests for Additional Information.

(a) The Commission may request from the filing party any additional information and documentary material necessary to complete the statutory review required by section 6 of the Act. The request shall be made prior to the expiration of the waiting period. All additional information and documentary material shall be submitted to the Director, Bureau of Agreements and Trade Monitoring, Federal Maritime Commission, Washington, D.C. 20573. If the request is not fully complied with, a statement of reasons for noncompliance shall be provided for each item or portion of such request which is not fully answered.

(b) Where the Commission has made a request for additional information material, the effective date is 45 days after receipt of the additional material. In the event all material is not submitted, the effective date will be 45 days after receipt of both the documents and information which are submitted, if any, and the statement indicating the reasons for noncompliance. The Commission may, upon notice to the Attorney General, and pursuant to sections 6(i) and 6(k) of the Act, request the United States District Court for the District of Columbia to further extend the effective date until there has been substantial compliance.

(c) A request for additional information may be made orally or in writing. In the case of an oral request, a written confirmation of the request shall be mailed to the filing party within seven days of the communication.

(d) The party upon whom a request for additional information is made will have a reasonable time to respond, as specified by the Commission. The test of reasonableness shall be based on the particular circumstances of the request and shall be determined on a case-by-case basis.

§ 572.607 Failure to Comply with Requests for Additional Information.

(a) A failure to comply with a request for additional information results when the party responsible for filing the request fails to substantially respond to the request or does not file a satisfactory statement of reasons for noncompliance. An adequate response is one which directly addresses the Commission's request. When a response is not received by the Commission within a specified time, failure to comply will have occurred.

(b) The Commission may, pursuant to section 6(i) of the Act, request relief from the United States District Court for the District of Columbia where there has been a failure to substantially comply with a request for additional information. The Commission may request that the court:

(1) Order compliance with the request; and

(2) At its discretion grant other equitable relief which under the circumstances seems necessary or appropriate.

(c) Where there has been a failure to substantially comply, section 6(i)(2) of the Act provides that the court shall extend the review period until there has been substantial compliance.

§ 572.608 Confidentiality of Submitted Material.

(a) Except for an agreement filed under section 5 of the Act, all information submitted to the Commission by the filing party will be exempt from disclosure under 5 U.S.C. 552. Included in this disclosure exemption is information provided in the Information Form, voluntary submissions of additional information, reasons for noncompliance, and replies to requests for additional information.

(b) Information which is confidential pursuant to paragraph (a) of this section may be disclosed, however, to the extent:

(1) It is relevant to an administrative or judicial action or proceeding; or

(2) It is in response to a request from either body of Congress or to a duly authorized committee or subcommittee of Congress.

§ 572.609 Negotiations.

At any time after the filing of an agreement and prior to the conclusion of judicial injunctive proceedings, the filing party or an authorized representative may submit additional factual or legal support for an agreement or may propose modifications of an agreement. Such negotiations between Commission personnel and filing parties may continue during the pendency of injunctive proceedings. Shippers, other government departments or agencies, and other third parties may not participate in negotiations.

Subpart G—Reporting and Record Retention Requirements

§ 572.701 General Requirements.

(a) *Address.* All reports required by this subpart should be addressed to the Commission as follows:

Director,
Bureau of Agreements and Trade Monitoring
Federal Maritime Commission
Washington, D.C. 20573

The lower, left-hand corner of the envelope in which each report is forwarded should indicate the subject of the report and the related agreement number. For example: "Minutes, Agreement 5000."

(b) *Serial. Numbers of Reports.* Each report filed with the Commission should be assigned a number for each subject. For example, a conference filing minutes of its first meeting upon the effective date of this rule should assign "Meeting No. 1" to its Minutes, the next meeting will be assigned "Meeting No. 2," and so on. The first Shippers' Request and Complaint report should be designated "Shippers' Request and Com-

plaint Report No. 1," the next report would be "Shippers' Request and Complaint Report No. 2," and so on.

(c) *Retention of Records.* Each agreement required to file an index of documents pursuant to this subpart shall retain a copy of each document listed for a minimum period of 3 years after the date the document is distributed to the members and shall make it available to the Commission upon written request.

(d) *Request for Documents.* Documents may be requested by the Director, Bureau of Agreements and Trade Monitoring, in writing by reference to a specific minute or index, and shall indicate that the documents will be received in confidence. Requested documents shall be furnished by the parties within the time specified.

(e) *Time for Filing.* Documents filed on an annual (calendar) year basis shall be filed by February 15 of the following year. Other documents shall be filed within 30 days of the end of a quarter-year, a meeting, or the receipt of a request for documents.

(f) *Confidentiality.* All information submitted to the Commission under this subpart shall be accorded confidential treatment to the fullest extent permitted by law.

572.702 Filing of Reports Related to Shippers' Requests and Complaints and Consultations.

(a) *Shippers' Requests and Complaints.* Each conference shall file with the Commission an annual report setting forth a statistical summary showing the total number of shippers' requests and complaints received, the total number which were fully granted, the total number which were partially granted and the total number which were denied, during each calendar year, under the established shippers' requests and complaints procedures. Each report shall also show the total number of requests or complaints which were pending disposition at the start and at the end of the report period. Each of the totals which are reported to the Commission shall be divided into three categories: those involving rates or charges, those involving transportation services, and those involving other matters.

(b) *Consultations.* Each conference shall file with the Commission an annual report setting forth a statistical summary showing the total number of requests for consultations and the total number of consultations during each calendar year under established consultation procedures. Each of the totals which are reported to the Commission shall be divided into two categories: consultations involving commercial disputes and consultations involving cooperation with shippers in preventing and eliminating malpractices.

§ 572.703 Filing of Minutes.

(a) *Meetings.* For purposes of this subpart, the term "meeting" shall include any meeting of the parties to the agreement, including meetings of their agents, principals, owners, committees, or subcommittees of the parties authorized to act in any capacity under the agreement and, if the

agreement authorizes, other action such as telephonic or polls of the membership, etc.

(b) *Content of Minutes.* Conferences, interconference agreements, agreements between a conference and one or more ocean common carriers, pooling agreements, equal access agreements, discussion agreements, marine terminal conferences, and marine terminal rate fixing agreements shall, through a designated official, file with the Commission a report of each meeting describing all matters within the scope of the agreement which are discussed or considered at any such meeting, shall specify any documents distributed by the conference or other agreement to inform or assist the members on such matters, and shall indicate the action taken. These reports need not disclose the identity of parties that participated in discussions, or the votes taken.

(c) *Exemption.* No minutes need be filed under paragraph (b) of this section with respect to any discussion of or action taken with regard to: (1) rates that, if adopted, would be required to be published in the Commodity Rate Section, Class Rate Section, or Open Rate Section of the pertinent tariff on file with the Commission (this exemption does not apply to discussions involving general rate policy, general rate changes, the opening or closing of rates, or service or time/volume contracts); or (2) purely administrative matters.

§ 572.704 Index of Documents.

(a) Each agreement required to file minutes pursuant to § 572.703 shall maintain an index of all reports, circulars, notices, statistics, analytical studies, or other documents, not otherwise filed with the Commission pursuant to this subpart, which are distributed to the member lines.

(b) Each index required by paragraph (a) of this section shall be filed with the Commission on a quarterly basis, the first to be filed for the period ending September 30, 1984, and for each succeeding quarterly period thereafter. Each index must be certified by an official of the agreement as true and correct.

§ 572.705 Waiver of Reporting and Record Retention.

Upon a showing of good cause, the Commission may waive any of the provisions of this subpart.

Subpart H—Transitional Rules

§ 572.801 Mandatory Provisions in Existing Conference Agreements.

As of June 18, 1984, all existing conference agreements must be in compliance with the requirements set forth in section 5(b) of the Act. Conferences shall achieve compliance with the Act by submitting to the Commission on or before June 18, 1984, either a telex to be followed by a letter, or a letter, evidencing the adoption by the conference of the mandatory provisions contained in this section. To the extent that any

provision in an existing agreement is inconsistent with a particular mandatory provision, the mandatory provision shall govern.

(a) *Neutral Body Policing.* Upon written request of one conference member submitted to the [chief executive officer] of the conference, the conference shall engage the services of an independent neutral body to police fully the obligations of the conference and its members.

(b) *Prohibited Acts.* The conference shall not engage in any boycott or take any other concerted action resulting in an unreasonable refusal to deal; or engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade, of a common carrier not a member of the conference, a group of common carriers, an ocean tramp or a bulk carrier.

(c) *Consultation.* In the event of a controversy, claim, or dispute of a commercial nature arising out of or relating to this agreement or efforts to reduce or eliminate malpractices, the conference, its [chief executive officer or other designee] shall attempt to resolve the dispute in an amicable manner through direct discussions with the disputant. The services of third parties may be drawn from members of the conference or impartial outsiders, including use of the Commission's conciliation service provided for at 46 CFR §§502.401–502.406. The means of invoking consultation shall be set forth in the conference tariff.

(d) *Shippers' Requests and Complaints.*

(1) Shippers' requests and complaints may be made by filing a statement thereof with the [chief executive officer or in the case of an executive domiciled outside the United States, the designated U.S. representative.] Such statement shall be accompanied by a completed information sheet prescribed by the conference [chief executive officer]. The statement and information sheet shall be submitted promptly to each member of the conference.

(2) The shipper's request or complaint shall be considered by the conference at its next meeting following its submission to the conference members. Written notice of the scheduling of consideration of the request or complaint shall be served on the shipper at the time of scheduling. The shipper shall be granted the opportunity to be heard at such Conference meeting upon written request.

(3) Conference discussion and action on the shippers' request or complaint need not be restricted to the exact scope of the request or complaint and may include other matters varying from but related thereto. However, all such discussion and action must be authorized by the conference agreement.

(4) The conference shall render a decision on the request or complaint promptly after its initial submission to the conference membership. Such decision shall be in writing, signed by the conference [chief executive officer] and served upon the shipper.

Such decision shall include a notice to the shipper that it may file a complaint with the Federal Maritime Commission if the matter is not resolved to the shipper's satisfaction and if the matter is one which may be subject to the Shipping Act of 1984.

(5) The procedures for filing shippers' requests and complaints shall be set forth in the conference tariff.

(e) *Independent Action.* Any party to this agreement may take independent action on any rate or service item required to be filed in a tariff pursuant to section 8(a) of the Shipping Act of 1984 (46 U.S.C. app. 1707(a)) upon not more than 10 calendar days' notice to the conference. The time period shall commence upon receipt by the conference, during normal business hours, of a written notice of a member's intention to exercise independent action. Within 10 calendar days of the receipt of such notice, the conference shall file the rate or service item in its tariff for use by the member. The conference or any other conference member may elect to adopt the independent rate or service item, on or after its effective date, by providing written notice of such intention. If another member decides to adopt the independent rate, then the conference shall file the rate immediately on behalf of that member. Unless otherwise provided in this agreement, conference members may regulate or prohibit its member lines from unilaterally entering into service or time/volume contracts and may also regulate or prohibit any conference member from taking independent action on any service contract or time/volume contract offered by the conference.

§572.802 Mandatory Provision in Existing Interconference Agreements.

Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier. Each agreement between conferences must provide the right of independent action for each conference.]

§572.803 Expiration Dates in Existing Agreements.

(a) Expiration dates to existing agreements or specific provisions thereof, shall remain in effect on and after June 18, 1984.

(b) Parties to agreements with expiration dates have the obligation to file any modification seeking renewal for a specific term or elimination of a termination date in sufficient time to accommodate the waiting period required under the Act.

Subpart I—Penalties

§572.901 Failure to File.

Any person operating under an agreement involving activities subject to the Act which has not been filed is in violation of the Act and the rules of this part and is subject to the civil penalties set forth in section 13(a) of the Act.

§ 572.902 Falsification of Reports.

Falsification of any report required by the Act or these rules, including falsification of any item on the Information Form, is a violation of the rules of this part and is subject to the civil penalties set forth in section 13(a) of the Act and may be subject to the criminal penalties provided for in 18 U.S.C. 1001.

Appendix A to Part 572—Information Form and Instructions

Explanation and Instructions for Information Form

The following explanation and instructions accompany the Information Form (Form) and are intended to facilitate the completion of the Form. The explanations and instructions should be read in conjunction with the Shipping Act of 1984 (Act) and with 46 CFR Part 572.

All agreements by or among ocean common carriers referenced in 572.201 (excluding assessment agreements, marine terminal agreements and those agreements exempted from the filing of the Information Form pursuant to Subpart C of the rules) filed with the Commission must be accompanied by a completed Information Form, which in all cases necessitates the completion of Parts I, II, V, VI, VII, VIII and IX.

Because of their potential substantial anticompetitive implications, parties filing certain types of agreements, namely rate-fixing (including, for example, agreements authorizing conferences, interconference agreements, and agreements between a conference and one or more ocean common carriers), pooling, and joint-service and consortium agreements, are required to complete Parts III and IV of the Form in addition to the above specified parts required to be completed by all filing parties.

Certain parts of the Form request information that may not be readily available to the filing party. Where precise information is not available, best estimates may be supplied. Where estimates are made, they should be identified by the use of the notation "est." Furnishing an estimate requires a clear explanation of why the precise information is not available. Where such an explanation is provided, the use of estimates will not ordinarily be regarded as a failure to supply a complete response as specified in 572.607, and does not require a separate statement of reasons for noncompliance.

In all parts of the Form where data are requested, the filing party is required to indicate all sources used to obtain such data. Sources should also be specified where estimates have been made by the filing party.

PART BY PART EXPLANATION

Part I

Part I requires the filing party to state the full name of the agreement as also provided under 572.501.

Part II(A)

Part II(A) requires the filing party to indicate whether or not the agreement authorizes the parties to collectively fix rates. Rate fixing may be authorized by a conference agreement [§ 572.104(f)], an interconference agreement [§ 572.104(m)], or an agreement between a conference and one or more ocean common carriers.

Part II(B)

Part II(B) requires the filing party to indicate whether or not the agreement authorizes the parties to pool cargoes or revenues [§ 572.104(w)].

Part II(C)

Part II(C) requires the filing party to indicate whether or not the agreement authorizes the parties to establish a joint service or consortium [§ 572.104(n)].

Background Information to Parts III and IV

If any question in Part II was answered "YES", the filing party is required to complete Parts III and IV (in addition to completing Parts I, II, V, VI, VII, VIII and IX, which are required to be completed by all filing parties).

The *amount of cargo* is to be given on *both* a weight ton (specify long, metric or short ton, whichever is used), and a dollar value basis.

The *dollar value of cargo* is measured according to Bureau of Census practices. The value of *export cargo* is taken to be equivalent to the f.a.s. (free alongside ship) value at the U.S. port of export, based on the transaction price, including inland freight, insurance and other charges incurred in placing the merchandise alongside the carrier at the U.S. port of exportation. The value of *import cargo* is defined as the price actually paid or payable for merchandise when sold for exportation to the United States, excluding U.S. import duties, freight, insurance, and other charges incurred in bringing the merchandise to the United States.

Sub-trade is defined as the scope of all liner movements between *each* foreign country and *each* U.S. port range within the scope of the agreement. Each foreign country/US. port range pair should be shown separately. Where the agreement covers both U.S. inbound and outbound liner movements, inbound and outbound liner movements should be shown separately.

U.S. port ranges are defined by using the Bureau of Census classification of U.S. Coastal Districts. Thus, the U.S. port ranges are defined as follows:

> *North Atlantic*—Includes ports along the eastern seaboard from the northern boundary of Maine to the southern boundary of Virginia.

South Atlantic—Includes ports along the eastern seaboard from the northern boundary of North Carolina to, but not including Key West, Florida. Also included are all ports in Puerto Rico and the U.S. Virgin Islands.

Gulf—Includes all ports along the Gulf of Mexico from Key West, Florida to Brownsville, Texas, inclusive.

South Pacific—Includes all ports in the States of California and Hawaii.

North Pacific—Includes all ports in the states of Oregon, Washington, and Alaska.

Great Lakes—Includes all ports bordering upon the Great Lakes and their connecting waterways as well as all ports in the State of New York on the St. Lawrence River.

Liner service refers to a definite, advertised schedule, giving relatively frequent sailings at regular intervals between specific U.S. ports or port ranges and designated foreign ports or port ranges. *Liner vessels* are defined as those vessels used in a liner service. *Liner cargoes* are cargoes carried on liner vessels in a liner service. A *liner operator* is a vessel operating ocean common carrier engaged in liner service. *Liner movement* is the carriage of liner cargo by liner operators.

Market share information should be provided using data for the most recent twelve (12) month period for which data are available. State the period used. Identify all sources of the data.

Alternative liner routing is defined as liner service between the foreign country specified in the sub-trade and any North American port(s) other than those located within the port range covered by the sub-trade. The alternative liner routing may serve the sub-trade's port(s) and interior point(s) by way of feeder service, transshipment, surface carriage (such as mini-landbridge), or some other form of substituted transport. Alternative liner routing includes only those liner services which compete for cargoes carried in the sub-trade.

Part III(A)

Part III(A) requires the filing party to provide the total amount of cargo carried on *all parties'* liner vessels in each sub-trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

Part III(B)

Part III(B) requires the filing party to provide the total amount of cargo carried on *all* liner vessels (i.e., both party and non-party carriers) operating in each sub-trade within the scope of the agreement for the most recent twelve (12) month period for which data are available.

Part III(C)

Part III(C) requires the filing party to provide the combined market share of all parties operating in each sub-trade within the scope of the agreement. The market share provided in Part III(C) is the quotient (multiplied by 100) of the total derived in Part III(A) divided by the total derived in Part III(B). The *formula for calculating market share* is as follows:

> The total amount of cargo carried on all parties' liner vessels in each sub-trade within the scope of the agreement over the most recent twelve-month period for which data are available divided by the total amount of cargo carried on all liner vessels in each sub-trade within the scope of the agreement over the same twelve month period; which quotient is multiplied by 100.

The most recent twelve month period for which data are available is to be the same period of time used both in the calculation of the parties' total sub-trade liner cargo movements [Part IV(A)] and in the calculation of the total sub-trade liner cargo movements for all liner operators [Part IV(B)].

Part IV(A)

Part IV(A)(1) requires the filing party to provide, for each sub-trade within the scope of the agreement, the names of all liner operators who are not parties to the agreement, and who were offering liner service in that sub-trade at the time the agreement was filed with the Commission.

Part IV(A)(2) requires the filing party to provide, for each sub-trade, the names of all liner operators serving alternative liner routings who compete for the cargoes carried by the parties.

Part: IV(A)(3) requires the filing party to describe the extent of the competition offered by all non-party liner operators, including liner operators directly serving the sub-trade *and* liner operators serving alternative liner routings. A description of the extent of competition should include estimates (or precise information where available) of non-party liner operator market share (shown either for each individual operator or for all operators collectively, and calculated on the basis either of height tons, value of cargo, or capacity), and any evidence of underutilized capacity in the alternative liner routings. Explain how the non-party market share was derived. Specify the units of measurement used in the calculations. Indicate the source(s) used to provide data or estimates.

Part IV(B)

Part IV(B)(1) requires the filing party to identify all non-liner competitive substitutes that are available to shippers of commodities historically transported by liner service within the scope of the agreement. Non-liner com-

petitive substitutes may include carriage on a charter or contract basis or on an infrequent, irregular basis by bulk, mix container/bulk, breakbulk or other vessel-type operators. Such substitutes may also include carriage by air freight operators or air passenger operators with available "belly space" for air freight. Such substitutes may provide service to a subtrade through some form of substituted service (e.g., mini-landbridge, transshipment or feeder service) by way of ports within an alternative North American port range(s).

Part IV(B)(2) requires the filing party to estimate the percentage of the total amount of cargo, historically carried in the trade on liner vessels, that has been carried by non-liner competitive substitutes over the most recent twelve (12) month period for which data are available. The intent of Part IV(B)(2) is to determine the amount of liner cargo historically carried in the trade that has been "lost" to non-liner operators. Identify all units of measurement and describe how the percentage was derived. Identify the sources used.

Part V(A)

Part V(A) requires the filing party to identify all U.S. ports expected to be served under this agreement. Include all U.S. ports expected to receive direct liner service (port calls by a party) and indirect liner service (port calls by way of some form of substituted service such as transshipment, feeder, or surface carriage).

Part V(B)

Part V(B)(1) requires the filing party to specify any party's reduction in frequency of service to any U.S. port within the scope of the agreement. Reductions in frequency are determined as follows: (1) for each party and for each U.S. port within the scope of the agreement served by that party, determine total number of port calls over the most recent twelve (12) month period for which data are available (historical port call calculation); (2) for each party and for each U.S. Port within the scope of the agreement served by that party, estimate the total number of port calls for the twelve (12) month period immediately following implementation of the agreement (expected port call calculation); (3) calculate the difference between the "historical port call calculation" and the "expected port call calculation." Provide, for each party and for each U.S. port, the following calculations: the "historical port call calculation"; the "expected port call calculation"; and the difference between those calculations.

Part V(B)(2) requires the filing party to specify any elimination of service to any U.S. port within the scope of the agreement that is currently (at the time the agreement is filed) receiving liner service front any party to the agreement, where the elimination of that port occurs as a result of the implementation of the agreement. The term "service to any U.S.

port'' includes direct service by the parties and indirect service by way of, for example, transshipment, feeder service, or alternate or substitute port service.

Part VI(A)

Part VI(A) requires the filing party to indicate whether or not the agreement was entered into as a direct or indirect response to any law, decree, rule, regulation or any other governmental action promulgated or, otherwise implemented by a foreign government. The agreement may, for example, operate in a context where a foreign government has promulgated or implemented certain cargo reservation, cargo preference or other cargo sharing schemes that favor national flag lines and that require these national lines to be members of a conference. A *direct* response to such governmental action would be the creation of a conference agreement. An *indirect* response to such governmental action would be the creation of a pool that facilitates cargo sharing within a conference even though the pool was not *per se* required by such governmental action.

Part VI(B)

Part VI(B) requires the filing party to identify all such laws, decrees, rules, regulations or any other foreign governmental actions that have led to the agreement. All such governmental actions should be identified by the type of governmental action (e.g., a law, decree, memorandum order, etc.), the full legal title of the governmental action, the date that the governmental action became (or will become) effective, and the date (if specified) the governmental action will terminate. Part VI(B) also requires a detailed description of the purpose and the nature of the governmental action, including all requirements imposed on the parties by the governmental action, and the specification of each provision in the agreement that is a direct or indirect response to each such governmental action.

Part VI(C)

Part VI(C) requires the filing party to indicate whether or not any law, decree, rule, regulation or any other foreign governmental action identified in Part II(B) limits access to the carriage of liner cargoes within the scope of the agreement. Limited access to the carriage of liner cargoes may be effected by excluding certain liner operators or classes of liner operators (e.g., by national flag or carrier nationality) from the trade entirely, or by reserving certain cargoes for carriage by certain liner operators or classes of liner operators (e.g., by national flag or carrier nationality), or by limiting the ports at which liner operators may call, or by restricting the frequency of scheduled port calls, or by other such measures that

restrict the open competition for liner cargoes within the scope of the agreement by liner operators.

Part VI(D)

Part VI(D) requires the filing party to explain how access to cargoes carried by liner operators is limited by the actions of a foreign government as identified in Part VI(B). See Part VI(C) for examples of how access to cargoes can be limited by the actions of a government.

Part VI(E)

Part VI(E) requires the filing party to provide the percentage of the total amount of cargo carried on all liner vessels in the trade to which access is limited by a foreign government. The percentage is derived by dividing the amount of cargo in the trade to which access is limited by a foreign government, by the total amount of cargo carried on all liner vessels in the trade and multiplying the quotient by 100. The *trade* is defined as the scope of the agreement, that is, all foreign and domestic ports or port ranges served under the agreement. The amount of cargo can be measured in weight tons or dollar value of cargo. Specify which unit of measurement is used. The amount of cargo should be provided on the basis of the most recent twelve (12) month period for which data are available. Where precise information is not available, best estimates may be supplied. Identify estimates by the use of the notation "est.". Indicate the sources of such estimates.

Part VII(A)

Part VII(A) requires the filing party to indicate all benefits resulting from the agreement that will accrue principally to the parties as a result of the operation of the agreement. Such benefits may include increased operational efficiencies or other reductions in costs that result from the implementation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VII(B)

Part VII(B) requires the filing party to indicate all benefits resulting from the agreement that will accrue to shippers and to U.S. commerce generally. Such benefits may include reduced rate levels or improved quality or frequency of service that result from the operation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VIII

Part VIII requires the filing party to identify any reports, studies or other research that were prepared by or for the parties severally or collectively for the purpose of analyzing, formulating or assessing the need for the proposed agreement or the activities contemplated therein.

Part IX(A)

Part IX(A) requires the filing party to provide the name, title, address, telephone number and cable address of a person the Commission may contact regarding the Information Form and any information provided therein.

Part IX(B)

Part IX(B) requires the filing party to provide the name, title, address, telephone number and cable address of a person the Commission may contact regarding a request for additional information or documents.

Part IX(C)

Part IX(C) requires generally that the filing party sign and certify before a Notary Public that the information in the form and all attachments and appendices were, in fact, prepared under the supervision of the filing party, and that all information so provided is to the best of the filing party's knowledge, true, correct and complete. The filing party is also required to indicate his or her relationship with the parties to the agreement.

FEDERAL MARITIME COMMISSION INFORMATION FORM

For Certain Agreements by or Among Ocean Common Carriers

Agreement Number _____ (Assigned by FMC)

PART I *Agreement Name:* _____

PART II *Agreement Type*

	YES	NO
(A) *Rate-Fixing Agreements*		
Does the agreement authorize the parties to collectively fix rates?	[ ]	[ ]
(B) *Pooling Agreements*		
Does the agreement authorize the parties to pool cargoes or revenues?	[ ]	[ ]

FEDERAL MARITIME COMMISSION INFORMATION FORM—Continued

For Certain Agreements by or Among Ocean Common Carriers

(C) *Joint Service Agreements*

Does the agreement authorize a joint service/consortium arrangement? [ ] [ ]

[If any question in PART II is answered "YES", complete PARTS III and IV, (in addition to PARTS I, II, V, VI, VII, VIII and IX that are required to be completed by all filing parties.)]

PART III *Market Share Information*

(A) Provide the total amount of cargo (measured in both weight tons and dollar value) carried on all parties' liner vessels in each sub-trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

(B) Provide the total amount of cargo (measured in both weight tons and dollar value) carried on all liner vessels in each sub-trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

(C) Provide the market share of all parties in each sub-trade within the scope of the agreement over the most recent twelve (12) month period for which data are available.

PART IV *Market Competition*

(A) *Liner Competition*

(1) For each sub-trade, provide the names of all liner operators *not* parties to the agreement, currently offering service in that sub-trade.

(2) Provide the names of all liner operators serving alternative liner routings where those operators compete for cargoes carried by the parties in the sub-trade.

FEDERAL MARITIME COMMISSION INFORMATION FORM—Continued

For Certain Agreements by or Among Ocean Common Carriers

(3) Describe the nature and extent of the competition from the liner operators listed in (A)(1) and (A)(2) above.

(B) *Non-Liner Competition*

(1) Identify all competitive substitute forms of transport, other than liner service, that are available to shippers of commodities historically transported by liner service in each subtrade (including, for example, bulk carriers, charter operators, or air freight carriers).

(2) Estimate the percentage of the total amount of liner cargoes in each subtrade (measured in weight tons and in dollar value), traditionally carried on liner vessels, that has been carried by non-liner substitute forms of transport over the most recent twelve (12) month period for which data are available.

PART V *Service to the Shipping Public Under the Agreement*

(A) *Proposed Service*

Identify all U.S. ports to be served by the parties under this agreement.

(B) *Reduced Sailings*

(1) Estimate the parties' reductions in frequency of calls at each U.S. port within the scope of the agreement.

(2) Specify the parties' elimination of service to any U.S. port within the scope of the agreement currently served by any party.

FEDERAL MARITIME COMMISSION INFORMATION FORM—Continued

For Certain Agreements by or Among Ocean Common Carriers

	YES	NO
PART VI *Foreign Government Involvement in the Liner Market*		
(A) Was this agreement entered into as a direct or indirect response to any law, decree, rule, regulation, or other governmental action promulgated or implemented by a foreign government?	[ ]	[ ]
(B) If the answer to (A) is "YES", identify all such laws, decrees, rules, regulations or other governmental actions and specify all provisions in the agreement that stem from these factors.		
(C) If the answer to (A) is "YES", do any of the above identified governmental actions limit access to the carriage of liner cargoes within the scope of the agreement?	[ ]	[ ]
(D) If the answer to (C) is "YES", explain how access to liner cargoes is limited by the foreign government.		
(E) If the answer to (C) is "YES", provide the percentage of the total liner cargo in the trade to which access is limited by a foreign government. Explain the method by which the percentage was derived.		

PART VII *Benefits of the Agreement*

(A) Indicate any benefits (such as improved efficiencies or other reductions in transportation costs) that will accrue principally to the parties as a result of the operation of the agreement. Provide the data necessary to substantiate the above specified benefits.

(B) Indicate any benefits (such as lower rate levels or improved service levels) that will accrue to shippers and to U.S. commerce generally as a result of the operation of the agreement. Provide the data necessary to substantiate the above specified benefits.

FEDERAL MARITIME COMMISSION INFORMATION FORM—Continued

For Certain Agreements by or Among Ocean Common Carriers

PART VIII *Reports, Studies or Other Research*

Identify any reports, studies or other research that were prepared by or for the parties severally or collectively for the purpose of analyzing, formulating or assessing the need for the proposed agreement or the activities contemplated therein.

PART IX *Identification of Person(s) to Contact Regarding the Information Form and Certification of Authenticity*

(A) Identification of Contact Person

(1) Name of Contact Person _____

(2) Title of Contact Person _____

(3) Firm Name and Business _____

(4) Business Telephone Number _____

(5) Cable Address _____

(B) Identification of an Individual Located in the United States Designated for the Limited Purpose of Receiving Notice of an Issuance of a Request for Additional Information or Documents (see § 572.407)

(1) Name _____

(2) Title _____

(3) Address _____

(4) Telephone _____

(5) Cable Address _____

FEDERAL MARITIME COMMISSION INFORMATION FORM—Continued

For Certain Agreements by or Among Ocean Common Carriers

(C) Certification

This Supplemental Agreement Filing Information Form together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Maritime Commission. Subject to the recognition that, where so indicated, reasonable estimates have been made because books and records do not provide the required data, the information is, to the best of my knowledge, true, correct, and complete in accordance with the statute and rules.

Name (please print or type) _____

_____

Title _____

Relationship with parties to agreement _____

_____

Signature _____

Date _____

Subscribed and sworn to me at the
City of _____ State of _____
This _____ day of _____, 19____
Signature _____
My Commission expires _____

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

ACTION: Interim Rule.

SUMMARY: The Commission instituted this proceeding by Federal Register notice of May 29, 1984 (49 FR 22296–22318), in order to issue rules implementing those sections of the Shipping Act of 1984 that govern agreements. The collection of information requirements of these interim rules have been granted interim clearance by the Office of Management and Budget (OMB), and are, therefore, effective on June 18, 1984, to the same extent as the balance of the interim rules. A new section has been added to reflect the interim control number assigned by OMB to these information collection requirements.

DATES: Interim Rule effective June 18, 1984.

SUPPLEMENTARY INFORMATION:

The Federal Maritime Commission is amending these interim rules by adding a new section which reflects the interim control number assigned by OMB to the information collection requirements of the rules.

List of subjects in 46 CFR Part 572—Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

Therefore, Part 572 of Title 46 of the Code of Federal Regulations is amended as follows:

Add § 572.991 to read as follows:

§ 572.991 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

This section displays the control number assigned to information collection requirements of the Commission in this part by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96–511. The Commission intends that this section comply with the requirements of section 3507(f) of the Paperwork Reduction Act, which requires that agencies display a current control number assigned by the Director of the Office of Management and Budget (OMB) for each agency information collection requirement:

Section	Current OMB Control No.
572.101 through 572.902	3072–0045

(Sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 18 of the Shipping Act of 1984 (46 U.S.C. app. 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1709, 1710, 1712, 1714, 1715, 1716 and 1717)).

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

ACTION: Interim Rules.

SUMMARY: The Commission amends its interim rules governing agreements by ocean common carriers and other persons subject to the Shipping Act of 1984. These amendments are issued pursuant to the interim rulemaking authority provided in the Act. These amendments make changes in Subpart D with respect to those modifications to agreements which must be accompanied by the Information Form. The purpose of these amendments to Subpart D is to ensure that only those modifications to agreements which significantly reduce competition will be subject to the information requirements. These amendments make adjustments in several of the mandatory provisions of Subpart H. The purpose of these changes is to clarify the mandatory provisions. These amendments also make the completion of Part VII of the Information Form optional for the filing party. Finally, these amendments make certain technical corrections in the rules and Information Form.

DATES: Interim Rule amendments listed in this document are effective on June 18, 1984.

SUPPLEMENTARY INFORMATION:

The Shipping Act of 1984, Public Law 98–237, 98 Stat. 67, 46 U.S.C. app. 1701–1720 (hereinafter referred to as "the Act" or "the 1984 Act") was signed into law on March 20, 1984 with an effective date of June 18, 1984. Section 17(b) of the Act (46 U.S.C. app. 1716(b)) authorizes the Commission to prescribe interim rules without adhering to the normal notice and comment procedures under the Administrative Procedure Act (5 U.S.C. 553). On May 29, 1984, pursuant to the authority under section 17(b), the Commission published interim rules implementing those provisions of the Act which govern agreements by ocean common carriers and other persons subject to the Act (49 *Fed. Reg.* 22296–11318). These interim agreements rules become effective on June 18, 1984. Interested persons were given 90 days from the date of publication in the *Federal Register* in which to comment on the interim rules. In addition, the supplementary

information to the interim rules invited persons who believed that the interim rules created a serious problem which should be addressed prior to the effective date, to bring their concern to the attention of the Commission in writing without prejudice to subsequently filing additional comments within the 90-day comment period.

The Commission has received a number of comments on the interim rules and has carefully reviewed all of these comments. Some address matters which do not require attention at this time. The absence of discussion of any particular comment in connection with these amendments should not in any way be construed as a determination as to the merits of the comment. It merely reflects the Commission's judgment that the comment did not raise a matter of such urgency as to require immediate action. Consideration of these comments not of an emergency nature will be deferred until final rules are issued and the Commission has the benefit of a full record developed during the course of this proceeding.

Other comments, either in whole or in part, do raise questions which require clarification prior to June 18, 1984. Based on the comments received, the Commission has determined that certain adjustments to Subparts D and H of the interim rules and to Part VII of the Information Form are warranted at this time. These adjustments affect the information requirements for agreement modifications, certain mandatory provisions, and the agreement benefits section of the Form, and are discussed more fully below. In addition, certain technical corrections are being made in the interim rules and the Form. Interested persons will have the opportunity to comment on these amendments to the interim rules, as well as the interim rules themselves, within the original 90-day comment period. Comments on the interim rules, as amended, should be received on or before August 27, 1984.

A. Amendments to Subpart D

1. *Section 572.402(e)(2).* Section 572.402 generally sets forth the requirements as to form for all agreements except for marine terminal agreements and assessment agreements. Paragraph (e)(2), however, presently refers only to § 572.502 in prescribing format rules for the body of an agreement. In order to provide direction to all classes of agreements subject to format requirements, paragraph (e)(2) should also refer to § 572.501. This section therefore is being amended by adding a reference to § 572.501.

2. *Section 572.403(a).* Subpart D of the interim rules, among other things, implements the information requirements under section 5 of the Act by requiring the filing of an information Form with certain agreements. Section 572.403(a) provides that the Information Form must accompany a significant modification to certain agreements. Significant modifications, for the purpose of section 572.403(a), are those that may result in a reduction in competition. Section 572.403(a) presently states that:

> Such modifications include, but are not limited to, changes in geographic scope, additions to the number of parties, reductions in service levels, changes in the allocations of pooled revenues or cargoes, or changes in pool penalty provisions or carrying charges.

All such modifications must be accompanied by the Information Form.

One comment refers to the definition of a significant modification in this section and contends, among other arguments, that the requirement that every significant modification to an existing agreement be accompanied by the Information Form is unduly burdensome.

One purpose of section 572.403(a) is to obtain needed information to review a modification to an agreement where such a modification may result in a significant reduction in competition. This purpose is clearly related to the standard of review set forth in section 6(g) of the Act. The Information Form would not be required where the competitive consequences of an agreement modification are minor. For example, the addition of a single port to an agreement's geographic scope would not, in most cases, be likely to have a significant impact on competition. On the other hand, expansion of geographic scope to include an entire new port range may have such competitive impact as to be a significant modification.

The Commission, therefore, is amending section 572.403(a) to clarify that its purpose is to apply only to significant modifications. Agreements which would not generally be likely to have a significant competitive impact will thereby not be required to file the Information Form. In the case of those modifications where the Form is not required and an issue under the general standard is raised, the Commission would be able to obtain information through the request for additional information procedures as set forth in section 572.606. The Commission has not attempted to address all cases in which a modification would require the filing of the Information Form. If a filing party is uncertain as to whether a modification is significant within the meaning of this section, they may contact the Director, Bureau of Agreements and Trade Monitoring for clarification.

B. Amendments to Subpart H

Subpart H of the interim rules deals with certain transitional matters affecting existing agreements. In particular, section 572.801 of Subpart H establishes rules for assuring that existing agreements comply with the requirements for conference agreements set forth in section 5(b) of the Act. The mechanism for achieving compliance is the submission to the Commission of a telex followed by a letter, or a letter, evidencing the adoption by the conference of the mandatory provisions contained in this section (§§572.801(a) through 572.801(e)). A number of the comments recommended changes to the mandatory provisions of paragraphs (c), (d) and (e) of section 572.801 dealing, respectively, with consultation, shipper's requests and complaints, and independent action. As indicated in the follow-

ing discussion, the Commission has determined to adopt some of the recommended changes or otherwise to make adjustments in the rules to accommodate concerns expressed in the comments.

1. *Section 572.801(c).* This section sets forth a mandatory consultation provision for conference agreements as required by section 5(b)(6) of the Act. One comment suggests that the phrase "direct discussions" be deleted and replaced with the phrase "direct communications." The reason offered for this change appears to be that a requirement of "direct discussions" is unduly burdensome on the conference. The Commission believes that there is merit in direct discussions between conferences and shippers and that such discussions are beneficial to the consultation process. The term "direct discussions" need not be limited to face-to-face meetings. Nor are such direct discussions intended to be the only means of consultation. Rather, it is intended that the consultation process shall provide an opportunity for such discussions. The Commission therefore is amending the first sentence of section 572.801(c) to state that the conference shall attempt to resolve the dispute in an amicable manner "with the opportunity for direct discussions with the disputant."

2. *Section 572.801(d).* This section sets forth a mandatory provision establishing conference procedures for handling shippers' requests and complaints as required under section 5(b)(7) of the Act. A number of comments recommend changes to various aspects of this mandatory provision.

Section 572.801(d)(2) presently states that, upon submission, a complaint will be considered at the next conference meeting. Written notice is to be sent to the shipper who will have an opportunity to be heard at a conference meeting.

One comment states that the requirement for consideration of a request or complaint at the next conference meeting is unworkable because of the large number of complaints received and because requests are often submitted in incomplete form and require investigation before they may be properly considered. For the same reasons, the comment argues that granting a shipper a hearing before the conference would not be feasible. The comment also states that it is inefficient and burdensome to require the entire conference to consider a request or complaint.

The Commission believes that there are benefits in having shipper requests and complaints considered at a conference meeting and in providing shippers with an opportunity to be heard. Nevertheless, the Commission does not wish to unduly burden conference deliberations or impose inflexible requirements as to when a shipper matter must be considered.

The Commission therefore is amending the first sentence of section 572.801(d)(2) by deleting the requirement that these matters be considered at the next meeting and stating that such matters shall be considered promptly. The Commission will also amend the third sentence of section 572.801(d)(2) to provide for an opportunity for hearing of a shipper matter by the chief executive officer of the conference if the shippers' request

or complaint is denied. This provision will be relocated in section 572.801(d)(4) of this section. Finally, sentence two is being deleted in light of the other changes to this provision.

Section 572.801(d)(4) provides that conference decisions on shipper matters shall include a notice that the shipper may file a complaint with the Federal Maritime Commission. One comment on this provision states that such a notification requirement would change the nature of the process from commercial consultation to an adversarial proceeding. The Commission does not wish to require procedures which could have an adverse impact on the successful resolution of requests or complaints. Moreover, in the absence of such a notice, shippers would still be likely to be aware of their rights under the 1984 Act. The Commission therefore is amending section 572.801(d)(4) by deleting the third sentence.

3. *Section 572.801(e).* This section implements the statutory requirement specified in section 5(b)(8) of the Act through a mandatory independent action provision. A number of the comments recommend changes in this provision. Several of these recommended changes have merit in that they clarify the purpose of this provision or avoid results which were not intended by the Commission.

The first sentence of § 572.801(e) states that a party may take independent action "upon not more than 10 calendar days notice to the conference." Several comments note that this language could be interpreted to allow independent action at any time less than 10 days. The comments note that the statute allows a conference to fix a specific notice period as long as it does not exceed 10 days. It was not the Commission's intention to preclude a conference from selecting any period of notice up to 10 days. Therefore, the Commission is amending the first sentence of § 572.801(e) to permit conferences to insert a specific number of days not to exceed 10 calendar days for notice of independent action.

The third sentence of § 572.801(e) states that the conference shall file the rate or service item in its tariff for use by the member "Within 10 calendar days of the receipt of such notice." One comment notes that this language could have the effect of extending the notice period beyond the statutory limit. The introductory clause in this sentence will therefore be deleted in order to remove this ambiguity.

The fourth sentence of § 572.801(e) provides for the adoption of an independent action rate or service item by other conference members. One comment suggests that this sentence could be construed as preventing another member from adopting an independent rate until the date the independent action becomes effective. This was not the Commission's intention. The Commission therefore will delete sentence four and replace it with a sentence which indicates that a member may adopt an independent rate or service item at any time following its announcement, effective on or after the effective date announced by the party taking independent action.

The sixth sentence of § 572.801(e) presently provides that a conference may regulate or prohibit member lines from unilaterally entering into service or time/volume contracts and may also regulate or prohibit a conference member from taking independent action on any service contract or time/volume contract offered by a conference. A number of the comments recommended changes in this sentence. One comment notes that the phrase "conference members" should read "the conference." The Commission agrees. Another comment suggested that this sentence should make clear the authority of the conference itself to enter into service contracts with shippers and shippers' associations. Sentence six shall be revised to clearly state the conference's authority in this regard, while retaining the concept that the negotiating and providing of service contracts is a matter which is exclusively within the conference's authority to control. The Commission is also deleting the reference to time/volume contracts in sentence six. This change is made necessary because in a separate rulemaking proceeding the Commission is no longer treating time/volume contracts as a separate category. Finally, the Commission is deleting the introductory clause of sentence six which states "Unless otherwise provided in this agreement" because it is unnecessary.

C. Amendments to the Information Form

1. *Information Form: Part VII Benefits of the Agreement.* Part VII of the Information Form contains questions which seek to elicit information regarding the benefits that may be expected to accrue to the parties, to shippers, or to U.S. commerce generally from the operation of the agreement. This part included in the Form so that the Commission, in its review of an agreement under the section 6(g) general standard, may consider increases in efficiency that may offset a reduction in competition. One comment objects to Part VII of the Information Form as an attempt to re-establish the public interest standard which was specifically removed by the 1984 Act. The Commission continues to believe that its interpretation of the Act and its legislative history supports the inclusion of Part VII in the Information Form. Assessment of such benefits is one element of a full analysis of an agreement under the general standard. Such an assessment, however, would come into play and would only be reached if it were first determined that the agreement would be likely to result in a substantial reduction in competition. Parties to agreements should certainly be able to demonstrate benefits to themselves and in most instances there would likely be benefit to shippers or to commerce generally. It would appear therefore that completion of Part VII of the Information Form would generally be to the advantage of parties filing agreements. Nevertheless, the Commission has determined to make completion of Part VII of the Form optional during the period of these interim rules and to defer a determination as to whether Part VII should be made mandatory or optional after the full comment period and an opportunity to gain operational experi-

ence with the Information Form. Should the information in Part VII be necessary in a particular case the Commission may obtain it through a request for additional information. Parties, of course, should be aware that this procedure would extend the waiting period before an agreement becomes effective. Appropriate changes are being made in the Information Form and accompanying instructions in order to indicate that completion of Part VII is optional.

2. *Information Form, Part IX(C).* The first sentence of this part refers to a "Supplemental Agreement Filing Information Form." The correct term is "Information Form." This incorrect term is being deleted and replaced with the correct term in sentence one.

The rules of this part, as amended herein, become effective on June 18, 1984. Existing conference agreements subject to the Act shall achieve compliance with the requirements of section 5(b) of the Act by indicating their adoption of the mandatory provisions specified in § 572.801, as amended herein, in the manner provided for in these rules.

List of subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

Therefore, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553), and sections 5, 6, and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1704, 1705 and 1716), the Federal Maritime Commission hereby amends Title 46, Code of Federal Regulations, Part 572, Subchapter D as follows:

1. In § 572.402, revise paragraph (e)(2) to read as follows:

§ 572.402 Form of Agreements.

* * * * *

(e) * * *

(2) Following the Table of Contents, the body of the agreement setting forth the operative provisions of the agreement in the order prescribed by §§ 572.501 and 572.502. Any additional material provisions shall be set forth as consecutively numbered articles.

* * * * *

2. In § 572.403, revise paragraph (a) to read as follows:

§ 572.403 Modification of Agreements.

The requirements of this section apply to all agreements except for marine terminal agreements and assessment agreements.

(a) Agreement modifications shall be: filed in accordance with the provisions of § 572.401; in the format specified in § 572.402 and this section; and accompanied by an Information Form. The Information Form shall be completed as it pertains to significant modifications of the agreement. Significant modifications, for the purposes of this section, are those that may result in a significant reduction in competition. Such modifications include, but are not

limited to: significant changes in the geographic scope of conference, pooling or joint service agreements which expand the scope to cover additional foreign countries or U.S. port ranges; additions to the number of parties in pooling or joint service agreements; significant reductions in service levels; significant changes in pool penalty provisions or carrying charges.

* * * * *

3. § 572.801 is amended by revising paragraphs (c), (d) and (e) to read as follows:

§ 572.801 Mandatory Provisions in Existing Conference Agreements.

* * * * *

(c) *Consultation.* In the event of a controversy, claim, or dispute of a commercial nature arising out of or relating to this agreement or efforts to reduce or eliminate malpractices, the conference, its [chief executive officer or other designee] shall attempt to resolve the dispute in an amicable manner with the opportunity for direct discussions with the disputant. The services of third parties may be drawn from members of the conference or impartial outsiders, including use of the Commission's conciliation service provided for at 46 CFR §§ 502.401–502.406. The means of invoking consultation shall be set forth in the conference tariff.

(d) *Shippers' Requests and Complaints.*

(1) Shippers' requests and complaints may be made by filing a statement thereof with the [chief executive officer or in the case of an executive domiciled outside the United States, the designated U.S. representative.] Such statement shall be accompanied by a completed information sheet prescribed by the conference [chief executive officer]. The statement and information sheet shall be submitted promptly to each member of the conference.

(2) The shipper's request or complaint shall be promptly considered by the conference.

(3) Conference discussion and action on the shippers' request or complaint need not be restricted to the exact scope of the request or complaint and may include other matters varying from but related thereto. However, all such discussion and action must be authorized by the conference agreement.

(4) The conference shall render a decision on the request or complaint promptly after its initial submission to the conference membership. Such decision shall be in writing, signed by the conference [chief executive officer] and served upon the shipper. If the shipper's request or complaint is denied, the shipper shall be granted an early opportunity to be heard by the chief executive officer.

(5) The procedures for filing shippers' requests and complaints shall be set forth in the conference tariff.

(e) *Independent Action.*

(1) Any party to this agreement may take independent action on any rate or service item required to be filed in a tariff pursuant to section 8(a) of the Shipping Act of 1984 (46 U.S.C. app. 1707(a)) upon [10 or such lesser period as the conference may elect] calendar days' notice to the conference. The time period shall commence upon receipt by the conference, during normal business hours, of a written notice of a member's intention to exercise independent action. The conference shall file the rate or service item in its tariff for use by the member. At any time following the announcement of an independent action by a party to this agreement, any other conference member may elect to adopt the independent rate or service item, effective on or after the effective date announced by the party taking independent action, by providing written notice of such intention. If another member decides to adopt the independent rate, then the conference shall file the rate immediately on behalf of that member.

(2) The conference may enter into service contracts with shippers and shippers' associations and may regulate or prohibit its member lines from unilaterally entering into service contracts and may also regulate or prohibit any conference member from taking independent action on any service contract offered by the conference.

4. Appendix A of Part 572 is amended as follows:

a. In Part VII of the Information Form after the title Benefits of the Agreement insert the following: (Optional);

b. In the Explanation and Instructions for Information Form revise the second paragraph to read as follows:

* * * * *

All agreements by or among ocean common carriers referenced in §572.201 (excluding assessment agreements, marine terminal agreements and those agreements exempted from the filing of the Information Form pursuant to Subpart C of the rules) filed with the Commission must be accompanied by a completed Information Form, which in all cases necessitates the completion of Parts I, II, V, VI, VIII and IX. Completion of Part VII is optional.

* * * * *

c. In the Part by Part Explanation of the Information Form revise Parts VII (A) and (B) to read as follows:

* * * * *

Part VII(A)

Part VII(A) permits the filing party to indicate all benefits resulting from the agreement that will accrue principally to the parties as a result of the operation of the agreement. Such benefits may include increased operational efficiencies or other reductions in costs that result from the implementation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

Part VII(B)

Part VII(B) permits the filing party to indicate all benefits resulting from the agreement that will accrue to shippers and to U.S. commerce generally. Such benefits may include reduced rate levels or improved quality or frequency of service that result from the operation of the agreement. Data that are necessary to substantiate the specified benefits should be submitted.

* * * * *

d. In Part IX(C) of the Information Form, remove the words "Supplemental Agreement Filing Information Form" and in their place insert the words "Information Form."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–56

JOSE BUENAVENTURA D/B/A PHILIPPINE EXPRESS POSSIBLE VIOLATION OF SECTIONS 16, INITIAL PARAGRAPH, AND 44(A), SHIPPING ACT, 1916

NOTICE

June 20, 1984

Notice is given that the time within which the Commission could determine to review the May 10, 1984, order in this proceeding styled "Approval of William Beasley Harris, Administrative Law Judge, of Agreement of Settlement," which approved the settlement and discontinued the proceeding, has expired. No such determination has been made and accordingly, that order has become administratively final.

In accordance with the terms of the Agreement of Settlement, Respondent shall:

a. Cease and desist from misdeclaring the weight of shipments to ocean carriers and obtaining or attempting to obtain transportation by water of property at less than rates and charges which would otherwise be applicable; and

b. Cease and desist from refusing to pay applicable ocean carrier tariff rates.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–56

JOSE BUENAVENTURA D/B/A PHILIPPINE EXPRESS [1] POSSIBLE VIOLATION OF SECTIONS 16, INITIAL PARAGRAPH, AND 44(A), SHIPPING ACT, 1916

Alan J. Jacobson, Hearing Counsel, *John Robert Ewers*, Director, Bureau of Hearing Counsel.

Bernard Ferrera, attorney for respondent.

APPROVAL BY WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE, OF AGREEMENT OF SETTLEMENT

Finalized June 20, 1984

The Order of Investigation and Hearing in this proceeding was served December 8, 1983; it was published in the *Federal Register*, Vol. 48, No. 240, on Tuesday, December 13, 1983, pages 55510–55511.

A prehearing conference was held in the proceeding on Tuesday, January 31, 1984.

In a letter dated February 29, 1984, Hearing Counsel requested that April 19, 1984 be set as the date for submission of a joint stipulation of facts, a proposed settlement and a memorandum in support thereof. The respondent supported the request. The request was granted.

The parties entered into the following stipulation:

STIPULATION

> Pursuant to Rule 162 of the Federal Maritime Commission's Rules of Practice and Procedure (46 C.F.R. §502.162), the Commission's Bureau of Hearing Counsel and Respondent Philippine Express Corp. and Jose Buenaventura hereby respectfully submit this stipulation of facts to the presiding Administrative Law Judge and request that he include the facts so agreed upon in the record in the instant proceeding.

[1] Title change from Philippine Express Corp. used in Order of Investigation and Hearing served December 8, 1983, for purpose of clarification. Rule 147, 46 CFR 502.147. This is in response to motion of Hearing Counsel served April 19, 1984, to delete the words "Philippine Express Corp." wherever they appear in the Order of Investigation and Hearing and substitute the words "Jose Buenaventura d/b/a Philippine Express." The reason for the change is simple. The Commission thinking Philippine Corporation was indeed a corporation in existence, named it as respondent. Mr. Buenaventura informed Hearing Counsel and Hearing Counsel confirmed through the New York Secretary of State Office, that he had not incorporated. Therefore, the true party-at-interest in this proceeding is Mr. Buenaventura.

1. Philippine Express, formerly located at 467 Tenth Avenue, New York, New York, was started in 1977 as an importer/exporter of general merchandise. It is no longer operating.

2. Mr. Jose Buenaventura, at all times relevant, was the President of Philippine Express and is responsible for the activities described herein.

3. During the course of 1980, Mr. Buenaventura, as Philippine Express, knowingly engaged in a scheme, involving six shipments of Cocoa Beans from New York to Manila, the Philippines, to obtain transportation by water at less than the applicable ocean carrier tariff rates.

4. The six shipments of cocoa beans were all carried aboard Maersk Line vessels and are represented by the following:

Vessel	Bill of Lading	Bill of Lading Date
ALBERT	NYCY 11969	1–11–80
AXEL	NYCY 14824	2–8–80
ARILD	NYCY 16976	2–27–80
ANDERS	NYCY 17858	3–7–80
ADRIAN	NYCY 19048	3–21–80
ALVA	NYCY 20121	3–28–80

5. On these shipments, Mr. Buenaventura first billed for and collected the proper freight charges from the underlying shippers. Balfour Maclaine International, Ltd. was the underlying shipper for the first five shipments listed in 4 above. Warren G. Harting & Co., Inc. was the underlying shipper for the last shipment.

6. Then, by using inaccurate dock receipts substituted in the carrier's files for the actual dock receipts, Mr. Buenaventura made it appear to the carrier that the shipments weighted approximately one-half of their actual weight.

7. Maersk Line rated these shipment based upon the false weight declarations on the dock receipts and on the corresponding bills of lading, also prepared by Philippine Express.

8. Relying on the inaccurate weight declarations, Maersk Line billed, and Philippine Express paid, approximately one-half the proper freight charges, and approximately one-half the amount paid to Philippine Express by the underlying shippers.

9. Philippine Express did not reimburse its underlying shippers for the difference between the amount they paid to Philippine Express and the amount Philippine Express paid to Maersk Line.

10. The total monetary difference on these shipments between the amount Philippine Express collected from the underlying shippers and the amount Philippine Express paid Maersk Line is $14,716.00.

11. On July 27, 1981, Mr. Buenaventura, of Philippine Express, entered an Affidavit of Confession of Judgement, in 80 Civ. 3830, United States District Court, Southern District of New York, a case initiated by complaint filed by Maersk Line to recover monies

owed it by Philippine Express in connection with the above described facts.

12. In said Confession of Judgment, Mr. Buenaventura acknowledged the facts as alleged in the complaint, and agreed to pay Maersk Line the sum of Thirty Thousand Dollars ($30,000).

13. During the period beginning on December 27, 1978 and running at least through April 18, 1980, Philippine Express carried on the business of ocean freight forwarding without an independent ocean freight forwarder's license issued to it by the Commission.

14. These freight forwarding activities were in connection with the six shipments described above as well as at least 97 other shipments.

15. Philippine Express performed the freight forwarding functions on these shipments, but pursuant to an arrangement with a licensed forwarder (that is no longer in business), listed that forwarder's license number in the forwarder block of the ocean carriers bill of lading.

Respectfully submitted,
/s/ John Robert Ewers 4–19–84
John Robert Ewers, Director
Bureau of Hearing Counsel

/s/ Bernard Ferrera
Bernard Ferrara
Attorney for Respondent
April 18, 1984
New York City, N.Y.

/s/ Alan J. Jacobson
Hearing Counsel

The parties entered into the following proposed settlement of Civil Penalties and Promissory Note Containing Agreement for Judgment:

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Hearing Counsel (Hearing Counsel) and Philippine Express Corp. and Jose Buenaventura (Respondent). 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. § 5053) and is to be incorporated into the Final Order in the instant proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served December 8, 1983, the Commission instituted the present investigation to determine whether Respondent had violated sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916 (46 U.S.C. §§ 815 and 841(b)) during the period December 29, 1978 through April 18, 1980, and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916 so found;

WHEREAS, Hearing Counsel believe that the facts as described in the Stipulation submitted in this proceeding indicate that Respondent engaged in specific conduct violative of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916, and Respondent chooses not to contest the question of violative conduct;

WHEREAS, Respondent has terminated the practices which are the basis of the Commission's allegations in this proceeding, and has indicated its willingness and commitment to maintain measures designed to eliminate discourage and prevent such practices 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 violation 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 conduct set forth in the factual record submitted in the present proceeding, Respondent agrees, as a condition of this Agreement, to comply with all the requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

1. Respondent hereby agrees, as a condition of this Agreement, to pay the Federal Maritime Commission the monetary amount of Ten Thousand Dollars ($10,000) which shall be payable according to the terms of the Promissory Note attached hereto as Appendix 1.

2. Respondent consents as a condition of this settlement agreement, to the entry of an Order directing it to cease and desist from practices which have resulted in the alleged violations described above. This Order shall expressly require the Respondent to:

a. Cease and desist from misdeclaring the weight of shipments to ocean carriers and obtaining or attempting to obtain transportation by water of property at less than rates and charges which would otherwise be applicable; and

b. Cease and desist from refusing to pay applicable ocean carrier tariff rates.

3. Except as provided in paragraph five (5) below, this Agreement shall forever bar the commencement or institution by the Commission of any assessment proceeding or other claims for recovery of civil penalties from Respondent arising from the conduct set forth and described in the factual record submitted in the present proceeding.

4. Respondent agrees to take all reasonable measures designed to discourage, prevent, and eliminate the conduct that may be violative of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916.

5. Respondent 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 December 8, 1988, by or on behalf of the Commission, to recover civil penalties for violations of sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916, arising out of the conduct set forth in the factual record submitted in the instant proceeding. In the event of such a breach by Respondent, if such noncompliance shall not have been cured or explained to the Commission's satisfaction within thirty (30) days after written notice to Respondent 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 Respondent will not impose 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.

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

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

8. Respondent 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 the consideration herein expressed.

The undersigned represents that he is properly authorized to execute this Agreement on behalf of Respondent and to fully

bind Respondent to all of the terms and conditions set forth herein.

_____	John Robert Ewers 4–19–84
Philippine Express	John Robert Ewers, Director
Jose Buenaventura	Bureau of Hearing Counsel
By: _____	/s/ Alan J. Jacobson
	Alan J. Jacobson
April 18, 1984	Hearing Counsel

PROMISSORY NOTE CONTAINING AGREEMENT FOR JUDGMENT

For value received, Jose Buenaventura promises to pay to the Federal Maritime Commission (the Commission) the principal sum of Ten Thousand Dollars ($10,000) to be paid at the offices of the Commission in Washington, D. C., by bank cashier's or certified check in the following installments:

One Thousand Dollars ($1,000) on or before ten (10) days following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before three (3) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before nine (9) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before fifteen (15) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before twenty one (21) months following the approval by the Commission of the Proposed Settlement in FMC No. 83–56.

One Thousand One Hundred Twenty Five Dollars ($1,125.00) on or before twenty four (24) months following the approval

by the Commission of the Proposed Settlement in FMC No. 83–56.

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 of the approval of the Commission of the Proposed Settlement in No. 83–56 and be computed at the rate of twelve percent (12%) per annum.

If any payment of principal or interest shall remain unpaid for a period of ten (10) days after becoming due and payable, the Commission shall give Respondent written notice of the amount unpaid. Respondent shall have five (5) days thereafter to pay all unpaid principal and interest. If any payment of principal and interest shall remain unpaid following this five (5) day period, then the entire unpaid principal amount of this 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 this Promissory Note, Jose Buenaventura does hereby authorize and empower any U.S. attorney, any of his assistants or any attorney of any court of record, Federal or State, to appear for him, and to enter and confess judgment against Jose Buenaventura 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 Jose Buenaventura 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. Jose Buenaventura 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 Jose Buenaventura 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.

By: _____

Jose Buenaventura

Date: April 18, 1984

Hearing Counsel submitted the following memorandum in support of the proposed settlement:

MEMORANDUM IN SUPPORT OF PROPOSED SETTLEMENT

I. INTRODUCTION

The Federal Maritime Commission began this proceeding by an Order of Investigation and Hearing served December 8, 1983. The Order alleged that Philippine Express may have violated sections 16, Initial Paragraph, and 44(a) of the Shipping Act, 1916. Specifically, the Commission ordered that the following issues be resolved in this proceeding:

1. Whether Philippine Express Corp. violated sections 16, Initial Paragraph, and/or 44(a) of the Shipping Act, 1916, during the period December 29, 1978 through April 18, 1980.
2. Whether civil penalties should be assessed against Philippine Express Corp. for violations of section 16, Initial Paragraph and/or 44(a) and, if so, the amount of any such penalty which should be imposed, taking into consideration factors in possible aggravation and mitigation of such penalty.
3. Whether the Commission should order Philippine Express Corp. to cease and desist from carrying on the business of forwarding without a license obtained pursuant to section 44 of the Shipping Act, 1916.

By Notice of March 1, 1984, the presiding Administrative Law Judge granted the parties' request to submit a proposed settlement agreement with supporting memoranda and record on or before April 19, 1984. The record in this proceeding consists of a stipulation of facts submitted herein. In this memorandum, Hearing Counsel explain the proposed settlement offered by the parties, and we indicate the reasons we believe support acceptance of the settlement.

II. THE PROPOSED SETTLEMENT SHOULD BE APPROVED

A. *Authority for Settlement*

It is well established that settlement is an acceptable means of terminating an administrative proceeding. The Administrative Procedure Act ("APA") provides in part that "[t]he agency shall give all interested parties opportunity for . . . the submission and consideration of . . . offers of settlement . . . when time, the nature of the proceeding, and the public interest permit . . .", 5 U.S.C. § 554(c)(1). The actual authority, however, to use settlement as a means to terminate a proceeding comes from judicial precedent and the agency's rules. *See Pennsylvania Gas & Water Co.* v. *FPC,* 463 F.2d 1242, 1247, n. 17 (D.C. Cir. 1972). The Court of Appeals for the District of Columbia in that case noted that the "purpose of the informal settlement provisions [in the APA] 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," and that settlement should not be discouraged. *Id.*

The Commission's rules provide authority for settlement of penalties for violations which are the subject of a formal proceeding, stating that "Hearing Counsel shall have full authority to enter into stipulations and settlements." 46 C.F.R. § 505.3 (1980).

The Commission has thus approved settlements under this authority for violations of many different sections of the Shipping Act, 1916, which fact indicates that "there is a very strong policy favoring settlements in lieu of needless expensive litigation and . . . the Commission has been following this policy frequently, especially in most recent years." *Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder License No. 1162,* 24 F.M.C. 316, 322 (1981).

Section 505.3 of the Commission's Rules for Compromise, Assessment, Settlement and Collection of Civil Penalties also requires that settlements be submitted for approval to the presiding officer. (46 C.F.R. § 505.3.) The presiding Administrative Law Judge in his determination has to follow the stricture that "the settlement must not contravene any law or public policy." *Old Ben Coal Company* v. *Sea-Land Service,* 21 F.M.C. 506, 512 (1978). If the settlement is not invalid under this principle, the presiding Administrative Law Judge may look to other criteria to decide whether "the settlement is fair, reasonable and adequate." *Id.*

In determining whether the settlement amount is sufficient to warrant approval of proposed settlements, the presiding Administrative Law Judge is assisted by the standards set forth in 4 C.F.R. Parts 101–105, which are referred to in section 505.1 of the Commission's Rules and Regulations (46 C.F.R. § 505.1). These standards under Part 103 of Chapter 4 provide criteria that can be considered in settling a case. Among those mentioned are ability of the respondent to pay and furtherance of enforcement policy. (4 C.F.R. § 103.)

B. *Proposed Settlement Agreement and Stipulation*

The proposed settlement agreement provides for Jose Buenaventura to pay a civil penalty in the amount of $10,000. This penalty is to be paid over a period of two years with interest according to a promissory note. In addition, as part of the settlement, Respondent agrees to the entry of an Order directing it to cease and desist from practices which have resulted in those complained of here.

Philippine Express knowingly obtained transportation by water of property at less than the applicable ocean carrier tariff rates. This involved six shipments of cocoa beans from New York to the Philippines, all during the first three months of 1980. (See Stipulation Nos. 3–12.) In addition, during the period beginning on December 27, 1979, and running through April 18, 1980, Philippine Express carried on the business of ocean freight

forwarding without an independent ocean freight forwarder's license issued to it by the Commission. (See Stipulation Nos. 13–15.)

Rather than fully litigate the issues raised in the Order of Investigation and Hearing, Respondent and Hearing Counsel entered into the proposed settlement and agreed upon a stipulated record.

C. *Criteria For Settlement*

The proposed settlement meets the criteria established by the Commission as set out in 4 C.F.R. parts 101–105 (1980). Part 103 of that Title includes standards to be used as guidelines in settling claims. Relevant to this proceeding are the factors mentioned previously; ability to pay and furtherance of agency enforcement policy.

Both of these factors figured prominently in Hearing Counsel's decision to enter into the settlement in this proceeding. In the first instance, a payment of $10,000 is a significant amount which will serve to emphasize the Commission's determination to eliminate practices such as those involved here.

It is also a penalty reasonable in light of Respondent's status as an individual and his agreement to pay Maersk Line the sum of Thirty Thousand dollars as compensation for the complained of practices as well as other matters.

Further support of the settlement amount is found in Respondent's financial status. Mr. Buenaventura is personally responsible for payment of the promissory note. His business, Philippine Express, is no longer functioning, and he was evicted from his office space. He has no business assets at all. He has also stated that he is personally without sufficient funds to pay a large penalty. He indicates, however, that he is trying "to get back on his feet" and, recognizing his obligation in this matter, will try to pay the $10,000 settlement amount.

Hearing Counsel believe the factors outlined above should be given considerable weight by the Administrative Law Judge in reviewing the settlement proposal. The settlement amount should operate to prevent recurrence of the practices upon which the proceeding was predicated and thereby serve the Commission's enforcement policy. It will also serve the Commission policy of favoring settlements in lieu of needless expensive litigation.

III. CONCLUSION

Hearing Counsel, by reason of the foregoing, urge the Presiding Administrative Law Judge to approve the proposed settlement.

Respectfully submitted,
John Robert Ewers, Director
Bureau of Hearing Counsel

Alan J. Jacobson
Hearing Counsel

DISCUSSION

Upon review of the above and the entire record in this presiding, the Presiding Administrative Law Judge is satisfied that the settlement is fair and reasonable, and should be approved. The Judge *finds* and *concludes* that the parties have made out a proper case for settlement and supplied stipulations and reasons in support which are found acceptable.

Wherefore, it is *ordered,* subject to approval by the Commission as provided in its Rules of Practice and Procedure:

(A) The settlement is approved pursuant to the proposed settlement and promissory note containing Agreement for Judgment.

(B) The parties shall notify the Commission promptly upon their carrying out the terms of the settlement.

(C) The case name shall be clarified as noted herein above.

(D) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PART 502]

GENERAL ORDER 16; DOCKET NO. 84–17

INTEREST IN REPARATION PROCEEDINGS

June 20, 1984

ACTION: Final Rule.

SUMMARY: This rule changes the method of assessment from simple to compound interest calculated on U.S. Treasury obligations. The rule implements section 11(g) of the Shipping Act of 1984 but would be equally applicable to proceedings under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933, initiated on or after June 18, 1984.

DATES: Effective 30 days from publication in the *Federal Register.*

SUPPLEMENTARY INFORMATION:

I. *BACKGROUND*

This proceeding was instituted by a Notice of Proposed Rulemaking published in the *Federal Register* on April 23, 1984 (49 FR 17044) for the purpose of conforming the Commission's current rule on the award of interest in reparations proceedings to Section 11(g) of the recently enacted Shipping Act of 1984. Section 11(g) of the Act requires that interest assessed in reparations proceedings be at "commercial rates compounded from the date of injury." The current Commission rule on the assessment of interest in reparations proceedings specifies that "Interest (simple) will accrue from the date of payment of freight charges to the date reparations are paid."

The proposed rule would make two modifications to the current rule. The first modification changes the period during which interest accrues. The period in the current rule extends from the date the freight charges are paid until the date reparations are paid. The period in the proposed rule would extend from the date the injury occurred until the date specified in the Commission Order awarding reparations.

The second modification changes the manner in which interest is accrued. In the current rule, simple interest is assessed on reparations awards, while in the proposed rule, interest is compounded on a daily basis.

The comment period on the proposed rule was 30 days after publication in the *Federal Register.* Comments were received from Traffic Service Bureau, Inc., United States Lines, Inc. and United States Lines (S.A.)

Inc. (together U.S.L.), and two Trans-Pacific conferences. These comments are discussed below.

The Period of Time During Which Interest Accrues

The proposed rule states that "Interest awarded in reparations proceedings will accrue from the date of injury to the date specified in the Commission Order awarding reparations." Traffic Service Bureau, Inc. suggests that interest should accrue from the date of injury to the date reparations are paid. It points out that: (1) this is the policy of the current rule; and (2) it encourages the timely payment of reparations.

U.S.L. suggests that a "mechanism should be developed whereby payment may be made in the discretion of the Respondent after service of the Recommended Decision of [the] Administrative Law Judge or the Settlement Officer." They argue that: (1) the rule provides a disincentive for earlier payment, (because once a date is specified in the Commission Order, there will be no incentive to pay before that date); and (2) the respondent is forced to pay interest during comment or Commission review periods subsequent to the date of recommended decisions by Administrative Law Judges or Settlement Officers. U.S.L. suggests that in the event that a party wishes to object to the decision of the Administrative Law Judge or of the Settlement Officer, that party should be required to file a notice of intention to object prior to the date specified for payment, and a failure to file such a notice would be deemed a waiver of its right to file objections. U.S.L. adds that "interest on any additional amount only, as determined by the Commission to be owed, could then be calculated in the same manner as the previous award."

The Commission, in enforcing the current rule, determines the relevant rate of interest to be assessed on reparations awards. The current rule also specifies that this relevant rate of interest is to be assessed on a simple basis (i.e., it is not compounded). The Commission however does not compute the actual interest amount, but leaves this to the respondent. Under the proposed rule, not only would the Commission determine the relevant rate of interest, but it would also calculate the actual amount of interest to be paid. This involves: (1) a determination of the relevant rate of interest (in the regard the current and the proposed rules are identical); and (2) the daily compounding of this rate of interest via a compounding formula in order to determine the precise interest payment to be made.

The proposed rule, in responding to a Congressional mandate to compound interest, requires the use of several involved calculations in order to compute the actual interest payments. While the least complicated compounding formula is used, it nevertheless lends itself to easy error either in misapplication or simple arithmetic mistakes. It is thus believed that if such calculations are made in all cases by the Commission, not only will there be a uniform application of the rule, but also, there will

be a minimal number of errors, because of a developed, in-house expertise (due to repetitive calculations) in the application of the formula (as opposed to occasional use by outside parties).

In order to include the amount of the interest payments in the Commission Orders awarding reparations, it is necessary to know the specific termination date of the reparations period. Under the current rule, where interest accrues until the date reparations are paid, such a date is unknown at the time of the commission Order. Hence, the proposed rule, (in order to identify a specific termination date for the reparations period), recommends that the reparations period terminate on the date specified in the Commission Order awarding reparations. The proposed rule also states that "Normally, the date specified within which payment must be made will be 15 days subsequent to the date of service of the Commission Order." The amount of lost interest which would accrue during the 15-day period would be negligible.

With respect to U.S.L.'s argument that some mechanism should be established to toll the time for payment of interest, this flies in the face of the theory underlying interest. No matter how long a proceeding may continue, the "offender" still has the use of the illegally-obtained monies. It should also be mentioned at this point that carriers as well as shippers benefit from this rule inasmuch as the 1984 Act permits carriers to proceed against shippers for underpayment.

In response to Traffic Service Bureau, Inc.'s concern about timely payment of reparations, it should be noted that in those instances of delinquent payments, the complainant may seek enforcement of the Commission Order in the United States District Court having jurisdiction over the parties as well as petition the Commission for relief.

The Compounding of Interest on a Daily Basis

The proposed rule specifies that interest will be compounded on a daily basis. U.S.L. argues against daily compounding and suggests that compounding occur every six months because this is the same maturity period as for six-month Treasury bills which are the benchmark on which the reparations rate of interest is based.

There is an important conceptual point that should be made concerning the above issue. The intent behind the proposed rule was to establish a benchmark interest rate that would produce a reasonable result for the reparations process. The Commission is not attempting to look behind a particular entity's uses of working capital to reveal in each case where the monies at issue were actually invested. The fungibility of money would make such an exercise impossible because the funds could have been placed in numerous alternative forms of investments. These alternatives include certificates of deposit, Treasury bills and bonds, money market funds, long-term corporate debentures, and literally hundreds of other instruments of varying risk and maturity. Thus, the linkage between the use of six-month-

Treasury-bill yields and a compounding of interest every six months is spurious. The interest rate factor determined by evaluating the monthly yields on six-month Treasury bills is simply a representation of what the Commission believes to be a fair rate of interest.

Daily compounding is recommended in the proposed rule because it is the most precise and least complicated, compounding formula which can be used. Perhaps of more importance, daily compounding is now used in the commercial sector by most major money market funds.

Furthermore, if six-month compounding were adopted by the Commission, there would still be a residual, daily compounding computation necessary in those instances when the reparation period did not precisely terminate at the beginning or the end of a six-month interval. This would unnecessarily complicate the proposed rule's compounding formula. Finally, the difference in the amount of reparations between six-month compounding (as recommended by U.S.L.) and daily compounding (as used in the proposed rule) is not very large. For example, at 10%, daily compounding over 5 years, a dollar would grow to $1.648, whereas with semiannual compounding, the amount would be $1.629.

The Use of the Six-Month Treasury Bill Rate

The Trans/Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic and Gulf Freight Conference, and their member lines, have argued against the proposed rule's use of the interest rates on six-month Treasury bills. They point out that six-month Treasury bills are available only in minimum $10,000 denominations, and consequently suggest that "it would be inappropriate to assess interest rates beyond those available in commercial passbook accounts for reparation awards before the Commission." U.S.L. on the other hand stated that: "While it can be argued that some index other than secondary market interest rates on six-month Treasury Bills may be more valid, since not all claims will involve $10,000 or more, U.S. Lines is satisfied that this index represents a readily ascertainable rate and a rate that is adequately reflective of the statutory intent."

This issue was raised in Docket 81–22 (the rulemaking for the current reparation rule). In its Final Order in that proceeding, the Commission upheld the use of six-month Treasury bills as a basis for calculating a reparations rate of interest and stated that: "While most reparation amounts, by themselves, would probably not be large enough to invest in Treasury bills, there are a myriad of investment opportunities at rates approximating the Treasury bill rate which are available to the small investor." The Commission thus concluded that "the use of an average Treasury bill rate as opposed to a fixed 'statutory' rate or 'passbook' rate is a valid exercise of agency discretion." As such the six-month Treasury bill rate fully meets the benchmark standard contemplated in this rule.

To reiterate, the six-month Treasury bill rate represents a benchmark interest rate that establishes a reasonable level of compensation. The Com-

mission is not attempting to identify the actual investment instruments used in each instance. It should be pointed out, however, that a hypothetical investor with less than $10,000 could obtain a return that would closely approximate the six-month Treasury bill rate by investing in a money market fund which invested solely in Treasury bills. As previously stated, most major money market funds compound interest on a daily basis.

All other comments have been considered and have been found to be without merit.

In view of the foregoing, the Commission is adopting the proposed rule as final, without change.

List of subjects in 46 CFR Part 502:

Administrative Practice and Procedure.

Therefore, pursuant to 5 U.S.C. 553, sections 22 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 821 and 841a.) and sections 11(g) and 17(a) of the Shipping Act of 1984 (46 U.S.C. app. 1710(g) and 1716(a)), the Commission is revising 46 CFR § 502.253 to read as follows:

§ 502.253 *Interest in reparation proceedings.*

Interest awarded in reparation proceedings will accrue from the date of injury to the date specified in the Commission Order awarding reparations. Normally, the date specified within which payment must be made will be 15 days subsequent to the date of service of the Commission Order. The rate of interest will be derived from the average monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that the injury occurred and concluding with the latest available monthly Treasury bill rate at the date of the Commission Order awarding reparations. Compounding will be daily from the date of injury to the date specified in the Commission Order awarding reparations. The monthly rates on six-month U.S. Treasury bills for the reparation period will be summed and divided by the number of months for which interest rates are available in the reparation period to determine the average interest rate applicable during the period.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–13
IN THE MATTER OF THE AUTHORITY OF THE MALAYSIA-PACIFIC RATE AGREEMENT TO SERVE ALASKA

ORDER DENYING PETITION FOR DECLARATORY ORDER

June 28, 1984

The members of the Malaysia-Pacific Rate Agreement (Agreement No. 9836) (Petitioners) have petitioned the Commission pursuant to Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68, for a declaratory order to remove uncertainties concerning the geographic scope of their agreement. Notice of the Petition was served on April 3, 1984. In response to the Notice, the Commission's Bureau of Hearing Counsel (Hearing Counsel) has requested leave to intervene and file a reply to the Petition. The intervention of Hearing Counsel will be granted and its reply considered herein.

DISCUSSION

Agreement No. 9836 authorizes its members to agree upon rates and practices for the trades from Malaysia, Singapore and Brunei "to ports on the West Coast of the United States, including the State of Hawaii" and Canada. Petitioners wish to provide service to Alaska and seek to have the Commission declare that Alaskan ports are included within the phrase "ports on the West Coast of the United States."

The Petition advises that Alaska is not mentioned in the memoranda and orders contemporaneous with the original approval of Agreement No. 9836 in 1970 and the subsequent modification in 1975 of the Agreement to include Hawaii (Agreement No. 9836–4). Petitioners go on to state that they have discovered no Commission or court case which construes the phrase "West Coast of the United States" or any analogous term. Despite the lack of legal authority on the question, Petitioners believe that the "plain and ordinary" meaning of "West Coast of the United States" includes Alaska. Petitioners argue that Alaska, unlike Hawaii, is on the West Coast of the United States.

Hearing Counsel opposes the Petition, arguing that agreements must be clear and explicit, particularly with respect to the limits on the scope of authority. It cites Commission precedent to the effect that agreements should be complete, especially as to matters of substance, and the language used should be so clear as to eliminate all necessity for the interpretation as to the "intent" of the parties. *In the Matter of Agreement No. 6510,*

1 U.S.M.C. 775, 778 (1938) and *Agreement No. T–1685, et al.*, 19 F.M.C. 440, 445 n. 8 (1977). Hearing Counsel believes that to avoid ambiguity, the Agreement should be modified to expressly include service to Alaska.

As the parties point out, the phrase "West Coast of the United States" as used in Agreement No. 9836 is not a term of art nor has it been construed by the Commission or the courts. This being the case, the question becomes whether or not the Commission, in this case, should construe the phrase broadly so as to include Alaska.

There is nothing to indicate that, at the time Agreement No. 9836 was originally submitted to the Commission, transportation circumstances in Alaska were relied on by the Agreement's proponents or considered by the Commission. Moreover, it appears from the Petition that, after obtaining approval, the parties operated under Agreement No. 9836 for fourteen years before expressing a desire to extend its coverage to Alaska. The Commission is therefore unable to grant the relief requested. If Petitioners wish to include Alaska within the geographic scope of their agreement, they should file an appropriate amendment to their agreement. For the Commission to decide otherwise would be to permit Petitioners to avoid the requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. app. § 814) and section 6 of the Shipping Act of 1984 (46 U.S.C. app. § 1705).

THEREFORE, IT IS ORDERED, That the Petition of the Malaysia-Pacific Rate Agreement for Declaratory Order is denied.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR 502]

GENERAL ORDER 16; DOCKET NO. 84–16

ENFORCEMENT OF ORDERS AND SUBPOENAS IN FORMAL PROCEEDINGS

June 29, 1984

ACTION: Final Rule.

SUMMARY: This revises the Commission's Rules of Practice and Procedure with respect to enforcement in the event of a party's refusal to obey an order or to comply with a subpoena. The revised procedures provide for court enforcement by the Attorney General on behalf of the Commission or private parties injured by the violation or refusal. Advance notice to the Commission is required of a private party's intention to seek court enforcement of subpoenas and discovery orders. The purpose of the revision is to clarify existing procedures and implement the statutory provisions of the Shipping Act of 1984.

DATES: Effective 30 days after publication in the *Federal Register.*

SUPPLEMENTARY INFORMATION:

On April 23, 1984, the Commission published in the *Federal Register* (49 Fed. Reg. 17043) a proposed amendment to the Commission's Rules of Practice and Procedure (46 CFR 502 et seq.) to clarify procedures for enforcement of Commission orders and subpoenas and to require advance notice to the Commission in cases of private party enforcement. Specifically, it was proposed that 46 CFR 502.210(b) be revised as follows:

> (b) *Enforcement of orders and subpoenas.* In the event of refusal to obey a Commission order or failure to comply with a Commission subpoena, the Attorney General, at the request of the Commission, or any party injured thereby may seek enforcement by a United States district court having jurisdiction over the parties. Such action shall be taken within twenty (20) days of the date of refusal to obey or failure to comply. A private party shall advise the Commission five (5) days (excluding Saturdays, Sundays and legal holidays) before applying to the court of its intent to seek enforcement.

Comments to the proposed rule were filed on behalf of the Chemical Manufacturers Association (CMA) and the non-governmental members of the Maritime Administrative Bar Association (MABA).

CMA and MABA question the Commission's authority to place limitations on the three-year statute of limitations for enforcement of Commission orders contained in section 14(e) of the Shipping Act of 1984 (1984 Act) (46 U.S.C. app. 1713(e)) with respect to matters other than subpoenas and discovery orders. Additionally, while acknowledging the need for prompt action with respect to subpoenas and discovery orders and the propriety of advance notice to the Commission in the event of private party enforcement of such directives, MABA feels that the time for enforcement should be increased to 120 days to conform with the time during which discovery must be completed under the Commission's Rules of Practice and Procedure. Lastly, CMA asks that the proposed rule be modified to show that it is applicable to subpoenas and discovery orders of the Commission's Administrative Law Judges (ALJs) as well as to orders of the Commission itself.

It was not the Commission's intention to apply the time limitations on enforcement to directives other than subpoenas and discovery orders and the language of the rule will be modified to ensure that the time limitations on enforcement contained therein apply only to subpoenas and orders related to discovery.

We do not agree, however, that the 20-day period during which subpoenas and discovery orders must be enforced should be increased. The 1984 Act, as MABA acknowledges, is designed to foster prompt determination of Commission proceedings (see section 11(c), (e), 46 U.S.C. app. 1710(c), (e)) and should not be read to thwart this objective. The legislative history, moreover, indicates that the three-year limitation was designed to relate, not to interim procedural orders, but to orders relating to findings of substantive violations of the Act. *See e.g., Ocean Shipping Act of 1983: Hearing on S. 47 Before the Subcommittee on Merchant Marine of the Senate Committee on Commerce, Science, and Transportation,* 98th Cong., 1st Sess. 130 (February 2, 1983) (Comments of Chemical Manufacturers Assn.).

The 20-day period provided in the present rule has been in effect since 1974, and no adverse consequences have been shown to flow from it. In fact, MABA does not contend that the present 20-day period has created any problems. On the other hand, the 120-day discovery period referred to by MABA is an outside limit which may often prove too lengthy as an enforcement period in particular cases, such as actions with respect to assessment agreements (Fifth paragraph, section 15, Shipping Act, 1916, 46 U.S.C. app. 814; section 5(d), Shipping Act of 1984, 46 U.S.C. app. 1704) and rate investigations in the domestic offshore trades (section 3(b), Intercoastal Shipping Act, 1933, 46 U.S.C. 845), which must be completed within one year. Of course, the 20-day provision can be waived in any case in which it has an unreasonably limiting effect.

In response to CMA's comments and to preserve present practice, the rule will be modified to ensure that it will apply to subpenas and discovery orders of ALJs as well as to orders of the Commission itself. This objective will be accomplished by deleting the word "Commission" before the words "order" and "subpena" in the first sentence of the rule.

List of Subjects in 46 CFR Part 502, Administrative Practice and Procedure

Therefore, pursuant to 5 U.S.C. 553; sections 27, 29 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 826, 828 and 841a); and sections 12(a), 14(c) and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1711(a), 1713(c) and 1716), section 502.210(b) of 46 CFR is revised as follows:

502.210 Refusal to comply with orders to answer or produce documents; sanctions; enforcement.

* * * * *

(b) *Enforcement of orders and subpenas.* In the event of refusal to obey an order or failure to comply with a subpena, the Attorney General, at the request of the Commission, or any party injured thereby may seek enforcement by a United States district court having jurisdiction over the parties. Any action with respect to enforcement of subpenas or orders relating to depositions written interrogatories, or other discovery matters shall be taken within twenty (20) days of the date of refusal to obey or failure to comply. A private party.shall advise the Commission five (5) days (excluding Saturdays, Sundays and legal holidays) before applying to the court of its intent to seek enforcement of such subpenas and discovery orders.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary