The Legal Right Of A Port To Cargo In the Age Of Containerization: Going, Going . . . Not Quite Gone

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I. INTRODUCTION

In the past 5 years the United States has seen the transformation (if not the outright upheaval of) the American transportation system.[1] Legislation has conferred upon the airline,[2] trucking,[3] railroad[4] and intercity bus[5] industries significant degrees of freedom from federal regulatory control and involvement. The foundation for the transformation of the maritime industry, however, was laid nearly 30 years ago through the use of technical innovation rather than through legislation. The birth of the "container revolution"[6] in 1955[7] subjected ocean transportation to a

1. For a discussion of the impact of deregulation of American transportation on the long-lived concept of common carriage, *see generally* Basedow, *Common Carriers—Continuity and Disintegration in United States Transportation Law-Part One*, 13 TRANSP. L.J. 1 (1983).

2. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending scattered sections of 49 U.S.C.).

3. Motor Carrier Act of 1980, 49 U.S.C. § 10101 (Supp. IV 1980). *See generally* Thoms, *Rollin' On. . .To a Free Market Motor Carrier Regulation* 1935-1980, 13 TRANSP. L.J. 43 (1983).

4. Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980). For an analysis of this legislation *see* Note, *The Staggers Rail Act of 1980, Authority to Compete with Ability to Compete*, 12 TRANSP. L.J. 301 (1981).

5. Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102 (1982) (amending scattered sections of 49 U.S.C.).

6. "The Container Revolution. . .reduced to its simplest denominator, . . . connotes no more or no less than a box of freight in motion—a concept as timeless as transportation itself." Schmeltzer & Peary, *Prospects and Problems of the Container Revolution*, 2 TRANSP. L.J. 263 (1970). As noted in the U.S. Dep't of Com. & Fed. Mar. Comm'n, *Ocean Freight Rate Guidelines for Shippers* 28 (January, 1974): "The container may be sealed at the shipper's loading dock and transported door to door by rail or highway and ocean carrier without opening. The major innovative element in containerization is its capacity for efficient intermodal movement."

7. For brief history of containerization, *see generally* NLRB v. International Longshoremen's Ass'n, 447 U.S. 490, 494-497 (1980); *see also* S. WAYNE, *The Container Revolution*, and

change likened to the replacement of sailing ships by steam powered ships during the 19th century.[8] With ports comprising an integral part of the maritime industry,[9] the advent of containerization changed the existing maritime situation dramatically. Because the containerization of cargo provided shippers with an increased flexibility in routing their cargo,[10] it subsequently represented a danger to the flow of cargo from the hinterland.[11] Such flexibility would prove to be decisively fatal in what had been a 50 year battle[12] waged by ports to protect that flow of cargo.[13] The following article will explore the development of the federal protection of the flows of commerce which are exclusive or "naturally tributary" to individual ports[14] or particular ranges of ports. Also addressed

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J. HENRY, *From Jumboizing to the Seabee via the Box Ships' Cargo*, CARGO SHIPS (H. Kummerman & R. Jacqunet ed. 1979).

8. Nat'l Acad. of Sci., Nat'l Research Council, *Port Development in the United States* 13 (1976) [hereinafter cited as "Port Development in the U.S."].

9. The Virginia Port Authority, in fact, "chastised" Congress for not giving ample recognition to the importance of ports in its consideration of so-called "maritime reform legislation":

> Ports are integral components of the foreign commerce of this country, not merely insignificant funnels through which cargo is channelled. H.R.1878 and the recently passed S.47 are best viewed as compromises between shippers and carriers, with added powers and protections for each, with ports not considered so important as separate components to command much specific consideration. It must be remembered, however, states and cities have invested millions, billions of dollars in shoreside terminals to facilitate trade. Ports spin-off billions of dollars in benefits to localities, states, and this nation as a whole. In other words, ports are big business and a growing vibrant industry and their vies on shipping legislation warrant as much consideration as do those of steamship lines—both ports and carriers exist merely to serve the shipper.

The Shipping Act of 1983: Hearings on H.R. 1848 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine & Fisheries, 98th Cong., 1st Sess., 1-2 (1983) (statement of J. Stanley Payne, Jr. General Counsel, Virginia Port Authority).

10. "Containerization is often referred to as 'intermodal transport' because of the ease with which containers can be transferred from one mode of transport to another. Thus, the shipper's proximity to a port is less important than before, *e.g.* a shipper in Chicago can ship containers destined for England through any number of East Coast U.S. or Canadian ports." G. SLETMO, & K. WILLIAM, LINER CONFERENCES IN THE CONTAINER AGE xxviii (1981).

11. "Hinterland" has been defined as "that area within the nation where a port's exports are produced and where its imports are marketed." Interstate Com. Comm'n, Rail Services Planning Office, *Rail Rate Equalization to and from Ports* v. (July 7, 1978).

12. The first allegation of port discrimination pursuant to the Shipping Act, 1916 was Alaskan Rate Investigation 1 U.S.S.B. 1 (United States Shipping Board) (1919). The Port Differential Investigation, 1 U.S.S.B. 61 (1925) marked the initial examination of established cargo flows from interior points to particular port ranges.

13. Many cases have dealt with exclusivity of cargo to *ranges* (North Atlantic, South Atlantic, etc.) of ports. *See, for example* The Port Differential Investigation, 1 U.S.S.B. 61 (1925).

14. The doctrine of naturally tributary cargo has its foundation in Section 8 of the Merchant Marine Act, 1920. Pub. L. No. 66-261, § 8, 41 Stat. 992 (1920) which reads:

> That it shall be the duty of the board, in cooperation with the Secretary of War with the object of promoting, encouraging and developing ports and transportation facilities in connection with water commerce over which it has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of com-

will be the impact of the evolution of containerization on the concept of "naturally tributary cargo", with a particular emphasis on the emergence of "load center" or "super ports".[15] The article will conclude with a look at how to ultimately resolve the conflict between port rights and carrier practices within the context of the Shipping Act of 1984.[16]

II. A PORT AND ITS FOUNDATION; THE HINTERLAND

The link between a port and its hinterland has been succinctly described in the following manner: "Waterborne commerce must flow through seaports with facilities for handling ships and the[ir] cargoes. The anchorage in quiet water is, however, second to the all important hinterland. Lacking that hinterland, harbors possessing great natural advantages can possess only strategic value.[17] A stable dependable hinterland and the flow of cargo from it serves as the basis for the continued existence of the port itself. Although not quite as obvious, the hinterland also serves as a foundation for the umbrella of industry activity radiating from it. It is this latter link of cargo flow sustaining the commercial infra-

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merce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight *which would naturally pass through such ports*: Provided, that if after such investigation the Secretary of Transportation shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or the new rates, charges, rules or regulations new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the board may submit its findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law.

46 U.S.C.A. 867 (Cum. Ann. Supp. 1983) (emphasis supplied). The Secretary of Transportation was substituted for the Federal Maritime Commission by the Maritime Act of 1981, Pub. L. No. 97-31, § 12 (40), 95 Stat. 156 (1981). The description "naturally tributary" was first used by the United States Shipping Commission in *Contract Routing Restrictions*, 2 U.S.M.C. 226 (1939): "We do not look with favor upon the attempt of carriers by artificial means to control the flow of cargo not naturally tributary to their lines," referring to the cargo of steamship lines, not ports, and with no reference to Section 8."

15. The concept of the load center is that of a small number of ports, one or two in each port region serving as the major terminal centers for all container cargo of the port region. Cargo for other ports in the region (range) would move by smaller feeder container vessels or by rail or truck. *Port Development in the U.S., supra* note 8, at 133.

16. Shipping Act of 1984, Public Law No. 98-237, 98 Stat. 67 (1984), codified at 46 U.S.C. app. § 1701 *et seq.*

17. C. McDOWELL & H. GIBBS, OCEAN TRANSPORTATION 76 (1954).

structure built upon the port that most clearly explains the zeal with which legal protection has been sought for ports (through the protection of their cargo flows). Magnified by the so-called "multiplier effect"[18] the economic spinoff of port activity is substantial and far ranging. To illustrate, in 1979 the Port of Hampton Roads, Virginia generated 134,693 jobs (6% of the total state work force) in the Commonwealth, 80,000 of which were outside the port.[19] Port related jobs[20] earned 2.3 billion in income (10% of the salaries and wages in the state) and generated 267.4 million in personal and corporate taxes (over 8% of all taxes paid in Virginia in 1979).[21] From a slightly different perspective, each ton of containerized cargo created $93.38 in revenue[22] and every 169 tons of containerized cargo moving through the port created one job.[23]

The dramatic impact of port activity is not unique;[24] the generation of

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18. The ratio between the total volume of sales (or income or employment) generated and sales directly related to the port is the multiplier for the port industry. The size of the multiplier depends on the structure, size and diversity of the port district's (or region's) economy. U.S. Dep't of Com., Mar. Admin. *Port Economic Impact Kit* 9 (September, 1979) [hereinafter cited as *Port Economic Impact Kit*]. The geographical spread of the multiplier effect of a load center, or even simply a major port, may be nationwide. *Port Development in the U.S., supra* note 8, at 38-39.

19. J. Silberman & G. Yochum, *The Economic Impact of Virginia's Ports on the Commonwealth* V. (1980) (Bureau of Business and Economic Research, Old Dominion University) [hereinafter cited as "*Economic Impact of Virginia's Ports*"].

20. Jobs in transportation and port services include stevedores, longshoremen, warehousemen, ship repair tug boat operators, marine survey, ship watch, ship chandlers, pilots, naval architects, launch service, ship cleaners, industrial marine supply, weighers and samplers, seamen's service, crane service, hydraulic repair, railroad and trucking, steamship owners and agents, freight forwarders/customhouse brokers, and state and federal government employees (Dept. of Agriculture, Coast Guard, Customs, etc.). *Id.* at 16-21.

The Port of Baltimore boasts, for example, of 33 firms specializing in freight forwarding, three specializing in customhouse brokerage and an additional 36 firms performing both services. Maryland Port Administration, *Port of Baltimore Handbook* 1983-84 12 (1983).

21. *Economic Impact of Virginia's Ports, supra*, note 19, at Ch. V, VI.

22. *Id.* at 35.

23. *Id.* at 43.

24. Three examples serve to illustrate this point; first in 1981 the Port of Houston generated 31,699 jobs for Texas residents, 56 percent of which were generated by general cargo. Further, the port generated nearly 3 billion in revenue to the state and national economy with over 50 percent remaining in Texas, including $510 million to the banking and insurance sectors. Finally, the port generated $1.6 billion in personal income for the residents of Texas. Booz, Allen & Hamilton, Inc. (For the Port of Houston Authority) *The Economic Impact of the Port of Houston*, September, 1982.

Second in 1980, the port of Baltimore generated $1.2 billion in revenue and jobs for 79,000 Maryland residents (4% of the state's work force) *Port of Baltimore Handbook* (1983), *supra* note 20.

As a final example, on the average 2,000 forty foot containers per month pass through the port of Oakland as a result of a joint venture between General Motors and Toyota. The joint venture would directly generate 114 jobs and would indirectly generate 76 more jobs as well as

"community benefit"[25] has served to justify the public financial aid and subsidies that have historically been extended to the majority of public port authorities.[26] The fact that some governmental subsidy has been considered a general necessity to continued port viability further illustrates the fact that, even in the past, when cargo flows were protected both legally and through established patterns of transportation, port facilities have not traditionally produced income sufficient to cover their costs of operation.[27] Tradition notwithstanding, an emerging trend is for state and local governments to virtually withdraw from the subsidization of ports and to force port authorities to depend increasingly on their own revenue for further growth and development.[28] Revenue bonds have replaced general obligation bonds as the principal method of long term borrowing by ports. Such bonds are predicated on cargo flow and the generation of revenues to serve as security.[29] The capital intensive nature of containerization with its costly, specialized terminals and related equipment has already placed enormous financial demands on public port agencies.[30] The thrust towards self-sufficiency in the development and growth of ports has presented the ports with a problem that has two dimensions. On the one hand, a port with limited resources and a limited expectation of cargo flow will find the competitive position of its future revenue bond issues in the financial market less promising than other competing ports which have a more established business volume.[31] On the other hand, those ports with bonds already outstanding and with a diminishing cargo base may also find their current bonds jeopardized.

$3.6 million in additional income and $9 million in rental sales. *Toyota to Oakland: 2000 FEUs/month*, American Shipper 59-60 (October, 1983).

For an overview on the economic impact of port activity in general, see *Port Economic Impact Kit, supra* note 18, and Mar. Admin., U.S. Dep't of Com., *What U.S. Ports Mean to the Economy*, (September 1978).

25. The term "Community" is used to refer to the "public," rather than connoting a geographical limitation. The national impact of the port industry is significant. In 1980, the U.S. port industry contributed $35 billion to the gross national product, generated $66 billion in direct and indirect dollar income from gross sales and services, and provided jobs for more than one million persons. In 1982 dollars, the total impact of the stevedoring/marine terminal industry [direct and indirect] amounted to $8.4 billion in revenues, 138,000 jobs, 2.5 billion in wages and salaries, 1.4 billion in business income, and 1.0 billion in Federal tax revenues. Mar. Admin., U.S. Dep't. of Transp., *The U.S. Stevedoring and Marine Terminal Industry* 3 (March, 1983).

26. *See also*, Mar. Admin., U.S. Dep't of Com., *Public Port Financing in the United States* (June, 1974) [hereinafter cited as "*Public Port Financing*"].

27. *Port Development in the U.S., supra* note 8, at 38.

28. Mar. Admin., U.S. Dep't of Transp., *A Report to the Congress on the Status of the Public Ports of the United States* 29, August, 1982 [hereinafter cited as "Report to Congress"]; See also King, *Ports Struggle with Subsidy Habit*, American Shipper 66-7 (April, 1983).

29. *Public Port Financing, supra* note 26, at 20, 29, 31-41.

30. Report to Congress, *supra* note 28, at 10, 11.

31. *Public Port Financing, supra* note 26, at 34-35.

This trend toward self-sufficiency may place the burden of generating port operating revenues on the ports' themselves, and the lack of steady dependable traffic may threaten the level of their daily functioning. Thus, with the stability of the hinterland of a port already the lifeblood for the massive industrial activity generated by it, its flow of cargo may additionally bear the burden of providing port operating and developmental revenues as well. The various pressures associated with pushing the ports toward self-sufficiency have placed an even greater premium on a stable, assured hinterland.

A. THE PROLIFERATION OF PORTS

Despite the apparent risk involved with an investment in the development of port facilities, the role of the port, both as a major industrial development in and of itself and as a "magnet" for economic development[32] has led to their dramatic proliferation. As of 1980, the United States had 1,456 marine terminals located in 189 seaports, comprising 2939 deep-draft ship berthing facilities. Also included within these totals were 1,448 general cargo berths.[33] In 1980 there were 137 container berths despite expenses which averaged as much as $17,102,500 per container berth[34] in the North Atlantic range.[35] Notwithstanding such associated costs, the industry as a whole annually spent upwards of $66 million between 1973-78 on port development.[36] It is estimated that by 1990, at least 111 new container berths will have to be completed to meet the projected demands.[37] In an industry that was "built" upon public investment,[38] port authorities will be faced with a monumental task. There is every indication, however, that they will be willing to meet such demand. The ports of Baltimore, Charleston, Jacksonville, Los Angeles, Miami, Oakland, San

32. Aside from the economic benefits, there is an intangible and allusive attraction to port activity, perhaps linked to the past when "the arrival of [a] ship was a great occasion." Ports are recognized as centers of "population [for] trade, industry and economic growth," *Report to Congress, supra* note 28, at 2. *See also* Mar. Admin., U.S. Dep't. of Com., *National Port Assessment—What U.S. Ports Mean to the Economy*, 4 (1978).

33. Mar. Admin., U.S. Dep't. of Com., *National Port Assessment 1980-1990 An Analysis of Future U.S. Port Requirements* 12 (June, 1980).

By 1984, the number of public and private terminals for ocean-going vessels had grown to 1566. Mar. Admin, U.S. Dept. of Transp., A Report to the Congress on the Status of the Public Ports of the United States, December, 1985 at 6.

34. *Id.*

35. *Id.* at 20. Estimated cost for construction of a container berth (in 1977 dollars) on the Gulf coast, was $11,450,000; on the Pacific Coast, $9,360,000 and on the Great Lakes $13,598,000.

36. *Id.* at 23.

37. *Id.* at 73.

38. In 1980, out of the 167 container facilities nationwide, only five were privately owned. *Id.* at 71-74.

Francisco, Savannah, Seattle, and Tacoma,[39] among others, have completed or are planning expansion of their container facilities. Additional container cranes have been added in Philadelphia, a port that has historically been beset by its location between the major container ports of New York and Baltimore.[40] Boston, similarly situated between New York and Canadian gateways, has recently placed a new container facility into operation.[41] Despite the high cost[42] of specialized port facilities and the increasing difficulties encountered in obtaining financing for their develop-

39. *Container Handling Projects Abound At U.S. Ports*, J. Com., June 25, 1984, at 13C, col. 1.

40. *Id.* at 23c, col. 1. *See also, Port Development in the United States, supra* note 8, at 24 (Philadelphia located in the shadow of larger nearby ports); *Philadelphia Presses Maersk to Continue Calls*, J. Com. Sept. 21, 1984 at 24B, col. 3 (Maersk Line to serve port via barge from Baltimore on Far East Service). *USL May End Direct Calls at Philadelphia*, J. Com. Dec. 21, 1983, at 1A, col. 4 (with introduction of larger ships by United States Lines unlikely to make calls at ports relatively close to each other). *But see, Philadelphia Port Corp. Takes Sales Pitch West*, J. Com., Nov. 23, 1983, at 12A, col. 6 (Philadelphia office calls on "hundreds and hundreds of operations in Philadelphia area previously utilizing Baltimore, New York.").

41. An $18 million, two crane, 10-acre container facility built at Massport's Paul W. Conley Marine Terminal was scheduled for opening in the fall of 1981. *See* Massachusetts Port Authority, 1981 Annual Report, 12. The opening of the port was delayed by a labor dispute, and finally opened in April, 1984. *Container Projects Abound at U.S. Ports*, J. Com., June 25, 1984, at 13c, col. 1.

Massachusetts faces the "location" problems similar to Philadelphia, by being in the shadow of New York. *See Boston Fears Loss of USL Direct Calls*, J. Com., Dec. 12, 1983 at 1A, col. 4 (United States Lines to discontinue direct call at Boston and serve the port by trucking cargo to New York); *see Report to Congress, supra* note 28 at 32-33; *Port Development in the U.S., supra* note 8 at 111-112, 131-132.

For a look at the problem of diversion of cargo to Canadian ports, *see generally* Lidinsky & Hellauer, *American-Canadian Cross Border Container Traffic: Innovation or Cargo Diversion?* 15 J. MAR. L. & COMM. 103 (1984); The Diversion of U.S. Cargo through Canadian Ports: An Evaluation of the Need for Regulation, 17 GEO. WASH. J. INT'L L. & ECON. 167 (1982).

The Massachusetts Port Authority has been especially active and vociferous in defending its hinterland from encroachment. *See* Petition for Leave to Intervene of Massachusetts Port Authority at 3 *Charter and Cargo Revenue Pooling Agreements in the US/Japan Trades* 22 SRR 1010 (1984) (Japanese Flag Five Line Consortium space charter and revenue pooling agreements attacked as means to reduce port calls: ". . .Boston would be the No. 1 candidate for total elimination"); Reply of Massachusetts Port Authority to Petition Seeking Reconsideration of Maersk Container Service Co. Request for Temporary Operating Authority, I.C.C. Docket No. MC 164032 (Sub 1 (ITA) (granted 1983) (attacking Maersk Container Service Company trucking rights application as providing for the transporting of its "local cargo for a tour of East Coast ports" overland).

The Massachusetts and Delaware River Port Authorities have jointly tried to prevent diversion of cargo to New York. See Schmeltzer & Peary, *Prospects and Problems of the Container Revolution*, 2 TRANSP. L.J. 263, 299 (1970). Together with Hampton Roads, Massachusetts and Delaware port authority have expressed a definite bloc of concern with the North Atlantic Conference's application for intermodal authority, for fearing that such authority would be used to concentrate cargo at one or two load centers. *North Atlantic Ports Split on Intermodal Proposal*, J. Com., August 26, 1983, at 1A, col. 5.

42. *Supra* note 35 and accompanying text.

ment,[43] the construction of ports continues. Faced with the decision of whether they should supply additional facilities and services in an attempt to attract future traffic or whether they should wait for demand to develop, ports have historically built so as to avoid obsolescence. The structure of the American port industry, an industry built upon this nation's notion of free enterprise and competition, has subsequently resulted in an ever increasing number of port terminals.[44]

III. INNOVATION—CONTAINERSHIPS AND LOAD CENTERS

While containerization has presented ports and port authorities with an opportunity to share in an ever-increasing cargo volume, the opportunity has brought along with it a concomitant danger inherent in the new technology. Enormous investment in shoreside facilities is required to utilize the technology of containerization and these expenditures are in turn matched by the huge costs of the containerships that are constructed to utilize such facilities. The economics of containership operation[45] are straightforward: large containerships are costly, ranging up to $55 million for each vessel.[46] These ships represent investments that must be amortized at a rate approaching several thousand dollars a day. Because of such financial obligations, the non-revenue earning time must be kept to a minimum.[47] The frequent service required of containerships results in fewer port calls and subsequently faster turn-around times.[48] Calls must

43. *Public Port Financing, supra* note 26, p. 14.

44. *Supra* note 33.

45. *See* G. Sletmo and E. Williams, Jr., *Liner Conferences in the Container Age*, 127-167 (1981); Antitrust Division, U.S. Dep't. of Justice, *Study of the Regulated Ocean Shipping Industry*, Part II 4-19 (January 1977); Council of European & Japanese National Shipowners Association, The University of Wales Institute of Science and Technology, *Liner Shipping in the U.S. Trades*, Sec. A 59-60 (April 1978).

46. The eight 33 knot SL-7's previously utilized by Sealand Service cost approximately $55 million each. Schmeltzer & Sheppard, *Container Feeder Systems* [hereinafter cited as "*Container Feeder Systems*"] 4 J. MAR. L. & COM. 215, 216 (1973). In April, 1983, at South Korean shipyard announced that U.S. Lines had contracted for 12, 4200 TEU (twenty foot container equivalent) containerships at a total cost of $570 million. *McLean Gets 22-man Crews for $47,500,000 Ships*, American Shipper 32 (June 1983). *See also Shipowners Flounder in Charting New Course*, Business Week, 120 (January 23, 1984) (problems of U.S. flag carriers in both modernizing fleets and even remaining in existence).

47. Containerization ships are only in port an average of 25% of the time compared with a 60% rate for a conventional vessel. *Note, Containerization and Intermodal Service in Ocean Shipping*, 21 STAN. L. REV. 1077, 1088-89 (1969); *See Sletmo & Williams, supra* note 45 at 133.

48. The Japanese Consortium replaced 25-30 conventional vessels with 7 containerships on its East Coast-Japan service. Schmeltzer & Sheppard, *supra* note 46, at 216. The Comptroller General found that the rapid adoption of container technology accounted for the decline in the U.S. general fleet from that of the second largest in the world in 1965 to the eighth largest in 1979. Comptroller General, General Accounting Office, *Report to the Chairman, Committee on Merchant Marine and Fisheries U.S. House of Representatives of the United States, Changes in Federal Maritime Regulation Can Increase Efficiency and Reduce Costs in the Ocean Liner Ship-*

be restricted to ports offering substantial cargo volume capacity and the opportunity for a rapid turn-around.[49] There is therefore an incentive to concentrate cargos in as few ports as possible—this is the basis for the container "load center" port.[50]

The concept of load centers and the economics necessitating them are not new. Their establishment was predicated upon the development of an inland transportation structure that can legitimately funnel cargo away from the weakening inland boundaries of other ports. The continuing maturation of intermodalism has provided steamship lines with the tools[51] needed to supplement the long established practices[52] used to draw cargo into load centers. The flexibility provided by containerized

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ping Industry, 12-14 (July 2, 1982). The trend is toward replacing older ships with new, larger containerships on something close to a two-for-one basis. *Fewer Containerships Expected to Handle Growing Tonnage*, J. Com., December 13, 1982, at 1C, col. 5.

New 'round-the-world service' by steamship lines has placed even greater time constraints on vessel utilization. *See Round the World Service Begins As Big Fleets Hit the High Seas*, J. Com, December 10, 1984, at 1c, col. 3.

49. Load centers must be heavily financed, to provide equipment needed for fast vessel turnaround. For example, three of the carriers calling at Baltimore now request three cranes per vessel when the equipment is available. *Load-Center Ports Seem Inevitable*, J. Com., February 1, 1984, at 12A, col. 2. Such substantial funding may require private participation, creating such problems for smaller ports as such funds are inevitably concentrated on load centers. From a technical standpoint, the sheer size of the new 4,200 TEU ships of U.S. Lines may preclude calls except at the world's largest container facilities. American Shipper, *supra* note 46 at 33 (June, 1983).

50. *The Economic Impact of Virginia's Ports*, *supra* note 19. Load centers have been referred to as base or principal ports, *Container Feeder Systems, supra* note 46, 217 note 8; "centers," *note, Containerization and Intermodal Service in Ocean Shipping*, 21 STAN. L.R. 1077, 1093; "intermodal cargo gateways," *Load Center Ports Seem Inevitable, supra* note 49; and "superport", Talbot, *The Dawn of the Superport—Will it Happen Here*, Tidewater Virginian 44 (October 1983).

Smaller ports are usually referred to as "feeder" ports Sealand Services Inc. (Mar. Admin. U.S. Dept. of Com.,) *Development of a Domestic Waterborne Feeder System*, (1976) or "regional ports", "*Container—Feeder Systems*," *supra* note 46, 217 note 8.

51. Discussion focusing on intermodalism must include three terms exclusive to shipping:

Landbridge—method of shipping from Far East ports . . . to Europe, by using water transport across the North American Continent (by rail) to an East Coast port on the Atlantic Ocean, and water transport again on to a European port—essentially "bridging by land" between Asia and Europe across America.

Mini-Bridge (often spoken as mini-landbridge)—a movement from a Far East port to a U.S. East Coast port that involves water transport to a U.S. Pacific Coast port and then overland transport to a U.S. East Coast port. Another mini-bridge system in effect and working is from a U.S. Gulf port to a Far East port, utilizing overland transport from the Gulf port to a U.S. West Coast port and then water transport to a Far East port. Micro-Bridge—the shipment moves directly from the inland point to a port. Whelan, "Bridges . . . Once and For All", Jacksonville SeaFarer 4, 5 (December, 1979).

"Microbridge" service was initiated as late as 1978 but is predicted to account, for one day up to 70% of all container movement in the United States international ocean trade. *See* Shreffler, "*How can Microbridge Survive*," American Shipper 38 (May 1982).

In each of the three, the container moves under a single or through bill of lading—a single

transport, along with the rapid growth of intercity trucking and the development of TOFC/COFC[53] railroad services has resulted in a major shift of inland traffic patterns towards the ports and has dissolved the integrity of

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factor through rate (covering ocean and land transport and terminal charges) is charged, Whelan, "*Bridges . . . Once and For All*", Jacksonville SeaFarer 4, 5 (December, 1979).

It has been called "the ultimate in ratemaking" giving a shipper both facility in dealing with costs, and the advantage of a single carrier assuming liability for the cargo's entire movement by land and sea." Schoedel, *Intermodal Ratemaking to Cause Major Change in North Atlantic Box Trades*, J. Com. Dec. 12, 1983, at 13c, col. 5. Seven conferences were recently granted authority to set collective intermodal ("bridge") in the North Atlantic trade may be the final tool necessary for the development of load centers, for the single factor rates to interior points will be published by the conference, with member carriers quoting the same rate but deciding individually which port to use. *See* Richardson, *Effects of Intermodalism—On Cargo Gateway Selection and The Port Industry*. World Wide Shipping/World Ports 83 (1984).

For a discussion of the foundations for load center, 'bridge' service, and the relationship between the two, see *Load Centers and Landbridges Move to Center Stage*, Container News, June, 1985, 12.

52. Such "long-established" practices have generally been utilized to "equalize" the shipper's cost of using a more distant "load center" with that to the port nearest the cargo's origin. In Sea-Land Services, v. South Atlantic & Caribbean Line, 6 SRR 1105, 1112 (F.M.C. 1966) (SRR: Shipping Rules and Regulations), the Commission discussed the various practices used to effectuate port equalization, excerpted here:

> Port equalization is accomplished in various ways. In its simplest form (sometimes called "equalization" in contradistinction to "proportional rates" or "transshipment"), the carrier pays to the shipper or, sometimes, to the inland carrier directly, the amount by which the cost to the shipper of overland transportation to the port of loading exceeds the cost of overland transportation from the same point of origin to the nearest port. (Note: this is often referred to as "absorption," as the carrier "absorbs" the difference. *See* City of Portland v. Pacific Westbound Conference, 4 F.M.B. 664 (1955). A more complicated method involves "proportional rates," accomplished through the deduction of specified differentials from ocean tariffs where shipments originate at certain points defined in the tariff, *see City of Mobile, infra* note 82.
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> A similar method, although relatively limited in scope, was proposed in *Proportional Commodity Rates on Cigarettes and Tobacco, supra*. There the basic commodity rates on certain tobacco products, from New York to Puerto Rico, were to be subject to deduction of specified differentials according to the location of the Virginia or North Carolina manufacturing plant at which the shipment originated. In each case, the differential specified in the tariff would have been equivalent to the exact amount by which the motor-carrier rate from point of origin to New York exceeded the motor-carrier from the same point to Baltimore. By means of these so-called proportional rates, the carrier would achieve precise equalization against the port of Baltimore on the commodities.
>
> Port equalization may also be effected through "transshipment." As used here transshipment refers to the movement of cargo, usually by land carrier, in the water carrier's name and at its expense, from a dock or terminal at the port where it is originally delivered by the shipper to the water carrier, to the dock or terminal at another port where it is loaded aboard a vessel of the water carrier. Although sometimes employed when the water carrier, for operating or other reasons, does not make a scheduled call at the port where the cargo is delivered, transshipment is also recognized, along with equalization, as a method of meeting the competition of carriers who call directly at a port where the equalizing or transshipping carrier does not call.

53. *Port Development in the U.S., supra* note 8, at 21. The nomenclature of inland transportation of containers is COFC (Containers-On-Flat-Car), or the movement of cargo containers on flat cars by rail, and TOFC (Trailer-On-Flat-Car); the movement of highway type trailers on rail operated flat cars. TOFC is also called "piggyback." I.C.C. Rail Service Planning Office, *Rail Rate Equalization To And From Ports*, Preliminary Report V (July 7, 1978).

their hinterlands, causing such services to overlap significantly.[54] A policy dilemma has resulted.

IV. Port vs. Carrier—The Policy Dilemma of Deregulation

While the maritime and airline industries have faced the transition of deregulation through different means, certain similarities concerning deregulation can still be drawn. The emerging concept of smaller ports or inland carriers feeding a container load center port closely resembles that of the hub-and-spoke system prevalently employed in the airline industry.[55] Just as small communities feared that deregulation of the airlines would bring about a loss of service or inadequate substituted service at best,[56] small ports also fear that the loss of a dependable hinterland will severely cripple their service and activities. The analogy however, is not complete. The evolution of intermodalism has given carriers the ability to feed their hubs overland while bypassing some smaller ports completely. Unlike the Civil Aeronautic Board's guarantee of retaining some level of service to smaller communities,[57] such guarantees have never been

54. North America cannot be easily split up into smaller segments for the purpose of analysis. Overland transport connections mean that ports in different geographical ranges can share overlapping hinterlands. Subsequently the port rotations adopted by many carriers have caused different port ranges to become interlocked. *High Service Standards Prevail in North Atlantic Trades*, Lloyd's Export Shipping 6 (Jan./Feb. 1983). Put in another way, "[t]he hinterlands of individual ports are no longer mutually exclusive but overlap, [and . . .] extensive areas of the United States are served by more than one port, [and are] commonly [served] by several ports or even ranges of ports on different coasts." *Port Development in the U.S., supra* note 8, at 33.

55. For an examination of the phenomenon of the "hubbing" of airline operations, see Civil Aeronautics Board, *Report to Congress, Implementation of the Provisions of the Airline Deregulation Act of 1978*, 9, 10 (January 31, 1984) [hereinafter cited as "*CAB Report*"].

56. The analogy between the two industries, and their regulatory burden, is interesting. The Federal Aviation Act, 49 U.S.C. 1302 et. seq., the basis for the regulation of airlines until 1978, stated that things vested with the public interest included: "(b) the regulation of air transportation in such manner as to recognize the inherent advantages of . . . carriers and (c) The promotion of adequate, economical and efficient service by air carriers at reasonable charges, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practice." These goals parallel to some extent those of maritime regulation. *See* note 60 *infra* and note 14 *supra*. It is not surprising that the fear of smaller communities regarding the loss of regulatory protection curtailing carrier service is shared now by ports. It was also predicted that economically marginal routes to smaller cities, and low traffic density sectors would simply be abandoned by the airlines. *See* Duprē, *A Thinking Person's Guide to Entry/Exit Deregulation in the Airline Industry*, 9 Transp. L.J. 273, 282-3 (1977).

57. The Airline Deregulation Act of 1978, 49 U.S.C. 1301 et seq. has as its policy the encouragement of competition, the development of feeder or satellite airports, and seeks to maintain adequate service as well. To counteract the displacement of service, the Act provides guaranteed "essential air service" to smaller American communities. *See* Dubuc, *Significant Legislative Developments in the Field of Aviation Law*, 45 J. Air L. & Com. 29-32 (1979). *See also* Havens & Heymsfeld, *Small Community Air Service Under the Airline Deregulation Act of 1978*, 46 J. Air L. & Com. 641 (1981).

Substitute services and smaller nonjet aircraft were introduced, with many airlines adopting

within the statutory powers of the maritime regulatory bodies of this country.[58] Through its own decisions, the Federal Maritime Commission has been forced to acknowledge carrier needs for flexibility and freedom while at the same time recognizing that such freedom and flexibility could subsequently saddle the port industry with facilities that could easily become redundant because of economizing by steamship companies.

V. THE DOCTRINE OF NATURALLY TRIBUTARY CARGO

The Federal Maritime Commission (FMC) and its predecessors,[59] entrusted with the protection of shippers, steamships and ports, have been forced to apply statutes passed in 1916[60] and 1920[61] to a shipping in

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a hub and spoke concept, by connecting a major air center with the surrounding smaller communities. Substituted service, as a means of protection, has not been entirely adequate, however. "Although this approach increases the overall efficiency of the services provided, it cannot counteract the detrimental effects on air service caused by a decrease in the number of seats on departing flights and the diminished quality of service experienced by the smaller community." *See* Meyer, *Section 419 of the Airline Deregulation Act: What Has Been the Effect on Air Service to Small Communities*, 47 J. AIR L. COM. 151, 167 (1981). Among the negative effects of such substitute service has been a decrease in the attractiveness in locating in new communities. *Id.* at 175. *See also CAB Report, supra* note 55.

Airline regulatory reform was also opposed by airport operators, who feared, as did the ports, that carrier freedom would undermine their financial stability. One commentator, however, felt that deregulation would lead to "less monument building", or capital investment several times that justified by reasonably foreseeable levels of traffic. Kelleher, *Deregulation and the Practicing Attorney*, 44 J. AIR L. COM. 261, 290 (1978).

58. *See, for example*, San Diego Harbor Comm. v. Matson Navigation Co., 2 SRR 127 (1962).

59. The Shipping Board was succeeded in 1933 by the United States Shipping Board Bureau, Exec. Order No. 6166, § 12 (1933), note following 5 U.S.C. §§ 124-32 (1958); The U.S.S.B.B. was in turn succeeded in 1936 by the United States Maritime Commission, Merchant Marine Act of 1936, ch. 858 § 201, 49 Stat. 1985. The U.S.M.C. was replaced in 1950 by the Federal Maritime Board, Reorg. Plan No. 21 of 1950, 64 Stat. 1273; and in 1961 by the Federal Maritime Commission, Reorg. Plan No. 7 of 1961, 75 Stat. 840. Note, *Rate Regulation In Ocean Shippin*, 78 HARV. L. REV. 635, 639 note 30 (1965).

60. Allegations of violation of Sections 16 First and 17 of the Shipping Act, 1916 are the crux of port discrimination cases. Section 16 First 46 U.S.C.A. § 815 (Cum. Ann. Supp. 1983)

> makes unlawful to . . . make or give any common carrier by water or any other person subject to this chapter, either acting alone or in conjunction with any other person, directly or indirectly . . . any undue or unreasonable preference or advantage to any particular person, locality, or description or traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 17 provides that:

> no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors.

Section 17's prohibition against undue discrimination among shippers could not logically be applied to ports. Discriminatory practices involve carriers exacting different payment from shippers using the same carrier, from the same point of origin and to the same point of destination.

industry that has undergone significant technological and structural changes since such statutes were enacted. Commission difficulties have never been greater than when the Commission is forced to reconcile the interests of the ports and the carriers, interests that have dramatically diverged along with the growth of containerization.

The "law" of discrimination against ports began as early as 1919 and has continued to evolve along with the maritime industry. From the

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Discrimination among ports, however, must always involve *two* ports. Undue discrimination under Section 17 should be viewed as undue or unreasonable preference or prejudice under Section 16 First. Council of No. Atl. Shipping Assoc. v. American Mail Lines, 17 SRR 781, 839-47 (F.M.C. 1977). *See also* Heavy Lift Practices and Charges, 17 SRR 505 (1977) (discussion of undue preference, prejudice under Section 16 First and unjust discrimination under Section 17).

61. *See* note 14 *supra*, and accompanying text. The Merchant Marine Act, 1936 contains specific port protection language. Section 205 provides:

> Without limiting the power and authority otherwise vested in the Federal Maritime Commission and the Secretary of Transportation, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels. [One can not prevent a carrier] located on any improvement project authorized by the Congress . . . lying within the continental limits of the United States, [from providing service] at the same rates which it charges at the nearest port already regularly served by it.

46 U.S.C.A. § 1115 (Cum. Ann. Supp. 1983). The Federal Maritime Commission and the Secretary of Transportation were substituted for the Commission in the first sentence of the provision by the Maritime Act of 1981, Pub. L. No. 97-31, § 12 (62), 95 Stat. 151 (1981).

Section 205 is incorporated into Shipping Act considerations. In Sacramento-Yolo Port District v. Pacific Coast European Conference, 12 SRR 528 (F.M.C. 1971). The port of Sacramento instituted a barge service from Sacramento to San Francisco, offering the service to carriers and not shippers. The conference agreement governing the activities of the steamship lines that might use the service prohibited absorption of barge service expenses. Sacramento alleged that the prohibition violated Sections 15, 16 First, and 17, and was contrary to Section 205 since it prevented lines from serving the port.

The Commission held that activity which contravened Section based on the legislative history of section 205, activity which contravened sec. 205 clearly was not approvable under Section 15. The commission and struck down the nonabsorption provision as contrary to the public interest under the latter section. *Id.* at 537. In a later case, Associated Latin Freight Conferences, 12 SRR 985 (F.M.C. 1972), the relationship between the Shipping Act and the Merchant Marine Act, 1936, was examined, with specifically Section 205 serving as the single legal issue. That the Commission surmised [t]he fact that different agencies may have been primarily responsible for enforcing the two sections does not mean that the substantive or policy content of those sections exists in a vacuum independent of each other. *Id.* at 989. Further, [t]he fact that Section 205 was not assigned to the Commission and Reorganization Plan No. 7 [does not indicate that it was an affirmation of] the intent of Congress to dilute, in any manner, the policy or proscriptions set forth in that section. *Id.* Despite the fact that the Commission has no specific authority to enforce Section 205, Section 205 could not "operate in its own statutory vacuum oblivious to the overall policy or objectives of Congress. *Id.* The Commission application of Section 8 of the Shipping Act was cited because it provides an expansive interpretation of the available rights. *Id.* Apparently overruled was *India, Pakistan, Conference—Discount Tariff Rule* 9 SRR 727 (F.M.C. 1967) (a proceeding brought under Shipping Act, not under Merchant Marine Act, which precluded consideration of Section 205 principles).

initial cases that formed the historical foundations of the present port/carrier conflict arose the distinct interests that would have to be balanced: the interests of the ports; the interests of those who gained an advantage or who were disadvantaged through carrier practices; the interests of steamship lines; the interests of shippers, and most importantly the interests of the American public. It suffices to say that cases in this area are decided on the basis of what interests are the most deserving of the protection of the Commission. Commission decisions can also be rendered based upon the perceived reasonableness of the "methods" utilized by steamship lines to serve the hinterland of a port without the necessity of a direct ship call. Such a notion of "fairness" was to become a formal standard of the Commission in the late 1970's.[62] Another consideration that permeates this long line of port discrimination cases is the extent to which technological advances outdate Commission policy and the degree to which such policy is either modified in recognition of and to accommodate those changes, or is maintained in resistance to such change. The strength of Section 8 of the Merchant Marine Act (MMA) reflects Congressional policy regarding the protection of ports and illustrates the extent to which rigid adherence to such protection could stifle innovation.

VI. EARLY CASES

In 1919, during the infancy of the Shipping Act of 1916, the United States Shipping Board (USSB) instituted a general investigation into the rates, regulations, and practices of ocean carriers involved in the Washington State Alaska trade. This investigation would mark the beginnings of the first port discrimination case.

In *Alaskan Rate Investigation*,[63] Anchorage farming and coal interests contended that higher ocean rates were being charged between Juneau and Anchorage than were being charged at Puget Sound ports, and that this practice subjected Anchorage to unjust discrimination. The USSB agreed that the price differential was unduly preferential to the Puget Sound ports and prejudicial to the Anchorage ports. The USSB found that much larger quantities of commodities would have moved through the Anchorage ports if the rates at this port were not 40 to 50% above the rates charged at the Puget Sound ports. Furthermore, the defendant steamship company could not show any justification for the differential and they themselves testified that the rates charged at the different ports

62. *See generally* Council of No. Atl. Shipping Assoc. v. AML, 18 SRR 774, 779 (F.M.C. 1978).

63. *Alaskan Rate* Investigation, 1 U.S.S.B. 1 (1919).

for the commodities in question should be equalized.[64]

Aside from its purely historical significance,[65] the decision in *Alaskan Rate Investigation* suggested a two step test for the consideration of allegations of port discrimination. Under the first step, an aggrieved port (or port interest) would have the burden of proving that the rate or practice has a detrimental impact on its flow of cargo.[66] Second, once this causal link has been established, carriers could then offer evidence justifying the practice and could then balance their interests with those of the complainant ports and shippers.[67] Such a decision underscores the important link between the ports and their hinterland, while adding weight to the general premise that whatever burdens the flow of products from a port's hinterland necessarily damages the port.[68]

In the next two cases, the broad scope and impact of the practices in question are pivotal with regards to the evolution of the right of a port to cargo.

In the first case, *The Port Differential Investigation*,[69] a system of rate differentials set by North Atlantic, South Atlantic, and Gulf steamship conferences in the heavy U.S.-European trade route (reflecting the differences in operating costs among the three ranges) was alleged to violate Sections 16 and 17 of the Shipping Act.[70] Unlike *Alaskan Rate Investigation*, in which rate differentials precluded shippers in the hinterland of one

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64. *Id.* at 11.

65. In upholding the tariff rule that required vessel calls at a private dock to offer a minimum of 25 tons of freight, the Shipping Board would also be forced to weigh the advantages, disadvantages, and legality, of limiting port calls to load centers, the steamship owned docks. Disadvantages included the following: increased steamship line costs in handling several small shipments rather than one large one, the issuance of separate shipping receipts, thus creating separate way bills and expense bills. The commission, in an analysis that is still applicable to the present day concept of load centers, reasoned that if shippers are required to call at ports for amounts of cargo smaller than the minimum, "ships would be seriously delayed by calling at various loading places for small shipments, . . . [and this would necessitate the use of] more circuitous routes of travel and in decreased efficiency of operation", contrary to the "public interest." *Id.*

66. Commonly called the "*but for*" or "*sine qua non*" rule in actions based in tort, it provides that '[t]he defendant's conduct is not a cause of the event, if the event would have occurred without it." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 238-9 (4th ed. 1971).

67. Steamship lines could attempt to show that the two ports were "substantially dissimilar" or not "substantially similarly situated," thus justifying the differentials. *Supra* note 63 at 10, 11.

68. Underscoring the link between hinterland and port, the shippers asserted that undue discrimination against the port was, in essence, discrimination against them. Compare with Board of Commissioners v. Seatrain 2 U.S.M.C. 500, 504 (1941) "A port and its transportation service are indissolvably linked together, are interdependent and a practice harmful to one injures the other."

69. The Port Differential Investigation (United States Maritime Commission) 61 (1925).

70. South Atlantic interests asserted that their rates were set differentially higher than for North Atlantic ports, and that this violated Sections 17 and 18 of the Shipping Act, 1916. Section 18 provides, in part:

port from competing effectively with shippers in the hinterland of another port, *The Port Differential Investigation* focused on the competition among three port ranges for the same cargo which came from the industrial U.S. Midwest.

As in the *Alaskan Rate Investigation*, such allegations faced a two-tiered level of scrutiny: one excluding the rate differentials, more cargo would have moved through the aggrieved port (or port range); two carriers could not justify their rate or practices by factors such as the volume of traffic handled at the port, the competition or distance among the ports, the advantages of location of one port over that of another, the character of traffic at the port, the frequency of service at the port, or the cost of operations at the port.[71] The fact that such aforementioned factors could be successfully utilized in the defense of a rate or practice was clearly elucidated in a preliminary statement issued by the Board in which "the character of discrimination inhibited by these provisions (Section 16 and 17 of the Shipping Act of 1916) is discrimination which is undue, unreasonable, or unjust."[72]

In *The Port Differential Investigation*, the Board focused on the hinterlands of the respective port ranges so as to determine the impact of the rate differentials. The Board found that the South Atlantic and Gulf ports primarily drew "low class, unmanufactured articles. . .from territory. . .recognized as local to [such] port groups" while the North Atlantic range captured a substantial volume of "high-class package freight" from the Midwest market, a market deemed to be a competitive area for all three groups. Moreover, witnesses representing the South Atlantic and

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"(a) Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

[Further] . . . Whenever the Commission finds that any rate, fare, charge, classification, tariff, regulation or practice, [which is] demanded, charged, collected, or observed by such carrier is unjust or unreasonable,it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice," was deemed inapplicable by the Board and was not considered. 1 U.S.M.C. at 63.

Conversely the Norfolk Port Commission, representing the southernmost port in the North Atlantic range, conversely, attacked rates set at parity among the three ranges and certain commodities as violative of Sections 16 and 17. *Id.* at 64.

Because the focus of the Board's investigation and discussion were the fixed rate *differentials* set among the three ranges, this will be the focus for the purpose of this paper.

71. The Commission stated, however, that it did not concur in the theory that a carrier is justified in burdening a port with a differential for the sole and only reason that the cost of operation from that port is greater than from some other port. *Id.* at 69.

72. *Id.* at 65. See text accompanying note 60, *supra*.

Gulf port interests testified, in a statement that was to be fatal to their cause, that the normal flow of Midwest cargo was through the North Atlantic ports, and that "[in the] absence of congestion or [the] inability of such ports to handle this traffic, it is not likely, even with parity rates, that any appreciable volume of it [would] move through the Gulf or South Atlantic ports.[73] In other words, factors other than the rate differentials determined the direction of the flow of cargo[74] and therefore the threshold of causation had not been met.

The statutory right of a port to federal protection of its cargo base was not specifically addressed by the Board in its decision in *The Port Differential Investigation*. The interpretation of the Merchant Marine Act of 1920 (MMA) and particularly Section 8 of the Act promoting the development of ports through the protection of cargo was, however, vigorously

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73. 1 U.S.M.C., at 68. Port development in the United States was, to no small degree, dependent on the port's vital link to its hinterland, first by road and inland waterway, later by canals and most importantly, railroads. The rail networks expanded, westwardly and rapidly into the developing "Western hinterland," culminating in 1826 with two all-rail routes linking New York and Chicago. Midwest links to other North Atlantic ports followed. *Port Development in the U.S.* at 15-18.

Southern and Gulf ports would "reach" the interior somewhat later. Prior to the latter part of 1919, there were virtually no through joint export rates from the interior territory of the country to the Gulf and South Atlantic ports. Interior territory roughly points eastward of a line drawn from Chicago, through Indianapolis to Cincinnati. Railroads serving the "southern" ports, unable to reach this industrial area with their own rails, could only do so with joint through rates with, eastern carriers that served the North Atlantic ports with their own rails from that territory. Such joint through rates were established only with the assumption of Federal control over the railroads in 1919 during wartime emergency. *See generally* Export and Import Rates To and From South Atlantic and Gulf Ports 169 I.C.C. 13 (1930).

After the war, South Atlantic and Gulf railroads proposed an adjustment in their federally-established joint export through rates with eastern carriers, asserting that only with differentially lower rates could their disadvantages be offset to any extent and "enable foreign commerce to move freely" through Southern and Gulf ports. In justification of such an adjustment, and highlighting their disadvantages, South Atlantic and Gulf witnesses blamed "the established trend of cargo movement between the North Atlantic and foreign ports and the tendency of shippers to prefer routes they have long been accustomed to use,". Export and Import Rates, 169 I.C.C. at 34. They attributed their lack of success in directing a more than minimal flow of manufactured goods through their ports to their concomitant lack of success in attracting fast, frequent steamship service, which in turn could be attracted only by higher rates attainable for carriage of manufactured goods. *Id.* at 37. Caught in a vicious circle, the South Atlantic and Gulf ports, without the populous, industrial hinterlands of the North Atlantic ports, and with no "presence" in the interior of the country, were outlets only for a limited number of raw products of the south from territory adjacent to the ports. *Id.*

74. Other ports in the North Atlantic not only did not enjoy the advantages of the port of New York vis-a-vis southern ports but in fact labored under many of the same handicaps. 169 I.C.C. at 51. New York's advantages included being the location of the headquarters of a majority of the principal steamship lines and most of the export and import brokers controlling traffic. *Id.* at 50-51. New York also had many more sailings and service to more foreign ports by larger and faster steamships, and superior banking facilities. Differential Rates 11 I.C.C. 13, 27 (1905).

advanced by the port interests.[75] The Board at least acknowledged the concept of "tributary" cargo flows in its analysis, focusing on the "natural flows" of cargo to the respective port ranges. The Board also focused on Section 8 by stating that "in the great public interest it would seem obvious that rate structures should be made so as to permit the flow of traffic to pass through as many ports as [the] economics of transportation and distribution will allow."[76]

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75. The hearing transcripts indicate some confusion over the applicability of Section 8. Witness H.H. Haines, Vice President and General Manager, Houston Chamber of Commerce, was told after specifying the provision, that he "did not have Section 8 in mind" because it did "not authorize the Shipping Board to remove discriminations." His response was that while the authority was not specified in the provision itself, "there are provisions of the Shipping Act which do, and the expression of those sections of the Merchant Marine Act and Transportation Act indicate very clearly the intent of Congress." Hearing Record, Oct. 10, 1924 at 847-48, The Port Differential Investigation 1 U.S.M.C. 61 (1925).

Matthew Hale, representing the South Atlantic Steamship Association went further, providing a history of the advantage of North Atlantic ports over those in the South Atlantic, recognized by the United States Congress when Section 8 was framed:

> In other words, just to review, in 1860 we were at least even with the North Atlantic, and according to statistics a little bit ahead. In 1860 to 1865, it was not economic law which developed the foreign trade of New York. It was northern armies and northern navies which cut the South off, and from 1865 to 1877, the critical period in the building up of the commerce of the United States, it was not economic range that built up the North Atlantic, it was negro domination of the South, and at the same time railroad building by the North helped by taxes—just get this gentlemen—out of the national treasury to which the South contributed. In other words, while we were being subjugated by negroes in the South, we were helping to pay for the railroads built from the North Atlantic to the Middle West and the far West, which are now to be used, thirty or forty years later, as a reason for our continuing to stay in subjection because of, first, military domination, second, political domination, and third, an arbitrary system of rail rates, and this is what diverted this traffic to the North Atlantic.

It was for this injustice that Congress enacted Section 8, asserted Hale. Hearing Record, November 25, 1924 at 911 *The Port Differential Investigation. Id.*

Richard K. Hale,for the Department of Public Works, Commonwealth of Massachusetts asserted that the case must be decided in light of the broad principles of the Transportation Act (1920) and the Merchant Marine Act (1920), agreeing with the southern ports "in support of the proposition that as many channels of trade as possible ought to be opened for the flow of the Nation's business." "The new law," he summarized, "contemplates that the railroads should have adequate rates to sustain them in order that they might render service. It provides consolidations of railroads to eliminate wasteful routes. It provides for the development of ports and you were to cooperate with the Secretary of War in that respect. It provided for a national fleet of merchant vessels under your direction. It provided for the coordination of rail and water transportation in the interest of the Nation."

Hearing Record, November 25, 1924, at 969-970, *The Port Differential Investigation. Id.*

76. This was advanced by counsel for the Port of New York Authority in conjunction with the New England ports, 1 U.S.S.B. at 71. Both were certainly aware of the conclusion earlier by the I.C.C. "[that] the maintenance of equal rates through all ports would divert traffic to New York to a much greater extent than it at present moves through the port." In the Matter of Differential Rates 11 ICC 13, 28 (1905).

The notion of equalized "through" rates was, of course, "manifestly beyond the scope of the Shipping Board's jurisdiction." 1 U.S.S.B. at 71. On the continuing question of "regulatory" jurisdiction over joint rail/water rates and additionally an examination of the "law" of cargo diver-

The assertion that Section 8 reflected Congressional intent and, as such, imposed responsibilities on the Shipping Board through the Shipping Act deliberations, although somewhat surprising, was still a tenuous concept at best. Section 8 may best be viewed as a response to the rail congestion that besieged the port of New York during World War I and which crippled vital European supply lines.[77] The principal aim of Section 8 was to break the stranglehold that the dominant northeast railroads and their North Atlantic outlets had on cargo moving from the interior of the country overseas.[78] While Section 8 granted the Shipping Board[79] the

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sion, *see generally* Note, *Challenges to the Legality of Minibridge Transportation Systems* 1978 DUKE L.J. 1233; Note, *Containerization and Intermodal Service in Ocean Shipping*, 21 STAN. L. REV. 1077 (1969).

77. There had been a growing inability on the part of the carriers to meet the country's expanding commercial and industrial needs satisfactorily even prior to the outbreak of war. *See generally* J. Sharfman, *The Interstate Commerce Commission* 157 (1969). In 1907, at hearings examining the severe car shortages in the Midwest and Great Plains, the president of the Northern Pacific (Railroad) stated that in "attempting to handle freight offered they were trying to force a 3-inch steam through a 1-inch nozzle." *In the Matter of Car Shortages and Other Insufficient Transportation Facilities* 12 I.C.C. 561, 565 (1907) (hearing of January 2, 1907). The President of the Great Northern Railroad testified that "[d]uring the time from 1895 and 1905 the business of the country—the tons moved 1 mile—increased 110 percent, and the facilities—the increase of facilities for doing the business and handling the miles—increased 20 percent in ten years, or 2 percent per annum. But of that 20 percent three-fourths of it was new mileage that was built in sections of the country that added to the congestion of the old." *Id.* at 565. Other witnesses testified that the problem was more one of poor use of existing equipment, "loading cars standing from two to twenty days at the points of origin, of empty cars lost in congested terminals or lying unused, sometimes in solid trains, for equal lengths of time." *Id.* at 566.

By 1916, the burden on the nation's railroads had become unprecedented. Interstate Com. Comm'n *Annual Report*, 72-73 (1916), 72-73. The "conditions of car distribution had. . .no parallel in U.S. history." Car Supply Investigation 42 I.C.C. 657 (1917). The Commission found "in consequence mills have shut down, prices have advanced, perishable articles of great value have been destroyed, and thousands of carloads of food products have been delayed in reaching their natural harbors." *Id.* at 661.

With formal American declaration of war in 1917, this burden on the railroads increased tremendously. "In the first five months after a state of war was declared to exist between this country and Germany, the railroads handled more freight than in any whole year previous to 1904." J. Sharfman, The Interstate Commerce Commission 143, note 11 (1961) (quoting C.O. Ruggles "Railway Service and Regulation," Quarterly Journal of Economics, Vol. 33 (November, 1918, 129-130). With the predominant flow of cargo to Europe naturally through Atlantic ports, New York harbor became "an extraordinary sight." Not since the days of Jefferson's embargo preceding the War of 1812 had there been such a mass of ships riding at anchor or made fast to docks. By 1918, thousand of freight cars waiting to be loaded jammed New York terminals. N.Y. City WPA Writers Project, *A Maritime History of New York*, (1941). On January 1, 1918, 7086 carloads of freight were "standing on wheels" at New York. On January 15, 1918, port congestion caused by the shifting and reshifting of cars to match ships, resulted in 213 ships waiting in New York for bunker coal. J. SMITH, INFLUENCE OF THE GREAT WAR UPON SHIPPING 205-206 (1919).

78. Prior to the latter part of 1919, there were no joint through export rates from the interior territory to Gulf and South Atlantic ports. *See* Export and Import Rates 169 I.C.C. 13, 18 (1930). The first such export joint rates were mandated in a letter of September 24, 1919, from the

power to investigate the means of promoting, encouraging, and develop-

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Director General of Railroads, United States Railroad Administration to North Atlantic "interests". *Id.* at 69-70, Appendix B. The "proposal', understandably, was not met with enthusiasm by Eastern railroads, which felt it would cause the diversion of considerable traffic, working to "short-haul a number of carriers upon whose lines the business originates," and causing freight to move twice its normal distance to seaboard. *Id.* at 71. The Railroad Administration responded that, "It is certainly in the best interest of the country as a whole to distribute the export traffic in a reasonable way among all ports which is what we have in mind in this adjustment." *Id.* at 72.

The legislative history of Section 8 itself specifically is quite sketchy, as the Commission noted in Board of Comm'n v. Seatrain International, 18 SRR 763, 772 (F.M.C. 1978). The "single statement concerning the amendment which eventually became Section 8 provides "Amendment No. 53: This amendment confers general powers upon the board to investigate terminal facilities at ports, and in case it finds that rates of rail carriers are detrimental to the upbuilding of such ports or that new rates or additional terminal facilities should be made by carriers it may submit its findings to the Interstate Commerce Commission. . . ." Joint Conference Committee on H.R. 10378 American Merchant Marine, H.R. REP. NO. 1093, H.R. No. 1102 and H.R. No. 1107, 66th Cong., 2nd Sess. 27-28, and 25-26 (1920)."

Most, if not all, of the debate focused on the disposition by the government of the enormous fleet of vessels accumulated during World War I through the establishment of a large number of shipping lines to operate on trade routes from the many coasts of the country. Excerpts of the ensuing Congressional debate show that a secondary thrust of the legislation, to stimulate the flow of commerce through many more ports, was debated:

> The people of this country are not going to divert their products as a matter of sentiment from the ordinary lines of commerce. Our people in the Mississippi Valley, who desire to ship their goods direct to Europe, are going to take the shortest and most rapid route to get the goods to Europe. They are not going to divert their commerce to ports at one side of the main routes of commerce. They are not going to send their traffic around by a by-path just for the sake of establishing traffic at a given small port, either on the Gulf Coast or the Atlantic Coast. In one way I can sympathize with small ports on the Atlantic and Pacific regarding which there is an idea that by furnishing ships for them we can build up their commerce and give them a trade that under natural conditions they cannot obtain. But there are two matters involved in the problem. It is not only a matter of furnishing ships but it is the course and trend of the import and export trade of the country. In other words, will a certain class of commerce go to a certain port just because you have ships ready, or will it go to a port because of the trade and traffic and market for the goods there? My own idea is that you cannot build up any such commerce by artificial means. Cong. Rec. 6809 (daily ed. May 10, 1920) (statement of Senator Nelson).

The problem of port congestion was highlighted:

> A system has developed centralizing very largely the shipping from the North Atlantic ports of our country. This tendency toward the centering of the shipping from the North Atlantic ports was emphasized during last year when it came to the question of the Shipping Board allocating its vessels.
>
> If there is one evil in this country from which the American people should be relieved it is the bottling up of the freight from all over the country in the city of New York. There is scarcely a section of the country but that has suffered on account of the congestion which almost continuously exists, bottling up everything in this particular center. 8168 Cong. Rec. (daily ed. June 4, 1920) (statement of Senator Trammell).
>
> It is very important, however, that the ownership of these ships shall be distributed all over the United States. During the recent World War there was a great congestion of goods for shipment in the maritime ports, and there has been congestion since that time. It is said that there was string of loaded cars from New York back to Cleveland and possibly farther west. I wish that the ports of this country could be opened clear around the waterfront of the United States.
>
> Just recently five of the South Atlantic ports sent a very large delegation out West; they went to Detroit and possibly as far as Minneapolis. I think the distance from

ing ports, it vested in the Interstate Commerce Commission (ICC) the ultimate authority to take action against "rail rates and practices" contrary to that end.[80] Perhaps this clear jurisdictional division of responsibility explains the Board's hesitancy to both adopt Section 8 in *The Port Differential Investigation* in 1925 and to broaden its authority. Still unsettled, however, was the question concerning how ocean transportation could be effectively regulated in a vacuum, without consideration of the impact of the often intertwined rail transportation on the flow of cargo to the seaboard.

> Charleston or Savannah to Chicago is practically the same as it is from there to New York. So if we would open up the South Atlantic and Gulf ports, instead of railroads being congested and not being able to handle our freight, the freight being shipped to those ports, we should get our goods to market more quickly and cheaply, and the whole country would thereby be benefitted.

Cong. Rec. 8489, 8490 (daily ed. June 4, 1920) (Statement of Senator Dial).

79. Section 8 was amended in 1981 to give the Secretary of Transportation this responsibility. See text accompanying note 14 *supra*.

80. Many railroad sought to increase the volume of international traffic at the ports they served by operating their own marine terminals. "With the exception of New York, port development in the United States has been of one railroad, by one railroad, to serve one railroad. The waterfront, the railroad pier, and even the line of ships berthing at the pier have all come to be considered by the railroad as part of its own private system. . ." *Port Development in the U.S.*, at 19, quoting R. MACELWEE, PORT DEVELOPMENT 273 (1926).

Other rail practices could be utilized to increase rail control over the flow of commerce. In Mobile Chamber of Commerce v. Mobile & O. R.R. 23 I.C.C. 417 (1912) the Southern Railway and Mobile & Ohio Railroad were accused of denying ships access to their docks, giving preference to those lines with which the railroads had special arrangements forcing shippers to other wharves where they would have to pay the switching, docking, and unloading charges absorbed if railroad wharves could be utilized, and refusing to issue through bills of lading to shippers unless the cargo would both move over railroad piers and to Europe on preferred steamship lines. *Id.* at 418. The Commission was especially critical of this latter practice, stating that "if this practice were to obtain at all ports it would be but a short time before there would be only so many steamship lines as there are railroad lines, and the ocean would become in a sense the property of the railroads, for they could make their ship-side rates and issue their through bills of lading only to those shippers who accepted movement beyond the ports by the railroad steamship lines." *Id.* at 426. For a discussion of other railroad-steamship line arrangements, *see* Pacific Navigation Co. v. Southern Pac. Ry., 31 I.C.C. 472, 480 (1914) ("To permit the rail carriers serving a port to favor one boat line or another. . .would practically close ports to all but favored vessels").

The Interstate Commerce Commission investigated other rail practices associated with marine terminals. In Discrimination in the Use of Wharfage Facilities, 27 I.C.C. 252 (1913), the Louisville-Nashville Railroad refused to make delivery of cargo destined for points served by the railroad on steamship lines, refused to deliver cargo to a steamship line's warehouse despite the fact that its spur was adjacent to it, and gave preferential berthing to ships consigned to its "agent" transit company. Charges for Wharfage, Handling, Storage, and Other Accessorial Services at Atlantic and Gulf Ports, 157 I.C.C. 663 (1929). The fact that railroads serving North Atlantic ports did not segregate port terminal charges from linehaul rates, and, in fact, absorbed them, was alleged to have hindered the development of South Atlantic and Gulf ports, where municipally owned terminals could not offer comparable rates and compete.

A. CITY OF MOBILE AND ITS PROGENY: A PORTS' FUNDAMENTAL RIGHT TO CARGO

The applicability of Section 8 to Shipping Act proceedings was a questionable practice back then.[81] The weight accorded Section 8 in another case conducted in 1941, *City of Mobile v. Baltimore Insular*,[82] could not have been foreseen at the time. As in the *The Port Differential Investigation*, the rates and practices at issue were broad in scope, and covered the North and South Atlantic ranges as well as the Gulf port ranges in the mainland (i.e., Puerto Rican trade). The allegedly unlawful conduct was that of an "equalization scheme" in which steamship lines were allowed to make deductions in their ocean rates to compensate for higher inland rates to port, thus resulting in equalized "through" rates from each coast.[83] There were no geographical limitations on the practice, a practice which reached deep into the interior of the country. As one defendant in the case was overheard to remark, "everything is equalized against everything."[84]

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81. There have been at least two investigations made pursuant to the mandate of Section 8, reported in Interstate Commerce Commission cases. Maritime Association, Boston Chamber of Commerce v. Ann Arbor Railroad, 95 I.C.C. 539 (1925) (rail rates and geographic position unfavorable to Boston, whose terminal facilities were capable of handling twice the then-current volume of traffic) and *Charges For Wharfage, Handling, Storage, and Accessorial Services at Atlantic and Gulf Ports, supra* note 80 (noncompensatory railroad terminal charges preventing development of terminal facilities by other interests). *See also* Interstate Commerce Commission, *Annual Report*, 1921 and U.S. Army Corps of Engineers, Board of Engineers For Rivers and Harbors, *A History of the Board of Engineers for Rivers and Harbors*, 115-117 (June 1980) (first report pursuant to Section 8 was made of Portland, Maine, published on April 4 1921).

82. 2 U.S.M.C. 474 (1941). An indication had come in Contract Routing Restrictions Under Agreements Nos. 16, 147, 185 and 4490. 2 U.S.M.C. 220 (1939). North Atlantic conferences required contract shippers, irrespective of origin, to ship through North Atlantic ports. The incentive was a rate discount, which could be lost should a shipment be made through another range in violation of the contract. Patronizing a carrier operating direct services from the Great Lakes ports to Europe was such a violation and seriously burdened Great Lakes ports. Though ultimately striking down the contracts as designed to effect a monopoly, and infringing on the right of choice of shippers, the Board surmised that

> the Great Lakes-St. Lawrence route is one of our great natural waterways upon which millions of dollars have been expended in the expectation of the actual development and growth of traffic from areas contiguous to its ports. "Economics" and "other advantages inherent" in using the Great Lakes ports had allowed them to remain competitive but the burden of the contractual routing caused the Board to state, uncategorically, we do not look with favor upon the attempt of carrier by artificial means to control the flow of traffic not naturally tributary to their lines.

Id. at 225, 266.

83. 2 U.S.M.C. at 477.

84. Again, the Interstate Commerce Commission faced the mirror image of this problem both prior to the Shipping Act, 1916 ("Since the thing in which the exporter is interested is. . .the entire through rate, it becomes necessary to examine the ocean as well as the inland portion of the transportation, Differential Rates, 11 I.C.C. 13, 23 (1905) and as late as the 1960's, Equalization of Rates at North Atlantic Ports, 311 I.C.C. 689 (1960) and 314 I.C.C. 185 (1961) which, of necessity, focused on the competition among Atlantic ports for *maritime* trade). *See generally*

The complainant, the City of Mobile, sought to limit the geographical reach that the North Atlantic carrier group had attained through the practices of equalization. The city argued that lower rail rates to the Gulf and South Atlantic ports that had been negated by the practice of equalization, had been established only "after due consideration of factors inherent in the transportation service to facilities for handling cargo at and ocean services available from the respective ports" and with the sanction of a sister Federal agency, the ICC, and [that] therefore [such] should not be nullified.[85] In an argument that would serve as the foundation for the evolution of "port discrimination", complainants asserted further that the continued viability of the nations ports was dependent "upon traffic from inland areas naturally tributary thereto."[86]

The FMC found that the practices in *City of Mobile* violated Section 16 of the Shipping Act. The Commission further stated in its findings that it could not entirely "ignore [the] complainant's contention that inland rates to seaboard and [the] advantages attaching thereto, should not be summarily nullified by ocean carriers in their rate making [practices]." As the Commission stated, "to condone this practice would wholly ignore the right of a port to traffic to which it may be entitled by reason of its geographical location."[87] This right appeared to be fundamental under stat-

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Maritime Ass'n, Boston Chamber of Commerce v. Ann Arbor R.R., 95 I.C.C. 539 (1925) and Rail Service Planning Office, Interstate Commerce Commission, *Rail Rate Equalization to and from Ports*, Preliminary Report, 1-27 (July 7, 1978). The problem of what was almost concurrent jurisdiction was also recognized at the F.M.C.:

> If this case does nothing else, it points up the inefficiency if not absurdity of departmentalizing the regulation of transportation. The problem of cargo diversion is not one that involves water carriers only. Minibridge would not be a factor at all if the rail rates were prohibitive. The basic premises underlying the Shipping Act and the Interstate Commerce Act have never, to my knowledge, been examined one in the light of the other, yet that they do interrelate and at times work at cross purposes has, with cases like this, become increasingly obvious.

North Atl. Shipping Assoc. v. American Mail Lines, 17 SRR 781, 831 note 81 (F.M.C. 1977).

85. Proponents of the equalization scheme, notably the Port Authority of New York, urged that it not be condemned because of the length of time it had been observed, that ports and businesses were built upon it, and that shippers and consignees accustomed to it. For the reasons the dominant port of New York would support equalization, *see* text accompanying notes 74 and 76 *supra*.

86. The "concept" of territory being tributary to an individual port had been acknowledged by the Interstate Commerce Commission. The prospects of the southern ports "for the future are good, but are dependent upon the development of the resources of the territory which is naturally tributary to them, and of direct and economical routes through these ports to countries which lie to the south, rather than upon the movement of traffic to and from territory which is not geographically tributary to them." *Export and Import Rates to South Atlantic and Gulf Ports*, 169 I.C.C. 66 (1930) (dissenting opinion of Commissioner Eastman) ". . . [t]ributary to the port of Boston is a great manufacturing district in New England." Maritime Ass'n, Boston Chamber of Commerce v. Ann Arbor R.R., 95 I.C.C. 539, 555 (1925). Or, "[c]ertain sections of the country are peculiarly tributary to certain railroads" Differential Rates, 11 I.C.C. 13, 30 (1905).

87. 2 U.S.M.C. at 486. The ICC had also faced the task of balancing the right of a port to

utes designed to establish and maintain ports,[88] and it specifically referred to Section 8 of the Merchant Marine Act. Section 8, interpreted as embodying basic Congressional policy in the promotion of port development, had thus been integrated into the Shipping Act.

The decision in *City of Mobile* however, permitted at least two different conclusions regarding the nature of this fundamental right. The first conclusion is based on the test from the *Alaskan Rate* and *Port Differential* cases which balanced the interests of steamship lines, shippers, and ports (as well as the interests of the public). The decisions in these two cases, which permitted carriers to justify otherwise unlawful rates and practices, were abandoned in favor of a "fundamental"[89] and legally unabridgeable right of a port to its naturally tributary cargo.

If the above conclusion would, by analogy to U.S. antitrust doctrine, render cargo diversion a "per se"[90] violation of the Shipping Act, then the second approach, allowing carrier defenses, may best be described as a "rule of reason" approach.[91] Support for this interpretation may be

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participate in "export business," with such right served by equalization, while at the same time "preserving subsidiary advantages" thereto. *Differential Rates* at 60-76. *See generally Maritime Ass'n, Boston*, text accompanying note 86 *supra*.

88. 2 U.S.M.C. at 486. The Commission left no doubt as to the particular statutory source of this right stating, "the contention has been made that Section 8 has no relation to the rate regulatory provisions of the Shipping Act, 1916. But to wholly ignore basic policies of Congress would be unwarranted." *Id.*

89. The concurring opinion of Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 493 (1965) describes the nature of Constitutionally-based *fundamental* rights: "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] as to be ranked as fundamental," quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . ." Powell v. Alabama, 287 U.S. 45, 67 (1932). Griswold, *supra* at 493. *See also* Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting).

90. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *Id.* at 223. "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Id.* at 224 note 59.

91. The classic "test" for unlawfulness under "rule of reason" was stated by Justice Brandeis in Chicago Board of Trade v. United States, 246 U.S. 231 (1918):

> The true test of illegality is whether the restraint imposed is such as merely regulates and perhaps thereby permits competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or possible. The history of the restraint, the evil believed to exist, the reason of adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This

gleaned from the Commission's observation that while equalization, in itself, was not unlawful, neither was it a common practice for ocean carriers[92] and the lawfulness of port equalization *to the extent [(t)here] in issue*[93] had not been previously presented for determination. Taken together, these statements support the inference that a "balancing" test *was* applied by the Commission, but that operation of the equalization plan not only fraught with noncompliance and malpractice but made worse by a lack of geographical limitations was clearly unreasonable.[94] The accurate interpretation of the Commission's decision in *City of Mobile v. Baltimore Insular Lines* would only await subsequent decisions for clarification.

The first decision rendered after Mobile was handed down only three days subsequent to the Mobile decision. With the parameters of port protection having experienced significant changes in *Mobile*, the business of ocean transportation itself was in a state of transition. In *City of Beaumont v. Seatrain*[95] the Commission was confronted with applying its broader port protection responsibility to the emerging technology of a predecessor of containerization, rail car carriage, and to an early "load center". The new technology, represented by the car-carrying vessels of Seatrain, were primarily utilized in the U.S. Gulf Coast-Havana trade. Because of

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is not because a good intention will save an otherwise objectionable regulation or the reverse, but because knowledge of intent may help the court to interpret facts and to predict consequences.

Id. at 238.

92. It was, however, a common practice for railroads. *See* text accompanying note 84, *supra*, on the notion of rail and ocean rate equalization.

93. Earlier, in *Intercoastal Rate Structure*, 2 U.S.M.C. 285 (1940) ocean carriers in the westbound intercoastal trade implemented a scheme to offset differences in rail costs to effect equalization of total transportation costs from interior points through Baltimore, New York and Philadelphia. At the time the equalization plan was implemented, the cost of ocean transportation to Baltimore and Philadelphia were 3 and 2 cents, respectively, more than New York, offsetting rail rate differences among those ports. When the instant case was brought before the Maritime Commission, the rail rates to Philadelphia and New York were one cent more to Philadelphia and three cents more to New York than to Baltimore, the equalization plan then having little relationship to rail differentials. It was asserted, nevertheless, that port equalization afforded inland shippers a maximum number of gateways and promoted competition for lines into central territory. *Id.* at 305. Baltimore interests opposed the plan on the grounds that it diverted high value cargo to New York and negated Baltimore's natural advantage of being close to interior producing points. *Id.* at 306. In consideration of the Shipping Act 1916 and the Merchant Marine Acts of 1920 and 1936, the equalization plan was struck down "as primarily designed by the various respondents to entice a larger share of the business away from their competitors' and not to equalize rail differentials and further confusing an already complicated competitive struggle." *Id.* at 307.

94. Such malpractices included deductions in ocean rates made in excess of the 30 percent specified by the conference agreement, 2 U.S.M.C. at 482, the use of unlike rail rates to different ports as a basis for reductions in the port-to-port rates, *id.* at 481, and equalization of rates from traffic *local* to other ports. *Id.* at 477.

95. 2 U.S.M.C. 500 (1941), *reconsidered and reversed*, 2 U.S.M.C. 699 (1943).

the high costs associated with the equipment required for loading and unloading[96] the rail cars, a single port in Texas City, Texas was chosen as the operations center through which Seatrain's traffic would be funneled. As provided under conference agreement, Seatrain agreed to absorb the difference between the shipper's cost of delivery to the Seatrain load center and to cost of delivery to ship the goods to the ports in Galveston, Houston, or Beaumont.[97] Shippers were not to be penalized by the higher inland cost associated with routing traffic to Texas City. The ports of Galveston, Houston, and Beaumont alleged that this absorption practice and the resulting diversion of cargo violated Sections 15, 16 and 17 of the Shipping Act. In its analysis, the Commission viewed the aggrieved ports as consisting of three distinct interests: one, the interest of shippers who supported the absorption practice; two, the port facilities which had lost some 2673 tons of cargo to Seatrain; and three, the carriers serving the affected ports that had lost cargo to Seatrain and whose bulkbreak service could not compete with Seatrain on parity rates.[98] The Commission noted that the port protection responsibilities enunciated in *City of Mobile*[99] were to be applied with even greater force to practices which allowed carriers to reach into ports and divert "local" cargo. However, the finding that the Seatrain absorption scheme was unlawful, was based on a warning issued by the Commission in *Contract Routing Restrictions*.[100] In this case the Commission stated that it did not "look with favor upon the attempt of carriers by artificial means to control the flow of traffic not naturally tributary to their lines." The Commission was concerned with more than just the injury to the complainant ports; the Commission was also concerned about how the other carriers, who provided essential "water carrier services" to the ports would be crippled by Seatrain's diversion of cargo and the subsequent rate wars that would be precipitated.[101] The "shipping acts" administered by the Commission, with their declared policy of furthering the development and maintenance of the American Merchant Marine, thus mandated the condemnation of Sea-

96. Seatrain's terminal consisted of "a railroad spur and a loading crane which fastens to a loaded car, picks it up and deposits it on one of the tracked decks in the vessel. The loaded car is strapped to the deck and at the point of discharge is raised, run onto a railroad track and moved intact to the final point of destination." *Id.* at 503.

97. The distance via rail to Texas City from Galveston, Houston and Beaumont is 14.2, 42.2 and 91 miles, respectively. 2 U.S.M.C. at 502.

98. *Id.* at 503-04.

99. 2 U.S.M.C. 474 (1941).

100. *See* text accompanying note 82 *supra*.

101. The Commission noted ". . . a port and its transportation services are indissolubly linked together, are interdependent, and a practice harmful to one injures the other." 2 U.S.M.C. at 504. Compare with *Alaskan Rate Investigation*, 1 U.S.S.B. 1 (1919) (practice harmful to shippers in hinterland of port harmful to port).

train's "traffic raiding" absorption practices.[102]

Undaunted, Seatrain cancelled the absorption provision and the Gulf and South Atlantic Steamship conference filed to remove the Texas ports from the scope of the agreement. This allowed the conference lines, including Seatrain, to set their own ocean rates to those ports.[103] Instead of absorbing additional inland transportation costs to Texas City, Seatrain simply chose to lower its ocean rate to accomplish the same end. A further hearing was ordered by the Commission to bring the record in the matter up to date.

In the second decision rendered by the Commission on the matter, the Commission noted that the service provided by Seatrain had neither the destructive impact that had been ascribed to it by the competing carriers, nor the detrimental effect that had been ascribed to the activity by the Commission in the initial hearing on the matter.[104]

Furthermore, it was determined that Texas City, Galveston, and Houston were considered to be "one terminal district or port"[105] (or all Galveston Bay ports), and that the area comprising the ports of Galveston and Houston and the surrounding territory was "centrally, economically and naturally" served by Seatrain's facilities at Texas City. The three ports were to have shared the same naturally tributary hinterland.[106] The earlier Commission decision was reversed and the proposed modification

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102. The preamble to the Shipping Act, 1916 provides in part "to establish a United States Shipping Board for the purpose of encouraging, developing and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States." U.S.C.A. § 801 (Cum. Ann. Supp. 1983).

The preamble of the Merchant Marine Act of 1920 states the purpose of the Act is "To provide for the promotion and maintenance of the American Merchant Marine. . . ." 46 U.S.C. app. § 861 *et seq.* (supp. I 1983). The purpose of the Merchant Marine Act of 1936, as stated in its preamble is "To further the development and maintenance of an adequate and well-balanced American Merchant Marine. . . ." 46 U.S.C.A. § 1101 (Cum. Ann. Supp. 1983).

103. 2 U.S.M.C. 699 (1943). Conferences are associations of steamship lines sanctioned by the Federal Maritime Commission in U.S. trades to set rates collectively. This ability to price-fix lawfully is in recognition of the thought the steamship industry is of such a unique nature that unfettered competition is unworkable. *See* Ellsworth, *Competition or Rationalization in the Liner Industry*, 10 J. MAR. L. COM. 499 (1979).

104. The Commission found that Seatrain's service was not so advantageous as to command a rate higher than those of breakbulk lines. *Id.* at 701. This, however, had been brought out in the earlier decision. 2 U.S.M.C. at 503. Also, on reexamination the Commission found it impossible to determine whether one of the principle commodities alleged diverted, rice, originated locally at the aggrieved ports or at interior mills and merely shipped through those ports, thus putting into question the claim of "traffic raiding" of local cargo. 2 U.S.M.C. at 701.

105. Again, highlighting the continuing "interplay" between transportation regulatory agencies, the Maritime Commission relied in part on the Interstate Commerce Commission's description of the three ports as "one terminal district or port" in *Rate Structure Investigation Part 3, Cotton*, 165 I.C.C. 595, 660 (1930). *See* text accompanying note 84, *supra*.

106. Beaumont, having access to the Gulf several miles east of the other ports and 126 miles by rail from Texas City, did not fall within the "Galveston Bay port" designation; its traffic was not

of the conferences' scope became unnecessary.[107]

These two cases (the first of which was decided pursuant to the principles of cargo protection announced in *City of Mobile*) did not clarify the degree of protection that was to be afforded to naturally tributary cargo, they did demonstrate the difficulties that the Board would encounter in both fulfilling its expanded responsibilities and yet not stifling the innovation that accrued to the benefit of shippers and steamship lines.

The first decision may have merely been a forum within which the Commission would be able to wield its new, stronger port protection duties. Certainly, Seatrain's "traffic raiding" of cargo not naturally tributary to, but from within the area of the aggrieved ports themselves, provided an ample opportunity for such an exhibit.

The first *City of Beaumont* decision appears to represent an attempt by the Maritime Commission to expand its authority and responsibility beyond that provided by Section 8 and into the Merchant Marine Acts of 1920 and 1936[108] which promote the American Merchant Marine. The fact that the Commission's expanded role dominated its initial decision (only to be ignored in the second case) illustrates the "conscious decision" of the Commission to limit the scope of its responsibilities which had already been beyond that of the Shipping Act by Section 8.

This reluctance to further broaden the scope of responsibility was again shown by the Commission's refusal to adopt Section 8 as a standard in *The Port Differential Investigation*. On a more practical level, Seatrain's service, although clearly innovative, was feasible only through the utilization of equalization. The practice of equalization in turn was evoking serious scrutiny by the Commission.

B. *City of Portland—Limitation of Defenses Strengthens Right*

The Commission's focus then shifted to the West Coast, specifically to the Pacific Westbound Conference that would remain a combatant in the port/carrier disputes over the course of a decade.[109] In *City of Portland v. Pacific Westbound Conference*,[110] the equalization practice of absorption, (as illustrated in *Seatrain*) permitted member lines to absorb the cost differential between that of the shipper's cost of delivery to that of the closest port (Portland and Seattle in this instance) and the cost associated

naturally tributary to Texas City, and could not be lawfully subjected to the absorption practice. 2 U.S.M.C. at 702.

107. *Id.* at 703-04.

108. *See* text accompanying note 102, *supra*.

109. Pacific Westbound Conference—Equalization Rules and Practices, 22 SRR 12 (F.M.C. 1983) and 19 SRR 521 (F.M.C. 1979), Stockton Port Dist. v. Pacific Westbound Conference, 6 SRR 505 (F.M.C. 1965).

110. 4 F.M.B. 664 (1955).

with delivery to the port being served by an equalizing line (San Francisco). It is undisputed that the cargo in question, primarily agricultural commodities from the states of Washington, Oregon, Idaho, and Montana, were naturally and geographically tributary to the complaining ports.[111]

The respondent carriers stressed the various reasons supporting the importance of the indirect service. The diversion of the cargo to San Francisco included the following benefits: more frequent service; the availability of refer space which is crucial for storing perishable products; and the fact that the San Francisco port was accorded "last out" port status among the California ports. The aggrieved ports argued that elimination of the practice would increase service to their ports, thereby benefitting their economies and freeing from jeopardy the heavy investment of the ports in physical facilities and equipment.[112]

The Commission proceeded to embark on a commodity-by-commodity analysis focusing on the adequacy of service at the Pacific Northwest ports. If the necessary direct service was not available, the equalization practice with indirect service was upheld while remaining under the continuing review of the Commission. Such a practice was permitted until sufficient service became available at the port (in this case Portland).[113]

The Commission emphasized that Section 8 required "that all other factors being substantially equal, a port should receive the benefits of or be subject to the burdens incident to its proximity or lack of proximity to another geographical area."[114]

With this the Commission made it clear that the lack of adequate service was the leading of two defenses that were available, and the other remaining defense available only when an emergency situation arose and

111. The leading cargoes of the Northwest, especially grain and lumber, were not affected by the equalization. 4 F.M.B. at 670. Neither was there any doubt apparently as to the detrimental impact of the practice, depriving Portland and Seattle of cargo that would normally move through those ports *but for* the equalization. 4 F.M.B. at 677 (emphasis supplied). See text accompanying note 66, *supra* ("but for" test to establish detrimental impact of practice).

112. This, of course, was prior to the advent of containerization, but the cost of providing specialized equipment was already escalating. Seatrain's unique operation in Texas City required a crane that cost $125,000. Beaumont v. Seatrain, 2 U.S.M.C. 699, 702 (1943). *See generally Public Port Financing in the U.S., supra* note 26.

113. There was no explanation given for this restriction of the utilization of absorption other than the Commission's own statement, "To the extent, therefore, that the ports of a given geographical area give or can give adequate transportation service, we look with disfavor on equalization rules or practices which divert traffic away from the natural direction of the flow of traffic." 4 F.M.B. at 679. The defense may have grown out of interpretation of a phrase in Section 8 "It shall be the duty of the Board . . . to investigate any matter that may tend to promote and encourage the vessels of ports adequate to care for the freight which would naturally pass through such ports. . . ." *See* text accompanying note 14 *supra*.

114. 4 F.M.B. at 677.

precluded a direct call upon the port. A carrier would be allowed to intervene in such a situation only if the carrier normally called at the port and only if the carrier restricted its use of the port during the emergency.[115]

It remained unclear whether there was a specific basis in Section 8 for a general limitation of defenses. What was clear, however, was that although a port's right to cargo from its naturally tributary areas remained valid, such right was now subject to these two quite restricted "exceptions." Thus the right was legally surmountable. The fact that the Commission in *Mobile* neither discussed such defenses nor implied their existence leaves one with the feeling that the Portland case is an interesting if not mysterious refinement of *Mobile* which contrasts with the more flexible thrust of the *City of Beaumont* case.

In 1965, the Pacific Westbound Conference was again embroiled in a controversy surrounding port equalization. This time the complaining party was the Port of Stockton, California. In *Stockton Port District v. PWC*,[116] conference members were authorized to reimburse shippers for the price differential between shipping to the nearest port of origin for the cargo (in this instance Stockton) and that of shipping to cargo to the actual port of loading (again, San Francisco). As in *Portland*, and the line of

115. *Id.* at 678. Interestingly the equalization was practiced almost exclusively by U.S.-flag, subsidized carriers, precluded by their subsidy contracts from serving the Pacific Northwest in addition to San Francisco. Equalization gave them the "tool" with which to serve those markets without necessitating a ship call, clearly unlawful. *Id. Compare with* Beaumont v. Seatrain, 2 U.S.M.C. 500 (1941) (equalization, deemed harmful to American Merchant Marine, deemed unlawful).

116. 6 SRR 505 (F.M.C. 1965), *aff'd*, 369 F.2d 380 (9th Cir. 1966), *cert. denied*, 386 U.S. 1031 (1967) (Initial Decision at 5 SRR 361 (F.M.C. 1964)). Throughout this Paper, the so-called Initial Decisions, those made at hearing-level by the Administrative Law Judges, or Hearing Examiners, will be examined and discussed, such decisions posseessing significance as "an important part of the whole record a reviewing court weighs in order to assess substantial evidence." National Ass'n of Recycling Indus. v. F.M.C., 658 F.2d 816, 824 (D.C. Cir. 1980). The Initial Decisions also, on the whole, tend to be less restrictive discussions more illuminating of policy considerations that justify decisions. This case was not the first port discrimination claim centering on the Port of Stockton. In Sun-Maid Raisin Growers Ass'n and Sunland Sales Coop. v. Blue Star Line, 2 U.S.M.C. 31 (1939), Stockton and its shippers complained of ocean rates of the Pacific Coast European Conference set higher for that port than the many "terminal loading ports" specified under conference agreement. Evidence presented showed that should be accorded the status (and rates) of such a terminal loading port, the volume of cargo through Stockton would increase, forcing increased steamship service. Interestingly, one defendant line contended "that the function of an ocean carrier is to skirt along the coast and pick up cargo gathered there from the interior" and that it would "gladly" withdraw services from some of the ports included in its blanket territory if not for the industry that had been established in reliance upon the continuation of such service. The larger ports such as San Francisco asserted that they had been "developed with the thought in mind that ports such as Stockton, lying behind terminal ports, would not be served by ocean-going vessels, and the large investment of the former, it is urged, should not be jeopardized by disturbing the existing relationship." Nevertheless, the differential was found violative of Sections 16 and 17.

prior discrimination cases leading back to *Alaska Rate Investigation*, the distinct interest of shippers, steamship lines, and ports were to be examined. The conclusion that was arrived at in this particular case would leave the Commission bitterly divided.

Consideration of the impact of the equalization yielded what might be considered representative of the three interests affected (generally) by such practices—the Port of Stockton, which had spent $23 million on its facilities since 1964, had lost $232,000 in revenue from the diversion of cargo,[117] steamship lines had saved both time in not traveling the 8 hours trek each way to Stockton, and $3,600 per vessel for the additional call, or $67,000 more than the $113,030 it cost them to equalize,[118] and shippers, while many preferring the alternative of direct service, strongly favored having access to more frequent service at San Francisco and its shorter in-transit time as "last loading" port.[119] Even though there were ample economic justifications for practicing the discrimination against Stockton, the Commission "would not save respondents equalization under the applicable precedents were it established that the practice drew cargo away from territory which was exclusively and naturally tributary to Stockton." The Commission reiterated the fundamental nature of a right of a port to its naturally tributary cargos as espoused in *City of Mobile*, and which was further refined in *City of Portland*. The Commission had also taken it upon itself to finally clarify the relationship between the Section 8 based right with that of Sections 16 First and Section 17 of the Shipping Act.

It was clear from a reading of the Shipping Act provisions that the provisions proscribed only prejudice and discrimination that was considered unjust and unreasonable. Since what was "unjust or unreasonable" were questions of fact which permitted a balancing of the interests of ports, carriers, and shippers,[120] it was difficult to devise a test that would fit every case or situation.

Diversion of the naturally tributary cargo of one port to another port however, allowed for no such considerations of benefits accruing to each interest, for it triggered a prima facie violation of two of the Shipping Act provisions.[121] Such violations could be defended only if it was shown

117. 6 SRR at 511 (F.M.C. 1965).

118. *Id.* at 513, 518.

119. *Id.* at 513.

120. *See* The Port Differential Investigation, 1 U.S.S.B. 61, 65 (1925) (It will be observed that the character of discrimination inhibited by these provisions of the statute is discrimination which is undue, unreasonable, or unjust. Whether that measure of discrimination is established by this record is the province of the board to determine.).

121. The Commission asserted ". . . there is ample economic and cost justification for the discrimination against Stockton such as it is. But even this would not save respondents' equalization under the applicable precedents were it established that the practice drew cargo away

that the aggrieved port did not provide adequate steamship service. The focus of alleged port discrimination was not the relatively straightforward demonstration of the benefits that accrued from the equalization practice as weighed against the damage that was inflicted but rather the "test" was based on a delineation of the amorphous boundaries of the ports exclusive hinterland, which provided for a much more complex endeavor. *City of Beaumont*[122] had added the important requirement that the "exclusive" hinterland infringed upon must be just that; exclusive and not shared with other ports.

The shifted focus of the Commission precipitated new and unique theories of defining areas naturally tributary to ports.[123] The Commission, however, found that Stockton and San Francisco did not represent separate and distinct geographical areas, with both being "Bay area" ports and drawing from the same hinterland.[124] Based on *City of Beaumont*, there could be no unlawful diversion. Such a conclusion was based, however, on a historical perspective that would remain an element of later tests for determining unlawfulness but which would necessarily prove to be less than determinative as the practice of containerization and intermodalism permanently disrupted the older, established routings of cargo. The Commission had explained that the natural flow of cargo from the San Joaquin Valley, the hinterland claimed to be exclusive to Stockton, had been part of the through-way to San Francisco or from the "Golden Gate to the Pacific Ocean." The Commission declared that "San Francisco did not cease to be such a port merely upon the creation of an additional port at Stockton."[125]

There seems to be lingering validity in the charge by Commissioner Hearn[126] that by categorizing San Francisco and Stockton as "Bay area ports" the Commission had effectively ignored the fundamental question of whether the "natural flow" of cargo from the San Joaquin Valley was through Stockton and whether the cargo would have flowed through

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from territory which was exclusively and naturally tributary to Stockton." 6 SRR at 518 (F.M.C. 1965).

122. 2 U.S.M.C. 699, 703 (1943) ". . . the area comprising the ports of Galveston and Houston and the surrounding territory are centrally, economically and naturally served by Seatrain's facilities at Texas City."

123. Stockton argued that a large part of central California, including the San Joaquin Valley, was naturally tributary to the port based on minimum trucking rates, which in turn were based on "constructive mileage," actual mileage weighed by such factors as the number of traffic lights and bridges, the presence or absence of mountainous terrain, the condition of the highways and other factors affecting truck traffic. 6 SRR at 518, note 6 (F.M.C. 1965).

124. *Id.* at 516. The Commission's sanction of the equalization was not unlimited. Equalization moving cargo tributary to Bay area ports to Los Angeles and Long Beach, California, was disapproved. *Id.* at 527.

125. *Id.* at 517.

126. *Id.* at 530.

Stockton rather than San Francisco if the equalization had not been present. The labeling by the Commission of the Bay area as "centrally, economically, and naturally served by San Francisco" was also quite puzzling.[127]

More importantly, the separate opinions of both Commissioners (Hearn in dissent and Patterson concurring only in the result) were to frame the policy dilemma that would remain the heart of future port discrimination claims.

Commissioner Hearn judged the majority's decision as, "(1) frustrating the will of Congress in developing new and modern ports and (2) turning over to conference carriers the right to determine which of our ports shall prosper and which shall suffer."[128] The commissioner surmised that millions of dollars worth of public and private investment would be impaired as a result of the decision that had been rendered.

Commissioner Patterson disputed the Commission's authority to administer the Merchant Marine Acts of 1920 and 1936 and therefore, he did not base his analysis on the "policies"[129] of such Acts. Instead, the commissioner discounted the interests of Stockton (and the interests of other such aggrieved ports) by succinctly stating that "[a]s long as the purpose and effect of the (absorption) rule are mutual economic advantage[s] of the carriers, and shippers, and localities, ports are not unreasonably disadvantaged."[130] He likewise countered Stockton's argument that, because of large public investment in the port, the port was entitled to "local tributary traffic." The Commissioner frankly stated that such investments depended on "commercial potentialities" and not on "future rights" and that once made the "investment did not create legal rights to

127. This paraphrased Commission's "description" in *Beaumont*. See note 115 *supra* and accompanying text.

128. 6 SRR at 528 (F.M.C. 1965). Later the conference system itself was assailed in an in depth study by the Justice Department in 1977. Antitrust Division, U.S. Dept. of Justice, *Study of the Regulated Ocean Shipping Industry* (January 16, 1977) "Justice Dept." An almost point-by-point reply in defense of the system, and a case made for strengthening it, was made by the Council of European and Japanese National Shipowners Association, The University of Wales, Institute of Science and Technology, *Liner Shipping in the U.S. Trades*, (April, 1978) "CENSA". One of the only points on which the two groups agreed was that the protection of naturally tributary cargo should end, albeit for different reasons. The Justice Department asserted that the concept had "served to inhibit some forms of competition (direct v. indirect service) and shipper choice, " *Justice Dept.* at 162 (parenthetical supplied). *CENSA* surmised that containerization, with fewer, larger ships plying trades, at fixed schedules, required a port to draw cargo from a "much larger catchment area" than naturally tributary. It found regulatory difficulties with equalization practices utilized to accomplish this illustrating a stark anachronism the (Shipping) Act, which took into account the very different technology and trade patterns of 1916, and therefore ought not to be invoked to prevent potentially beneficial changes in transport technology from being fully implemented. *CENSA* at 59.

129. 6 SRR at 532 (F.M.C. 1965).

130. 6 SRR at 532e (F.M.C. 1965).

a flow of business or entitle anyone to anything."[131]

C. Mainland-Puerto Rico Cases—Absolute v. Conditional Right

A series of cases involving the Mainland-Puerto Rico trade were to soon follow, beginning with *Sealand Service v. South Atlantic & Carribbean Line*.[132] Cases centering on this trade route would once again bring the question concerning the strength of a port's fundamental right to cargo that had been clearly established by the Commission.

At issue in the SACL case was the equalization practice of transshipment,[133] rather than the practice of absorption, as SACL accepted cargo at Jacksonville and moved it at its own expense to Miami for direct service to Puerto Rico. The rates for the indirect service from Jacksonville (which was listed along with Miami and San Juan as a terminal port) were the same as that of the direct service from Miami. Sealand alleged that the practice diverted the naturally tributary cargo of Jacksonville, contrary to Section 8 and in violation of Sections 14, 16, and 17 of the Shipping Act.

The Administrative Law Judge, while dismissing the applicability of Section 8 as a standard administered by the Commission,[134] found that the substituted service permitted SACL to secure substantial additional cargo through Miami from areas "which (because of the) geography (of the area) and (because of) the normal inland routes"[135] were actually tributary to Jacksonville, and therefore in violation of Section 16, First. The Commission itself also failed to address the mandates of Section 8, although they did manage to apply the test of *City of Portland v. PWC*.[136] The test was comprised of the following factors: (1) a diversion of traffic from a port to which the area of origin is naturally tributary, to a port to which the area is not naturally tributary; (2) where the diversion of cargo is not justified, in the shippers interest, by the lack of adequate service out

131. 6 SRR at 532g (F.M.C. 1965). Or, as Patterson stated, "The justification for public investment in port construction comes before, not after the investment." *Id.*

132. 6 SRR 79 (F.M.C. 1965) (Initial Decision).

133. *See* text accompanying note 52, *supra*, for distinction between transshipment and absorption.

134. A primary reason was that the functions prescribed by Section 8 were not among those transferred to the F.M.C. by Reorganization Plan No. 7 of 1961, which created the Commission. 6 SRR at 86 (F.M.C. 1965). *See* text accompanying note 59, *supra* (detailing governmental reorganization plans impacting "Commission" and predecessors).

135. 6 SRR at 89 (F.M.C. 1965). "The traffic accorded 'substituted' service originated or was destined for points in or about Jacksonville or north or west thereof." *Id.*

136. 4 F.M.B. 665 (1955). The test was not explicitly established, but rather implied in the then Maritime Board's statement that " [to] the extent, therefore, that the ports of a given geographical area give or can give adequate transportation services, we look with disfavor on equalization rules or practices which divert traffic away from the natural direction of the flow of traffic." *Id.* at 679.

of the port from which traffic is so diverted or; (3) emergency or exigent circumstances are not present to preclude a direct call. Evidence showed that the cargo in dispute was "attracted by considerations of time, distance, and cost factors"[137] to Jacksonville, but notwithstanding these logical inducements, moved through Miami.[138] More succinctly, the Commission stated that *but for* the free inland transportation of the substituted service, the traffic would not have moved through Miami. In establishing this as a standard of proof, it rejected the proposed test that "[a] diversion of traffic [is the equivalent] of traffic that would have moved through Jacksonville instead of Miami but for the substituted rule" and overruled the precedent established in *Philadelphia Ocean Traffic Bureau v. Export S.S. Corporation*[139] in doing so. The Commission also dismissed SACL's claims that service at Jacksonville was inadequate because Sealand's rates were higher than SACL's. The Commission stated: "We find this service to be adequate in general for shippers who wish or [who] may wish to use Jacksonville".[140] The Commission further stated that, "we do not hold that cargo tributary to Jacksonville must move to this port, nor do we say that service must be adequate to accept all cargo."[141] "We simply hold that a carrier cannot utilize a substituted service rule to siphon off cargo, some of which would otherwise move through Jacksonville."[142]

Sealand v. SACL represented a significant expansion of the fundamental right to naturally tributary cargo. The case further weakened both the required standard of proof for unlawfulness and the primary defense of inadequacy of service. The first standard would remain especially troublesome for two specific reasons. One, in discarding the "but for" test of *Philadelphia Ocean Traffic Bureau*, the Commission adopted an aberration of it: that *but for* the equalization the traffic would *not* have moved through the more distant port. This test seems to focus on Section

137. Shipments from Canton, Georgia, 360 miles from Jacksonville, moved instead through Miami, a distance of 700 miles from origin—and time and cost factors were necessarily based on distance. 6 SRR at 1113 (F.M.C. 1965).

138. *Id.* at 1116.

139. 1 U.S.S.B.B. 538 (1936) (United States Shipping Board Bureau). In that case, members of The West Coast of Italy and Sicilian Ports/North Atlantic Range Conference added a surcharge on the New York ocean rate for cargo destined to Philadelphia. The Shipping Board stated it well settled that the existence of unjust discrimination and undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. . . . [I]t is essential to reveal the specific effect of the rates on the flow of the traffic concerned. Furthermore, a pertinent inquiry is whether the alleged prejudice is the proximate cause of the disadvantage. The Board concluded that more than general representations were needed to prove "that the rate situation is solely responsible" of the disadvantage. *Id.* at 541.

140. 6 SRR at 1115 (F.M.C. 1965).

141. *Id.*

142. *Id.*

16 First's prohibition against undue preference rather than on unjust prejudice and detrimental impact of the practice. Previous cases had been virtually unanimous in their attacks on the harm, not the benefit caused by equalization practices and there was no explanation given for the departure in this case. The new test allowed one to conclude that a potential diversion of cargo (cargo that may never have flowed through an aggrieved port) might yet be the foundation for a successful claim of unlawful diversion. Again, there is no requirement that the practice be shown to have caused the diversion *from* the complainant port to trigger unlawfulness, only that it was somehow artificially induced *to* another port. It is difficult for one to claim to have been damaged as a result of an equalization practice if the allegedly aggrieved port could not show that it would have served as the outlet for that cargo in the absence of the practice. Yet this is exactly what the Commission sanctioned, the difficulty in such logic notwithstanding. The second case, decided in the same year, involved the same two parties from the initial case, along with other parties who were all involved in a prospective rate war between North and South Atlantic carriers in the same over-tonnaged trade with Puerto Rico. In *Reduced Rates on Machinery-Atlantic to Puerto Rican Ports*,[143] a 1964 rate reduction by Sealand, serving the North Atlantic range, triggered rate reductions by South Atlantic carriers, TMT and SACL. Another subsequent rate reduction by Sealand was again followed by the same action by TMT and SACL. At this point, the rates were suspended by the Commission; an investigation was ordered and a hearing soon ensued. The primary issue was the extremely low rate of TMT, which had somehow been found to have been just and reasonable.[144] In addressing the allegation that the rate differential favoring South Atlantic ports diverted cargo which was, by virtue of favorable rail rates, naturally tributary to the North Atlantic, Administrative Law Judge Greer qualified that so-called "fundamental right" with the rule (taken from *City of Portland*) that Section 8 required that a given geographical area and its ports should receive the benefits and burdens of their mutual proximities only with "all other factors being substantially equal." TMT's inferior service and its need to maintain correspondingly lower rates to meet the competition did not satisfy this standard.[145]

The Commission, confronted with this less than expansive interpretation of Section 8 agreed that all other factors were not substantially equal.

143. 7 SRR 233 (F.M.C. 1966).

144. 9 SRR 175 (F.M.C. 1967).

145. *Id.* at 183. Similarity of transportation conditions *had* been established as a necessary element of undue preference and prejudice under section 16, First. San Diego Harbor Comm'n v. Matson Navigation Co., 2 SRR 127 (F.M.C. 1962) *citing Intercoastal Cancellations and Restrictions*, 2 U.S.M.C. 397 (1940).

However, the Commission found the basis for such inequality not with TMT's inferior service, but rather because of the closer proximity of the South Atlantic ports to Puerto Rico than that of the North Atlantic ports. The Commission's conclusion as to the lawfulness of the rate differential was different from that of the administrative law judge. In balancing the "natural distance advantage" of TMT with the "natural advantage" of the North Atlantic ports and their lower inland freight rates, the Commission determined the following factors: one, that neither the level of TMT's rates nor the degree of the differential was supported through either shipper's testimony that their particular rates were necessary; two, that neither carrier presented evidence proving that such rates produced any greater overall revenue for either carrier than a lower rate would have; and three, the carriers had failed to prove that the transportation conditions necessary to justify the diversion of naturally tributary cargo were present.[146] The difference between North and South Atlantic rates was reduced by the Commission so that carriers and ports could each realize their "natural advantages."[147]

The final case of the three in this area, *Rates From Jacksonville to Puerto Rico*,[148] involved a second prospective rate war between Sealand (serving Puerto Rico from Jacksonville, Fla. and Elizabeth, N.J.) and TMT (with regular service from Jacksonville and alternate voyages via Miami). TMT maintenance of rates that were lower from Jacksonville than Sealand's rates from Jacksonville (and Elizabeth) on southbound voyages, was again alleged to have diverted cargo naturally tributary to New York.

Once again, Administrative Law Judge Greer asserted that the right to naturally tributary cargo was "not unqualified" and could be lost if a differential having such effect was so justified by transportation conditions. Forcing TMT to raise its rates was likely to drive it out of business and allowing Sealand to lower its rates from Jacksonville so as to meet TMT's competition would most likely divert more North Atlantic cargo through that port. Therefore, transportation conditions prevented enforcement of the right of North Atlantic ports to the cargo naturally tributary to

146. 7 SRR 233, 245 (F.M.C. 1966) citing United States v. Illinois Cent. R.R., 263 U.S. 515, 524 (1924).

147. TMT appealed successfully to the Court of Appeals for the D.C. Circuit, which remanded the case back to the Commission. The primary issue was the rate setting authority of the Commission and its utilization to protect naturally tributary cargo. Also at issue was the role or importance of distance in ratemaking between ports. 7 SRR 1001 (F.M.C. 1967).

On remand, the Commission held that the "policy of promoting the movement of cargo through ports through which it should normally move applies equally to equalization cases and the instant cases, *id.* at 1005, and that distance has an "important bearing where because of a shorter distance between transit points a carrier incurs lesser costs." *Id.* at 1006.

148. 9 SRR 175 (F.M.C. 1967), *petition to reopen and reconsider denied*, 9 SRR 339 (F.M.C. 1967).

their range.[149]

The Commission found that TMT did indeed divert cargo which, based upon inland rail rates, was tributary to North Atlantic ports.[150] However, the Commission qualified this decision by stating, "Naturally tributary [cargo] is an economic concept. . .", [dependent upon] . . . the shippers cost, the value of a carrier's service to a shipper or other factors." The Commission went further and cited the test concerning the lawfulness of the rate differential as stated in *Reduced Rates On Machinery*.[151] The record was held insufficient to make a determination regarding whether the cargo met the threshold of legally (naturally) tributary cargo. By affirming the initial decision, the diversion was justified due to the transportation conditions and the differential upheld.

These two Puerto Rican trade decisions, which restricted the right to naturally tributary cargo, are in contrast to *Sealand v. SACL* which broadened the right to naturally tributary cargo. In both *Reduced Rates on Machinery* and *Rates from Jacksonville*, the Commission relied on the qualifications of *City of Portland* which held that Section 8 protection applied only when "all other factors [were] substantially equal." While *City of Portland* is most significant for establishing inadequacy of service as virtually the sole defense to a charge of diversion of cargo, the Maritime Board had initially appeared receptive to the consideration of other factors that would also serve as a justification for diverting cargo. However, the Board found that the other factors that were proferred, factors which centered primarily on the superior service provided at San Francisco, to be not credible,[152] unimpressive,[153] or unjustified.[154] The Board's "consideration" of both the evidence offered to justify the diversion and the evidence offered to establish the inadequate service at the Pacific Northwest ports was questionable in and of itself. Apparently the Board had neglected to consider applying the concept of "fundamental right" as explicated in *City of Mobile* to the present case.

The precedential value of *Reduced Rates on Machinery* and *Rates from Jacksonville* remained unclear however, because the protection of naturally tributary cargo was not the focus of inquiry in either case. In fact, the test cited in *Rates from Jacksonville* to distinguish naturally tributary as opposed to merely tributary cargo included the consideration of the cost and the value of the cargo to the shipper. This test was taken from *Reduced Rates on Machinery* and was based not on *City of Mobile*

149. 7 SRR at 552 (F.M.C. 1966).
150. *Id.* at 538 (emphasis supplied).
151. *Id.* at 537.
152. 4 F.M.B. 665, 676 (1955).
153. *Id.* at 676.
154. *Id.*

and the concept of cargo diversion, but rather it was based on a Supreme Court decision concerning railroad rate differentials. While *Reduced Rates on Machinery* and *Rates from Jacksonville* may be distinguished factually from typical port discrimination cases, (i.e., cases which usually focus on equalization practices and indirect service), the requirement of equality of "other factors" was initially established in *City of Portland. City of Portland* not only laid the foundation for port discrimination cases through the concept of naturally tributary cargo, but it also appears to have given the Commission the flexibility to weigh policies, which had not been indicated in previous decisions. Whatever the strength of precedent for such an interpretation, the clear thrust of both sets of cases was that the concept of "fundamental right" could fall in the face of certain "transportation conditions."

VII. The Doctrine of Naturally Tributary Cargo—As Containerization Evolves

By 1967 the Commission had built upon the foundations of decisions beginning in 1941 and had established "law" or principles regarding the diversion of naturally tributary cargo. This included the principle that the right of a port to cargo from areas tributary to it is a fundamental right based upon Section 8 of the Merchant Marine Act of 1920 (*City of Mobile*). *City of Mobile* concluded that "all other factors being substantially equal", ports should receive the benefits of proximity to given geographical areas, and violation of this principle is justified only through evidence of inadequate service at that port, an emergency situation (*City of Portland*) or if the aggrieved and distant ports do not represent distinct naturally tributary areas (*City of Beaumont, Stockton Port District*).

VIII. The Modern Cases of Port Protection

A. *Investigations of Overland and OCP Rates and Absorptions*

The first of what may be considered the "modern" cases in the evolution of port protection was borne of a historic event which preceded the modern cases by roughly 100 years. The completion of the first transcontinental railroad in 1869 provided the Pacific Coast ports with the means with which to compete with the Atlantic and Gulf ports for the voluminous flow of cargo from the American Midwest to Far East.[155] *Investigation of Overland and OCP Rates and Absorptions*[156] focused on a system of ocean rates through the Pacific gateways which were struc-

155. For a brief history of the first transcontinental railway, *see Union Pacific System: Better, Faster Service to Oakland*, Port Progress 3 (Nov/Dec 1983).

156. 10 SRR 899 (F.M.C. 1969), *affirmed sub nom*, Port of New York v. F.M.C., 429 F.2d 663 (5th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971).

tured so that when the ocean rate was combined with the applicable inland rates, such rates approached parity with that of the combined rates charged by their Atlantic and Gulf Coast counterparts. Thus, while the principle aim of Overland/OCP ratemaking was to allow ocean and rail carriers serving the Pacific Coast to meet Atlantic and Gulf competition,[157] the result, which was clearly beneficial to shippers, was to provide shippers with an alternative third coast through which to move their cargo. After no less than 40 years of operation,[158] the Atlantic and Gulf ports challenged the system as one which unlawfully diverted "traffic [which] inherently and geographically" belonged to the Atlantic and Gulf ports.

Assuming that the assertion that Overland/OCP ratemaking could be considered a form of port equalization, the Commission declared that the complainant ports' attempt to claim as their naturally tributary area the entire central portion of the United States would be absurd. The Commission further stated that "naturally tributary cargo" applied to "territory locally tributary to a particular port" or a cluster of ports as in *City of Beaumont*, rather than to the general territory which an entire range of ports or more than one range or seaboard may serve competitively.[159]

In his dissent, Commissioner Hearn found little distinction between the port equalization of previous cases and the "national equalization"[160] of the Overland/OCP tarrifs, tarrifs which he termed "the grandaddy" of intermodalism.[161] While agreeing with the Commission's decision limiting application of this right to "naturally tributary" cargo, the Commissioner expressed a disdain for it; "we are now entering [into] an era [of] transportation when concepts such as 'naturally tributary' may no longer suit the needs of transportation. The Commission should make it clear that these concepts cannot prevail if they prevent substantial benefits from accruing to the shipping public or [if they] obstruct innovative action in transportation."[162] The statement of Commissioner Hearn in Overland/OCP

157. Overland/OCP rates were established using usual ratemaking factors, although an emphasis was placed upon competition. As the Commission explained "the rate necessary to achieve parity with the Atlantic or Gulf gateway is obtained by subtracting the rail charges covering a representative shipment via the Pacific Coast from the sum of the railroad ocean charges for the same shipment via the most likely competitive route. 10 SRR at 912 (F.M.C. 1969).

158. One such agreement was, in fact, filed with the Shipping Board as early as 1917, while the generic PWC agreement was done so in 1923. *Id.* at 913.

159. This distinction between equalizing inland-ocean rates to and from ports within the same range and that of meeting the same combination of a competitive coast seems to be one without a difference. Steamship lines, in the former, were absorbing inland costs differentials while in the latter they were, in essence, absorbing some of the ocean/rail disadvantage to shippers. The principle is the same and amounted to, as Vice Chairman Hearn described it "national equalization." 10 SRR at 936 (F.M.C. 1969) (dissenting opinion of Commissioner Hearn).

160. *Id.* at 940 (dissenting opinion of Commissioner Hearn).

161. *Id.* at 936.

162. *Id.* at 940. Benefits of overland/OCP rates to exporters and importers primarily stressed

should be contrasted with an earlier statement he made in *City of Stockton*, in which the Commissioner expressed a concern with carrier power over ports. Commissioner Hearn's statement in Overland/OCP would foretell a developing theme in future Commission decisions.

In the past the Commission had not made a serious attempt to delineate zones naturally tributary to either the complainant Atlantic or Gulf Coast or to the defendant Pacific Coast ports. The long unchallenged history of Overland/OCP ratemaking, innovative when it was first devised and initially vulnerable to regulatory attack, had by this time become fundamentally ingrained in the nation's transportation system, and was of such clear benefit to shippers that the Commission could not reasonably refuse to sanction it. The fact that the practice unquestionably involved no diversion of cargo "local" to any of the four ranges as was the case in *City of Mobile* and *City of Beaumont*, along with the fact that the practice fostered "constructive" competition which the Commission has sought to uphold in *Rates from Jacksonville*, further added to the strength of its support. The decision essentially reflected a more liberal approach to port protection.

B. *Intermodal Service to Portland, Oregon—A Load Center and Creative Regulation*

Absorption, a more traditional form of port discrimination, led the Commission to institute an investigation in the case of *Intermodal Service to Portland*.[163] At issue in the case were the tarrifs of two Trans-Pacific steamship conferences which authorized cargo to be discharged from member carriers at the Port of Seattle and which was then transported by inland carrier to Portland at the carrier's expense.[164] Perhaps more than in any previous case, the conflict between both the interests of steamship lines in limiting their ports of call and between that of developing ports in

"the desirability of the alternative Pacific Coast routes, providing greater speed and flexibility in meeting sales and production deadlines at competitive cost," [while] allowing reduced inventories and therefore reduced financial costs. Warehousing and national distribution centers had been built to best serve areas in proximity to Pacific Coast ports as had entire systems of merchandizing, distribution and marketing. OCP/overland ratemaking and the increased availability and attractiveness of the Pacific gateway were therefore important in the event of labor strikes. 10 SRR at 503 (F.M.C. 1969).

Shippers testified that the OCP/overland rate structure combatted the diversion of cargo to Canadian ports. On Canadian diversion, *see generally* Lidinsky & Hellauer, *American-Canadian Cross Border Container Traffic: Innovation or Cargo Diversion*?, 15 J. MAR. L. & COM. 103 (1984).

163. 14 SRR 107 (F.M.C. 1973).

164. Although the practice at issue was labelled absorption, it was more akin to transshipment as steamship lines arranged inland carriage, paying the applicable charge for motor carrier movement from Seattle to Portland. 12 SRR 601, 611 (F.M.C. 1971) (Initial Decision). *See also* text accompanying note 52 *supra*.

seeking their "share" of the flow of containerized cargo would converge. The Administrative Law Judge and the Commission each attempted to fashion compromise solutions that would best serve the competing needs of steamship lines and the needs of a port relegated to the status of a "load center".

Portland was developed as a container port somewhat later than Seattle. Seattle had not only captured its own local cargo but had also managed to reach deep into the interior of the country for Overland/OCP traffic and was what would be termed a "load center".[165] In contrast, Portland had invested in container facilities but primarily handled traffic local to it and did not attract significant amounts of Overland/OCP cargo. In what amounted to a vicious circle, the inability of Portland to compete for the Overland/OCP traffic meant that it could not attract adequate steamship service and consequently it could not compete for traffic from the "common tributary territory"[166] it essentially shared with Seattle. Moreover, the steamship lines could render service legally inadequate at Portland by simply refusing to call there and, following the standards enunciated in *City of Portland*, could force the Commission to sanction their use of indirect service.[167] Administrative Law Judge Morgan proposed a unique if unconventional solution in this instance. As a compromise, steamship lines serving Portland indirectly through Seattle could do so only by offering such service at a premium of $1.50 a ton more than the carrier's ocean rate from Seattle. The premium sought to encourage shippers to utilize the more costly indirect service only if they deemed the direct service from Portland inadequate, with the hope that additional direct service to Portland would result, based on the cost advantages over indirect service. Subject to this limitation, the absorption practice would be lawful, since it did not appear contrary to Section 8.[168] In addition, such a practice would obviate the need for continuous litigation and would remain consistent with the test for unlawful diversion established in *City of Portland*.

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165. This may have been the initial Commission consideration of a legitimate container load center and its consequences. In its order of investigation, the Commission noted that "[t]he determination of these matters is of prime importance for the guidance of the shipping industry and should be made the subject of a full hearing." 12 SRR at 603 (F.M.C. 1971).

166. Portland and Seattle were found to be in "essentially the same geographic area," serving a "somewhat common tributary territory." 14 SRR at 126 (F.M.C. 1973). *See* Stockton v. PWC, 6 SRR 505 (F.M.C. 1965); City of Beaumont v. Seatrain, 2 U.S.M.C. 699 (1943).

167. In this manner economics, rather than the Commission, would determine the adequacy of service. 12 SRR at 629 (F.M.C. 1971).

168. The spirit of Section 8 was at least reflected in the Hearing Examiner's statement that "[w]hile no party has mentioned the matter of natural defense, it is always possible that bombs or missiles in the event of world hostilities may destroy some of our port facilities in which circumstances alternate facilities would be essential. The development of port facilities should be encouraged." *Id.* at 621. *See* text accompanying note 75 *supra* (history of Section 8).

Exceptions were filed. The Commission succinctly framed its difficult task as one of "determining how much of our present approach is still of value and, to the extent [that] it is not, how much of it we may discard within the limits of law and of fair and prudent administration."[169]

While noting that the concept of naturally tributary cargo had no application to cargo which moved predominantly through Pacific Northwest ports, the Commission found that there was a significantly smaller amount of "local cargo" that moved through Portland from areas where the "proximity of local industries and lower inland mileage suggested the 'naturalness' of movement through one rather than the other port."[170] The only defense to a diversion of such cargo, as enumerated in *City of Portland*, was inadequate service at Portland.

While the service at Portland was certainly adequate for such small local cargo flow, the Commission recognized that conference carriers who dominated the trade could easily surmount this "barrier" and could gain access to cargo by simply refusing to call at Portland, thus rendering service inadequate by their very act. The Commission's solution was to require a direct call to Portland on alternate voyages as a condition for allowing lines to continue to provide indirect service there.[171] Thus, the Commission attained the same result sought by the Administrative Law Judge, but without the infirmities of a differential, and without penalizing shippers for utilizing an indirect service beneficial to them. The Commission also felt that its solution amply served the policies of Section 8, although the impact of that provision was slight because of the small amount of tributary cargo to which it applied. In any event, Section 8 did not proscribe specific conduct.[172]

These exercises of "creative" regulation, both proclaimed as an attempt to reconcile the economics of containership operation with the promotion of port development and as a protection of the competitive interests of ports, were better explained through the Commission's state-

169. 14 SRR 107, 125 (F.M.C. 1973). Again, in recognition of the importance of the principles to be considered, the Maryland Port Administration advocated treating the case as a rulemaking to examine the broader issues. *Id.* at 124. The issue of cargo diversiohn, complex and controversial, has prompted other such cries for formal rulemaking. *See* Cargo Diversion Practice at U.S. Gulf Ports, 16 SRR 1265 (F.M.C. 1976), Cargo Diversion—Denial of Petition for Rulemaking, 14 SRR 236 (F.M.C. 1973) *clarified* 14 SRR 630 (F.M.C. 1974).

170. *Id.* at 126.

171. 14 SRR at 128 (F.M.C. 1974).

172. Hearing Counsel, while acknowledging the policy conflict between the development of ports and of intermodalism, suggested that until Congress made a determination that it favored develoment of the latter, the promotion of the development ports, as already embodied in Section 8, must prevail. The conferences and Seattle interpreted Section 8 as enunciating a general policy of port promotion only, not to be followed if the result was the hinderance of the development of containerization. This conflict or divergence of opinion, was no more resolved in this case as had been in those previous.

ment that "a major consideration in this proceeding, aside from the matter of the rights of Portland with respect to naturally tributary cargo, is the extent to which each port should be allowed to develop into a container "load center".[173] Portland's concern, as echoed by the Commission, did not center upon the diversion of its local cargo, but rather upon the hope of attracting what Portland considered its share of the enormous flow of Overland/OCP cargo that flowed to Seattle, a flow that had been established through Seattle's early financial commitment to the development of container facilities. This cargo was naturally tributary to neither port and therefore, based on Commission precedent, did not warrant Commission "creativity" or protection.

Based on *City of Portland*, indirect service and equalization could be sanctioned only if direct service to Portland was found to be inadequate. This was not found to be the situation. The inquiry could have ended at that point, but Portland would have still faced problems in attracting additional direct service to capture Overland/OCP cargo. The established legal standard was essentially changed to accomplish that objective; the right to provide indirect service was conditioned on the adequacy rather than on the inadequacy of direct service. Portland was therefore assured of some level of direct service.

By clinging to the existing legal standard for unlawful diversion, the Commission both compelled service for all practical purposes (which was beyond its authority)[174] and the Commission also did not consider the more obvious, but difficult solution of prohibiting absorption on cargo it determined local to Portland. This would have provided carriers already serving the port with a larger cargo base and with an additional incentive to remain at Portland. Other carriers would have been faced with the decision of whether a direct call to Portland, as based on the amount of cargo "guaranteed" to the port, was justified.

C. THE MINIBRIDGE DECISION—A NEW TEST EVOLVES

In *Intermodal Service to Portland*, the Commission was confronted with the traditional means of port equalization: the practice of absorption.

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173. *Id.* at 128.

174. *See* San Diego Harbor Com. v. Matson Navigation Co. 2 SRR 127 (F.M.C. 1963). *See also* Scott Paper Co. v. Puerto Rico Maritime Shipping Authority 14 SRR 1616 (F.M.C. 1975), "Unlike sister agencies, the Interstate Commerce Commission and the Civil Aeronautics Board, the FMC does not issue certificates of public convenience and necessity, requiring maintenance of service on listed routes." *Id.* at 1617.

On August 30, 1985, the Trans-Pacific Freight Conference of Japan petitioned the FMC to set aside restrictions on indirect service to Portland arising from the Commission's decision in *Intermodal Service to Portland*. The petition stressed the present use of larger containerships that necessitated to an even greater degree limitations of port calls. Petition of Defendants to Set Aside Order in Part, Service to Portland, Oregon, 14 SRR 107 (F.M.C. 1973).

In the past the practice of absorption had been considered the principle evil of port discrimination claims. Now, however, absorption had evolved into a means to an end, with the end being that of the container load centers. The Commission would next examine what was at the time considered a new dimension of intermodalism, the now-familiar minibridge.[175] In actuality, the minibridge was really an extension of the equalization practice of transshipment. At the time of its introduction the minibridge was perceived to be such a bold innovation that it would, in principle, be subjected to detailed Commission scrutiny through two major decisions, *Board of Commissioners v. Seatrain* and *Council of North Atlantic Shipping Associations v. American Mail Lines*.[176] Of these two decisions, the latter case, *North Atlantic Shipping*, would, in one fell swoop, wipe clean the slate of Commission precedent and would help to formulate a new test regarding the diversion of naturally tributary cargo.

In the first case, *Board of Commissioners v. Seatrain*,[177] the Gulf ports assailed Seatrain's European minibridge. Seatrain had established joint rail/water rates with the Southern Railway for service between New Orleans[178] and Europe through Southern's movement of containers to Charleston, South Carolina and ocean transportation on Seatrain vessels from there. The complainant ports alleged that the minibridge unlawfully diverted their naturally tributary cargo in contravention of Sections 8, 16, 17, and 18. The complainant ports also voiced their concern that the unlawful diversion of cargo placed their current investments in jepoardy by impinging upon the cash flow necessary to service outstanding bonds, by discouraging future investment, and by threatening their very economic existence.[179]

Administrative Law Judge Levy found both the Gulf ports' claims of injury[180] unpersuasive and their case for diversion unconvincing in that they were unable to establish an area "susceptible of objective delinea-

175. For a definition of minibridge, *see* text accompanying note 51 *supra*.

176. 18 SRR 774 (F.M.C. 1978).

177. *Id*. at 763.

178. Beaumont, Houston, and Galveston, Texas were later added as terminal points.

179. 16 SRR at 242 (F.M.C. 1975). Concern over the impact of minibridge was not unwarranted. In 1981, nearly one million tons of cargo moved via the Far East minibridge, split nearly equally between East and Gulf coast origins. *See generally* Mar. Admin., U.S. Dept. of Transp., *U.S. Imports via Minibridge*, Ocotber 1982).

180. The Administrative Law Judge concluded that the ports individually had suffered from infirmities unrelated to the impact of minibridge, including export/import imbalance, decreases in military cargo, strikes, insufficient cargo volume to justify a direct call, and competition among themselves. Furthermore, even conceding that some cargo was diverted, the amount diverted, was such an insignificant percentage of the total cargo of the ports as to be unworthy of protection. This was indicated by the complainant's own statement that their cargo flow had not decreased as a result but rather their *increases* had been spared. Models that purported to assess the overall negative impact of the minibridge on the ports had failed to include both the economic

tion" (i.e., a radius in which the cargo can *ipso facto* be demonstrated to be naturally tributary)[181] or any other test for naturally tributary areas that also recognized the public interest as well as innovation.[182] Judge Levy found the key to lie with the public interest which was perhaps best reflected in a traffic manager's decision regarding how to route his cargo so as to earn the greatest profit for his company. The concept of providing for the public interest flexibly through innovation was something that Congress could not have intended to stifle despite the fact that the Shipping Act of 1916 and the Merchant Marine Acts were conceived prior to intermodal capability.[183] A balancing test emphasizing innovation along with competition would insure that the best interests of the public would be served.

The Commission adopted the Initial Decision, determining that the concept of naturally tributary cargo could not "be extended to the point where a port or range of ports can claim a multi-state inland region as its exclusive territory"[184] while no individual port had sought to establish an area locally tributary to it alone. By basing their argument on historical flaws rather than on the basis of fair competition, the Gulf ports sought support for the rather flawed notion that Congress had intended Section 8 to freeze international transportation movement into the pattern found in the 1920's.[185]

The second of perhaps the two most significant cases with respect to the development of the legal protection of ports (the first being *City of Mobile* and its establishment of the doctrine of naturally tributary cargo) was the case of *Council of North Atlantic Shipping Associations (CONASA) v. American Mail Lines*.[186] In lieu of a requested rulemaking

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benefit of minibridge-related activity at the railheads of the Guld ports and the corresponding benefit to the port of Charleston.

181. 16 SRR at 259 (F.M.C. 1975).

182. *Id.* No definitions of the term "naturally tributary" were submitted which did not ignore the benefits of innovation and technology to shippers, not could ports answer the "obvious" questions proposed by the Examier which he asserted should serve as basis for consideration of the concept. For example "are the cargo's origin and destination geographically proximate to the port?" In what way is the flow of cargo through that particular port in the public interest? What economic factors ind cargo inextricably to a port?

183. 16 SRR at 259-60 (F.M.C. 1975). Competition, to the public benefit, was within the context of those Acts, as were load centers that had altered the bounds of naturally tributary areas established by breakbulk cargo. Cited was Commissioner Hearn's observation in dissent in *Overland/OCP Rates and Absorptions* that the concept of naturally tributary cargo had perhaps been outmoded by transportation innovation. *Supra* note 160.

184. *See* Overland/OCP Rates supra note 160. (Claims that cargo of central United States inherently belonging to Gulf and North Atlantic ranges refuted.)

185. The importance of historical cargo flow to the determination of naturally tributary status was, in orther words, significantly discounted.

186. 18 SRR 774 (F.M.C. 1978).

to dispose of all of the "cargo diversion issues,"[187] CONASA was designated as the lead case for the establishment of general minibridge principles. The Commission recognized that developments in transportation had sharpened the historical conflict between that of the ports, which sought the maximum amount of carrier calls attainable, and that of carriers, who continually sought to reduce the number of port calls through devices such as containerization, intermodalism, and the minibridge. Thus, these two economic interests were pitted against one another.[188]

187. Two steamship lines filed a petition for a general rulemaking proceeding to consider absorption and equalization practices, particularly to sanction them as lawful under Sections 16 and 17, 14 SRR 236 (F.M.C. 1973), *clarified*, 14 SRR 630 (F.M.C. 1974). At the time, twelve cases involving such practices were pending before the Commission, "an aggregate of 29 conferences, about 30 port authorities, port intent groups and labor groups, and 82 steamship lines parties to one proceeding or another." The petitioning parties felt this ad hoc adjudicatory approach unfair, unworkable, and a serious drain on the resources of most ports. *Id.* at 237. The Commission, however, rejecting the request, noted that the very generality of the explicit standards of Sections 15, 16 and 17 of the Shipping Act, 1916 (*undue* and *unreasonable* prejudice, for example) did not permit issuance of general rules but mandated a case-by-case determination. In lieu of instituting a rulemaking, and recognizing the poroblems attendant with multiplicit litigation, two cases were chosen to serve as vehicles for the development of general principles. Council of North Atlantic Shipping Ass'n v. American Mail Lines 18 SRR 774 (F.M.C. 1978) (minibridge).

One of the pending port discrimination cases at the time of the Commission's denial of rulemaking was Cargo Diversion Practice at U.S. Gulf Ports By Common Carriers By Water Which Are Members of the Gulf-European Freight Assoc., 16 SRR 1265 (F.M.C. 1976). Administrative Law Judge Kline dismissed that adjudicatory proceeding and recommended that the Commission institute a *rulemaking* to consider the peculiar problems of cargo diversion in the Gulf, an approach "far better than the present state of affairs in which a plethora of such" cargo diversionary "cases have continue to spring up around the country requiring time-consuming litigation." *Id.* at 1275. His entire action, and rationale is contrary to the earlier Order Denying Rulemaking, to the point of suggesting approaches or standards for consideration. *Id.* at 1283-84.

Judge Kline saw *Intermodal Service . . . at Philadelphia*, which *had* been designated as a lead case, as, too, suffering from "stalemate and old age largely attributable to the use of an adjudicatory procedure" and "paralyzed" as a result. *Id.* 1281. That assessment appears accurate, in light of a continuing progression of procedural difficulties. 14 SRR 57 (F.M.C. 1973); 14 SRR 435 (F.M.C. 1974); 14 SRR 539 (F.M.C. 1974); 14 SRR 592 (F.M.C. 1974); 14 SRR 664 (F.M.C. 1974); 14 SRR 780 (F.M.C. 1974); 16 SRR 556 (F.M.C. 1975); 16 SRR 1546 (F.M.C. 1976); 16 SRR 1613 (F.M.C. 1976).

188. 17 SSR at 811-12 (F.M.C. 1977); *See* Cargo Diversion—Denial of Petition for Rulemaking, 14 SRR 236 (F.M.C. 1973). Minibridge does not fit into the traditional "load center" scheme with its foundation the elimination of port calls to "adjacent" ports. *See Intermodal Service to Portland, Oregon* 14 SRR 107 (F.M.C. 1973). Complainants in *CONASA* attempted to cast minibridge in that light, however, in alleging that the ocean carrier's net revenue after division of total rate with rail carriers was less than that realized in all-water, OCP or local service. 17 SRR at 835 (F.M.C. 1977). The impact of designation of these lead-cases on the then recently decided case of *Intermodal Service to Portland* was a source of confusion, 14 SRR at 632 (F.M.C. 1973), prompting the Commission to announce that it was not its "intention to abandon the principles relevant to absorptions announced therein." *Id.* at 634.

The economic interests of complainant North Atlantic ports presented at hearing were different only in magnitude from those stressed previous cases. More succinctly, port interests char-

The hub of this intense conflict was the use of the minibridge from the Far East to the U.S. Atlantic coast via the Pacific Coast ports. The complainants asserted that by diverting their naturally tributary cargo the "Far East" minibridge was violative of the policies of Section 8, and that this warranted an examination of the doctrine of naturally tributary cargo. Administrative Law Judge Gosgrave concluded that the confusion surrounding the application of Section 8, particularly the availability of defenses,[189] was based on a neglect of the fact that Section 8 expressed one Congressional policy that clearly mandated a balancing of interests;[190] interests of carriers (often minimized) as well as the interests of ports. As in *Seatrain*, a balancing of these interests was to establish the lawfulness of the use of the minibridge.

In adopting Judge Gosgraves decision, the Commission formally adopted a new balancing test for adjudging the unlawfulness of cargo diversion, although the Commission acknowledged that it was "not practical or feasible to draw future guidelines. . .if by guidelines (it) is meant the drafting of precise rules by which a simple determination of legality or illegality could be made.[191] The test that did evolve consisted of three parts. First, the threshold inquiry was whether the cargo was within the naturally tributary zone of the aggrieved port, a zone that was constantly

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acterized their physical facilities as (1) very long-lived and fixed (2) very expensive, requiring long-term borrowing and (3) of necessity, requiring extensive use so as to amortize debt, 17 SRR at 198 (F.M.C. 1977). In additon to current facilities and future expansion being jopardized by minibridge drain of cargo, the ripple or multiplier effect of decreased port activity said CONASA, amounted to $53-million for a 18 month period.

189. Judge Cosgrave surmised that the decision in Discounting Contract/Non-contract Rates, 9 SRR 726 (Initial Decision) (F.M.C. 1967) reversed, 10 SRR 15 (F.M.C. 1968), allowed the conclusion that so-called traditional defenses, including volume of traffic, competition, distance, advantages of location, character of traffic and frequency of service. Surcharge on Shipments from Buffalo, 2 SRR 111, 114-15 (F.M.C. 1962), *citing* The Port Differential Investigation, 1 U.S.S.B. 61 (1925). *See also* Alaskan Rate Investigation, 1 U.S.S.B. 1 (1919) (advantage of 171 miles over route of nearly 1000 not sufficient justification for rate disparity were available only if Section 8 was not utilized as the basis for the allegation). In Discounting Contract/Non-Contract Rates the tariff of the India, Pakistan, Ceylon & Burma Outward Freight Conference allowed its members to offer discounts on certain iron and steel items of up to 30% off of the conference rates, which were restricted to certain ports of origin. The port of New York complained that the rates were not applied equally and burdened its flow of cargo.

The Hearing Examiner found that the rates were not the principle cause of the loss of traffic but instead "the preference of shippers for outports," 9 SRR 751 (F.M.C. 1967), "the outports nearness to main producing mills or cheaper inland freight costs, experience of outports in handling steel, outports geared to handle steel in large lots." *Id.* at 750. The Commission, however, found only two of the factors considered by the Hearing Examiner, served to justify . . . comparative loading costs and carrier competition. 10 SRR at 25 (F.M.C. 1968). If violation of Section 8 was alleged, inadequacy of service at the aggrieved port was the only defense. *See for example*, Stockton Port District v. Pacific Westbound Conference, 6 SRR 505 (F.M.C. 1965).

190. 17 SRR at 833 (F.M.C. 1977).

191. *Id.* at 778-779 *quoting* Initial Decision, 17 SRR at 830 (F.M.C. 1977).

changing and which was dependent upon the commodity involved as well as by a consideration of several other factors. These other factors included (a) the flow of traffic through the port prior to the conduct in question; (b) the relevant inland transportation rates; (c) natural or geographical transportation patterns and efficiencies; and (d) shipper needs and cargo characteristics.[192] Second, once the diversion had been established, the reasonableness of the diversion would be determined by a consideration of (a) the quantity and quality of cargo being diverted (i.e., is there substantial injury); (b) the cost to the carrier of providing direct service to the port; (c) any operational difficulties or other transportation factors that bear upon the carrier's ability to provide direct service (i.e., lack of cargo volume, inadequate facilities); (d) the competitive conditions existing in the trade; (e) the fairness of the diversionary method or methods employed (e.g. absorption, solicitation).[193] Finally, the harm suffered by the port would have to be substantial.[194]

This test or balancing of interests was designed to end the utilization of Section 8 so as to protect ports at the expense of or to the determent of carriers serving those ports. Such a test would guide all future allegations regarding violations of Section 16 First and Section 17 of the Shipping Act of 1916 based on charges of cargo diversion. With this new standard in place, the Far East minibridge was deemed to be lawful.[195]

The *CONASA/Seatrain* decisions, by upholding the Far East and Gulf/European minibridge systems effectively overruled *City of Mobile* and the previous line of cases which had awarded ports with a fundamen-

192. 18 SRR at 77 (F.M.C. 1978).

193. *Id.*

194. The "but for" test, of causation of diversion by the practice, rejected in Sealand v. SACL, 6 SRR 1105 (F.M.C. 1966), was also reinstated by the Administrative Law Judge, 17 SRR at 836 (F.M.C. 1977), note 88 and, thus, arguably, adopted by the Commission, though not explicitly.

195. *CONASA* had not even sought to delineate the area "naturally tributary" to it, nor to determine the extent of the diversion. While a radius of 50 miles from the port was suggested by *CONASA* as locally "tributary," 18 SRR at 836 (F.M.C. 1978), it placed its sole reliance on the fact that the container was loaded at the port city at railhead and the case suffered from the same lack of substance as did those of its Gulf counterparts in *Seatrain, supra* note 166. Suggested, however, was an appeall for retention of the protection of cargo if only in considerably restricted degree, "local tributary cargo," as noted in Intermodal Service to Portland, Oregon, 14 SRR 107 (F.M.C. 1973).

To contrast the effect of such a perimeter of protection, in 1976, 53% of the port of New York and New Jersey's export business originated over 50 miles from the port and 26% of the port's imports were destined for areas outside that 50 miles. *Effects of Intermodalism—On Cargo Gateway Selection & The Port Industry*, WORLD WIDE SHIPPING/WORLD PORTS MAGAZINE 83-84 (Dec./Jan., 1984). The port of Boston draws 76% of its total liner volume from within 55 miles of its waterfront—only 2% of Boston liftings are generated in localities beyond 100 miles from the port. Hearing on April 11, 1984, Notice of Inquiry FMC Docket No. 83-38. Statement of Rino Moriconi, Assistant Port Director, Massachusetts Port Authority at 8.

tal right to naturally tributary cargo. This result occurred a scant two years after the decision in *City of Mobile* and *City of Beaumont* in which the regulatory flexibility was needed so as to prevent a stifling of innovation. Over a period of thirty years, Section 8 had evolved from a policy embodying a fundamental right of ports to Shipping Board protection, (as was illustrated in *City of Mobile*), to a policy which reflected only a national concern for ports (as illustrated in *Seatrain*).[196]

It also seems clear that even if the complainant ports in both the *Seatrain* and *CONASA* cases had shown the substantial damage found to be lacking and had ultimately proven this to be fatal in each case, the minibridge idea would been upheld nonetheless.[197] Unlike the previous cases such as *Sealand v. SACL* and *Intermodal Service to Portland*, the use of the minibridge had such potentially broad application and was of such clear benefit to shippers,[198] let alone carriers, that the past tests for unlawful diversion were outdated. Even the new *CONASA/Seatrain* guidelines somehow seemed inappropriate.

The minibridge concept thus provided an easy application of the new standards. What remained unclear was the extent to which the guidelines would lend themselves to the application to a true load center (i.e., a feeder port battle over "common cargo"). Diversion between adjacent ports would also demonstrate the extent to which any of the principles embodied in *Intermodal Service to Portland* still applied.[199] Finally, there was a need for a demonstration of how effective the new guidelines would be in providing a more substantial indication as to the parameters of permissible practice. By discarding defenses that had severely restricted carrier flexibility, the Commission had laid the foundation for the potential chaotic eruption of cargo diversion proceedings. Certainly, the CONASA

196. 18 SRR at 772 (F.M.C. 1978).

197. Administrative Law Judge Levy stated in *Seatrain, supra* note 166, "Even if the growth were so great, and even if the service expanded into other trades to the point where the impact on the ports became substantial, we would then have to ask ourselves why has this come about? Would it have been caused by an unconscionable, unscrupulous, underhanded, undercutting competitive methods or because a better mousetrap has been fashioned?" 16 SRR at 273 (F.M.C. 1976). This was echoed by Judge Cosgrave observation in *CONASA* that "the effect of the allegedly prejudicial practice on all interests—including shippers must be taken into account when measuring the substantiality of the prejudice or preference." 17 SRR at 838 (F.M.C. 1977).

198. Minibridge gives shippers a choice of all-water or joint rail/water, the greater service frequency and shorter transit time, coupled with the single bill of lading and single rate, at no greater cost. . . [A]dditionally, it combines "simplicity of documentation, easy ascertainment of total transit charges with single bookkeeping and insurance entities. [Further] the shipper need look only to a single carrier regarding damage claims, [because] the carriers will ascertain liability as between themselves." 16 SRR at 274 (F.M.C. 1976).

199. *See* text accompanying note 188 *supra*.

categories of "fairness" and "transportation efficiencies" allowed much room for interpretation and therefore the introduction of controversy.

D. Dart Containerline—The Misapplication of the New Standards

The first test for the new law of port discrimination as developed and represented by the standards in CONASA occurred in *North Carolina State Ports Authority v. Dart Containerline.*[200] At issue was the utilization of transshipment, a practice virtually identical to that found to be unlawful in the pre-CONASA case of *Sealand v. South Atlantic* and *Caribbean Line.* Dart had received cargo at the Port of Wilmington and had shipped it overland to Norfolk at its own expense. The cargo ultimately was destined for direct service to Europe. Wilmington alleged unlawful diversion of its naturally tributary cargo (unmanufactured tobacco) to which Dart's indirect service was limited. Under CONASA guidelines, the first thing that would need to be determined would be the boundary of the areas naturally tributary to both ports. Such a determination would be based on the following factors: historical flow; inland transportation rates; natural or geographic transportation patterns or efficiencies; shipper needs; and cargo characteristics.

The Administrative Law Judge applied the new "standards" and found the following. First, prior to the development of port facilities in North Carolina, the flow of unmanufactured tobacco had been predominantly through Norfolk which still laid claim to 51.7% of U.S. exports of the commodity.[201] Second, an examination of inland rates proved to be difficult to surmise because the transportation of the particular commodity was not regulated and was thus subject only to negotiation between carrier and shipper. An analysis showed that on the average, there was only a slight disparity regarding the inland rates between the two ports and such rates were incapable of absolute determination because of their ne-

200. 19 SRR 521 (F.M.C. 1979), *aff'd sub nom.* Dart Containerline v. F.M.C., 639 F.2d 808 (1981). It was clear that the economic basis for interests of the adverse parties had changed in magnitude but not in nature over the years of port discrimination claims. A weekly Dart call at Wilmington would cost approximately $38,291.67; $1,367.56 per box if it could obtain the 28 boxes of unmanufactured tobacco that the major line served Wilmington directly, (which Seatrain did), and $254.63 per box if it could average the 150.4 containers per call overall handled by Seatrain. Balanced against this was the $300 per container cost of Dart's overland truck substitute service.

The port of Wilmington had committed $32 million in development of its facilities, including $8 million for container facilities and was seeking 14 million for more. The loss of all unmanufactured tobacco to Dart's service would cost Wilmington yearly revenues of $80,426 and should loss of that cargo induce Seatrain to cease direct service, $213,455. 18 SRR at 1503 (F.M.C. 1978).

201. 18 SRR at 1510 (F.M.C. 1978). 13.2% moved through Wilmington. *Id.*

gotiated nature. Third, the determination of what rightfully belonged to a ports' natural or geographical transportation pattern and efficiences required an examination of such things as the quality of the highways feeding the ports, a look at the surrounding railroad networks, etc. Norfolk's superior highway network was self evident but was apparently of little significance. Finally, an evaluation of the shippers needs and cargo characteristics only served to illustrate that inland rates were important to shippers and that personal relationships between shippers and carrier representatives entered into the final choice of a port.[202]

Although the second tier of the CONASA guidelines was applied, it was clearly unnecessary because the threshold test (that of the diversion of naturally tributary cargo) had not been met. Judge Levy found the commodity to have shown "no preference [for any port] whatsoever and [it] is not naturally tributary to any port."[203] On the average, the markets that the commodities were bound were equidistant from both ports. Historically, unmanfuactured tobacco was more naturally tributary to Norfolk than to any other port. However, even without the implementation of Dart's substitute service, the tobacco would have moved through both ports.

With Seatrain serving Wilmington directly and Dart indirectly, and with competition conducted on the basis of service (rates were at parity), Dart would have a significant impact only if its service better served shipper needs and requirements. To deny shippers such a choice was found not to be in the public interest.

Perhaps the decision best reflects the liberal spirit of CONASA in accommodating the needs of carriers to concentrate on their ship calls and direct service. The indirect service of Dart would have allowed it to compete for cargo with previously established North Atlantic service without facing additional port calls. Ultimately, such competition was to the advantage of shippers. Based on the finding that the cargo was not naturally tributary, however, the port/carrier conflict did not reach the proportion that it would have had Dart been adjudged to have been diverting cargo belonging to Wilmington or to its Norfolk load center. The ultimate conflict between load center and feeder port was averted.[204]

Whatever significance that could be attached to Judge Levy's appli-

202. Presumably, such personal relationships were important only if economic considerations were substantially equal, the transportation managers making an "economic judgment of how to make the best profit for his company." Board of Comm'n v. Seatrain, 16 SRR 235, 265-6 (F.M.C. 1975).

203. Wilmington was, in fact, on the average of 11 miles closer to major tobacco markets in North Carolina and Virginia. 18 SRR at 1507 (F.M.C. 1972).

204. That conflict *had* taken place in Intermodal Service to Portland, 12 SRR 601 (F.M.C. 1971), not resolved but merely addressed by compromise.

cation of the CONASA guidelines in the context of modern intermodalism was short lived, for in a 3-2 decision, the Commission struck down Dart's transshipment scheme.[205] The majority stated that Dart's substitute service was premised on an assumption that unmanufactured cargo would naturally move to Wilmington. If the cargo did not move to Wilmington, there would be no need for Dart's service because the cargo would likely move to Norfolk. Furthermore, regardless of the apparent overlap of the two port's hinterlands, once the cargo arrived at Wilmington, it assumed the status of being naturally tributary to that port.

In providing two final justifications for the decision, the Commission found that "in this era of inflation and dwindling fuel resources, shippers and carriers. . .[of commerce] are best served by competition which increases productivity rather than by competition based upon artificial shipping inducements". Dart's backhauling of cargo to Norfolk[206] put an additional burden on Dart. The Commission felt that Dart's failure to prove the cost of service, coupled with the operational and competitive characteristics precluded direct regular containership service and made Dart's indirect service to the port appear to be inherently unreasonable.[207]

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205. 19 SRR 521 (F.M.C. 1979).

206. In Sealand v. South Atlantic Caribbean Line, 6 SRR 1105 (F.M.C. 1966), the transshipment scheme involved no such backhauling but actually moved the cargo overland closer to its ultimate destination. Nevertheless, it too, was struck down.

207. The *Dart* decision was, of course, not only a blow to that steamship line but also to the port of Hampton Roads, Virginia, which would also have been the beneficiary of *Dart's* transshipment scheme. As southernmost port in the North Atlantic range, and capturing 75% of its exports and 65% of its imports from the southeastern United States, the port was especially hurt by the growth of South Atlantic competitors, including Wilmington.

In 1981, the Virginia Port Authority (VPA), representing Hampton Roads, challenged the South Atlantic-North Europe Rate Agreement (SANE) as representing the Federal Maritime Commission-sanctioned diversion of cargo naturally tributary to Hampton Roads. The Commission, in its Order approving a three-year extension of SANE in 1978, cited the benefits of the agreement in restoring the flow of containerized traffic that had been diverted through North Atlantic ports with the early advent of containerization at those ports from its "natural" course through those in the South Atlantic. Agreement No. 9984-14, South Atlantic North Europe Rate Agreement, (Order of Approval of Federal Maritime Commission, September 30, 1981). Specifically, challenged was the rate flexibility 48-hour independent rate action provided by SANE as opposed to the cumbersome "North Atlantic Conference" rate machinery. Cargo was diverted, alleged the VPA, to the range of least resistance. If rates are inflexible in one range, it is simple to shift the cargo to another range and service. (The two SANE members, Sealand and U.S. Lines, were also members of the North Atlantic "Conference") where there is greater rate flexibility. Comments of the Virginia Port Authority, Agreement No. 9984-14, South Atlantic-North Europe Rate Agreement, F.M.C., (July 6, 1981).

The resolution of the controversy that had as its basis alleged diversion of the naturally tributary cargo of Hampton Roads was unconventional: the Virginia Port Authority withdrew its comments in acknowledgement of the "waiting" period for exercise of the right of independent action be lengthened from 48 hours to 30 days (10 days was originally requested by SANE for extention) and the requested extention be shortened from three years to 18 months, moderating

Commissioners Bakke and Kanuk found ample room for dissent from what could best be termed the majority's substitution of "an ivory tower regulatory theory . . . [in place of] pragmatic commercial judgment."[208] The dissent cited to fatal inconsistencies inherent in the condemnation of the backhaul of cargo to Norfolk in an era of dwindling fuel reserves. The dissent further alluded to the fact that the majority seemed to ignore the "commercial reality" of the Dart/Seatrain competition. Finally, the dissent questioned placing the burden upon Dart with respect to a showing of "why it is necessary for Dart to compete in . . . this manner".[209]

In contrast to the Administrative law Judge's decision, the decision of the majority in Dart did not reflect the Commission policy embodied in *CONASA* and *Seatrain* of allowing carriers to realize the benefits derived from increased flexibility and the efficiency of intermodalism. The decision to strike down Dart's indirect service (clear commercial advantages and the justification of indirect rather than direct service notwithstanding), represented the return to an era of more zealous port protection by the Commission.

The majority also refused to discard *Sealand v. South Atlantic and Carribean Lines* as being inapplicable by both its decision and through guidelines set in *CONASA*. In *Pacific Westbound Conference—Equaliza-*

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the effects of the Agreement. The SANE agreement, as such, was approved by the Commission only to die, however, on January 8, 1983, as Sealand withdrew. It was speculated that such withdrawal was based upon the lack of flexibility the 30-day notice requirement, in deference to the Virginia Port Authority, gave. *See Birth and Death of a Rate Agreement*, AMERICAN SHIPPER 11 (February 1983). In late 1983, three additional steamship lines serving the North Atlantic-Europe trade joined with former SANE members Sealand and U.S. Lines to request F.M.C. resurrection of SANE. *See* Comments of Virginia Port Authority, Agreement No. 10491, 10492 North Europe-U.S. South Atlantic Rate Agreements, Federal Maritime Commission (January 1, 1984). This time the Virginia Port Authority supported the request for approval reasoning that from a Hampton Roads perspective, the greater the provisions of the North Atlantic Conference agreement (then recently revised to include 30-day independent action) and SANE mirror each other, the less likely and able the involved lines are to use the South Atlantic as a means to divert cargo unreasonably. *Id.*

In the fall of 1984, six Atlantic steamship lines filed with the Federal Maritime Commission agreements, westbound and eastbound, covering the entire Atlantic range to and from North Europe, seeking to end the long-lived North/South Atlantic distinction and achieving what Virginia Port Authority had sought. 49 F. Reg. 175 (1984).

The problem of diversions of ports into ranges for ratemaking was highlighted from as early as 1925 in The Port Differential Investigation, 1 U.S.S.B. 61 (1925). *See also* Leeward and Windward Islands and Guinas Conference Agreement, 18 SRR 1418 (F.M.C. 1978) (division of Atlantic coast into two ratemaking sections held lawful).

208. 19 SRR at 527 (F.M.C. 1979).

209. *Id.* at 527-28. The decisions of the Administrative Law Judge in *CONASA*, as adopted by the Commission, couched the second tier of those standards (i.e. the reasonableness of the practice causing the diversion as a defense and the opportunity to justify the practice for carriers). Hence, the burden was rightfully placed on defendant steamship lines. 17 SRR at 832-33.

tion Rules and Practices,[210] the Commission had clearly stated that its analysis in CONASA was not limited to minibridge cases, but that such an analysis had represented "a refinement in the methodology that the Commission will generally apply to all cases of cargo diversion and absorption of inland transportation cost". This methodology is no less applicable to small diversions (i.e., those involving adjacent ports in the same range) than it is to large diversions (i.e., minibridge movements).[211] Such a declaration is certainly broad enough to apply to *Dart*, despite the Commission's pronouncement that "the actual holdings of the minibridge cases are not precedent for overland cost absorptions intended to attract cargo tributary. . .[to] nearby ports with adequate facilities for handling such cargo".[212] This unjustifiable pigeon-holing of *Dart* placed Dart back into the rigid, factual pre-*CONASA* realm of *Sealand v. SACL* and *City of Portland*.

Finally, the majority also stated that "[a] different situation would be presented if Dart were to compete for North Carolina tobacco by openly adjusting its Norfolk rates rather than publishing fictitious rates. In any event it would be most appropriate for Dart to publish a true point-to-point intermodal tariff from the major tobacco markets to Europe (e.g. Danville, Virginia to Hamburg, Germany)."[213]

Notwithstanding the fact that cargo would be moved either directly to Norfolk or indirectly through Wilmington, in essence the Commission sanctioned the use of the microbridge while condemning the use of the minibridge. This inescapably leads one to the conclusion that the true basis for the decision was the fact that once the cargo moved or was induced to the port of Wilmington, it attained the status of being naturally tributary to that port. This was the situation notwithstanding the fact that the cargo had come from origins in which tobacco had consistently moved to Hampton Roads, and despite the fact that such cargo may have flowed to the port solely to take advantage of Dart's indirect service. This later case spawned the creative means which insured the flow of cargo through a particular port.

The diversion of local cargo had also contributed significantly to the condemnation of equalization schemes in cases such as *City of Portland v. PWC* and *City of Mobile v. Baltimore Insular Lines*. Such cargo diversion was labelled "traffic raiding" in the initial *City of Beaumont v. Seatrain* decision, which was subsequently reversed. In according cargo with

210. 19 SRR 133 (F.M.C. 1979).

211. 19 SRR at 136 (F.M.C. 1979) note 5.

212. *Id.*

213. To distinguish "microbridge" from the minibridge tariffs struck down, *see* text accompanying note 51 *supra*.

such a status, the Commission had overlooked restrictions that it had previously established in the *CONASA* case.

In *CONASA*, the Commission stated that ports must identify naturally tributary areas that were both individual and distinct if they sought to invoke Commission protection. Such individual and distinct tributary areas had not been shown by Wilmington. Furthermore, in the *CONASA* case, the Commission, held as faulty the idea that cargo loaded within a port area, or railhead was naturally tributary to that particular port. However, the Commission appeared to reverse itself by adopting that very logic in *Dart*.[214]

E. *Pacific Westbound Conference—The Law Further Evolves*

The final chapter in the story of the evolution of regulatory protection of the cargo flow from areas naturally tributary to individual ports involved (appropriately enough) the port of Portland, Oregon. Much had changed since 1955[215] when Portland and Seattle jointly sought to halt the diversion of cargo to San Francisco. By making a significant investment in container facilities during the infancy of containerization in the 1960's, Seattle had become (to the detriment of Portland) the load center for the Pacific Northwest. The existence of Portland in the shadow of Seattle was made even more burdensome by the equalization practices of the Pacific Westbound Conference (PWC). PWC members were authorized to absorb the difference between a shippers cost of delivery to a port where the lowest inland rates applied (Portland), and the cost of delivery to a port served by an equalizing line (Seattle).[216] Much had changed since the most recent case involving the "beleaguered" port of Portland in *Intermodal Service to Portland, Oregon*. Portland's present motive in seeking to have the equalization rules eliminated was not to increase direct service to Portland. This fact compelled the Commission to devise a somewhat "creative" compromise in its decision. In *Pacific Westbound*

214. The U.S. Court of Appeals for the D.C. Circuit found that the Administrative Law Judge had erred in focusing on the flow of unmanufactured tobacco prior to 1972; noting that tributary zones varied over time and began to shift to Wilmington to an extent at that time. Dart Containerline v. F.M.C., 639 F.2d 808, 813, 816 (1981). In affirming the majority decision, it scored the Commission, too, for considering the inefficiency of Dart's indirect service in the first-tier of the *CONASA* guidelines, the delineation of the bounds of naturally tributary cargo. *Id.* at 817.

215. City of Portland v. Pacific Westbound Conference, 4 F.M.B. 664 (1955).

216. By Order of September 11, 1978, the Commission instituted an investigation into the absorption practices where allegedly there ws unlawful diversion of the naturally tributary cargo of Portland. Most significant was the pronouncement that the guidelines established in the *CONASA/Seatrain* minibridge cases would govern this non-minibridge case and, consequently, Section 8 would not be a statutory basis under consideration. Pacific Westbound Conference-Equalization Rates and Practices, 19 SRR 133, (F.M.C. 1979) (Order of Investigation). *See also id.* at 133 (confirmation that *CONASA* guidelines applied).

Conference—Equalization Rules and Practices,[217] Portland sought to grant to lines that were serving the port the right to carry Portland's "naturally tributary" cargo. Such cargo was presently being equalized through Seattle.

The first inquiry under *CONASA* (that of the requirement of culpability), was whether or not the cargo that had allegedly been diverted to Seattle was or had ever been naturally tributary to Portland. There was neither a demonstration that the historical flow of the cargo in question had been through Portland nor was there any proof that Portland had been favored over Seattle for certain commodities. At best, inland transportation rates did favor Portland, but this advantage was more than offset or balanced by the closer proximity of Seattle to the Far East markets. Furthermore, Seattle's advantages to shippers accruing from the infrastructure built around its load center status, when contrasted with the various infirmities or disadvantages attending the utilization of Portland, meant that service to Seattle was *sine qua non* in order for shippers to stay in the "export ball game".[218]

Despite the fact that Portland had, thus, failed to meet the threshold burden of *CONASA*, the reasonableness of the practice, the second tier of the standard, was nevertheless considered because of the "obvious overlap between the issues of diversion from a naturally tributary zone and justification. . . ."[219] As the economic justification of the indirect service was unquestioned and there was no indication that the practice was unfair in its thrust or manner of utilization,[220] the practice was upheld.

The Commission adopted the initial decision. Of greater significance however, was the way that the Commission addressed the broader principles surrounding the continued viability of the concept of naturally tributary cargo. The Commission did so despite their own assertion that consideration of such issues was more appropriate to rulemaking than to an adjudicatory hearing.[221]

The applicability of Section 8 to Shipping Act proceedings was no longer used as a basis for investigations or for determining unlawful diver-

217. 22 SRR 946 (F.M.C. 1984).

218. 22 SRR at 66 (F.M.C. 1984).

219. As an example, queuing delays and gang deficiencies at Portland serve both established inadequacies of service or inefficiencies under the "naturally tributary" or initial tier of the *CONASA* test and also serve to justify carrier decisions not to call at the port under the second tier, reasonableness of the practice.

220. The economic justification was unquestioned. As to the second factor, fairness, Seattle was neither using the equalization as an inducement in its solicitation of traffic, drawing away traffic from Portland that would otherwise have been shipped from there, nor by its substituted service, doing anything independent lines were not. There was little question of fairness.

221. 22 SRR at 961 (F.M.C. 1984). Rulemaking to consider cargo diversion issues was denied in *CONASA*.

sion.[222] However, the Commission would not discard the notion that ports had a "natural right" to certain cargo. In the eyes of the Commission, ports were still a protected class both under the Shipping Act of 1916 and under the Shipping Act of 1984. The Commission further declined to conclude that carrier equalization practices would never be violative of the Shipping Act.[223]

Notwithstanding these caveats, the Commission stated that "the lesson . . . may be that the "naturally tributary" doctrine has become obsolete insofar as it would apply to geographic territory surrounding a port. With the development of intermodalism and load centers, perhaps no particular geographic point is always tributary to a [particular port]. . ."[224] Perhaps the idea that cargo considered geographically "naturally tributary" coupled with Commission involvement which had arisen from the practice of equalization had been rendered obsolete.

The limitation placed upon the right of a port was explicitly restricted to cargo that was geographically tributary to a port and not to commodities which might be tied to a port for which they were best suited.[225] The Commission found *Dart* wholly reaffirmed according to these standards—the equalization practice which was struck down was based on a targeted commodity over which the doctrine of captive cargo might retain validity. In addition, the issue of discrimination between shippers, and not ports, was at issue in *Dart*, thus distinguishing it from the present case. The Commission held that "application of the *Dart* rationale to this record must therefore lead to a result preserving PWC's practices".[226]

The decisions in *Pacific Westbound Conference—Equalization Rules and Practices* and *Dart* warrant comparison as each was a "vehicle" for the application of *CONASA* guidelines. The Administrative Law Judge in each case reached the same conclusion and upheld the practice that was at issue.

In *Dart*, unmanufactured tobacco had historically flowed to both of the competing ports, seemingly without preference, whereas in *PWC*, many of the shippers had actually favored Seattle over Portland. The approaches in each case varied significantly when it came to considering the influence or importance of "relevant inland transportation rates". It

222. This was stated in unequivocal terms, "We reiterate now that Section 8 will not be the basis for Commission investigations of carrier equalization practices." *Id.*

223. *Id.*

224. *Id.* at 962. The Commission recognized that the concept of load centers was controversial and still developing. Its statement that Seattle had no legal right to become a load center and that Portland had a right to have a fair opportunity to compete was strangely reminiscent of its edict in *Intermodal Service to Portland* that Portland should have the opportunity to develop, as had Seattle, into a load center. This concern spawned, as noted earlier, a questionable decision.

225. *Id.* at 962.

226. *Id.*

was clear in *PWC* that inland motor carrier rates alone favored Portland. However, other factors favored Seattle and subsequently tipped the balance in its favor. Seattle had closer proximity to foreign destinations, had more numerous transportation options and liner service and offered other advantages that were a direct result of Seattle's emergence as a "load center". The inland rate differential was merely one of the elements that was considered by the judge for it was freely admitted that "obviously inland motor carrier rates favor . . . [the Port of Portland] . . . or there would [not] have been [any] equalization or absorption." In both of the *Dart* cases however, inland rates became the focal point of the decisions, as the exact rates and mileage from the major tobacco markets to both ports were examined. This analysis was performed despite the fact that mileage was not necessarily determinative of rates. Coupled with this was the fact that carriage of the commodity was unregulated by the ICC and rates were therefore matters that were determined through private negotiation between private entities. Thus, rates were not subject to verification by anyone.

The Commission in *Dart*, as in *PWC*, further "assumed that there is a consistent inland cost differential favoring Wilmington," and that if this was not the situation, shippers would have sent their cargo directly to Norfolk. In *PWC* this fact was balanced by the other advantages that Seattle had to offer over Portland. In *Dart* the Commission found that because "the very nature of Dart's intermodal service depends upon . . . some unmanufactured tobacco . . . naturally moving to Wilmington",[227] the cargo was therefore sasured to be naturally tributary to that port. The majority in *Dart* failed to consider the benefits afforded shippers through the use of an alternate gateway (offering the advantages associated with the greater level of activity in Norfolk) or the benefits accruing to steamship lines from their ability to focus their activities to a single port and to thus avoid costly ship calls. The majority in *Dart* recognized Dart's strategy as that of concentrating its service in Norfolk (or expanding the reach of its Norfolk call) and as being based upon artificial inducements rather than upon productivity. Similar means and ends in *PWC*, with steamship lines funnelling cargo into Seattle, was seen in a more favorable light.

In other words, different tests were applied—a more restrictive, port protective stance was taken in *Dart*, whereas a more liberal, broader standard was applied in *PWC*. Only the later decision seems to be in accord with both the literal *CONASA* guidelines and the intent behind them. That a factual difference may account for part of the discrepancy is indeed arguable: in *Dart* cargo was induced into the port of Wilmington for transshipment to Norfolk while in *PWC* cargo from inland origins (and

227. 19 SRR 521, 525 (F.M.C. 1979).

at rates that were favorable to Portland) was routed directly to Seattle. Nevertheless, the failure of the Commission to apply a balancing test to this cargo that it had found to be local to Wilmington indicates that *CONASA* guidelines were not followed.

As precedent, it is important to note what the Commission's decision in *Pacific Westbound Conference—Equalization and Absorption Practices* represents and what it does not represent. The Commission asserted that based on the record before it, it was unable to conclude that ports, as a statutorily protected class, did not have a "natural right" to certain cargo. Therefore the Commission could not label equalization practices as *per se* lawful. The Commission's use of equivocal language when it (apparently) discarded the concept of geographically naturally tributary cargo left further room for doubt as to the doctrine's demise.

The sole exception regarding Commission application of the concept of the right of a port to cargo centers around the idea that certain commodities may somehow be tied to a particular port best suited to meet its needs. Thus a distinction was drawn between geographically and commodity based captiveness, a distinction which was without precedent. It is certainly true that throughout the history of port discrimination, aggrieved ports had been unsuccessful in delineating any firm geographical areas exclusive to them. The Commission had been equally unsuccessful in providing guidance[228] and while examining such ill-fated attempts, the Commission developed guidelines in *CONASA* which were based more on transportation policy than upon strict geographical parameters. Therefore, Commission elimination of such futile and resource-wasting attempts could correctly be viewed as an exercise in "enlightened regulation."[229]

There was not a valid reason for retaining a doctrine based upon tying a particular commodity to a particular port. While a commodity may best be suited to a particular port, the entire basis for intermodality (and the circumstances that made the concept of captive cargo obsolete) was based on the standardization or uniformity provided through containerization and the resulting flexibility provided in the handling of cargo. In other words, while cargo may best be suited to a particular port, this is simply one of a number of factors that shippers must consider and which should be balanced against or which should override other advantages such as a tie-in arrangement. Commission investigations of practices singling out

228. As Commissioner Patterson noted in Reduced Rates on Machinery-Atlantic to P.R. Ports, 7 SRR 233, 259 (F.M.C. 1966), "[W]e should consider ourselves totally ill-equipped to draw the necessary lines on a map to fix places where any law of nature implied by naturally tributary characteristics dictates shipments should not be diverted from one port or carrier rather than another. . ." That such delineation is incapable of demonstration is the basis for the weakness of the entire concept of naturally tributary cargo.

229. Disposition of Container Marine Lines, 10 SRR 105, 118 (F.M.C. 1968).

commodities for equalization, *Proportional Commodity Rates on Cigarettes and Tobacco*[230] and *Dart* have ultimately focused *not* on the specific characteristics of the commodity, but rather the area from which it originated.

Cited in support of the concept of commodity-based exclusivity was the case of *Intermodal Service to Portland, Oregon. Intermodal Service* stood for the proposition that, despite the flexibility afforded by containerization, cargo could still be considered naturally tributary or local to a given port. Thus a distinction was not made as to commodity versus geographical characteristics. At best, retention of the concept of commodity-based naturally tributary cargo is itself a return to the arduous examinations surrounding the adequacy of service for specific commodities, a task the Commission appeared ready to avoid.[231]

If the consideration and disposal of the issue of naturally tributary cargo by the Commission is somewhat less than conclusive or satisfying, then its rationalization of *Dart* appears to be even less adequate. "The decision in *Dart* was well within the principles of *CONASA*, for the backhauling of cargo to Norfolk was operationally and economically inefficient and the equalization was targeted to a specific commodity. Questions were raised regarding unjust discrimination between shippers, an issue that was apart from that [of unjust discrimination] between ports." Preservation of *Dart* in light of the principles enunciated in *PWC* is misguided. As noted earlier, the decision in *Dart* centered around the conclusion that cargo induced into Wilmington for transshipment to Norfolk essentially became geographically naturally tributary or local to Wilmington and its subsequent transshipment was thus unlawful. Economic efficiency was not the primary issue and, although operational inefficiency was never proven by the Commission, the burden of proof regarding the demonstration of operational efficiency was incorrectly placed on the shoulders of Dart. The issue of possible discrimination among shippers was a secondary issue at best.[232]

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230. 1 SRR 145 (F.M.C. 1960). In *Proportional Rates*, in the infancy of containerization, respondent steamship line offered service from New York to Puerto Rico, offering so called 'proportional rates' on shipments originating at various Virginia and North Carolina cities. See text accompanying note 53 *supra* for definition of proportional rates. Baltimore's contention that the reduced rates would divert traffic normally following through the port and were, thus, unlawful, was accepted by the Shipping Board, which stressed the inadequacy of the justification offered by the line in support of the practice. Quoted in support was the *City of Mobile* passage that 'territorial *regions* and *zones* tributary to ports' were statutorily required to be recognized. *Id.* at note 152 (emphasis supplied). The characteristics of the commodity tying them to any of the ports was not an issue.

231. 22 SRR at 962 (F.M.C. 1984).

232. 19 SRR at 526 (F.M.C. 1979).

IX. Naturally Tributary Cargo—Regulatory Remnants and Alternatives

Based on the Commission's latest pronouncement in *PWC*, it is questionable whether the doctrine of naturally tributary cargo retains any viability at all. There are many obvious reasons why it should not, with the foremost one being that, despite torturously long proceedings, neither the aggrieved ports, the carriers, nor the Federal Maritime Commission have been able to label cargo in a definitive manner or suggest standards that would provide any degree of guidance regarding the paramters of lawful practice. The first tier of *CONASA* standards, that of the threshold determination of the status of diverted cargo, can justifiably be disregarded. Perhaps it would be equally justifiable to disregard the second tier of *CONASA*, that of the reasonableness of carrier practices retaining some validity as a standard for unlawfulness. It is noteworthy that in the Initial Decisions in both *Dart* and *PWC*, the reasonableness of carriers practices were examined in depth despite the fact that the threshold test was not met (i.e., the cargo diverted was not found to be naturally tributary to the complainant ports). It is at least arguable that the reasonableness of the practice alone was the determining factor regarding the lawfulness of the practices. The question therefore becomes one of policy; is there some point at which the rights of carriers frantically funneling cargo by whatever means, at various rate levels into larger and larger ships and load centers must bow to the greater public interest encompassing a port and its community? This must be considered in light of the substantial powers which have been given to steamship lines (both individually and collectively), under the Shipping Act, and which can damage ports. Despite the benefits that have accrued from competition, innovation, and from the weakening of port rights that has been precipitated, there is still an ever-present danger surrounding the control of the shipping outlets for this nation's commerce solely by commercial interests.

Perhaps a balancing test could be utilized where the benefits of the practice or ratemaking device accruing to the shipper (and the need for its utilization by the steamship line) would be weighed against the possible detriment to the complaining port and the surrounding community. Focus should be placed on both the short and the long-term effects of the practice. Positive short term effects surrounding the application of cargo routing should be weighed against the long term instability that may be created throughout the port industry. Cargo routing may render as useless new debt-financed facilities and may necessitate a change of the basic port-carrier relationship from one of a casual commitment to that of a greater commitment (i.e., along the lines of airport-airline bond guarantees). It is policy issues such as this that make consideration of the issue more appropriate for rulemaking and less likely for any satisfactory reso-

lution. Adjudication has already helped to develop guidelines of an ambiguous nature (as was illustrated in *PWC*) and may return the Commission to its past role as arbiter in massive proceedings.

The most promising approach would combine a Commission rulemaking/balancing test which would utilize, (along with factors previously applied in Section 16, First inquiries),[233] the following: trigger events such as intermodal rates which are set suspiciously low from targeted points; higher rates from the hinterland of other ports subsidizing them; the use of independent action so as to discriminate against the shippers of a particular port or equalization practices that subsidize the cost of inland transportation beyond a reasonable distance. The latter standard is especially appropriate for it balances the reasonable expectation of a port to be able to compete for cargo with that of the commercial decision of steamship lines to build larger ships and to concentrate service. Thus, the diversion of cargo closely tied to a port would be a factor to be considered but would not be an overriding one and would not be a "trigger" event.

However, The Shipping Act of 1984 may sporadically change the shipper/carrier/port relationship so as to obviate the need to develop port-protection standards, notwithstanding the protected status of ports under it.

X. *THE SHIPPING ACT OF 1984*—A THREAT TO PORTS

On March 20, 1984,[234] President Reagan signed into law the Shipping Act of 1984,[235] thus culminating nearly seven years of Congressional and maritime industry effort to supplant the venerable Shipping Act, 1916. Technological development and the evolution of intermodalism in the intervening sixty-eight years had rendered the 1916 Act obsolete by mandating a growing need for both cooperation and a more flexible relationship both among steamship lines and shippers. The declared purposes of the Shipping Act are three fold: (1) to establish a non-

233. Section 16, First standards have permitted introduction of factors to justify disparate treatment, such as "volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service. . . . Surcharge on Shipments from Buffalo, 2 SRR 111, 114-15 (F.M.C. 1962). For a more recent application of Section 16, First, *see* Cargill v. Waterman, 21 SRR 287 (F.M.C. 1981).

234. *See Reagan Praises Ship Reform*, J. Com., March 21, 1984, at 1A; *see also* 88 Cong. Information Bureau No. 54, March 20, 1984, page 1 et. seq.

235. 46 U.S.C. Appx. §§ 1701-1720 (1985). For an analysis of the Shipping Act of 1984, *see* Friedmann & Devierno, *The Shipping Act of 1984: The Shift From Government Regulation to Shipper "Regulation"*, 15 J. MAR. L. & COM. 311 (1984). *See also* H.R. REP. NO. 98-53, Part 1, 98th Cong., 1st Sess. (1983). For brief history of maritime reform legislation generally; *see* Schmeltzer & Weiner, *Liner Shipping in the 1980's; Competitive Patterns and Legislative Initiatives in the 96th Congress*, 12 J. MAR. L. & COM. 25 (1980).

discriminatory regulatory process. . .with a minimum of government intervention and regulatory cost[s]' (2) to provide an efficient and economical transportation system in the ocean commerce of the United States; (3) to encourage development of [a] U.S. flag liner fleet capable of meeting national security needs.[236] From a practical standpoint, the primary thrusts of the Act are to reestablish the primacy of the Federal Maritime Commission regulation of ocean transportation while at the same time reducing that role.[237] The Shipping Act of 1984 produced "a watershed in the evolution of U.S. regulatory shipping policy aimed at reducing excessive, parochial, and protectionist" government regulation.[238] The Act reflects the Reagan Administration position that "[I]t should not be the responsibility of the Federal Maritime Commission to determine what industry practices might best achieve the efficiencies required the marketplace".[239] The Act further reflects the carefully balanced interests of two elements of the particular marketplace (steamship lines and shippers), both of which compromised their positions so as to give added flexibility and protection to one another.[240]

One analyst has stated that under the new Shipping Act, the parameters of permissible conduct merely reiterate the abstract concepts of unjust, unfair, unreasonable, undue preferences or advantages, or prejudice

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236. 46 U.S.C. Appx. §§ 1701-1720 (1985).

237. *See* Sher & DeVierno, *Maritime Reform, The Players Are The Same But The Rules Have Changed*, AMERICAN SHIPPER, (April 1984); *see also* Bakke, *The Shpping Act of 1984: The Ocean Regulatory Millennium Has Arrived*, TRANSPORT 2000, March/April, 1984 at 12. *See* 130 Cong. Rec. H1289 (daily ed. Mar. 6, 1984) (statement of Rep. Jones). The so-called "public interest" standard for the approvability of agreements, pursuant to the Shipping Act, but based on antitrust principles was established in Fed. Maritime Comm'n v. Aktiebolaget Svenska Amerika Linien (Swedish American Line) 390 U.S. 238 (1968).

238. This evaluation was made by Conrad Everhard, president of Dart Containerline, a foreign flag carrier. Armbruster, *Johns and Everhard Welcome Shipping Act*, J. COM., Mar. 22, 1984, at 12A, col. 13.

Also eliminated was the risk of retroactive antitrust exposure if the Shipping Act immunity duly granted were subsequently removed. Japan Line v. Sabre Shipping, 407 F.2d 173 (2d Cir. 1969), *cert. denied*, 395 U.S. 922 (1969). *See* Sabre Shipping v. American President Lines, 285 F. Supp. 949 (S.D.N.Y. 1968), *cert. denied*, 395 U.S. 922 (1969); Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966).

239. International Ocean Commerce Transportation Act: Report of Committee on Merchant Marine and Fisheries to Accompany H.R. 1878, 98th Cong., 1st Sess. 42 at 43 (1983) (Letter to Chairman Walter B. Jones from Drew Lewis, Secretary of Transportation, dated February 5, 1982).

240. *See* Shipping Act of 1984: Conference Report on S.47, H.R. No. 600, 98th Cong., 2nd Sess. *See also*: Morrison, *FMC Chief: Ship Act Aids Lines, Shippers*, J. COM., Mar. 22, 1984, at 1A, 12A, col. 5. Whether the balance struck is precise has been subject to discussion, especially with regard to the plight of small shippers. *See* Armbruster, *Kanuk, Carey Clash On New Shipping Act*, J. Com., Mar. 27, 1984 at 1A, col. 5. *See Sher and DeVierno, supra* note 235 at 22.

or disadvantage of the 1916 Act,[241] while others have declared that the Act has had little significant impact on the port industry. "[A]s the thrust of the Act was to address carrier and shipper issues,[242] the increased freedom given [to] steamship conferences [with respect to their] decision-making and operation, [coupled] with freedom from the threat of antitrust laws and much burdensome regulation may have [had a] direct impact on the now-diminished . . . right[s] of a port to exclusive hinterland.

The impact of the Shipping Act of 1984 may be viewed as five fold: one, the increased ability of conferences to coordinate service; two, a decreased opportunity to prevent implementation of potentially damaging agreements; three, sanction of conference intermodal authority; four, sanction of service contracts between carrier and shipper; and finally, the clear intent of Congress as is reflected in the legislation overall and its legislative history in providing steamship lines with significantly less restrained operating flexibility.

A primary purpose of the Shipping Act of 1984 is to provide a legislative vehicle for cutting the costs of carriers, and consumers by encouraging higher utilization of vessels. Greater carrier cooperation and even integration of operation, including the formation of joint ventures, the chartering of space on a competitor's vessels, and the pooling of cargo or revenue are all protected by the Shipping Act. These practices fall within the "rationalization",[243] or within the integrated planning in the supply of vessels and equipment. Interpretation of the 1916 Act and the "public

241. *See* Bakke, *The Shipping Act of 1984*, *supra* note 237 at 13. These adjectives represent, of course, the thrust for Sections 16 and 17 of the Shipping Act, 1916. *See* note 60 *supra*, and accompanying text (excerpts from Sections 16 and 17).

242. Sher and DeVierno, *supra* note 237 at 20. The interpretation that the "Shipping Act of 1982" the predecessor "maritime reform legislation" to the Shipping Act of 1984, and of similar at least in thrust, strengthened steamship conference power at the expense of ports was made more evident by The National Institute of Economics and Law in its *Analysis: Potential Effects of the "Shipping Act of 1982" on American Port Cities* (August 1982). This view was disputed, however, by a port official, who labeled the paper's authors "well meaning overly credentialed academics with no port industry experience." *Ship Reform Critics Draw Baltimore Fire*, J. Com. Aug. 25, 1982 at 1B, col. 3 (quoting Richard A. Lidinsky, Jr., Maryland Port Administration).

In fact, since passage of the Act, there has been a definite movement toward rationalization of services of steamship lines. See *'Consortium Fever' Sweeps Container Shipping Industry Worldwide*, J. Com., June 24, 1985 at BC, col. 1.

243. Ellsworth, *Competition or Rationalization in the Liner Industry?*, 10 J. MAR. L. & COM. 497, 498 (1979). For an example of a revenue sharing "rationalization" agreement among North Atlantic steamship lines, along with an examination of the concerns of ports and other controversial issues, *see* Agreement No. 10,000—North Atlantic Pool, 14 SRR 267 (F.M.C. 1973). *See also* Pacific Coast European Conference—Tariff Rules, 12 SRR 405 (F.M.C. 1971). Conference rules limited the number of terminals in San Francisco Bay area ports that its members could call on, together with implementing an equalization system between those ports.

See also, Frank, "*If you can't beat them. . .*," Forbes 36, 37 (April 23, 1984) (new Act may lead to steamship consortia and superports).

interest" standard by which rationalization agreements have been judged in the past are believed to have discouraged[244] the development of schemes to coordinate sailing schedules, while at the same time they have controlled capacity, thus eliminating wasteful service competition, and have increased vessel utilization.

Such rationalization may have the potential for the collective assigning to or allotting of ports to specific conference carriers. Ports may lose steamship service not because of the competitive factors of the marketplace, the incentives each port provides or because of the advantages they possess but rather service would be lost based upon the decisions of steamship conferences. Rationalization itself may relegate a port to "feeder" status or may significantly alter its level of service and thus its place in "port rotation" schedules.

The second danger facing the port's is the new, more liberal standard in which situations such as those described above will be judged. Replacing the Svenska "public interest" test that had been widely criticized[245] because of the uncertainty of its application and its vagueness is a "general standard" of the new Act which gives presumptive validity to agreements not facially in violation of a list of specific prohibitions. This new standard places the burden upon the Commission[246] to seek an injunction to stop the implementation of an agreement if the Commission determines that such an agreement is likely, through a reduction in competition, to produce an unreasonable reduction in transportation or an unreasonable increase in transportation cost.[247] Clearly, with the burden of proof shifted, and with a much less onerous standard of approval, carrier agreements considered unapprovable in the past will now become facilitated and realized. The instructions given to the FMC by Congress in its Joint Explanatory Statement of the Committee on Conference[248] also

244. *See supra* text accompanying note 235. This was the conclusion of a study of the United States General Accounting Office conducted at the request of the House Merchant Marine and Fisheries Committee. Comptroller General, U.S. General Accounting Office, Report to the Chairman, Committee on Merchant Marine and Fisheries U.S. House of Representatives *Changes in Federal Maritime Regulation Can Increase Efficiency and Reduce Costs in the Ocean Liner Shipping Industry*, 50, Appendix II (July 2, 1982). This view was dismissed by the Federal Maritime Commission as inaccurate, that it had approved 20 joint service agreements and over a dozen space charter agreements as well as pooling agreements and those providing for the establishment of consortia. *Id.* at 40, Appendix II. (Letter of January 22, 1982, from Alan Green, Jr., Chairman, Federal Maritime Commission, to Henry Eschhwege, General Accounting Office). *But see* Beargie, *Space Charter Gets Quick OK*, American Shipper 12 (September 1984) (first space charter/rationalization agreement approved under Shipping Act of 1984).

245. *See, for example*, 130 Cong. Rec. H1294 (daily ed. Mar. 6, 1984) (statement of Rep. Moorehead) (criticism of current regulatory scheme).

246. 46 U.S.C. Appx. § 1705, g (1985).

247. *Id.*

248. H.R. Rep. No. 600, 98th Cong., 2nd Sess. 31-37 (1984).

made it clear that the new standards are to be applied narrowly so as to not contradict the thrust of the Act in facilitating carrier flexibility. "Reasonableness" is to be understood in a commercial context. The reasonableness will be judged as based upon the change in services provided to shippers which is likely to arise from the agreement; that such change is meaningful and material, and that such change cannot in and of itself be determined to be a per se "impermissible result".[249]

A second aspect of the unreasonableness requirement is that the negative impact upon shippers may be offset by the benefits of an agreement, including in specific "any efficiency-creating aspect of an agreement. Congress intends that carrier integration and rationalization are to be considered favorably by the Commission and the courts, [with] the intent being that ocean carriers be free to structure their own affairs. . ."[250]

The third provision of the Shipping Act of 1984 with the potential for an impact upon ports is the grant of intermodal ratemaking authority to steamship conferences. As has been previously noted, such intermodal ratemaking transfers "port of delivery options from the shipper/consignee to th steamship line." "[C]argo is made port blind, [and] ocean carriers [are] given [the] freedom to choose and [to] utilize the port most cost effective to them."[251] While individual lines already possessed such power, the exercise of it independently, outside of collective tarrifs, had threatened the very existence of the conference structure.[252] Utilized collectively within the more stable environment of that structure, such authority may serve as the prerequisite for load centering by individual lines and may assist the implementation of rationalization schemes by the conference itself.

The potential for both restraint and the predatory exercise of intermodal ratemaking by the conferences was considered so great that guidelines were considered which were not unlike those developed in *CONASA*.[253] The recent grant of authority prior to the effectiveness of the

249. *Id.* at 35; See note 90 *supra* and accompanying text for analogy of shipping to antitrust laws and "per se" illegality.

250. *Id.* at 36.

251. Richardson, *Effects of Intermodalism on Cargo Gateway Selection and the Port Industry*, World Wide Shipping/World Ports 83 (1984).

252. *See North Atlantic Jittery Over Intermodal Authority*, American Shipper 30 (January, 1984).

253. The guidelines were announced in U.S. Atlantic & Gulf/Australia-New Zealand Conference (Agreement No. 6200-20—Intermodal Authority) 21 SRR 89 (F.M.C. 1981). As specified in the decision, carriers proponents of conference intermodal would have to demonstrate "the intermodal cargo to be carried would naturally and efficiently move through the ports already served by the conference or rate making group; operational economies and improvements would result; there is a significant shipper demand for the intermodal service being proposed; a more frequent and reliable service would be offered to a broad range of service points; regular

Shipping Act of 1984 to seven North Atlantic-Europe conferences was most likely "the largest single grant of such operational authority ever cleared by the Federal Maritime Commission",[254] and was hailed as ". . . [one of] the most important decision[s] they've ever made."[255] A port organization representing the North Atlantic range was unable to reach a consensus position supporting Commission approval. A "definite bloc of concern" developed among the members that such authority would facilitate load centering. Three member ports filed separate comments expressing their concern with the FMC-sanction of cargo diversion,[256] and this sentiment was later echoed by a port representative of New York in that "It [the authority] could have a great effect on ports because for the first time it could create load centers, [thus] making it difficult to determine whether [such authority] is a blessing [or a curse]."[257]

In its Order of Approval, the Commission acknowledged these fears, stating that such trends may be inevitable in the evolution of modern intermodal transportation systems, but that appropriate remedies were available under the Shipping Act for unreasonable diversion.[258]

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service would be available for a broad range of commodities and not just selected high-rated items; commercially attractive rates would be assessed for the proposed intermodal service; and there is relevant competition for the cargo the rate making group proposes to carry. Finally, the member lines should provide sufficient evidence concerning the competitive environment in which they would operate to satisfy the Commission that there is an absence of predatory intent on the part of the conference seeking the authority." *Id.* at 92.

254. *FMC OKs Massive Use of Intermodal Service*, J. Com., Dec. 13, 1984, at 1A, col. 5.

255. *N. Atlantic Rate Groups Mull Intermodal Tariffs*, J. Com., Nov. 23, 1983, at 24B, col. 3 (comment of Conrad Everhard, president of Dart Containerline).

256. *North Atlantic Ports Split on Intermodal Proposal*, J. Com., Aug. 26, 1983, at 1A, col. 5. A "definite bloc of concern" arose among Philadelphia, Hampton Roads, and Boston port interests on The Traffic Board of the North Atlantic Ports Association. In individual comments subsequently filed, none of the ports opposed the grant of authority, not wishing "to restrict the employment of intermodalism or to impede the furtherance of other technological industry advancement"—In Re FMC Agreements 9214-31, 7100-27, 7670-23, 7700-24, 8210-47, 5850-39, 9982-18, Comments of Massachusetts Port Authority at 3. *See also* comments of Virginia Port Authority and Philadelphia Port Corporation. *Id.*

257. *North Atlantic Rate Groups Mull Intermodal Tarrifs*, J. Com., Nov. 23, 1983, at 24B, col. 3 (quoting Robert Steiner, deputy director of the port department of the Port Authority of New York and New Jersey) (order granting intermodal authority).

258. The Virginia Port Authority later asked the U.S. Court of Appeals for the District of Columbia to set aside the FMC's final order of December 9, 1983, granting the seven north atlantic conferences intermodal authority. Virginia Port Authority and Virginia Int'l Terminals, Inc. v. F.M.C., *appeal docketed*, No. 84-1040 (D.C. Cir. 1984). The appeal was made in response to Conference decision to raise the intermodal rates based on that authority, a decision that the VPA said would divert cargo to South Atlantic ports. *See Port Authority Appeals Order on Tariffs*, The Virginian Pilot, Feb. 18, 1984. The appeal was subsequently dropped after VPA officials met with the Conference officials in London to express their concerns directly. *VPA Drops Lawsuit Against Conferences*, J. Com., Feb. 23, 1984, at 1B, col. 1. The court held that the FMC did have authority and jurisdiction under Section 15 to accept and approve conference intermodal rates. Judge Wald, while concurring in the result, felt "the question of the scope of Section 15 a

A fourth concern regarding the impact of the new Shipping Act upon ports is the sanction of service contracts between steamship lines and shippers. Such contracts may, by their nature, be discriminatory by offering service and rate commitments to shippers based on volume commitments. An agreement to utilize a particular port can also be a part of such an agreement and, because it is not defined by the Act as an essential term required to be filed with the Commission, it may remain private to the parties and undiscoverable to competing ports.[259]

Finally, as was noted earlier, while the Shipping Act contains the same prohibitions against unjust discrimination and undue or unreasonable preference as did its predecessor, such provisions must now be interpreted and applied within the context of the entire Act. Since the overriding concern of the present Act seeks to provide carriers with a less intrusive or burdensome regulatory environment within which to operate, the terms "unjust" and "unreasonable" may now present radically different thresholds than before.

XI. LOAD CENTERS TODAY

The scope of the debate in the maritime community concerning load centers has perhaps only been rivalled by the past controversy that surrounded the protection of naturally tributary cargo. Thus, controversy ushers in the new dawn of the Shipping Act.[260] For some the load center concept is neither new or inevitable.[261] Others feel certain that smaller ports will survive and cite a number of reasons for this belief:[262] because

difficult one, . . . [t]oo important to be finally decided . . . on the puny record provided by the Commission." *Id.* at 900. The decision was subsequently accepted for en banc review and vacated as to the issue of Commission jurisdiction but rendered moot by expiration of conference intermodal authority by terms of the Agreement. *See* United States v. Federal Maritime Commission, 694 F.2d 793 (D.C. Cir. 1982).

259. 46 U.S.C. app. § 1707(c)1 (1985). 'Shippers in Driver's Seat' As Huge Containerships, Load Centers Proliferate, J. Com, March 11, 1985 at 13c, col. 5 (quoting Rex Sherman, American Association of Port Authorities, "As long as we have an imbalance of supply [of cargo space, (it is doubtful) there will be a surge toward load centering."]

260. *Shipping Industry Mulls "Load Center" Concept*, J. Com., Apr. 5, 1984 at 3B, col. 5; *Load Center Ports Seen Inevitable*, J. Com., Feb. 1, 1984, at 12A, col. 2; *Which Ports Will Assume Load Center Roles?*, J. Com., Dec. 14, 1983, at 3B, col. 1½; *Will Load Center Ports Crush Competitors?*, J. Com., Sept. 26, 1983, at 24B, col. 3; Kane, *A Super Port For Containers*, HANDLING & SHIPPING MANAGEMENT, 54 February, 1984.

261. *See Load Center Problems Cited at AAPA Meeting September 26, 1984*, at 1, col. 2. (AAPA is the American Association of Port Authorities.); *but see A Super Port for Containers, supra* note 260 (an anonymous steamship executive noted the concept had been around a very long time, but "[t]here will be no mad rush by steamship lines to set up operations at just a few ports. It's just against human nature").

262. *Will Load Center Ports Crush Competitors?, supra* note 260 (quoting M. Fred Whelan, director of trade development for the Jacksonville Port Authority). *But see* Intermodal Service to Portland, Oregon, 12 SRR 601, 618-19 (F.M.C. 1971) (adequate service to Portland a factor in its

"ships follow cargo"; that larger ports can easily become complacent, inefficient, and expensive; because some ports could become load centers for some lines and feeder ports for others,[263] and finally, because smaller ports will more readily specialize, diversify, and adapt themselves thus attracting lines with the increased negotiating power that they will have.[264]

Debate notwithstanding, load centers have emerged and are here to stay. An example is Philadelphia which has attracted carriers through its central location between New York and Baltimore. This location, historically viewed as a disadvantage is now seen as a distinct advantage as lines further restrict direct calls. Additional evidence is provided by the fact that three steamship lines have recently selected the port as a load center.[265] The port further serves as a load center in conjunction with Boston for a fourth line that purposely bypasses New York and the competition of giant containerships.[266]

The new generation of super containerships are also being placed in service. Atlantic Container Lines recently introduced the largest and most

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potential development "to extent cargo follows ships"). Generally intermodal rates give shipper less choice in cargo routing so that cargo can be "pulled" into a given port. See generally *United States Ports Vie For Load Center Status*, J. Com, December 10, 1984 at 1c, col. 5.

263. *A Super Port for Containers, supra* note 260, at 56. In December, 1976, the U.S. Maritime Administration released an extensive study it had prepared jointly with U.S. flag carrier Sea-Land Service on a waterborne system for feeding cargo to load centers for international shipments. Three combinations of ports were chosen as having "relatively high international market potential." New York would serve as a load center for Boston, Philadelphia and Baltimore; Norfolk for Wilmington, Charleston, Savannah and Jacksonville; and New Orleans for Tampa and Mobile. Despite shipper bias in favor of direct call over the proposed relay system and competition from inland modes, the system was projected as economically feasible.

At the time of the study, there existed an uncertainty as to which agency, (the Federal Maritime or the Interstate Commerce Commission), could or would assert jurisdiction over the waterborne system, and a "substantial" regulatory impediment as to rail and truck alternatives (specifically, but not explicitly mentioned, the use of microbridge tariffs) Mar. Admin., U.S. Dept. of Com. Development of a Domestic Waterborne Feeder System, Final Report (December 1976).

264. ". . .[S]ome carriers like to go to smaller ports where they gain increased negotiating power by being a big fish in a little pond" (quoting Richard P. Leach, manager, Port of Houston) *Will "Load Centers" Crush Competitors?, supra* note 260. *See also Shipping Industry Mulls "Load Center" Concept, supra* note 261 (smaller West Gulf ports protect themselves from the advent of load centers by diversifying); *Law, Economic Changes "Threaten" Small Ports*, J. Com., May 19, 1983, at 24B, col. 1 (smaller ports urged to specialize and attract cargo best suited for the individual port).

265. *ABC Counts Philadelphia As Its Load Center*, J. Com., Sept. 30, 1983, at 12A, col. 3 (ABC Containerlines contradicts conventional wisdom of New York or Baltimore as load center); *Philadelphia Welcomes Park Lines*, J. Com., Mar. 15, 1984, at 12A, col. 3 (direct service to North Europe); *Delta Line Selects Philadelphia As Atlantic Load Center*, DESTINATION: PHILADELPHIA, Jan.-Feb. 1984, at 2.

266. *See N. Atlantic Service Set For Launch*, J. Com., Apr. 18, 1984, at 1A, col. 2 (BCR-Lines offers direct Boston sailings to Europe); *Philadelphia Marks Debut of New Ocean Carrier, id.*, at 1B, col. 5.

technologically advanced cargo ship ever built for the North Atlantic Trade,[267] with a capacity of 2,130 20 foot containers and some 600 automobiles. United States Lines has introduced the first of its 4,218 20 foot container "econ" ships which provide around the world service.[268] With the first of these giant ships, United States Lines will establish load centers in New York and Savannah. The impact upon Savannah demonstrates the significance.[269] The direct impact will amount to $40 million annually, with the indirect impact estimated at $100 million annually. In 1986 more than 200 U.S. Lines' vessels are expected to call on the port of Savannah, picking up and discharging 15,000 40 foot containers weekly. Cargo volume through the use of 150,000 to 175,000 containers may be in the 1.25 to 1.5 million ton range. The advent of super-sized vessels is already creating complications. The vessels' deeper drafts ride closer to the bottom of the ocean floor thus causing vibration and turning difficulties when moving through such premier ports as New York and Baltimore.[270] The age of the supership and the load center had indeed arrived.

XII. Railroads and Inland Ports

The development of load centers is based on a foundation greater than simply ocean transportation and has consequences extending deeply inland from shoreside. Railroads have been called the key to load centers,[271] for the ability of steamship lines to gather cargo from distances far beyond the hinterland of its chosen port is dependent on advantageous inland rates. Inland carriers may be encouraged to provide such rates too, benefitting from the control of routing by its steamship "intermodal" partner by a greater likelihood of backhaul cargo, keeping its own costs down.[272] It is thought by some that regional monopolies in the form of big railroads and big motor carriers may lead to decreased rail/motor service generally, altering transportation patterns and freezing

267. *Third Generation Ships*, American Shipper, May, 1984, 32, 34; *See also New ACL Containership Makes First Call at New York*, J. Com., Mar. 30, 1984, at 1B, col. 3; Davis, *New Containerships Spur Big Scramble for Cargo*, J. Com., June 25, 1984 p. 1C at col. 4.

268. *Third Generation Ships*, *supra* note 267.

269. *USL to Give Savannah A Boost*, J. Com., Apr. 16, 1984, at 24B, col. 3; *see also Port Gets $40 Million Boost*, Savannah Evening Press, Apr. 6, 1984.

270. *Bigger Ships Highlight Channel Dept Problem*, J. Com., Apr. 6, 1984, at 1B, col. 3 (In New York, for example, a strong wind combined with tides can reduce channel depth by four-five feet); *se also United States Lines Leaning Toward Port of Savannah*, J. Com., Apr. 2, 1984, at 1B, col. 5 (a selling point of Savannah was pledge of pilots to handle superships of carriers at any time); *see supra* note 10.

271. *See* Will Load Centers Crush Competitors, *supra* note 260.

272. *See* Law, Economic Changes. . ., *supra* note 264.

out marginal or smaller ports.[273] Ocean carriers may greater utilize unit trains to feed cargo into load center ports, justifying the development by railroads of hub terminals and some rail carriers may spend heavily in developing their own load centers over the next five years to match those of shiplines.[274]

Ports, warned that foreign oceanborne commerce can and will migrate literally overnight[275] "and that clearly carriers and shippers each possess trump cards in the determination of that gateway," have reached further inland, like steamship lines, to gain control of cargo. The most noticeable "device" to do so has been the "inland terminal,"[276] primarily designed to entice cargo through their "ocean" terminals by lowering shippers' inland transportation costs. They eliminate for shippers the expense of costly empty container shipments and provide mainland site for marshalling, stuffing, and stripping of containers. Charleston's inland center at Greer, South Carolina allows that "port" to become the second closest Atlantic port to the Midwest industrial hinterland.[277] North Carolina's inland port at Charlotte is closer to the entire states of Tennessee and Kentucky than any other "port."[278] Atlanta has been suggested as an ideal link with Savannah, and Jacksonville is considering extending the port to that city as well in what may be the first inland terminal developed across state lines.[279] The entire basis for the inland terminal or port concept is that "the port that can produce the most tonnage for the ocean carriers will be "relieved of the jeopardy of being rationalized," "cut out by steamship lines from direct service." The concept is that of becoming the "load center of a load center."[280]

Competition between ports may lay the foundation for them ex-

273. *See* A Super Port for Containers, *supra* note 260, at 58.

274. *See Shipping Industry Mulls Load Center Concept*, *supra* note 260.

275. *Intermodal Carriers "Urged" To Cooperate*, J. Com., Apr. 12, 1984, at 1B, col. 3 (port costs, stevedoring costs, interface costs, rail and truck linehaul costs will all enter into gateway collection by ocean carrier).

276. Such facilities have been built contiguous to rail ramps, (South Carolina) or use existing rail terminals, (North Carolina) and serve to eliminate for shippers the expense of empty container shipments. Empty containers are held at the terminals until needed for shipments in the reverse directions. *See IS GPA-Owned Terminal in Atlanta Needed?*, J. Com., Apr. 18, 1984, at 3B, col. 5.

277. *Charleston "Moves" 210 Miles Inland*, J. Com., Nov. 22, 1983, at 14A, col. 3.

278. *State's First Inland Port to Open Monday at Charlotte*, The Virginian-Pilot, Jan. 1, 1984.

279. *See Is GPA Owned Terminal in Atlanta Needed?*, *supra* note 276.

An inland terminal to serve the Port of Hampton Roads, Virginia may be built in Hagerstown, Maryland by the Norfolk & Western Railway, primarily to funnel Evergreen Marine Line's containers to the port.

Talks on New Terminal May Mean Boost for Area, The Virginian Pilot/Ledger-Star, July 21, 1985, page E1, col. 1.

280. *See supra* note 277 (quoting W. Don Welch, Executive Director, South Carolina State Ports Authority).

panding into non-vessel common carrier operators and trucking as well as inland terminal operations.[281] The New Orleans Traffic and Transportation Bureau, in conjunction with the port of New Orleans, has recently become a shippers' agent,[282] contracting with railroads for volume movements and corresponding rate discounts.[283] The ports of Los Angeles and Long Beach have jointly developed a huge intermodal rail facility, four to five miles from the container terminals at both ports, reducing the time and cost of trucking from railhead to terminals.[284] Development of the $50-million facility has proceeded as an attempt to divert Far East cargo from Puget Sound ports as well as all-water Far East cargo from the Atlantic and Gulf coasts. Other ports are expanding into the interior and beyond with sales offices in hopes of diverting traffic from current routings.[285]

XIII. CONCLUSION

It is appropriate to conclude this examination of intermodalism today with the perspective of Section 8 and the evolution of the principle of naturally tributary cargo. Section 8 arose from congestion that seized the North Atlantic port range during World War I—those ports had been developed primarily on the monopolistic powers of large railroads, funneling cargo from the interior of the country, largely to the exclusion of other ports and ranges. Section 8 instructed the Interstate Commerce Commission to take action to prevent disruption of the natural flow of cargo so that this state of paralysis would never again occur. This was interpreted by the predecessor to the Federal Maritime Commission not as simply a right of a port to cargo from areas naturally tributary thereto, but, a fundamental one, virtually unsurmountable. Rigid enforcement of the right had the unfortunate consequence of impeding innovation and sacrificing carrier interests as containerization and intermodalism revolutionized ocean transportation. Eventually, the economic pressures of change forced regulatory reconciliation of this right and those carrier needs, which diverged

281. *Ship Act Seen Catalyst to Port Agression*, J. Com., Mar. 30, 1984, at 1B, col. 3. (Port authorities have not abandoned traditional functions such as marketing, but expanded them). *See Philadelphia Port Corp. Takes Sales Pitch West*, J. Com., Nov. 23, 1983, at 12A, col. 6.

282. Shippers agents act to consolidate the rail movements of shippers to exact volume discounts from the linehaul railroad. 49 U.S.C. § 10562(4) (1980).

283. *New Orleans Launches New Container Service*, J. Com., April 17, 1984, p. 1B, col. 3. *Seattle to Buy Intermodal Railcars*, J. Com. Sept. 25, 1984 at 1, col. 4 (port to offer service between Seattle and Chicago to Reach Midwest Cheaply—competition of LA/Long Beach).

284. Johnson, *Ports Planning Joint Intermodal Facility*, 2 CONTAINER NEWS 37 (April, 1984). *Philadelphia Mulls Rail Yard Benefits*, J. Com., Sept. 21, 1984 at 24B, col. 4 (freight yard to allow easier access of unit trains to waterfront in attempt to facilitate emergence as load center).

285. *Philadelphia Port Corp. Takes Sales Pitch West*, J. Com., Nov. 23, 1983 at 12A, col. 6.

so completely that Section 8 and the right to naturally tributary cargo would be largely discarded.

Today, load center ports, based on diverting cargo that has traditionally flowed through other ports and concentrating it, are emerging after twenty years of speculation. The lack of a guarantee to cargo, coupled with the emergence "superport" concept, may have spread apprehension through the port industry but concomitantly fostered competition and innovation. Ports, through inland terminals for example, have attempted to change and make more advantageous that which logically seems immutable—their geographic location. In developing these inland load centers, ports have also attempted to do that which they have complained about for years—encroach upon the hinterlands of other ports and disrupt traditional transportation patterns tying cargo to port. The advent of inland ports may have effectively ended the usefulness of any concept of naturally tributary cargo, if the concept retains any vitality. Given the history of port discrimination claims,[286] it is not difficult to imagine, however,

286. Ports, of course, have sought to restrict the permissible practices of carriers beyond equalization and bridging. Most notable was the attempt of the Delaware Port Authority to keep Transamerican Trailer Transport (TTT) from merely *soliciting* (advertising and sales calles) cargo naturally tributary to Philadelphia for ocean transport from Baltimore and New York, the carrier's port of call. TTT did not absorb any inland rate differential nor did it even accept the cargo for transportation other than at the two latter ports. Nevertheless, the court issued a preliminary injunction against the solicitation of cargo by TTT and its agents, citing a possibility of extensive irreparable harm if allowed to continue and a likelihood that the port would prevail before the Federal Maritime Commission. 331 F. Supp. 441 (E.D. Pa. 1971). The court, persuaded by the opinion of the FMC's General Counsel that the case was based on a novel cause of action and should not be considered as merely another in a long line of condemned equalization cases, and also having little likelihood of success, reversed. Delaware River Port Auth. v. Transamerican Trailer Transp., Inc. (TTT), 501 F.2d 917 (3rd Cir. 1974).

The action then continued at the FMC. The Administrative Law Judge, finding that the statutes regulating shipping, did not "vest a port with monopoly over local cargo," found that bare solicitation was not unlawful. The Commission adopted this decision, finding that "the time has long since passed for this case to be put to rest." Delaware River Port Auth. v. TTT, 14 SRR 1468 (F.M.C. 1975).

Nevertheless, the Commission's decision was appealed and again upheld. "[T]he position pressed upon us. . .is unprecedented, and amounts to a contention that common carriers cannot engage in lawful competition. . . . No transportation regulatory agency has ever held that traffic solicitation of the kind involved here constitutes discrimination or the giving of an undue preference or advantage." Delaware River Port Auth. v. TTT, 536 F.2d 319 (D.C. Cir. 1976).

Ironically, nearly a decade later, Sealand Service alleged its competitor, American Marine Lines (AML) was engaging in deceptive advertising by failing to indicate that its "service" to New York and Baltimore was not direct but rather through Philadelphia. Sealand further alleged that the service might unlawfully divert cargo naturally tributary to the ports listed in the tariff but not served directly, an argument little used by steamship lines, but rather against them and their practices. American Marine Lines Tariff, FMC-F No. 1 (January 18, 1983). The Maryland Port Administration, representing the port of Baltimore, supported the petition. Statement of Maryland Port Administration in Support of Petition of Sealand Service, Inc., American Marine Lines Co., *Tariff* FMC-F No. 1 (January 26, 1983). By letter dated April 8, 1983, Sealand was informed of the Commission's denial of its petition.

a port making the novel complaint that cargo naturally tributary *to its inland terminal* is being unlawfully diverted to the "inland load center" of another port.[287] The primary point is that lack of a guarantee to cargo has

287. While port discrimination and cargo diversion cases have traditionally pitted port against carrier, two recent actions have involved claims by ports, and port interests, against other ports.

In the first, the Boston Shipping Association, representing steamship and stevedoring interests in that port, alleged that a provision of the so-called master contract with the International Longshoreman's Union subjected the port to unlawful discrimination by violating Sections 15, 16, 17, and 18 of the Shipping Act, Section 8 of the Merchant Marine Act, 1920, and Section 205 of the Merchant Marine Act, 1936. At issue was Rule 10, providing that royalties collected on container movement for the benefit of longshoremen would be done at port of first unloading, in the instant case New York, and be put into the appropriate fund there for longshoremen, rather than the origin or destination port, Boston, to or from which the cargo was transshipped. Cargo diversion, alleged BSA, was the result of royalties, assessed on each ton, needed to be increased to maintain sufficient benefit funds. The Commission (and on appeal the U.S. Court of Appeals for the First Circuit) denied the claim.

The Court of Appeals found that the primary objective of the laws claimed violated was to protect the industry's customers, not its members. The prohibition against unfair discrimination between ports was viewed as serving this objective by ensuring fair competition. In the instant case, there was no evidence that shippers were detrimentally impacted by Rule 10 or that the rule represented an artificial inducement aberration to competition of the kind proscribed in Dart Containerline v. FMC, 639 F.2d 808 (D.C. Cir. 1981). interestingly, the test applied was established in Port of New York v. A.B. Svensk Amerika Linien, 4 F.M.B. 202, 205 (1953): (1) that the complaining port and the allegedly preferred port were in competition; (2) that the discrimination complained of was the proximate cause of injury to the complaining port, and (3) that such discrimination was unreasonable. Boston Shipping Ass'n v. FMC 706 F.2d at 1240. (1983) This, of course, is the test applied in the line of port discrimination cases in which a violation of Section 8 was not alleged. *See* In Re Gulf/Mediterranean Port Conf. Agreement, 5 SRR 247 (F.M.C. 1964); Surcharge from Buffalo, 2 SRR 111 (F.M.C. 1962); West Indies Fruit v. Flota Merchante Gran Colombiana, 1 SRR 433 (F.M.C. 1962).

The latest port versus port controversy is one of the first impression for the Commission and one of the most interesting of cargo diversion. The South Carolina State Ports Authority filed a complaint against the Georgia Port Authority for violation of Sections 16, First, and 17 of the Shipping Act and Section 8 of the Merchant Marine. 22 SRR 1111 (F.M.C. 1984). The vehicle for such violation was a consultant's report prepared for GPA, in essence weighing the potential of the two ports, Charleston and Savannah, as load centers. Charleston alleged that the report contained gross misstatements of fact, erroneous assumptions, and misleading representations intended to help Savannah be successfully marketed into a load center.

The Administrative Law Judge refused to grant Savannah's motion to dismiss, unwilling to hold as a matter of law that solicitation or marketing could not be unlawful (that more than the mere solicitation sanctioned in Delaware River Port Auth. v. Transamerican Trailer Train, 501 F.2d 917 (3d Cir. 1974) could be involved or that, based on Boston Shipping Ass'n v. F.M.C., 706 F.2d 1231 (1st Cir. 1983), that a competing port did not have standing to sue another allegedly preferred port under the Shipping Act. 22 SRR at 1116-1117 (F.M.C. 1984). Interestingly also, Charleston would specifically be allowed to introduce evidence on the issue of any claimant "naturally tributary" cargo provided such evidence intended to establish a violation of Section 16, First, or 17 of the Shipping Act 1916. *PWC-Equalization Rules and Practices* was cited in support. 22 SRR at 1118 (F.M.C. 1984). *See also Welch: No More Tears at Charleston*, J. Com., Sept. 21, 1984, at 12A, col. 1 (overview by Don Welch, Executive Director, South Carolina State Ports Authority of competition among ports in South Atlantic).

Finally, in another unique action, the Port Authority of New York and New Jersey, in February, 1984, filed a complaint with the Federal Maritime Commission under the Maritime Labor

fostered creativity and hopefully will force more rational development and investment decisions.

The final point is that the load center concept may be of the same nature or evil of undue concentration of cargo that Section 8 sought to remedy. The analogy is more than clear—railroads, which were the root of the congestion in the first two decades of the century, have, through intermodalism, again assumed a pivotal status in the development of superports. Rail mergers and agreements with steamship lines may lead to a protection of interests and once again result in favored ports or load centers. Section 8 itself was a reaction to the consequences of similar concentration, allowed to reach crisis proportion. The Shipping Act of 1984, enacted to reflect the development and radically changed nature of shipping since 1916, instructs the Federal Maritime Commission for 5 years, to collect and analyze "the changes in the frequency or types of common carrier services available to specific ports or geographic regions." Section 8 gave the original United States Shipping Board similar duties.

The circle may be complete.

Agreements Act of 1980, P.L. 96-325, 94 Stat. 1021 (1980) against the New York Shipping Association, which represented waterfront employers. The thrust of the complaint was than an agreement negotiation between the Shipping Association and the International Longshoremen's Association, imposed a tonnage assessment on New York/New Jersey cargo to help fund longshore benefits, was unjustly discriminatory and burdened the naturally tributary cargo of the port. Port Auth. of New York v. New York Shipping Assoc., 23 SRR 21 (F.M.C. 1985).

While the parties ultimately reached agreement (1985) on a new formula, it is interesting to note that, in its decision, the Commission stated the 'naturally tributary' concept seems to have little continuing validity, and the proper means of determining the lawfulness of port competitive practices in the container age is to examine whether the contested practice is directed against certain commodities or exists at the expense of economic or operational efficiencies. Id at 50.

The case was later settled upon the Georgia Ports Authority's acknowledgment that the report contained certain errors and would no longer be distributed. *See* No. 84-5 South Carolina State Ports Auth. v. Georgia Ports Auth., No. 84-5 (F.M.C. 1984) (order dismissing complaint).