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COMMENT

OCEAN SHIPPING CONFERENCES AND THE FEDERAL MARITIME COMMISSION

In the Shipping Act of 1916,¹ Congress created a unique system of regulating international merchant carriers. The system is based upon anti-competitive conferences which fix discriminatory rates.² Congress also provided for a regulatory agency, the Federal Maritime Commission, designed to control the monopoly characteristics of these conferences in order to avoid detriment to American firms and to protect these agreements from United States antitrust legislation. To enable the Commission to fulfill the latter function, section 15 of the Shipping Act of 1916 provides that agreements "fixing or regulating transportation rates or fares" filed with and approved by the Commission will be exempt from antitrust regulation,³ and that the Commission *must* grant approval to all such agreements that do not violate enumerated statutory criteria.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications or cancellations.⁴

In order to fulfill its dual function, the Commission is given the power to conduct hearings and to subpoena documents.⁵ Although recently held to extend throughout the world,⁶ the Commission's sub-

¹ 39 Stat. 728, *as amended*, 46 U.S.C. §§ 801-42 (1964) (Supp. II, 1965-66) *as amended*, 81 Stat. 544 (1 U.S. CODE CONG. & AD. NEWS 589 (1967)).

² "Virtually no one denies that conference organization is a major departure from free competition." McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 U. CHI. L. REV. 191, 271 (1960).

³ 39 Stat. 733, *as amended*, 75 Stat. 763 (1961), 46 U.S.C. § 814 (1964),

⁴ *Id.*

⁵ 46 U.S.C. § 826 (1964), *as amended*, 81 Stat. 544 (1 U.S. CODE CONG. & AD. NEWS 589 (1967)).

⁶ *See* FMC v. DeSmedt, 366 F.2d 464, 471-73 (2d Cir.), *aff'g* Ludlow Corp. v. DeSmedt, 249 F. Supp. 496, 500 (S.D.N.Y.) *cert. denied*, 385 U.S. 974 (1966).

poena power has, in fact, been limited to those foreign countries willing to allow the Commission to investigate domiciliary firms.⁷ As a result, the Commission's efforts to conduct hearings concerning the rates employed by conferences under approved agreements have been nullified by the refusal of numerous foreign governments to allow their carriers to obey Commission subpoenas.⁸ The Commission, unable to perform its assigned function, has, for the first time, reacted by disbanding the offending conference.⁹ The net effect, under a recent Supreme Court decision holding antitrust sanctions applicable to unapproved conferences,¹⁰ has been to remove the antitrust immunity of the conference members.

Although the expansion of antitrust jurisdiction and the restriction on the Commission's subpoena power have developed independently, both events stem from a common source—the recent revitalization of the Commission's regulatory efforts. The outcome of these events has been the Commission's decision to disband noncomplying conferences. The legality and wisdom of its response, however, are suspect.

I

THE MARITIME INDUSTRY DILEMMA

A. *The Earlier Situation: 1916-1958*

Prior to 1958,¹¹ there was little danger that an approved conference would subsequently be disapproved and disbanded. Similarly, it was unlikely that either a disapproved conference or an unapproved conference would have antitrust proceedings brought against it. One reason for this situation was the FMC's failure to determine, through investigation, whether approved standards had, in fact, been met. As Clarence G. Morse, then Chairman of the FMC, told an antitrust subcommittee,

⁷ See *FMC v. DeSmedt*, 268 F. Supp. 972, 975-76 (S.D.N.Y. 1967).

⁸ See, e.g., *Calcutta, East Coast of India & East Pakistan/U.S.A. Conf. F.M.C. No. 67-33*, at 9 (Sept. 14, 1967).

⁹ *Id.* at 5.

¹⁰ *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, *modified*, 383 U.S. 932 (1966), *distinguishing* *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932); *Far East Conf. v. United States*, 342 U.S. 570 (1952).

¹¹ Although any attempt to isolate the source of the maritime industry's present turmoil would be artificial, the Supreme Court's decision in *Federal Maritime Bd. v. Isbrandtsen Co.*, 356 U.S. 481 (1958), clearly engendered the legislative concern that resulted in the 1961 amendment to the Shipping Act. See *American Export Isbrandtsen Lines, Inc. v. FMC*, 380 F.2d 609, 616 (D.C. Cir. 1967). The *Isbrandtsen* decision of 1958 held that the dual rate contracts employed to "tie" shippers to the conference are illegal when "employed as predatory devices," 356 U.S. at 499.

the Commission operated on the premise that all agreements filed for section 15 approval were prima facie valid, unless the Commission subsequently investigated and discovered a defect.¹² As a result, all conference agreements were initially approved, and thus were exempt from antitrust proceedings.

A corollary to the Commission's willingness to grant agreements prima facie validity was its less than zealous efforts to investigate those agreements initially "approved." That for a period of fifty-two years, the power to disband a conference had never been used, is indicative of the Commission's old attitude. The only suggestion that such power existed appeared as dictum in a 1935 Commission decision.¹³ Thus, the filing of rates and agreements for section 15 exemptions was an empty formality, and the conference procedure of modifying rates within agreements at will, subject only to notification of the Commission within thirty days was, in effect, a carte blanche.¹⁴

¹² *Hearings on Monopoly Problems in Regulated Industries Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 86th Cong., 1st & 2d Sess., pt. 1, at 12 (1960) [hereinafter cited as *Celler Hearings*]. "When agreements are submitted for Board approval they are examined for completeness, clarity, and prima facie validity under applicable provisions of the Shipping Act . . ." *Id.* For a discussion of the doctrine of prima facie validity of conference agreements, see *Celler Hearings*, pt. 1, at 1009, 1013 (letter from Thos. E. Stakem, Jr., Vice-Chairman, Federal Maritime Board, to Representative Emanuel Celler, Feb. 17, 1960):

It might be contended, contrary to the conclusions set forth above, that approval under Section 15 is a mere privilege, not a right, and that the Board has the power to deny this privilege for whatever reason it deems fit. This argument is necessarily based on the premise, however, that the word "shall" may be read as permissive rather than mandatory. Such a premise is inconsistent with the several considerations set forth above.

The statute clearly states that *unless* such an agreement is

unjustly discriminatory or unfair as between carriers [or] shippers . . . or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act . . . [it shall be approved].

Shipping Act of 1916, § 15, as amended, 75 Stat. 763 (1961), 46 U.S.C. § 814 (1964).

It is interesting to note that a similar assumption was employed by the Civil Aeronautics Board. See Bechick, *The International Air Transport Association and the Civil Aeronautics Board*, 25 J. AIR. L. & COM. R (1958), stating that as of Nov. 13, 1957, "The Board will now require that certain agreements which are reached informally within IATA be submitted to CAB for formal approval. In the past such agreements took effect unless specifically disapproved." *Id.* at 23.

¹³ *Edmond Weil, Inc. v. Italian Line*, 1 U.S.S.B.B. 395 (1935):

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

Id. at 398.

¹⁴ [T]he provisions of Part 235 [46 C.F.R. part 235, containing the Maritime Board's rules of general applicability for preparing rate schedules] are seen not to constitute tariff requirements at all, since they call for no statement of rates currently in force or binding for the future . . . They merely call for a mass of detailed rate history

The "automatic" antitrust immunity resulting from the Commission's failure to investigate conference agreements at or subsequent to filing was finally attacked by the courts despite the vigorous protests of the Commission. In two cases decided in 1954, *River Plate & Brazil Conferences v. Pressed Steel Car Co.*¹⁵ and *Pacific Westbound Conference v. Leval & Co.*,¹⁶ a federal district court and the Oregon Supreme Court held that there could be no recovery of liquidated damages for breach of a contract based upon a dual rate agreement, unless the agreement was formally approved by the Commission.¹⁷ In a third case, *Isbrandtsen Co. v. United States*,¹⁸ the Court of Appeals for the District of Columbia interpreted section 15 to provide "that such agreements or modifications 'shall be lawful only when and as long as approved' by the Board."¹⁹ The necessary implication of these decisions was that such unapproved dual rate contracts were not entitled to antitrust exemption. Significantly, at that time, most such contracts had never been specifically approved by the Commission. The Commission's reaction was simply to ignore these decisions. For example, in response to a letter concerning unapproved dual rate conferences in light of the *Pressed Steel Car Co.* case, the Commission wrote that it was not aware of any such contracts.²⁰ The response was based upon the assumption that tacit approval remained sufficient,²¹ and, consequently, the doctrine of prima facie legality of conference agreements, including dual rate contracts, and its corollary of automatic exemption from antitrust proceedings continued well beyond these decisions.²²

A second reason for the almost total immunity of shipping confer-

Galland, *Steamship Tariffs in Foreign Commerce*, 35 TUL. L. REV. 141, 150 (1960). For the history of the Commission's rate regulations, see *id.* at 150-64.

¹⁵ 124 F. Supp. 88 (S.D.N.Y. 1954), *aff'd*, 227 F.2d 60 (2d Cir. 1955).

¹⁶ 201 Ore. 390, 269 P.2d 541, *cert. denied*, 348 U.S. 897 (1954).

¹⁷ *River Plate & Brazil Confs. v. Pressed Steel Car Co.*, 124 F. Supp. 88, 91 (S.D.N.Y. 1954); *Pacific Westbound Conf. v. Leval & Co.*, 201 Ore. 390, 396, 269 P.2d 541, 543-44 (1954); see *Celler Hearings*, *supra* note 12, pt. 1, at 79.

¹⁸ 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

¹⁹ *Id.* at 56 (emphasis in original); see *Celler Hearings*, pt. 1, at 79.

²⁰ In this exchange of correspondence, Stauffer Chemical Co. asked for a list of those outward steamship conferences whose contracts had not been formally approved by the Board in the light of the *Pressed Steel Car Co.* case. . . . In answer to this letter, the Secretary of the Board replied that the Board was not aware of any steamship conferences who employed contracts requiring approval which had not been approved by the Board. . . . In the light of the *Isbrandtsen* case, *Pressed Steel Car* case, and *Leval* case, was not this reply rather misleading?

Celler Hearings, pt. 1, at 95 (statement of Representative Emanuel Celler, Chairman, Antitrust Subcommittee, Committee on Judiciary).

²¹ "This again, gets into the question of tacit approval or formal approval." *Id.* (statement of Mr. Morse, Federal Maritime Board Chairman, in response to the Committee Chairman's question, *supra* note 20).

²² See note 12 *supra*.

ences during this period was the complete absence of communication between the Maritime Commission and the Justice Department.²³ This can be traced to the Commission's restrictive interpretation of the role that antitrust should play in the regulation of the shipping industry. Indeed, in hearings before the Antitrust Subcommittee of the Committee on the Judiciary, the Commission's counsel expressed the view that mere participation in the international shipping industry was sufficient to exempt a firm from antitrust regulation by the Justice Department. Failure to file an agreement was considered a violation of the Shipping Act only, and not of the antitrust provisions. Punishment in such a case was a civil penalty of \$1,000 per day. Interestingly, however, no such penalty had ever been enforced.²⁴

B. *Antitrust and The Shipping Industry*

Although several early cases²⁵ had challenged the Commission's pre-1958 assumption that antitrust sanctions were totally inapplicable to the shipping industry, it was not until 1966 that antitrust jurisdiction was finally established. In *Carnation Co. v. Pacific Westbound Conference*,²⁶ the Supreme Court held that the Shipping Act of 1916, specifically section 15, was not designed to give the shipping industry complete antitrust immunity. Two earlier cases²⁷ implying that such an immunity existed were distinguished on the ground that in those situations the actions of the Court would have interfered with the lawful proceedings of the Commission. Thus, under the *Carnation* holding, antitrust sanctions may be applied "so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers."²⁸ When the Commission withdraws a conference's section 15 approval, however, subsequent court action finding an antitrust violation would in no way infringe upon the Commission's role. Indeed, this result would be contemplated by the Commission.²⁹

²³ In discussing an agreement not subject to § 15 exemption before the Antitrust Subcommittee, the Maritime Board's counsel indicated that until this time the Commission "[had] not . . . reported such an agreement to the Department of Justice." *Celler Hearings*, pt. 1, at 45 (testimony of Mr. Aptaker, Chief, Regulation Branch, Office of General Counsel, Federal Maritime Board).

²⁴ *Id.* at 70-71 (testimony of Mr. Morse).

²⁵ See cases cited note 17 *supra*.

²⁶ 383 U.S. 213, *modified*, 383 U.S. 932 (1966), *rev'g* 336 F.2d 650 (9th Cir. 1964).

²⁷ *Far East Conf. v. United States*, 342 U.S. 570 (1952); *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932).

²⁸ 383 U.S. at 221.

²⁹ See, e.g., *Calcutta, East Coast of India & East Pakistan/U.S.A. Conf. F.M.C. No 67-33*, at 9 (Sept. 14, 1967).

I might say, generally, that if the Commission cannot obtain this type of

With *Carnation* as precedent, several cases have been initiated in an effort to employ antitrust sanctions against offending shipping conferences. In *Firestone Tire & Rubber Co. v. American President Lines, Ltd.*,³⁰ a federal district court extended the principle adopted in *Carnation* to allow the initiation of discovery proceedings in a treble damage suit prior to completion of the Commission's hearing.³¹

More recently, the Commission decided that fifteen conference members had "conspir[ed] to destroy" the independent Sapphire Steamship Line, and determined that the original section 15 agreement was illegal as filed.³² On the basis of these findings, Sapphire is pressing a \$3.5 million treble damage suit against the offending conference members.³³

Although the ultimate impact of the application of antitrust legislation to the shipping industry will depend upon the Commission's attitude toward the conference structure, these cases demonstrate the dramatic change in the effectiveness of the Commission's power to disband a noncomplying conference. The crucial issue is the desirability of applying this power.

C. Discovery and Subpoena Power

Implicit in a discussion of the scope of the Maritime Commission's subpoena authority³⁴ is the assumption that it is used. Prior to 1958, the Commission's presumption of prima facie validity of conference agreements negated any pressing requirement to subpoena materials

information then it cannot perform its statutory functions of regulating conferences. If it cannot perform these functions, then the whole question of permitting the existence of conferences, which are quite simply legalized cartels, will have to be reviewed. Congress, in immunizing conferences from the antitrust laws, did so only on the condition and the assumption that these anticompetitive bodies could and would be submitted to the supervision of the Federal Maritime Commission.

Hearings on Discriminatory Ocean Freight Rates and the Balance of Payments Before the Joint Economic Comm., 88th Cong., 1st & 2d Sess., pt. 4, at 651 (1964) (Statement of Adm. John Harlee, Chairman, FMC) [hereinafter cited as *Douglas Hearings*]; see pp. 1079-80 *infra*.

³⁰ 266 F. Supp. 76 (S.D.N.Y. 1966).

³¹ *Id.* at 78-79. The court noted that in *Carnation* the petitioner did not "seem to have needed any discovery." A stay pending a final Commission determination of whether a § 15 exemption is available to the conference had been granted. The court in *Firestone*, while holding that the actual trial itself must await the Commission's decision, nevertheless permitted pre-trial discovery to proceed on the grounds that it would not interfere.

³² N.Y. Times, Dec. 13, 1967, at 93, col. 5.

³³ *Id.*; J. COMMERCE, Dec. 13, 1967, at 26, col. 3.

³⁴ For an in-depth study of the situation prior to the enactment of a discovery procedure, see Galland, *A Note on Maritime Discovery*, 19 ADMIN. L. REV. 119, 124 (1966).

for investigative purposes.³⁵ This presumption was finally eliminated, however, by the Supreme Court's holding in *Federal Maritime Board v. Isbrandsten Co.* that the dual rate agreement was illegal when used to stifle the competition of independent carriers.³⁶ The ensuing legislation, which preserved the dual rate contract system, clearly stipulated that the Commission must actively judge each conference agreement underlying a dual rate tariff against the criteria of section 15.³⁷

Consequently, in order for a conference member to avoid the danger of antitrust prosecution, it is now essential that the conference agreement and the various dual rate agreements employed by its members actually be filed and granted commission approval pursuant to section 15 of the Shipping Act. Of equal importance in evaluating the scope of the Commission's subpoena power is the fact that the Commission, under more dynamic leadership, has aggressively assumed its statutory duty of conducting an investigation on the merits of each such proposal and disapproving those agreements which fail to meet the statutory guidelines.³⁸ To enable the Commission to perform this function, sections 21 and 27 of the Shipping Act of 1916 confer authority to call on carriers and other regulated persons for "any periodical or special report, or any account, record, rate or charge, or any memorandum of any facts and transactions" on pain of \$100 for each day of default,³⁹ and to subpoena witnesses, books and papers.⁴⁰

Due to the international character of the shipping industry and the preponderance of foreign firms in many conferences, the Commission must reach documents in the possession of persons associated with firms not domiciled or incorporated in this country. Reaching such documents is the Commission's principal regulatory problem.⁴¹

Recently, in an attempt to alleviate the confusion of the subpoena provision, Congress amended section 27 to give the Commission dis-

³⁵ See, pp. 1071-74 *supra*.

³⁶ 356 U.S. 481 (1958).

³⁷ Act of October 3, 1961, § 14(b), 75 Stat. 762, 46 U.S.C. § 813a (1964).

³⁸ *Id.*; see *United States Atl. & Gulf/Australia-New Zealand Conf. v. FMC*, 364 F.2d 696 (D.C. Cir. 1966); *Aktiebolaget Svenska Amerika Linien v. FMC*, 351 F.2d 756 (D.C. Cir. 1965) *rev'd*, 36 U.S.L.W. 4213 (U.S. March 6, 1968); *Outward Continental N. Pac. Freight Conf.*, F.M.C. No. 66-36 (Mar. 28, 1967).

³⁹ Shipping Act of 1916, § 21, 39 Stat. 736, *as amended*, 46 U.S.C. § 820 (1964); see, Galland, *supra* note 34, at 124.

⁴⁰ Shipping Act of 1916, § 27, 46 U.S.C. § 826 (1964), *as amended*, 81 Stat. 544 (1 U.S. CODE CONG. & AD. NEWS 589 (1967)).

⁴¹ See *FMC v. Anglo-Canadian Shipping Co.*, 335 F.2d 255 (9th Cir. 1964); *FMC v. DeSmedt*, 268 F. Supp. 972 (S.D.N.Y. 1967); *Calcutta, East Coast of India & East Pakistan/U.S.A. Conf.*, F.M.C. No. 67-33 (Sept. 14, 1967).

covery power analogous to that contained in the federal rules.⁴² The problem under amended section 27 is twofold: first, does the Commission have the authority to request such material from a foreign firm; second, assuming the necessary authority, will the courts enforce the Commission's order through contempt proceedings?

Under the original subpoena section, the answer to the first inquiry is clearly yes. Although there was some discussion of the meaning of the statutory language employed by the Commission to support its claim to worldwide subpoena power,⁴³ the Court of Appeals for the Second Circuit, in *FMC v. DeSmedt*,⁴⁴ upheld a district court ruling that the Commission's power to subpoena extended throughout the world. The experience of other agencies under the federal rules indicates that the Commission's newly acquired discovery power will also enjoy worldwide applicability.⁴⁵

The question of court enforcement of a contempt proceeding against a foreign firm for failure to comply with either the Commission's subpoena or discovery power demands presents a more difficult problem. Although the federal courts have been willing to support the Commission's subpoena power, they have always inserted one caveat in their opinions. Thus the court of appeals in *FMC v. DeSmedt* suggested that:

[W]e are not now confronted with an effort to hold a foreign carrier in contempt or to assess fines for refusing at its government's command to produce documents in response to a subpoena, and we ought not to anticipate that the problem will inevitably arise.⁴⁶

Recently, however, the *DeSmedt* case was tried for the third time on the issue of whether the federal courts could hold in contempt a foreign carrier that refused to comply with a Commission and court sub-

⁴² 81 Stat. 544 (1 U.S. CODE CONG. & AD. NEWS 589 (1967)).

⁴³ *FMC v. DeSmedt*, 366 F.2d 464, 474 (2d Cir. 1966) (dissenting opinion), noted in 52 IOWA L. REV. 1022 (1967).

⁴⁴ 366 F.2d 464 (2d Cir.), *aff'g* *Ludlow v. DeSmedt*, 249 F. Supp. 496 (S.D.N.Y. 1966), *cert. denied*, 385 U.S. 974 (1967).

⁴⁵ See, e.g., *Société Internationale v. Rogers*, 357 U.S. 197 (1958).

⁴⁶ 366 F.2d at 473. Other examples of this caveat being employed to distinguish between a valid subpoena order and the power to enforce it are as follows: "The extent to which the information could be forcibly elicited is another matter, not in the least relevant to whether it may be lawfully demanded." *Kerr S.S. Co. v. United States*, 284 F.2d 61, 64 (2d Cir. 1960); "[T]he question as to whether the order can be enforced by extra-territorial means is not presently before us. All that is here involved is whether the order was properly and validly issued." *Montship Lines, Ltd. v. FMB*, 295 F.2d 147, 154 (D.C. Cir. 1961); see also Gardner, *Steamship Conferences and the Shipping Act, 1916*, 35 TUL. L. REV. 129, 140 (1960), where it is stated: "It is too early to say whether production of documents can be compelled . . . and whether disciplinary orders can in fact be enforced abroad."

poena order.⁴⁷ Predictably, the court would not force a foreign firm to violate the laws of its own country.⁴⁸ In view of the widespread existence within foreign countries of laws forbidding compliance with foreign subpoenas of documents and other materials, and since a large number of conference hearings by the Commission may eventually turn on this issue,⁴⁹ the applicability of this decision to the newly enacted discovery section is important.

In amending section 27 of the Shipping Act,⁵⁰ Congress declared that "[b]ecause of the success of the Federal Rules of Civil Procedure in simplifying and expediting litigation, the procedures therein provided should be closely followed by the Commission . . ."⁵¹ The effect of this amendment is to apply the present federal rules concerning discovery to hearings conducted by the Commission under section 22.⁵² Further, Congress indicated that although the former subpoena power had been simplified, "[T]here [was] no intention to make any change in the scope, nature, or jurisdiction of [this] power."⁵³ Thus, the non-enforceability precedent remains applicable to both the earlier subpoena power under section 27 and the investigative power under section 21.

Unfortunately, Federal Rules 34 and 37, pertaining to discovery and enforcement, will not aid the Commission in its efforts to reach documents located in an unwilling foreign country. In *Société Internationale v. Rogers*⁵⁴ the Supreme Court held that:

. . . Rule 37 should not be construed to authorize dismissal of this

⁴⁷ *FMC v. DeSmedt*, 268 F. Supp. 972 (S.D.N.Y. 1967).

⁴⁸ *Id.* at 975; see p. 1079 & note 56 *infra*.

⁴⁹ See Comment, *Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635, 643 (1965):

In 1963 the Commission served section 21 orders on sixteen conferences. . . . The inbound conferences are domiciled abroad, and they and the foreign members of all sixteen conferences were supported by their governments in refusing to comply with the Commission's orders. The Commission suspended the orders as to them and sought to persuade their governments voluntarily to furnish documents located outside the United States. To date [1965], the Commission has not vacated the suspension of the orders.

⁵⁰ 46 U.S.C. § 826 (1964), as amended, 81 Stat. 544 (1 U.S. CODE CONG. & AD. NEWS 589 (1967)).

⁵¹ S. REP. NO. 472, 90th Cong., 1st Sess. 2 (1967).

⁵² *Id.* It is interesting to note that discovery procedure is not entirely new to the Commission. In fact, they had enacted their own discovery rule (Rule of Practice 12(k), 46 C.F.R. § 201.211 (Supp. 1963)) which was subsequently invalidated by the court decision in *FMC v. Anglo-Canadian Shipping Co.*, 335 F.2d 255 (9th Cir. 1964). This provision was cited with approval in the report of the Commerce Committee accompanying the present act. S. REP. NO. 472, 90th Cong., 1st Sess. 2 (1967).

⁵³ S. REP. NO. 472, 90th Cong., 1st Sess. 2 (1967).

⁵⁴ 357 U.S. 197 (1958), noted in 46 CALIF. L. REV. 836, 841 (1958).

complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.⁵⁵

Further, the basic premise of the Supreme Court's approval, that a party should not be forced to violate the laws of his own country, has continued to be supported in courts throughout the country.⁵⁶ Thus, the Commission's problem of reaching materials in order to investigate a questionable agreement or rate remains.

D. *The Commission's Response*

The final and only variable element in the dilemma facing the maritime industry is the Commission's reaction to the restrictions of its subpoena authority on the one hand, and to the application of anti-trust sanctions on the other. If the conference system is to be preserved, the Commission must be willing to accept the limitations upon its subpoena authority, and must adopt a less autocratic regulatory procedure.

The Maritime Commission's recent efforts to gain control of the rates and procedures of the various conferences dealing with the United States demonstrates, however, that the Commission is not willing to stand aside and allow the conferences to, in effect, regulate themselves. The new attitude was articulated by present Commission Chairman, Adm. John Harillee, in the recent Douglas Hearings:

[I]f the Commission cannot obtain this type of information [documents from foreign member-firms] then it cannot perform its statutory functions of regulating conferences. If it cannot perform these functions, then the whole question of permitting the existence of conferences, which are quite simply legalized cartels, will have to be reviewed.⁵⁷

That this statement was no idle threat, is amply demonstrated by the Commission's action in disbanding both the Calcutta Conference and, more recently, the Outward Continental North Pacific Freight Conference.⁵⁸

⁵⁵ *Id.* at 212.

⁵⁶ See, e.g., *Société Internationale v. Rogers*, 357 U.S. 196 (1958); *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *First Nat'l City Bank v. IRS*, 271 F.2d 616 (2d Cir. 1959), *cert. denied*, 361 U.S. 948 (1960); *SEC v. Minas De Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945); *United States v. Standard Oil Co.*, 23 F.R.D. 1 (S.D.N.Y. 1958). See Comment, *Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635, 643 (1965). *But cf.* *Fontaine v. SEC*, 259 F. Supp. 880 (D.P.R. 1966).

⁵⁷ *Douglas Hearings*, *supra* note 29, pt. 4, at 651.

⁵⁸ *Calcutta, East Coast of India & East Pakistan/U.S.A. Conf.*, F.M.C. No. 67-33 (Sept. 14, 1967). *Outward Continental N. Pac. Freight Conf.*, F.M.C. No. 66-36 (Mar. 28, 1967); see J. COMMERCE, Oct. 30, 1967, at 36, col. 2.

In disbanding the Outward Continental Conference,⁵⁹ the Commission based its decision upon the specific provisions added to section 15 by the 1961 amendment, requiring each conference to adopt an approved internal policing system.⁶⁰ At the hearing, it was apparently stipulated that the conference had failed to meet this provision. Outward Continental defended on the ground that the Commission could not "disapprove its agreement without a specific finding . . . that the agreement operates in one of the four ways set out in section 15."⁶¹ The merits of this contention and the propriety of the Commission's actions generally under section 15 were not considered, however, the Commission ruling only that there was inadequate policing.⁶² Thus, Outward Continental serves merely as an additional example of the Commission's get-tough policy with conferences.

Of more importance in ascertaining the Commission's present attitude toward section 15, is the disbanding of the Calcutta Conference.⁶³ The Commission made little effort to ground its ruling on a factual violation of the statutory language of section 15. Instead, it held that the concept of regulation by the Maritime Commission was basic to the presupposition of antitrust immunity. Further, the Commission decided that if it continued to be impossible to reach documents located abroad because of hostile foreign law, it had no alternative but to remove those firms from section 15 exemption, not for statutory reasons, but simply because the justification behind their exemption had failed.⁶⁴ In essence, the Commission has overreached the specific language of the act in an attempt either to gain a more receptive foreign attitude to-

⁵⁹ Outward Continental N. Pac. Freight Conf., F.M.C. No. 66-36 (Mar. 28, 1967); *aff'd*, 385 F.2d 981 (D.C. Cir. 1967).

⁶⁰ *Id.* at 2.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

⁷⁵ Stat. 764 (1961), 46 U.S.C. § 814 (1964).

⁶¹ Outward Continental N. Pac. Freight Conf., F.M.C. No. 66-36, at 4-5 (Mar. 28, 1967).

⁶² *Id.* at 5.

⁶³ Calcutta, East Coast of India & East Pakistan/U.S.A. Conf., F.M.C. No. 67-33 (Sept. 14, 1967), *appeal docketed*, No. 21,355, D.C. Cir., 1967.

⁶⁴ Since effective supervision and control of respondents' concerted activities is not possible in the present posture of the conference, the antitrust exemption which our approval granted respondents must be withdrawn. To do so is not to punish respondents in any sense of the word. All we are doing here is to restore the regulatory forces of free and open competition. We cannot do otherwise under the law and still protect shippers, both exporters and importers from the possibility of unreasonably high rates which could result from an unfettered freedom of concerted anticompetitive activity.

Id. at 9.

ward Commission regulation, or to eliminate much of the conference system.

Because of the practical significance of this new approach, the Commission's role in light of the *Calcutta Conference* case must be reevaluated.

II

DISBANDING OF CONFERENCES—AN UNSATISFACTORY APPROACH

The Commission has taken a strong stance to preserve what it feels is its proper function in regulating the foreign commerce of the United States. This position is not, however, supported by either legislative intent underlying the Congressional reaffirmation of section 15 or by statutory construction. Also, in light of the present economic structure of the shipping industry,⁶⁵ the wisdom of the Commission's discretionary disbanding policy is questionable.

A. Statutory Construction

Section 15 originally provided three criteria for determining continued approval of a conference:

The [Commission shall] . . . disapprove, cancel, or modify any agreement . . . that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act⁶⁶

The 1961 amendment preserved these original criteria and established a fourth qualification—the Commission shall “disapprove, cancel, or modify any agreement . . . contrary to the public interest.”⁶⁷

Thus, the Commission's power to disband conferences that refuse to comply with subpoena demands is not specifically granted under section 15. Consequently, the issue turns on the meaning of the sentence granting the Commission power to approve conferences: “The Commission . . . shall approve *all other* agreements, modifications or cancellations.”⁶⁸ Prior to *Isbrandtsen*, the Commission operated on the premise that there was no discretion granted it in approving conference agreements.⁶⁹ This appears to be the only defensible construction of section 15.

⁶⁵ See pp. 1085-88 *infra*.

⁶⁶ Shipping Act of 1916, § 15, 39 Stat. 734.

⁶⁷ 75 Stat. 763 (1961), 46 U.S.C. § 814 (1964).

⁶⁸ *Id.* (emphasis added).

⁶⁹ See p. 1072 *supra*.

The issue of the Commission's discretion was recently considered by the Supreme Court in *FMC v. Aktiebolaget Svenska Amerika Linien*.⁷⁰ Although it upheld the Commission's contention that any agreement contrary to United States antitrust laws is rebuttably presumed contrary to the public interest,⁷¹ and thus voidable under section 15, the Court reaffirmed that the Commission must "adduce substantial evidence to support a finding under one of the four standards of § 15"⁷² Applying a nondiscretionary construction of section 15 to the Commission's decision in the *Calcutta Conference* case, the determinative question is whether the Commission "adduced substantial evidence" to justify its decision.

The Commission based its decision to disband the conference for noncompliance with subpoena demands upon a 1916 Congressional assumption that some governmental agency would control combinations granted an exemption under section 15.⁷³ The Commission stated:

[T]he *public interest* requires that we remove the aegis of section 15 from the concerted activities of an anticompetitive combination whose refusal to supply lawfully demanded information frustrates our efforts at effective supervision and control of those activities and *deprives a shipper in our commerce of the necessary means to prosecute his complaint under the Act*.⁷⁴

The Supreme Court's decision in *FMC v. Aktiebolaget Svenska Amerika Linien*⁷⁵ indicates that the threshold problem is whether the Calcutta Conference, having refused to obey a Commission subpoena, is, without further proof of wrongdoing, rebuttably presumed to violate the public interest. Both the Congressional intent behind the 1961 amendment, and the economic underpinnings of the shipping industry, suggest that

⁷⁰ 36 U.S.L.W. 4213 (U.S. Mar. 6, 1968).

⁷¹ *Id.* at 4217.

⁷² *Id.* at 4215.

⁷³ The antitrust exemption which results from the approval of agreements under section 15 was granted by Congress only on the assumption that the anticompetitive combinations thereby authorized would be effectively supervised and controlled by an agency of the government.

Calcutta, East Coast of India & East Pakistan/U.S.A. Conf., F.M.C. No. 67-33, at 4 (Sept. 14, 1967). The authority cited to support this proposition is derived principally from the 1914 Alexander Report and the House reports on the 1961 amendment. With the exception of § 18(b)(5), providing for the control of rates, however, the strong bill desired by the House was rejected, and the more moderate Senate version passed into law. *See* H.R. REP. No. 1247, 87th Cong., 1st Sess. (1961) (accompanying H.R. 6775). *See* discussion of legislative intent, pp. 1083-85 *infra*.

⁷⁴ Calcutta, East Coast of India & East Pakistan/U.S.A. Conf., F.M.C. No. 67-33, at 5 (Sept. 14, 1967) (emphasis added).

⁷⁵ 36 U.S.L.W. 4213 (U.S. March 6, 1968).

Congress did not intend such a presumption. Moreover, if the Commission must affirmatively demonstrate detriment to the public interest, can it justifiably contend that noncompliance with subpoena is alone sufficient to "deprive a shipper in our commerce of the necessary means to prosecute his complaint under the act"? Since section 18(b)(5),⁷⁶ enacted as part of the 1961 amendment, provides an alternative approach to regulating the detrimental rate situation which avoids the subpoena difficulties inherent in the present procedure, there is no such justification.

B. Legislative Intent

In 1961, following years of moratorium legislation limiting the impact of the Supreme Court's decision in *Federal Maritime Board v. Isbrandtsen Co.*,⁷⁷ Congress enacted what it considered a more permanent solution to the shipping conference dilemma.⁷⁸ The motivation for the amendment was a desire to legalize the dual rate contract held discriminatory in *Isbrandtsen*; however, as a result of extensive hearings, the legislators also found it necessary to modify section 15.

The legislative history of the 1961 amendment reveals that Congress again decided that the shipping conference system, based upon the principal of private internal regulation of rates, was the most desirable regulatory device.⁷⁹

Both the actual additions to section 15 and various suggested amendments support this position. The legislators added a clause emphasizing the necessity of internal self-regulation:

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable

⁷⁶ 46 U.S.C. § 817(b)(5) (1964).

⁷⁷ 356 U.S. 481 (1958). See note 11 *supra*.

⁷⁸ Act of October 3, 1961, § 14(b), 75 Stat. 762, 46 U.S.C. § 814 (1964).

⁷⁹ See S. REP. No. 860, 87th Cong., 1st Sess. 1 (1961), where it is stated: "The primary purpose of this amended bill is to authorize ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual rate contracts with shippers." In *American Export Isbrandtsen Lines, Inc. v. FMC*, 380 F.2d 609, 617 (1967), the court commented: "The Bill as finally reported and passed represented largely a triumph for the conference interests in that most of the antitrust aspects of the legislation were deleted and dual rate contracts were legalized." FMC, FACT FINDING INVESTIGATION No. 6, THE EFFECTS OF STEAMSHIP CONFERENCE ORGANIZATION, PROCEDURE, RULES, REGULATIONS AND PRACTICES UPON THE FOREIGN COMMERCE OF THE UNITED STATES, at 5 (1967) [hereinafter cited as *Dickson Report*] states: "[T]he conference system has generally served the purposes for which it was designed, if somewhat imperfectly, and . . . there may be no feasible alternative for serving the same purpose, taking into account the practical considerations involved in international commerce."

procedures for promptly and fairly hearing and considering shippers' requests and complaints.⁸⁰

A House proposal requiring foreign carriers to appoint an agent to accept service of process was rejected, however, thereby denying the Commission a valuable regulatory device and further implementing the principal of private internal regulation.⁸¹ A second House-suggested amendment to section 15, requiring that conferences be approved only if significant independent competition existed to serve as an effective regulatory device, was also rejected conclusively by the Senate committee. The Senate report aptly pointed out that the two assumptions upon which such an amendment would rest, independent competition and strong conference activity, were mutually exclusive.⁸² Finally, only one of the House provisions designed to strengthen the Commission's position was adopted in the Senate; and that only after bitter debate.⁸³ As amended, section 18(b)(5) gives the Commission the power to establish maximum and minimum rates.⁸⁴

Thus, in effect this amendment was a severe compromise between two distinct outlooks on the methods to be employed by the Commission.⁸⁵ The FMC has the duty to investigate conference activities, to approve maximum and minimum rates, and to regulate internal policing of conferences. To enable the Commission to perform these functions, Congress authorized the fining of conferences using unapproved rates and the disbanding of those failing either to police their own activities or to meet the four general criteria outlined in section 15.⁸⁶ But the power to subpoena foreign documents necessary to conduct such investigations was, in effect, denied. Congress neither

⁸⁰ 75 Stat. 763 (1961), 46 U.S.C. § 814 (1964).

⁸¹ See S. REP. No. 860, 87th Cong., 1st Sess. 25 (1961).

⁸² Clearly then, under standards such as these, few if any effective dual-rate contracts could be approved by the Commission. And those which were approved would be under a constant sword of disapproval. To make matters worse, the sword would be in the hands of nonconference lines which could wield it or not as they saw fit.

Id. at 23.

⁸³ Your committee finds, however, that it would be a serious mistake at this time in world affairs for the U.S. Government unilaterally to assert by statute such a bold claim of right to sit in judgment of the "reasonableness" of international ocean freight rates.

Id. at 25.

⁸⁴ 46 U.S.C. § 817(b)(5) (1964). See pp. 1088-93 *infra*.

⁸⁵ See *American Export Isbrandtsen Lines, Inc. v. FMC*, 380 F.2d 609 (1967): "A large part of the Senate hearings was taken up with attempting to reconcile the divergent and almost contradictory provisions in the House Bill." *Id.* at 617.

⁸⁶ 46 U.S.C. § 814 (1964).

authorized nor tacitly approved Commission authority to enforce its own subpoenas.⁸⁷

The Congressional report indicates that the legislators viewed such authority as neither politically feasible nor desirable:

“[S]aying” the Commission has such powers, which obviously it cannot enforce effectively against the nationals of unwilling foreign governments, would result only in such provisions being enforceable effectively against American-Flag lines, thereby prejudicing them in relation to their relatively unreachable foreign-flag competitors.⁸⁸

Thus, the Commission’s efforts to coerce foreign firms into supplying subpoenaed documents by threatening to disband their conferences contradicts Congressional intent.

C. *Economic Ramifications of the Commission’s Activity*

The goal of the Shipping Act of 1916 was to advance the position of our merchant marine. A similar goal underlies the policy of foreign shipping powers.⁸⁹ Foreign provisions outlawing the supplying of subpoenaed documents to the Commission are, in general, simply an expedient to protect foreign firms from regulation by the United States.⁹⁰ Thus, so long as foreign governments desire to maintain the economic independence of their merchant marine, any unilateral attempt to regulate the world’s commerce will be resisted.⁹¹

The disbanding of conferences for failure of member firms to comply with the Commission’s subpoena demands will lead ultimately to the elimination of the conference structure from the shipping industry. Although such action would create free competition, the net result would be an even greater regulatory burden on the Commission. This can be demonstrated by comparing present regulations with those that would be necessary to insure the American carrier a competitive position within a theoretically free market.

⁸⁷ See *FMC v. DeSmedt*, 268 F. Supp. 972 (S.D.N.Y. 1967). Under the *DeSmedt* decision, the Commission is also barred from obtaining judicial contempt orders to bolster its position against recalcitrant foreign governments.

⁸⁸ S. REP. NO. 860, 87th Cong., 1st Sess. 25 (1961).

⁸⁹ *Dickson Report*, *supra* note 79, at 191. “The almost universal tendency is to regard a merchant marine . . . as an instrument of national policy.”

⁹⁰ For example, the British response to a request for data during a 1963 Commission hearing was the enactment of a bill levying fines of up to 1,000 pounds for compliance with such requests without permission. Shipping Contracts and Commercial Document Act 1964, c. 87.

⁹¹ “[S]o long as the present attitude of important foreign governments prevails in regard to unilateral utility type regulation of ocean transportation, it is not a feasible alternative to the conference system in maintaining rate stability.” *Dickson Report*, at 193.

American-flag liner participation in the conference system is founded upon the premise that United States firms otherwise cannot successfully compete with foreign competition.⁹² Congress has provided several regulatory safeguards which insure participation and protection within the shipping conferences of the world: first, all American firms must be granted admission into any economically desirable conference;⁹³ second, all such conferences must be given the power to discriminate against independent competition and thus establish profitable rates;⁹⁴ and third, all intraconference competitiveness must be strictly regulated to avoid discrimination against the American-flag members.⁹⁵

⁹² "It is clear that the United States suffers a comparative and absolute disadvantage in providing ocean transportation. To provide equivalent services costs us more than it costs foreign suppliers." McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 U. CHI. L. REV. 191, 307 (1960). See *American Export Isbrandtsen Lines, Inc. v. FMC*, 380 F.2d 609, 616 (1967).

⁹³ 46 U.S.C. § 813 (1964); see Kharasch, *Conferences of Carriers by Sea: Freedom of Rate Fixing*, 23 J. AIR. L. & COM. 287 (1956). In discussing this provision the author states:

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

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

Id. at 294 (italics in original). See also *id.* at 302; McGee, *Ocean Freight Rate Conferences and the American Merchant Marine*, 27 U. CHI. L. REV. 191, 251-68 (1960).

⁹⁴ 46 U.S.C. § 813a (1964); see *American Export Isbrandtsen Lines, Inc. v. FMC*, 380 F.2d 609 (D.C. Cir. 1967).

[T]his legislation was a direct result of, and reaction to, the 1958 *Isbrandtsen* decision. . . . [T]he Court [in *Isbrandtsen*] held that conference carriers could not "tie" shippers to the conference through restrictive dual rate contracts, because this would have the effect of stifling the competition of independents.

The legislative reaction by Congress largely reflected the reaction of the shipping industry. That reaction was that the abolition of dual rate contracts would mean the destruction of the conference system, would create cut-throat competition and ultimately would bring about the demise of the American merchant marine, since, unprotected, it could not compete with lower-cost foreign lines.

Id. at 616.

⁹⁵ See note 60 *supra*; Outward Continental N. Pac. Freight Conf., F.M.C. No. 66-36 (Mar. 28, 1967); *aff'd*, 385 F.2d 981 (D.C. Cir. 1967); Admission to Conf. Membership-Pac. Coast European Conf., 9 F.M.C. 241 (1966).

There is a secondary statutory defense similarly designed to protect the American-flag lines within the conference. Shipping Act of 1916, §§ 14-14a, 46 U.S.C. §§ 812, 813 (1964). Section 14 is designed to remove those anti-competitive devices not authorized American firms, such as deferred rebates and fighting ships, from the hands of our foreign competitors, in the hope of maintaining intra-conference equality. Similarly, § 14a provides for the sanction of refusal of the right to enter United States ports for a continuing violation of § 14. Kharasch, *supra* note 93, at 294. See also D. MARX, *INTERNATIONAL SHIPPING CARTELS* 260 (1953); McGee, *supra* note 93, at 232 n.92, 238.

It is clear that foreign firms have been largely receptive to the first requirement. Apparently, American participation has simply been accepted as an additional cost of trading with the prosperous United States market. Consequently, American firms have been able to enjoy the profits of an artificially established rate without intensive Commission control.⁹⁶ Conversely, as the Commission continues to disband conferences, the American firms will lose the advantage of artificially high rates, and the Commission will be faced with the difficulty of investigating for sub rosa agreements establishing rates without American participation. In light of the general approval of cartels and monopolistic agreements in many foreign countries, this would be a more difficult job than the regulation of conferences.

The second requirement of our present regulatory approach allows conferences to employ the dual rate contract principle to maintain an artificial, competitive edge.⁹⁷ The only Commission regulation necessary to obtain this result is the elimination of anti-competitive devices more drastic than the dual rate contract, such as deferred rebates⁹⁸ and fighting ships,⁹⁹ neither of which are allowed to American firms. Once again, foreign carriers have apparently acquiesced, and little Commission regulation has been needed. However, in a freely competitive situation, assuming again that American firms are not competitive, the Commission would be forced to eliminate not only those activities presently restricted, but also the dual rate contract.

The final regulatory requirement insures that the American-flag liner is not discriminated against within the conference organization. Although both the 1961 amendment to section 15, requiring *inter alia* that internal policing of conferences be established,¹⁰⁰ and the recent disbanding of the Outward Continental North Pacific Freight Conference¹⁰¹ indicate that certain difficulties exist in this area, removing the conference wrapping from the individual firm will not eliminate the problem. On the contrary, placing each member on his own would increase clandestine bargaining agreements.

The ultimate economic effect of the Commission's recent decision to disband conferences that refuse to comply with its subpoena and discovery power is contrary to the public interest. The cumulative result of a policy of disbandment would be a multiplication of coercive

⁹⁶ McGee, *supra* note 93, at 260-68.

⁹⁷ See note 94 *supra*.

⁹⁸ 46 U.S.C. § 812 (1964).

⁹⁹ *Id.*

¹⁰⁰ 46 U.S.C. § 814 (1964); see note 60 *supra*.

¹⁰¹ Outward Continental N. Pac. Freight Conf., F.M.C. No. 66-36 (Mar. 28, 1967).

anti-competitive activities by foreign firms, and an escalation of problems beyond the Commission's control.

Thus, in the *Calcutta Conference* case, the Commission should not be granted the power to disband the conference under section 15, unless there is absolutely no other way to protect the public against conference rate-making infractions. The Commission, however, is by no means powerless to meet an unjust or detrimental rate situation. A more judicious application of the provisions of the Shipping Act would achieve better results.

III

DISAPPROVING RATES RATHER THAN DISBANDING CONFERENCES— A TENTATIVE SOLUTION

A. *Section 18(b)(5)*

Section 18(b)(5)¹⁰² offers the Commission an effective alternative to disbanding. It sanctions control of individual rates that are "so unreasonably high or low as to be detrimental to the commerce of the United States." By granting the power to disapprove a single rate, this section allows the Commission to grant appropriate relief without attacking the conference structure. Since necessary cost figures may be gathered from United States conference members without foreign-firm cooperation, the necessity of subpoenaing documents from foreign firms is avoided.

Several cases demonstrate the feasibility of this approach.¹⁰³ In a recent investigation of the Hong Kong-U.S. Atlantic & Gulf Coast trade,¹⁰⁴ the Commission adopted guidelines implementing United States carriers' cost figures in section 18(b)(5) proceedings. The Commission stated that "a rate which fails to meet out-of-pocket costs of the carrier quoting the rate" would be unreasonably low.¹⁰⁵ A similar rule of thumb could be employed for excessive rates. To eliminate the necessity of obtaining foreign data, the Commission indicated that "a carrier may, by proving his own out-of-pocket costs, establish a rebuttable presumption of out-of-pocket costs prevailing generally in the industry."¹⁰⁶ Although these guidelines were directed toward the situ-

¹⁰² 75 Stat. 765 (1961), 46 U.S.C. § 817(b)(5) (1964).

¹⁰³ See *FMC v. Aktiebolaget Svenska Amerika Linien*, 36 U.S.L.W. 4213 (U.S. Mar. 6, 1968); Investigation of Hong Kong—U.S. Atl. & Gulf Coast Tr., F.M.C. No. 67-1088 (Nov. 5, 1967).

¹⁰⁴ F.M.C. No. 67-1088 (Nov. 5, 1967).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

ation where the complainant was an American conference member, and thus presupposed that information concerning its cost figures would be voluntarily supplied, the same procedure is available to exporters or other non-conference partitioners.¹⁰⁷

The Commission's procedure, applying criteria ascertainable from United States sources, also eliminates due process objections to a shift in the burden of proof on the basis of noncompliance with subpoena demands.¹⁰⁸ Evidence of foreign cost figures is unnecessary to establish a detrimental effect on American commerce, and the mere fact that a foreign rate is proven to be below the out-of-pocket costs of an American-flag liner meets the statutory criteria. In the absence of a convincing demonstration that the rate in question is nevertheless desirable, it should be disapproved. A similar technique for shifting the burden of proof in section 15 proceedings has been sustained by the Supreme Court.¹⁰⁹

B. *Scope of Effective Rate Regulation*

Prior to the 1961 amendment, the Commission's only regulatory power over rates was its threat to disband conferences whose rates were "unreasonably high or low and therefor detrimental to the commerce of the United States."¹¹⁰ In 1961, Congress codified this test in section 18(b)(5).¹¹¹ This did not broaden the Commission's power to regulate rates, but simply allowed the Commission to avoid the harsh results of disbanding an entire conference by applying its earlier standard to a particular rate.¹¹² However, because section 18(b)(5) is cast in terms disapproving existing rates it conflicts with the conference's power to

¹⁰⁷ Section 27 empowers the Commission to obtain information from American-flag carriers. 46 U.S.C. § 826 (1964).

¹⁰⁸ See *Société Internationale v. Rogers*, 357 U.S. 197 (1958).

¹⁰⁹ *FMC v. Aktiebolaget Svenska Amerika Linien*, 36 U.S.L.W. 4213 (U.S. March 6, 1968).

The Court held that any agreement invalid under United States antitrust policy "will be approved only if the conferences can 'bring forth such facts as would demonstrate that the . . . rule was required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.'"

Id. at 4215. The effect of this decision was to approve the Commission's policy of shifting the burden of establishing that an agreement is in the "public interest" under § 15, at least initially, to the conference, if the agreement on its face violates United States antitrust laws.

¹¹⁰ See *Edmond Weil, Inc. v. Italian Line*, 1 U.S.S.B.B. 395, 398 (1935).

¹¹¹ 46 U.S.C. § 817(b)(5) (1964).

¹¹² The assumption underlying this statement is that the Commission's threat to disband those conferences that continued to use rates detrimental to the United States was workable. This threat, however, was never carried out.

modify at will rates based upon approved agreements. Section 15 provides:

Any agreement or any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful . . . except that tariff rates . . . agreed upon by approved conferences . . . shall be permitted to take effect without prior approval¹¹³

If the Commission is to deal with offending conferences rate by rate, it must have the power to enforce its findings, not only against disapproved rates, but also against changes in previously approved rates that are "permitted to take effect without prior approval," despite the fact that such rates are designed to negate Commission decisions.¹¹⁴

Initially, however, the necessity of applying section 18(b)(5) is limited by the requirement that the rate be based upon an approved agreement.¹¹⁵ If a conference fails to gain initial approval, the Commission, by virtue of its section 15 power, may issue a cease and desist order,¹¹⁶ and, if further action is necessary, antitrust sanctions may be sought.¹¹⁷ If a conference, under an initially approved agreement, makes a drastic rate modification, the Commission, at its discretion,¹¹⁸ can require the conference to reacquire section 15 approval.¹¹⁹ Thus, in the drastic rate modification situation, the same sanctions available in the non-initially approved situation are applicable.

Although the Commission's operation under section 15 limits, to some extent, the application of section 18(b)(5),¹²⁰ the preponderance of rate changes are simple modifications which may be regulated only

¹¹³ 75 Stat. 764 (1961), 46 U.S.C. § 814 (1964).

¹¹⁴ See Comment, *Rate Regulation in Ocean Shipping*, 78 HARV. L. REV. 635, 646-47 (1964). The author suggests that section 18(b)(5) merely empowers the Commission to disapprove the offending rate and that as a result it is unlikely that it will prove effective in curbing detrimental rates.

¹¹⁵ 46 U.S.C. § 814 (1964).

¹¹⁶ See *Persian Gulf Outward Freight Conf. v. FMC*, 375 F.2d 335 (D.C. Cir. 1967).

¹¹⁷ Only those "agreements, modifications, or cancellations lawful under this section . . . shall be excepted from the [antitrust] provisions . . ." 75 Stat. 764 (1961), 46 U.S.C. § 814 (1964).

¹¹⁸ The Commission, in its discretion, itself determines whether a proposal is a "new agreement" or simply a "modification." See, *Consolo v. FMC*, 383 U.S. 607 (1966); *Persian Gulf Outward Freight Conf. v. FMC*, 375 F.2d 335 (D.C. Cir. 1967). "A Commission determination that the conferece falls within or without the approved agreement must be given due deference by a reviewing court." *Id.* at 339.

¹¹⁹ See *Persian Gulf Outward Freight Conf. v. FMC*, 375 F.2d 335, 339 (D.C. Cir. 1967) "[T]he dual-level tariff changes by the conference are of such a magnitude as to constitute a 'new' Section 15 agreement which has not been filed with or approved by the Commission."

¹²⁰ See *id.* at 338-39.

if "detrimental to the commerce of the United States."¹²¹ In *Trans-Pacific Freight Conference of Japan v. FMC*,¹²² the Circuit Court for the District of Columbia emphasized the distinction between new agreements and modifications, holding that the Commission did not have the power to issue a cease and desist order when the order was aimed at conference action undertaken pursuant to the terms of an *approved* agreement.¹²³ Nevertheless, the Commission is not without recourse when a conference disregards its findings that a particular rate violates section 18(b)(5). Once the Commission has established such a violation, any attempt to subvert its findings would be subject to a court imposed injunction pending a final Commission determination of the absolute minimum or maximum rate that may be employed.¹²⁴ The proof deduced from the initial section 18(b)(5) proceedings would enable the Commission to establish rough maximum and minimum rates. Any rate above or below these extremes would carry a *prima facie* presumption of detriment, and thus be grounds for an injunction. For example, if a rate is shown to be clearly below an American-flag liner's out-of-pocket costs, any modifications of that rate remaining below such costs would be subject to an injunctive proceeding pending further hearings by the Commission.¹²⁵

¹²¹ 75 Stat. 765 (1961), 46 U.S.C. § 817(b)(5) (1964).

¹²² 302 F.2d 875 (D.C. Cir. 1962).

¹²³ *Id.* at 879.

¹²⁴ See *West India Fruit & S.S. Co. v. Seatrain Lines, Inc.*, 170 F.2d 775 (2d Cir. 1948), *cert. denied*, 336 U.S. 908 (1949); *FMC v. Atlantic & Gulf/Panama Canal Zone Conf.*, 241 F. Supp. 766 (S.D.N.Y. 1965).

¹²⁵ In *West India Fruit & S.S. Co. v. Seatrain Lines, Inc.*, 170 F.2d 775 (2d Cir. 1948), despite the fact that § 18(b)(5) had not yet been enacted, the Commission, as plaintiff, sought and received an injunction to restrain the imposition of a 50% rate cut pending a hearing. The injunction was granted on the basis of a possible infraction of several general provisions of the Shipping Act and the likelihood of harm that would result if retaliatory rate cutting were initiated by foreign lines. After the enactment of § 18(b)(5), the Commission has an even more precise statutory guide upon which to base its appeal for court assistance. The specific prohibitions of § 18(b)(5), coupled with the Commission's ability to demonstrate, for example, that a specific rate is clearly below the out-of-pocket costs of comparable American lines, should be sufficient grounds for temporary injunctive relief. The court in *Seatrain* held inapposite cases in which court action had been denied because of the primary jurisdiction of the Commission. It pointed out that in the situation at hand the Commission was in fact the party requesting injunctive aid and thus the prohibition against preempting its authority was inapplicable.

More recently, the feasibility of injunctive relief was considered by a district court in *FMC v. Atlantic & Gulf/Panama Canal Zone Conf.*, 241 F. Supp. 766 (S.D.N.Y. 1965). Although the court denied the requested injunction for "insufficiency of proof," it held that it had "inherent power . . . to prevent irreparable harm and maintain the status quo pending an administrative decision, applying traditional concepts of equity jurisprudence." *Id.* at 777. Further, the Court emphasized that the "quantum of proof" necessary to establish injunctive relief paralleled the wording of § 18(b)(5). Thus, the Commission need

C. *A Comparison—Disbanding v. Section 18(b)(5)*

The theoretical difficulties inherent in any attempt to unilaterally regulate the international shipping industry, Congress' refusal to grant the power necessary to undertake this goal, the vast amount of litigation stemming from the Commission's efforts in this direction, the recent warnings of a Commission fact-finding report, and the difficulties that undoubtedly will result from widespread use of antitrust sanctions in lieu of internal regulation by the conference system, indicate that the most desirable regulatory approach is one that protects American interests with a minimum of interference. Significantly, a comparison of the Commission's present practice of disbanding noncomplying conferences with the alternative of dealing individually with each rate modification of an approved agreement under section 18(b)(5) demonstrates that the difference is solely one of degree. The disbanding provisions of both section 15 and section 18(b)(5) provide for identical sanctions of a \$1,000 per day fine and the revocation of antitrust exemption.¹²⁶

By disbanding the Calcutta Conference,¹²⁷ the Commission has needlessly destroyed not only the rate in question, but an entire shipping conference consisting of many firms and a multitude of rates. This practice promotes discrimination against American carriers, since in an openly competitive situation, the Commission's ability to control discriminatory practices is limited. Continued resistance by foreign carriers willing to risk antitrust sanctions¹²⁸ makes effective regulation difficult.¹²⁹ By applying antitrust only to situations where a conference

only demonstrate that the proposed modification is "detrimental to the commerce of the United States" to gain injunctive assistance.

¹²⁶ 46 U.S.C. §§ 814, 817(b)(5) (1964).

¹²⁷ Calcutta, East Coast of India & East Pakistan/U.S.A. Conf., F.M.C. No. 67-33 (Sept. 14, 1967).

¹²⁸ Although prior to *Carnation* the general belief was that antitrust was totally inapplicable to the maritime industry, there is little doubt that jurisdiction is available against foreign firms trading with the United States. See *United States v. Pacific & Arctic Co.*, 228 U.S. 87 (1913); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). In *United States v. Hamburg-Amerikanische P.F.A. Gesellschaft*, 200 F. 806, 807 (S.D.N.Y. 1911), the court stated:

Citizens of foreign countries are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad, nor by employing foreign vessels to effect their purpose. Such combinations are to be tested by the same standard as similar combinations entered into here by citizens of this country. The vital question in all cases is the same: Is the combination to so operate in this country as to directly and materially affect our foreign commerce?

Id. at 807. See generally, W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* (1958).

¹²⁹ See, *Dickson Report*, *supra* note 79, at 191.

[I]n the light of the possibility of retaliatory measures for practical purposes the attitudes of various foreign governments must be given weight The effect of retaliation and counter retaliation could be so serious as to entirely stem the flow of commerce between two contending nations.

has continued to employ a disapproved rate, however, the Commission can preserve the conference structure. Indeed, the possibility that the accessibility of American firms might result in one-sided antitrust burdens is also reduced. In light of Congress's recent reapproval of the conference system, and its repeated refusal to expand the Commission's subpoena authority, the Commission's present position is untenable.

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