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THE FEDERAL MARITIME COMMISSION AND UNITED STATES
IN RULES ON CONTAINERS INJUNCTIVE ACTION*/

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA AND
FEDERAL MARITIME COMMISSION,

Plaintiffs,

v.

ABC CONTAINERLINE N.V.,
ALCOA STEAMSHIP COMPANY, INC.,
AMERICAN PRESIDENT LINES, LTD.,
ATLANTIC CARGO SERVICES, AB
ATLANTIC CONTAINER LINE GIE,
ATLANTTRAFIK EXPRESS,
BANGLADESH SHIPPING CORP.,
THE BANK & SAVILL LINE,
BANK LINE LTD.,
BARBER BLUE SEA LINE,
BERMUDA CONTAINER LINE LTD.,
A. BOTTACHI S.A. DE NAVEGACION,
BLACK STAR LINE LTD.,
BOX CARIBBEAN LINES,
CAST NORTH AMERICA LTD.,
CCT (COORDINATED CARIBBEAN TRANSPORT),
CHILEAN LINE,
CMA (COMPAGNIE MARITIME d'AFFRETEMENT),
COLUMBUS LINE, INC.,
COMPAGNIE GENERALE MARITIME,
COMPAGNIE MARITIME ZAIROISE,
COMPAGNIE NATIONALE ALGERIENNE
DE NAVIGATION,
COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
COMPANHIA DE NAVEGACAO MARITIMA NETUMAR,
COMPANIA PERUANA DE VAPORES,
COMPANIA TRANSATLANTICA ESPANOLA, S.A.,
CONCORDE/NOPAL LINE,
CONSTELLATION LINES, S.A.,
CONTRACT MARINE CARRIERS,
COSTA LINE,
D. B. TURKISH CARGO LINES,
DAMPSKIBSSELSKABET TORM A/S,
DART CONTAINERLINE CO., LTD.,
DELTA STEAMSHIP LINES, INC.,
ECUADORIAN LINE, INC.,
E.L.M.A. (EMPRESA LINEAS MARITIMAS
ARGENTINAS, S.A.),
EGYPTIAN NATIONAL LINE,
EVERGREEN LINE (EVERGREEN MARINE CORP.),
FARRELL LINES, INC.,

COMPLAINT

83 Civ. 6591 (HFW)

FLOMERCA LINE,)
FOREST LINES,)
FROTA AMAZONICA S.A.,)
GALLEON SHIPPING CORP.,)
GALAPAGOS LINES S.A.,)
GRANCOLOMBIANA (N.Y.) INC.,)
GULF EUROPE EXPRESS,)
HAFSKIP LTD.,)
HAPAG-LLOYD AG,)
HELLENIC LINES LTD.,)
HOEGH LINES,)
HOLLAND PAN-AMERICAN LINE,)
IBERO LINES,)
ICELAND STEAMSHIP CO., LTD.,)
ITALIAN LINE,)
IVARAN LINES,)
JAPAN LINE (USA) LTD.,)
JECO SHIPPING LINE,)
JINYANG LINE,)
JUGOLINIJA,)
K LINE,)
KIRK LINE,)
KMTC LINE,)
KOCTUG LINE,)
KOREA SHIPPING CORP.,)
LIEF HOEGH & COMPANY,)
LIGNES CENTRAFRICAINES,)
LINEAS AGROMAR)
LYKES BROS. STEAMSHIP CO., INC.,)
MAERSK LINE,)
MARITIME COMPANY OF THE PHILIPPINES,)
MEDAFRICA LINE,)
MEXICAN LINE,)
MITSUI O.S.K. LINES, LTD.,)
MOORE McCORMACK LINES, INC.,)
NACIONAL LINE,)
NAMUCAR LINE,)
NEDLLOYD LINES,)
NEPTUNE ORIENT LINES,)
NIGERIA AMERICAN LINE,)
NIGERIAN STAR LINE,)
NIPPON YUSEN KAISHA,)
NORDANA LINE,)
OCEAN WORLD LINES,)
ORIENT OVERSEAS CONTAINER LINE,)
P.A.C.E. LINE,)
PAKISTAN NATIONAL SHIPPING CORP.,)
P & O STRATH SERVICES,)
POLISH OCEAN LINES,)
PORTUGUESE LINE (COMPANHIA PORTUGUESA)
DE TRANSPORTES MARITIMAS E.P.),)
PRUDENTIAL LINES, INC.,)
P.T. DJAKARTA LLOYD,)
PUERTO RICO MARITIME SHIPPING AUTHORITY,)

SALEN DRY CARGO D/B/A SALEN PROJECT/ LINER SERVICES,
SAUDI NATIONAL LINES,
SCINDIA STEAM NAVIGATION CO., LTD.,
SEA-LAND SERVICE, INC.,
SHIPPING CORP. OF INDIA, LTD.,
SHOWA LINE, LTD.,
SOUTH AFRICAN MARINE CORP., LTD.,
SURINAM LINE,
TMS LINE,
TRANS FREIGHT LINES, INC.,
TRANSNAVE (TRANSPORTES NAVIEROS ECUATORIANOS),
TRIKORA LLOYD,
UNITED ARAB SHIPPING CO. (S.A.G.),
UNITED STATES LINES, INC.,
URUGUAYAN LINE,
U.S. AFRICA LINE,
VENEZUELAN LINE,
WATERMAN STEAMSHIP CORP.,
WEST INDIES SHIPPING CO.,
WESTWIND AFRICA LINE, LTD.,
YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.,
YANG MING MARINE TRANSPORT CORP.,
ZIM-AMERICA ISRAELI SHIPPING CO.,

Defendants.

Plaintiffs, United States of America and Federal Maritime Commission, by their attorney, Rudolph W. Giuliani, United States Attorney for the Southern District of New York, for its complaint herein, alleges upon information and belief as follows:

Preliminary Statement

1. This is a civil action seeking a preliminary injunction, pursuant to Rule 65 of the Federal Rules of Civil Procedure, against defendants, ocean common carriers by water serving United States Atlantic and Gulf Coast Ports, forbidding them to implement certain practices restricting shipper access to and use of cargo containers. The lawfulness of defendants' practices is presently under investigation in a proceeding pending before plaintiff Federal Maritime Commission ("FMC" or "Commission") entitled FMC Docket No. 81-11, "50-Mile Container Rules" Implementation by Ocean Common

Carriers Serving U. S. Atlantic and Gulf Coast Ports - Possible Violations of the Shipping Act, 1916. Plaintiffs ask that such injunction remain in effect pending the outcome of FMC Docket No. 81-11 and the issuance of a further order by this Court.

Jurisdiction

2. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (civil actions arising under the laws of the United States): 28 U.S.C. § 1337(a) (civil actions arising under any act of Congress regulating commerce); and 28 U.S.C. § 1345 (civil actions commenced by the United States).

Venue

3. Venue is proper in this judicial district under 28 U.S.C. § 1391(b), (c).

Parties

4. Plaintiff Federal Maritime Commission is an independent regulatory agency of the United States and is authorized by Congress to administer the Shipping Act of 1916, as amended, 46 U.S.C. § 801, *et seq.*

5. Defendant ABC Containerline N.V. is a common carrier by water operating in the commerce of the United States and does business within this district at 1 World Trade Center, New York, N.Y. 10048.

and does business within this district at 245 Park Avenue, New York, N.Y. 10017.

117. Defendant Yamashita-Shinnihon Steamship Co., Lt is a common carrier by water operating in the commerce of the United States and does business within this district at 1 World Trade Center, New York, N.Y. 10048.

118. Defendant Yang Ming Marine Transport Corp. is a common carrier by water operating in the commerce of the Unit States and does business within this district at 2 World Trad Center, New York, N.Y. 10048.

119. Defendant Zim-America Israeli Shipping Co. is a common carrier by water operating in the commerce of the Unite States and does business within this district at 1 World Trade Center, New York, N.Y. 10048.

Claim for Relief

120. Pursuant to its obligations under the Shipping Act of 1916, as amended (46 U.S.C. § 801 et seq.), the FMC is investigating the lawfulness of a practice of common carriers by water, originating in collective bargaining agreements between various carrier and terminal operator multi-employer collective bargaining groups at United States Atlantic and Gulf Coast ports, and the International Longshoremen's Association ("ILA") which represents longshore laborers at those ports.

121. The practices under FMC examination, which are s forth in carrier tariffs on file with the Commission, require on-pier unloading and reloading (stuffing and stripping) of certain cargo containers loaded or unloaded in areas within 5

miles of a port and deny carrier-owned or leased containers to people performing cargo consolidation services within 50 miles of a port ("the 50-mile rule").

123. There is a strong probability that such carrier practices, known as the "50-mile rule", will be proven to be unlawful. At the very least, their validity under the shipping laws presents questions of a serious, substantial, and difficult nature.

124. Before the Commission is able to reach a decision with respect to the merits of the practices, however, irreparable injury is likely to occur to certain shippers and cargo consolidators whose operations may be severely interrupted and even terminated.

125. No similar injury has occurred or will occur to those persons who desire to implement or have implemented the "50-mile rule".

126. The public interest, which favors effective administration of regulatory statutes, would be furthered by the requested relief.

127. This Court is empowered, under the circumstances set forth in paragraphs 123 through 126, to enter an order for interim injunctive relief forbidding the enforcement of the 50-mile rule pending resolution by the Commission and such further order as the Court may deem appropriate.

Demand For Judgment

WHEREFORE, plaintiffs pray:

(1) for issuance of a preliminary injunction

enjoining defendants from implementing or enforcing the 50-mile rule pending Commission determination and further order of this Court;

(2) for an order requiring defendants to file notices in their applicable tariffs stating that the implementation of the 50-mile rule has been enjoined pending Commission determination and further order of this Court; and

(3) for plaintiffs' costs and fees in this action, together with such other and further relief as the Court may deem just and proper.

Dated: New York, New York
August 31, 1983

RUDOLPH W. GIULIANI
United States Attorney for the Southern District of New York,
Attorney for Plaintiffs

By: Susan Millington Campbell
SUSAN MILLINGTON CAMPBELL
Assistant United States Attorney
Office and Post Office Address:
U. S. Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Tel. No.: (212) 791-1973

Of Counsel:

C. JONATHAN BENNER
General Counsel

ROBERT D. BOURGOIN
Deputy General Counsel

GORDON M. SHAW
Attorney
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573

SMC:md
WP-382/2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA AND FEDERAL MARITIME COMMISSION, :

Plaintiffs, :

- against - : 83 Civ. 6571 (HFW)

ABC CONTAINERLINE N.V., et al., :

Defendants. :

- x

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Preliminary Statement

This memorandum of law is respectfully submitted in support of plaintiffs' motion for a preliminary injunction pursuant to Fed. R. Civ. P. 65 enjoining the implementation or enforcement by defendants, who are ocean common carriers, of certain cargo container rules pending final decision of the Federal Maritime Commission ("FMC") in a pending FMC proceeding, Docket No. 81-11, captioned "50-Mile Container Rules" Implementation By Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports - Possible Violations of the Shipping Act, 1916.

Pursuant to the Shipping Act of 1916, 46 U.S.C. §§ 801 et seq., the FMC has been vested by Congress with the duty to regulate the activities of both ocean common carriers and persons who furnish terminal services in connection with such carriers. In accordance with that duty, the Commission is now investigating the lawfulness of a certain carrier practice engaged in by defendants, known as the "50-mile rule", which had its origin in collective bargaining agreements between various carrier and terminal operator multi-employer collective bargaining groups at United States Atlantic and Gulf Coast ports, and the International Longshoremen's Association ("ILA"), an employee association representing longshore laborers at those ports.* The 50-miles rule in essence (a) requires on-pier unloadi[ng] and reloading (stripping and stuffing) of certain containers loaded with cargo coming from or destined to areas within 50 miles of a port; and (b) requires carriers to deny containers to persons performing cargo consolidation services within 50 miles of a port.

The Commission submits that there is a strong probability that the "50-mile rule" will be declared unlawful at the conclusion of the pending administrative proceeding.

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* The union has not been named as a defendant in this action, and the FMC asserts no authority over the ILA. See New York Shipping Association, 16 F.M.C. 381, 388-389 (1973), aff'd sub nom. New York Shipping Ass'n, Inc. v. FMC, 495 F.2d 1215, 1220-1221 (2d Cir.), cert. denied, 419 U.S. 964 (1974); FMC v. Pacific Maritime Ass'n, 435 U.S. 40, 50 (1978). The Commission's jurisdiction over the carriers' 50-mile rule practices is not dependent upon the presence of the ILA in proceedings before it. See Sea-Land Service, Inc., et al. - Proposed Rules on Containers, 21 F.M.C. 1, 12 (1978), jurisdiction aff'd and record remanded sub nom., Council of North Atlantic Shipping Assn's v. FMC, 672 F.2d 171, 172 (D.C. Cir.), cert. denied, ______ U.S. ______, 103 S.Ct. 69 (Oct. 4, 1982). The ILA has intervened and is actively participating in pending Docket No. 81-11. Plaintiffs would not oppose the ILA's participation in this proceeding should it seek to intervene or should the Court determine that it ought appropriately be made a defendant pursuant to Rule 19 of the Federal Rules of Civil Procedure.

Since all of the defendants already have implemented or are now implementing the 50-mile rule, irreparable injury has occurred and is likely to continue to occur to a number of shippers and cargo consolidators whose operations will be severely interrupte[d] and possibly terminated. The affidavits submitted in support of plaintiffs' motion attest to the likelihood of that injury if an injunction is not now issued barring implementation or enforceme[nt] of the 50-mile rule during the pendency of the FMC proceeding. Implementation of the rule has already resulted in the loss of thousands of dollars in revenue and the loss of jobs. In severa[l] cases it has so seriously threatened businesses that they have been forced to curtail or discontinue operations. Major account[s] have been lost, and the financial security has been threatened o[f] persons representing all facets of the shipping public - - i.e., both cargo consolidators and individual shippers. As against that harm, plaintiffs submit that no similar or comparable injur[y] will befall any of the defendants or their employees as a result of the issuance of an injunction. Further, they submit that the issuance of an injunction to preserve the status quo pending the resolution of the FMC proceeding is clearly in the public interest.

STATEMENT OF FACTS

A. The 50-mile Rule

The 50-mile rule originated in collective bargaining argreements between the ILA and employer organizations in the shipping industry in response to the technological innovation o[f] containerized shipping. The new technology in essence involves the use on specially designed ships of large, reusable metal receptacles which can be moved on and off ships unopened, and then attached to a truck chassis for transportation intact to and from the pier. The use of containers is substantially more economical than traditional methods of handling cargo since it reduces the costs of handling and enables cargo to be loaded or unloaded in a fraction of the time required in conventional loading operations. See NLRB v. International Longshoremen's Association, 447 U.S. 490, 494-96 (1980).

Before containerized shipping developed, truckers delivered loose cargo to the pier, where longshoremen consolidated some cargo on board the ship. Longshoremen also unloaded pallets and loose cargo from the ship to be picked up by truckers and often assisted the truckers at the pier. The introduction of containerized shipping greatly reduced the work of longshoremen at the pier, as cargo was no longer handled piece by piece. Id.

As a result of the conflict between the interests of the shipping lines in fully utilizing this economically advantageous new technology and the interests of the ILA in reducing the deleterious effect of this new technology on bargaining unit work, containerization was the subject of numerous disputes between the various employer associations in east coast ports and the ILA beginning in 1959. 447 U.S. at 496-98. The 50-mile rule was intended by the ILA to be one means of preserving work for longshoremen which the ILA maintai they have traditionally done and which is lost when cargo is moved to and from vessels in large containers rather than piece by piece. Sea-Land Service, Inc., et al. - Proposed Rules On Containers ("Sea-Land Service"), 21 F.M.C. 1, 17-18, 20. (1978), jurisdiction aff'd and record remanded sub nom., Counsel of North Atlantic Shipping Assn's v. F.M.C., 672 F.2d 171, 172 (D.C. Cir.), cert. denied, _____ U.S. ______, 103 S.Ct. 69 (Oct. 4, 1982). When applied by water carriers against their customers, the Rule requires that all containers which had been loaded or will be unloaded in areas within 50 miles of a port be unloaded and reloaded on the piers by ILA labor. Carriers impose an additional charge for the "service" of unloading and reloading previously loaded containers on the piers. Exceptions are made only for containers which hold solely (1) mail, used household goods, or military effects, (2) export cargo of a single manufacturer or other single shipper loaded by the shipper's employees at his own facility, or (3) import cargo destined for a single consignee, but only if such cargo is unloaded at the consignee's facilities by his own employees or stored in a warehouse for 30 days at the normal warehousing fees. Sea-Land Service, supra, 21 F.M.C. at 9-10. The Rule in addition requires that carriers deny containers to any consolidator or de-consolidator of cargo within the 50-mile area, i.e., anyone loading or unloading the cargo of more than one shipper in a single container. Sea-Land Service, supra, 21 F.M.C at 27.

The 50-mile rule has two distinct, although related, aspects. On the one-hand, as a provision in collective bargaining agreements, it controls the relationship between labor and management. The National Labor Relations Board has upheld the 50-mile rule in substantial part as a legitimate measure of employee work preservation.* However, on the other hand, as a carrier tariff provision which must be filed with the FMC before it lawfully can be implemented, the 50-mile rule also governs the relationship between steamship operators and their customers. See Council of North Atlantic Shipping Association v. FMC, 672 F.2d 171, 180-81 (D.C. Cir. 1982), cert. denied, ____ U.S. ____, 103 S.Ct. 69 (Oct. 4, 1982) ("CONASA"). It is with respect to this second aspect that the Commission has once found the rule unlawful (see pp. 7-11, infra) and it is with respect to this aspect that the Commission is now investigating the rule in FMC Docket No. 81-11.**

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* See 266 NLRB No. 54 (February 28, 1983). Aspects of the NLRB's decision are now pending review by the Court of Appeals for the Fourth Circuit.

** The fact that the NLRB has determined that the rule is lawful under the labor laws does not legalize those rules under the shipping laws. Employers and employees are not empowered, when negotiating collective bargaining agreements, to ignore their obligations under laws other than the labor laws, including the shipping act. FMC v. Pacific Maritime Ass'n, 435 U.S. 40 (1978); Volkswagenwerk v. FMC, 390 U.S. 261 (1968); United Mine Workers v. Pennington, 381 U.S. 657, 665-666 (1965); Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 684-687 (1965); Burlington Truck Lines v. United States, 371 U.S. 156 (1962); Carpenters' Union v. Labor Board, 357 U.S. 93 (1958); Galveston Truck Line Corp. v. Ada Motor Lines, Inc., 73 M.C.C. 617 (1957); As the Court of Appeals for the District of Columbia noted in CONASA, supra, "The NLRB's interpretation of Section 8(b)(4) and 8(e) [of the National Labor Relations Act] does not answer the questions the FMC is required to ask - do the Rules unduly discriminate against certain shippers, and are they unjust and unreasonable?" 672 F.2d at 181.

B. Prior Agency and Court Proceedings

In 1978, the Commission found unlawful under certain provisions of the Shipping Act of 1916 (46 U.S.C. §§ 801 *et seq.*) and the Intercoastal Shipping Act of 1933 (46 U.S.C. §§ 84 *et seq.*) carrier practices virtually identical to the "50-mile" practices now under investigation before the agency. FMC Docket Nos. 73-17, 74-40, *Sea-Land Service*, *supra*. On review, the United States Court of Appeals for the District of Columbia affirmed the Commission's jurisdiction to review the practice and, *sua sponte*, remanded the record to the agency for the limited purpose of permitting the Commission to consider the effect of two recent Supreme Court cases, *FMC* v. *Pacific Maritime Association*, 435 U.S. 40 (1978) ("*PMA*"), and *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980) ("*ILA*"), on the findings of violation. *CONASA*, *supra*, 672 F.2d 179, 183, 189. Upon remand, the Commission reexamined the recor and the applicable law in the light of these two cases, and reaffirmed its conclusion that the 50-mile rule practice was unlawful.

It held that the requirements that loaded containers be stuffed and stripped on the piers, that containers not be given to consolidators, and that inbound cargo not delivered to a shipper operating his own warehouse be stuffed and stripped o the piers unless stored for 30 days prior to delivery, are unjust and unreasonable within the meaning of section 18(a) of the Shipping Act, 46 U.S.C. § 817, and section 4 of the Intercoastal Shipping Act of 1933, 46 U.S.C. § 845a, because (a) there was no transportation justification for the transfer on the piers of cargo already in containers into other containers, or the payment of a charge for such "service", and (b) the rules are discriminatory with respect to shippers similarly situated insofar as transportation considerations are concerned. Sea-Land Service, supra, 21 F.M.C. at 28-29. The Commission further found that the tariff rules implementing the 50-mile rule are unlawfully discriminatory and prejudicial because they unfairly treat and unjustly discriminate against consolidators by denying them transportation facilities (i.e., containers) while furnishing them to other shippers, and making other transportation facilities (i.e., piers) unequally available to shippers by allowing some shippers' containers to transit the piers without stuffing and stripping, while requiring other filled containers to be stuffed and stripped at the piers in violation of section 14(Fourth) of the Shipping Act, 46 U.S.C. § 812. 21 F.M.C. at 28. Moreover, it found that the 50-mile rule unduly and unreasonably prefers certain shippers and consignees and unduly and unreasonably prejudices and disadvantages other shippers and consignees in violation of section 16(First) of the Shipping Act, 46 U.S.C. § 815, by permitting those individual shippers or consignees who load or unload containers at their own facilities with their own employees to avoid restuffing and restripping at the piers, while requiring similarly situated shippers and consignees to have their containers restuffed and restripped on the piers and, in addition, requiring that they pay an additional charge for such "service." 21 F.M.C. at 28.*

The Supreme Court has long held that a carrier may not discriminate among shippers tendering carload or full-container shipments on the basis of beneficial ownership. ICC v. Delaware, L. & W. R.R., 220 U.S. 235, 252 (1911). This rule protects not just the consolidators but the underlying small shippers, who depend on whatever efficiencies may be secured by use of the consolidators in their competition with larger shippers. Preventing such distortions in the product market because of discrimination by carriers, who obviously play a crucial role in the distribution of goods, is a central purpose of common carrier regulation. As the Supreme Court has said of an analogous statute, "the principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." New York v. United States, 331 U.S. 284, 296 (1947). Cf. American Trucking Ass'n v. Atchison, T. & S.F. Ry., 387 U.S. 397, 406 (1967).

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* The record before the Commission also showed, and the Commission found, that implementation of the 50-mile tariff rules had had serious detrimental consequences, perhaps the most damaging of which were forcing one consolidator out of business at two ports, causing another to curtail its service and lose customers, and making another temporarily cease operations at a port. 21 F.M.C. at 24-25. Similar findings were also made by the Court of Appeals in reviewing the Commission's determination in CONASA. 672 F.2d at 177.

The FMC's decision was predicated on the statutory prohibitions against discrimination and unreasonable practices, which reflect a considered legislative judgment regarding the role of common carriers in the economy. These probations may bar some particular methods of resolving labor/management conflicts, but do not undermine the collective bargaining process itself. For these reasons, a consistent line of decisions requires the enforcement of common carriers' obligations to comply with statutes governing their transporation responsibilities notwithstanding the provisions of collective bargaining agreements. See, e.g., Railway Employees v. Florida, E.C.R. Co., 384 U.S. 238, 245-55 (1966); Burlington Truck Lines v. U.S., 371 U.S. 156, 172-74 (1962) ("Burlington Truck"); Carpenters' Union v. Labor Board, 357 U.S. 93, 108-11 (1958).

As the Commission recognized, however, FMC enforcement of those obligations should take account of the collective bargaining background of the tariff provison in question and the labor consequences of its enforcement action; the optimal remedy should have the least adverse effect upon the union and employer. Sea-Land Service, supra, 21 F.M.C. at 3-4, 22, 29, 33-34; See Burlington, supra, 371 U.S. at 172-74. The Commission thus asserted no jurisdiction over any portion of the collective bargaining agreement, and determined that instead of imposing specific language, it would permit the carrier additional time to fashion its own tariff adjustments. 21 F.M.C. at 6, 34-35.

In examining its decision on remand in light of the two recent Supreme Court decisions, PMA and ILA, the Commission determined that nothing in either of those decisions required reversal of the agency's prior findings. PMA recognized that the agency's jurisdiction was not defeated because of the presence of provisions in collective bargaining agreements, while ILA, in remanding the question of the validity of the 50-mile rule under the labor laws to the NLRB, specifically referred to the issue in pending FMC Docket Nos. 73-17 and 74-40, noting that that issue was not before the Court in ILA. 447 U.S. at 512. The Commission thus reaffirmed its prior holding as to the unlawfulness of the 50-mile rule, and discontinued its proceedings.*

On July 2, 1982, the District of Columbia Court of Appeals issued a Supplemental Opinion Following Remand, in which it "vacate[d] the Commission's order that . . . [the] proceedings be discontinued" and directed that further action therein be deferred until the Supreme Court had ruled on a pending petition for a writ of certiorari and until the Commission had completed the now-pending proceeding, FMC Docket No. 81-11, in aid of which injunctive relief is sought here. The Commission was directed thereafter to "reconsider its conclusions in Docket

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* The Commission's Report and Order on Remand, served May 19, 1982, is submitted herewith as Attachment A to Plaintiffs' Motion Papers.

Nos. 73-17 and 74-40."* The Supreme Court denied certiorari on October 4, 1982 and, on September 23, 1982, the Court of Appeals denied the Commission's petition for rehearing and suggestion for rehearing <u>en</u> <u>banc</u> of the Supplemental Opinion Following Remand.

As both defendants and the ILA have acknowledged, the carrier practices under consideration in Docket No. 81-11 are "virtually identical" to those in issue in Docket Nos. 73-17 and 74-40 and "both proceedings involve identical questions of law and fact . . . ." <u>See</u> Petition for Consolidation and Reconsideration, March 30, 1982, pp. 3-4.** The findings of the Commission in FMC Docket Nos. 73-17 and 74-40 remain in full force and effect, pending only the reconsideration upon completion of the now-pending FMC Docket No. 81-11 proceeding which the District of Columbia Court of Appeals ordered "[b]ecause the information developed in that investigation may shed further light on the shipping law issues involved in Commission Docket Nos. 73-17 and 74-40. . . ." <u>CONASA</u>, <u>supra</u>, 672 F.2d at 182.

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* The Court of Appeals Supplemental Opinion Following Remand in <u>CONASA</u> is submitted herewith as Attachment B.

** The Petition for Consolidation and Reconsideration is submitted herewith as Attachment C. The Petition for Consolidation and Reconsideration was filed jointly by the ILA and, on behalf of its members, by the New York Shipping Association, Inc., a multi-employer collective bargaining group representing all employers of ILA longshore labor in the geographic area subject to the jurisdiction of the Port Authority of New York and New Jersey.

C. The Present FMC Proceeding, Docket No. 81-11

As set forth above, the FMC is now investigating in Docket No. 81-11 the lawfulness of the 50-mile rule as a tariff provision which was implemented beginning on April 18, 1983.* All of the defendants named in this action are respondents in that proceeding. Hearings before an Administrative Law Judge ("ALJ") were concluded in the proceeding on August 4, 1983, and the parties' post-hearing briefs are to be submitted by December, 1983, after which the ALJ will render his decision. Pursuant to FMC procedure, and the Administrative Procedure Act, 5 U.S.C. §§ 552 *et seq.*, exceptions to that decision may then be filed, following which a final decision will enter. It is anticipated that such a decision will not be reached until July or August, 1984.

ARGUMENT

POINT I

THIS COURT SHOULD GRANT PRELIMINARY INJUNCTIVE RELIEF TO PRESERVE THE STATUS QUO PENDING COMMISSION RESOLUTION OF THE MERITS OF THE CONTROVERSY

It is well-established that this Court is empowered to issue preliminary injunctive relief to preserve the *status quo* in aid of the Commission's administrative process. The purpose of such relief is to prevent harm to the public interest and the

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* It is clear that carrier practices like the 50-mile rule are required to be set forth in carrier tariffs. *See, e.g.*, *South Atlantic and Caribbean Lines, Inc.*, 12 F.M.C. 237, 238-42 (1969); *United States v. Sea-Land Service, Inc.*, 424 F.Supp. 1008, 1011, 1012 (D.N.J. 1977), *appeal dismissed*, 577 F.2d 730 (3d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *CONASA*, *supra*, 672 F.2d at 182.

various private interests the Commission is authorized to protect until the Commission is able to finally rule on the merits of a particular controversy. The Commission has no authority to issue orders to cease and desist prior to ultimate determinations on the merits. Trans-Pacific Freight Conference of Japan v. FMB, 302 F.2d 875, 878-80 (D.C. Cir. 1962); Delaware River Port Authority v. United States Lines, Inc., 331 F. Supp. 441, 448 (E.D. Pa. 1971). Thus, in cases where interim injunctive relief is necessary, federal district courts are empowered to provide it. See, e.g., State of Texas v. Seatrain International, 518 F.2d 175, 178-1979 (5th Cir. 1975); West India Fruit & S.S. Co. v. Seatrain Lines, Inc., 170 F.2d 775, 778-79 (2d Cir. 1948), cert. dismissed, 336 U.S. 908 (1949); FMC v. Australia/U.S. Atlantic & Gulf Conf., 337 F. Supp. 1032, 1035 (S.D.N.Y. 1972); Delaware River Port Authority v. United States Lines, Inc., supra, 331 F. Supp. at 448; C. Tennant & Sons, Inc. v. New York Terminal Conf., 299 F.Supp. 796, 798-99 (S.D.N.Y. 1969); FMC v. Atlantic & Gulf/Panama Canal Zone, 241 F.Supp. 766, 774-77 (S.D.N.Y. 1965); Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, 183 F. Supp. 910 (E.D. Pa. 1960).

The Standard for Preliminary Injunctive Relief

To establish a basis for an award of preliminary injunctive relief, a plaintiff must ordinarily meet one of two tests long recognized by this Circuit:

> Preliminary injunctive relief in this Circuit calls for a showing of "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardship tipping decidedly toward the party requesting the preliminary relief."

Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir. 1979), quoting Seaboard World Airlines, Inc. v. Tiger Int'l, Inc., 600 F.2d 355, 359-60 (2d Cir. 1979). Accord e.g., United States v. Bedford Associates, 618 F.2d 904, 912 n. 15 (2d Cir. 1980); KMW International v. Chase Manhattan Bank, N. A., 606 F.2d 10, 14 (2d Cir. 1979); Jackson Diary, Inc. v. H.P. Hood & Sons, Inc. 596 F.2d 70, 72 (2d Cir. 1979) (per curiam); Federal Maritime Commission v. Australia/U.S.Atlantic & Gulf Conference, 337 F.Supp. 1032, 1036 (S.D.N.Y. 1972) (Weinfeld, J.).

Where, as here, it is the government, rather than a private litigant, which seeks preliminary injunctive relief in order to protect the public interest, the required showing under both tests is less rigorous. See Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944); SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975) (SEC enforcement action) ("the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief."); United States v. Diapulse Corp., 457 F.2d 25, 27 (2d Cir. 1972) (FDA inforcement action); FTC v. Lancaster Colony Corp., 434 F.Supp.

1088, 1091 (S.N.Y. 1977). "[C]rucial to the determination of the public interest is whether the grant of an injunction will further the statutory purpose" sought to be protected by the governmental agency. FMC v. Australia/U.S. Atlantic & Gulf Conference, supra, 337 F.Supp. at 1038.

> Good administration of the statute is in the public interest and that will be promoted by taking timely steps when necessary to prevent violations either when they are about to occur or prevent their continuance after they have begun. The trial court is not bound by the strict requirements of traditional equity as developed in private litigation but in deciding whether or not to grant an injunction in this type of case should also consider whether the injunction is reasonably required as an aid in the administration of the statute, to the end that the Congressional purposes underlying its enactment shall not be thwarted.

Walling v. Brooklyn Braid Co., 152 F.2d 938, 940-41 (2d Cir. 1945).

Plaintiffs submit that there is a significant likelihood of success on the merits of its contention that the 50-mile rule violates the Shipping Act of 1916 and the Intercoastal Shipping Act of 1933, and that irreparable injury already has been suffered and is likely to continue to be suffered by cargo consolidators and individual shippers who operate within the 50-mile zone unless defendants are enjoined from implementing or enforcing the 50-mile rule pending resolution of the FMC administrative proceeding. As the Second Circuit has stated, "the normal function of the preliminary injunction is to maintain the status quo pending a full hearing on the merits." Triebwasser & Katz v. American Telephone and Telegraph Co., 535 F.2d 1356, 1360 (2d Cir. 1976). Moreover, plaintiffs submit that the public interest clearly favors entry of an injunction until the administrative process has run its course. See West India Fruit & S.S. Co. v. Seatrain Lines, supra, 170 F.2d at 778-79; FMC v. Australia/U.S. Atlantic & Gulf Conference, supra, 337 F.Supp. at 1036-1038; Delaware River Port Authority v. United States Lines, Inc., supra, 331 F.Supp. at 447-49; Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, supra, 183 F.Supp. at 917-18.

1. There Is A Significant Likelihood That The 50-Mile Rule Now Under Investigation By The FMC Is Inconsistent With The Requirements Of The Shipping Act Of 1916 And Will Be Found Unlawful

As detailed above, pp. 17, supra, the Commission has already found unlawful under both the Shipping Act, 46 U.S.C §§ 801 et seq. and the Intercoastal Shipping Act, 46 U.S.C. § 833 et seq., carrier practices virtually identical to the "50-mile rule" now under investigation before the agency. FMC Docket Nos. 73-17, 74-40, Sea-Land Service, supra. Since "[b]oth proceedings involved identical questions of law and fact" (Petition for Consolidation and Reconsideration at 3-4, Attachment C hereto), the Commission submits that there is a strong likelihood that the 50-mile rule will be declared unlawful as well under those same statutes in Docket No. 81-11.*

The only material respects in which Docket No. 81-11 differs from the earlier proceedings is that the latter involved an earlier time period and involved far fewer respondents: only 3 carriers were respondents in Docket Nos. 73-17 and 74-40, whereas all of the defendant carriers are respondents in the present proceeding. See CONASA, supra, 672 F.2d at 178, 182 n.98 and Attachment B at 2. When the Commission reconsiders its decision in Docket Nos. 73-17 and 74-40 following the disposition of the pending proceeding, it is most unlikely that a different result will or could be reached.**

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* It should be noted that the Commission's views are set forth solely for the purposes of obtaining temporary injunctive relief, that the Commission does not seek permanent injunctive relief, and that these views in no way indicate a predisposition of its part as to the outcome of the pending administrative proceeding.

** A change of law has occurred which makes applicable to Docket No. 81-11 a statute which did not apply to Docket Nos. 73-17 and 74-40; however, that change will in no way affect the result in Docket No. 81-11. The Maritime Labor Agreements Act of 1980, 94 Stat. 1021 ("MLAA"), removed the Commission's jurisdiction over certain activities flowing from collective bargaining agreements, but preserved the agency's authority over "rates, charges, regulations, or practices of a common carrier by water . . . which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement." 46 U.S.C. § 841c. The Court of Appeals in CONASA did not specifically decide if the above-quoted language was applicable to the 50-mile rule carrier practices because the activities there under review occurred before the effective date of the MLAA. Nonetheless, the Court found that: "This proviso appears to retain existing FMC jurisdiction over the [50-mile] Rules on Containers as applied to shipping customers through steamship company tariffs." CONASA, supra, 672 F.2d at 182. Much legislative history supports this conclusion (see, e.g., S. Rep. No. 96-854, 96th Cong., 2d Sess. 6, 13 (1980)), and the FMC has adopted this construction of the MLAA in issuing an "Interim Report and Order" in Docket No. 81-11 reaffirming its jurisdiction over carrier practices implementing the 50-mile rule. (See 21 S.R.R. 544, 554-60 (1981).

There is nothing in the evidentiary record of Docket No. 81-11 which will affect events or circumstances in the 1973 to 1978 time period, the period relevant to the earlier proceedings. <u>See</u> <u>CONASA</u>, <u>supra</u>, 672 F.2d at 178-79. No more recent evidence is pertinent to the validity of the earlier Rules.

On June 30, 1983 the ILA gave notice of its intent to reopen the collective bargaining agreement to consider problems which had arisen with respect to implementation by the carriers of the 50-mile rule. On July 29, 1983, the ILA reached an agreement with the carriers on these problems.* The agreement in essence reconfirmed both the provisions and application of the 50-mile rule as previously adopted, with one material change. The present agreement, unlike the agreement in effect prior to July 29, 1983, prohibits carriers from supplying not only containers, but also "chassis" (wheeled frames) or "bogeys" (wheels) to NVOS or consolidators. Compare Attachment E, Rule 1(a), <u>with</u> Attachment G, Paragraph 8).

Since this additional requirement does not appear in any of defendants' tariffs on file with the FMC, to the extent that carriers attempt to implement the requirements, they engage

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* The text of the July 29, 1983 agreement, entitled "Agreement After Renegotiation under paragraph "8" of the Containerization Agreement," is submitted herewith as Attachment G.

in patent Shipping Act violations. See, e.g., South Atlantic and Caribbean Lines, Inc. supra, 12 F.M.C. at 238-242; CONASA, supra, 672 F.2d at 182; United States v. Sea-Land Service, Inc., 424 F. Supp. at 1011-1012.* There is evidence that this prohibition on furnishing chassis or bogeys has already been implemented by some defendants. As the Affidavit of Michael J. Fuchs states, six defendants (Hapag-Lloyd, AG, Sea-Land Service, Inc., Trans Freight Lines, Inc., Atlantic Container Line, GIE, Dart Containerline, Co., Ltd., and United States Lines, Inc.) denied a chassis to an NVO/consolidator who had attempted to obtain it in connection with the transportation of containers which the consolidator had itself leased independently of ocean carriers. (Attachment D, Affidavit of Fuchs).

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* The July 29, 1983 Agreement itself appears implicitly to recognize the deficiency in present carrier tariffs by providing that: "Each carrier shall have an obligation to have any tariff provisions or allowances in conflict with the Rules on Containers or the Containerization Agreement changed as soon as possible consistent with the requirements of law." (See Attachment G, paragraph 6).

2. The 50-Mile Rule Now Under Investigation By The FMC, If Enforced As a Carrier Practice Prior To Conclusion Of The Agency's Investigation, Is Likely To Cause Irreparable Injury To Shippers And Cargo Consolidators Whose Interests Are Entrusted To the Commission's Protection.

The twenty-four affidavits of cargo consolidators and shippers submitted by plaintiffs in support of this motion (Attachment D to the motion) amply demonstrate that irreparable injury has occurred and likely will continue to occur if enforcement of the 50-mile rule is not temporarily enjoined. This showing is further buttressed by both the prior findings of the Commission in Sea-Land Service, supra, in reviewing the prior operation of virtually identical carrier practices, and by the D.C. Court of Appeals' findings in CONASA, supra, upon review of the Commission's determination therein.

During the prior operation of the Rule, one cargo consolidator was forced out of business at two ports, another was forced to curtail its service and lose customers, while a third was forced temporarily to cease operations at a port. Sea-Land Service, supra, 21 FMC at 27-25. As the Court of Appeals found, the record demonstrated that "NVO's [non-vessel operating common carriers] and distributors previously operating within the 50-mile zone have been severely affected and in some cases have been forced to cease operations." CONASA, supra, 672 F.2d at 177.

The affidavits submitted in support of this motion demonstrate that implementation and enforcement of the 50-mile rule has had and will have the same or similar effect. Consolidators have experienced difficulties in obtaining containers (Attachment D: Affidavits of Coyne, Friedman, at 1, Justiss, at 7-8), as well as the threatened and actual loss of major customers. (Attachment D: Affidavits of Bartlett, Gallardo, Kuehn, at 4, Mallory, Lipin, Weddle, at 2). Some forwarders have already been forced signficantly to alter their services. (Attachment D; Affidavits of Coyne, Justiss, at 6, 9-10, Pohan, at 7, MacDonald, Weddle, at 1), and to lay-off employees. (Attachment D: Affidavits of Brauner, Benson, at 2, Marchini). Others will go bankrupt if implementation of the rules does not cease (Attachment D: Affidavits of Pohan, at 5-7, Weddle, at 1, 3, Friedman, at 2). Thousands of dollars of revenue have already been lost. (Attachment D: Affidavits of Benson, Jones, Weddle, at 1-2). Additional expenses caused by the rules have cut so severely into several shippers' profit margin as to seriously threaten their ability to remain in business. (Attachment D: Affidavits of Shuhda, Silini). It is well-established that where, as here, the ability of an industry to survive economic pressure is doubtful, as has been established in the record in 73-17 and 74-40, and acknowledged by the CONASA Court, an injunction to preserve the status quo pending agency determination is proper. See e.g., FMC v. Australia/U.S. Atlantic & Gulf Conference, supra, 337 F. Supp. at 1037-38.

Implementation of the rule has had other deleterious consequences. Several shippers have stated that because of the Rule's requirement for unloading and reloading containers on the piers, they will be forced to change the traffic patterns of their cargo, and ship through Canadian and Central American, rather than United States, ports. (Attachment D: Affidavits of Gallardo, Brauner, Lipin, Pohan, at 3-4). As the court stated in Delaware River Port Authority v. United States Lines, Inc., supra, 331 F. Supp. at 448, in issuing an injunction to maintain the status quo pending Commission determination of a practice alleged to unlawfully divert cargo from the Port of Philadelphia, "[s]ubstantial or mass diversion even for a very short period of time would have a disastrous and irreparably harmful effect. . . ." In analogous circumstances, an injunction was issued pending maritime agency action in Pennsylvania Motor Truck Association v. Port of Philadelphia Marine Terminal Association, supra, 183 F. Supp. at 917-18. There, increased charges to shippers resulting from compulsory truck loading and unloading on piers by terminal operators created a situation where "members of . . . [a trucking] association [stood] to lose a substantial part of their business, should such shippers or consignees either manufacture their products in other plants, or divert the shipment of their goods to other means of transportation." The 50-mile rule presents precisely the same threat of lost business and disrupted traffic patterns as did the shipment practices at issue in Pennyslvania Motor Truck and Delaware River Port Authority.

3. The Balance Of Hardships Tips Decidedly In Favor Of Consolidators And Shippers.

While irreparable injury is likely to befall shippers and consolidators if the Rule is implemented, no similar injury will predictably be suffered by water carriers or their employees if an injunction is entered.

With respect to the carriers, the Commission submits that they may indeed be in a better position if the Rule is not enforced. Absent implementation of the 50-mile rule, cargo will move more quickly and efficiently, and both in-port costs and time will be significantly reduced. See NLRB v. International Longshoremen's Association, 447 U.S. 490, 494-96 (1980).

With respect to the carriers' employees, plaintiffs submit that their inability to implement or enforce the 50-mile rule will not defeat the longshoremen's hard-bargained rights to other measures which have and will continue to protect them against the effects of mechanization upon their earning capacities. Longshoremen are compensated for every container not unloaded and reloaded on the piers by "container royalties" amounting to $3 per ton of containerized cargo. See Attachment E, FMC Tariff containing 50-mile rule, Rule 10. Moreover, longshoremen have a guaranteed annual income based upon 2,080 hours of work per year, another hard-won protection for loss of work due to mechanization. See Initial Decision of Judge Harmatz, page 19, in 266 NLRB No. 54 (February 28, 1983).* Finally, there is evidence that enforcement of the 50-mile rule in any event may not in fact furnish on-dock work to longshoremen. Several shippers have indicated that if the rule is enforced, they will ship through Canadian ports where the ILA does not supply the labor. (Attachment D: Affidavits of Pohan, at 3-4, Bartlett, at 2, Brauner).

The Rule was not in effect from February 28, 1981 until April 18, 1983. There is no indication that suspension of the Rule during that time materially injured anyone. In past proceedings, the ILA has estimated that 20% of all containerized cargo moving out of United States Atlantic and Gulf ports is subject to the provisions of the 50-mile rule. See CONASA, 672 F.2d at 176; NLRB v. Longshoremen, 447 U.S. 490, 499 (1980).

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* The Decision of Judge Harmatz and the Decision of the NLRB which adopted it with minor modifications are submitted herewith as Attachment F.

Thus, grant of an injunction will not deprive longshoremen of protection against loss of work but will merely temporarily prevent one type of activity which may not obtain work for them, appears to involve only a small part of their operations, and which has not been engaged in for at least the last two years. Whatever harm may arguably be suffered by those employees is thus entirely speculative and, plaintiffs submit, clearly outweighed by the concrete, demonstrable harm suffered by consolidators and shippers.

In essence, issuance of a preliminary injunction here will merely reestablish the status quo ante which existed prior to the April 18, 1983 implementation of the Rules. It has been repeatedly held that injunctive relief is appropriately entered in aid of administrative proceedings not only to preserve the status quo which exists at the time of its issuance, but also to restore the status quo ante. "Otherwise, in any case of alleged illegal activities, a preliminary injunction restoring the situation prior to such activities could never be granted, because, by its very nature, such injunctive relief alters the conditions then existing and restores the status quo ante." Delaware River Port Authority v. United States Lines, Inc., supra, 331 F. Supp. at 447-48. See also Angle v. Sacks, 382 F.2d 665 (10th Cir. 1967); Westchester Lodge 2186 v. Railway Express Agency, Inc., 329 F.2d 748 (2d Cir. 1964); Greene v. Mr. Wicke Ltd. Co., 270 F. Supp. 1012 (D.C. Conn. 1967).

Moreover, the fact that the practice sought to be enjoined is contained in a tariff on file with the FMC in no way militates against plaintiffs' entitlement to an injunction. Although matters required to be filed in tariffs must be adhered to, filing ". . . does not legalize such rates or practices nor in any way amount to approval by the Commission." Delaware River Port Authority v. United States Lines, Inc., supra, 331 F. Supp. at 447. See also Arizona Grocery Co. v. Atchison, T. & S.F. R. Co., 284 U.S. 370, 384-35 (1932); American Export Isbrandtsen Lines v. FMC, 409 F.2d 1258, 1260 n.4 (2d Cir. 1969); Chicago, M. St. P. & P. R. Co. v. Alouette Peat Products, 253 F.2d 449, 455-56 (9th Cir. 1957). Indeed the defendant carriers have already acknowledged that the filing of the tariff containing the 50-mile rule has created no presumption of the lawfulness of those practices since the tarifff itself states on its initial page: "The provisions of the collective bargaining agreement, known as the rules on containers, which are set forth in this tariff, are subject to ongoing review by the Federal Maritime Commission and various federal courts and may be changed pursuant to decisions of these tribunals." (Attachment E, at 1).

4. <u>The Public Interest Strongly Favors Issuance Of A Preliminary Injunction.</u>

As the Second Circuit stated in Walling v. Brooklyn Braid Co., 152 F.2d 938, 940-41 (2d Cir. 1945), agency enforcement of a statute, and the conduct of proceedings to determine whether statutory violations have occurred, is clearly in the public interest. Thus, if in fact the 50-mile rule is unlawful, as the Commission found with respect to analogous predecessor practices, "the Commission, entrusted with ... enforcement [of the Shipping Act], is entitled to the requested injunctive relief to prevent frustration of the Congressional policy. . . ." FMC v. Australia/U.S. Atlantic & Gulf Conference, supra, 337 F. Supp. at 1038.

Moreover, as the affidavit of the FMC's economist, Austin L. Schmitt, demonstrates, implementation of the 50-mile rule has an adverse impact on the public at large by adding millions of dollars per year to transportation costs and greatly decreasing transportation efficiency. (Attachement D: Affidavit of Ellsworth).

SMC:md
WP-382/2

CONCLUSION

For all of the foregoing reasons, plaintiffs respectfully request that their motion for a preliminary injunction be granted in all respects.

Dated: New York, New York

August 31, 1983

Respectfully submitted,

RUDOLPH W. GIULIANI
United States Attorney for the
Southern District of New York
Attorney for Plaintiffs

SUSAN M. CAMPBELL
Assistant United States Attorney

C. JONATHAN BENNER
General Counsel

ROBERT D. BOURGOIN
Deputy General Counsel

GORDON M. SHAW
Attorney
Federal Maritime Commission

THE WHITE HOUSE
WASHINGTON

RAH -

I don't know why Burnley left this case out, but it is directly on point (FMC; not enforcement of an order) and from the Southern District of N.Y. Judge Stewart ruled the FMC could not intervene without DOJ approval. The ruling would seem to cover the question before us.

John

In re OCEAN SHIPPING ANTITRUST LITIGATION.

MDL No. 395
M21-26 (CES).

United States District Court,
S. D. New York.

Oct. 15, 1980.

Shippers brought action against common carriers engaged in ocean transportation of freight for hire seeking damages for injuries allegedly sustained as result of defendants' violation of Sherman Anti-Trust Act. Upon Federal Maritime Commission's motion to intervene and defendants' alternative motions to dismiss or to stay action pending an investigation and determination by the Commission, the District Court, Stewart, J., held that: (1) absent authorization or consent of Department of Justice, Commission was without authority to move independently to intervene; (2) agreements implemented by defendants which were not approved by Federal Maritime Commission and which included activities involving establishment of rates which were filed as tariffs, were not immune from antitrust laws; and (3) defendant's doctrine of primary jurisdiction did not require referral to Commission of actions.

Motions denied.

1. **Monopolies** ⇐16(1)

Under Shipping Act, an agreement among carriers approved by Federal Maritime Commission is excepted from antitrust laws; however, before approval or after disapproval agreement is subject to antitrust laws. Shipping Act, 1916, § 15 as amended 46 U.S.C.A. § 814.

2. **Federal Civil Procedure** ⇐338

Absent authorization or consent of Department of Justice, Federal Maritime Commission was without authority to move independently to intervene in action brought against common carriers engaged in ocean transportation of freight for hire seeking damages for injuries allegedly sustained as result of alleged violations of antitrust laws. Fed.Rules Civ.Proc. Rule 24(a)(2), (b)(2), 28 U.S.C.A.; 28 U.S.C.A. §§ 516, 519.

3. **Statutes** ⇐158

Repeals of antitrust laws by implication are strongly disfavored and have been found only in cases of plain repugnancy between antitrust laws and regulatory provisions.

4. **Monopolies** ⇐12(16)

To determine applicability of Sherman Anti-Trust Act to a regulated industry, courts must consider whether and to what extent Congress intended to exempt activities of that industry from antitrust laws and that can be determined through an examination of legislative history and administrative scheme itself. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

5. **Monopolies** ⇐16(1)

Agreements implemented by defendant common carriers engaged in ocean transportation of freight for hire, which were not approved by Federal Maritime Commission and which included activities involving establishment of rates which were filed as tariffs, were not immune from antitrust laws. Shipping Act, 1916, § 18(b) as amended 46 U.S.C.A. § 817(b).

6. **Shipping** ⇐3

Although defendants were common carriers engaged in ocean transportation of freight for hire and, as such, were subject to regulation by Federal Maritime Commission, doctrine of primary jurisdiction did not require referral to Commission of actions wherein shippers sought damages for injuries sustained as result of defendants' alleged violations of federal antitrust laws since it was within competence of court to determine whether defendants' alleged price fixing activities could conceivably be within scope of approved agreements. Shipping Act, 1916, § 1 et seq. as amended 46 U.S.C.A. § 801 et seq.

Brien E. Kehoe, Gen. Counsel, Edward G. Gruis, Deputy Gen. Counsel, Washington, D. C., Anne E. Mickey, Atty., Federal Mariplaintiffs Packaging Industries Group, Inc. and Mercantile Development, Inc.

James B. Sloan, Sloan & Connelly, P. C., Chicago, Ill., for plaintiff Palacek Imports, Inc.

Sheldon P. Barr, Barr & Bello, New York City, for plaintiff Paramount Electrical Supply Co., Inc.

Anthony L. Tersigni, Meyers, Tersigni, Kaufman, Debrot, Feldman & Gray, New York City, for plaintiff Indecor, Inc.

H. Kenneth Kudon, Danzansky, Dickey, Tydings, Quint & Gordon, Washington, D. C., for plaintiff Selfix, Inc.

Leonard Barrack, Barrack, Rodos & McMahon, Philadelphia, Pa., for plaintiff Starmel Food Corp.

Dale E. Fredericks, Sedwick, Detert, Moran & Arnold, San Francisco, Cal., for plaintiff Tacony Corp.

Sheldon O. Collen, Friedman & Kovan, Chicago, Ill., for plaintiff The Testor Corp.

David Berger, Berger & Montague, P. C., Philadelphia, Pa., for plaintiff Pat Harris of New Jersey, Inc.

Arthur N. Abbey, New York City, for plaintiff Regent Sheffield, Ltd.

Daniel W. Krasner, Wolf, Haldenstein, Adler, Freeman & Herz, New York City, for plaintiff Trans-Ocean Sales Co., Inc.

Richard J. Rappaport, Ross, Hardies, O'Keefe, Babcock & Parsons, Chicago, Ill., for plaintiff T. I. Raleigh (U. S. A.), Inc.

MEMORANDUM DECISION

STEWART, District Judge:

Plaintiffs, shippers in the United States/Europe ocean shipping trade, brought these actions under section 4 of the Clayton Act, 15 U.S.C. § 15 seeking damages for injuries sustained as a result of violations by defendants of section 1 of the Sherman Act, 15 U.S.C. § 1.[1] They seek relief on behalf of themselves and all United States shippers by common carrier in the United States/Europe trade during the period 1971 through a certain time in 1977. Defendants are common carriers engaged in ocean transportation of freight for hire, serving the United States/Europe trade. As such, they are subject to regulation by the Federal Maritime Commission ("FMC" or "Commission") under the Shipping Act of 1916, as amended, 46 U.S.C. § 801 *et seq.*, 1976.

Plaintiffs allege that, beginning in 1971 and continuing until sometime in 1977, defendants participated in a conspiracy consisting of a continuing agreement to fix, raise, maintain and stabilize price levels for the shipment of freight in the United States/Europe trade. Plaintiffs further allege that the agreement was not approved by the Commission and was not authorized or permitted by existing agreements that had been approved by the FMC.

[1] Under the Shipping Act, any agreement among carriers engaged in ocean transportation of freight fixing rates or fares or in any manner providing for an exclusive, preferential or cooperative working arrangement must be filed with the FMC, 46 U.S.C. § 814. The Commission is required to disapprove agreements that are:

> unjustly discriminatory or unfair as between carriers, shippers, . . . or operate to the detriment of the commerce of the United States, or [are] . . . contrary to the public interest, or . . . [are] in violation of the [act].

It is required to approve all other agreements subject to its jurisdiction. 46 U.S.C. § 814. An agreement approved by the Commission is excepted from the antitrust laws. Before approval or after disapproval, however, the agreement is subject to antitrust laws. *Id.*

Defendants have moved to dismiss the complaints or, in the alternative, to stay the action pending an investigation and determination by the Commission, pursuant to the doctrine of primary jurisdiction. The Commission has moved to intervene and for a stay of this proceeding.

1. Pursuant to an order of the Judicial Panel on Multidistrict Litigation, these cases have been transferred to us for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407. Plaintiffs have filed a motion for class certification which is currently pending in this court.

I

The facts and circumstances leading to these motions, as set forth in the parties' pleadings, are as follows: As of 1972, the FMC had approved seven conference agreements, three rate agreements, and a number of cooperative working agreements, of which each of the defendant lines were a member for some relevant period.[2] In 1969 defendant lines filed with the FMC the "Transatlantic Freight Conference," FMC Agreement 9813. The proposed "super-conference" allegedly would have established one conference with authority to fix rates, charges and practices for the United States/Europe trade. In 1971, the parties withdrew the proposed agreement. In 1977, eight conferences covering the United States/Europe trade, of which defendants were members, filed a proposed agreement, called the Bridge Agreement, to take joint interconference action on such matters as rates and charges for transportation of cargo, costs of providing transportation of cargo, and collection, preparation and dissemination of data or reports. The Bridge Agreement was disapproved by the FMC in March of 1978. The carriers appealed the FMC's order of disapproval on procedural grounds. The FMC determined, based on a recent Court of Appeals decision, that their procedures would not be found to meet due process requirements set forth in *U.S. Lines v. FMC*, 584 F.2d 519 (D.C.Cir.1978). The FMC them moved to remand the case for further proceedings, and the Court of Appeals granted this motion. The carriers then withdrew their proposed agreement, and pursuant to court order, the FMC vacated the proceedings and dismissed the case as moot.

On June 1, 1979, a federal grand jury in the District of Columbia returned indictments against the defendants charging that they entered into several agreements and understandings not approved by the FMC during the years 1971 through 1975 "to fix, raise, stabilize and maintain price levels for the shipment of freight in the United States/Europe trade." D.C.Crim. No. 79-00271, §§ 33, 34. The defendants pleaded nolo contendere to the indictments on June 8, 1979, and large fines were assessed.

Following the judgment in the criminal actions, the instant civil actions were filed and consolidated before us for pretrial proceedings.[3] On August 14, 1979, the FMC served an Order of Investigation naming the seven defendants and their conferences as "respondents" and directing that a hearing be held to investigate the charges contained in the indictment. Investigation of Unfiled Agreements in the North Atlantic Trades, FMC Docket 7983.

II

[2] The FMC, by its General Counsel's Office, moves to intervene in this action, pursuant to Rule 24(a)(2) and Rule 24(b)(2), F.R.Civ.P. Plaintiffs move to strike the Commission's motion to intervene, or in the alternative, to deny intervention. The Office of the Attorney General, not a party to this action, has submitted a letter to the Court asserting that the Commission is without authority to move independently to intervene without the authorization or consent of the Department of Justice, that no such authorization or consent was granted, and that the Court should therefore strike the pleadings of the Commission.

Plaintiffs and the Attorney General rely on 28 U.S.C. §§ 516 and 519 as the basis for their motions to strike. Section 516 of Title 28 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to

2. A conference is an association of common carriers which usually provides for fixing of uniform rates and practices within the specified trade, the filing of a common tariff, and the appointment of a chairman to conduct the administrative affairs of the parties. 46 C.F.R. § 522.2(a)(1). A rate agreement is a similar arrangement which is not expected to become a dominant factor in United States commerce in the trade specified in the agreement. 46 C.F.R. § 522.2(a)(3).

3. Plaintiffs have filed a united and consolidated amended complaint, hereinafter referred to as "the complaint".

officers of the Department of Justice, under the direction of the Attorney General.

Section 519 of Title 28 provides:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party . . . .

Courts have construed these provisions strictly, *see Federal Trade Commission v. Guignon*, 390 F.2d 323 (8th Cir. 1968); *United States v. Daniel, Urbahn, Seelye and Fuller*, 357 F.Supp. 853 (N.D.Ill.1973), and have held that, unless otherwise provided by law, the Attorney General has plenary power and supervision over all federal government litigation, including litigation involving the regulatory agencies. *I.C.C. v. Southern Railway Co.*, 543 F.2d 534, 535 (5th Cir. 1976); *Hughes Aircraft Co. v. U.S.*, 534 F.2d 889, 900 (Ct.Cl.1976).

The Commission does not claim that a specific statutory provision exempts it from 28 U.S.C. §§ 516 and 519. Rather, the Commission argues that its motions are not within the scope of these sections because they were filed "for the limited purpose of protecting and preserving its jurisdiction under section 15". Reply Brief of FMC, p. 7.

We are not persuaded that the relevant provisions support the distinction urged by the Commission. The determination of a motion to stay the litigation is part of the conduct of this litigation. Moreover, 28 U.S.C. § 516 specifically reserves to the Department of Justice litigation in which an agency is "interested". There is no statutory basis for the distinction offered by the Commission.

The Commission also argues that there are policy reasons pertaining to questions of conflict of interest, the appearance of prejudgment and primary jurisdiction, which offer additional bases for the inapplicability of 28 U.S.C. §§ 516 and 519. As the Court stated in *F.T.C. v. Guignon, supra*, "we believe that such fundamental policy considerations concerning possible disagreement between federal agencies are best resolved by legislative action". *Id.* at 330. We also note that these sections merely restate "the traditional responsibility of the Attorney General over the conduct of all litigation on behalf of the United States and its agencies. (citations omitted) The principle not only centralizes responsibility for the conduct of public litigation but enables the President, through the Attorney General, to supervise the various policies of the executive branch. The alternative would allow a proliferation of policies among and within the various agencies". *I.C.C. v. Southern Railway Co., supra*, at 536.

In sum, we hold that the Commission was without authority to move to intervene in this action, and order that this motion be stricken. We will, however, treat the Commission as amicus curiae, and consider their views concerning ~~the~~ appropriateness of a stay pending its hearing and investigation. We now turn to defendants' motions.

III

Defendants move to dismiss the complaints, claiming that under the Shipping Act's tariff provisions, section 18(b), 46 U.S.C. § 817(b), the Commission has exclusive jurisdiction over ocean shipping rates so that all rate-fixing activities by ocean carriers have implied immunity from the antitrust laws.[4] They base their position on the principle that, where there is a "plain repugnancy" between the antitrust laws and a federal regulatory scheme, the Court will imply immunity from the antitrust laws. *United States v. Philadelphia National Bank*, 374 U.S. 321, 350–51, 83 S.Ct. 1715, 1734–1735, 10 L.Ed.2d 915 (1963). Defendants, relying primarily on *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922), argue that antitrust claims by shippers for damages resulting from price-fixing by ocean carriers are inconsistent with the tar-

4. 46 U.S.C. § 817 requires ocean carriers to file maximum rates, fares and charges, tariffs showing all rates and charges of such carrier and places between which freight will be carried. No change in rates, charges, etc. shall be made except by the filing of a new tariff, and carriers are required to charge the rates and charges specified in the tariff.