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Shipping Regulation and the Federal Maritime Commission

PART I

James S. Gordon†

Recent years have witnessed a remarkable burst of Federal Maritime Commission activity, spurred largely by congressional pressures upon the Commission.¹ Since its creation and investiture in late 1961, the pace of Commission activity has totally eclipsed that of its predecessor agencies during the 45 years of their existence.²

The Commission's zeal has imposed significant burdens and costs both on the Government and the industry. Its "fact-finding investigations" and hearings into steamship conference³ activities, and partic-

† Assistant Professor of Law, Indiana University. This article is a preliminary draft of a chapter which will appear in somewhat condensed form in a forthcoming book entitled *American Maritime Policy* by the author and Mr. Peter Karasz, whose careful reading of this draft and helpful comments thereon are gratefully acknowledged. This is the first installment of a two-part article. The second part will appear in the Winter 1970 Issue, Volume 37, Number 2.

¹ JOINT ECONOMIC COMM., DISCRIMINATORY OCEAN FREIGHT RATES AND THE BALANCE OF PAYMENTS, S. REP. NO. 1, 89th Cong., 1st Sess. (1965) [hereinafter cited as 1965 DOUGLAS COMMITTEE REPORT]. See also *Hearings on Discriminatory Ocean Freight Rates and the Balance of Payments Before the Joint Economic Comm.*, 88th Cong., 1st Sess., pt. 2, 193-4 (1963) (statement of Senator Douglas), and ANTITRUST SUBCOMM. OF THE HOUSE COMM. ON THE JUDICIARY, THE OCEAN FREIGHT INDUSTRY, H.R. REP. NO. 1419, 87th Cong., 2d Sess. 398-9 (1962) [hereinafter cited as CELLER COMMITTEE REPORT].

² "Whatever the reason, between 1916 and 1959 no penalties were imposed under the penal provisions of the Shipping Act and only 127 proceedings under the foreign trade provisions of sections 14 to 17 were reported, of which about half resulted in regulatory orders." Note, *Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635, 640 (1965). Since the investiture of the Commission in 1961, docketed proceedings relating to sections 14 through 18 have very substantially exceeded 127 in number.

³ Steamship conferences are associations of liner shipping firms which are formed and persist out of a desire of the member lines to reduce competition amongst themselves. They may or may not have a formal organization with a chairman or secretary and a staff which exists independently of the staffs of the member lines. Whether they are formally organized and meet regularly, or they are mere "48-hour agreements" under which lines agree to consult and then quote identical rates (each firm reserving the right of independent action on 48-hour notice to the rest), typically each member line has one vote which counts equally with every other. Subjects of collective agreement and action usually include not only freight rates but also most other terms and conditions of service. Conferences differ widely in the extent to which they succeed in cartelizing their respective markets. The liner shipping market in which a given conference will operate is usually defined by the boundaries of a single trade, that is, a group of routes linking one group of ports to another, although there are numerous conferences which cover more than one trade.

ularly conference rate levels and rate-making practices, have entailed extensive administrative proceedings and led to lengthy litigation before the courts. Nearly all of the liner firms serving the United States foreign trades have been affected. Moreover, these Commission activities have led to formal protests from leading maritime powers and to hostile foreign reactions, such as the passage of legislation in Europe and Japan forbidding national flag lines to comply with Commission orders and subpoenas relating to matters and documents or records outside the borders of the United States.⁴ Perhaps most serious of all, the example of such sustained American regulatory activity has stimulated foreign emulation, introducing an increased degree of parochial nationalism into what is the most international of industries. With each passing year the specter of inconsistent regulation of liner shipping by the United States and its foreign trading partners, each intending in good faith to "protect" its own commerce from "detriment" and "unjust discrimination," grows more insistent.

Whether the national interest is sufficiently served to warrant the costs, both present and future, of the Commission's activities is the question addressed in this article. We will describe the regulatory provisions of the Shipping Act of 1916, focusing especially on the Federal Maritime Commission's efforts in both indirect and direct rate regulation. We will then evaluate the law and the Commission's regulatory activities in the field of international liner shipping in terms of the national interest they are designed to serve.

I. THE LAW AND THE NATIONAL INTEREST

The underlying rationale of the Shipping Act of 1916 is the advancement of the economic welfare of American shippers (by which term we include both exporters and importers) engaged in the foreign commerce of the United States. Both the original statute, the product of the Alexander Committee investigations, and the 1961 amendments, the offspring of the Celler and Bonner Committee investigations, are based on the premise that the national interest requires the direct protection of shippers by specific statutory provisions and the indirect safeguarding of their interests by related provisions de-

⁴ See *Hearings on H.R. 4299 Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine and Fisheries*, 87th Cong., 1st Sess. 140-4, 158-64 (1961); *Hearings on H.R. 6775 Before the Merchant Marine and Fisheries Subcomm. of the Senate Comm. on Commerce*, 87th Cong., 1st Sess., pt. I, at 52-70 (1961); 1 A. CHAYES, T. EHRLICH & A. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* 425-50 (1968) [hereinafter referred to as CHAYES].

signed to protect and foster a strong American-flag merchant marine. The notion is that, if the latter is strong, the former will not suffer discrimination at the hands of foreign-flag shipping interests. Each of the provisions of the Shipping Act of 1916, as amended, may be easily and directly related to this conception of the national interest,⁵ and in view of the nature of the American economy—the United States is much more a nation of shippers than a nation of steamship operators—this is the only conception of the national interest which is capable of providing a meaningful rationale for American shipping policy.

A. *The Underlying Rationale of the Law*

American shipping policy rests on three major legislative decisions, two of them reached in 1916 with the passage of the original Shipping Act, and the third reached at the time of its recent revision by the Bonner Act amendments of 1961: (1) to exempt steamship conferences from the antitrust laws; (2) to institute government regulation of conference practices; (3) to legitimate exclusive patronage (dual-rate) contracts. Each of these decisions is the product of very extensive legislative investigation and rests upon carefully articulated justifications which are consistent throughout.

1. *Exemption of Steamship Conferences from the Antitrust Laws.* Commencing in 1912, the Committee on Merchant Marine and Fisheries of the House of Representatives, under the chairmanship of Representative Joshua W. Alexander of Missouri, undertook two years of investigations to determine "whether or not we should recognize the agreements existing between carriers by water or recommend that the Sherman antitrust law should be enforced against them and these conferences broken up."⁶ The outcome was the often-cited Alexander Committee Report,⁷ which attributed to the conference system a variety of important advantages for American exporters and importers and concluded that unchecked competition (the assumed result of the application of the antitrust laws to conferences) would seriously injure the interests of all merchants in the foreign trades and particularly the interests of American exporters. In 1916, the legislation

⁵ Perhaps the strongest contemporary reading of the Shipping Act as a shipper-protection statute, and the closest identification of the national interest with the interests of American shippers and especially exporters, is that of the Joint Economic Committee. See generally 1965 DOUGLAS COMMITTEE REPORT and the text at notes 166-72 *infra*.

⁶ 54 CONG. REC. 8077 (1916) (statement of Congressman Alexander).

⁷ HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, REPORT ON STEAMSHIP AGREEMENTS AND AFFILIATIONS IN THE AMERICAN FOREIGN AND DOMESTIC TRADES, H.R. DOC. NO. 805, 63rd Cong., 2d Sess. (1914) [hereinafter cited as ALEXANDER COMMITTEE REPORT].

recommended by the Committee, which exempted conferences from the antitrust laws and subjected them to regulation, was enacted in almost the same form originally proposed by the Committee.

In the opinion of the Alexander Committee, "if honestly and fairly conducted," conferences can provide "greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination."⁸ Each of the foregoing advantages would allegedly accrue directly to exporters and importers in ways laboriously documented to the Committee by a parade of carrier and exporter-importer witnesses. Certain other advantages of the conference system, also mentioned by the Committee, such as that it protected economically weaker carriers from falling prey to competition, eliminated wasteful competition through rationalization of sailing dates, and promoted economic distribution of costs of servicing undesirable locations through devices such as pooling arrangements, while phrased in terms of aids to the carriers themselves, were also clearly intended to be viewed as advantages to American merchants. For it was alleged that the elimination of the smaller, weaker carriers might lead to monopoly control of shipping services and that wasteful duplication of service would result in increased costs and, ultimately, increased freight rates.

The alleged advantages of conferences aside, perhaps the principal reason why the Alexander Committee decided to recommend their legitimization was that it became convinced that to do otherwise would be seriously impractical. It was argued that unchecked competition would lead inevitably to the monopolization of the shipping services upon which American exporters and importers depended, and the demise of steamship conferences among the carriers serving American trades would somehow disadvantage American merchants in foreign markets:

It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars and represent a truce between the contend-

⁸ *Id.* at 416.

ing lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.⁹

It would seem clear, then, that the national interest was conceived of as synonymous with that of the American exporter-importer and from this conception emerged the justification for exempting steamship conferences from the reach of the antitrust laws.

2. *Government Regulation of Conference Practices.* The antitrust exemption, however, was not alone the keystone of the original Shipping Act. Rather, this role was shared by the regulatory scheme created to police and control certain abusive, anti-competitive practices considered disadvantageous to American exporters and importers, all of which were attributed by the Alexander Committee to the limited monopoly power possessed by existing conferences.¹⁰ In brief, if the American merchant was to obtain the alleged benefits of the conference system, only diligent government regulation could assure it to him:

The Committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted are inherent, and can only be eliminated by effective government control; and it is such control that the Committee recommends as the means of preserving to American exporters and importers the advantages enumerated, and of preventing the abuses complained of.¹¹

The outcome was a trade-off between the antitrust exemption and a comprehensive regulatory program specifically prohibiting a vari-

⁹ *Id.* at 416-7.

¹⁰ *Id.* at 304.

¹¹ *Id.* at 418.

ety of practices considered to embody the worst of all conference abuses. These specific prohibitions were to be supplemented by an on-going, affirmative policy of government supervision to be administered by an agency fully empowered to disapprove and cancel any conference agreements which it found to be discriminatory, unfair, or detrimental to the commercial interests of the United States.¹² Moreover, the performance of any such agreement before public filing and agency approval, or at any time after its disapproval or cancellation, was to be declared unlawful and subject to the full penalties of the antitrust laws, in addition to substantial fines. In its most important provisions, this is the bare-boned structure of the basic regulatory scheme as it presently exists. As we shall show in the detailed review of the statute which follows shortly below, each provision of the law can be properly understood only in the context of congressional concern that American exporters and importers obtain the alleged advantages for which conferences were originally legitimated, as well as adequate protection against abuse of the market power which conferences were thought inherently to afford the carriers belonging to them.

3. *Legitimization of Dual-Rate Contracts.* Dual-rate contracts are exclusive patronage contracts under which a signer obtains a lower rate than a non-signer although both may be exporters or importers of identical cargoes. Not all conferences utilize such contracts; in fact, at present about 58 per cent do not.¹³ But those that do have traditionally utilized them as a defense against competition, that is, to exclude nonconference lines from their market by foreclosing to them the custom of nearly all exporters and importers of any significance in the trade.¹⁴ For this reason, the legality of dual-rate contracts under the antitrust laws and the Shipping Act of 1916 had been contested for many years prior to 1958 by independent carriers, the Department of Justice, and an occasional exporter or importer, both in the courts and before the regulatory agencies which from time to time administered the Shipping Act.¹⁵

In 1958, the issue was resolved when the Supreme Court held

¹² *Id.* at 419-21.

¹³ Calculated from FEDERAL MARITIME COMMISSION, APPROVED INTERCONFERENCE AGREEMENTS OF STEAMSHIP LINES IN THE FOREIGN COMMERCE OF THE UNITED STATES, January 1, 1966-January 1, 1968.

¹⁴ See text at note 27 *infra*; S. REP. No. 860, 87th Cong., 1st Sess. (1961), reported in 2 U.S. CODE CONG. & AD. NEWS 3108, 3127-30; see also CELLER COMMITTEE REPORT 216-22.

¹⁵ For a history of this litigation, see Dodds, *Legality of Shipper Tying Arrangements in Ocean Commerce*, 23 U. PITT. L. REV. 933 (1962); see also CELLER COMMITTEE REPORT 210-5.

the use of such a contract under the circumstances in the case at bar, *Federal Maritime Board v. Isbrandtsen*,¹⁶ to be a "resort to other discriminating or unfair methods" to stifle outside competition in violation of [the Shipping Act of 1916] Section 14 Third."¹⁷ Although the Court qualified its holding with the statement that section 14 third "strikes down dual-rate systems only where they are employed as predatory devices"—a factual determination to be made by the Federal Maritime Board in each case¹⁸—the *Isbrandtsen* decision was widely, and quite properly, viewed as throwing substantial doubt on the legality of all existing dual-rate contracts.¹⁹ In the confusion which followed, the industry appealed to Congress for aid, and legislation was quickly passed suspending the impact of the *Isbrandtsen* decision until Congress could fully investigate the problem and produce a legislative solution.²⁰

In the extensive congressional investigations²¹ which commenced immediately after the passage of the dual-rate moratorium law, witnesses for the Federal Maritime Board, the steamship industry and a variety of shipper groups took the position that dual-rate contracts were essential to the survival of the steamship conference system and to the attainment of its purported advantages for exporters and importers. In brief, the proponents of an enabling law overturning the Supreme Court's *Isbrandtsen* decision argued repetitively that

¹⁶ 356 U.S. 481 (1958).

¹⁷ *Id.* at 493.

¹⁸ *Id.* at 499.

¹⁹ See Auerbach, *The Isbrandtsen Case and Its Aftermath*, 1959 Wisc. L. Rev. 223, 245-51; see also S. REP. NO. 860, *supra* note 14, at 3116. The essence of the problem was that all dual-rate contracts are exclusionary and thus, arguably, "predatory" with respect to independent competition.

²⁰ Act of August 12, 1958, P.L. 85-626, 72 Stat. 574 (expired June 30, 1960). Dual-rate contracts in existence on May 28, 1958, the date of the *Isbrandtsen* decision, were declared lawful for a two-year period under the Shipping Act unless and until disapproved by the Federal Maritime Board. The moratorium was later extended for various periods until April 3, 1964, at which time all prior contracts not meeting the preconditions required by Bonner Act amendments to the Shipping Act of 1916 and duly approved by the newly constituted Federal Maritime Commission, were finally declared illegal, 75 Stat. 762 (1961). For a history of the moratorium legislation and its effects through 1962, see CELLER COMMITTEE REPORT 215 n.23 and sources cited therein. The moratorium was later justified by Senator Magnuson, chairman of the Senate Commerce Committee, as "emergency" legislation designed only to allow Congress time for deliberation. 107 CONG. REC. 19343 (1961).

²¹ *Hearings on the Ocean Freight Industry Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 86th Cong., 1st & 2d Sess., ser. 14, pt. 1, vols. I-IV and pt. 2, vols. I-II (1959-60) [hereinafter cited as *Celler Committee Hearings*]; *id.*, 87th Cong., 1st Sess., ser. 10, pt. 3, vols. I-II (1961). *Hearings Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine and Fisheries*, 86th Cong., 1st Sess., pts. I-III (1959) [hereinafter cited as *Bonner Committee Hearings*].

the dual-rate system was "indispensable to the strength of a conference", helpful in preventing malpractices in the trade in violation of conference agreements and the Shipping Act, and responsible for "assuring the stability of rates necessary to permit and encourage forward trading" by exporters and importers.²² The argument was universally couched in terms of protection of the merchant's interest in regular, frequent and high-quality service, the prevention of unsettling rate wars, and the elimination of practices which resulted in rate discrimination between shippers and ports.²³

In nearly all particulars, the legislative committees of both houses were convinced by the foregoing arguments, despite their very serious vulnerability²⁴ and the determined opposition of the Department of Justice.²⁵ However, the House version of the bill, while legitimizing dual-rate contracts, nevertheless basically reaffirmed the Supreme Court's *Isbrandtsen* decision by including language specifically designed to protect independent competition from the "predatory" use of such contracts by conferences. The Commission, under this bill, would have been required to disapprove the use of any dual-rate system which it found was intended or reasonably likely to cause the exclusion of any other carrier from the trade.²⁶ This language was stricken from the bill in the Senate Commerce Committee on the ground that:

Examination of the record in the House and before the Merchant Marine and Fisheries Subcommittee of your committee reveals overwhelmingly that every effective dual-rate contract used by a conference is intended, and reasonably likely, and tends to cause nonconference lines either to join the confer-

²² CELLER COMMITTEE REPORT 216; see also REPORT OF THE SPECIAL SUBCOMM. ON STEAMSHIP CONFERENCES OF THE HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, H.R. REP. No. 498, 87th Cong., 1st Sess. (1961).

²³ See, e.g., the synthesis offered by Dodds, *supra* note 15, at 949-58, and the arguments of the Federal Maritime Board, *In re* the Statement of Japan-Atlantic and Gulf Freight Conference (*Isbrandtsen* case on remand from the court of appeals), 4 F.M.B. 706, 736-42 (1955).

²⁴ See, e.g., the trenchant attacks on the foregoing justifications mounted in the Senate by Senator Estes Kefauver, note 28 *infra*; by the Antitrust Subcommittee of the House Judiciary Committee, CELLER COMMITTEE REPORT 216-22; and by the Department of Justice in testimony before the Bonner Committee, *Bonner Committee Hearings*, pt. 1 at 164 *et seq.*

²⁵ See, e.g., testimony of Lee Loevinger, Assistant Attorney General, Antitrust Division, Department of Justice, during *Hearings on H.R. 4299 Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine and Fisheries*, 87th Cong., 1st Sess. 423-56 (1961).

²⁶ S. REP. NO. 860, *supra* note 14, at 3127-30.

ence using the contract or to leave the trade for happy hunting elsewhere.

* * *

Clearly, then, under standards such as these, few if any effective dual-rate contracts could be approved by the Commission. And those which were approved would be under a constant sword of disapproval. . . .²⁷

When the bill reached the floor of the Senate, Senator Estes Kefauver, armed with extensive documentation,²⁸ led the fight for the restoration of the House language. What ensued was an elaborate floor fight over the Kefauver amendments, culminating in the only extensive congressional debate in modern times over the national interest as it is affected by the existence and operation of the conference system in the international shipping economy.

The opponents of the Kefauver amendments early took the position that the conference system itself was at stake; that without the right to institute what were inherently exclusionary dual-rate contracts, the system could not survive in the deluge of rate wars which the House-passed bill was said to assure. In most respects, their arguments for conferences paralleled those advanced by the Alexander Committee, 47 years earlier, and the defenses for dual-rate contracts which had been raised before the legislative committees.²⁹ In addition, Senators from major maritime states urged that the survival of the American-flag merchant marine would be threatened if dual-rate contracts were jeopardized, for after the predicted demise of conferences, the higher cost American carriers would allegedly not be able to compete with the lower cost foreign-flag operators.³⁰ However, in view of Senator Kefauver's arguments—acknowledged by his opponents³¹—that the American-flag lines were subsidized precisely to avoid this dire result and that conferences in American trades were dominated by foreign-flag lines, the principal defense of dual-rate contracts was placed not upon the needs of the American-flag liner industry, but rather upon the needs of American exporters and importers and their allegedly widespread support for the dual-rate law without antitrust amendments.³² Thus, in the 11th hour, when Senator Kefauver's amendments restoring the House bill's original antitrust language had passed and were being

²⁷ *Id.* at 3128-9.

²⁸ His lengthy speech on the Senate floor appears at 107 CONG. REC. 19335-74 (1961).

²⁹ 107 CONG. REC. 19334, 19420-8.

³⁰ *Id.* at 19421, 19428.

³¹ *Id.*

³² *Id.* at 19427.

reconsidered,³³ the leaders of the opposition, Senators Engle and Long of Louisiana urged that the antitrust standards be dropped on the ground that an effective dual-rate system—even if necessarily destructive of independent competition—was in the interest of American exporters and importers.³⁴

In the end, the Kefauver amendments were defeated, and Congress rejected the antitrust approach to conference regulation represented by the *Isbrandtsen* decision. The Congress recognized the steamship conferences as a “limited or qualified monopoly system”³⁵ but justified their existence in shipper-protection terms. Accordingly, rather than hedging the legitimization of dual-rate contracts with antitrust restrictions, Congress amended other sections of the Shipping Act of 1916, to strengthen the regulatory powers of the newly created Federal Maritime Commission;³⁶ to further restrict conference powers by explicit language establishing new prerequisites for the legality of their basic agreements; and to protect exporters and importers even further by a battery of mandatory restrictions on the terms and conditions of the dual-rate contracts which the Commission was now authorized to approve.³⁷ In language and impact, the Bonner Act amendments of 1961 are surely the most explicit congressional statement to date of the identity of the national interest with the interests of American exporters and importers.

B. *Highlights of the Law*

The Shipping Act of 1916 was not enacted merely to regulate steamship conferences. It was primarily “An Act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United

³³ *Id.* at 19422-8.

³⁴ *Id.* at 19427.

³⁵ *Id.* at 19334 (remarks of Senator Engle, manager of the bill in the Senate). The context of his remarks was as follows: “We have provided a limited or qualified monopoly system. There is no question about it. I call it a qualified monopoly, because ordinarily a monopoly excludes everybody. The bill provides that every shipping line that wishes to do so may enter the conference.”

³⁶ One such provision, section 18(b)(5), empowering the Commission to “disapprove any conference rate, fare, or charge which after hearing it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States,” was defended by its author, Senator Kefauver, as “a last effort to provide some protection—even though only a small amount—to American shippers.” *Id.* at 19429.

³⁷ These and other provisions of the Bonner Act amendments are described in detail in the text below.

States. . . ."³⁸ Of the 36 sections of the original Act, the provisions exclusively devoted to regulatory measures occupy approximately eight sections commencing with section 14. The preceding sections were concerned with United States-flag fleet promotion and operation and the remaining ones with procedural rules and the enforcement and investigatory powers of the newly created Shipping Board.

Section 14 was essentially a criminal statute outlawing a variety of conference practices, such as deferred rebates, fighting ships, retaliation against shippers' patronizing nonconference competitors, and certain forms of "unfair or unjust" practices, all of which were considered extremely damaging to exporters and importers and competition. These were declared misdemeanors punishable by a fine of not more than \$25,000. Section 15 established the basic scheme of conference regulation, consisting of agreement filing, Shipping Board approval, and the antitrust exemption. Sections 16 and 17 forbade discriminatory preferences in favor of particular persons, "localities," or commodities, rate cutting by various methods considered unfair and dishonest, and other unfair competitive practices. Sections 18 and 19 established a comprehensive system of interstate shipping regulation. Section 20 forbade all common carriers and their agents to disclose or utilize information respecting cargoes to the detriment or prejudice of any shipper, consignee, or other carrier. And, finally, sections 21 and 22, respectively, empowered the Board to require carriers and other persons subject to the act to file reports of "Any facts and transactions appertaining to the business of such carrier or other person" as the Board may require, and established procedures by which the Board may award reparations to "any person" injured by violations of the Act.

In examining these sections of the original Act, as modified, and in places enlarged, by the 1961 Bonner amendments, we shall first treat the law governing the approval of steamship conference agreements; next, the requisite terms and conditions of the "approvable" dual-rate contract; and finally, the explicit shipper-protection provisions built in to limit the exercise by the carriers of whatever usable monopoly power the statute may have incidentally created or legitimated.

1. *Approval of Conference Agreements.* Whatever they might have been in form and operation prior to 1916, and even as late as 1961, steamship conferences in the United States foreign trades are now the creatures of the 87th Congress. Conference membership is now completely open-ended; competing conferences may agree to agree on

³⁸ 39 Stat. 728 (1916).

rates, but may not bind each other to do so; conferences must undertake to prevent their members from chiseling rates in times of excess capacity, even though for most such an endeavor has never been thought worth the effort; and, finally, conference members are required to make themselves available for negotiations with exporters and importers. Conferences are not merely mandated by the law in each of the foregoing respects; rather, their very existence is pre-conditioned on compliance.

(a) Freedom of entry and exit. Section 15 of the Shipping Act permits agreements between competing carriers which eliminate rate and service competition, but only under certain conditions. The agreements must explicitly permit "admission and readmission to conference membership of other qualified carriers in the trade" in addition to providing "that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal."³⁹ This language was introduced into the Act by the 1961 amendments specifically to eliminate spurious restrictions on conference membership,⁴⁰ which had on occasion been permitted by the predecessor agencies of the Federal Maritime Commission. The new language has been interpreted by the Commission to require "that membership must be completely open subject only to routine conditions."⁴¹ Consequently, the Commission has ruled that all conference agreements must contain language substantially as follows:

Any common carrier by water which has been regularly engaged as a common carrier in the trade covered by this agreement, or who furnishes evidence of ability and intention in good faith to institute and maintain such a common carrier service between ports within the scope of this agreement, and who evidences an ability and intention in good faith to abide by all the terms and conditions of this agreement, may hereafter become a party to this agreement by affixing its signature thereto.⁴²

The conference may require that new members pay admission fees, which in some instances have been set as high as \$5,000, pay any outstanding financial obligations arising from prior membership, and post a security bond or make a deposit to guarantee performance of the terms and conditions of the agreement.⁴³ Bonds and deposits

³⁹ 46 U.S.C. § 814 (1964).

⁴⁰ Agreement No. 9218, North Atlantic Continental/North Atlantic Westbound Freight Conference, 9 F.M.C. 415, 422 (1966); *CELLER COMMITTEE REPORT* 96-98.

⁴¹ 9 F.M.C. at 422.

⁴² 46 C.F.R. § 523.2(a) (1969).

⁴³ *Id.*

for the latter purpose have, with Commission approval, been set as high as \$50,000,⁴⁴ although the normal range is between \$10,000 and \$25,000.

The Commission has also ruled that every conference agreement must contain language (a) assuring prompt action on membership applications; (b) specifically abjuring the right to deny admission or readmission if the routine conditions for membership are met; (c) committing the conference promptly to notify the Commission of all admissions and denials of admission to membership, accompanied, in the latter case, by "a statement of the reasons therefor"; and (d) assuring all members that they may withdraw from the conference without penalty on 30 days' written notice.⁴⁵ Moreover, every conference must explicitly relinquish the power to expel any member except for failure to maintain the minimum sailing requirements, which the agreement itself must specify, or for violations of the terms and conditions of the agreement. Nor can the agreement permit expulsion until the expelled party and the Commission have been furnished a "detailed statement setting forth the reason or reasons therefor."⁴⁶ Agreements not meeting all of the foregoing preconditions substantially *in haec verbis* may be disapproved by the Commission.⁴⁷

(b) The right of independent action. Section 15 also countenances rate agreements between carriers not members of the same conferences when the contracting parties are serving "different trades that would otherwise be naturally competitive."⁴⁸ However, under present law this is a rather limited dispensation, as the 1961 amendments to section 15 explicitly direct the Commission to disapprove any such agreement "unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference retains the right of independent action."⁴⁹ The FMC has therefore ruled that no such agreement may require a delay of more than ten days before either party "may take action or follow procedures independent of those agreed upon."⁵⁰

Underlying this provision of the Bonner Act was the notion that

⁴⁴ CELLER COMMITTEE REPORT 97 n.11.

⁴⁵ 46 C.F.R. § 523.2(b)-(f) (1969).

⁴⁶ 46 C.F.R. § 523.2(i) (1969).

⁴⁷ *Pacific Coast European Conference v. FMC*, 376 F.2d 785 (D.C. Cir. 1967).

⁴⁸ 46 U.S.C. § 814 (1964). Precisely what constitutes "naturally competitive trades" has never been defined, but it would seem that if two conferences consider their individual ratemaking decisions so interdependent that they require an agreement limiting the discretion that each may exercise, then they must be serving "naturally competitive trades."

⁴⁹ *Id.*

⁵⁰ 46 C.F.R. § 529.2 (1969).

rates for any given trade should be controlled exclusively by the carriers serving that trade, not by carriers serving competing routes. The theory is that importers and exporters will obtain "fair and equitable" rates only if the lines which in fact serve them have the ultimate ratemaking discretion, for carriers serving competing routes are concerned only with protecting themselves and their own customers from competition. The example most often cited in this regard has been Joint Agreement No. 8200 between the Far East Conference and the Pacific Westbound Conference under which each conference possessed a veto over the rate actions of the other.⁵¹ This agreement allegedly injured those exporters constrained by their location to ship from only one coast, "by transferring the ultimate decision with respect to their rates from the carriers immediately serving them to the carriers on the other coast who have no knowledge of or necessarily any interest in the welfare of the particular shipper."⁵²

In keeping with this notion of fairness, the House version of the bill required the disapproval of agreements not only between conferences, but also between carriers serving naturally competitive trades, unless the agreement provided for a "right of independent action." Under severe pressure from the industry, which was now faced with the impending disapproval of many existing conference agreements, the Senate struck out this provision, but in the Conference Committee, it "receded from its position with an amendment, accepted by the House conferees, limiting the prohibition on carrier agreements to carriers not members of the same conference."⁵³ With respect to interconference agreements, the final version of the Bonner Act amendments reflected the original House bill.

As with many other congressional compromises, this one promptly raised complex and troublesome questions, one of which the Commission, to its credit, recognized in an important 1965 decision regarding the Atlantic, Gulf and Great Lakes/Australia-New Zealand trades. In this case, certain carriers serving the Atlantic and Gulf ports amended their conference agreement to include the Great Lakes/Australia-New Zealand trade, but with an arrangement granting the Atlantic and Gulf carriers a binding veto over any rates set by the Great Lakes carriers beneath prevailing Atlantic and Gulf levels.

Although this arrangement would have functioned within one and the same conference, the Commission found it to be "the same, in

⁵¹ H.R. REP. NO. 498, *supra* note 22, at 9-10.

⁵² *Id.* at 10.

⁵³ CONFERENCE REP. NO. 1247, 87th Cong., 1st Sess. (1961), reported in 2 U.S. CODE CONG. & AD. NEWS 3143, 3145.

practice, as that which Congress sought to prohibit," for if, by including two or more trades within a single conference, the carriers serving one trade can veto the rates of carriers serving the others, "the independent action requirement of section 15 would be a nullity."⁵⁴ While, to be sure, this holding enforces the spirit, if not the language, of the Act, it seems to be in derogation of the explicit terms of the Senate-House compromise from which the law emerged. Nevertheless, on the conference's petition for review the Commission's interpretation of the Act was apparently sustained by the Court of Appeals for the District of Columbia, but, due to the peculiarly indecisive nature of that court's opinion, the question remains somewhat unsettled.⁵⁵

Since, as we shall note below, the "independent action" provision can have profound effects on the ratemaking process, it is regrettable that the reach of the clause is still uncertain. But, there is still another uncertainty that merits equal consideration. Even were the difficulties of defining the phrase "naturally competitive" somehow avoidable,⁵⁶ it may not be so easy to avoid defining precisely what is a "trade." If a trade be defined as "a group of routes linking one geographical area to another,"⁵⁷ then there are many significant conferences which encompass more than one trade and permit a number of their member lines to vote (often with decisive impact under the applicable voting rules) on rates affecting trades not served by them. For example, the Far East Conference includes two distinct trades, *i.e.*, two separable groups of routes linking two geographical areas with the Far East; one from Atlantic and one from Gulf ports. Not all the lines serve both the Atlantic and Gulf ports. The same is the case with other important conferences encompassing trades emanating from the Atlantic and Gulf ranges to other geographically separate and competing foreign ranges of ports in Europe, Africa, Asia, and Latin America. In the unlikely event that the Commission's

⁵⁴ *In re* Agreement Nos. 6200-7 *et al.*—U.S. Atlantic & Gulf/Australia-New Zealand Conference, 9 F.M.C. 1, 7 (1965).

⁵⁵ Although it was argued, the court ignored the incongruity between the Commission's interpretation and the legislative history of the "independent action" provision, but, nonetheless, remanded the case to the Commission for the correction of what it perceived as "logical untidiness." And, while holding that the Commission could properly disapprove the veto arrangement on a finding that it "operated to the detriment of the commerce of the United States," the court found that "it is not absolutely certain from the context" that the Commission in fact intended to make such a finding. *U.S. Atlantic & Gulf/Australia-New Zealand Conference v. FMC*, 364 F.2d 696, 700 (D.C. Cir. 1966).

⁵⁶ See note 48 *supra*.

⁵⁷ *Hearings on Discriminatory Ocean Freight Rates and the Balance of Payments Before the Joint Economic Comm.*, 88th Cong., 1st & 2d Sess., pt. I, at 135-68 (1963); D. MARX, *INTERNATIONAL SHIPPING CARTELS* 137-8 (1953); and Note, *Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635 (1965).

ruling in the *Australia-New Zealand* case were given general applicability, there would inevitably be a substantial restructuring of American steamship conferences.⁵⁸

(c) The self-policing requirement. Another Bonner Act amendment to section 15 empowers the Commission to disapprove any conference agreement "on a finding of inadequate policing of the obligations under it." The wording and placement of this provision emerged from a compromise in the Senate-House Conference Committee resulting in the elimination of the House requirement that conference agreements *contain* "effective provisions" for self-policing as a precondition to Commission approval.⁵⁹ The Senate objected to such a prerequisite to approval in the first instance, and replaced it with language emphasizing that the Commission was to inquire into the adequacy of self-policing *under* such agreements once they were functioning. However, not long after the enactment of the amendments, the Commission reversed the Conference Committee's compromise by promulgating a rule which in effect read the original language of the House bill back into the statute.⁶⁰ Subsequently, its first order disapproving a conference agreement not containing a detailed description of the requisite self-policing system was sustained on appeal — on the theory that for the Commission to require the incorporation of "some systematic and regular procedures . . . [by] compulsory amendment of the agreement is a reasonable manner of ensuring that the conference has in fact adopted a policing system and that it is brought clearly to the Commission's attention."⁶¹

The origin of this provision of the law lies in the extensive revelations of "malpractices," such as secret rate cutting and other forms

⁵⁸ Among those conferences affected would also be (a) the few which include within their jurisdiction both the inbound and outbound routes, which have, in all geographical markets, normally been considered separate trades, see D. MARX, *supra* note 57, (b) the 42 American conferences whose jurisdiction included Canadian ports as of 1962, CELLER COMMITTEE REPORT 337, and (c) the many American conferences which, although emanating from a single range of United States ports, include so wide a range of foreign ports that, under the traditional definition, they encompass more than one "trade," e.g., the American conferences serving the Far East, the Mediterranean and South Asia. As it is obvious that all lines that belong to many of these conferences do not serve each of the included but separable "trades," and yet vote on rates regarding all of them, the Commission's *Australia-New Zealand* decision has a potentially enormous impact.

⁵⁹ CONFERENCE REP. NO. 1247, *supra* note 53, at 3145.

⁶⁰ "Conference agreements and other rate-fixing agreements . . . whether or not previously approved, shall contain a provision describing the method or system used by the parties in policing the obligations under the agreement, including the procedure for handling complaints and the functions and authority of every person having responsibility for administering the system." 46 C.F.R. § 528.2 (Supp. 1969).

⁶¹ *Outward Continental North Pacific Freight Conference v. FMC*, 385 F.2d 981, 984 (2d Cir. 1967).

of personal favoritism practiced by members of nearly all conferences which the Celler and Bonner Committees investigated.⁶² These various forms of chiseling on agreed conference rates were considered by nearly all members of the congressional investigatory and legislative committees to negate many of the basic advantages for exporters and importers which traditionally had been claimed for the conference system.⁶³

The hearings, records, and committee reports indicate that it was widely believed that only the largest exporters and importers obtained these secret rate cuts and otherwise benefited from such *sub rosa* competition; smaller exporters and importers were thus allegedly discriminated against, despite the claim that conferences assure equal treatment for all exporters and importers. Secondly, chiseling and other malpractices which constitute an important means of intraconference competition inevitably produce intramural retaliation, in self-defense if nothing else, and thereby allegedly undermine conference solidarity and the rate and service stability upon which all exporters and importers are said to depend. Finally, it was frequently argued that the major perpetrators and prime beneficiaries of competitive "malpractices" were the foreign-flag members of the conferences, all of which allegedly engaged in their illegal activities abroad, beyond the reach of American authorities. Consequently, failure of the conferences effectively to police their agreements was injurious to the competitive position of the American-flag conference lines, for which the Congress has always been very solicitous.⁶⁴ Thus, the self-policing requirement of amended section 15 may be viewed as the direct outcome of traditional shipper-protection and United States-flag fleet promotion considerations.

(d) Procedures for hearing exporters' and importers' requests and complaints. Reacting to shipper testimony that steamship conference offices, particularly in the inbound trades, were often located in out-of-the-way places, or that conference personnel had rendered themselves otherwise inaccessible,⁶⁵ Congress amended section 15 to require that the Commission disapprove the operation of conferences demon-

⁶² See, e.g., CELLER COMMITTEE REPORT 249-79; Note, *Self-policing of Ocean Shipping Conferences*, 20 STAN. L. REV. 724, 726-7 (1968).

⁶³ See CELLER COMMITTEE REPORT and citations therein, upon which the congressional consensus summarized in the following paragraph is based.

⁶⁴ It is important to remember that perhaps the primary reason, after national defense, for the long standing congressional policy of U.S.-flag shipping promotion and subsidization is the belief that in the absence of a large, competitive American commercial fleet, American exporters and importers would be at the mercy of foreign operators.

⁶⁵ *Hearings on H.R. 4299 Before the Special Subcomm. on Steamship Conferences of the House Comm. on Merchant Marine and Fisheries*, 87th Cong., 1st Sess. 394, 412 (1961).

strating a "failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints."⁶⁶ Subsequently, the Commission promulgated General Order 14 defining the phrase "shippers' . . . requests and complaints," and requiring every ratemaking group operating under a section 15 agreement to file with the Commission "a statement outlining in complete detail its procedures for the disposition of shippers' requests and complaints."⁶⁷ The rules further provide that, on a quarterly basis, every conference must file a detailed report with the Commission describing the nature and date of all requests and complaints received, the nature and date of conference action upon them, the identity of the exporters or importers, and the reason for every denial. Every conference domiciled abroad must designate a resident representative in the United States to receive requests and complaints and file the appropriate reports. Finally, every tariff issued by an approved section 15 ratemaking group must contain "full instructions as to where and by what method shippers may file their requests and complaints," together with sample forms. As in the case of all other rules in accord with the 1961 amendments, the courts have affirmed the Commission's disapproval of the section 15 agreements of noncomplying carriers.⁶⁸

(e) General standards for approval of section 15 agreements. In addition to the foregoing requirements for section 15 agreements, the law establishes four general grounds upon which the Commission, after notice and hearing, may "disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it." These grounds are that the agreement:

- (a) is "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors";
- (b) operates or has operated "to the detriment of the commerce of the United States";
- (c) is "contrary to the public interest"; or
- (d) is "in violation of this chapter."

None of these has any particular content and in most reported cases, they appear to be largely redundant. If a proposed or operative agreement is held "unjustly discriminatory . . .," it is also normally

⁶⁶ 46 U.S.C. § 814, as amended by P.L. 88-275, 78 Stat. 148 (1961).

⁶⁷ 46 C.F.R. § 527.3 (Supp. 1969).

⁶⁸ *Outward Continental North Pacific Freight Conference v. FMC*, 385 F.2d 981 (2d Cir. 1967).

found to operate "to the detriment of the commerce. . . ."⁶⁹ And if the intervening or protesting exporters and importers or ports can show that they will suffer "unjust discrimination," they are concomitantly making out a case that the contested agreement is also "in violation of this chapter," specifically sections 16 and 17. If any one or all of the foregoing findings are made, the Commission will also on occasion find the agreement "contrary to the public interest";⁷⁰ yet, even where this additional malediction is not uttered, it is clear that the agreement might just as easily have been disapproved under this rubric as well.

But the "public interest" clause is not merely a catchall. Although the last to be added, (the others were part of the original 1916 version of the law), it shows every promise of dominating the entire statute. The Supreme Court has interpreted this phrase to grant the Commission "considerably broader authority"⁷¹ to control the dispensation of section 15's antitrust immunity than the Commission had possessed under the three preexisting criteria alone. In the recent *American Society of Travel Agents (ASTA)* case, the Supreme Court unanimously reversed a District of Columbia Court of Appeals decision invalidating a Commission rule that conference restraints which interfere with the policies of the antitrust laws will be approved only if the conference can "bring forth such facts as would demonstrate that the . . . [conference practice or] rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act."⁷² Labeling this the Commission's "antitrust test," the Supreme Court explicitly held it "an appropriate refinement of the statutory 'public interest' standard."⁷³

The potential impact of this decision, however, comes less from the holding itself than from the manner in which the Court defined

⁶⁹ See, e.g., *Imposition of Surcharge by the Far East Conference at Searsport, Maine*, 9 F.M.C. 129 (1965); *Cargo to Adriatic, Black Sea and Levant Ports*, 2 U.S.M.C. 342 (1940); *FMC v. Svenska Amerika Linien*, 390 U.S. 238 (1968). Redundant use of these standards also appears in *Investigation of Ocean Rate Structures in the Trade Between United States North Atlantic Ports and Ports in the United Kingdom and Eire—North Atlantic-United Kingdom Freight Conference, Agreement No. 7100, North Atlantic Westbound Freight Ass'n, Agreement No. 5850*, 9 P & F SHIPPING REG. REP. 1007 (1968) (opinion of the presiding examiner).

⁷⁰ See *FMC v. Svenska Amerika Linien*, 390 U.S. 238 (1968). Recently, the FMC has even struck down an agreement under section 15 using the "public interest" language alone. *Calcutta, E. Coast of India & E. Pakistan/U.S.A. Conference, FMC No. 67-33* (Sept. 14, 1967) (unreported Commission Opinion), *rev'd*, 399 F.2d 994 (2d Cir. 1968).

⁷¹ 390 U.S. at 243.

⁷² *Id.*

⁷³ *Id.* at 246.

the standard's proper application. In confronting the contentions that Congress deliberately rejected the application of antitrust standards in the original Act and again in the 1961 amendments, and that their judicial introduction into the law renders the "promise of antitrust immunity meaningless," the Court commenced what may ultimately be a total restructuring of the procedure, scope, and content of future section 15 proceedings:

The Commission's approach does not make the promise of antitrust immunity meaningless because a restraint that would violate the antitrust laws will still be approved whenever a sufficient justification for it exists. Nor does the Commission's test, by requiring the conference to come forward with a justification for the restraint, improperly shift the burden of proof. The Commission must of course adduce substantial evidence to support a finding under one of the four standards of § 15, but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is "contrary to the public interest," unless other evidence in the record fairly detracts from the weight of this factor. It is not unreasonable to require that a conference adopting a particular rule to govern its own affairs, for reasons best known to the conference itself, must come forward and explain to the Commission what those reasons are.⁷⁴

This is not an unprecedented reading of the statute. In several prior, albeit isolated, cases carriers and conferences had been required to justify their section 15 arrangements in terms of the public interest or the "regulatory purposes of the Act."⁷⁵ But the important point is that this view of the Commission's section 15 function has never before had across-the-board applicability; rather the Act was read in most instances as the District of Columbia Court of Appeals in the *ASTA* case had previously interpreted it. Conference agreements, pools, and the like, have traditionally been approved *unless* the FMC found them in violation of the Act's standards, irrespective of their benefits for anyone but the carriers and conferences concerned—with the Commission's public counsel or the occasional intervening protestant bearing the negative burden of proof.⁷⁶ Consequently, in the reports

⁷⁴ *Id.* at 245-6.

⁷⁵ See, e.g., Mediterranean Pools Investigation, 9 F.M.C. 2264 (1966); Rate Agreement United States/Persian Gulf Trade, Agreement No. 8900, 8 F.M.C. 712 (1965).

⁷⁶ See, e.g., Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System, Agreement No. 8660, 10 P & F SHIPPING REG. REP. 249 (1968); The Dual Rate Cases, 8 F.M.C. 16 (1964); Alcoa Steamship Co. v. Cia Anonima Venezulana de Navegacion, 7 F.M.C. 345 (1964).

of most section 15 cases, the Commission has acted as though it were a hybrid judge and jury merely resolving essentially private disputes between the proponents of section 15 agreements or modifications and the protesting ports, exporters and importers, or carriers. In some cases, pools, for example, have been disallowed because a participating carrier convinced the Commission that its percentage share was too small ("unjustly discriminatory")⁷⁷ or that conditions had changed making "unfair" a previously "fair" arrangement;⁷⁸ in others, port equalization rules have been disapproved⁷⁹ because the ports affected successfully supported their claims under the section 15 standards; and, in a significant number of the rest, intervening exporter-importer interests or competing carriers or terminal operators brought forth sufficient evidence of individual injury to force disapproval or modification of the entire agreement, one or more of its parts, or specific related practices. Only in a minority of cases did the Commission or its predecessors launch investigations on their own in which questions of public import rather than specific parochial economic interests became decisive. On the whole, then, prior to the *ASTA* case, it is proper to say that the proponents of section 15 agreements needed only rebut the arguments of the protesting intervenors; the proponent's burden was generally negative.

Under the *ASTA* interpretation, this scenario is radically altered. All section 15 agreements are *prima facie* restraints in violation of the antitrust laws. Their overall purpose is to restrain competition,⁸⁰ and each of the subsidiary inter-carrier covenants respecting rates, brokerage commissions, on-carriage absorptions and the like, typically incorporated in these agreements, along with the various rules to implement them, are designed specifically to accomplish the larger anti-competitive purpose. Thus, the mere existence of the agreement and its subsidiary covenants, rules, and regulations provides "substantial evidence" of an antitrust violation authorizing the Commission to "require that the conference . . . come forward and explain" the reasons why the Commission should dispense its antitrust exemption.

It is upon this threshold shifting of the burden of proof that the

⁷⁷ *River Plate and Brazil Conferences v. Lloyd Brasileiro and Moore-McCormick Lines, Inc.*, 8 F.M.C. 479 (1964).

⁷⁸ *Northern Pan-American Line v. Moore-McCormick Lines, Inc.*, 8 F.M.C. 213 (1964).

⁷⁹ *Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12 (1965).

⁸⁰ This was explicitly recognized by the authors of the Bonner Act amendments to the Shipping Act in 1961. See notes 24-35, *supra*, and accompanying text for the congressional acceptance of the proposition. See also S. REP. No. 860, 87th Cong., 1st Sess. (1961), reported in 2 U.S. CODE CONG. & AD. NEWS 3108, 3122-30.

Commission's "considerably broader authority" to control the anti-trust exemption must turn. But its effective implementation will require the Commission to break sharply with the bulk of its past decisions which have required that some particular interest, whether it be that of a port, a competing carrier, or an importer or exporter, be injured—at present or in the future—in a demonstrable way. Under the *ASTA* rule, the Commission would be justified even in taking the somewhat extreme position that all section 15 agreements are inimical to the public interest unless proven otherwise. However, to take this position, the Commission cannot merely reject the seemingly haphazard pattern of past section 15 decisions, with their nearly exclusive emphasis on the specific facts of every different case; it would have to develop a coherent body of doctrine regarding those justifications which will adequately meet the carriers' burden of proof under the "contrary to the public interest" criterion. For this purpose, the Commission could not do better than to make the underlying legislative rationale for exempting conference agreements from the antitrust laws the operative test: unless the proponents of a section 15 agreement can show that it protects exporters or importers by assuring them the claimed advantages of conferences, or for any similar reason, then such an agreement or practice should not be approved.

(f) Application of the invigorated "public interest" standard. In view of its possibilities for affirmative regulation as well as for deliberate contraction of the scope of the antitrust exemption, it is instructive briefly to study the implications of placing a burden of justification on the proponents of section 15 agreements. For this purpose, the *ASTA* case is a suitable vehicle. At issue in this case was the legality under section 15 of (i) the westbound Atlantic Passenger Steamship Conference agreement requirement that commissions to travel agents be fixed by unanimous vote, both in the conference as a whole and in the subcommittee responsible for recommending changes in conference rules, and (ii) the eastbound Trans-Atlantic Passenger Steamship Conference rule prohibiting travel agents authorized to book passage on conference vessels from also selling passage on nonconference vessels, although such agents were permitted to sell airline tickets at their pleasure. The former was referred to as the "unanimity rule" and the latter as the "tying rule."

The Commission found that the unanimity rule "was responsible for the existing disparity between effective commissions on air and sea travel and for the delays in conference action to rectify the situation."⁸¹ This disparity, in turn, was causing a diversion of passenger

⁸¹ 390 U.S. at 247.

business to the airlines, contrary to the interest of a majority of the conference members and the merchant marine at large. Since the Commission also found that the conference "had failed to establish any important public interest served by the unanimity rule" and, moreover, "that it invaded the principles of the antitrust laws more than was necessary to further any valid regulatory purpose,"⁸² it disapproved the rule under section 15 and ordered its elimination.

With respect to the tying rule, the Commission made a variety of antitrust findings to the ultimate effect that the rule forecloses non-conference lines from an opportunity to reach effectively 80 per cent of all trans-Atlantic steamship passengers, thereby injuring their competitive opportunities and limiting the options open to passengers and agents alike. Then, rejecting the conference's justifications for the tying rule, the Commission disapproved it and ordered its elimination as "contrary to the public interest," as well as "unjustly discriminatory" and "detrimental to the commerce of the United States."⁸³

The actions of the Commission with respect to both rules are illuminating if viewed in juxtaposition. In the case of the unanimity rule, the requirement that the conference affirmatively justify section 15 approval virtually ended the matter. The best argument the conference could offer was that the rule protected the United States-flag minority from majority control over "basic financial decisions." This, not surprisingly, was easily brushed off by the Court,⁸⁴ since the rule cuts both ways at the very least. It may protect any given line from coercion by the majority, but the majority may be coerced by the veto of any given line—as allegedly happened in the *ASTA* case itself. The truth, of course, is that there can rarely be any logical justification for any given voting rule, whether in terms of the public interest or some "valid regulatory purpose of the Shipping Act." Voting rules are the result of compromise between the lines when the conference is formed and whenever new members seek entry. As the outcome of negotiated bargains, the most that can be said for them is that they reflect a temporary balance of power. To require the conference to offer an affirmative justification in terms *other than* a blow-

⁸² *Id.*

⁸³ *Id.* at 252.

⁸⁴

This is a bewildering contention, to say the least. The rule may enable a single line to protect itself from a majority decision, but the rule in no way guarantees that line control over its own financial decisions. Lack of unanimity does not leave lines free to make independent decisions but simply freezes the existing situation. In this way control over the basic financial decisions of all lines is 'surrendered' not to the majority, but to any single line that happens to oppose change.

Id. at 249-50.

by-blow description of the inter-carrier bargaining process itself, is for the Commission effectively to decide the issue against the conference, *ab initio*.⁸⁵

By contrast, the tying rule can have substantive justifications, but whether any given justification is acceptable under the law is, of course, an entirely separate question. In essence, the tying rule is the functional equivalent of a dual-rate contract, with travel agents occupying the position of exporters or importers. Thus, predictably, the conference offered the same justification as that so tirelessly advanced on behalf of dual-rate contracts: The rule, it was claimed, preserved the stability of the conference by tying to it the great bulk of the passenger market, thus encouraging members to remain in and outsiders to join. Rather than quarreling with this theory, the Commission, and later the court, merely found that the conference failed to carry the burden of proof on this issue, and that by itself, "the theory was therefore insufficient to justify the undeniable injury to interests ordinarily protected by the antitrust laws."⁸⁶ Certainly, such a result might have been anticipated once the burden of proof had been shifted away from the ASTA toward the conference; for with the rule in existence for a great many years, if not from the conference's inception, it would indeed have been surprising if the conference could have produced actual evidence of the evils of life without the rule.

While this case surely demonstrates the significant outcome-determinative effect of redistributing the burden of proof in section 15 cases, it does not necessarily presage the end of a great many conference rules and practices. Although procedural and structural rules, most of which are based on nothing more than prudential bargains among contesting competitors, are clearly vulnerable, there are a variety of other conference rules and practices which are justifiable in terms of the survival of the conference and the elimination of competitive "malpractices"—if only the evidence could be obtained. To hold the former kinds of rules and practices, which cannot be justified in public policy terms, beyond the pale of section 15 is merely to provide further limits on the nature and content of the bargains which carriers will be allowed to make in establishing steamship conferences.

⁸⁵ Accordingly, it is not surprising that on this issue the case was reduced to a squabble over the facts and their interpretation. By holding that, "based on [its] special familiarity with the shipping industry," the Commission was entitled to indulge in "conjecture" whenever the evidence was "incomplete" (390 U.S. at 249), the Court scuttled this last ground for appeal not only for the *ASTA* respondents, but also for respondents in all later section 15 litigation.

⁸⁶ 390 U.S. at 251.

It is here that the newly invigorated "contrary to the public interest" standard could have its primary impact.

2. *Approval of dual-rate contracts.* The 1961 amendments to the Shipping Act require the Federal Maritime Commission to permit individual carriers and conferences of carriers to offer exporters and importers a limited kind of exclusive patronage contract, unless it specifically finds that such a contract⁸⁷ "will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory, or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors."⁸⁸ In the event of such a finding, the contract must be disapproved and its use thereafter is per se illegal. Prior to Commission approval, implementation of such a contract is prohibited.

The particular form of contract contemplated by the statute must be "available to all shippers and consignees on equal terms and conditions" and may, by its terms and operation, discriminate between a shipper who agrees to "give all or any fixed portion of his patronage to such carrier or conference of carriers" and a shipper who does not choose to so commit himself. The former may be charged a lower rate than the latter, even though both ship the same commodities; hence, conferences utilizing a system of such contracts are commonly said to be operating under a "dual-rate contract" system.

There is only one kind of dual-rate contract which the Commission is authorized to approve, and its operative provisions have been prescribed with such particularity that the existing contract system may properly be viewed as the creation of the 87th Congress, albeit slightly augmented by subsequent administrative interpretation. Nothing exactly like the "approved" dual-rate contract antedated the 1961 amendments, nor, in their present form, are the contract's basic terms and conditions the outcome of private commercial negotiation. Rather, as drawn by Congress the basic contract itself has become a primary input in the process of commercial negotiation, principally by affecting in various ways the relative bargaining power of carriers, on the one hand, and exporters and importers on the other. What follows is a rather detailed review of the prescribed content of the "approved" contract; readers already familiar with the dual-rate system might do well to skip to the next subsection.

⁸⁷ All the statutory prerequisites for the legality of such contracts, including filing with, and approval by, the Commission, are also applicable to any contract amendment or modification subsequent to the Commission's initial approval.

⁸⁸ 46 U.S.C. § 813(a) (1964).

(a) Prompt release. Section 14b requires that an approved dual-rate contract permit "prompt release of the contract shipper [exporter or importer] from the contract with respect to any shipment or shipments for which the contracting carrier or conference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice." In the interest of avoiding controversies over precisely what is meant by "prompt release," the Commission has required that all dual-rate contracts fix a specific period of time within which the conference must respond to the shipper's request for space and in fact proceed to furnish the space promised.⁸⁹ Accordingly, the Commission has required the incorporation of the following clause in all contracts:

If within three business days of such request the Conference fails to secure space on a vessel scheduled to sail within 15 days of the date of the request from the Merchant as aforesaid the Merchant shall be at liberty to secure such space on any vessel whatsoever.⁹⁰

In light of differences in "the reasonable commercial needs" of particular trades, the Commission will permit some variation in the foregoing time period;⁹¹ but, presumably, the burden of proof rests heavily on the conference concerned.

(b) 90 days notice of rate increases. Section 14b(2) provides that whenever a dual-rate contract becomes effective with respect to a given commodity rate, that rate "shall not be increased before a reasonable period, but in no case less than ninety days." Upon examination of the legislative history of this subsection, the Commission concluded that the literal terms of the statute did not in fact accomplish the actual congressional purpose, which was to permit exporters and importers to know with certainty well in advance of shipment what the prevailing freight rate will be. Accordingly, the Commission required that all contracts provide that rate increases be published in the tariff at least 90 days prior to effectiveness.⁹² Also, to discourage "rate increases which might be completely unacceptable to merchants" and to make it unnecessary for the merchant "unqualifiedly to cancel his contract upon notice of rate increase which he found unacceptable,"

⁸⁹ The Dual Rate Cases, 8 F.M.C. 16, 27 (1964) [hereinafter referred to as *The Dual Rate Cases*]. Hereafter, citation of mandatory contractual provisions will be to the Code of Federal Regulations (C.F.R.); explanation of the provisions are drawn from *The Dual Rate Cases*.

⁹⁰ 46 C.F.R. § 538.10 contract § 5 (1969) [hereinafter cited as the Uniform Merchant's Contract].

⁹¹ *Id.* at n.3.

⁹² *Id.* at § 4(a).

all contracts must grant the merchant 30 days after notice of a rate increase within which to tender the conference notice of contract cancellation "to become effective as of the effective date of the proposed increase."⁹³ Similarly, the conference is granted 30 days subsequent to the expiration of the shipper's 30-day period within which to notify the merchant of its rescission of the proposed increase. Should the conference exercise this option, then the contract remains in force "as if the proposed increase had never been made." Finally, the conference is required to offer the merchant a subscription to its tariffs "at a reasonably compensatory price" and to open its tariffs to inspection at its offices and those of each member line.

(c) The "legal right" clause. Perhaps the most difficult problems associated with dual-rate contracts concern which shipments are covered and what parties are bound by any given exporter's or importer's signature. Due to the complexities involved, Congress left both problems more or less to the discretion of the Commission.⁹⁴

The House version of section 14b(3) required all contracts to contain a provision expressly limiting their coverage to "only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier." The Senate added a provision specifying that it was a breach of contract for the shipper intentionally to relinquish his control of routing with the result that the shipment is carried by a vessel of a carrier not a party to the contract. On the assumption that the merchant alone will possess the facts necessary to establish his legal right to select the carrier, for example, whether the sale was a bona fide f.a.s. rather than a clandestine c.i.f. transaction, the Commission approved an optional contract provision raising a rebuttable presumption that the merchant has the legal right to control routing "if he participated in the arrangement for ocean transportation or if his name appears on a bill of lading or export declaration as shipper or consignee."⁹⁵

The second controversy concerned the binding effect of a merchant's signature on companies affiliated with him. The Commission defined the primary desideratum as a clause which would "make it less easy for a signatory merchant to evade his obligations under the contract through the subterfuge of using an affiliated company for nonconference shipments"; however, the Commission interpreted the legisla-

⁹³ *Id.*

⁹⁴ S. REP. NO. 860, 87th Cong., 1st Sess. (1961), reported in 2 U.S. CODE CONG. & AD. NEWS 3108, 3121-2.

⁹⁵ The Dual Rate Cases, 8 F.M.C. 27, 31 (1964). This provision has been incorporated as an optional clause in section 6 of the Uniform Merchant's Contract.

tive intent to bar conferences from binding the affiliate of a signatory merchant "without regard to the merchant's control over the affiliated company."⁹⁶ The result was a compromise requiring conferences desiring an "affiliates clause" to define the term "merchant" to include not only the contract signatory himself, but also:

any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract *and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control)* in relation to shipping matters. . . .⁹⁷

(d) The "natural routing" clause. The fourth subsection of the dual-rate statute requires approved contracts expressly to provide that the contract shipper need not "divert shipment of goods from natural routings not served by the . . . conference . . . where direct carriage is available." As defined by the Commission, a natural routing "is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances."⁹⁸ In practice, this provision would allow a contracting exporter or importer to use non-conference vessels only when use of a conference service requires him to divert his cargoes away from his customary and most economical ports of exit or entry, and nonconference service is direct and demonstrably less expensive.

(e) Limitations on damages for breach. Should a merchant breach his contract, subsection 5 limits damages recoverable by the conference to actual damages "to be determined after breach in accordance with the principles of contract law," or liquidated damages which may not exceed the contract freight rate on the shipment in question less the cost of handling. Recognizing the explicit legislative intent to outlaw anything in the nature of a penalty, the Commission has strictly limited the power of conferences to suspend or terminate the rights of contract shippers during and after any litigation between the parties. Only if the merchant does not promptly dispute the conference's claim that he has breached his contract, or promptly pay any damages for which he may be adjudged liable, may his right to obtain contract rates be suspended or terminated. Moreover, the conference may not terminate the merchant's rights without also terminating his obligations

⁹⁶ *Id.* at 32.

⁹⁷ *Id.* at 33-34; Uniform Merchant's Contract § 1(b).

⁹⁸ 8 F.M.C. at 35; Uniform Merchant's Contract § 8.

under the contract. Once the merchant pays the damages assessed against him, his rights under the contract must immediately be reinstated.⁹⁹

(f) Bilateral rights of cancellation. No dual-rate contract may be approved which fails expressly to provide that the contracting exporter or importer may terminate the contract at will, without penalty, upon 90 days notice. Carriers and conferences may do likewise, but subject to the proviso that once a contract system is terminated in whole or in part, it may not be reinstated without prior Commission approval.

(g) Permissible spread between contract and noncontract rates. While permitting contract signatories to obtain lower rates than non-signatories, Congress restricted the spread to a maximum of 15 per cent "of the ordinary rates." Moreover, as with all other aspects of the system, no conference may decrease the spread or, if less than 15 per cent, increase it, without prior approval of the Commission.¹⁰⁰

(h) Cargoes excluded from the contract. All approved contracts must expressly exclude cargoes "loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots." Concluding that "the same factors which prompted the exclusion of liquid chemicals would serve also to exclude liquid petroleum," and with due regard for the difficulties of distinguishing the former from the latter kinds of liquids, the Commission has also ordered all contracts expressly to exclude liquid bulk petroleum in less than shipload lots.¹⁰¹

(i) Other mandatory and optional provisions. Section 14b(9) authorizes the Commission further to qualify and condition the coverage and content of dual-rate contracts. Accordingly, the Commission has promulgated a variety of other mandatory and permissive contract provisions. Of the former, the six-month "charter exclusion" clause is most important. All contracts must permit merchants to use owned or chartered vessels, provided the term of the charter is six months or more. This is a compromise solution to the problem of how to protect conferences from "spot raiding" of cargoes while permitting merchants the economies of scale which may be obtained by bona fide proprietary carriage. In defining what is "proprietary," the Commission has ruled that "ownership of or other appropriate legal interest in cargo is the basic test"; conferences may not restrict the reach

⁹⁹ 8 F.M.C. at 36-37; Uniform Merchant's Contract § 11(e). *See also* 46 C.F.R. § 530.6 (b)(1) (1969).

¹⁰⁰ *See* 46 U.S.C. § 817(b)(2) (1964).

¹⁰¹ 8 F.M.C. at 39-40.

of the "charter exclusion" clause to cargo raised, grown, manufactured, or produced by the merchant.¹⁰² Consequently, large trading companies as well as firms manufacturing or producing a wide range of goods are free to utilize charters for multi-commodity cargoes, in a manner directly analogous to proprietary tramp shipping.

Perhaps the most important permissive ruling governs the adjustment of the contract system to a conference's occasional need to meet outside competition by "opening rates."¹⁰³ Recognizing that rates are often opened in response to the demands of contract shippers and that, in such cases, meeting the quickly changing rate quotations of outsiders "requires that rate-fixing initiative be returned to the individual conference members,"¹⁰⁴ the Commission ruled that contract rates may be opened without advanced notice, freeing the shippers affected thereby from their contract obligations. However, rates may not again be closed without 90 days' notice to the trade, and during the interval, the individual lines may not charge rates in excess of the last published contract rate for a minimum period of 90 days from the date on which the rate was opened.¹⁰⁵ Thus, the device of opening rates cannot be used to accomplish a rate increase in less than the mandatory 90-day period. In sum, what the Commission has authorized is the temporary suspension of the contract system as to specific commodities on which the conference may be facing particularly severe independent competition.

(j) General standards for the approval of dual-rate contracts. Section 14b of the Act requires the Commission to "permit" the use of dual-rate contract systems, amendments, or modifications unless it finds that the system would be "detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors." The Commission "shall withdraw permission" if it makes similar findings regarding the system while in operation. By comparison with the same phraseology in section 15 with respect to the approval of conference agreements, the word "carriers" is conspicuously absent from the "unjustly discriminatory" clause. Doubtless, this reflects the congressional decision to disregard the exclusionary

¹⁰² Pacific Westbound Conference Amendment to Dual Rate Contract, 9 F.M.C. 403 (1966).

¹⁰³ A rate is "opened" when the conference rate is removed and each individual carrier is permitted to establish its own rate on a commodity through negotiations with the exporters and importers concerned.

¹⁰⁴ 8 F.M.C. at 46.

¹⁰⁵ *Id.* at 46-47; Uniform Merchant's Contract § 7(b).

effects which dual-rate systems might have on nonconference carriers, and the deliberate intention of the Senate Commerce Committee to dispose of antitrust considerations. However, in view of the Supreme Court's holding that antitrust standards are properly incorporated within the broader "public interest" standard, it would now appear that the Commission will be compelled to consider to some extent the effect of the institution of a contract system on nonconference lines. To date, it has not done so.

The very few reported decisions applying the general standards of approvability have been exclusively concerned with the protection of exporters and importers and ports. In two notable instances, the Commission blocked attempts by conferences to include the Great Lakes ports within contract systems already encompassing the Atlantic and Gulf ranges.¹⁰⁶ In each case, it appears obvious that the few conference members serving the Lakes during the season when they are open to navigation were faced with serious independent competition, while competition from the Atlantic and Gulf ports was negligible. Many, if not all, important shippers from the Lakes were also dependent on the conference's Atlantic and Gulf services. Consequently, each conference was attempting to tie service in a monopolistic market to service in a more competitive market and thereby obtain a position of strength in the latter which it could not otherwise hope to attain. While the Commission declined in both instances to permit such an arrangement, in only one of these cases did it indicate an appreciation of the true motivation of the contract's proponents and the underlying problem of "leverage" which is involved in situations of this kind. But, even in this latter instance, the threat to independent Great Lakes carriers was nowhere mentioned.¹⁰⁷ Consequently, the pro-competitive outcome of these cases may have been purely fortuitous. For the future, however, the newly discovered anti-

¹⁰⁶ *In re* Agreement Nos. 6200-7, *et al.*—U.S. Atlantic & Gulf/Australia-New Zealand Conference, 9 F.M.C. 1 (1965), and *The Dual Rate Cases (re: River Plate and Brazil Conferences)*, 8 F.M.C. at 44.

¹⁰⁷ 9 F.M.C. at 9. The Commission's specific findings were that the extension of the dual-rate system to the Great Lakes in this manner would be "discriminatory," "detrimental to Commerce," and "contrary to the public interest." With respect to this part of its decision, the Commission was upheld by the court of appeals, *U.S. Atlantic & Gulf/Australia-New Zealand Conference v. FMC*, 364 F.2d 696, 699 (D.C. Cir. 1966). In *The Dual Rate Cases*, the Commission reached a similar conclusion regarding the attempt by the newly formed Pacific Coast/Latin American Conference, which comprised ten individual preexisting conferences, to bind exporters and importers by a single dual-rate contract covering all ten of the trades in question. Characterizing the evil as forcing a shipper desiring a contract in only one of the trades to sign a contract covering all of them, the Commission vetoed the arrangement as "detrimental to commerce," 8 F.M.C. at 49-50.

trust content of the "contrary to the public interest" standard would appear to require the Commission to focus more directly and consciously on the threat to nonconference carriers posed by permitting conferences to utilize the device of the common dual-rate system in order to link together trades in which they have substantial monopoly power with trades in which they face independent competition. As nearly all of the largest American shippers route cargoes from more than one range of ports to the same destination, permitting the use of this device could have a significant market-foreclosing impact on nonconference lines.¹⁰⁸

3. *Prohibition of certain anti-competitive practices.* The use of deferred rebates and fighting ships, retaliation against shippers who have patronized competing carriers or filed a complaint with the Federal Maritime Commission, "unfair or unjustly discriminatory" contracts with shippers based on volume of shipments, and other forms of "unjust discrimination" in rates or space accommodations, are explicitly proscribed by section 14.¹⁰⁹ Violation of this section is a misdemeanor punishable by a maximum fine of \$25,000 for each offense. From the inception of the Act to the present, there has existed a broad consensus that each of these predatory practices was inherently inimical to competition. Not only are they widely believed to destroy independent liner competition, and thus lead to conference monopolization of liner services, but their effects on the welfare of exporters and importers have been equally feared. The Alexander Committee, for example, explicitly condemned the deferred rebate system not only for stifling nonconference competition, but also for placing the exporter and importer in a "position of continual dependence" on the conferences.¹¹⁰ Of course, retaliation against shippers, like all other forms of "unjust" discrimination, was considered to be destructive of the competitive capability of the victims in their respective export or import markets to the detriment of the nation's commerce.

With the exception of the *Isbrandtsen* cases,¹¹¹ litigation under the

¹⁰⁸ Curiously, the Commission, in the *River Plate and Brazil Conferences* decision, was chiefly concerned with the fact that the conferences did not offer satisfactory service ("shippers must subscribe to inadequate conference service out of the Great Lakes in order to get needed contract rates from Atlantic and Gulf ports") and explicitly left it open for the conferences to return for permission at a later date when they "extend fuller service to the Great Lakes." 8 F.M.C. at 44.

¹⁰⁹ 46 U.S.C. § 812 (1964). On predatory practices, see generally *FMB v. Isbrandtsen Co.*, 356 U.S. 481, 488-93 (1958); CELLER COMMITTEE REPORT at 8-11.

¹¹⁰ HOUSE COMM. ON THE MERCHANT MARINE AND FISHERIES, STEAMSHIP AGREEMENTS & AFFILIATIONS IN THE AMERICAN FOREIGN & DOMESTIC TRADES, H.R. DOC. NO. 805, 63d Cong., 2d Sess. 307 (1914), cited in Dodds, *Legality of Shipper Tying Arrangements in Ocean Commerce*, 23 U. PITT. L. REV. 933, 941 (1962).

¹¹¹ *FMB v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

provisions outlawing predatory practices has not been extensive or notable. However, shippers have occasionally entered claims under the specific prohibitions in section 14 fourth against "unfair or unjustly discriminatory" contracts based on volume and unfair treatment with respect to cargo space accommodations. But these claims have normally been combined with or subordinated to allegations based on the much broader shipper-protection language of sections 16 and 17.¹¹²

4. *Tariff filing provisions.*¹¹³ All ocean carriers must keep their tariffs open for public inspection and file them with the Federal Maritime Commission. Tariffs must show all classifications and rates and charges for transport to and from every port which the carrier or conference serves. Conferences, by special Commission rule, may file a single tariff for all of their members. If any conference rule or regulation affects or determines in part or in whole the aggregate rates or charges, it too must be shown, along with copies of any documents evidencing the transportation agreement. The only rates and charges which need not be filed are those applicable to cargo loaded and carried in bulk without mark or count and softwood lumber in the primary stages of manufacture. Tariffs must be made available to the public at reasonable cost.

Tariff changes of any kind resulting in an increase in cost to the shipper, as well as any new or initial rate, may not become effective until the expiration of 30 days after publication and filing with the Commission. Where "good cause" is shown, however, the Commission may permit new or increased rates to become effective at an earlier date. Tariff changes resulting in decreased cost to the shipper are effective immediately after publication and filing with the Commission.

In order to assure that the published and filed tariffs reflect reality, the law explicitly forbids charging, demanding, collecting, or receiving more or less for transportation or related services than the amount specified in the tariffs filed with the Commission and in effect at the time. Carriers may not rebate, refund, or remit "in any manner or by any device any portion of the rates or charges so specified, nor extend or deny any person any privilege or facility, except in accordance with such tariffs."¹¹⁴ Civil penalties for the violation of this

¹¹² See, e.g., *Consolo v. FMC*, 383 U.S. 607 (1966); *Grace Line, Inc. v. Skips A/S Viking Line*, 7 F.M.C. 432 (1962); *Consolo v. Flota Mercante Grancolombiana S.A.*, 5 F.M.B. 633 (1959); *In re Agreement No. 6870*, 3 F.M.B. 227 (1950); *Neuss, Hesslein and Co. v. Grace Line, Inc.*, 2 U.S.M.C. 3 (1939).

¹¹³ 46 U.S.C. § 817(b) (1964).

¹¹⁴ 46 U.S.C. § 817(b)(3) (1964).

provision, as well as all other parts of section 18(b), are fixed at \$1,000 per day for the duration of the offense.

The tariff filing provisions also empower the Commission to prescribe the form and manner of publication and filing and to reject filings not in conformity with the law or the Commission's regulations. Those rejected are declared void and their use unlawful. Pursuant to this authorization, the Commission has promulgated detailed rules to govern everything from the width of margins on tariff pages to the labeling of commodity rates and classifications and the manner in which they must be shown. It is obviously an extreme effort at standardization both for its own sake and in order to prevent circumvention of the ameliorative and informative purposes of the law.

5. *The Commission's limited powers over ratemaking.* Sections 16 and 17¹¹⁵ of the Shipping Act are explicit exporter-importer and port protection statutes aimed at abuses of conference market power. The former outlaws any form of ratemaking which unduly or unreasonably prefers one exporter or importer, locality, or classification of freight over another; the latter outlaws unjust discrimination between shippers and ports and rates "unjustly prejudicial to American exporters as compared with their foreign competitors." These sections are largely overlapping and most litigants allege violations of both in contesting rates before the Commission. In any event, it would be difficult to imagine an unduly preferential rate which is not also unjustly discriminatory or prejudicial, and the Commission has not attempted to articulate operative distinctions either between "preferences" and "discriminations" per se or between the "undue," the "unreasonable," and the "unjust."

Nevertheless, in spite of the conceptual confusion, these sections confer somewhat different powers on the Commission. Of these differences, the most important concerns Commission powers. Section 16, as originally worded, merely declared undue preferences illegal, backing up this prohibition as well as others against false billing, false classifications, false weighing, etc., by a criminal fine of not more than \$5,000 for each offense. This section conferred upon the Commission's predecessors no remedial power over rates. Conversely, from its inception, section 17 conferred upon the United States Shipping Board and its successors the power to "alter" rates found to be unjustly discriminatory "to the extent necessary to correct such unjust discrimination or prejudice," and to order the offending carrier to

¹¹⁵ 46 U.S.C. § 815 (1964) and 46 U.S.C. § 816 (1964), respectively.

cease and desist from charging or collecting the rate or fare in question. In 1961, section 16 was amended to permit a state governor to protest to the newly created Commission any *conference*¹¹⁶ rate or regulation on the ground that it "unjustly discriminates" against his state, and to permit the Commission to take remedial action. The Commission was empowered to order the conference to show cause why the rate of regulation should not be "set aside"; moreover, by acting within the 180-day limit prescribed for such proceedings,¹¹⁷ the Commission may "set aside" any rate or rule that it finds to be unjustly discriminatory.

The difference between "set aside" and "alter," the operative language of sections 16 and 17, respectively, could be substantial. The former leaves the setting of the ultimate rate to the conference, subject of course to a new FMC veto; the latter gives the Commission what seems to be the power to set the rate. The same distinction is relevant to another important provision of the Shipping Act, section 18(b)(5),¹¹⁸ which empowers the Commission to "disapprove" rates and charges of carriers and conferences in foreign commerce which "it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States." It is noteworthy that, like section 16, its operative language confers no remedial powers on the Commission. The offending rate under section 18(b)(5) may be "disapproved," not "altered." But, again, as in the case of the preceding statutory provisions, what reported litigation there has been involving section 18(b)(5) to date has not been exclusively restricted to this part of the statute. Rather, sections 14 fourth, 15, 16, 17, and 18(b)(5) have been pleaded in conjunction whenever possible¹¹⁹—an easily appreciated practice, since, as we have earlier pointed out, what is detrimental to commerce can usually be proven unjustly discriminatory, if not unduly preferential or prejudicial, with respect to some interest or another.

¹¹⁶ The section allows the governors to protest only against conference rates; rates, if set by individual carriers, could not be protested in this manner no matter how significant they might be to the state's commerce.

¹¹⁷ This 180-day limitation on the Commission's typically protracted proceedings appears to be the only contribution of the "Governors' clause." Presumably, governors will protest on behalf of ports or important shipper interests within their jurisdiction. However, both had standing under sections 16 and 17 prior to their amendment in 1961, and the Governors' clause does not materially increase their leverage on the Commission.

¹¹⁸ 46 U.S.C. § 817(b)(5) (1964).

¹¹⁹ See, e.g., *Imposition of Surcharge on Cargo to Manila*, 8 F.M.C. 395 (1965); *Grace Line, Inc. v. Skips A/S Viking Line*, 7 F.M.C. 432 (1962); and *Raymond International, Inc. v. Venezuelan Line*, 6 F.M.B. 189 (1961). This practice began well before the enactment of section 18(b)(5). See, e.g., *Edmund Weil, Inc. v. Italian Line, "Italia,"* 1 U.S.S.B. 395 (1935).

Yet, in view of the Commission's doctrine that it may disapprove conference agreements under section 15 if it finds that the conference is fixing rates detrimental to the commerce of the United States or in violation of the other three standards mentioned in that section, it is not at all clear how much sections 16, 17, and 18(b)(5) add to the Commission's power over ratemaking. While this doctrine has never been invoked, largely because it has always been considered too draconian, the Commission has, in one notable case, taken action closely similar in outcome.¹²⁰ In this instance, a single member of the Far East Conference was ordered to cease and desist from assessing a surcharge on newsprint cargoes moving from Searsport, Maine, to Manila. For a variety of complex reasons the carrier did not comply and the United States district court refused to order compliance. Subsequently, the Commission ordered the Far East Conference to show cause why the port of Searsport should not be stricken from its jurisdiction—action analogous to dissolving the conference with respect to the carriage of cargoes emanating from Searsport. Upon entering the appropriate section 15 findings of unjust discrimination, detriment to commerce, etc., the Commission chose not to modify or cancel the basic agreement with respect to Searsport, ordering instead that the rate on newsprint at Searsport be opened; that is, it required the conference members to set rates individually on newsprint moving to Manila from Searsport, thereby withdrawing from the conference jurisdiction over this commodity-port combination.

While the *Searsport* case is the only example of such agency action against the conference agreement itself to rectify ratemaking practices considered illegal, such an action under section 15 appears hallowed by a long procession of *obiter dicta* in Commission and court opinions since at least as early as 1935.¹²¹ In view of the extremely broad language of section 15, which fixes the standards under which the Commission is empowered to disapprove proposed or existing conferences, it would indeed be difficult to make a case to the contrary. The conclusion which emerges, however, is curious, but entirely plausible: with

¹²⁰ Imposition of Surcharge by the Far East Conference at Searsport, Maine, 9 F.M.C. 129 (1965). While the Calcutta, East Coast of India and East Pakistan/U.S.A. Conference case, FMC No. 67-33 (Sept. 14, 1967), in which the Commission invoked the language of section 15 to disapprove the existing Calcutta Conference Agreement, appears relevant in this respect, it is inapposite. The Commission's action was based not on any finding of detrimental ratemaking, but rather on the recalcitrance of certain conference members who refused to produce documents and records in response to subpoenas duces tecum. See text at notes 158-63 *infra*.

¹²¹ See *Edmund Weil, Inc. v. Italian Line "Italia"*, 1 U.S.S.B. 395 (1935). More recent expressions of this claim are to be found in the *Iron and Steel*, *infra* note 166, and *High Pressure Boiler*, *infra* note 182, rate disparities investigations.

respect to its power to curb abuses in conference ratemaking, the additional authority conferred upon the Commission by section 16, 17, and 18(b)(5) is largely redundant.

6. *Summary*: (a) the law and the national interest. The multifarious provisions of the Shipping Law just reviewed are tightly bound together by a consistent thread of deliberate national policy. Some provisions stem from the congressional belief that the explicit proscription of specific kinds of conduct will protect exporters and importers from exploitation by steamship conferences. Others reflect the belief that exporters and importers can adequately protect themselves if they are given the requisite information and are protected from a variety of legal and economic restraints on their freedom. And still others, some of these being the most important provisions of all, quite clearly reflect the legislative view that the long run promotion and protection of American commercial interests ultimately depends upon the preservation of some minimum amount of competition within the context of the conference system. The law, in language and spirit, is intended as a shipper-protection statute. It identifies the national interest in the sphere of ocean shipping with the interests of the nation's merchants engaged in the foreign trades. Only upon its effectiveness in protecting these interests may American shipping law and policy be evaluated.

(b) The statutory scheme: indirect and direct rate regulation. Congress has created a peculiarly American brand of international cartel in the steamship conference "approved" by the Shipping Act and exempted from the United States antitrust laws. As designed by Congress, this cartel must allow free entry and exit to all carriers and is obliged to police itself so as to prevent rate competition among its members which might result in unequal treatment for shippers. It has an obligation to hear the requests and complaints of its customers, and must disclose its membership, agreements, rules and regulations, and activities to a public agency. The "American" conference has no secrets. Indeed, if the most recent interpretations of section 15 of the Act were to be developed fully, the American conference would be required literally to justify its every anti-competitive action in terms of the "public interest." Moreover, all exclusionary tactics or devices, save one, the dual-rate contract, are forbidden to it; and even this device must take a form explicitly designed by Congress. The contract may be used to bind contracting exporters and importers to conference services in exchange for discriminatory rate concessions, but the extent of these concessions is limited, certain provisions intended to protect contracting shippers against exploitation are man-

datory, and penalties against exporters and importers for breach are forbidden.

In many instances, it is likely that the foregoing constraints on conference organization and operation materially strengthen the bargaining position of American exporters and importers and weaken that of the conferences in the on-going process of negotiation through which all carrier rates of any significance are established. The most obvious example, of course, is the statutory requirement of open conference membership which impedes restriction on liner shipping capacity in any given trade. In this sense, it is proper to characterize sections 14, 14b, and 15 as the principal components of a statutory scheme of indirect rate regulation. To the extent that they are strictly enforced, it is difficult to perceive how conferences could effectively restrict the supply of liner service and elevate their prices for most exporters and importers significantly above levels which, at least in theory, would be expected to prevail in similarly structured, but more competitively organized ocean liner markets.¹²² And, conversely, the strict enforcement of sections 14, 14b, and 15 must perforce help to maximize the market power of the American exporter and importer by increasing his elasticity of demand for conference services. We discuss these effects of the statute—most of which are seldom recognized or understood—in Section III of this article, where we focus on the benefits and advantages to the national interest to be gained by an aggressive policy of “indirect rate regulation.”

By contrast with the statutory provisions generally acting upon conference organization and activities, sections 16, 17, and 18(b)(5), which are expressly concerned with rate discrimination and rate levels, comprise the elements of a program of direct rate regulation. This is their obvious intent, and if enforced to the letter, their obvious impact. The enforcement of sections 16 and 17 requires that the Commission distinguish the merely discriminatory or merely preferential rate from one which is unreasonably or unduly discriminatory or preferential. A similar problem inheres in section 18(b)(5) which proscribes only those rates which are “so unreasonably high or low as to be detrimental to the commerce of the United States,” and not merely those rates which, by one standard or another, appear high or low.

Increased direct rate regulation under these sections of the statute is what is normally called for by the periodic demands upon the Fed-

¹²² Even absent conferences, ratemaking in liner shipping would not be cost related, as in the model of perfect or pure competition, given the presence of tightly oligopolistic market structures on each trade route.

eral Maritime Commission that it "do something about steamship conferences," and this is the area of Commission activity which has created the greatest controversy within the industry and the only serious opposition from foreign governments to American efforts to regulate international shipping. In the following section of this article we examine the leading cases in which the Federal Maritime Commission has attempted directly to influence the level of a broad group of freight rates by wide-ranging investigative proceedings aimed at determining their reasonableness. We shall then assess the regulatory doctrine which the Commission has evolved and its results to date, and thereupon evaluate the costs and benefits of rate regulation, both direct and indirect, under the Shipping Act.

II. DIRECT RATE REGULATION

Sections 16, 17, and 18(b)(5)¹²³ empower the Federal Maritime Commission to regulate the ratemaking practices of approved steamship conferences to prevent their members from abusing whatever incremental market power they may obtain from eliminating overt rate competition among themselves.¹²⁴ The objects of protection are exporters and importers, ports and, to a lesser extent, independent carriers, whose continued, albeit marginal, existence has traditionally been thought desirable, despite their frequent and derogatory characterization as rate-cutting, fly-by-night, foreign-flag lines in congressional hearings, reports, and debates.¹²⁵ The abuses proscribed are undue, unjust, or unreasonable preferences and discrimination in rates and unreasonably high or low rate levels; ordinary "profiteering" and run-of-the-mill, preferential, or discriminatory ratemaking were not to be curtailed as long as conferences treated similarly situated shippers and ports alike.¹²⁶

¹²³ Sections 14 fourth and 15 have similar objectives. However, neither is aimed primarily at rate levels per se, and neither contains language empowering the Commission to engage in direct rate regulations.

¹²⁴ It should be stressed that the principal source of market power possessed by the liner firms which are active in American foreign trades is the tightly oligopolistic firm structure of the industry on nearly every trade route. Membership in steamship conferences furnishes only a highly variable increment to this market power by increasing the availability of otherwise elusive or unobtainable information and lowering the cost of obtaining it, by enabling the lines to present a united front (at least superficially) in bargaining with oligopsonistic exporters and importers, and by furnishing an organized forum for inter-carrier bargaining and for collective policing of the oligopoly price structure and price levels ultimately resulting from negotiation.

¹²⁵ See, e.g., STAFF OF SENATE COMM. ON COMMERCE, INDEX TO THE LEGISLATIVE HISTORY OF THE STEAMSHIP CONFERENCE/DUAL RATE LAW, S. DOC. NO. 100, 87th Cong., 2d Sess. (1962) and S. REP. NO. 860, 87th Cong., 2d Sess. (1961), to accompany H.R. 6775, 87th Cong., 2d Sess. (1961), reported in 2 U.S. CODE CONG. & AD. NEWS 3109-10, 3129.

¹²⁶ For a contemporary and characteristic statement of the scope of the Act, see

With the exception of section 18(b)(5), these provisions have always been enforced through rate-by-rate and shipper-by-shipper adjudicative proceedings. Typically, cases have arisen when an exporter or importer or port has complained of a rate or practice favoring a competitor or diverting cargo movement, as the case may be. The Commission's task is to determine whether, within the context of the extraordinarily differentiated and highly discriminatory steamship or terminal tariffs which are normally in question, an *unreasonable* differentiation between commodities or shippers or an *unreasonable* discrimination of any other kind has been made. The task may be easy where only similarly situated, economically undifferentiated exporters or importers of the same cargo, or users of the same terminal, are involved,¹²⁷ but somewhat more difficult where similarities between the ports or parties in question are few, arguable, or nonexistent, and rational value-of-service or competitive considerations are involved.¹²⁸ In general, the FMC has operated as a strictly adjudicatory body in these kinds of cases and has established a collection of "common law" precedents which it may or may not follow from case to case.¹²⁹ Lacking the power to fix rates in the foreign trades on a standard of a reasonable minimum or maximum rate of return on carrier investment, the Commission's remedies have been limited to awards of damages, cease and desist orders, and other ad hoc remedies.¹³⁰ It is not self-evident that any particular body of expertise or any long

Hearings on Discriminatory Ocean Freight Rates and the Balance of Payments Before the Subcomm. on Federal Procurement and Regulation of the Joint Economic Comm., 89th Cong., 1st Sess., pt. 2, at 353-9 (1965) [hereinafter cited as *Douglas Hearings II*] (statement of John Harillee, Chairman, Federal Maritime Commission) and *Lake Charles Harbor and Terminal District v. Port of Beaumont Navigation District*, FMC No. 68-3 at 6 n.3 (April 24, 1969) (opinion of the Commission).

¹²⁷ *E.g.*, *Hellenic Lines, Ltd.*—Violation of sections 16 first and 17, 7 F.M.C. 673 (1964). For this purpose, the "competitive relationship" doctrine has been evolved. It holds that for unequal treatment to be found illegal, the shippers treated unequally must be in a competitive relationship. *See, e.g.*, *Nickey Bros., Inc. v. Associated Steamship Lines*, 5 F.M.B. 467, 477-9 (1958); *Volkswagenwerk Aktiengesellschaft v. Marine Terminals Corp.*, 9 F.M.C. 77, 83-84 (1965), *aff'd sub nom. Volkswagenwerk Aktiengesellschaft v. FMC*, 371 F.2d 747 (D.C. Cir. 1966), *rev'd and remanded*, 390 U.S. 261 (1968).

¹²⁸ *See Lake Charles Harbor and Terminal District*, *supra* note 126 at 7; *Investigation of Overland and OCP Rates and Absorption*, FMC No. 65-31 at 41-45 (Feb. 24, 1969) (opinion of the Commission).

¹²⁹ *E.g.*, *compare Reduced Rates on Machinery and Tractors from United States Atlantic Ports to Puerto Rico*, 9 F.M.C. 465 (1966), 10 F.M.C. 248 (1967) and *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966) *with Investigation of Overland and OCP Rates and Absorption*, *supra* note 128, and *Lake Charles Harbor and Terminal District*, *supra* note 126. *See also* the Supreme Court's catalogue of Commission decisions taking inconsistent positions under sections 16 and 17, *Volkswagenwerk*, *supra* note 127, 390 U.S. at 278-82.

¹³⁰ *See, e.g.*, *Imposition of Surcharge by the Far East Conference at Searsport, Maine*, 9 F.M.C. 129 (1965).

run accretion of experience with the maritime industry is necessary for the accomplishment of this task; nor has FMC decision making in this area been any more or less consistent and predictable than those typically reached by the Interstate Commerce Commission, the Civil Aeronautics Board, or similar agencies, and by the courts upon review of the actions of these agencies.¹³¹

The direct impact of the Commission's isolated rate cases under sections 16 and 17 on the level of ocean freight rates has been imperceptible. Only the miniscule number of exporters and importers who have succeeded in the extended administrative and judicial proceedings involved have directly benefited thereby.¹³² Nevertheless, the potential of sections 16 and 17 for costly litigation may have an indirect impact on rate levels by strengthening the bargaining position of carriers against shippers who seek individually tailored rate concessions. We shall return below to assess the impact of these two statutory provisions on ratemaking and the role of the FMC in enforcing them. Our focus here is upon direct rate regulation conducted by the FMC under section 18(b)(5).

A. *The Five Major 18(b)(5) Investigations.*

In contrast to individual rate-by-rate, shipper-by-shipper adjudications under sections 16 and 17, the Commission has relied primarily upon section 18(b)(5) in its attempts to regulate the overall level of groups of rates or of entire tariffs. At this writing there have been only five 18(b)(5) proceedings of any significance to reach the stage of final disposition by the Commission. Two of them were initiated in response to private complaints filed with the Commission by a carrier and a shipper, respectively. The other three were initiated *sua sponte* by the Commission to determine if freight rates were retarding American exports and, if so, to require that they be lowered. Had the Commission ever reached the merits of the former two cases, which, in fact, it did not, it would merely have resolved what were essentially private disputes. Only in the latter three cases did the Commission make an attempt at prospective regulation on a broad scale. We shall, nevertheless, treat all five of these proceedings together because they raise common 18(b)(5) issues, such as what is an "unreasonably high or low" rate or what economic data or phenomena will be accepted as proof of "detriment to commerce."

1. *The Hong Kong Inbound Investigation.* The first of the two

¹³¹ See generally H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962).

¹³² But this has rarely been accomplished without expensive and time consuming litigation. See, e.g., *Consolo v. FMC*, *supra* note 112, and cases cited therein.

more or less private disputes was the *Investigation of Rates in the Hong Kong-United States Atlantic and Gulf Trade*.¹³³ It was also the first case ever to be brought under section 18(b)(5). In retrospect, the Commission's proceedings constituted but the tip of an immense iceberg of antitrust litigation between the then bankrupt Sabre Line and the Japan-Atlantic and Gulf and the New York Freight Bureau (Hong Kong) Conference, which served the inbound trade between Japan and Hong Kong and the East and Gulf Coast ports of the United States. The dispute arose during a rate war between the member lines of the New York Freight Bureau and a group of independent carriers among which the Sabre Line was of some significance. After an especially severe round of rate cutting during which the conference lowered its rates "to the levels quoted by the non-conference lines, due account being taken of the rebates being paid by such carriers,"¹³⁴ Sabre Line filed a "telegraphic protest" with the Commission alleging that the rates in the trade had become "unreasonably low and detrimental to the commerce of the United States."¹³⁵ The foregoing was, of course, a paraphrase of the language of section 18(b)(5), and roughly a month later, on December 10, 1962, the Commission instituted its only investigation to date into freight rates alleged to be "unreasonably low."

Approximately four and a half years later the presiding hearing examiner filed his initial decision finding the rates in dispute illegal on the grounds that they were noncompensatory of the "direct costs" incurred in serving the port of Hong Kong and lifting the cargoes in question and that, by instituting such unduly low, "predatory" rates, the conference had "forced [Sabre] out of the trade."¹³⁶ The proceedings before the Commission were protracted, and the delays were compounded by extensive litigation in the federal courts over the enforceability of a battery of subpoenas duces tecum.¹³⁷ Several months before the examiner's decision, Sabre Line instituted an anti-

¹³³ FMC No. 1083 (Nov. 3, 1967) (opinion of the Commission) [hereinafter cited as *Hong Kong Inbound Investigation*].

¹³⁴ This is the language of the Conference minutes filed with the Commission, covering its meeting of Nov. 1, 1962, when a particularly sharp rate cut was made. The Commission described the Conference's action as a reduction "to a level several dollars below Sabre's rates and approaching the lowest of the published independent rates." *Hong Kong Inbound Investigation* at 5.

¹³⁵ *Id.*

¹³⁶ *Investigation of Rates in the Hong Kong—United States Atlantic and Gulf Trade*, FMC No. 1083 at 19 (April 20, 1967) (initial decision of the hearing examiner) [hereinafter cited as *Init. Dec.*].

¹³⁷ *FMC v. Caragher*, 243 F. Supp. 136 (S.D.N.Y. 1965), *aff'd and rev'd in part*, 364 F.2d 709 (2d Cir. 1966).

trust action seeking more than \$45 million in treble damages from the carriers which had participated in the rate war. The principal theory of the complaint was that the conference agreements and the rate actions taken under them during the rate war lost their section 15 exemption from the antitrust laws because the rates filed under them violated section 18(b)(5).¹³⁸

In view of Sabre Line's antitrust action, it became of no little consequence whether the Commission affirmed or reversed the hearing examiner's findings of fact and conclusions of law. The Commission did neither. So far as it was concerned, the case was moot: five years had passed since the rate war which had occasioned the investigations; the economic evidence was "outdated"; the trade had "long since regained an element of stability"; and, finally, no "useful purpose" would be served by the Commission's examining "a carrier's now defunct rate structure."¹³⁹ Thus, its own egregious administrative delay¹⁴⁰ and the respondents' employment of what the hearing examiner characterized as a "complete manual of dilatory procedures,"¹⁴¹ became the Commission's justification for avoiding a final resolution of the 18(b)(5) issues.¹⁴² Sabre Line, however, relying heavily upon

¹³⁸ Complaint at 14, *Sabre Shipping Corp. v. American President Lines Ltd.*, 66 Civil No. 3617 (S.D.N.Y. 1966). Another ground was that the crucial rate reductions in the inbound Hong Kong trade made by the New York Freight Bureau (Hong Kong) on Nov. 9, 1962 were agreed upon during a meeting of the Japan-Atlantic and Gulf Conference, whose membership was identical with that of the New York Freight Bureau, and thus these rate reductions were illegal under section 15 of the Shipping Act, since the Japan-Atlantic and Gulf Conference had no power to fix rates in the Hong Kong trade.

¹³⁹ *Hong Kong Inbound Investigation* at 7.

¹⁴⁰ The Commission's Order of Investigation was issued on Dec. 10, 1962. Commission counsel did not serve the subpoenas duces tecum in question until Sept. 3, 1963. Not until April 21, 1964, were respondents faced with the choice of producing the documents called for or formally refusing to do so at a hearing. On June 2, 1964, the hearing examiner referred the respondents' refusals to produce to the Commission for action. The Commission waited almost a year, until May 19, 1965, to apply to the courts for an order compelling compliance with the subpoenas. *FMC v. Caragher*, *supra* note 137, 364 F.2d at 709, 712-3. Curiously, the same court of appeals which related the above chronology required six months after oral argument to render a decision. An additional year passed after the subpoenas were enforced before the Commission itself finally decided the case (Nov. 3, 1967).

¹⁴¹ *Init. Dec.* at 24 n.29.

¹⁴² The Commission's language is worthy of note:

Because of the protracted delay, due in large measure to the necessity for subpoena enforcement proceedings in the courts, we conclude that the investigation should be discontinued on the ground that it has become moot.

....

... [S]ome useful purpose must be served before the Commission will undertake to examine a carrier's now-defunct rate structure. Similarly, the Commission will not consider outdated economic evidence upon which the findings of unreasonableness and detriment to commerce must be based.

Hong Kong Inbound Investigation at 7.

the opinion of the hearing examiner, has continued to press its action in the courts.¹⁴³

For our purposes, the *Hong Kong Inbound Investigation* was not entirely futile. What it had commenced as an adjudication, the Commission concluded as a quasi-rulemaking proceeding designed to establish criteria for applying section 18(b)(5) to future instances wherein rates are challenged as "unreasonably low." In brief, the Commission produced two rules. The first is that "a rate which fails to meet [the] out-of-pocket costs of the carrier quoting the rate is unreasonably low." Out-of-pocket costs are defined as cargo handling expenses "plus any directly assignable costs such as brokerage, etc."¹⁴⁴ By their nature, these costs are necessarily associated exclusively with the carriage of a specific shipment—a point which the Commission appeared to stress by repetition in subsequent sentences—rather than with the provision of service to a particular port. Having thus defined and delimited the content of its cost criterion, the Commission had nothing further to say on the subject. It did not explain why the examiner's reliance upon "direct costs" was improper either as a general rule or in the particular case in hand; nor did it explain why, if calculations of "direct costs" similar to those utilized by the examiner were necessary and proper in measuring the extent of unduly prejudicial or unjustly discriminatory rates under sections 16 and 17,¹⁴⁵ the same calculations should be totally ignored in measuring the reasonableness of rates under section 18(b)(5).

The Commission's second rule is a rule of procedure designed explicitly to solve the "problem" of "how a complaining carrier would establish the out-of-pocket costs of his competitor." The Commission's solution was to provide that:

a carrier may, by proving his own out-of-pocket costs, establish a rebuttable presumption of the out-of-pocket costs prevailing generally in the trade. Secondly, a carrier may show detriment to commerce by proof of some measurable adverse economic impact [upon] itself. In establishing these standards, we hopefully have avoided the pitfalls of protracted litigation which

¹⁴³ See *Sabre Shipping Corp. v. American President Lines*, 285 F. Supp. 949 (S.D.N.Y. 1968), denying motions of certain defendants to dismiss, motions to stay pending final resolution of 18(b)(5) issues by the FMC, and motions for summary judgment; *Japan Line, Ltd. v. Sabre Shipping Corp.*, 407 F.2d 173 (2d Cir. 1969) and *Sabre Shipping Corp. v. American President Lines, Ltd.*, 1969 Trade Cas. 86517 (S.D.N.Y.), denying motions by certain defendants for summary judgment and overruling defendants' objections to interrogatories.

¹⁴⁴ *Hong Kong Inbound Investigation* at 8.

¹⁴⁵ See, e.g., *Absorption or Equalization of Inland Freight Charges in Connection with Transportation by Water of Explosives*, 6 F.M.B. 138, 144-7 (1960).

were demonstrated in this proceeding. This procedure should also place the burdens of proving facts upon those persons most capable and most readily able to prove such facts.¹⁴⁶

The carrier whose rate has been challenged in the foregoing manner must "rebut the presumption created by showing that his actual out-of-pocket costs and other rate factors vary materially from those developed by the complaining carrier,"¹⁴⁷ or by disproving the "adverse economic impact upon itself" alleged by the complaining carrier. If he fails, his rate is disapproved.

Both rulings could have a significant impact on future direct rate regulation under section 18(b)(5). At this point, however, we will discuss only the one relating to the use of "out-of-pocket" costs to establish the reasonable minimum rate. Owing to its position at the core of the present Commission regulatory policy, the latter ruling, with its reliance upon comparative economic data and rebuttable presumptions, is best examined after our review of all of the Commission's section 18(b)(5) decisions has been completed.

In terms of its impact upon the scope and force of the section 18(b)(5) prohibition of unreasonably low rates, the importance of the Commission's *Hong Kong* decision cannot be overstated. While the Commission never explicitly said as much, it could not have determined that recovery *vel non* of out-of-pocket costs was henceforth to be the criterion of the reasonable minimum rate without rejecting the examiner's "direct costs" criterion as well as his findings based thereon. The examiner's formulation of "direct costs" which must be recovered, if a rate is to survive an 18(b)(5) challenge, included all the expenses of deviating a voyage to and spending time in the port of Hong Kong, (amortization of capital, interest, voyage vessel operating costs, etc.), plus the out-of-pocket costs associated with soliciting and handling the particular cargoes carried from Hong Kong. While apparently recognizing that ratemaking on such a basis would depart not only from the so-called "incremental ton approach" prevailing throughout the industry but also from the most fundamental principles of transport pricing,¹⁴⁸ the examiner nonetheless reasoned that, since the cargoes affected by the rate war amounted to over 70 per cent of the carriers' total Hong Kong liftings, it was proper to conclude that the carriers "deviated" their voyages to the port of Hong Kong explicitly to take on these cargoes. Thus, all costs of sailing to

¹⁴⁶ *Hong Kong Inbound Investigation* at 9.

¹⁴⁷ *Id.* at 8-9.

¹⁴⁸ See generally D. LOCKLIN, *ECONOMICS OF TRANSPORTATION* ch. 8 (6th ed. 1966); J. R. MEYER, *ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRIES* ch. 9 (1959); D. PERGRUM, *TRANSPORTATION: ECONOMICS AND PUBLIC POLICY* ch. 8 (rev. ed. 1968).

and from and berthing in Hong Kong, and not merely out-of-pocket expenses related to the tonnage lifted, should have been recovered by the rates assessed on these Hong Kong cargoes. Otherwise, the carriers were worse off for calling at Hong Kong, having incurred in reality an out-of-pocket loss on their Hong Kong service. Since these direct costs of serving Hong Kong, when divided by the average tonnage carried per sailing, amounted to \$27.68 per ton, and the weighted average of the conference rates at their nadir in December, 1962 came to \$19.95 per ton, it naturally followed that the rates challenged by Sabre Line were noncompensatory and, consequently, unreasonably low.¹⁴⁹ By comparison, out-of-pocket costs taken alone amounted to much less than \$18.00 per ton, the lowest conference rate of relevance in the proceeding; accordingly, if only out-of-pocket costs must be recovered to qualify a rate as compensatory, then all of the rates in issue were invulnerable to an 18(b)(5) attack.¹⁵⁰ As both the record and the briefs and oral arguments of the parties stressed this difference in outcome, there can be no doubt that in rejecting direct costs and relying upon out-of-pocket costs alone, the Commission deliberately intended to reverse the examiner. Its refusal to explicitly determine the validity of Sabre Line's 18(b)(5) claims on the ground of mootness should not be permitted to obscure the obvious purpose and effect of the Commission's ruling.

This is the most important aspect of the decision in the *Hong Kong Inbound Investigation*. For if, as appears plain, the purpose of outlawing "unreasonably low" rates is to protect independent carriers from predatory conference pricing,¹⁵¹ the Commission has gutted the statute. The Hong Kong inbound rate war was not unusual. Seldom,

¹⁴⁹ Init. Dec. at 9-13.

¹⁵⁰ This is based on figures introduced by the Government. The examiner implicitly conceded that this would have been the outcome based on an out-of-pocket cost test. *Id.* at 24.

¹⁵¹ The legislative history of section 18(b)(5) is unusually clear and concise. After deletion from the House bill by the Senate Commerce Committee, the section was reinserted into the final text of Public Law 87-346, the 1961 amendments to the Shipping Act, by an amendment introduced by Senator Kefauver, who was the only spokesman in its behalf. No opposition was voiced. Senator Engle, floor manager of the bill for the Commerce Committee, accepted the amendment, and it passed without objection. Kefauver explained the purpose of the amendment's proscription of "unreasonably low" rates as follows:

Under the House Bill and my amendment, cartels would be precluded from using unreasonably low rates as a predatory device. It was such a device that led the Supreme Court to its decision in the *Isbrandtsen* case, which is at the root of the proposed legislation. The members of the west coast United States-Japan cartel dropped rates to as low as 30% of normal in order to drive *Isbrandtsen* from the trade. This, the Supreme Court said, was illegal under the Shipping Act of 1916.

It should be outlawed in the future as well as in the past, because once all competition is driven from a trade, rates will skyrocket.

if ever, do freight rates fall below out-of-pocket costs, even in the fiercest, most protracted rate wars. When genuine cutthroat competition does in fact commence, however, as it did in the Hong Kong trade in 1962, rates for all important moving commodities, while remaining above out-of-pocket costs, do in fact often fall significantly below "direct costs," as these were defined by the examiner. Consequently, to make application of section 18(b)(5) turn on a finding that a rate is below out-of-pocket costs, is to render the statute irrelevant to practically all rate war situations. This conclusion follows directly from the nature and purpose of rate wars and the tactics of the conferences which become engaged in them.

Rate wars are typically waged over the most important commodities, the "core cargoes" upon which the trade principally relies.¹⁵² The conference does not initiate severe rate cutting¹⁵³ primarily to deter an independent from lifting any particular one of these cargoes, but rather to drive the independent entirely from the trade, that is, from active service to or from a particular port or range of ports.

Accordingly, the primary tactic used is to cut rates on all of the commodities upon which the independent's business relies to a level below the "direct cost" (again, as defined by the examiner) of providing service to the port or ports in question, which is precisely what the New York Freight Bureau (Hong Kong) did. It would not have been necessary for the conference to have slashed its rates below the out-of-pocket costs of lifting one or more of the particular cargoes carried from Hong Kong. Instead, relying on their greater financial

¹⁵² In the instant case, these cargoes were artificial flowers, cotton goods, footwear and toys, together constituting 70% of total cargo liftings at Hong Kong. Forty per cent of all Hong Kong cargoes were artificial flowers. *Init. Dec. at 3* (finding of fact no. 1). Similarly, the major rate wars which have occurred in the outbound Gulf trades have centered on cotton, naval stores, petroleum products and chemicals (including synthetic rubber and resins); in the outbound South Atlantic trades on woodpulp, linerboard and other paper products, naval stores, tobacco, lumber and logs, and textile wastes; and in the outbound Pacific trades on canned goods and forest products. In each of these cases, these items constituted 50% or more of total carryings in the trade during the rate war in question.

¹⁵³ Rate cutting of the kind accurately described as a "rate war" is never launched by an independent. The independent seeks to live quietly just below the conference rate "umbrella," cutting rates typically by as little as 15% below conference tariffs. This is tolerated by the conference only as long as the independent does not obtain a significant market share. When he threatens to do so, the conference begins to lower the umbrella. *See, e.g., Grace Line Inc. v. Skips A/S Viking Line, supra* note 119, for a description of a rate war conforming closely to the model given in the text. In the instant case, the conference apparently allowed Sabre and Isbrandtsen, the leading independents, to live under its rate umbrella, commencing a rate war only at the point where it could no longer survive further market share attrition. *Init. Dec. at 3-9*. As a relatively large number of other independents with wildly erratic rates were also in the trade, the facts are not as clear as in the Grace Line case, *supra*.

strength and their possession of other services over which to spread possible losses,¹⁵⁴ the conference carriers generally act on the assumption that long before they are seriously injured they can drive the financially weaker and, typically, less diversified independent lines from the trade by making recovery of the direct costs of serving the particular ports in question impossible over an extended period of time.¹⁵⁵ If the examiner's findings in *Hong Kong Inbound Investigation* are accurate, it was precisely at this stage that Sabre Line left the trade; yet, to repeat, the rates prevailing at that time, even though at their nadir, still permitted recovery of out-of-pocket costs. In sum, if the only rate which can be found "so unreasonably low . . . as to be detrimental to the commerce of the United States" is that rate which lies below out-of-pocket costs, section 18(b)(5) will never protect a Sabre Lines from predation.

2. *The Ludlow Litigation.* The second more or less private dispute arising under section 18(b)(5) was brought to the Commission by the Ludlow Corporation, an importer of jute and jute products from Indian ports served by the Calcutta, East Coast of India and Pakistan/USA Conference. In August of 1965, Ludlow filed a formal complaint with the Commission, under section 22 of the Shipping Act,¹⁵⁶ protesting that a conference rate increase which would become effective in October of that year would subject Ludlow to rates so "unreasonably high . . . as to be detrimental to the commerce of the United States."¹⁵⁷ The Commission instituted an investigation

¹⁵⁴ Each of the major American-flag and Japanese-flag carriers belonging to the New York Freight Bureau (Hong Kong) during the 1962 rate war served a minimum of three different trades and some as many as seven. Sabre Line served only one at that time.

¹⁵⁵ What happens in practice bears out with extraordinary fidelity the theoretical predictions of M. SHUBIK, *STRATEGY AND MARKET STRUCTURE* chs. 10-12 (1959) and Telser, *Cutthroat Competition and the Long Purse*, 9 J. LAW & ECON. 259 (1966). See *Grace Line, Inc. v. Skips A/S Viking Line*, *supra* note 119 at 442-7, wherein the Commission's findings of fact describe a rate war corresponding in most of its details to the generalized description we have offered. All the rates fell no lower than out-of-pocket costs (with perhaps a few unusual exceptions). The dominant conference line commenced the rate war, the objective was predatory, and the rates on all major commodities were cut.

¹⁵⁶ 39 Stat. 736 (1916), 46 U.S.C. § 821 (1964):

Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board . . . may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

¹⁵⁷ Ludlow's complaint also alleged that the rate increases violated sections 15 and 14(b) of the Shipping Act in that both the Conference rate-fixing agreement and dual-

in early October 1965,¹⁵⁸ at which time the Hearing Examiner granted Ludlow Corporation's application for the issuance of subpoenas duces tecum directed to each of the conference members. At first, the subpoenas were limited to the production of documents located in the United States; but, subsequently, upon Ludlow's application to the Commission itself, additional subpoenas were issued requiring the production of certain documents and records "wherever located." The respondent carriers refused to comply with the subpoenas and the Commission filed a petition in the Southern District of New York for an order of enforcement. Whereupon there ensued three years of litigation before the New York district court, two different courts of appeal, and the Commission itself. While four different judicial decisions¹⁵⁹ and a landmark Commission opinion¹⁶⁰ were ultimately rendered, no section 18(b)(5) issues were ever decided. In fact, the original complaint which launched the Commission investigation eventually became lost in the shuffle and was dismissed in mid-December, 1968 on the ground that the Ludlow Corporation and the Calcutta Conference had settled their differences.¹⁶¹

As in the Commission's *Hong Kong Inbound Investigation*, attention was focused in the *Ludlow* case exclusively upon subpoena enforcement. The subpoenaed documents and records were considered so important that the Commission went so far as to cancel the Calcutta Conference agreement—the first government-decreed conference dissolution in the history of the Shipping Act—when some of the conference members persisted in their refusal to produce all of the economic data demanded:

The relevance of the subpoenaed documents to the complaint of Ludlow is now settled. The courts have held the documents

rate contract (to which Ludlow was a signatory), were being "so used as to 'operate to the detriment of the commerce of the United States,'" *FMC v. DeSmedt*, 366 F.2d 464, 466-7 (2d Cir. 1966). These allegations were wholly dependent upon Ludlow's primary section 18(b)(5) theory and had the dispute ever reached the hearing stage, would doubtless have been treated as redundant.

¹⁵⁸ *Ludlow Corp. v. Calcutta, East Coast of India and East Pakistan/U.S.A. Conference*, FMC No. 65-30.

¹⁵⁹ *Calcutta, East Coast of India and East Pakistan/U.S.A. Conference v. FMC*, 399 F.2d 994 (D.C. Cir. 1968) (setting aside the Commission's order cancelling the Calcutta Conference agreement); *FMC v. DeSmedt*, 268 F. Supp. 972 (S.D.N.Y. 1967) (denying motions to hold respondents in contempt); *Ludlow Corp. v. DeSmedt*, 249 F. Supp. 496 (S.D.N.Y. 1966) (enforcing subpoenas duces tecum), *aff'd sub nom. FMC v. DeSmedt*, 366 F.2d 464 (2d Cir. 1966).

¹⁶⁰ *Calcutta, East Coast of India and East Pakistan/U.S.A. Conference*, FMC No. 67-33 (Sept. 14, 1967) (opinion of the Commission).

¹⁶¹ The presiding examiner's order dismissing the complaint stated only that, "complainant, with the concurrence of respondent, requests that the complaint herein be dismissed on the ground that satisfactory adjustments have been made to the tariff in question." FMC No. 65-30 (Dec. 17, 1968).

necessary to the proper determination of the validity of the disputed rates under that section. . . . Without the information called for by the subpoenas, we cannot discharge our duty under section 22 of the Act to investigate all properly filed complaints, and if we conclude that there has been a violation of the statute, to provide appropriate relief. Thus, the failure to produce the information has prevented us from fulfilling our statutory responsibilities.

. . . .
 . . . [H]ere we are confronted with a situation that permits of only one solution for it is the very integrity of the regulatory program of this country which is at stake. Since effective supervision and control of respondents' concerted activities is not possible in the present posture of the conference, the antitrust exemption which our approval granted respondents must be withdrawn. . . . We cannot do otherwise under the law and still protect shippers . . . from the possibility of unreasonably high rates. . . .¹⁶²

Within the year, the Commission had been reversed by the Court of Appeals for the District of Columbia on the grounds, among others, that the Commission possessed significantly more than "only one solution" to the problem, and that the "solution" which it did elect failed for lack of a "nexus between the subpoena problems encountered in the *Ludlow* complaint proceeding . . . and the Commission's conclusion that the continued life of the Conference . . . was incompatible with the public interest. . . ."¹⁶³

While the *Ludlow* proceedings failed to reach any 18(b)(5) issues and the Commission's landmark *Calcutta Conference* decision was reversed on appeal,¹⁶⁴ the *Ludlow-Calcutta Conference* litigation is nonetheless entitled to an important place in our study of direct rate regulation under section 18(b)(5). First, as the preceding extracts from the Commission's opinion illustrate, the Commission accepted its own and the federal judiciary's loose standards of "relevance," (customarily applied in discovery proceedings for purposes of subpoena enforcement) as synonymous with the standards which a trier of fact must perforce apply when deciding whether certain evidence is both necessary and sufficient to support his (or its) findings. Thus, the Commission jumped from the conclusion that all of the cost and revenue data subpoenaed was relevant to the 18(b)(5) dispute in hand

¹⁶² Opinion of the Commission, *supra* note 160, at 5, 9.

¹⁶³ *Calcutta, East Coast of India and East Pakistan/U.S.A. Conference v. FMC*, 399 F.2d 994, 997 (D.C. Cir. 1968).

¹⁶⁴ On remand, the Commission issued an order, dated December 17, 1968, discontinuing the proceeding on the ground that the original *Ludlow* complaint had been settled. FMC No. 67-33, *supra* note 160.

to the conclusion that without all the data subpoenaed no adjudication of that particular dispute, or any other of a similar kind, was possible. In fact, as we shall argue below, the relative value of such economic data to a determination of the reasonableness of a liner freight rate is at best dubious, and at worst, nil.

Second, the *Ludlow* complaint proceeding illustrates the potential dynamite in section 18(b)(5) for future shipper-carrier negotiations over liner freight rates and, as such, for the entire ratemaking process. If the "detriment to the commerce of the United States" proscribed by section 18(b)(5) is interpreted as injury to the interests of particular, individual exporters or importers, then negotiations which fail to result in rate reductions for these shippers are as likely as not to spawn section 18(b)(5) complaints and wind up as full-fledged adversary proceedings before the FMC. Indeed, in the *North Atlantic United Kingdom Rate Disparities* case,¹⁶⁵ the Commission has already taken major strides toward making this prospect a reality by deciding the reasonableness of specific rates on the basis of their alleged effects on the business and profits of particular exporters.

3. *The Iron and Steel Rate Disparities Investigation.* The *Iron and Steel* case¹⁶⁶ is one of a group of rate disparities investigations initiated by the Commission under congressional fire during late 1963 and early 1964. The opponents of steamship conferences, in general, and of the 1961 amendments to the Shipping Act, in particular, had vigorously argued that steamship conferences were "foreign dominated" and discriminated against American exports. Their charges were invariably documented with instances in which exports were rated higher than allegedly identical imports moving over the same trade route, or over other routes assumed to be comparable in terms of distance and other cost factors. Similar evidence was adduced to show that American exporters paid more to ship their goods to third-country markets than did their English, German, or Japanese competitors.¹⁶⁷

If the legislative history of the enabling act to which an agency owes its existence may be presumed to influence its future conduct at all, it surely might have been predicted that the new Federal Maritime Commission would have rushed to investigate these allegations.

¹⁶⁵ Investigation of Ocean Rate Structures in the Trade between the United States North Atlantic Ports and Ports in the United Kingdom and Eire, FMC No. 65-45 (August 20, 1968) (opinion of the Commission) [hereinafter referred to variously as the *NAUK Case*, the *NAUK Investigation*, and *Docket 65-45*].

¹⁶⁶ *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180 (1965) [hereinafter cited as *Iron and Steel*].

¹⁶⁷ See, e.g., 107 CONG. REC. 19366, 19373, 19413-8 (1961).

Yet, during its first two years of existence, the Commission did little or nothing on the rate disparities front. In the middle of its third year, however, and with the sudden force of a tornado, Senator Paul H. Douglas of Illinois, Chairman of the Joint Economic Committee, burst upon the scene, and the Commission's disinclination to act was rudely challenged:

UNITED STATES CONGRESS

The Joint Economic Committee

May 3, 1963

THE PRESIDENT

The White House

Washington, D.C.

My Dear Mr. President: As you know, the Joint Economic Committee has been holding hearings on the steel industry. . . .

The committee was seriously disturbed to learn of the existence of substantial discrimination against American exporters in ocean freight rates. For example, the record shows that freight rates on identical steel products are significantly higher—sometimes nearly twice as high—when they are exported than when imported. On some classes of steel products this differential appears to be 10 per cent or more of the prices of the products concerned. . . .

Seeking a better understanding of this unfavorable situation, the committee invited the Chairman of the Federal Maritime Commission or his representative to testify. Testimony by the Commission's representatives revealed what I called in the record, "a grave dereliction of duty on the part of the Federal Maritime Commission" in protecting the national interest. The testimony showed that the Maritime Commission has long been aware of the existence of discrimination against American exporters . . . but that no study had ever been made by the Commission to determine the extent of this discrimination and its consequences for American trade. . . .

It became evident that the Maritime Commission views its role in protecting American exporters against discrimination in freight rates as purely passive, leaving the initiative for instigating action to private parties or to other Government agencies. . . .

In a matter so vital to the national interest, Mr. President,

it is shocking to find the Maritime Commission's lack of initiative justified, as it was yesterday, in the words: "Just the old adage of the squeaking wheel getting the grease, Senator, there is so little grease to go around." . . .

Faithfully yours,
PAUL H. DOUGLAS, CHAIRMAN¹⁶⁸

In relatively short order, Senator Douglas succeeded in having the incumbent Chairman of the Federal Maritime Commission ousted and replaced with a vigorous regulator, who also happened to be the Commander of Ensign John F. Kennedy's PT boat squadron in World War II.¹⁶⁹ In addition, by the application of almost constant pressure, the Senator bludgeoned the Commission into accepting not only the idea that the issue of rate disparities was a real one, but also the notion that among the Commission's primary functions was direct rate regulation to promote American exports.¹⁷⁰ Thus were commenced the Commission's rate disparities investigations, of which the *Iron and Steel* case was the first to reach a final disposition on the merits.

The investigation known as *Iron and Steel Rates, Export-Import*, was instituted by the Commission under sections 15 and 18(b)(5) of the Act to determine (1) whether the outbound and inbound rates on iron and steel items assessed by the conferences and common carriers in the United States North Atlantic and Gulf/United Kingdom and Continent trades and in the United States Atlantic, Gulf and Pacific trades with Japan were "so unreasonably high or low as to be detrimental to the commerce of the United States, and (2) whether the discrepancy between such [outbound and inbound] rates results in unjust prejudice to exporters of the United States as compared with their foreign competitors."¹⁷¹ During the investigation, the scope of the inquiry was expanded to include the trades between the Pacific

¹⁶⁸ *Hearings on Discriminatory Ocean Freight Rates and the Balance of Payments Before the Joint Economic Comm.*, 88th Cong., 1st Sess., pt. 1, at 3-4 (1963) [hereinafter cited as 1 *Douglas Committee Hearings*].

¹⁶⁹ 1965 DOUGLAS COMMITTEE REPORT, *supra* note 1, 28; N.Y. Times, Aug. 25, 1963, at 84; *id.*, Aug. 27, 1963, at 62. See also W. CARY, POLITICS AND THE REGULATORY AGENCIES 9 (1967).

¹⁷⁰ 1965 DOUGLAS COMMITTEE REPORT 28-30; see *Hearings on Discriminatory Ocean Freight Rates and the Balance of Payments Before the Subcomm. on Federal Procurement and Regulation of the Joint Economic Comm.*, 89th Cong., 1st Sess., pt. 2, at 353-9 (1965) (statement by J. Harlee, FMC Chairman) [hereinafter cited as 2 *Douglas Committee Hearings*]; SUBCOMM. ON FEDERAL PROCUREMENT AND REGULATION OF THE JOINT ECONOMIC COMM., 89TH CONG., 2D SESS., REPORT (Comm. Print 1966) [hereinafter referred to as 1966 DOUGLAS COMMITTEE REPORT].

¹⁷¹ 9 F.M.C. at 181.

Coast and Australia, and all United States trades to and from the Philippines.

The formulation of the issues to be investigated responded directly to the testimony of the steel industry before the Douglas Committee and the Committee's demands for agency action. In particular, they reflected the view that, because published inbound liner freight rates were significantly lower than published outbound rates on the same or similar iron and steel products, the nation's iron and steel exports were harmed—in sum, that freight rates could be a meaningful deterrent to iron and steel exports.¹⁷² After reviewing more than 4,000 pages of testimony, 247 exhibits, and a substantial collection of documents and statistical materials, the hearing examiner, and later the full Commission, concluded that there was no basis in fact for these allegations and decided both of the foregoing issues in favor of the respondent carriers and conferences.

In the first place, it was discovered that the same or similar iron and steel products are not for the most part imported and exported; that the nation's major exports and imports of iron and steel items do not in fact even move in ocean liners; and that in the very few instances in which the *same* products are imported and exported, the great majority of these move by different modes of ocean transportation—principally in tramps and chartered vessels.

In the second place, the allegedly discriminatory rate disparities were found to be either nonexistent or irrelevant to the competitive position of American iron and steel exporters. With respect to Japan, for example, the Commission found that the lower Japanese production costs were “an almost insurmountable barrier” to American sales in that country; that American mills have “never been competitive in Japan in a wide range of steel commodities”; and that, “[i]n most instances, the rates on steel from the United States to Japan have no influence on the inability of American shippers to export.”¹⁷³ The American disadvantage vis-à-vis the Japanese mills in the Philippine market was much the same; although there was some evidence introduced that rates from Europe and Australia were lower than comparable rates from the United States to the Philippines, the Commission found that “European and Australian mills have lost business in the Philippines to the Japanese in about the same volume as the United States.”¹⁷⁴

¹⁷² See notes 167-70, *supra*; see also 107 CONG. REC. 19366, 19413 (1961).

¹⁷³ 9 F.M.C. at 184-5.

¹⁷⁴ *Id.* at 185.

The findings were similar in the other trades investigated: either the outbound rate turned out to be lower than the inbound rate or, where there was indeed a disparity, it was irrelevant to the problems of American exporters or beyond the power of the conferences to correct.

On the basis of these and similar findings, the Commission held that the existing iron and steel rates, export and import, did not violate section 18(b)(5) or any other provision of the Shipping Act. Moreover, it explicitly held the existence of rate disparities to be irrelevant to "domestic competition with imports" and "the exporter's ability to sell."¹⁷⁵ Then, characterizing American steel producers as being "simply estopped from participating in exports," the Commission seemed deliberately to exonerate the carriers from any responsibility for the plight of the steel industry: "In many cases, even if the steel were carried free, the basic American cost still would be higher than the corresponding foreign cost."¹⁷⁶

Having rebuffed Senator Douglas with its findings of fact—none of which was in the least surprising—the Commission proceeded by frankly acknowledged *obiter dicta*¹⁷⁷ to placate the Senator and simultaneously to defend itself from future criticism.¹⁷⁸ The Senator, some of his most influential witnesses, and the Joint Economic Committee's (JEC) report had recommended that, when rate disparities were alleged to injure American exports, the FMC should not proceed through lengthy adjudicatory hearings, but rather should promptly order the carrier assessing the higher of any two presumably comparable rates to justify it, under pain of disapproval under section 18(b)(5).¹⁷⁹ Accepting the Senator's position and the recommendation of the JEC report, and no doubt recognizing that the announcement of such a policy would lend it a tough "no nonsense" image, the

¹⁷⁵ *Id.* at 189.

¹⁷⁶ *Id.*

¹⁷⁷ Section 18(b)(5) was added to the Shipping Act by Public Law 87-346 in 1961.

It has not been thoroughly construed and has not been specifically applied to many ratemaking situations, particularly in the area of inbound/outbound rate disparities. While we find no violation of section 18(b)(5), we believe certain comments are appropriate.

Id.

¹⁷⁸ Senator Douglas had already announced a new set of hearings, this time to be conducted by the Subcommittee on Federal Procurement and Regulation of the Joint Economic Committee. These hearings commenced in April of 1965, three months after the Commission's *Iron and Steel* opinion was rendered.

¹⁷⁹ This in fact was the first of the Joint Economic Committee's many "recommendations" to the FMC in its report on the Douglas hearings, which had been published eleven months before the Commission's *Iron and Steel* decision. 1965 DOUGLAS COMMITTEE REPORT 3, 28-29.

Commission seized the opportunity and promulgated the following rule:

When a rate disparity in reciprocal trades on similar commodities appears, and when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable.¹⁸⁰

Such a demonstration may be accomplished by a showing that "the attendant transportation circumstances require that the rate be set at the level" challenged under section 18(b)(5) or that the difference between the outbound and inbound rates in question is due to any of the "myriad ratemaking factors which might differ" between the trades, including "competition, volume of the movement, stowage, stevedoring costs, and others."¹⁸¹ The promulgation of this rule, which we shall henceforth call the "reciprocal disparities rule" or more simply, the "*Iron and Steel* rule," constitutes the entirety of the Commission's accomplishment in this celebrated litigation. We shall examine the content and application of this rule below.

4. *The Boilers Case*. The *Boilers Investigation*¹⁸² was similar to the *Iron and Steel* case, except that triangular rather than reciprocal rate disparities were primarily involved. The Commission's Order of Investigation recited the charge that rates on utility-type boilers and components shipped to South America, the Far East, and the Indian subcontinent were higher from American than from English and Continental ports, and that inbound rates were lower than outbound rates in the United States-Japanese trades. The purpose of the proceeding was to determine whether, if these charges were true, the higher outbound rates from the United States violated sections 17¹⁸³ or 18(b)(5) of the Shipping Act.

As in the *Iron and Steel* case, the record wholly failed to support the view that freight-rate discrimination had impaired the competitive position of American boiler exporters:

While the domestic manufacturer may be confronted with foreign competition, the record does not show that a domestic

¹⁸⁰ 9 F.M.C. at 191.

¹⁸¹ *Id.* at 191-2.

¹⁸² Outboard Rates Affecting the Exportation of High-Pressure Boilers (Utility Type), Parts and Related Structural Components, 9 F.M.C. 441 (1966) [hereinafter referred to as the *Boilers Case* or the *Boilers Investigation*].

¹⁸³ 46 U.S.C. § 816 (1964): "No common carrier by water in foreign commerce shall demand, charge, or collect any rate . . . which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors."

manufacturer ever lost a sale to a foreign competitor because of higher rates applicable in the United States foreign trades. Neither was there any concrete evidence whatever of detriment to the trade in utility boilers or to the commerce of the United States in general by reason of the level, absolute or comparative, of ocean freight rates.¹⁸⁴

Indeed, a rather contrary impression emerges from the Commission's description of the evidence in the record. The American exporters of utility-type boilers are a tight oligopoly of four large firms, facing so little foreign competition in the Latin American, South Asian, and Far Eastern markets investigated that the industry witness¹⁸⁵ was unable to produce any specific data quantifying this competition or even so much as identifying its source. Apparently, this was a high technology market in which American manufacturers had such substantial cost advantages that even though Japanese firms apparently built such boilers, and constituted the American exporters' "chief competition in the Philippines," the Commission found that American utility boilers "are exported to Japan, notwithstanding the inherent competitive disadvantage of ocean transport costs."¹⁸⁶ In fact, despite a significant rate disparity in favor of the inbound movement of most boilers and parts in the trade between the United States and Japan, "the record show[ed] that no boiler or boiler parts have moved inbound [from Japan] under these rates."¹⁸⁷

Ratemaking, too, turned out to be very different in practice from that which had been anticipated. In the main, the boilers in question were used in very large power generation projects, in the construction of which the boiler manufacturer was merely a subcontractor, who routed his boiler cargoes and components much as directed by the ultimate purchaser or the prime contractor for the project. In almost every case this latter individual had negotiated special "project rates" covering all the components of his project, including boilers and parts, substantially lower than those published in the relevant conference tariffs for non-project related shipments of the same cargoes. Consequently, every rate applicable to the movement of boilers in each of the trades concerned was unique and likely to differ significantly

¹⁸⁴ 9 F.M.C. at 444. The Douglas Committee had uncritically accepted the industry trade association's bald assertions to the contrary. 1965 DOUGLAS COMMITTEE REPORT 19.

¹⁸⁵ "No manufacturer, seller, or purchaser, shipper, or consignee of utility boilers testified. General testimony concerning the product and industry was provided by a trade-association executive, Mr. M. O. Funk, . . . manager of the American Boiler Manufacturers Association . . ." 9 F.M.C. at 442-3.

¹⁸⁶ *Id.* at 444.

¹⁸⁷ *Id.* at 458.

from every other which had preceded or was likely to succeed it. Further confusion was assured by the fact that few boilers moved as a complete unit, many being over 20-stories high when assembled. Rather, "shop-fabricated components, parts, and materials coming under various commodity classifications are shipped in partial lots"¹⁸⁸ for on-site assembly. Often more than a year is taken in the shipping process. Freight charges for any particular utility boiler will thus depend upon the unique mix of components going into that boiler. Consequently, a fictional construct of the "typical" boiler had to be created for each trade and rated part by part. Apparently, the result was less than satisfactory, for the Commission found that "the figures submitted varied widely in the various categories to the extent that no reasonably comparable boilers were involved."¹⁸⁹ Some figures submitted by the manufacturers did not even contemplate the shipment of a complete boiler but assumed that some components would be supplied locally.

Yet, the Commission accepted the construct of the "ideal boiler" and the accompanying "typical" list of boiler components, and analyzed the rate disparities although the various project rates, rebates, and many divergent rating practices rendered the published tariffs wholly irrelevant to the outbound trade in boilers. In each case, the Commission found the disparities which supposedly favored foreign manufacturers justified either by the greater distance to destination from the United States than from Europe or by the existence of "depressed rates" in the foreign-to-foreign trade used as a basis of comparison.¹⁹⁰ In the case of the lower inbound Japanese rates, the Commission disregarded the disparity on the ground that nothing was moving inbound. These considerations, plus the lack of evidence of injury to American exporters, clearly disposed of the issues raised by the Order of Investigation.

Lest the investigation be considered a total loss, however, and doubtless with an eye toward the second series of Douglas Committee Hearings then under way, the Commission proceeded through deliberate *obiter dicta*, as in the *Iron and Steel* case, to enhance its image as a tough regulator by shifting the burden of proof onto the carriers in triangular rate disparities investigations. On the theory that "triangular rate disparities" are analogous to reciprocal rate disparities and that the legality of both may be determined on the same principles, the Commission literally read section 17 into section 18(b)(5)

¹⁸⁸ *Id.* at 445.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 454-5.

to produce a rather complex rule which we paraphrase as follows: Whenever the American exporter's rate exceeds his foreign competitor's rate to the same destination, and there is evidence that "the transportation conditions" in the two trades are comparable "in material respects" and the movement of American exports has been "impaired," the carriers must rebut the findings of comparability as between commodities or trades or refute the evidence of "impairment" of movement of American exports, at risk of the Commission's disapproval of the rates in question.¹⁹¹

Although this rule would appear to constitute no more than a mere logical extension of the reciprocal disparities rule of the *Iron and Steel* case, there is a basic distinction. The *Iron and Steel* rule imposes a burden of proof of reasonableness upon carriers which are, at least presumptively, serving both of the routes being compared—both the inbound and outbound legs of the same trade. Irrespective of whether all other aspects of the operation of the *Iron and Steel* rule are fair, and whether or not it is otherwise capable of producing defensible results, the reciprocal disparities rule does at least reflect some rough justice. If the inbound and outbound carriers are by and large the same, they do have the power to remedy an allegedly harmful disparity by either lowering the outbound rate or raising the inbound rate. In contrast, the outbound carriers from the United States to South America or India, for example, are rarely the same as the outbound carriers from Europe or Japan to those same destinations. Consequently, the former carriers have no control whatsoever over the rates charged by the latter; nor are they necessarily familiar with the conditions which account for the latter's rates being lower than their own. Should the outbound carriers from the United States be unable to justify their higher rates to South America or India, their only remedy is to lower those rates. They cannot cause an increase in the European or Japanese rates in question, or, for that matter, prevent the carriers in those foreign-to-foreign trades from the further lowering their rates to protect their own shippers from the inroads of American exporters. In view of these factors, it makes little sense to read the *Iron and Steel* rule into section 17 and section 17 into section 18(b)(5). Thus, the FMC's triangular rate disparities rule would appear to be even more vulnerable to criticism than its reciprocal disparities rule.

5. *The Investigation of Ocean Rate Structures in the North Atlantic United Kingdom Trade.* The *NAUK Investigation* was brought

¹⁹¹ *Id.* at 458.

under sections 15, 18(b)(5), and 22 of the Shipping Act, 1916 and section 212(f) of the Merchant Marine Act of 1936.¹⁹² In its order assigning the case for a hearing,¹⁹³ the Commission specified nine issues on which it "desire[d] the parties to present evidence and testimony and advance arguments." Six of these concerned the structure and level of rates in the outbound North Atlantic United Kingdom Conference (NAUK) tariff as compared with those in the inbound North Atlantic Westbound Freight Association (NAWFA) tariff. The Commission wished to determine (i) whether the outbound rate structure was "effectively higher" than the inbound rate structure; (ii) whether the "apparent disparate rate structure in the trade," which had been disclosed in a much publicized study by the Commission's staff, as well as specific disparities between inbound and outbound rates on similar commodities, adversely affected American exports or otherwise violated the standards of section 15 of the Shipping Act of 1916; and (iii) whether there existed any "transportation factors" which would "explain or justify" the higher outbound rate structure or the existence of higher outbound rates on specific commodities. The three remaining questions were whether any individual commodity rates should be disapproved as authorized by section 18(b)(5), whether any recommendations should be made to Congress "to correct discriminations caused by rate disparities in this trade," and whether the conference agreements of the NAUK and NAWFA lines should be modified or disapproved pursuant to section 15.

As the foregoing catalogue of questions for investigation suggests, the *NAUK* case was intended primarily as an investigation of "rate structures"¹⁹⁴ as opposed to the earlier *Iron and Steel* and *Boilers* cases, which had been concerned with specific rate levels. The theory of the *NAUK Investigation* was explained by the Commission's chairman,

¹⁹² 49 Stat. 1990 (1936), 46 U.S.C. § 1122(e) (1964). This section provides that the Commission is "authorized and directed"

To investigate, under the regulatory powers transferred to it by this chapter, any and all discriminatory rates, charges, classifications, and practices whereby exporters and shippers of cargo originating in the United States are required by any common carrier by water in the foreign trade of the United States to pay a higher rate from any United States port to a foreign port than the rate charged by such carrier on similar cargo from such foreign port to such United States port, and recommend to Congress measures by which such discrimination may be corrected;

¹⁹³ Order of Investigation, FMC 65-45, 30 Fed. Reg. 15600 (Dec. 17, 1965).

¹⁹⁴ A "rate structure," to the extent that it constitutes a single definable concept, is that which appears when all rates in a single tariff are taken in the aggregate: "the overall array" or "profile" of rates in a tariff. See *NAUK Investigation*, *supra* note 165 (Jan. 31, 1968) (presiding examiner's initial decision) [hereinafter cited as *Init. Dec.*].

John Harlee, seven months prior to its commencement, in testimony before the Douglas Committee:

It is not the existence of rate disparities either selectively or an entire disparate rate structure alone that gives one concern. In all probability if there were no conference system and each carrier, without consultation with other carriers, arrived at his price list, there would still be selective inbound/outbound disparities and probably some disparity in the entire rate structures inbound and outbound. This would, perhaps, be tolerable. What is of concern is that two rate-setting bodies with a substantial identity of membership may by agreement be fixing a rate structure in one direction which is higher than that it fixes in another direction.¹⁹⁵

The solution to this problem was assumed to lie in diligent investigation of the rate structures of the nation's most important trades in which significant individual rate disparities emerged from a comparison of inbound and outbound tariffs. Unless the disparity between the outbound and inbound rate structures could be justified or explained "by the normal economic forces, including price or rate competition by carriers," the Commission was prepared to conclude that the disparity was, in Chairman Harlee's terminology, "artificial" and deliberately "discriminatory against exporters from the United States in favor of exporters from a foreign country."¹⁹⁶

On this theory, the Commission had issued a battery of section 21¹⁹⁷ orders against eight outbound and eight inbound steamship conferences serving reciprocal trade routes, ordering the production of a wide range of cost, cargo, and revenue data relating both to the car-

¹⁹⁵ 2 *Douglas Committee Hearings* at 356. This statement is directly responsive to the Joint Economic Committee's formulation of the problem. The Joint Economic Committee Report spoke of the foreign domination of steamship conferences, 1965 DOUGLAS COMMITTEE REPORT 4, 13; of bloc-voting against the American-flag carriers by the more numerous foreign-flag carriers, *id.* at 20; and of the total absence of justification for higher outbound rates in the trades with Japan and Europe, *id.* at 13-20. Mainly by innuendo this report leaves the overwhelming impression that American foreign commerce is beset by secret agreements or conspiracies—chiefly among foreign steamship lines—to discriminate against American exports in favor of the exports of their respective countries.

¹⁹⁶ 2 *Douglas Committee Hearings* at 354-5.

¹⁹⁷ 39 Stat. 736 (1916), 46 U.S.C. § 820 (1964). This provision authorizes the Commission to

require any common carrier by water, or other person subject to this chapter . . . to file with it . . . any periodical or special report, or any account, record, rate, or charge, or any memorandum of any facts and transactions appertaining to the business of such carrier or other person subject to this chapter. Such report, account, record, . . . or memorandum shall be under oath whenever the [Commission] so requires, and shall be furnished in the form and within the time prescribed by the [Commission].

riers' services as a whole and to their carryings of about 100 commodities "selected because of the wide freight rate disparity, actual or potential tonnage movement, and because they were the subject of protests by exporters or investigation by the Joint Economic Committee of the Congress or the Department of Commerce."¹⁹⁸ The Commission's orders created a considerable international flap. Acting collectively, the 11 maritime nations most significantly affected formally protested to the State Department that the FMC's demands and threats of penalties exceeded the jurisdiction of the United States and infringed their national sovereignty; England, France, and Germany, among others, passed legislation forbidding compliance; and a bruising international dispute was averted only at the last minute by negotiations between the United States and 14 other maritime powers, sponsored by the Organization for Economic Cooperation and Development.¹⁹⁹ After nearly a year of meetings, an "Agreed Minute" was ultimately produced governing the nature and content of the information which the FMC might obtain with the cooperation of the 14 foreign governments, and the uses to which this information might be put.²⁰⁰ Simultaneously, roughly four years of conference litigation in the federal courts over the proper reach and scope of section 21 orders came to an end with the broadest possible judicial reading of the Commission's powers under the statute.²⁰¹

With the information obtained under the "Agreed Minute" and that which the judicial enforcement of its section 21 orders within the United States had produced, the Commission concluded that the rate structures in the trade between United States North Atlantic ports and those in the United Kingdom and Ireland were disparate and discriminated severely against American exports, without being justified or explained in terms of volume and value of cargoes or the competitive conditions prevalent in the trade.²⁰² This conclusion was based on the following statistics:

¹⁹⁸ 1964 FMC ANN. REP. 11.

¹⁹⁹ A narrative of the events referred to in the text, accompanied by excerpts from the relevant documents, foreign statutes, and citations to related materials are compiled in 1 CHAYES, *supra* note 4, at 425-50.

²⁰⁰ Agreed Minute on Exchange of Shipping Information, 52 DEP'T STATE BULL. 188 (1965), reproduced in 1 CHAYES 444-7.

²⁰¹ See *Far East Conference v. FMC*, 337 F.2d 146, 150 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 991 (1965). Section 21 orders are valid and enforceable even though no complaint proceedings are involved. "They are available to aid investigation without the need for the support of a charge of violation of the Act or belief even that such a violation is probable." See also *Pacific Westbound Freight Conference v. United States*, 332 F.2d 49 (9th Cir. 1964), and other cases cited therein.

²⁰² 2 *Douglas Committee Hearings*, pt. 2, at 417 (memorandum by the FMC), reproduced in 1 CHAYES 461.

U.S. NORTH ATLANTIC—UNITED KINGDOM TRADE—LINER CARRYINGS, 1963²⁰³

	Outbound	Inbound	Extent inbound exceeds outbound	Percent inbound exceeds outbound
Weight tons	518,098	550,942	32,844	6
Cargo value	\$464,450,419	\$559,183,267	\$94,732,848	20
Revenue tons	601,308	985,139	383,831	64
Revenue	\$21,603,446	\$26,899,183	\$5,295,737	25
Average revenue per revenue ton	\$35.93	\$27.30	—	—

To the Commission, this data proved that the dominant direction of trade is inbound from the United Kingdom. Weight tons inbound were greater by 6 per cent than weight tons outbound; total cargo value inbound was 20 per cent greater than outbound; revenue tons carried inbound exceeded revenue tons carried outbound by 64 per cent; and the carrier's gross revenues were 25 per cent greater inbound than outbound. On the basis of this data, the outbound leg of the trade, with its lower volume and lower aggregate cargo value, should be viewed as the "backhaul"; thus, if credence could be given to the received learning of transportation economics, outbound rates in the aggregate should have been lower than inbound rates in the aggregate, instead of vice versa. In fact, average revenue per revenue ton in the outboard trade exceeded that in the inbound trade by about a third.

But this was not all. Even more damning were the inferences which the Commission drew from data respecting the 10 major commodities moving in each direction in the trade:

Outbound, the average revenue per revenue ton is \$38.36; inbound, it is \$28.89. Each of these average rates is higher than the average overall revenue per revenue ton, which would tend to refute the argument that low rates are given to outbound commodities that actually move in volume. This comparison also shows an apparent discrimination against U.S. exporters. In major moving commodities, the average revenue per revenue ton outbound is 33 per cent higher than the average revenue per revenue ton inbound.²⁰⁴

This set of statistics, plus the finding that "the outbound tariff has a heavier concentration of rates in the higher rate levels, and the inbound tariff has a heavier concentration of rates at the lower rate

²⁰³ 1 CHAYES 458.

²⁰⁴ *Id.* at 459.

levels,"²⁰⁵ appeared to indicate systematic discrimination against American exporters, "by agreement . . . between two rate-setting bodies with substantial identity of membership"—the principal evil as to which Chairman Harllee had voiced his concern.

Accordingly, citing substantially all of these statistics, and emphasizing (by placement at the head of the list) its finding that "of the 12 members of the outbound conference and 11 members of the inbound conference, 7 are common to both,"²⁰⁶ the Commission issued its December 16, 1965 Order of Investigation to which we have previously referred. The North Atlantic United Kingdom Freight Conference and the North Atlantic Westbound Freight Association, and all of their member lines were named as respondents, and the presiding examiner was explicitly ordered to place upon them the burden of proof according to the rule announced in the *Iron and Steel Investigation*, which had been decided only six days before.

Hearings which extended over many months were held in several cities. The testimony of professional economists, consultants, and academic specialists in transportation, as well as exporters and importers, members of the Commission's staff, and officials of the respondent carriers and several government agencies was spread over 4,955 pages of record and 178 exhibits, many of which were very extensive. The length of the proceedings as a whole and their extraordinary formlessness were due in the main to the examiner's ruling, early in the hearings, that the Order of Investigation "required" an inquiry into any and all outbound rates that "may violate the standards of the Shipping Act, entirely aside from any question of disparity."²⁰⁷ This ruling opened the entire NAUK Conference tariff—over 1,500 individual rates and several hundred additional classifications—to challenge by the Commission's staff and disgruntled shippers.

Again, as in the *Iron and Steel* and *Boilers* cases, the Commission's findings wholly repudiated the assumptions upon which the launching of the investigation had been based. The Commission found that the overall rate structure, considered as a "price profile," was 25 per cent higher outbound than inbound, but that this disparity was neither "effective nor significant" because the "aggregate amounts paid by shippers" were not greater in the outbound trade. The Commission expressly agreed with its staff hearing counsel who "conceded" that:

It appears to be true that if we concentrate on yield per ton

²⁰⁵ Order of Investigation, FMC 65-45, 30 Fed. Reg. 15599 (Dec. 17, 1965).

²⁰⁶ *Id.*

²⁰⁷ Init. Dec., *supra* note 194, at 4.

for the major moving commodities outbound (i.e., over 500 tons) compared to yield per ton inbound [overall commodities], there is no higher outbound disparity.²⁰⁸

Indeed, on the record as reviewed by the Commission itself,²⁰⁹ the foregoing "concession" was much understated. The 116 heaviest moving commodities in the outbound trade (all of which moved in volume greater than 500 tons in 1965) were rated extraordinarily favorably, at levels which averaged at least \$10.00 below the average rate in the inbound tariff. The average revenue per weight ton for the 25 major moving commodities in the outbound trade (which constituted better than 55 per cent of total outbound liftings, in terms of revenue tons) was \$29.36, while the average revenue per weight ton for the 25 leading items inbound was \$63.20, more than twice as great. Moreover, 70 of the leading 116 commodities outbound (these 70 constituting over 65 per cent of outbound tonnage by weight tons, as opposed to revenue tons, and nearly 60 per cent of total outbound revenue)²¹⁰ moved at rates below \$40 per ton, or, in other words, at rates 50 per cent or more below the average rate fixed by the inbound conference on its 25 leading commodities. In sum, it was discovered that the very great majority of cargoes actually moving in the outbound trade were shipped under a tariff structure which was vastly more favorable than that under which inbound cargoes of comparable importance were moving.

This proceeding, however, unlike its two predecessors, was not to be in vain. Applying the rate disparity rules, the Commission found grounds for "disapproving" seven rates out of the more than 1,500 listed in the NAUK Conference tariff and opened to scrutiny by the examiner's broad reading of the Commission's Order of Investigation. The NAUK rates disapproved were those applicable to "General Cargo, N.O.S.," under which about 2.5 per cent of the total conference carryings moved in 1965, and "Egg Albumen," "Meat Offals," "Onions," "Plastic Sheeting," "Sleds," and "Toys," which collectively accounted for another 2 per cent of total conference liftings in that year.²¹¹ The

²⁰⁸ *NAUK Investigation* at 28.

²⁰⁹ *Id.* at 14-16.

²¹⁰ These figures do not appear in the Commission's opinion but are drawn from an exhibit prepared by the NAUK Conference Office showing its 1965 carryings of items accounting for 300 weight tons or more during the year, and from the presiding examiner's tables of total carryings and revenues, *Init. Dec.*, *supra* note 194, at 39.

²¹¹ Calculated from the sources referred to in the preceding note. The Commission lumped together General Cargo, N.O.S., and specific commodity N.O.S. rates treating them erroneously as the same in origin and effect in all cases—although recognizing that they were occasionally fixed at different levels. By so doing, it was able to conclude that N.O.S. rates covered 10.6% of NAUK carryings in 1965.

outbound rates for General Cargo, N.O.S., Meat Offals, Plastic Sheetings, and Sleds were 32, 40, 45, and 100 per cent higher, respectively, than their counterparts in the reciprocal trade. Similarly, the outbound NAUK rates for Egg Albumen, Onions and Toys, were found to be 40, 45, and 75 per cent higher, respectively, than the outbound Canada/United Kingdom or North Atlantic/Continent rates. As the Commission's Order of Investigation provided, these findings established the first leg of the *Iron and Steel* rule, as amplified in the *Boilers* case: the existence of rate disparities. Only "impairment of movement" under the higher rates remained to be established in order to shift the burden of proof of "reasonableness" to the NAUK Conference.

For evidence of impairment of movement, the Commission relied heavily upon the testimony of the exporters affected by the rates in question. With the exception of the evidence accepted as proof that the General Cargo, N.O.S. rate inhibited exports, all of the exporters' testimony was essentially the same. Each swore on the witness stand that a lower rate would surely increase his exports to the United Kingdom. When asked what rate was required to achieve this effect and what rate he would consider reasonable, in each case the witness would point to a lower rate in competitive trade, Canada/United Kingdom, for example, or in a related trade in close geographic proximity, such as the North Atlantic Continental trade. The flavor of the testimony may be obtained from a passage from the record apparently considered of such significance that it was cited by the Commission, without more, for the proposition that, "the relatively high outbound rate [on Meat Offals] has prevented sales and a lower rate would increase the exports of this commodity."²¹² A witness for Armour & Co., one of the largest meat packers, said:

In view of strong competition from Australia and New Zealand, meat packers who can produce the same products cheaper than U. S. packers and who also enjoy lower rate of import duties, we solemnly feel that the current ocean freight rates from U. S. ports to the United Kingdom on frozen variety meats should be reduced to the level of the rates to continental ports.

The rates to U.K. are about three quarter cent per pound higher than to the continent and our Sales Department has many times advised that they could not sell in U.K. as our delivered price was one quarter cent or one half cent per pound higher than buyers were willing to pay. This would indicate if U.K. rates were at the same level as continental

²¹² NAUK Investigation at 21.

rates, our quotations would many times result in sales that we cannot make under existing rates.²¹³

A variation on this theme was the argument that the exporter and his entire industry (e.g., Onions, Toys) were losing business to Canadian exporters or other American exporters routing their cargoes through Canada—it was never quite clear which—and that parity with Canadian rates was essential. In the case of each of the commodities in question, with the exception of Meat Offals, evidence was introduced that exports to the United Kingdom through North Atlantic gateways or from the United States at large—again, the record was never clear—were declining. On the basis of this kind of evidence and nothing more, the Commission concluded that the second leg of the rate disparities rule had been established: The rates for Egg Albumen, Meat Offal, Onions, Plastic Sheeting, and Sleds and Toys were impairing their export, and thus, were *prima facie* illegal.

With respect to the NAUK Conference's General Cargo, N.O.S. rate, the evidentiary prerequisites for the second leg of the rate disparities rule were substantially watered down. The Commission did not point to specific evidence in the record nor find explicitly that the N.O.S. rate inhibited or impaired exports of the several hundred commodities moving annually under it, but only that, because it was "so high" (\$70.75 per ton W/M), "it has a tendency" to do so.²¹⁴ There were two or three isolated instances cited in which shippers allegedly had difficulty exporting under the General Cargo rate, but it was not upon such evidence that the Commission principally relied. Instead, the Commission bottomed its finding that the \$70.75 General Cargo rate had a "tendency to inhibit exports" upon the proposition that the General Cargo, N.O.S. rate is "merely a starting point for bargaining"²¹⁵ over cargo classification and rate levels, and that at so high a level it had had a harmful impact on the bargaining position of exporters vis-à-vis the conference. The examiner's findings on this point were that:

The record establishes that the high NAUK general cargo rate places the onus on a prospective shipper whose commodity is not listed in the conference tariff to demonstrate that the commodity rate should be lower than the N.O.S. rate. *The shipper is in an unfavorable position to justify a partic-*

²¹³ *Id.*

²¹⁴ *Id.* at 38.

²¹⁵ While this was the language of the presiding examiner, *Init. Dec.*, *supra* note 194, at 49, it aptly characterizes the Commission's more prolix views on the nature of the General Cargo, N.O.S. rate.

ular rate, as compared to the conference, because the business of the conference is setting rates. If the N.O.S. rate were in an amount approximately equal to the average rate in the entire tariff, the instances of this inequitable burden being placed on the shipper would decrease substantially.

. . . .

. . . The expert testimony also demonstrated that it is psychologically forbidding and disturbing for shippers, particularly small shippers, to try to convince a shipping conference that \$70.75 N.O.S. rate should be, say, a \$40 commodity rate. Rather than undertake this burden, they often simply decide against exporting the commodity.²¹⁶

The Commission accepted this reasoning in full and incorporated the examiner's language *in haec verbis*, changing only the italicized portion to read: "The shipper is usually in a unfavorable position to justify a particular rate, as compared to the conference, *because of lack of economic pressure and lack of experience.*"²¹⁷

It should be noted here that there is no visible support in the examiner's findings or in the record for this new characterization of the exporter's bargaining disadvantage; rather there is much in both which renders it of very questionable accuracy.²¹⁸ Yet, the foregoing "evidence" was held sufficient to support a finding that the outbound General Cargo, N.O.S. rate impaired exports.

Having thus established that the higher NAUK rate inhibited or had a tendency to inhibit exports in each case, the Commission held that these NAUK rates were *prima facie* illegal; that under the Commission's rate disparities rules the NAUK Conference was therefore obliged to justify them; and, finally, that in view of the carriers' refusal to submit "appropriate data," the examiner quite properly ruled that "rates which appear to be unreasonable by virtue of their comparison with other rates were in fact unreasonable because of lack of proof to the contrary."²¹⁹

²¹⁶ *Id.* at 49-50 (italics supplied).

²¹⁷ *NAUK Investigation* at 17 (italics supplied).

²¹⁸ *E.g.*, the examiner found that in 1966 the NAUK Conference received 174 requests for rate adjustments from shippers and granted 140 or 80.4%, a considerably greater percentage than did NAWFA of its total shipper requests. *See* Init. Dec., *supra* note 194, at 20. The great majority of these were requests by shippers of very small tonnages for specific commodity classifications at rates lower than General Cargo, N.O.S. The examiner gave an example of such a case, wherein a shipper of very small tonnages of aquariums under the N.O.S. rate of \$70.75 was given a 50% reduction to \$35.50 W/M. *Id.* at 76. Moreover the Commission's statement amply demonstrates the inability of the Commission to grapple with the ratemaking process as a whole, that is, to comprehend its fundamental dynamic, for it is on the basis of "economic pressure" that all rates are set.

²¹⁹ *NAUK Investigation* at 33.

The presiding examiner's proposed remedy was that the Commission fix new "reasonable rates." For General Cargo, N.O.S., this rate was to be roughly equal to the average rate in the NAUK Conference tariff; for the six specific commodities, the Conference was ordered to file new rates no higher than those prevailing either in the inbound trade, or in the nearby competitive trade, whichever had been used as the standard of reference under the rate disparities rule. This was an extraordinary and unprecedented remedy, assuming for the Commission a rate-fixing power which it never before thought it possessed²²⁰ and which Congress quite clearly denied it.²²¹ The Commission rejected the examiner's remedial proposals, but deliberately left open the question of whether it possessed the power to fix rates in the United States foreign liner trades. It merely disapproved the seven rates in issue under section 18(b)(5) and ordered the NAUK Conference to "file lower rates . . . with a justification of the level of the new rate, based upon cost, value of service, or other transportation conditions."²²² Here the matter now rests, while the NAUK Conference seeks review in the United States court of appeals.

²²⁰ The Commission's traditional view of its powers was summarized by Chairman Harlee in *Hearing on Refunding of Freight Charges Before the Subcomm. on Merchant Marine and Fisheries of the Senate Commerce Comm.*, 90th Cong., 1st Sess., ser. no. 90-56 (1967).

Although section 18(b)(5) of the Shipping Act, 1916, gives to the Commission authority to disapprove any rate "filed by a common carrier by water in the foreign commerce of the United States," which it finds to be "so unreasonably high" as to be detrimental to the commerce of the United States, nowhere in the Shipping Act is the Commission given the power to fix a "reasonable rate" in the foreign trade.

²²¹ Illustrative of the clarity of congressional intent on this score is the language of the Senate Commerce Committee Report on the Bonner amendments, S. REP. NO. 860, 87th Cong., 1st Sess. 3132 (1961), reported in 2 U.S. CODE CONG. & AD. NEWS 3132. Even the Douglas Committee did not favor empowering the FMC to fix reasonable rates in the foreign trades. 1966 DOUGLAS COMMITTEE REPORT 20.

²²² NAUK Investigation at 42-43.