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# Shipping Regulation and the Federal Maritime Commission

## PART II

James S. Gordon†

On June 27, 1969, the Court of Appeals for the District of Columbia affirmed the Federal Maritime Commission's decision in the *NAUK Investigation*.<sup>223</sup> The court's decision decided nothing other than that the Commission's remedial orders did not exceed its very limited authority over ratemaking in the foreign liner trades. The court did not decide whether the Commission's interpretation of section 18(b) (5)'s standards of "unreasonableness" and "detriment to commerce" were correct; whether the burden of proof precluded worked by the *Iron and Steel* rule was fair, let alone lawful; or whether there was sufficient evidence, or any at all, to support the Commission's statutory findings. For the court, the dispositive and sole question was whether the Commission's order, which required the carriers to "justify" their new rates (to be filed in place of those "disapproved") in terms of cost, value of service, and other traditional ratemaking factors, was an undue interference with the carriers' congressionally approved system of rate-making, as the conferences had argued. In reaching and then deciding this issue in favor of the Commission, the court did not examine and then reject the conferences' strenuous arguments on the foregoing questions; it simply ignored them and assumed the issues which they raised. Consequently, little, if anything, more is known of the probable fate of the FMC's regulatory doctrine in the federal courts after, than before, the *NAUK* appeal, and the possibility of thorough judicial review of the procedures and legal rules which determined the *NAUK* outcome is, at least temporarily, foreclosed. The Commission's *NAUK* decision will doubtless join its *Iron and Steel* and *Boilers* antecedents as hard and fast precedent for similar, if not more aggressive, direct rate regulation in the "rate disparities" mold.<sup>224</sup>

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† Member of the Illinois Bar. This is the second installment of a two-part article. The first part appeared in the Fall 1969 Issue, 37 U. CHI. L. REV. 90-158.

<sup>223</sup> *American Export-Isbrandtsen Lines, Inc. v. FMC*, Docket No. 22,402 (D.C. Cir. 1969).

<sup>224</sup> See, e.g., Speech of Commissioner G. H. Hearn before the Federal Bar Association,

On a number of grounds, not the least of which is that the Commission's decision makes very questionable law, the inconclusive outcome of the principal issues underlying the *NAUK* litigation is unfortunate. It is dubious whether the findings of fact upon which the Commission's final orders were based can withstand critical examination. It is far from clear that the Commission's entire regulatory doctrine, even if applied upon a proper record, is capable of producing rational results. It is not possible to reconcile the Commission's view of its regulatory powers under section 18(b)(5) with the fundamental regulatory scheme of the Shipping Act of 1916. Here, we shall take up the first two subjects, in the order given, leaving the third for discussion in a subsequent section of this article.

Viewed even in the extremely restrictive context of the rate disparities rule,<sup>225</sup> there are substantial reasons to doubt that an adequate *prima facie* case was made against the *NAUK* Conference rates which the Commission disapproved. It is dubious that the *NAUK* trades inbound and outbound were comparable *inter se* or with the Canada/United Kingdom and North Atlantic Continent trades in any meaningful sense, in view of the very significant differences as between these trades in the identity of the carrier participants and their primary interests,<sup>226</sup> in the degree of competition facing the different conferences

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Sept. 4, 1969, FMC News Release Sp 69-12, and Speech of Dep. Sol. H. B. Mutter before the National Customhouse Brokers and Forwarders Assoc., Sept. 30, 1969, FMC News Release Sp 69-18. At this writing, the Commission's staff is currently engaged in preparations for a similar investigation of the outbound trade between North Atlantic and Gulf ports and the Far East.

<sup>225</sup> For the wording of this rule, see text at notes 180-1 *supra*. The basic doctrine is that rates may be deemed "so unreasonably high . . . as to be detrimental to the commerce of the United States" exclusively on the basis of unfavorable rate comparisons coupled with the testimony of shippers that they would ship more under a lower freight rate—the latter testimony being characterized as "evidence" that movement of goods under the higher rate has been "impaired." See, e.g., the testimony of the meatpackers, text at note 213 *supra*. An unfavorable rate comparison plus such testimony gives rise to a presumption of unreasonableness, which, if not rebutted, will support a Commission ruling under section 18(b)(5), disapproving the rate(s) in question.

<sup>226</sup> Two members of the *NAUK* (outbound) Conference did not belong to the *NAWFA* (inbound) Conference, and six members of the *NAWFA* did not belong to *NAUK*. Carriers operating as independents in the reciprocal trade—or not serving it at all—do not have an identity of interests with carriers serving both trades and belonging to both inbound and outbound conferences. Excellent examples are the powerful German and Scandinavian-flag carriers which belonged *only* to *NAWFA* and did not in the 1965-68 period serve the *NAUK* trade. As Continental carriers serving England en route to the United States only to top off cargoes, and being accustomed to the stiffer competition in the Continental liner markets, their interests conflicted more often than not with the English-flag lines, which did not then serve the Continent at all and derived all their business in their home market. The impact of such divergent identities and interests was heightened by the unanimous voting rules of the *NAUK* Conference and the *NAWFA*

serving each trade,<sup>227</sup> in geographic market coverage,<sup>228</sup> and in the elasticity of demand for conference liner services of the shippers affected by the different rates compared.<sup>229</sup> These were very wide divergences, and given their existence, and given the well known fact that competition and the relative elasticity of demand of shippers are prime determinants of rate levels, rate comparisons were inevitably destined to produce disparities—indeed, the discovery of identical rate levels as between these trades would have been truly startling. There is, consequently, no rational basis whatsoever for permitting a showing of the

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which rendered concerted ratemaking between inbound and outbound conference for strictly nationalistic or discriminatory purposes next to impossible. To say the least, there is an even more striking divergence of membership lists and carrier interests as between the NAUK, Canada/UK and North Atlantic Continental Freight Conferences, and the Commission's attempt to treat the carriers serving these trades as identical (*NAUK Investigation* at 33) and to compare rate levels as between these trades is even less satisfactory.

<sup>227</sup> See text accompanying notes 282-7 *infra*.

<sup>228</sup> The NAWFA fixes rates for the South Atlantic ports, which many, although not all, of its members serve; the NAUK Conference jurisdiction excludes the South Atlantic range and a small minority, if any, of its members actually serve the South Atlantic ports on the same services scheduled regularly from North Atlantic ports. Obviously, this difference in the geography actually covered by specific services of their respective members implies that, as between the inbound and outbound conferences, ports served, cargo mix, and cargo-related as well as vessel voyage operating expenses were significantly different for a number of important carriers. Accordingly, the overall cost and revenue profiles of the outbound and inbound trades were different enough to account for different ratemaking policies as between the outbound and inbound conferences. While the impact of these differences and the divergent interests which they engender is nonquantifiable, it poses problems similar to those discussed in note 226 *supra* and difficulties for the Commission's regulatory doctrine which cannot be dodged by merely excluding from the cargo and revenue data furnished by the NAWFA the tonnage and receipts clearly allocable to South Atlantic business. This was all the examiner did, *Init. Dec.*, *supra* note 194, at 28, on the ground that the differences described in this note, irrespective of their impact, must be ignored because "regulation by means of rate comparisons would be completely frustrated if the carriers could avoid all control by merely constructing their tariffs and conducting their operations on differing bases." *Id.* at 29. Besides admitting the bankruptcy of the method of regulation upon which he was relying, the examiner is obviously begging the crucial question: whether rate comparisons, given these marked differences, make any sense whatsoever. The Commission is equally guilty; however, it simply ignored the problem altogether, after excluding the NAWFA's inbound carryings to South Atlantic ports "from the comparisons because the outbound conference covers only the North Atlantic ports." *NAUK Investigation* at 8 n.3.

<sup>229</sup> To the extent that a shipper's elasticity of demand is determined by the ease with which he can substitute independent for conference service, this conclusion is buttressed by the FMC's and the Canadian Commission's findings summarized on pages 283-4. If they are accurate, it is obvious that inbound shippers have a greater ability to substitute competing liner services against the NAWFA Conference members than do shippers in the outbound trade against the NAUK Conference. Similarly, Canadian shippers are relatively better off in this regard than their NAUK counterparts.

existence of these disparities, without more, to establish a presumption of "unreasonableness" against any one of the several rates compared.<sup>230</sup>

Similarly, there is strong reason to doubt whether any detriment to commerce (or "impairment of movement") was ever established. The most extraordinarily self-serving shipper testimony was accepted at face value despite the total absence of hard data. No scientific effort was ever made to determine whether there was any cause and effect relationship between relatively high rate levels and a shipper witness' complaint that he was unable to export as much as he thought he might under a lower rate. No evidence of the elasticity of demand for the goods in question relative to their price in the English market was ever introduced. Nor was there even any data regarding the level of landed price competition in the English market. Even the "expert witnesses" called on behalf of the government were able to say no more than that lowering freight rates would increase exports, "all other things being equal."<sup>231</sup> But, the conferences introduced substantial evidence that "all other things" were far from being equal, in that a half-dozen or more other barriers to increased exports to England of the goods in question<sup>232</sup> were of far greater importance than freight rates in inhibit-

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<sup>230</sup> Indeed, until it formulated its *Iron and Steel* rule, the Commission and its predecessors had consistently refused to permit a mere showing of lower rates for the carriage of similar cargoes in reciprocal or other allegedly comparable trades—even in trades in which voyage costs were higher because distance was greater—to support, without more, a presumption of unreasonableness such as that which determined the results of the *NAUK Investigation*. *Edmond Weil, Inc. v. Italian Line "Italia," supra* note 121, at 395, 396: "The mere fact that the rate in the reverse direction is substantially lower does not justify a finding that the rate under attack is unreasonable or in any other way detrimental to our commerce." *Id.* at 399. *See also* *California Packing Corp. v. States S.S. Co.*, 1 U.S.S.B. 546, 548 (1936); *Philadelphia Ocean Traffic Bureau v. Export S.S. Corp.*, 1 U.S.S.B. 538, 541 (1936); *Puerto Rican Rates*, 2 U.S.M.C. 117, 119, 124 (1939); *Alaska Livestock & Trading Co. v. Aleutian Marine Transport Co.*, 7 F.M.C. 387 (1962); *Thatcher Glass Mfg. Co. v. Sea-Land Service, Inc.*, 8 F.M.C. 645, 649 (1965). These cases provide unqualified support for the proposition that the significant differences rehearsed in the preceding text and accompanying notes between the NAUK trade and those with which it was compared should have invalidated all rate comparisons between them. And since none of the inbound NAWFA, outbound Canada/UK or North Atlantic Continental rates were themselves demonstrably "reasonable" on the record, it is surely remarkable that the Commission's 18(b)(5) findings based, as they were, on nothing more than such rate comparisons, survived judicial scrutiny. *Cf. Note, Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635, 649 (1965); D. LOCKLIN, *ECONOMICS OF TRANSPORTATION*, 408-9, 436 (6th ed. 1966).

<sup>231</sup> This testimony was characterized by the hearing examiner as "an economic fact" which had been established by "the overwhelming weight of the credible and persuasive testimony of the economic experts." *Init. Dec.*, *supra* note 194, at 45. Of course, these experts failed to predict whether the rates would have to be lowered 50, 75 or 100 per cent to achieve the desired effect.

<sup>232</sup> Among these barriers to increased exports were "the high markup on imported

ing cargo movement—evidence which was never even challenged. The hearing examiner merely held this evidence insufficient to negate the inference that freight rate levels might not also be of *some* importance,<sup>233</sup> and with the exception of its unconvincing discussion of toys, the Commission simply ignored this evidence altogether.<sup>234</sup> Having done so, it was easy for the Commission confidently to second-guess the judgment of the carriers and enter “findings” that it was the relatively high level of the freight rate on the commodities concerned which was impairing the nation’s exports and thus the carryings and revenues of the conference lines. There is nothing in the hearing examiner’s or the Commission’s opinions, however, which invites confidence in this conclusion.

We might well devote many pages at this point to a more comprehensive review of the evidence supporting the critical views expressed above. Also, inconsistent, arbitrary, and curiously illogical findings and rulings

goods in the United Kingdom, high manufacturing costs in the United States, tariff duties and Commonwealth preference duties [in favor of Canadian, Australian, etc. producers] on imports in the United Kingdom . . .,” *id.* at 45, as well as the 10 per cent, across-the-board surcharge slapped on by the Exchequer to dampen imports and strengthen the British balance of payments.

<sup>233</sup> The examiner’s actual ruling was as follows: “This contention actually amounts to no more than speculation, because the respondents did not adduce evidence that these other factors were the sole cause of the decline in the movement of commodities.” *Id.* at 45-46. The examiner’s error here is related to a more fundamental error which he shared with the Commission: the inability to perceive that these “other factors” (summarized in the preceding note) may serve to make the demand for the American exports in question, and thus for conference shipping capacity, relatively inelastic with respect to freight rate levels.

<sup>234</sup> The Commission’s toys discussion illustrates each of the foregoing criticisms. The FMC disapproved the NAUK Conference’s toys rate of \$35.50 per ton W/M [weight (2240 lbs.) or measure (40 cu. ft. to the ton) whichever produces the greatest revenue] because it was \$15.00 higher than the rate applicable in the Canada/UK trade. It reasoned as follows:

It is true, as respondents state, that other factors such as British import duty, high mark-up in their stores, the 10 per cent British surcharge on imports, and other factors make it difficult for the American toy exporter to compete. Our costs are no higher than those in Canada, however, except for the Commonwealth preference in import duties. Yet, the Canadians successfully export American toys and some of our exporters ship out of Canada.

*NAUK Investigation* at 25. It is noteworthy that the *NAUK* record was silent as to the value and composition of the “typical ton” of toys, if such a construct exists; consequently, no one knows whether shippers from American ports and those from Canadian ports (whether the latter are American or Canadian was never established) are exporting the same kinds of goods and whether the C.I.F. price advantage of \$15 per ton for the latter gives them a meaningful price advantage in the English market. There was no evidence in the record, and it is surely not intuitively obvious, that American and Canadian manufacturing—and especially labor costs—are the same; and if Canadians are indeed “successfully” exporting “American toys” while Americans themselves are not, it would suggest that the Commonwealth preference in import duties rather than freight rate differentials, might in itself explain the advantage of Canadian producers.

are abundant,<sup>235</sup> and it is easy and tempting to ferret out and criticize them, for whatever the exercise may be worth. But this is not our purpose; nor would it help much in evaluating the worth of the Commission's regulatory doctrine. At most, we might convince ourselves that the doctrine was sloppily administered and wrongly applied. In contrast, there is far greater utility in proceeding under the assumption that somewhere there may be a case in which the Commission's rules may be given proper application. Thus, we shall take the Commission's final interpretation, in its *NAUK* opinion, of the meaning of section 18(b)(5) as the definitive core of its regulatory doctrine—which, in fact, it is clearly intended to be—and question whether this doctrine, when and if above criticism in its application to particular facts, is even remotely capable of producing a rational program of direct rate regulation.

### B. *The Commission's Regulatory Doctrine*

Without question, the Shipping Act contemplates that ocean liner freight rates shall be fixed at whatever level the carriers choose, so long as those carriers acting jointly do so pursuant to filed and approved steamship conference agreements, and so long as all rates established are appropriately filed with the Commission and do not violate the statutory proscriptions against undue and unjust preferences and unreasonable discriminations. It is just as certain that the phrases, "so unreasonably high or low" and "detrimental to the commerce of the United States" which appear in section 18(b)(5) together define the only rates which the Commission may disapprove under that section, and thus are clearly intended to control the exercise of the regulatory power which that section confers. Accordingly, the manner in which the Commission has interpreted these two phrases has determined the principal features of its regulatory doctrine as it has emerged to date.

1. *Detriment to Commerce.* In the *NAUK* decision, the Commission attempted its first systematic examination of the meaning of the words, "detriment to commerce," and concluded that that phrase meant nothing more than "something harmful."<sup>236</sup> That is, in the Commission's view, Congress empowered it to disapprove any rate which is "so unreasonably high or low" as to cause "something harmful" to competing carriers or to exporters or importers. Precisely what "something

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<sup>235</sup> E.g., compare the Commission's grounds for reversing the hearing examiner on rates over \$55 per ton, *NAUK Investigation* at 37, with its grounds for affirming him on the General Cargo, N.O.S. rate, *id.* at 16-17, 38-39, and on onions, *id.* at 22-23, 41.

<sup>236</sup> *NAUK Investigation* at 35.

harmful" means is, to say the least, unclear, since the words include everything and exclude nothing, even the case of the shipper exporting at a profit sufficiently large, after insurance and freight expenses, to encourage him to continue exporting significant tonnages over a substantial period of time.<sup>237</sup> The course of development of this extraordinarily non-definitive definition suggests that the Commission is more than a little satisfied with the vagueness of its handiwork.

Initially the FMC attempted to establish some tangible, limiting criteria for determining whether a particular rate level impaired cargo movement. In *Iron and Steel*, its first 18(b)(5) decision, it stated that before the rebuttable presumption of unreasonableness<sup>238</sup> would arise against a rate, "the Commission . . . would still have the burden of proving that . . . tonnage is handicapped in moving because the rate is too high."<sup>239</sup> While this statement is certainly vague to the point of vacuity respecting the requisite harmful effect on commerce (what a wide spectrum of effects the word "handicapped" must cover!), it does seem to require that a test of direct causality between rate level and impairment of cargo movements be applied to the evidence. In addition, *Iron and Steel* appeared to require that this evidence be significant or substantial; for while the Commission noted a "few isolated instances" in the record "where shippers stated they lost sales because of their inability to secure a rate reduction from Conferences," it found this evidence insufficient to support a conclusion that the "rates are unlawful."<sup>240</sup> But these minimal criteria were quickly abandoned three months later in the *Boilers* opinion, under circumstances which led inevitably to their complete repudiation in the subsequent *NAUK* decision.

The *Boilers* case was at best a very poor vehicle for the development of standards for judging injury to exports caused by unreasonably high freight rates. The record did not disclose that an exporter "ever lost a sale to a foreign competitor because of higher rates applicable in the United States foreign trades."<sup>241</sup> The very most that the sole witness in the case, the manager of the American Boilers Manufacturers Association, was willing to say under oath was as follows:

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<sup>237</sup> The meat offal, egg albumen, onion, and toys shippers whose commodities were the subject of the Commission's ameliorative section 18(b)(5) orders in the *NAUK Investigation* would all answer to this description. Meat offal movement, for example, exceeded 3000 tons in 1965, NAUK Conference exhibit, *supra* note 210.

<sup>238</sup> See note 225 *supra*, for the manner of application and operation of this presumption.

<sup>239</sup> 9 F.M.C. at 191.

<sup>240</sup> *Id.* at 192.

<sup>241</sup> 9 F.M.C. at 444.



Transportation is an integral direct cost in any evaluation. And we feel that our margins of advantage are being reduced, either artificially or by general development of some of those competing countries, that we have to be extremely concerned with any cost differential that is going to make our position that much less desirable. And ocean freight rates is [*sic*] one of our direct factors that we have to be concerned with.<sup>242</sup>

Quoting this testimony, and relying directly upon it, the Commission inexplicably concluded that "it would appear that the record is adequate to show some indirect harm to the exporter even if it is merely a limitation of the profit that could be made from a sale."<sup>243</sup> Even more inexplicably, and notwithstanding the clear language to the contrary in its *Iron and Steel* opinion (upon which it purported to rely) the Commission found this "indirect harm to the exporter" to be coterminous with the "detriment to commerce" which section 18(b)(5) prohibited. In the future, it ruled, the higher of two rates compared "can be considered to be harmful even if it merely constitutes a limitation on the net profit" of the shipper.<sup>244</sup>

Obviously, this ruling substantially lightens, if not eliminates, the evidentiary burden upon the opponents of a conference rate. As every penny of ocean freight "constitutes a limitation on the net profit that could be realized from a sale," in the sense that, if the cargo moved free of charge, net profits to the shipper would always be greater, every rate, even one under which very significant tonnages are moving daily, is potentially illegal under section 18(b)(5).

But even this open-ended definition was apparently too restrictive of the Commission's discretion, and when the *NAUK* record came before it, the FMC was determined to loosen its evidentiary standards even further. The *NAUK* respondents had argued that the "tonnage handicapped in moving" test of *Iron and Steel*, and the "limitation of net profits" test of *Boilers*, vitiated the Commission's prior rulings going back as far as 1935, that a rate detrimental to the commerce of the United States must be one which prevented cargo from moving or caused significant loss of sales to shippers.<sup>245</sup> This was true, said the

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<sup>242</sup> *Id.* at 445.

<sup>243</sup> *Id.* at 444.

<sup>244</sup> *Id.* at 457.

<sup>245</sup> The cases cited by the respondents were *Edmond Weil, Inc. v. Italian Line "Italia," supra* note 121; *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28 (1939); *Imposition of Surcharge by the Far East Conference at Searsport, Maine*, *supra* note 120; and *Surcharge at U.S. Atlantic and Gulf Ports*, 10 F.M.C. 13 (1966).

Commission, but not because these earlier cases were decided incorrectly; rather these standards were simply too restrictive.

[A] rate which prevents cargo from moving certainly is detrimental to commerce. But what of a more intangible economic impact, the watering down of profits or the inability of a merchant to enter in a market at all? An unreasonable rate which causes either of these results is detrimental to U.S. commerce. Many situations may arise in which some economic harm other than "lost sales" is worked by a rate upon some aspect of our commerce. Thus, we will not restrict the definition of detriment to commerce to those rates which prevent a commodity from moving. Rather, we will define detriment as something harmful, not limit it to "lost sales" or other rigid formulas.<sup>246</sup>

Surely, with this statement, the Commission's policy is unambiguous. No restrictions upon the definition, and thus the content, of the "detriment to commerce" phrase of the statute will be tolerated, if they might constrain or limit the Commission's discretion to intervene in the ratemaking process for the purpose of export promotion or for any other reason. As "something harmful" is an inherently contentless decision-making criterion, detriment to commerce will henceforth be whatever the Commission may choose to say it is in any given case.

But this is not all. One of the Commission's potentially most important rulings in the *NAUK* case indicates that the requisite "something harmful" need not even be presently in being, nor capable of perception by the ordinary businessman, or for that matter, by anyone other than "the experts." It will be recalled that the Commission disapproved the *NAUK* Conference's General Cargo, N.O.S. rate on the ground that it had a "tendency to inhibit exports,"<sup>247</sup> which is to say that it had a tendency to do "something harmful." This ruling was based exclusively on testimony of "experts" who said little more than that the level of the General Cargo, N.O.S. rate placed the shipper in an "unfavorable position" in negotiating with the carriers, and was otherwise so "psychologically forbidding and disturbing" to the shipper when he wished to "try to convince the shipping conference that the \$70.75 N.O.S. rate should be, say, a \$40 commodity rate," that he "often" decided not to export at all.<sup>248</sup> Although the conferences cross-examined these experts diligently, emphasizing the numerous cases wherein commodities formerly shipped under General Cargo, N.O.S. rates were

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<sup>246</sup> *NAUK Investigation* at 35.

<sup>247</sup> Note 214 *supra* and accompanying text.

<sup>248</sup> Text at note 216 *supra*.

reclassified at lower rates after shipper-carrier negotiations, they were never able to come to grips with, let alone rebut, such chimerical evidence. Thus, if the Commission's findings of fact are read in conjunction with its interpretation of the meaning and content of the law, it is clear that a rate may be held unreasonably high in a 18(b)(5) proceeding although it has not actually caused something harmful. It need only have a tendency to do so, and this tendency may be extrapolated from psychological and other non-economic phenomena.

Certainly, the foregoing suggests that the Commission's removal of any and all substantive content from the phrase "detriment to commerce" is deliberate. The more vague the standard the less the opponent of a particular rate level need prove in order to shift the burden of proving the reasonableness of that rate level to the carriers. Similarly, the less tangible the test of injury and the more attenuated the requisite evidence of causation, the more discretion the Commission will have to aid specific shippers, whether importers or exporters, possessing significant political influence or any other virtue to which the Commission may attach importance at any given moment. In short, the Commission has entirely freed itself from one of the only two legislative restraints on its section 18(b)(5) power.

2. *The rate "so unreasonably high or low."* Although the *Iron and Steel* and *Boilers* decisions were purportedly based upon it, the "unreasonably high or low" language of section 18(b)(5) was not formally defined until the Commission's *NAUK* opinion. Such a rate, the Commission there stated, was

in general . . . one which does not conform to the rate-making factors of cost, value of service, or other transportation conditions. In other words, an unreasonable rate is one that cannot be justified by one or more of these factors.<sup>249</sup>

This definition is clearly the product of the Commission's preoccupation with rate disparities. It emerges directly from the *Iron and Steel* rule which sets up a rebuttable presumption of unreasonableness against a rate and places upon the carriers the burden of

showing that the attendant transportation circumstances require that the rate be set at that level. Subjects of justification may include myriad rate-making factors which might differ between the inbound and outbound rates. These include competition, volume of the movement, stowage, stevedoring costs, and others.<sup>250</sup>

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<sup>249</sup> *NAUK Investigation* at 29.

<sup>250</sup> 9 F.M.C. at 191-2.

Through this burden of proof manipulation, the Commission originally sought little more than an explanation for directional rate disparities for the carriage of similar cargoes over the same ocean trade route which would negate the inference of inter-carrier conspiracy to discriminate against American exporters.<sup>251</sup> Although not originated by them, the idea that disparities between rates over the same trade route permits such an inference in cases wherein exports were declining was popularized and literally forced upon the Commission by Senator Paul Douglas, members of his joint Economic Committee staff, and various spokesmen for influential shippers who should have, and probably did, know better.<sup>252</sup> These individuals focussed on the assumed similarities in cargo handling and voyage cost factors, excluding outright from consideration or down-playing such other ratemaking factors as shipper elasticity of demand for conference liner services and the strength of non-conference liner competition, the primary determinants of whatever disparities there are between the rates assessed for the carriage of similar commodities over different routes. For them the mere existence of inbound-outbound disparities between rates on commodities exports of which had declined could properly support an inference that the carriers responsible were discriminating deliberately against American exports, and this inference, in turn, could support a presumption that the higher outbound rate was in violation of section 18(b)(5) unless proved otherwise. As we have seen,<sup>253</sup> the Commission's leadership was roundly castigated for its failure to adopt and act upon this theory, and was ultimately replaced by a new chairman who was prepared to espouse the Douglas viewpoint, as his own.

It was from this context that the Commission's regulatory doctrine, and particularly the *Iron and Steel* rule, with its insistence that the carriers "justify" charging rates higher for outbound than for inbound traffic, emerged. Given that the Commission's original and principal objective was to blunt congressional criticism that it was doing nothing to eradicate conspiratorial or otherwise unjustifiable discriminations against American exporters, its policy of forcing the conferences to "justify" their rates, when such disparities appeared, in terms of cost, value of service, and other "attendant transportation circumstances" was if nothing else entirely logical. Indeed, it might even have been capable of uncovering and eradicating that very rare, if not unique, case in which wholly irrational ratemaking or an inter-carrier conspiracy against American exporters was in fact lurking in the shadows. But, as a doc-

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<sup>251</sup> Text at notes 195-6 *supra*.

<sup>252</sup> See note 195 *supra*.

<sup>253</sup> See text at note 168 *supra*.

trine of direct rate regulation intended to police the reasonableness of ocean liner rate levels for the purpose of export promotion—as in the *NAUK Investigation*—or for any other reason, the Commission's interpretation of the “unreasonably high or low” language of section 18(b)(5) makes no sense whatsoever. Rate levels in ocean liner shipping, with its tightly oligopolistic market structure and its largely cartelized price setting, simply cannot be “justified” or proved “reasonable” in terms of cost, value of service, and “attendant transportation circumstances” such as the presence or absence of significant inter-carrier competition. They may only be explained in these terms. For even if the carriers were capable of adequately explaining or accounting for specific rate levels in terms of their bargaining advantages over shippers or the latter's bargaining advantage over them, the Commission lacks any quantitative standards by which to measure the result, since it lacks power to inquire into the reasonableness of the rate of return on carrier investment.

It is important not to underrate the difficulties raised by the Commission's ratemaking impotence. Two of them should be emphasized. First, the FMC and its predecessors have on many occasions<sup>254</sup> followed the lead of the Interstate Commerce Commission in recognizing and approving rate discrimination based on value of service (entirely non-cost) considerations not only for the reason that it lacks power to impose entirely cost-related ratemaking upon the industry, but also for other reasons which have become dogma in the field of regulated industries.<sup>255</sup> Rate discrimination in every trade and on every route has created enormously complex tariffs which are constantly in the throes of change. Consequently, there is much cross-subsidization of one cargo by another, one shipper group of another. Without power over rate of return, adjusting the levels of cross-subsidizing is virtually impossible—especially since it is not merely the lowest value cargoes which are subsidized but also those which are most susceptible to raiding by tramps, air freight,

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<sup>254</sup> See *Investigation of Overland and OCP Rates and Absorptions*, *supra* note 128, and the extensive citations therein.

<sup>255</sup> One of the most concise, yet rich, summaries of these reasons appears in W. K. JONES, *CASES AND MATERIALS ON REGULATED INDUSTRIES* 215 (1967):

It [value of service] means, in effect, taking advantage of a condition of expansible traffic volume where the traffic will respond to rate reductions, the results being the encouragement of the maximum utilization of the carrier's plant and equipment, the distribution of the constant costs over a larger volume of tonnage, and the attainment of a lower level of rates on all traffic, the high-rated as well as the low-rated, than could be realized if differences in rates were limited solely to the differences in cost of service.

The foregoing was excerpted from Interstate Commerce Commission, Bureau of Accounts, *Cost Finding and Valuation*, Statement No. 4-54-Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs (1954); reissued as Statement No. 7-63 (1963).

and even overland carriers, all of which the FMC is powerless to regulate. Secondly, Congress has passed a number of laws explicitly designed indirectly to subsidize American-flag shipping by guaranteeing government—principally foreign-aid—financed cargoes to American-flag vessels. These flag-reservation laws inevitably decrease the elasticity of demand of the exporters whose cargoes are subject to them, making them the captives of the United States-flag carriers serving the routes in question. The result is that the market power of the American-flag carriers—and accordingly, their conference—is vastly increased and the bargaining leverage of the shippers correspondingly decreased, if not destroyed—a circumstance which might, nearly by itself, explain why American capital goods exporters to the underdeveloped countries of Africa, Asia, and Latin America pay significantly higher freight rates than do their foreign competitors.<sup>256</sup> Yet, if faced with this explanation, offered frankly in an 18(b)(5) proceeding, the Commission is powerless to fashion a remedy. The congressional policy of United States-flag fleet promotion and the means chosen to implement it could not be, respectively, more clear or effective; lacking the power to impose the maximum rate ceilings which alone are capable of protecting the U.S. exporter's interests under these government-created monopoly conditions, the most the Commission can do is reach the occasional, blatant case of unconscionable profiteering *which requires for its success* an unjustifiable rate discrimination between shippers. But even here, the courts have drastically limited the Commission's powers.<sup>257</sup> We shall

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<sup>256</sup> See, e.g., the case of United States High-Pressure Boiler exporters to the underdeveloped countries of South Asia and Latin America, text following note 261 *infra*.

<sup>257</sup> See *American Export-Isbrandtsen Lines, Inc. v. FMC*, 409 F.2d 1258 (2d Cir. 1969), in which the court reversed the FMC's ruling that the North Atlantic Mediterranean Freight Conference (read: American Export-Isbrandtsen Lines and Prudential Lines, the only two American-flag members and the only conference members eligible to carry the U.S. Government cargoes in question) had violated section 17's prohibition against unjust discrimination between shippers, by charging the State Department \$81.50 per ton and the Department of Defense only \$36.20 per ton for the carriage of household goods "to the same destination under substantially identical circumstances," *id.* at 1259. Somehow, the court was persuaded that rather than being due to the carriers' unjustly discriminating between shippers, the rate disparity "was the result of a choice by the United States Government . . . to use different methods of dealing with the carriers depending on which of its departments was doing the shipping . . ." *Id.* at 1260. The Defense Department both negotiated with the carriers and (later in time) took competitive bids; State merely shipped at whatever rate the "conference" charged. The two American-flag carriers convinced the court that it was the "conference" which fixed the rate, as they were but two of 20 members of the conference "and since a vote of 2/3 is required to effect such a change" in rates, efforts to lower the rate for the State Department would have been futile. *Id.* One wonders how the court would have come out on this argument, if anyone had bothered to tell it that the cargo in question was restricted to U.S.-flag carriers, that all other members of the conference were foreign-flag lines, and that conference members who have no interest in particular cargoes traditionally defer to their colleagues who do. In any event, its opinion shows no inkling that the court really understood the situation.

return to these and related problems after pausing now to study in some detail the *Boilers* and *NAUK* results which very neatly illustrate nearly all of the difficulties reviewed in the foregoing discussion.

(a) The results of the *Boilers* case. The subject of the *Boilers* investigation was the supposed competitive disadvantage to American exporters of large utility-type boilers caused by higher freight rates from the United States to India, Pakistan, Brazil, Argentina and the Philippines than from ports in Europe and Japan to the same destinations. We have reviewed above the Commission's findings that American exporters were not in fact injured by the rate disparities in question and noted that despite these findings the Commission nonetheless applied the rate disparities rule and adjudicated the reasonableness of the higher outbound United States rates.<sup>258</sup> We shall look here in detail at the Commission's grounds for holding that the carriers had adequately "justified" the higher outbound American rates. The Commission accepted what were basically two justifications, higher costs in the outbound American trades than in the outbound competitive trades and differences in "attendant transportation circumstances," the major one being competition.

(i) *Cost*. The carriers' cost justification was based on two factors: the greater distance and voyage duration from American to Indian or Pakistani ports and the fact that loading costs—and particularly heavy-lift charges—were not included in the outbound rate from Continental ports. First, we shall look at the distance justification. The evidence in the *Boilers* record showed that rates from the United States to Calcutta exceeded rates from Hamburg and the United Kingdom by 18.5 per cent. Finding that "it is 27% further to Calcutta from the United States than from the Continent and United Kingdom," the Commission concluded that the higher United States outbound rate did not violate either section 17 or section 18(b)(5) because, "[e]xpressed as a percentage of the United States-Calcutta distance, the mileage difference is upwards of 21%, compared with a rate difference of 18.5%."<sup>259</sup> Whether the Commission meant to say that this mileage differential made the triangular trades in question noncomparable or whether it furnished in itself a satisfactory justification for higher outbound American rates is unclear. Nevertheless, viewed either way, the result is the same, and there is no doubt that the Commission bottomed its finding that sections 17 and 18(b)(5) were not violated on the increased cost to the carriers in the United States/India-Pakistan trade imposed by the greater distance and voyage duration from American than from European ports. In any event, in the recent case of *G. H. Leavell & Co. v.*

<sup>258</sup> Text accompanying notes 184-91 *supra*.

<sup>259</sup> 9 F.M.C. at 448-9, 454-5.

*Hellenic Lines, Ltd.*<sup>260</sup> the Commission cites its *Boilers* decision for the proposition that a steep 65 per cent surcharge on cargoes which had to be rerouted around the Cape of Good Hope when the Suez Canal was closed in June, 1967 was reasonable, since the voyage duration was increased 164 per cent and the mileage distance 193 per cent. Accordingly, at this point in time there can be no doubt that the Commission intends to judge the reasonableness of given rate levels and surcharges on the ground of their specific relation to differences in the carriers' vessel voyage operating cost.

As regulatory policy, this aspect of the Commission's doctrine is transparently erroneous. In both the *Boilers* and *Leavell* cases there was no evidence introduced showing, respectively, the actual difference in vessel voyage operating costs between the American and Continental carriers in the India-Pakistan trade or the increase in these costs to Hellenic Lines attributable to the lengthened voyage necessitated by the closing of the Suez Canal. Only if there is some basis for relating actual costs to the rates charged is it possible to determine whether a given rate disparity is justified by a given cost difference or whether a given surcharge level is justified by a given increase in carriers' costs. For it is elementary that there is no direct relationship between vessel operating costs and freight rate levels for particular items of cargo, whether high-pressure utility-type boilers or shoelaces; value of service and competitive considerations are far more influential in determining rate levels on an item-by-item basis. The Commission itself recognized this in the *Boilers* opinion, within a mere two pages of accepting the carriers' distance justification, and thereby unwittingly demonstrated that such total reliance on cost is misplaced. In the process of explaining that Continental/Argentine rates were "depressed" (presumably by competition) and therefore not fairly comparable with American/Argentine rates, the Commission pointed to evidence that Continental rates to Buenos Aires were 22 per cent less than Continental rates to Rio de Janeiro, despite the fact that Buenos Aires is 1,000 miles farther from Europe than Rio.<sup>261</sup>

Actually, there is a cause much more important than unequal distances for the sharp disparity in United States/India-Pakistan and Continental/India-Pakistan liner freight rates which the Commission ignored. The United States/India-Pakistan trade is a heavily government-financed trade characterized by a preponderance of flag-reservation cargoes—of which large, high-pressure boilers for use in huge government-owned, foreign-aid financed, power plants are typical. The liner

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<sup>260</sup> F.M.C. Docket No. 68-14 (Oct. 1, 1969).

<sup>261</sup> 9 F.M.C. at 450.



trade in these cargoes is the duopoly of the American-flag and Indian-Pakistani lines; competition is nonexistent, and cargoes move at premium rates. By contrast, the trade between Europe and India-Pakistan has none of these artificial restrictions on the shippers' choice of liner services, nor is it as concentrated in market structure. The substantially more competitive conditions characterizing the outbound European/India-Pakistan trade cannot help but produce lower freight rates for Continental exporters; and the fact that the Continental ports are closer to Calcutta by 21 per cent (in nautical miles) is a purely fortuitous and irrelevant coincidence. The Commission's justification for the 18.5 per cent higher rates from the United States to Calcutta on the ground of greater nautical distance is therefore wholly unconvincing, if not entirely erroneous. Indeed, it may well be the case that the national-flag carriers were abusing their dominant market position—created chiefly by United States cargo preference laws—to extract monopoly rates from shippers; that the triangular rate disparities in question were in fact illegal under sections 17 and 18(b)(5); and that the Commission's holding was completely the reverse of what it should have been!

A similar difficulty afflicts the Commission's finding that the reasonableness of the differential between United States/Philippines and Continental/Philippines rates could not be determined because of the absence from the record of certain cargo-related costs, particularly loading and heavy-lift charges. The outbound American rates were 41 per cent higher than the outbound Continental rates which, according to the Commission, did not include the cost of loading, "which makes up a substantial part of a carrier's tackle-to-tackle rates."<sup>262</sup> On this basis the Commission concluded that "no disparity on the ordinary tariff rates to the Philippines has been shown because the Continent to Philippine data are insufficient to make a probative comparison."<sup>263</sup> Earlier, the Commission indicated that another rate disparity was somewhat less significant than it first appeared because "[t]here are substantial heavy-lift charges in connection with boiler parts which are higher from the Continent than from the United States. On the other hand, U.S. loading costs are higher."<sup>264</sup> While the Commission made no judgment based on this cost standard, the implication that it might have, if the requisite data were present, can fairly be made. Moreover, in its *NAUK* decision<sup>265</sup> the Commission explicitly endorses reliance

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<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 455.

<sup>264</sup> *Id.* at 450 n.6.

<sup>265</sup> *NAUK Investigation* at 32.

upon the "out-of-pocket" costs related to cargo handling for the purpose of "justifying" particular rate levels and invites such carrier defenses in future proceedings. But, cargo-related costs provide no more reliable standards by which to judge the reasonableness of liner rate levels than do vessel voyage operating costs. Cargo-related costs establish only the zero-profit limits of the carriers, that is, they provide only a floor for liner rates. As such, they may be useful to the Commission in deciding whether a rate is unreasonably low in violation of section 18(b)(5)<sup>266</sup> but this is the easiest question raised by that section and in no event is it the question with which we are here concerned.

The truly difficult question, and the one raised by the *Iron and Steel*, *Boilers*, and *NAUK* cases, is whether the amount of revenue which the lines retain on the shipping transaction over and above direct cargo-related costs is "reasonable" or better characterized as "monopoly profits." For this, a great deal more information is needed. Looking at differences in cargo-related costs as between trades only provides insight into the zero-profit limits of one of the parties to the rate-making process—the carriers. The Commission needs to know the differences in the zero-profit limits of the shippers of the commodity being investigated, as between the trades compared, before it can determine if the carriers' retentions under the higher of the two disparate rates represented an unreasonably high proportion of the total "profits pie" created by the entire commercial transaction. For example, the landed price of boilers in Latin America may be so far above the shipper's cost of production, overland transport, and insurance, that the ocean carriers may justifiably obtain a very high rate for their services, and still leave the shipper with substantially higher profits than he would have earned had he sold his boilers exclusively in the domestic market. Landed price competition between American and European boiler manufacturers, however, in the Near East might be substantially greater, forcing down the range between the price in the foreign and domestic markets. As a consequence, in this case the zero-profit limits of the shipper and carrier are much closer together and the freight rate must accordingly be lower—leaving the carriers with smaller retentions on the transaction. Both the United States/Latin American and United States/Near East rates may be "reasonable" under section 18(b)(5), although one is very substantially above the cargo-related costs of the carriers and the other is not. In this very plausible example, the rate disparity could neither be condemned nor justified in terms of cargo-related costs.

An additional and equally serious objection to the use of cargo-related

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<sup>266</sup> However, total reliance upon out-of-pocket costs for this purpose is clearly mistaken. See text accompanying notes 146-55 *supra*.

costs is that the Commission may be faced with a situation in which the carriers attempt to meet some of these costs by special assessments against the cargo; for example, heavy-lift charges, which were especially important in the *Boilers* case. It was considered significant that they were reported to be higher from the Continent than from the United States.<sup>267</sup>

Yet, unless the Commission subpoenas the actual heavy-lift costs of the carriers, it cannot reach rational and accurate results if it accepts the heavy-lift charges as published as a fair reflection of the cost of the service performed for a shipper. The following table sets out the heavy-lift charges levied by 16 outbound conferences (counting the Pacific Coast/India-Pakistan services provided by American Mail Line and American President Lines as the equivalent of a "conference") in the United States trades. (See table on following page.)

This comparison immediately demonstrates that the "extra weight" of an item does not in itself determine anything about a rate. There is no general rule governing when a heavy-lift charge will be assessed or what the assessment will be. Not only is it true that the shippers and carriers will negotiate whether or not any given extra charge will be levied at all,<sup>268</sup> but the amount of the charge itself is always open to negotiation.<sup>269</sup> And finally, as the table below indicates, there is not even a consistent pattern in across-the-board charges as between the conferences which sail out of the exact same ports with the exact same loading cost structures. Thus, the North Atlantic Continental Freight Conference imposes no heavy-lift charge at all on items weighing less than 5 tons, whereas the other conferences do; and on an item weighing 50.1 long tons, the 16 conferences have nine different levies, reaching from \$94.88 to \$3,793.04. Yet, there is obviously no cost justification for these discrepancies. Most modern vessels are equipped to lift items

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<sup>267</sup> 9 F.M.C. at 450 n.6.

<sup>268</sup> Although the heavy-lift charges are stated in such a way that they appear to apply to all items in a steamship tariff, this is rarely the case, since the minimum weight at which the charge is imposed is normally high enough to exclude the most important items of relatively heavy weight per unit which move steadily in the trade. But, in addition, the tariffs often also exempt specific items from the heavy-lift charge; for example: the entry for copper (anodes, bars, billets, cakes, cathodes, etc.) in the North Atlantic United Kingdom Freight Conference Tariff (Item No. 2588, Tariff No. (46) FMC-1) reads, "Heavy Lift Charges shall not apply on pieces weighing 6720 lbs. or less"; the entry for Airplanes and Parts, packed, Item No. 0091 contains the same language; and the entry for Agricultural Implements, Item No. 0077-0084 in the same tariff, contains similar wording excluding all pieces weighing less than 8960 lbs. (4 tons) from the heavy-lift charges.

<sup>269</sup> This, in fact, is the normal manner of proceeding in the case of all shipments of very large or heavy items such as boilers, locomotives, power generators, presses, etc.

## HEAVY-LIFT CHARGES!

ACTUAL DOLLAR CHARGE PER INDIVIDUAL PIECE OR PACKAGE BY CONFERENCE BY WEIGHT WITH BOTH SHORT TON (ST) AND LONG TON (LT) SHOWN

9,184 lbs.	13,664 lbs.	20,384 lbs.	27,104 lbs.	36,064 lbs.	45,024 lbs.	56,224 lbs.	67,424 lbs.	89,824 lbs.	112,224 lbs.	
4.59 ST	6.83 ST	10.19 ST	13.55 ST	18.03 ST	22.51 ST	28.11 ST	33.71 ST	44.91 ST	56.11 ST	
4.10 LT	6.10 LT	9.10 LT	12.10 LT	16.10 LT	20.10 LT	25.10 LT	30.10 LT	40.10 LT	50.10 LT	
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AG/River Plate and Brazil <sup>2</sup>	12.30	24.40	63.70	121.00	225.40	361.80	577.30	842.80	1,523.80	2,404.80
AG/Santo Domingo*	17.44	42.35	112.09	197.83	371.42	571.75	916.39	1,220.30	1,841.31	2,637.17
AG/East Coast Colombia*	14.69	32.78	93.75	151.76	238.00	351.16	494.74	728.14	1,958.08	3,793.04
NA/Continental Europe <sup>3</sup>	—	31.72	72.80	121.00	206.08	265.32	361.44	457.52	689.72	941.88
NA/Mediterranean	26.03	54.29	91.91	137.94	203.66	279.39	381.52	495.14	761.90	1,347.69
NA/Turkey/RCD	26.03	54.29	91.91	137.94	203.66	279.39	381.52	495.14	761.90	1,347.69
G/Turkey/RCD <sup>4</sup>	26.03	53.98	91.91	137.94	203.66	279.39	381.52	495.14	759.89	1,347.69
G/Mediterranean	26.03	53.98	91.91	137.94	203.66	279.39	381.52	495.14	759.89	1,347.69
AG/Persian Gulf/8900	9.02	28.06	74.62	150.04	276.92	442.20	702.80	1,023.40	1,844.60	2,905.80
AG/Persian Gulf	9.02	28.06	74.62	150.04	276.92	442.20	702.80	1,023.40	1,844.60	2,905.80
AG/India-Pakistan	15.37	35.99	83.26	178.47	326.02	542.70	1,010.27	1,568.21	2,530.31	3,712.41
AG/Pakistan/RCD	15.37	35.99	83.26	178.47	326.02	542.70	1,010.27	1,568.21	2,530.31	3,712.41
Pac/India-Pakistan <sup>5</sup>	45.10	89.97	186.55	317.62	525.34	717.97	978.15	1,266.31	1,935.63	2,728.95
American President	45.10	89.97	186.55	317.62	525.34	717.97	978.15	1,266.31	1,935.63	2,728.95
American Mail	45.10	89.97	186.55	317.62	525.34	717.97	978.15	1,266.31	1,935.63	2,728.95
AG/Singapore	45.10	89.97	186.55	317.62	525.34	717.97	978.15	1,266.31	1,935.63	2,728.95
AG/Japan/Far East*	51.64	107.91	240.99	366.53	589.58	797.98	1,093.48	1,404.02	2,142.31	3,046.77
Pac Straits/Singapore <sup>6</sup>	45.10	89.97	186.55	317.62	525.34	717.97	978.15	1,266.31	1,935.63	2,728.95

• Short ton rate base.

1 From the Tariffs of the conferences and carriers named herein, on file with the FMC as of March, 1967.

2 AG stands for Atlantic and Gulf.

3 NA stands for North Atlantic.

4 G stands for Gulf. RCD are the initials of a Turkish-, Iranian- and Pakistani-flag joint service from the United States. It should be especially noted in comparing the heavy-lift charges assessed by the RCD carriers to Turkey, that North Atlantic and Gulf stevedoring rates and other direct costs of heavy lifts were by no means equal during 1967 on the average ton of cargo lifted.

5 Pac stands for Pacific. The curious fact that heavy-lift charges are considerably higher from the Atlantic and Gulf to India-Pakistan until 45,024 lbs., after which the situation is completely reversed, should be noted.

6 This conference is formally entitled Pacific/Straits Conference, FMC No. 5680, sailing from U.S. Pacific Coast ports to Singapore and Malaysia. Compare Atlantic and Gulf charges with Pacific/Singapore charges. West Coast stevedoring at this time was somewhat less costly than East Coast. See, *e.g.*, the spread between AG/India-Pakistan and Pac/India-Pakistan.

weighing 10 to 20 tons;<sup>270</sup> and even if some additional lift equipment is required for the heavier items, the discrepancies remain irreconcilable on any cost basis.<sup>271</sup>

Any attempt to correlate heavy-lift charges with the cost of providing the service is futile; the only correlation that makes any sense is one based on the competition among the lines and conferences immediately concerned. Where services are competitive, the heavy-lift charges are identical; and on trade routes where there is substantial competition, *i.e.*, the North Atlantic Continental Europe and Mediterranean routes, heavy-lift charges are lowest.

In summary, there are no cost factors whether relating to voyage distance and duration or cargo handling costs, even when the latter are broken out and separately assessed by the carriers in addition to the published tariff rate, which correlate with rate levels with any degree of reliability. Costs merely provide floors for rates, not ceilings. A regulatory doctrine which permits a rate challenged as too high to be justified or proven reasonable on grounds of carrier costs is incapable of providing a sound policy of rate level regulation.

(ii) "*Attendant transportation circumstances.*" Although the Continental outbound rate to Buenos Aires on boiler parts was 15.4 per cent less than the United States outbound rate, there was no showing "that these disparities have any tangible impact on the shipping public."<sup>272</sup> On this ground, and because of differences in what it characterized as "attendant transportation circumstances," the Commission pronounced itself satisfied that the higher United States outbound rate did not violate section 17 or section 18(b)(5). The Commission's reasoning is important for our purposes and thus is reproduced here in full.

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<sup>270</sup> This is not to say that heavy items being lifted by a ship's own equipment do not result in any extra costs; indeed they do. Longshore labor has dictated a variety of restrictions on handling such items which severely limit productivity and thereby increase costs. If the weights are such that booms must be "married," or "double purchase" winches and falls must be rigged, the entire loading operation can be greatly slowed, and if the loading of one or more hatches must be suspended in the process, with one or more longshore gangs standing by drawing their hourly rate, the cost of this delay must be attributed to the heavy-lift cargo. Moreover, as the stevedore bears all risk of damage and loss to cargoes being loaded, he demands a higher rate for very heavy lifts, which normally are comprised of high value cargo. Finally, heavy-lift equipment is costly and an attempt is made to allocate at least a portion of its cost to the specific item being lifted by it. All but the last item are, of course, out-of-pocket costs to the liner firm.

<sup>271</sup> Since labor is a significant cost input both in loading and unloading, see note 270 *supra*, one might have thought that heavy-lift charges would be least where longshore labor is cheapest. But, as the table shows, the reverse seems to be the case; European heavy lifts are the least and Asian the most expensive.

<sup>272</sup> 9 F.M.C. at 455.

. . . [T]he Continental rates to Buenos Aires are depressed for reasons having nothing to do with competition between U.S. exporters and their foreign competitors. Although it is about 1,000 miles farther from Continental ports to Buenos Aires than to Rio de Janeiro, the Continental rate on boiler parts is \$47.92 to Rio against \$37.22 to Buenos Aires—\$10.70 (22%) less than the rate to Rio, a spread considerably greater than the \$6.78 (15.4%) spread between United States and Continental rates to Buenos Aires.

Apparently, the rates from the Continent to the River Plate (which includes Buenos Aires) are traditionally lower than to Brazil, because of the large volume of traffic and the fact that return cargo is more plentiful than in the Brazil trade. Thus competition for outbound cargoes [from the Continent] to the River Plate depressed rates, while ships going to Brazil have to continue on to the River Plate for return cargoes.<sup>273</sup>

What the Commission apparently means is that there was much less cargo moving outbound from the Continent to Argentina than there was moving in the reciprocal direction, and this imbalance of trade created substantial excess capacity on the outbound leg of the voyage, generating a scramble for cargoes. Hence, even though there was probably a conference operating in the trade from Europe to the River Plate, a subject on which the FMC made no findings, rate levels were by any standard rather low. The trade to Brazil, however, was vastly different. Here there was also an imbalance of cargoes, but in the opposite direction. Vessels sailed from the Continent to Rio with substantial load factors, but were unable to obtain sufficient cargoes to make the inbound leg profitable without going on to Buenos Aires. The result was a strong conference in the Brazilian trade from the Continent, with rates 22 per cent above those from the Continent to Argentina, despite the fact that Argentina was 1,000 miles further away from Europe. From this comparison with the Continent/Brazil rates, the Commission evidently reasoned that the Continent/Argentina rates are "depressed" by competition, and concluded either that "transportation conditions" in the Continent/Argentina and United States/Argentina trades were therefore not comparable "in material respects" or that the higher United States rates were justifiable—unfortunately, one cannot be quite sure of the precise ground of the Commission's holding. But, read either way, the Commission's analysis demonstrates that to use competitive differences as a standard for justifying rate disparities either vitiates the Commission's regulatory doctrine—

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<sup>273</sup> *Id.* at 450.

chiefly, the *Iron and Steel* rule—as a practical tool for implementing sections 17 and 18(b)(5) of the Shipping Act, or raises very disquieting issues which are irresolvable in the context of section 17 or section 18(b)(5) proceedings.

It would seem obvious that if there is any objective whatsoever to be achieved by the prohibition of “unreasonably high” rates, it must be the protection of American shippers from those carriers or conferences which face no substantial competition—these being the only ones which could extort from their customers rates which would either produce monopoly profits or prevent cargo from moving—or both.<sup>274</sup> Yet, under the Commission’s interpretation of section 18(b)(5) as applied via the rate disparities rule to the American and Continental/Argentina trades, that statute is a self-denying ordinance. The respondent carriers are not merely permitted—they are invited—to establish the reasonableness of their rates by showing that the trade with which their rates are compared is *more* competitive; that is, that they—the respondents—face *less* competition than do the carriers serving the reciprocal or triangular trade in question. The underlying *cause* of or *explanation* for the higher rate (the stronger market position of the conference in question) has become in effect the *justification* for that rate! Thus, the statute is vitiated.

But if, instead the Commission attempts to determine whether the American outbound conference whose rate is higher than that in the reciprocal or triangular trade is abusing its market power, the Commission’s regulatory doctrine raises crippling problems which litigation conducted according to its strictures cannot possibly resolve. This is well illustrated by the portion of the *Boilers* opinion excerpted above, where the Commission labeled the lower Continent/Argentina rates “depressed,” although there was nothing in the record to justify such a description, or, much less, to suggest that these rates were unprofitable to the Continental carriers. Since all prices for goods or services established under more rather than less competitive conditions certainly cannot be deemed “depressed,” would it not have made as much sense to label the United States/Argentina rates “inflated”? For if, in regulating freight rates under section 18(b)(5) on the strictly comparative basis the Commission has chosen, it develops that the perceived difference in rates between two trades is due to a greater degree of com-

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<sup>274</sup> It seems beyond dispute that Senator Kefauver viewed his amendment, which later became section 18(b)(5), as a prophylactic against abuse of monopoly power, rather than as a proscription of monopoly power per se. 107 CONG. REC. 19430 (1961). Surely, only a conference with an effective monopoly of liner service in a trade could prevent cargo from moving in the sense referred to by Senator Kefauver and illustrated by his citation of the several decisions of the FMC’s predecessors, which he intended 18(b)(5) to codify. *Id.*



petition in one than in the other, how is the Commission to know, without looking at cost and revenue data, which rates are "inflated," "depressed," or simply "reasonable"? For the lines in the trade experiencing greater competition may be suffering from rates below cost—whether "out-of-pocket," or "direct" (fully distributed) costs are relevant, is another question—or from rates otherwise providing an insufficient return on capital; and shippers in the trade experiencing less competition or none at all may be suffering under monopoly rates.

Other troublesome questions are suggested by the Commission's statement that the Continental/Argentine rates are lower than American rates "for reasons having nothing to do with competition between U.S. exporters and their foreign competitors."<sup>275</sup> In the first place, one would have thought that from this finding the Commission might have concluded that the only other explanation for the lower Continental/Argentine rate was that the trade was imperfectly cartelized; that is, that the resident conference was weak. This might have suggested to a perceptive Commission the extent to which the outbound American conference was charging its shippers monopolistic or, at the least, rather higher-than-competitive rates. In other words, the fact that the Continental carriers were *not* engaged in a scheme to artificially depress their rates in order to destroy American exporters and enlarge the market for their own shippers, should have made their rates a *more reliable* standard for measuring American outbound rates rather than a less reliable one! Nevertheless, the Commission apparently reached the opposite conclusion.

In the second place, what could the Commission have done if it had found that the Continent/Argentina rates were lower than the American outbound rates for reasons having to do with competition between United States exporters and their foreign competitors? In view of the fact that carriers normally are motivated by a desire to help their shippers compete in foreign markets, this is at least as realistic a finding as that which the Commission actually made. What would such a finding mean for the application of the rate disparities rule? Would it now be easier for the Commission to conclude that the trades were sufficiently comparable and that the higher American outbound rate was unjustified? Could the Commission reasonably require the United States/Argentina carriers to meet those lower rates merely because American exporters were suffering in competition with foreign exporters? Certainly, no clear-cut answer appears in section 17 or section 18(b)(5), and no answer whatsoever would seem supportable unless

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275 9 F.M.C. at 450.

we knew the return to the carriers on the rates which the Commission will require them to charge.

These difficult questions, although drawn directly from the Commission's language in the *Boilers* opinion, may not be attributed merely to the inartful draftsmanship of its author(s). On the contrary, they are unavoidable if the Commission persists in its view that sections 17 and 18(b)(5) can be meaningfully enforced by rate-level comparisons alone.<sup>276</sup> For competition—that is, the availability to shippers of non-conference liner services, alternative modes of transport, and alternative routes to destination—is a primary determinant of any given rate level. Rate levels will always differ, even as between trades which have similar voyage and cargo-related cost structures, and even as between the same or similar commodities, to the precise extent that competition differs between the reciprocal or triangular trades compared. A more accurate statement of the same proposition is that rate disparities will *only* appear between reciprocal or triangular trades when the conferences differ in the extent to which they have effectively cartelized their respective liner markets and when the shippers in each market differ in the facility with which they can substitute alternative, competitive services for the conference lines. Thus, if the carriers must “justify” the higher of any two disparate rates in terms of “attendant transportation circumstances,” and this phrase includes competitive conditions, as it must, the difficulties suggested above appear. The Commission's inability to obtain data relating to the overall profitability of the rates in question, and its impotence to fix rates according to public utility principles paralyzes it in a system which explicitly legalizes cartels and thus cannot be said to have outlawed all rates higher than competitive conditions might dictate. Absent the appropriate data, the FMC is unable to identify the excessive or abusive monopoly rate and to distinguish it from that which Congress must be conceded to have endorsed in sections 14b and 15 and permitted in section 18(b)(5).<sup>277</sup> Similarly, absent the power to fix rates based on reasonable levels of profitability it has no effective criteria to apply to whatever data it might obtain.

There is, finally, one nearly insuperable difficulty with using “atten-

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<sup>276</sup> There is no evidence of record of the reasonableness of the rates as measured by the excess of revenue over costs of moving the cargo. Thus, the only probative measure of the reasonableness of the rates must be based upon a consideration of rate disparities, either triangular or reciprocal.

9 F.M.C. at 457.

<sup>277</sup> Senator Kefauver failed to recognize this: “It [18(b)(5)] acknowledges that these monopolies can set high rates—even unreasonably high rates. But, the rates must not be so unreasonable as to be detrimental to the commerce of the United States.” 107 CONG. REC. 19429 (1961). It is his last sentence which causes the problem.

dant transportation circumstances," whether these are limited to competitive conditions or broadened to include everything from famine in India to the closing of the Suez Canal, as criteria for judging the reasonableness of rate levels. While it is indeed possible to explain the differences between two rates in different trades on the ground of differences in transportation circumstances, it is impossible to reduce these "circumstances" to numerical values, statistics or hard data, so as to determine whether the particular disparity (10%, 20% or 50%) is warranted by the difference in transportation circumstances. The impact of competition cannot be quantified and its role cannot be evaluated outside the shipper-carrier and inter-carrier rate bargaining process within which and upon which competition has its effects. Moreover, as the Supreme Court has recognized, "ratemaking is a continuous process,"<sup>278</sup> and nowhere is this more true than in ocean liner transport. Competitive conditions are continuously changing not merely in the particular ocean liner markets subject to the Commission's jurisdiction but also in the several other markets for transport services not subject to its jurisdiction. Even if numerical values could be assigned to specific levels of competition and this data plugged into the record, there is no reason to believe that during the one or two-year period during which the section 17 or section 18(b)(5) proceeding is litigated, first before the Commission and then in the courts, that transportation circumstances will remain the same. This criticism is particularly appropos if the Commission persists in applying section 18(b)(5) in the context of comparative proceedings between trades. For the factors referred to previously which account for all differences in rates on similar cargoes, as well as such circumstances as whether the cargoes are government or commercially financed and restricted or unrestricted by cargo preference laws to certain national-flag vessels, are likely to be constantly changing. It would be difficult enough for the Commission to determine whether any one or more of these factors "justifies" a given rate level, if they were all in static equilibrium; but when they are in constant flux, the Commission's difficulties would appear to be overwhelming.

(b) The results of the *NAUK* case. As we have seen, seven NAUK Conference rates which were higher than their counterparts in three other trades were disapproved on the ground that the Conference failed to justify them in terms similar to those accepted in the *Boilers* case. Three months after the Commission's final order,<sup>279</sup> the Conference

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<sup>278</sup> *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 461 (1945).

<sup>279</sup> The Commission's order was dated August 20, 1968, but its effectiveness was stayed until November 25, 1968 to facilitate the Conference's appeal from the Commission's

filed new rates accompanied by the written "justifications" which the Commission required.<sup>280</sup> Shortly thereafter, the FMC's Bureau of Hearing Counsel filed its written comments on the Conference's justifications.<sup>281</sup> Since no further action has been taken during the ensuing twelve months, the *NAUK Investigation* would appear finally to be concluded.

In every respect, and for the same reasons, the *NAUK* results are as unsatisfactory as those of the *Boilers* case. The Conference's justifications are as completely beyond principled evaluation as the rates themselves, given the dearth of information at the Commission's command, and its statutory inability to look to the carriers' rate of return. Thus, whether the rates are still unreasonable in terms of section 18(b)(5)—if indeed they ever were—is an open question. Again, the essence of the problem is that the Commission compared rates in a more effectively cartelized trade with rates in one or more less effectively cartelized trades and tried to force the former down to the level of the latter in the absence both of clearly defined standards for doing so and of a supporting rationale consistent with the statutory scheme of the Shipping Act.

We shall look first, and briefly, at the marked differences in "transportation conditions" as between the *NAUK* trade and those with which it was compared. If the Commission meant seriously its reiterated assertions that the *NAUK* decision would be governed by the precedent of the *Iron and Steel* and *Boilers* cases, it is clear that the "transportation conditions" justification, had it been argued by the *NAUK* Conference, would have been upheld. Again, as in the *Boilers* case, the result would have been a violation of section 18(b)(5), and a clear demonstration of the futility of the Commission's regulatory doctrine, in general, and of its rate disparities investigations, in particular. Next, we shall examine the new rates and written justifications therefor filed by the *NAUK* Conference to determine, if we can, whether the *NAUK* results warrant the great public and private cost of achieving them.

There can be no doubt that during the period under investigation

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decision. On November 21, 1968 the Court of Appeals dissolved the stay so as to avoid "any possible claim of mootness of the important issues presented by this appeal . . ." *American Export-Isbrandtsen, Lines Inc. v. FMC*, Docket No. 22,402 (D.C. Cir. 1969) (order of November 21, 1968).

<sup>280</sup> These justifications were conveyed by a letter from C. J. Moran, *NAUK* Conference Chairman, to the Secretary, Federal Maritime Commission, Nov. 25, 1968 [hereinafter cited as *Conference Letter*].

<sup>281</sup> Letter from D. J. Brunner, Director, Bureau of Hearing Counsel to the Secretary, Federal Maritime Commission, Dec. 6, 1968 [hereinafter cited as *Bureau Letter*].

the North Atlantic United Kingdom outbound trade was more effectively cartelized than either the Canada/United Kingdom and North Atlantic Continental outbound trades or the United Kingdom/United States inbound trade. Not only would every experienced shipper and steamship operator active in the United States and Canadian North Atlantic trades with Europe so testify, but there was conclusive evidence to this effect spread across the hearing examiner's and the Commission's NAUK decisions. The Commission found that the NAUK Conference lines carried 98 per cent of all eastbound liner cargo in 1965 while the NAWFA members carried only 94 per cent,<sup>282</sup> and that, more significantly,

There are some special factors that tend to keep the NAWFA rates down: the existence of very active trade associations in the United Kingdom that negotiate with the conference, competition from manufacturers on the Continent, ability of shippers to transship via Continental ports (the rates from the Continent to the United States being lower than those from the United Kingdom), nonconference competition from the United Kingdom and the Continent, conference competition from the Continent, and carriers destined for the United States Great Lakes and Gulf ports with cargo destined to mid-west points.<sup>283</sup>

In every respect mentioned in the foregoing excerpt, with the notable exception of powerful shipper groups and trade associations which are also present in the United States and which negotiate highly successfully with the NAUK Conference, the NAUK carriers face significantly less actual and potential competition. This conclusion is further buttressed by the comparative capacity utilization figures compiled by the hearing examiner for the years 1961-66. While showing an extraordinarily high unused capacity for both conferences, they leave no doubt that the NAWFA members were considerably worse off:

Conference	Percentage of Capacity Unused <sup>284</sup>					
	1961	1962	1963	1964	1965	1966
NAWFA	71.4	68.0	66.2	68.3	64.0	61.4
NAUK	61.0	62.8	65.2	61.4	57.7	53.0

These figures, of course, reflect a complex of underlying "transportation conditions." Not only did the inbound NAWFA members make more

<sup>282</sup> NAUK Investigation at 3-4.

<sup>283</sup> *Id.* at 7.

<sup>284</sup> Init. Dec., *supra* note 194, at 39.

sailings per year<sup>285</sup> and offer a considerably greater carrying capacity to the trade than their outbound NAUK Conference counterparts,<sup>286</sup> but they also had to contend with a larger number of independent liner and tramp sailings.<sup>287</sup> Yet, for their relatively greater supply of liner tonnage there was only a slightly greater quantity of cargo offerings available for the NAWFA than for the NAUK Conference carriers in three of the six years studied, once the bulk and military cargo carryings of the NAUK Conference members are added to their commercial, break-bulk liftings,<sup>288</sup> and in the remaining three years, 1964-67, there was probably less cargo available for the inbound NAWFA

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Conference	Number of Sailings					
	1961	1962	1963	1964	1965	1966
NAWFA	391	409	391	384	361	411
NAUK	319	321	327	372	311	383

*Id.*

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Conference	Total Carrying Capacity in Measurement Tons (000's)					
	1961	1962	1963	1964	1965	1966
NAWFA	3,573	3,441	3,345	3,426	3,157	3,403
NAUK	2,790	2,680	2,696	2,983	2,579	3,117

*Id.*<sup>287</sup> Note 283 *supra*.

<sup>288</sup> The hearing examiner excluded both bulk and military cargo carryings from the measurement and weight tonnage lifted during the period 1961-66 by the NAUK Conference carriers. Yet, bulk carryings comprised of grains, oils, and other bulk liquids, and soy bean meal amounted to 34,601 out of a total of 404,569 weight tons or 8.5 per cent of the total carryings by weight during 1965 of the NAUK Conference members. *See* note 210 *supra*. Military cargo carryings, which move in the main on a measurement basis and are largely restricted to U.S.-flag lines, occupied roughly 33-40 per cent of total cubic capacity outbound of the American-flag members of the NAUK Conference during the six years studied. Statistics are based on confidential data obtained from the carriers and from interviews with carrier and conference officials. As a consequence, it may be estimated that military cargo liftings comprised a minimum of approximately 10 per cent of total Conference carryings on a measurement basis, in view of the substantial share of Conference capacity operated under the American flag. This is a conservative estimate, which much understates the impact of military cargoes during the 1961-63 period, but is somewhat closer to reality for the period 1964-66. In sum, by excluding bulk and military cargo carryings from the NAUK Conference statistics, the examiner understated actual NAUK Conference carryings by a factor of approximately 18 per cent. This is very significant since little or no bulk commodities or military cargoes move inbound from the United Kingdom.

lines.<sup>289</sup> Clearly, the foregoing data could easily have justified a Commission finding identical to that made in the *Boilers* case,<sup>290</sup> that transportation conditions in the trades served by the NAWFA and NAUK Conference, respectively, were so different as to render their rates not fairly comparable, or alternatively, that the lower inbound rates were "depressed" by competition and thus, the higher outbound rates were "justified." A similar analysis is appropriate with respect to the North Atlantic Continental and Canada/United Kingdom trades. As the conferences in these trades clearly faced greater competition than the NAUK Conference in its trade and, accordingly, possessed significantly smaller market shares,<sup>291</sup> the Commission could have and should have found the Canadian and Continental trades not fairly comparable with the NAUK trade in "transportation conditions," or, alternatively, that higher rates were "justified" in the latter trade.

In sum, the rates on onions and meat offal, for example, were lower in the trades compared than in the NAUK trade for the reason that their shippers were better able to substitute the service of independent lines for the service of the conferences in those trades than were shippers of similar commodities in the NAUK trade. Similarly, the rate on General Cargo, N.O.S.—which covers the cargo offerings of perhaps hundreds of shippers and cannot possibly reflect the cost to the carriers of lifting any particular cargo or the value of the service to and relative demand elasticity of any one of the many shippers

<sup>289</sup> In this regard, the preceding note should be read in the light of the following data:

Conference	Measurements Tons Carried (000's)					
	1961	1962	1963	1964	1965	1966
NAWFA	1,024	1,101	1,131	1,086	1,136	1,315
NAUK*	717	686	697	911	863	1,206

Conference	Weight Tons Carried (000's)					
	1961	1962	1963	1964	1965	1966
NAWFA	456	520	519	501	552	661
NAUK*	354	350	327	485	436	520

\* Does not include bulk or military cargo.

Init. Dec., *supra* note 194, at 39.

<sup>290</sup> Text following note 273 *supra*.

<sup>291</sup> The fierce competitive situation prevailing then and now in the Continental trade is so well known as to require no citation of authority; relative to the Canadian/UK trade, however, see CANADIAN RESTRICTIVE TRADE PRACTICES COMMISSION, SHIPPING CONFERENCE ARRANGEMENTS AND PRACTICES, A REPORT IN THE MATTER OF AN INQUIRY UNDER THE COMBINES INVESTIGATION ACT IN CONNECTION WITH THE TRANSPORTATION OF COMMODITIES BY WATER FROM AND TO PORTS IN EASTERN CANADA 36-40 (1965).

concerned—was lower in the inbound NAWFA tariff precisely because that conference feared that a higher rate would divert significant carryings to the independent lines. This pressure of existing and potential competition also explains why the NAWFA General Cargo, N.O.S. rate covered a smaller number of commodities than its NAUK counterpart, the NAWFA tariff being very much more differentiated with nearly 1,000 more tariff entries than the NAUK tariff.<sup>292</sup> The greater the elasticity of demand on the part of shippers, even those controlling small volumes of cargo, the more likely it is that the carriers will have to move away from the General Cargo, N.O.S. rate, with its disregard for the specific characteristics and demand elasticities of particular shippers, toward more personalized classifications and rates tailored to individual differences in bargaining power.

An impressive case can be made then, that the *NAUK Investigation* should have resulted in a set of findings that section 18(b)(5) had not been violated because the justifications made out in the *Boilers* case with respect to the Brazilian and Argentinean rates there in question had been established here as well. This was not the outcome of the investigation, however, because the NAUK Conference did not make this defense. It stressed the foregoing differences in value of service and transportation circumstances not to justify its higher rates, but to deny, *in limine*, the propriety of rate comparisons under the *Iron and Steel* rule. As both the hearing examiner and the full Commission were determined to hold the trades fully comparable, irrespective of the facts,<sup>293</sup> the conference's strategy was an obvious failure. Yet, having adopted it, a reintroduction of the same evidence for the purpose of establishing "rate justifications," was either considered unnecessary or futile. In any event, the NAUK Conference's defeat was hardly inevitable and seems to have been due, ironically, to a failure fully to appreciate the toothlessness of the Commission's regulatory doctrine.

Nevertheless, having lost its battles before the Commission and the courts, the NAUK Conference by no means lost the war. The rates disapproved covered a trivial amount of tonnage and the new rates filed have surely had a minute impact on its revenues. More important for our purposes, however, are the rate justifications which the NAUK Conference finally filed in conjunction with its new, lower rate levels. Nothing better demonstrates the futility of the Commission's regulatory doctrine than these "justifications."

(i) *General Cargo, N.O.S.* The NAUK Conference complied with

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<sup>292</sup> Init. Dec., *supra* note 194, at 33. There were 2,730 commodity classifications in the NAWFA tariff and only 1,650 in that of the NAUK Conference.

<sup>293</sup> See notes 226-9 *supra* and accompanying text.



the Commission's order to file a new General Cargo, N.O.S. rate by replacing its formerly unitary \$70.75 W/M rate with a scale of four rates based upon value as set forth in the margin.<sup>294</sup> Of these only the first two were lower than the previous rate, the first by \$26.75 and the second by \$4.75. The latter two rates are considerably higher.<sup>295</sup> The Conference justified its new rate schedule with the following reasoning: since the General Cargo, N.O.S. rate covers so many and widely varying types of cargo, it cannot reflect cost of service or value of service factors; accordingly, no "justification" may be based on such considerations. Nor did the Conference attempt a justification based on "other transportation conditions." All it would say was that:

So far as "other transportation conditions" are concerned, this Conference points out that its General Cargo rates are substantially lower than those of other conferences serving the eastbound trade to Europe. The new rate scales are in some instances lower and in others higher than those of the inbound conference with which they have been compared but fairly meet the points made by the Commission. The Conference Lines do consider that the new scale of rates may bring them more closely into accord with the value of these unknown—and unknowable—goods, but only future experience can provide an assurance of this.<sup>296</sup>

The Bureau of Hearing Counsel made no comment on the Conference's "justifications," that is, other than taking credit for the change ("This is in accord with our recommendations in this proceeding."), and acknowledging that it was impossible to evaluate the impact of this change until data had been accumulated regarding cargo movement under the new rate levels.<sup>297</sup>

There are three damning features of the foregoing exercise. First, we are unlikely ever to know with certainty whether the Conference's

<sup>294</sup> The new General Cargo, N.O.S. rates effective September 10, 1968 were as follows:

Value per ton W/M	Rate*	Item No.**
Up to \$500	\$44 W/M	3762
\$500 to \$1,000	\$66 W/M	3763
\$1,000 to \$2,000	\$83 W/M	3764
\$2,000 to \$5,000	\$99 W/M	3765
Over \$5,000	2% Ad Valorem	3766

\* This is the contract rate, and is approximately 15% less than the non-contract rate.

\*\* North Atlantic United Kingdom Freight Conference Tariff No. (46) F.M.C.-1.

<sup>295</sup> As of July 28, 1969, two of the General Cargo rates, those for cargo valued up to \$500 per ton and \$1,000 to \$2,000 per ton have been raised by \$5.25 and \$6, respectively.

<sup>296</sup> Conference Letter at 2-3.

<sup>297</sup> Bureau Letter at 1.

rate decrease had any impact on cargo movement. Second, the NAUK Conference's "justification," based as it is on rate comparisons, is as meaningless, if not more so, than the Commission's original rationalization for holding the \$70.75 N.O.S. rate unreasonably high. Third, the rate decrease might even be harmful. Surely, if any one of these observations is correct, the Commission ought to be declared bankrupt under section 18(b)(5).

First, it is clear that both the Conference and the Bureau of Hearing Counsel are correct in declining to speculate regarding the effect of the new rates; experience alone can tell. Nevertheless, it is highly questionable whether, after the data is in, there will be a sound basis for confidence that anything of significance has been accomplished. For the essence of the General Cargo rate is that the cargoes which move under it are truly "unknown and unknowable" until the event, and once they come to the attention of the carriers, they rarely continue to remain rated as "General Cargo, N.O.S." unless the carriers are convinced that the movement of the goods is unlikely to be price elastic. If they are correct—and there are certainly no a priori reasons or empirical evidence to warrant our doubting it, and much, on the contrary, to confirm our faith<sup>298</sup>—then the great majority of the Conference's General Cargo, N.O.S. carryings are unlikely to increase in volume in response to the NAUK Conference's rate cuts. If this is true, we shall never know the value of the exercise, and more important, the carriers will merely lose revenues to no end—but more on the latter point below.

Second, it is noteworthy that the Conference interpreted "other transportation conditions" to refer to rates in other trades and not to competitive circumstances, throwing back to the Commission, as a ground for "justification," the same rate comparisons upon which the Commission originally found the \$70.75 rate to be in violation of section 18(b)(5). But if the General Cargo, N.O.S. rate "bears no relationship to the cost of the service or the value of the service, because it is applicable to a widely varying type of cargo; that is, any cargo for which a specific commodity rate cannot be found in the tariff,"<sup>299</sup> then the General Cargo, N.O.S. rate is strictly arbitrary in every tariff and every trade and no one General Cargo rate may be shown to be less or more reasonable than another merely by a process of comparison. Thus, there was no basis whatsoever upon which the FMC could conclude that the higher NAUK General Cargo rate was unreasonably high merely because it was higher than the NAWFA

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<sup>298</sup> See note 218 *supra*.

<sup>299</sup> *NAUK Investigation* at 16.

General Cargo rate. But this was what the Commission did, and if "turnabout is fair play," it is fitting that the Conference was permitted to "justify" its new rates on the basis of the same meaningless rate comparisons used by the Commission. Presumably, because two of its four General Cargo rates are now lower than the NAWFA rate, they are now "reasonable"!

Finally, there is as much reason to believe that lowering two of the four new General Cargo, N.O.S. rates below the old \$70.75 level may do as much harm to American exporters and the carriers as good. We begin with the proposition that the only cargoes which move under General Cargo, N.O.S. rates are those for which the relatively high rate level is of no significance in the landed price competition in the market of destination; those which possess very little elasticity of demand for ocean transport services; or those which are routed by shippers who are too inexperienced or ignorant to know that it is possible for them to negotiate lower rates from the conference, if they can make a case that lower rates will increase their consignments to the trade. The high ratio of successful to unsuccessful applications to the NAUK Conference for lower rate levels<sup>300</sup> and the proliferation of rating classifications in the NAUK Conference Tariff under which very small volumes of cargo move annually<sup>301</sup> together suggest that the very great majority of shippers under the General Cargo rubric belong in the first two categories described. As a consequence it is very unlikely that the Conference will have increased its revenues by cutting its General Cargo, N.O.S. rates approximately \$26 per ton W/M for cargoes valued under \$500 per ton, and \$4.75 per ton W/M for cargoes valued from \$500-\$1,000 per ton. These rate cuts may stimulate some additional business, if by chance some of the cargoes affected are highly price elastic in the English market, but it is doubtful that the Conference will make up in greater volume all of the revenue which it loses by its lower per ton rates. In any event, it is certain that the highly priced elastic commodities would have sooner or later been recognized and given lower-rated classifications. If this analysis is correct, then the Commission has coerced the Conference into an

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<sup>300</sup> See note 298 *supra*.

<sup>301</sup> The examiner found that although there were 1650 entries in the NAUK Conference tariff in 1965, "three quarters of the tonnage carried by the NAUK vessels that year was transported under just 116 of these tariff rates." *Init. Dec.*, *supra* note 194, at 29-30. It should be noted that after the top 116 items, volume drops off very steeply and rather small shippers are involved. For example, the 200th commodity carried in terms of weight tons, item 6951, grapes, moved in a volume of only 305 tons in 1965. *See* note 210 *supra*. Finally, the cargo statistics distributed by the Conference office to the member lines on a quarterly and annual basis show that there are several hundred tariff entries under which considerably less than 75 tons moves in any given year.

outright loss of revenue which is essential and is, in fact, used to subsidize the carriage of commodities which do not cover their fully distributed costs either because their very low value increases the chances that, if made to pay higher rates they will be uncompetitive in the English market, or because their shippers possess a very high elasticity of demand for shipping service. In this sense there has been a violation of the basic principle of value of service ratemaking, and if sufficient revenues are in fact diverted in this manner, rates for other cargoes might have to be raised to the detriment of the shippers and the carriers, too. In any case, no one knows at present what the result will be, and it is unlikely that anyone ever will. The uncertainty which inheres in this outcome and the absence of any rational way to evaluate it would suggest that the game is surely not worth the candle.

(ii) *The six commodity rates.* The Conference filed new rates for egg albumen, meat offal, onions, plastic sheeting, and toys,<sup>302</sup> which were lower than the rates disapproved by \$4.50, \$4.00, \$1.00, \$21.25 and \$5.00 per ton, respectively. In no case did it offer a rate justification based on cost, value of service or transportation conditions; but, rather, in each instance urged the Commission to accept the new level in question because it narrowed the rate disparity upon which the Commission had based its finding that the old NAUK Conference rate in question was unreasonably high. Thus, the new egg albumen rate, for example, lowered the gap between NAUK and North Atlantic Continental rates to ½ cent per pound on a weight basis or to .3 cents per pound on the measurement basis upon which egg albumen is actually freighted, and the new meat offal rate, in conjunction with an increase in the North Atlantic Continental rate, lowered the disparity between the former and the latter to \$2.25 per ton on a weight basis. In the case of onions, too, the principal NAUK Conference justification was that the Canadian/United Kingdom Conference rate had been substantially increased after the NAUK proceedings ended and thus only a small rate adjustment (\$1.00 per ton) was required to decrease the disparity which bothered the Commission to a mere \$1.25 per ton. In the case of two of the commodities, plastic sheeting and egg albumen, the justification for the modified rates also contained a

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<sup>302</sup> The sixth commodity, sleds, was not given a new rate, but rather was included in the toy rate. The rate for sleds which the Commission had disapproved was the \$70.75 General Cargo rate, which the Conference stubbornly maintained it had never intended to charge for sleds in the first place—the sleds rate having been deleted through a misunderstanding. Accordingly, a cross-reference was inserted in the tariff to make it clear that sleds was now included within toys. Consequently, we shall exclude the sleds rate from all future discussion. *Conference Letter* at 2, 4.

statement to the effect that decreasing the rate disparities in question "should suffice to remove any impediment to the movement" of goods.<sup>303</sup>

The Bureau of Hearing Counsel had little to say regarding these justifications. In the case of meat offal, toys, sleds, and plastic sheeting, it reported that all of the shippers which the Bureau contacted were happy with the Conference's rate reductions. With respect to egg albumen, the Bureau expressed a willingness to disregard the fact that the modified NAUK rate remained higher than the Continental rate on the ground that "there is some indication in the record that the Continental rate may be depressed."<sup>304</sup>

Its only quarrel with the Conference came with respect to its rate reduction on onions of only \$1.00 per ton, which left a disparity between the NAUK and Canadian/United Kingdom rates of \$4.23 rather than the \$1.25 calculated by the Conference, the Canadian dollar being worth only \$0.92 U.S. on the date of the Bureau's comments. The Conference had justified its higher rate on the grounds that (1) the higher NAUK rate was obviously of no consequence to the competitive position of the onion exporters, since Canadian shippers "unable to find suitable space at Canadian ports, are currently trucking onions to New York for shipment to the United Kingdom"; and (2) the new rate, which worked out to only \$13.17 per measurement ton (the freighting basis), was "too low for any perishable commodity."<sup>305</sup> To these arguments the Bureau replied (1) that the Canadian shippers were routing through New York *because* the St. Lawrence River ports were closed for the winter and suitable space was not available at Canadian ports; and (2) that the Canadian rate was even lower on a measurement basis (\$10.71 per ton) and "[f]urthermore, whereas NAUK complains about having to charge only \$13.17 to onion shippers, it maintains tobacco rates of \$11 and \$13.50 per measurement ton."<sup>306</sup> In any event, the Bureau declined to make an issue over the new onion rate because the onion shippers contacted did not request further action.

The Conference's justifications and the Bureau's comments thereon offer no basis for confidence that the *NAUK Investigation* constitutes a worthwhile regulatory accomplishment. Surely, nothing the Conference said establishes the reasonableness of its new rate levels. The problem is, of course, the same as that which we have already discussed: rate comparisons can by themselves neither justify nor condemn rate levels. It is impossible to "justify" charging higher rates because one has more

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<sup>303</sup> Conference Letter at 3-4.

<sup>304</sup> Bureau Letter at 1.

<sup>305</sup> Conference Letter at 4.

<sup>306</sup> Bureau Letter at 2.

monopoly power than other sellers of similar services who are forced to charge lower rates because their markets are less-effectively cartelized. But, as we have seen, any other excuse or "justification" for the NAUK Conference's higher rates is specious. A more effective cartel is its own justification in a system in which cartels are the proper and legal organization of the industry! Thus, when the Bureau of Hearing Counsel accepted the higher NAUK rate for egg albumen on the ground that there was evidence that the North Atlantic Continental rate with which it was compared "may be depressed"—presumably by competition—the Bureau was unintentionally admitting the bankruptcy of the regulatory doctrine to which it is wedded. For this rationale can "justify" not merely the NAUK egg albumen rates, but all its other rates as well. In any event, the willingness of the Bureau Counsel to drop the matter solely because the shippers of the commodities in question were happy with the Conference's rate reductions exposes the very great degree to which the entire *NAUK* proceedings were dependent upon individual shipper complaints rather than any objective standards of rate evaluation.

Finally, the Bureau and the Commission do not come off very well in the former's exchange with the Conference regarding the disparity between NAUK and Canada/United Kingdom onion rates. On the contrary, the exchange confirms our doubts that the Commission ever had any substantial grounds for finding the original onion rate, which it disapproved, unreasonably high. In actual fact, both the old rate, which worked out to approximately \$14 per measurement ton, and the new rate of \$13.17 per measurement ton are very low rates which cannot possibly cover the fully distributed costs of the shipping services which the onion exporters are obtaining. It is likely that both rates leave only a very small margin over the carriers' cargo-related costs, if anything at all. The old rate was as low as \$14 because of the significant bargaining power of the onion exporters, onions being the 8th most important commodity lifted by the carriers.<sup>307</sup> The onion exporters and the Conference have a long history of hard bargaining in which the considerable elasticity of demand of the shippers had forced down the rate to an extraordinarily low level. At all times, in fact, the American onion exporters had utilized a bargaining strategy which whipsawed the NAUK Conference with the lower rates available to their Canadian competitors and to some of their number who routed their cargoes through Canada. Altogether, it may fairly be said that the

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<sup>307</sup> Ranking derived from the Conference's Hearings exhibit note 210 *supra*.

onion exporters had squeezed from the Conference the maximum concessions which they could possibly have obtained on their own, and to suggest that the Conference had violated section 18(b)(5) by failing to concede even more, is obviously absurd. Nevertheless, this is the effect of the Commission's disapproval of the old onion rate. The new rate, amounting to \$13.17 per measurement ton, will only require that the onion exporters be further subsidized by other shippers who are presently paying rates above their fully distributed costs—that is, by shippers possessing less bargaining power. For the Bureau of Hearing Counsel to argue that the NAUK Conference should now be estopped to complain about the low onion rate into which the Commission has coerced it, because the Conference maintains even lower rates for tobacco, indicates the full measure of the Bureau's failure to understand the dynamics of the rate-making process. For the NAUK tobacco rates are also unusually low and border closely on being unremunerative; they, too, certainly fail to cover the carriers' fully distributed costs. Yet, with respect to these rates, as with onions, the NAUK Conference has no choice whatsoever. Tobacco is the second most important commodity in tonnage and the leading commodity in revenue carried by the Conference and its shippers have the strongest bargaining power of any shippers in the North Atlantic trades because they possess the highest elasticity of demand for Conference services. To charge tobacco more is to lose it entirely. Accordingly, to argue that an unusually low rate such as onions is still unreasonably high in violation of section 18 (b)(5), as the Bureau did in its letter, because that rate remains higher than another unusually low rate is ludicrous.

In sum, the results of the *NAUK Investigation* are very discouraging. They carry to a logical extreme the full potential of the Commission's *Iron and Steel*, or rate disparities, rule with all its disabilities. The outcome of the *NAUK Investigation*, like that of the *Boilers* case, illuminates the full dimensions of the Commission's failure to come to grips with the fundamental problems of regulating the rates of one cartel exclusively by reference to the rates of another, absent the power to look to the carriers' rate of return. It has relied upon little more than burden of proof manipulation and the self-serving testimony of witnesses who care little about the broader questions of public policy involved and seek only to maximize their own profits. By itself, this would not constitute a significant departure from the normal practice of most regulatory agencies, but, in view of the fact that the Commission has failed to develop any substantive standards by which it can evaluate the great mass of evidence which its prolific investigations

have generated, the quality of the Commission's regulatory product is unlikely ever to rise above the very low level reached in *NAUK* and *Boilers*.

This is not to say that no regulation of steamship conference rate making is possible or desirable; the conclusion we urge is only that no further broad-scale direct rate regulation be pursued. In terms of rates actually lowered, the costs of the Commission's proceedings far exceed their benefits, and in terms of the regulatory doctrine developed and the results which this doctrine has thus far produced, the entire exercise has been an intellectual debacle. Absent the power to fix rates based upon public utility ratemaking principles, there is no hope that the Commission can pour meaningful content into sections 17 and 18(b)(5). Indeed, if ever effectively enforced, these sections would inevitably conflict on the most fundamental level with sections 14b and 15. The latter create a carefully articulated statutory scheme relying upon the private rate negotiations which have always characterized the price-setting behavior of this industry, while conditioning the bargaining strengths and weaknesses of the shippers and carriers vis-à-vis each other. Our contention is that, to the extent that the FMC or some other agency effectively enforces sections 14b and 15, steamship conference ratemaking may be beneficially controlled in the interest of the United States shippers for whose protection the Shipping Act was originally promulgated;<sup>308</sup> nothing further is required.

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<sup>308</sup> In the next section of the chapter upon which this paper is based, we deal in depth with the manner in which and the reasons why indirect rate regulation is fully capable of accomplishing the objectives which the Commission and its critics have long sought to achieve. Among other things, we point out that most of the impact of sections 14, 14b, and 15 is latent, some of the provisions of these sections are mutually inconsistent and counter-productive, and most of the force of these sections has been neglected or dissipated. In addition, we question whether an independent regulatory agency, such as the FMC, is required to enforce them. Unfortunately, these topics are too lengthy to be discussed in the present article.