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Robert N. Kharasch

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CONFERENCES OF CARRIERS BY SEA: FREEDOM OF RATE FIXING

By Robert N. Kharasch

Partner, Galland, Kharasch & Calkins, attorneys at law, Washington, D. C.

Introduction

THE alphabet is not as old as international carriage by ship; practical transport by air in foreign commerce is younger than most passengers. From a comparison of ages, one might expect that the behavior of air carriers, the laws and treaties governing their behavior, and the national or international agencies concerned with enforcing the laws and treaties would all be constructed after the model of the institutions long established on the seas. In the fixing of rates for air carriage just the contrary is true, and those concerned with international air transport are rarely required to examine the state of maritime affairs.

Nevertheless, it may be worthwhile for the readers of the Journal of Air Law and Commerce to look briefly at the institutions of international maritime carriage: similarities may supply precedents, while differences are useful to illuminate the reasons for difference.

Accordingly, I propose to describe the groups of carriers—"conferences"—which fix rates for the carriage of goods and persons in the foreign commerce of the United States, the laws of the United States which govern the behavior of carriers by sea, either individually or in conference, and the Federal agency which interprets and enforces the laws. Although the survey will be confined to the foreign commerce of the United States alone, the restriction is not severe. Conferences of carriers by sea exist throughout the world, but a full-fledged system of conference regulation is confined to the United States and perhaps a few other countries, notably post-war Japan, which has adopted the American system.[1]

As a starting point, we might note the following characteristics of present-day international air carriage:

(1) There is no freedom of the air; the first through fifth freedoms are to be obtained from governments by grant, not by right.[2]

[1] The Marine Transportation Law of Japan (Law No. 187, June 1, 1949) is based in part upon the Shipping Act, 1916. In particular, Article 28 corresponds to Section 15 of the American Act, and Articles 28 (1)-(3) and 30 appear to be copies of Section 14 and 16-17. *Marine Statute-Book of Japan* (Chuwa Printing Co., Tokyo, 1952).

An account of some pre-war attempts at regulation of ocean rates by various nations is provided in Chapter VI of Marx, *International Shipping Cartels* (Princeton University Press, 1953).

[2] The five freedoms are set forth in the 1944 International Air Transport Agreement ("Five Freedoms Agreement"), 1945 U.S.Av.R.284. Consult Calkins, "The Role of the Civil Aeronautics Board in the Grant of Operating Rights in Foreign Air Carriage," 22 Journal of Air Law and Commerce 253.

(2) All major international air carriers belong to the International Air Transport Association (IATA) and therein fix rates for the international carriage of passengers or goods.

(3) Air carriers typically obtain foreign landing and traffic rights as a result of bilateral agreements; most countries except the United States in effect make adherence to IATA rates when fixed a condition of enjoyment of traffic rights.

(4) An authorization issued by the Civil Aeronautics Board (subject to the President's approval) is required of any carrier—United States citizen or not—wishing to engage in international air transportation from or to the United States.[3]

(5) The Civil Aeronautics Board in the United States has power to approve or disapprove the agreements "affecting air transportation" between any air carrier which is a citizen of the United States and any other carrier.[4] IATA resolutions, including rate-fixing agreements, are thus subject to the inspection of a Federal agency.

(6) International air carriers must file tariffs with the Civil Aeronautics Board, may change published rates only upon thirty days' notice, and must observe the rates thus filed.[5]

Of the six preceding paragraphs, only that numbered (5) is even remotely comparable to the state of things in international water carriage. Both the statute law and the voluntary grouping of carriers are strikingly different. But the basic difference in air and water transportation lies in the ancient freedom of the seas.

There are no numbered freedoms on the seas: the first principle is absolute freedom of a ship under any flag to operate between any two ports in any two different countries without benefit of bilateral treaty or certificate.[6] The ship owner is not completely free, for in most countries, there are cabotage laws, preference, either explicit or understood, of the national flag carriers, restrictions of change of vessel registry (or on ownership of vessels), and the like,[7] but the right of any ship to free entry to the ports of every peaceful maritime nation is almost unchallenged.[8]

This freedom of the seas has a profound effect on the economic climate of the business of ocean shipping. Since most of the laws to

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[3] Civil Aeronautics Act of 1938, Sections 401, 402, 801 (49 U.S.C. 481, 482, 601).

[4] Civil Aeronautics Act of 1938, Section 412 (49 U.S.C. 492).

[5] Civil Aeronautics Act of 1938, Section 403 (49 U.S.C. 483).

[6] Leaving aside treaties of Friendship, Commerce and Navigation.

[7] The United States by statute requires a 50-50 split of government-financed cargoes between United States-flag and foreign-flag ships: 46 U.S.C. 1241(b).

United States laws are concerned with prohibiting the transfer of vessels to foreign registry. Norway, in contrast, requires that a Norweigan ship be at least six-tenths owned by Norwegian nationals: *Laws Concerning the Nationality of Ships*, p. 124 (United Nations, New York, 1955).

[8] Section 14a of the Shipping Act of 1916, 46 U.S.C. 813, discussed below, provides for the closing of United States ports to foreign-flag carriers in continuing violation of the Section. Section 36, 46 U.S.C. 834, "authorizes" the Secretary of the Treasury to refuse clearance to vessels with open capacity but which have refused cargo.

be discussed are attempts to ameliorate this economic climate, a brief examination of the economics of ocean shipping is worthwhile here. A non-technical discussion is indicated. There is a recent and well-documented text by an economist—*International Shipping Cartels*, by Professor Daniel Marx—and almost all of what Professor Marx says is sound, but the professional's style of attack is sometimes unhelpful:

> "Ocean shipping produces different products, all of which may be described as transportation service, which, in technical economic language, is described as the creation of place utility."[9]

Taking this as undoubtedly true, it is well to consider the differences between ocean shipping and other methods of creating "place utility." The differences are significant:

> "There is a tendency for complainants in regulatory proceedings before the [United States Shipping] Board to so rely upon decisions of the Interstate Commerce Commission as to give too little consideration to the fundamental differences between transportation by rail and transportation by water. The unit of transportation by rail is a car with a capacity of a relatively few thousand pounds. The unit of transportation by water is a ship, and the ships involved in the instant proceeding had an average cargo capacity of around seventy-five hundred tons. The comparative ease with which a railroad, by dropping or adding cars, can adjust its operations to slight fluctuations in tonnage moving is obvious. Moreover, railroads are semimonopolistic in character and in any given competitive field relatively few in number; while operators of vessels in foreign commerce of the United States may at any time and without warning be subjected to most severe competition by tramp vessels of any nation or by vessels chartered by shippers with large quantities of cargo to be transported. The exigencies of ocean transportation are many and largely peculiar unto such transportation. They can not be neglected by the steamship operator if he is to survive, nor can the Board in arriving at its decisions fail to consider them."[10]

Economics

There are, of course, a number of specialized ship types, ranging from supertankers and fully refrigerated ships to passenger liners and a projected intercoastal wine tanker. Passenger carriage is of some interest, but for present purposes we are chiefly concerned with the common carriage of dry cargo in unspecialized ships—that is, carriage for the public by "cargo liners" operating in "berth service," as opposed to proprietary or "tramp" carriage. Some definiitions may be helpful:

> "*Liner, berth, or regular service*
>
> These terms, often used interchangeably, have reference to a service operating on a definite, advertised schedule, giving relatively frequent sailings at regular intervals between specific United States ports or range and designated foreign ports or range.
>
> *Non-liner, irregular, or tramp service*
>
> These terms have reference to operations of ships on an unscheduled basis as cargo offers, usually carrying full cargo lots,

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[9] Marx, op. cit. note 1, p. 9.

[10] *Atlantic Refining Co.* v. *Ellerman & Bucknall S.S. Co.*, 1 U.S.S.B. 242, 253.

generally of a single bulk commodity, with no restricted trading limits."[11]

Although a legal distinction is drawn between the activities of cargo liners and tramps,[12] in fact the two types of operation are often competitive. There is a vast and active fleet of vessels available for charter throughout the world, and the same type of ship used in berth service is to a considerable extent the type used in tramp carriage. Thus, tramp and liner operators compete for the supply of tonnage (i.e., vessels). While tramps do not usually carry general cargo, except in full shiploads, liners can and do carry the bulk cargoes which are the tramp's staple. Thus, there is effective competition for cargo.

The importance of tramps should not be underestimated. Overall, liners carry the lesser part of American trade, at least by weight. In 1955, liners carried 25,000,000 long tons of United States exports, or not even a third of the total of 89,700,000 tons, and only 16,000,000 long tons of the 45,100,000 tons total of United States imports.[13]

In the foreign commerce of the United States, carriers under United States flag are by no means dominant. Only twenty-three percent of total export and import trade in 1955 moved on United States flag vessels.[14] The reason, and the explanation of much of American shipping policy, is that a United States flag ship operates at a great cost disadvantage. The cost of operation of a standard ocean-going vessel may be $1000 a day or more higher under American flag than under the flag of a competing nation. This blunt business fact has necessitated the grant of subsidy to American cargo liner operators, has produced an enormous increase in the tonnage registered under the "runaway" flags of Panama or Liberia, and has constantly influenced the administration of the shipping laws. For at sea, the high cost operator is protected only by the level of conference rates.

The freedom of the seas is a freedom much exercised. Much of the foreign trade of the United States moves by what international air carriers would regard as "fifth freedom"[15] carriers. A Danish-flag steamship line, for example, runs its vessels Round-The-World westbound, from United States Atlantic and Pacific coast ports, to the Far East, through the Suez Canal and the Mediterranean Sea and returning to United States Atlantic ports, carrying cargo between all ports on the way. Denmark is not on the itinerary.

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[11] From "Review of Essential United States Foreign Trade Routes" p. 14 (U.S. Department of Commerce Maritime Administration, May 1953).

[12] The Shipping Act, 1916 explicitly exempts tramps from regulation by providing in Section 1 (46 U.S.C. 801) "that a cargo boat commonly called an ocean tramp shall not be deemed such 'common carrier by water in foreign commerce.'"

[13] "United States Foreign Water-Borne Commerce, A Review of 1955" p. 3 (Bureau of the Census, September 1956).

[14] *Ibid.*, p. 4.

[15] The fifth freedom set forth in the International Air Transport Agreement, note 2, above, is the grant by one state to the carriers of another state of "the privilege to take on passengers, mail and cargo destined for the territory of any other contracting state, and the privilege to put down passengers, mail and cargo coming from any such territory."

The combination of freedom of the seas and a free market for ships has, as might be expected, a violently unsettling influence on the level of rates for ocean carriage. The practical interchangeability of most dry cargo vessels, the obvious inflexibility of the world's supply of tonnage at a given time, and the lack of any acceptable substitute for ocean carriage, all make maritime rates extremely sensitive to changes in demand. Tramp rates vary widely, liner rates are somewhat more stable, while the gyrations of the tanker market have created famous post-war fortunes.

Some idea of tramp and tanker rate behavior can be gained from the monthly index of world shipping rates compiled by the Norwegian Shipping News and published by The Journal of Commerce. Using July-December 1947 as an index of 100, in 1949-1950 the time charter rate for dry cargo ships was in the 60-70 range, in 1951 hit 250, in 1952-1954 sank as low as 60-70 again, and in May 1956 was back up at over 200. Tanker rates, on a different index, went from 50 in 1954 and 62.6 in June 1955 to 204.5 in December of 1955.

In short, just as tank warfare on the North African deserts permitted the exercise of the art of war in its purest form, unhindered by accidents of terrain, so the carriage of goods by sea still offers a near perfect model where the forces of classic economic theory can operate unchecked. Thus, a rate war at sea is not a milk and water affair of a few cents reduction in the dollar. In 1953 when a rate war broke out in the inbound trade from Japan to the West Coast of the United States, rates dropped rapidly to 30 to 40 percent of their previous level until some lines were charging less to carry cargo across the Pacific than it cost to put the goods on and off a ship.[16]

This propensity of shipowners to operate below out-of-pocket costs appears to be dominant in all trades. Even the protected intercoastal trades have seen some of the most savage rate wars on record.[17] A typical comment on a fairly mild rate war in foreign commerce is this description of the negotiations in July 1953 to form again the shattered Continental North Atlantic Westbound Freight Conference:[18]

> "The present rate situation on the route is described as extremely fluid. Not only have the former members taken to quoting their own rates as did the independents when the trouble began, but the conference itself has adopted an 'open rate' rule under which the three remaining members can quote freight charges unilaterally.
>
> "According to one source the rate levels on many of the most important commodities moved in the trade—including steel, the biggest of all westbound item(s); glass—have been cut very nearly to the bare handling costs by some lines."

It is only to be expected that competition so virulent would lead to private efforts to mitigate its effects, or, in plainer language, to fix the prices for the carriers' services. International rate-fixing groups

[16] Docket 730, *Statement of Japan-Atlantic and Gulf Freight Conference*, 4 F.M.B.—(Adv. p. 12), December 14, 1955.

[17] *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 404-8.

[18] From The Journal of Commerce, July 20, 1953.

of carriers—shipping "rings"—were conceived before 1900.[19] The doctrines of classical economics predict just such a development. Adam Smith's sour comment is famous:

> "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[20]

The modern device to permit the meeting of people in the business of carrying goods by sea is the voluntary rate fixing organization now usually called a conference. Conferences exist in commerce between all regions of the world. In trade to and from the United States they are subject to regulation by the Federal Maritime Board, the Agency charged with the enforcement of the Shipping Act, 1916. Both the Act and the Agency merit attention.

The Statute and the Agency

A combination of carriers to fix prices in the foreign trade of the United States would, without more, be a violation of the antitrust laws. However, Section 15 of the Shipping Act of 1916 (46 U.S.C. 814) confers upon a Federal agency the power to approve agreements between carriers and thereby exempt actions pursuant to such agreements from the operation of the antitrust laws.[21] All common carriers by water[22] in trade touching the United States, American citizens or not, are required to file almost every agreement among themselves, and it is unlawful—with a penalty of $1,000 a day for every violation—to carry out any agreement which has not been approved or which has been disapproved. The agency is commanded to "disapprove, cancel, or modify" any agreement which it finds is "unjustly discriminatory or unfair" or "to operate to the detriment of the commerce of the United States."[23]

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[19] *Mogul Steamship Co.* v. *McGregor*, [1892] App. Cas. 25.

[20] *The Wealth of Nations*, Book I, p. 128 (Modern Library Ed., 1937).

[21] In *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51, 57 (C.A.D.C., 1954), cert. den. 347 U.S. 990, the court said:

"... the Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws. The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal *per se*."

[22] Section 15 extends to every "common carrier by water or other person subject to this Act." An "other person" is one "carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water" Section 1, 46 U.S.C. 801.

[23] There are some interesting differences between Section 15 and Section 412 of the Civil Aeronautics Act (49 U.S.C. 492):

(1) Section 15 applies to carriers of all nationalities, Section 412 to United States citizen "air carriers";

(2) Section 15 applies to agreements among water carriers or "other persons subject to this Act," Section 412 both to agreements between air carriers and between an air carrier and an "other carrier";

(3) Unapproved agreements are made expressly illegal by Section 15; Section 412 contains no such provision;

(4) Under Section 15 the Maritime Board may approve or "disapprove, cancel, or modify" any agreement; under Section 412 the Civil Aeronautics Board may only approve or disapprove.

Like all the maritime statutes of the United States, the Shipping Act, 1916 is something of a miscellany. Section 15 applies only to carriers acting jointly, but other sections restrict actions either individual or joint, and here again the law applies to all carriers, whether or not United States citizens. One of the most important portions of the Act is Section 14 (46 U.S.C. 812) which successively prohibits the following commercial weapons:

(1) Payment of deferred rebates to shippers;[24]

(2) Use of a "fighting ship" to drive competitors out of the trade;[25]

(3) Retaliation against shippers by refusing space or by "resort to other discriminating or unfair methods because such shipper has patronized any other carrier . . . or for any other reason."

(4) Making of contracts discriminating between shippers based on the volume of freight offered, or unjust discrimination against any shipper in the matter of cargo space, cargo handling, or claims settlement.

Moreover, Section 16 of the Shipping Act prohibits carriers alone or together from giving preference to particular persons, localities, or traffic, from allowing transportation to be obtained at reduced rates by false billing, and from inducing discriminatory rates of insurance (46 U.S.C. 815). Finally, Section 22 (46 U.S.C. 821) gives the agency full powers to hear complaints and order payment of reparation to *any* person for the injury caused by *any* violation of the Act—a function not granted to the Civil Aeronautics Board.[26]

This massive authority conferred by the Shipping Act, 1916, was originally administered by the United States Shipping Board, and successively by the United States Shipping Board Bureau of the Department of Commerce, the United States Maritime Commission, and now by the three-member Federal Maritime Board.[27] While the Maritime

[24] A deferred rebate is, of course, a return of money sometime after carriage is complete if the shipper has meanwhile complied with the rebate agreement.

A simultaneous rebate is also outlawed by Section 16 (second) (46 U.S.C. 815), as an allowance of transportation below the "regular rates or charges then established on the line . . . if the rebate is induced by "unjust or unfair device or means."

[25] "The term 'fighting ship' in this Act means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade." Shipping Act, 1916, Section 14 (second), 46 U.S.C. 812.

[26] The procedure for collecting reparations is clumsy. After obtaining an order in a proceeding presumably once subject to judicial review, the prevailing party must then take the Board's findings and order to a District Court, where they are only "prima facie evidence of the facts therein stated"—Shipping Act, 1916, Section 30, 46 U.S.C. 829. See *Hernandez v. Arnold Bernstein*, 116 F. 2d 849 (C.C.A. 2d, 1941).

The Civil Aeronautics Board's lack of reparations power tends to restrict its jurisdiction over unified agreements: *Slick Airways v. American Airlines*, 107 F. Supp. 199 (D.C.N.J., 1951), app. dis. 204 F. 2d 230, cert. den. 346 U.S. 806. Compare with *Slick* the result in *American Union Transport v. River Plate & Brazil Conferences*, 126 F. Supp. 91 (S.D.N.Y., 1954), aff'd. 222 F. 2d 369.

[27] The decisions of the chain of agencies are cited, respectively, U.S.S.B., U.S.S.B.B., U.S.M.C., F.M.B. (or M.A.) and are bound in a series of four volumes.

Commission combined administrative and regulatory powers the Maritime Board has now received most of the quasi-judicial functions, while the Chairman of the Board, who is also the Maritime Administrator, exercises most administrative authority.[28]

The powers of the Board and Administrator far exceed those first granted in 1916. In the Merchant Marine Act, 1920, the agency received vague but plenary power:

> "To make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country . . ."[29]

The Merchant Marine Act of 1920 also added a new Section 14a (46 U.S.C. 813) to the Act of 1916. This Section 14a, surely one of the most curious in American regulatory law, is directed *only* toward carriers not citizens of the United States. These foreign carriers are to suffer the extraordinary sanction of refusal of the right to enter United States ports for either of two offenses:

(1) Continuing violation of Section 14—that is, granting deferred rebates or the like in the foreign commerce of the United States; or

(2) Belonging to a conference covering commerce between foreign ports (not in the foreign commerce of the United States) which conference uses deferred rebates and refuses to admit United States citizen carriers to membership.

In other words, this section assures to United States carriers the right to engage (in trade between foreign ports) in practices flatly outlawed in the foreign trade of the United States.

Besides its duties under the Shipping Act, 1916, the Maritime Board exercises important functions under the Intercoastal Shipping Act, 1933 (46 U.S.C. 843), the Merchant Ship Sales Act of 1946 (50 U.S.C.A. App. 1738), and the Merchant Marine Act of 1936 (46 U.S.C. 1101), with the Maritime Administrator having parallel executive authority.

Taken together the Maritime statutes give the Board and Administrator enormous powers over American and foreign-flag shipping. Thus, through its power to charter for private operation the more than 2,000 ships in the national defense reserve fleet[30] the Board could break the level of rates in the world's shipping markets. Given the necessary appropriations, the maritime agencies may build and sell ships, establish shipping services, and grant construction or operating

[28] Reorganization Plan No. 21 of 1950, 5 U.S.C.A. 133—15 and 46 U.S.C. 1111, note.

[29] Merchant Marine Act, 1920, Section 19, 46 U.S.C. 876.

[30] Merchant Ship Sales Act of 1946, Section 5(e), 50 U.S.C.A. App. 1738(e).

differential subsidies to American companies to equalize their construction or operating costs with those of their foreign competitors.[31] The Administrator's power extends to the granting or withholding of permission to transfer United States flag ships to foreign registry.[32] The agencies issues several forms of insurance, design prototype ships and inspect nautical schools.[33] The list could be extended.

The Board's right to exercise any of this complex of powers has been repeatedly affirmed by the Federal courts. In an almost unbroken line of cases, some of them landmarks of administrative law, the courts have held that the Maritime Board and its predecessors have exclusive primary jurisdiction to consider almost any aspect of Maritime regulation.[34]

But, in spite of this imposing array of statutory powers, the published reports of the Maritime Board and its predecessors, covering forty years of regulation, now amount to only four volumes, with only a portion of the decisions devoted to the problems of a conference system and the administration of the 1916 Act. This sparse record may reflect a lack of public knowledge of the provisions of the law, or successful informal controls by the Government agencies, or official lassitude. Or the reason may be that the conference system has worked smoothly. At any rate, conference agreements are public information, and there is no need to wait for litigation to inspect the agreements the Board has approved.

Approved Agreements

There are what must appear to be, to those who live with IATA, a great number of agreements creating conferences which have been approved by the Maritime Board and its predecessors—well over one hundred.

Usually, there is a separate grouping of carriers for each "trade," with the word "trade" being flexible, but meaning, usually, commerce between a coast of the United States and one or more countries. In most major trades there are both outbound and inbound conferences established by separate agreements, often domiciled at opposite sides of an ocean. Even a conference with headquarters in Europe, composed entirely of non-citizens, files its agreement in Washington if it covers the carriage of cargo to the United States.

Besides these so-called "organic" conference agreements, several other classes of agreement are filed for approval by the Maritime Board. There are inter-conference agreements which weave some conferences into super-conferences, or provide for some working arrangement between conferences in closely-linked trades. Again, there are a fair

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31 Merchant Marine Act, 1936, 46 U.S.C. 1101 *et seq.*

32 Shipping Act 1916, Sections 9, 37; 46 U.S.C. 808, 835.

33 34 U.S.C. 1123 a-e.

34 *Far East Conference* v. *United States*, 342 U.S. 570; *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474; *United States* v. *American Union Transport*, 327 U.S. 437; *State of California* v. *United States*, 320 U.S. 577.

number of revenue pooling agreements among individual lines, and agreements for limitation of sailings, or apportionment of cargo. In addition, there are numerous petty arrangements between one carrier and another for the trans-shipment of goods and the like. However, the basic pattern is one conference agreement for each trade, establishing a voluntary association with the sole professed purpose of eliminating intra-conference competition by fixing rates.

After filing of any agreement with the Maritime Board, the Board's practice now is to insert a notice of filing in the Federal Register, inviting comments or protests. Dual-rate agreements, to be discussed below, are subject to a special order requiring a statement of reasons to be filed.[35] The Board may or may not order a hearing if one is demanded, but will usually wait to receive comments or requests for hearing before approving an agreement.

Once the "organic" conference agreement has been filed, the Maritime Board does not pass upon each action of each conference changing a rate. The Maritime Board regards agreement upon a single rate as "interstitial" and already approved by the approval of the practice of joint rate setting.[36] But, any agreement affecting outsiders—going beyond mere control of intra-conference competition—is not "interstitial," and must be separately approved.[37]

While the Board receives a flood of minutes of conference meetings (most agreements include a provision that minutes will be sent to the Board),[38] there is no requirement, either statutory or by formal Board Order, that minutes be submitted. In fact, the Board's regulations stipulate that "statements of routine arrangements" are not accepted for "formal filing" but "may be received as information."[39]

There is no rigidity—there are no requirements—for internal conference arrangements, although the Board will occasionally indicate its displeasure with particular practices, such as voting by inactive members.[40] A conference may make its decisions by unanimous or merely majority vote;[41] it may fix some or all of the rates in its trade, but once rates are fixed the agreement almost always provides for a rigid adherence by the membership, enforced—at least potentially—by a system of fines or, ultimately, expulsion.

From time to time the Board in the course of an investigation will admonish conferences to conduct themselves properly, as by self-policing to prevent false billing,[42] or to remember:

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[35] General Order 76, 46 C.F.R. 236.

[36] *Isbrandtsen Co. v. United States*, 211 F. 2d 51, 56 (C.A.D.C., 1954), cert. den. 347 U.S. 990.

[37] Docket 767, *Agreement and Practices Pertaining to Brokerage*, Report on Motions for Interim Order, (December 2, 1955), Report on Petition for Reconsideration (June 8, 1956).

[38] *Section 15 Inquiry*, 1 U.S.S.B. 121.

[39] 46 C.F.R. 222. 16.

[40] *Agreement No. 7790*, 2 U.S.M.C. 775, 779.

[41] *Pacific Coast European Conference Agreement*, 3 U.S.M.C. 11, 19.

[42] *Rates from Japan to United States*, 2 U.S.M.C. 426, 437.

" * * * While there is no detailed description of the duties imposed upon conference members by Section 15 of the Shipping Act, 1916, it seems appropriate to state that the advantages of group action in rate matters and exemption from the antitrust laws with the subsequent elimination of competition, flowing to carriers by approval of a conference agreement, are not gratuitous grants. They are intended, in furtherance of the policies of the Shipping Act, to develop and encourage the maintenance of a merchant marine and to build up the commerce of the United States, and they, therefore, place upon conference members the duty to consider shippers' needs and problems, and to provide for the orderly receipt and careful consideration of shippers' requests with full opportunity for exchange of views."[43]

Using the privilege of exemption from the antitrust laws, conferences proceed to fix rates, and to accumulate rates into tariffs. This much is not astonishing. But the legal results of tariff publication are bizarre in the extreme, and worth separate treatment.

Tariffs and Rates

The legal consequences of publication of a maritime tariff are unknown to other forms of transportation, for a maritime tariff need not be published, and in large part a maritime tariff has no legal effect. The current formal regulations of the Maritime Board do not require the filing of any tariffs in foreign commerce.[44] The Board's published order demands only that outbound rates charged must be *reported* within thirty days after a ship has sailed.[45] Inbound rates need not even be reported.[46] Thus, although most conferences do publish tariffs, and do give advance notice of rate changes, they need not do so, and a shipper could conceivably send his cargo to the dock to find the rate halved—or doubled—when the ship arrives.[47]

Consistent with the absence of any tariff filing requirement, the Board holds that the Shipping Act does not make it unlawful for carriers in foreign commerce to charge more than published rates.[48] However, it *is* unlawful to charge *less* than "regular rates" if this is

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[43] *Pacific Coast-European Rates and Practices*, 2 U.S.M.C. 58, 61.

[44] The Intercoastal Shipping Act, 1933, 46 U.S.C. 843, establishes a conventional tariff filing system (30 days notice of rate changes, suspension powers, tariffs to be observed, rates must be reasonable) for the off-shore domestic trades—Alaska, Hawaii, Puerto Rico—and is administered by the Federal Maritime Board.

[45] 46 C.F.R 235, issued following *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 470.

[46] On March 9, 1956, the Board issued a notice of proposed rule-making (Docket 789) proposing to require the filing of all inbound rates.

In Docket 783, *Section 19 Investigation—Pacific Coast European Trade*, the Board is proposing a rule requiring tariffs of Pacific-Europe carriers to be changed *before* actual rates are changed.

[47] ". . . [T]his company neither published a tariff nor maintained a rate schedule, its rates being made from day to day at whatever level seemed necessary to get the business away from the conference carriers." *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 400, 479.

[48] *Afghan-American Trading Co.* v. *Isbrandtsen Co.*, 3 F.M.B. 622; *United Nations* v. *Hellenic Lines Limited*, 3 F.M.B. 781; *Huber Mfg. Co.* v. *Stoomvaart Maatschappij "Nederland,"* 4 F.M.B. 343.

"unfair" among shippers.[49] A shipper may thus complain of overcharges and have a carrier ordered to pay reparation by the Board only where the carrier has actually discriminated, that is, charged different rates to two shippers similarly situated—the so-called "triangular" relation.[50]

It should be clearly understood that Congress nowhere confers upon the Board the right to control rates. The modest 30-days-after reporting regulation was not issued until July, 1935, after investigation, and under authority of Section 19 of the 1920 Act, as a "rule or regulation" to "meet . . . conditions unfavorable to shipping . . . result (ing) from . . . competitive methods" of foreign-flag operators. The Board's current view is that it can do nothing to prevent rate-cutting by a single line, absent discrimination:

> "We look with disfavor on the practice of quoting rates by differentially lower amount or percentage than the rates of competitors but find it, without more, not within the scope of Section 16."[51]

On the other hand, the Maritime Board and its predecessors have several times claimed jurisdiction over the level of rates set by conferences. While it must be admitted that no reported case strikes down a conference rate, yet the agency has said both:

> "An unreasonably high rate is clearly detrimental to the commerce of the United States, and upon a showing that a conference rate in foreign commerce is unreasonably high the [Board] will require its reduction to a proper level. If necessary, approval of the conference agreement will be withdrawn."[52]

and:

> "Had the power been given this [Board] to compel complainant, defendants, and all other carriers in the trade to raise their rates, the situation is such that the power would now be exercised. Were the agreement under consideration actually responsible for the low rates in the trade, the [Board's] course of action under existing power would also be clear. There is nothing in the record, however, to warrant the conclusion that the agreement has brought about the unremunerative rate level. On the contrary . . ."[53]

By definition, an effective conference succeeds in raising the level of rates, and over the years one might expect many shippers to have attacked the level of conference rates, either by filing formal complaints or at least in testimony before the Maritime Board or the Congress. Surprisingly, this is not so, and many shippers seem to believe in strong conferences. The accepted explanation of the paradox is that a single stable conference rate charged to all, even if high, is preferable for most shippers to a choice of a number of unstable

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[49] *Prince Line* v. *American Paper Exports*, 55 F. 2d 1053 (C.C.A. 2d, 1932); see *United Nations* v. *Hellenic Lines Limited*, 3 F.M.B. 781, 786-7.

[50] *Anglo Canadian Shipping Co.* v. *Mitsui Steamship Co.*, 4 F.M.B. 535, 537.

[51] *Ibid.*, at 542.

[52] *Edmond Weil* v. *Italian Line "Italia,"* 1 U.S.S.B.B. 395, 398. See also *Pacific Coast—River Plate Brazil Rates*, 2 U.S.M.C. 28, 30.

[53] *Seas Shipping Co.* v. *American South African Line*, 1 U.S.S.B.B. 568, 583.

rates, when a competitor, particularly a larger competitor, may obtain an advantage.[54]

That conferences do produce a relative rate stability seems unquestionable. In the trans-Atlantic trades, for example, there was a general fifteen percent advance in April 1955, a ten percent advance in February 1956, with an additional ten percent rise announced but not to be effective until February 1957.[55] Such stability may be obtained—and was in the example—in the face of some non-conference competition, at least when cargo is plentiful. To meet outside competition, however, most conferences will try to prevent the non-conference carriers from obtaining cargo, with the favored device being some form of dual rate system.

Dual Rates

Any conference must suffer the divisive forces working on a rate fixing group. Even without the prospect of outside competition, the temptation is present for any conference member to resign and underquote the conference rates in order to obtain more or better cargo. As in most commercial activities, it pays to be an independent operating "under the umbrella" of the prices fixed by the majority.[56] When to this natural temptation is added the prospect of new competition produced by the traditional freedom of entry into any trade, the life expectancy of most conferences would seem to be short.

We have seen that the Shipping Act, 1916, denies to carriers serving the United States almost all of the readily apparent means of controlling non-conference competition. The traditional and apparently effective device of the deferred rebate, while still in favor with conferences operating in foreign-to-foreign trade as a means of tying shippers to the conference lines,[57] is flatly prohibited, calling forth a rueful official comment on:

> "The vulnerability of our conferences which, by the Shipping Act, 1916, are prohibited from using the deferred rebate system employed almost universally in the export trade of other countries as a protection against such competition."[58]

[54] See "Merchant Marine Study and Investigation" Sen. Rep. 2494, 81st Cong. 2d Sess., at p. 85.

[55] The Journal of Commerce, October 15, 1956, p. 1.

[56] "Unlike the railway carrier, the ocean carrier is unable to add or eliminate cargo carrying units in adjustment to the variations of cargo offerings. Since the ship is a single carrying unit, the carrier's costs, exclusive of cargo handling costs are fixed. Costs per unit of cargo carried vary in inverse proportion to cargo carried. Accordingly, the rate cutter, particularly in times of relative cargo shortage and intense carrier competition is able profitably to fill his vessel, although he might not be able to realize a profit with less than a shipload."—Chairman Morse, dissenting in Docket 743, *Statement of Trans-Pacific Freight Conference of Japan*, 4 F.M.B.—(Adv. p. 28-9, December 19, 1955).

[57] A deferred rebate system in the cotton trade from Egypt to India and Pakistan is described in *Isbrandtsen Co. v. American Export Lines*, 4 F.M.B. 442. The amount of rebate was 30 shillings of a total rate of 155 or 170 shillings per 100 kilos.

[58] *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 470, 490.

Forbidden the deferred rebate, the most effective weapon left to conferences, and the focus of intense postwar litigation, is the dual rate, or contract/non-contract, system.

In a dual rate system, shippers who sign contracts pledging to patronize conference lines are entitled to preferential "contract" rates. Shippers who will not sign the contract are charged a second and higher set of "non-contract" rates. Generally, the contracts guarantee up to 90 days notice of proposed rate increases—an advantage not to be minimized. A dual rate system will be effective only where the conference lines provide a large majority of sailings in a trade and where most shippers require frequent service. Thus, a dual rate system could not be expected to work where the "independent" lines provide more service than the conference lines, nor is a dual rate system appropriate for passenger traffic.[59]

Further, the dual rate system is not effective in stabilizing rates on commodities which are frequently carried in full shipload lots by tramps. Any shipper regularly able to fill an entire ship with his cargo can insist that the conference lines meet the going tramp rate. But where shippers require frequent service and an independent rate cutter offers a relatively small proportion of sailings in the trade, the dual rate system is thought to be extremely effective.

After an early period of indecision,[60] the Maritime Board is committed to the proposition that the dual rate system is both legal and often the appropriate remedy for an unsettled trade. Although the Board once claimed an agreement to adopt a dual rate system was an "interstitial" agreement not requiring Board approval, it is now accepted that prior approval from the Board is necessary.[61]

Opponents of the dual rate system have argued that no matter what the Board finds, the system is *per se* illegal because it discriminates between the signing and the non-signing shipper, which is said to be contrary to Section 14 of the Shipping Act, 1916. In spite of the long history of the dual rate system, there has as yet been no explicit holding by a court that the system is legal[62]—an anomaly which may be resolved by a case now pending in the District of Columbia Court of Appeals.[63]

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[59] W. M. Sheehan, "Exclusive Patronage Contracts in International Air Transportation," 21 JOURNAL OF AIR LAW AND COMMERCE 159, 173, suggests that a dual rate system "could be a sound and desirable development in international air cargo transportation."

[60] Compare *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922), condemning dual rates as a discrimination, with *Rawleigh v. Stoomvaart, etc.*, 1 U.S.S.B. 285 (1933). The early decisions are all canvassed in the report in Docket 730, *Statement of Japan-Atlantic and Gulf Freight Conference*, 4 F.M.B.—(December 14, 1955).

[61] *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C.A.D.C., 1954); Docket 767, *Agreements and Practices Pertaining to Brokerage*, Report on Motions for Interim Order, 4 F.M.B.—(November 30, 1955).

[62] On appeal of the decision in *Isbrandtsen Co.* v. *United States*, 96 F. Supp. 883, where the issue of *per se* illegality was argued, the Supreme Court split four to four—312 U.S. 950. Sheehan, op. cit. note 59, argues that the courts will and the Civil Aeronautics Board should approve dual rate systems.

[63] This is the Japan-Atlantic and Gulf case, discussed in the next paragraph of the text.

[While this article was in proof, the United States Court of Appeals for the District of Columbia Circuit did decide the pending case just referred to above. On November 9, 1956, in *Isbrandtsen Company* v. *United States,* No. 13027, the court held that Section 14, Third, of the Shipping Act, 1916, makes dual rate contracts illegal because retaliatory, and therefore held the dual rate system unapprovable by the Maritime Board. The Supreme Court will of course be asked to review this decision and may at last come to grips with the legality of the dual rate system.]

While the Board has usually approved the use of dual rates in foreign commerce,[64] approval is not automatic. In a recent major case a two to one majority of the Board refused the use of dual rates to the Trans-Pacific Freight Conference of Japan,[65] covering the inbound trade from Japan to the Pacific Coast of the United States. Almost simultaneously, the Board approved the use of a dual rate system by the Japan/Atlantic and Gulf conference, in the inbound trade from Japan to the Atlantic and Gulf coasts of the United States.[66]

Both conferences proposed a 9½% spread between the contract and non-contract rates. In both cases the same independent line had been underquoting conference rates and in both cases the Japanese Fair Trade Commission had expressed approval of the 9½% contract/non-contract differential. Before the Board's decisions were issued, both conferences' rates had been "opened"—that is, members were left free to quote rates individually—and rate wars had followed.

However, in the one case the majority of the Board disapproved the system as not necessary to meet competition, and blamed the rate collapse of the trade not on outside competition but on an overtonnaging of the trade. In the other case, the Board found the dual-rate system to be "a necessary competitive measure to offset non-conference competition in this trade." The 9½% spread was approved as large enough to protect the conference but not so large as to force the non-conference competitor out of business—or it might be better to say, to force the competitor out of business as an independent, for an independent is free to join any conference supervised by the Maritime Board.

Admission to Conferences

Absent a dual-rate system or some other effective tying arrangement, conference members obviously would want to have their conference contain all carriers in a trade. But given the existence of a

[64] In domestic commerce, the Board's predecessors disapproved the use of dual rates: *Intercoastal Investigation, 1935,* 1 U.S.S.B.B. 400; *Gulf Intercoastal Contract Rates,* 1 U.S.S.B.B. 524, aff'd sub nom. *Swayne & Hoyt v. United States,* 300 U.S. 297.

[65] Docket 743, *Statement of Trans-Pacific Freight Conference of Japan,* 4 F.M.B.—(December 19, 1955).

[66] Docket 730, *Statement of Japan-Atlantic and Gulf Freight Conference,* 4 F.M.B.—(December 14, 1955).

successful dual-rate system, conference membership takes on a valuable glitter; membership may be the only way to obtain cargo. Time after time in such situations conferences have tried to refuse entry to newcomers.

With very few exceptions—none of any importance[67]—the Maritime Board and its predecessors have insisted upon the instant admission to every conference of all "qualified" applicants, and the qualifications are limited to an intent to operate as a common carrier in the trade and willingness to pay the admission fee most conferences require.[68] Even this fee has been kept to a minimum; $5,000 is too high, but $250 is acceptable.[69]

The policy of free admission to all conferences under the Maritime Board's jurisdiction has been adopted in the face of frequent explicit findings that trades are overtonnaged, and that entry of still another carrier would increase the surplus of capacity:

> "We are urged to consider, as determining factor, whether the trade is adequately tonnaged. But this factor cannot be controlling for the reason that if adequacy of existing service is to prevent new lines from engaging in the trade, carriers already in the service could perpetuate their monopoly by the simple and expedient method of continuing to maintain adequate service."[70]

The Board continues to go to some lengths to protect the policy of free admission. An investigation has been ordered of a conference which made it a condition of membership that the applicant withdraw from pending litigation before the Board wherein the applicant opposed the conference position.[71] The applicant agreed and is now a conference member, but the Board still questions the condition upon membership.

Freedom to engage in a trade, freedom to enter conferences, combined with conference power to fix rates, may in time result in vessels being placed in service beyond the needs of a trade.[72] To deal with this overtonnaging, a number of devices are available.

Pools and Traffic Division

An agreement to pool revenue, together with a limitation on number of sailings, is one obvious solution to overtonnaging of a trade by the members of the pool. The Maritime Board has approved a number

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[67] *Hind, Rolph & Co. v. French Line*, 2 U.S.M.C. 138, reopened 2 U.S.M.C. 280, is an aberration. The Maritime Commission first refused to order Brodin Line admitted to membership in three conferences. The case was then reopened and declared moot, and subsequently "distinguished" in *Olsen v. Blue Star Line, Limited*, 2 U.S.M.C. 529, 533.

[68] The latest case is *American-Hawaiian Steamship Co. v. Intercontinental Marine Lines*, 4 F.M.B. 160. In *Black Diamond Steamship Corp. v. Compagnie Maritime Belge*, 2 U.S.M.C. 755, the Commission ordered the removal of a provision in conference agreements which limited admission to carriers already operating.

[69] *Pacific Coast European Conference Agreement*, 3 U.S.M.C. 11, 14.

[70] *Waterman S.S. Corp. v. Arnold Bernstein Line*, 2 U.S.M.C. 238.

[71] Docket 792, *Agreement and Practices Pertaining to Limitation of Membership.*

[72] So Marx, op. cit. note 1, at 301: "The combination of competition with monopolistically determined prices, however, is apt to encourage the operation of redundant tonnage."

of pooling agreements, and consideres them "not *per se* unlawfully discriminatory or a violation of the Shipping Act, 1916."[73]

While a pool is the final step in eliminating intra-conference competition, participation in pools is not confined to conference carriers. In a 1939 investigation of part of the elaborate pre-war network of trans-Atlantic pools the Board's predecessor approved agreements between conference lines and a rate-cutting independent. By use of a revenue pool from which the independent regularly received payments, and a limitation on sailings, the independent's competition was controlled. At the same time the independent continued to underquote, thus "protecting the conference lines against competition from tramps or others outside of the conferences . . . "[74]

A variant method of avoiding intra-conference competition is the cargo pool, where the actual liftings of one or many commodities are apportioned in an agreed ratio. Other variations on the theme exist, such as agency arrangements among competitiors,[75] division of ports to be served,[76] or alternate sailing agreements.[77]

Since price competition among conference members is already eliminated, the effects of a pool on rates are not immediately visible. Recently, the Maritime Board has found that there is "substantial competition" between members of a revenue pool, notwithstanding that both lines are also members of the same conference.[78] Nevertheless, it is plain that a pool does reduce the threat of potential competition between carriers, and no doubt allows the members to present a stronger front to shippers seeking rate reductions.

Ordinarily the purpose of a pool is best served when all competing carriers are members, but mere membership in a pool usually confers no apparent competitive advantage against outsiders. Following this reasoning, the Maritime Board holds that a pool, unlike a conference, need not be opened to all who apply.[79]

Borderline Cases

Conferences, dual rates and pools are all legal steps toward increasing the economic power of carriers through joint action. It is only natural that new ways to use the joint power of conferences have been proposed, and that some such attempts have been challenged before the Maritime Board.

For example, the purpose of a conference is conventionally said to be the fixing of rates for what carriers sell, but there have been repeated attempts to use the conference machinery to control the price to be paid for at least one important item the member lines buy: the services of freight forwarders and brokers. An individual carrier is

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[73] *West Coast Line* v. *Grace Line*, 3 F.M.B. 586, 596.
[74] *Agreements 1438 and 5260-5264*, 2 U.S.M.C. 228, 237.
[75] *American Export Lines—Section 804 Waiver*, 4 F.M.B. 379.
[76] *Lykes-Harrison Pooling Agreement*, 4 F.M.B. 515.
[77] *Moore-McCormack-Swedish Lines Sailing Agreement*, 4 F.M.B. 559.
[78] *Lykes-Harrison*, op.cit. note 76, *Moore-McCormack*, op.cit. note 77; *Grace-C.S.A.V. Pooling Agreement*, 4 F.M.B. 528.
[79] *West Coast Line* v. *Grace Line*, 3 F.M.B. 586.

of course free to pay a "brokerage" fee or not, as it chooses. In order to avoid the competitive pressure to pay brokerage, conferences have adopted prohibitions against payment by members. The Maritime Board has disapproved outright prohibitions as resulting in "detriment to the commerce of the United States in that it has had and will have a serious effect upon the forwarding industry."[80] It is acceptable, though, to adopt a concerted prohibition which does not restrict brokerage to less than the customary 1¼%. In practical effect, the Board has prescribed a reasonable brokerage rate for carriers to pay.

The shipper's commitments in the exclusive patronage contracts under a dual-rate system have presented another problem in extension of power. A major question is whether a conference can apply the contract to F.O.B. or F.A.S. shipments, and thus require the contract shipper to have his customers abroad ship on conference lines. The Board has so far held that contract rates do not and should not apply to F.O.B. or F.A.S. shipments unless the buyer is a "contract signatory."[81] But:

> "We do not here state that we may never approve of a Shipper's Rate Agreement which requires its signatories to ship exclusively via conference vessels all goods sold by such signatories for export in the trade served by the Conference, whether sold on F.O.B., F.A.S., C.I.F., or C. & F. terms. Such an agreement, like the dual rate system itself, would depend, for approval, on the competitive need shown to exist, in keeping, however, with the command of the court in *Isbrandtsen* v. *United States*, 211 F. 2d 51, 57 (C.A., D.C. Cir. 1954) that a concerted conduct approved by us and thus exempted from the anti-trust laws must not offend the spirit of those laws any more than is necessary to serve the purposes of the act."[82]

At least one conference has tried to fight outside competition by establishing a list of "approved" freight forwarders and brokers. Only those on the list could receive the usual brokerage fees, and any forwarder-broker shipping via a non-conference carrier lost his place on the list. Thus far, the Board has declared the establishment of such a list to be an unapproved agreement, and has not approved the scheme.[83]

Perhaps the most significant means of extending conference power is the agreement between conferences. Such agreements may purport to do no more than establish a common administrative organization for several conferences. In an intermediate stage, conferences which

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[80] *Agreements and Practices re Brokerage*, 3 U.S.M.C. 170, 177, aff'd sub nom. *Atlantic & Gulf/West Coast Conference* v. *United States*, 94 F. Supp. 138 (S.D. N.Y., 1950) and *Pacific Westbound Conference* v. *United States*, 94 F. Supp. 649 (N.D. Cal., 1950); see also *Joint Committee* v. *Pacific Westbound Conference*, 4 F.M.B. 166.

[81] Docket 725, *Secretary of Agriculture* v. *North Atlantic Continental Freight Conference*, 4 F.M.B.—(February 29, 1956); Docket 730, *Statement of Japan-Atlantic & Gulf Freight Conference*, 4 F.M.B.—(December 14, 1955).

[82] Docket 764, *Mitsui Steamship Company* v. *Anglo Canadian Shipping Co.*, 4 F.M.B.—(Adv. p. 24, June 8, 1956).

[83] Docket 767, *Agreement and Practices Pertaining to Brokerage*, Report of the Board on Motions for Interim Order, November 30, 1955.

compete for goods originating at common inland points may agree either to co-operate in fixing rates or to charge identical rates. Finally, conferences may agree to offer a single exclusive patronage contract. Examples of each type of inter-conference agreement have been approved by the Board,[84] and as yet no such agreement has been disapproved after hearing.[85]

One might speculate on an extension of inter-conference agreements to form one world-wide grouping. No such monolithic development is likely to occur, even if the Board were to permit it. The failure to create an organization of such modest aims as the proposed Intergovernmental Maritime Consultative Organization[86] is doubtless significant. Nevertheless, some tendency to larger groupings persists, a discernible IATA-tropism.

Passengers

Thus far, we have considered the practices and regulation of conferences of cargo carriers. A parallel treatment of passenger conferences might be expected. It is disappointing in an article such as this to note that passenger conferences have created almost no regulatory problems. Passenger conferences exist, but devices such as dual rates have little or no applicability to passenger carriage. Although a large corporation might be induced to sign a contract to patronize conference lines, it is hard to imagine any effective dual-rate system applying to tourists.

The prospect of outside competition appearing in a trade is surely less in passenger carriage than in the dry cargo trades. The typical freighter accommodation for twelve passengers cannot much affect the rate level on a large passenger liner. There are far fewer full-passenger vessels afloat than freighters, and passenger ships cost far more to build.

Accordingly, passenger conferences are confined to the regulation of intra-conference competition. Fares are of course fixed or controlled, but what may be more important is control of the members solicitation practices, commissions paid, and the like.[87] The corresponding provisions in a cargo conference would be those controlling the payment of brokerage.

In the future, international air carriers may find the behavior of passenger conferences of special interest. It seems unlikely that there will be competition between air and sea carriers for meaningful amounts of cargo for many years. Competition for passenger traffic is already

[84] Consult Marx, op. cit. note 1, at pp. 151-154.

[85] Consider, however, *Contract Routing Restrictions*, 2 U.S.M.C. 220, 226 where shippers were offered contracts forbidding use of any carrier direct from the Great Lakes via the St. Lawrence. The Commission said: "We do not look with favor upon the attempt of carriers by artificial means to control the flow of traffic not naturally tributary to their lines," and disapproved use of the contracts.

[86] See Marx, op. cit. note 1, pp. 272-279, reprinting portions of the IMCO charter.

[87] See *Singer* v. *Trans-Atlantic Passenger Conference*, 1 U.S.S.B.B. 520 (subagency rules).

direct, although the effects may so far have been masked by postwar prosperity. The fact of competition among carriers suggests an eventual agreement to prevent competitive rate-cutting.

There are no agreements between the ocean passenger conferences and IATA, and no rate-protecting agreement may yet be needed. Owning to the differences between Section 15 of the Shipping Act and Section 412 of the Civil Aeronautics Act, it seems that the Civil Aeronautics Board would have jurisdiction to approve or disapprove any future air-sea treaty of peace, while the Maritime Board could only reach such an agreement insofar as it affected the joint practices of the water carriers.[88]

Conclusion

The Congress which passed the Shipping Act of 1916 had a taste for paradox. On the one hand, the Act fosters the establishment of rate fixing conferences. On the other hand, the Act forbids the most effective means of enforcing uniform rates. On the one hand, the Congress has confided to the Maritime Board great powers over carriers of all nationalities. On the other hand, the Board has been left with the delicate task of supervising international carriage without any vestige of international support for its work. Most nations do not attempt to regulate conference activity, and a unilateral policy of minute regulation by an agency of the United States would be both administratively difficult and diplomatically dangerous.

The Federal Maritime Board and its predecessors have carried forward the dual nature of the statute into their regulatory decisions. The Act has been construed as contemplating a state of uneasy monopoly. The published reports of the Board and its predecessors reveal both fear of monopoly power, at least on occasion, and desire to avoid at all costs the vicious rate wars which are the inevitable result of lack of monopoly power. More often than not, the Board's predecessors have chosen to meet the problem by using the threat of regulation rather than the fact.

The Board's problems obviously are not eased by the traditional American trust-busting attitude toward monopoly. It is futile to argue whether a conference is or is not really a monopoly.[89] From the economist's point of view a conference is a cartel — it is an international price-fixing agreement. But it is a legal cartel, endorsed by Congress in 1916 and approved on re-examination:

> "It must be clearly recognized that the conference system has assisted in the establishment of an American merchant marine where before it had little chance of survival. Before 1914, we carried only 9.4 percent of our foreign trade in our own ships. The rates have been set high enough to allow the American operator

[88] See note 23, above.

[89] At common law, at least English common law, a conference is not a monopoly: *Mogul Steamship Co.* v. *McGregor*, [1892] App. Cas. 25. The *Mogul* case is discussed in the context of English law by Letwin, "The English Common Law Concerning Monopolies" 21 Univ. Chi. L. Rev. 355.

to at least meet his out-of-pocket costs of operation, and while the foreign operator has many advantages, not the least of which is greater profits on his operation, the fact remains that from the standpoint of national security and from the point of view of the American shipper, the conference system has paid off in stability of rates and improved quality of service."[90]

According to the Board's reports, most shippers are willing to forego open competitive rates in order to obtain (the list is not exhaustive):[91]

(1) rate stability;

(2) rate information;

(3) last (and probably most important), the assurance that competitors are not obtaining lower rates.

Each of the three numbered benefits could be directly accorded to shippers, and is, in regulation of domestic transportation, without using the elaborate conference mechanism. The Maritime Board is at least close to having the statutory power to require publication of rates upon notice and thus producing short term rate stability. But to guarantee the third numbered benefit — that all carriers will charge equal rates — requires either rate-fixing power or conference membership by all carriers. The Shipping Act does not confer rate-fixing power, and forbids use of some of the competitive weapons which in effect might make conference membership a business necessity.

On this analysis, the successive agencies administering the 1916 Act have had the choice of promoting strong conferences with strong regulation, or weaker conferences requiring less rate regulation and with rates more vulnerable to competitive pressure. The choice so far has been to trust to a system of checks and balances — of what has been called countervailing power.[92]

The result is a mechanism illogical in plan, but capable of cancelling out the diverse pressures of governments, shippers and carriers with a minimum of friction. As an international institution, the conference system can then be judged a success, for not the least of the virtues of such an institution is an absence of criticism.

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[90] "Merchant Marine Study and Investigation," Sen. Rept. 2494, 81st Cong. 2d Sess., at p. 86.

[91] Other reasons often suggested are the shipper's fear of future monopoly after a rate war kills off the weak carriers, and the shipper's desire for assurance of regular service.

[92] Galbraith, *American Capitalism, The Concept of Countervailing Power* (Houghton Mifflin, Boston, 1952).