THE ROLE OF CONFERENCES AND THE DUAL-RATE SYSTEM IN OCEAN FOREIGN TRADE*

E. ROBERT SEAVER† AND EDWARD SCHMELTZER‡

I

THE NEED FOR FOREIGN OCEAN CONFERENCES

This paper is concerned primarily with conferences in ocean foreign trade, although comparisons will be made with the conferences in other fields of transportation. It should be understood at the outset that the important controversy in ocean foreign trade is not whether conferences should be allowed to exist, but whether they should be allowed to use the dual-rate system whereby shippers who contract to deal exclusively with the steamship lines of the conference are, by the terms of the contract, given a specified rate discount.

Conferences are composed of ocean common carriers serving the same trade areas who join together to fix rates or otherwise control competition in the trade. They have operated successfully since 1875,¹ and, subject to federal regulation,² they are specifically authorized by section fifteen of the Shipping Act of 1916 to operate in the ocean commerce of the United States.³ The 1916 Act stemmed from lengthy investigations which the Alexander Committee,⁴ a subgroup of the Merchant Marine and Fisheries Committee of the House of Representatives, conducted pursuant to resolutions of February 24, 1912, and June 18, 1912. The Alexander Committee fully

* The views expressed in this article are the personal views of the authors and not necessarily those of either the Federal Maritime Board or the Maritime Administration.

† LL.B. 1940, University of Kansas City. Member of the Missouri and Virginia bars; General Counsel, Federal Maritime Board and Maritime Administration.

‡ A.B. 1950, Hunter College; M.A. 1951, Columbia University; LL.B. 1954, George Washington University. Member of the District of Columbia bar; Trial Attorney, Federal Maritime Board and Maritime Administration.

¹ DANIEL MARX, JR., *INTERNATIONAL SHIPPING CARTELS* 46 (1953).

² The federal agencies which have, in succession, regulated the shipping industry pursuant to the Shipping Act of 1916, 39 Stat. 728, 46 U.S.C. §§ 801 *et seq.* (1952), have been the United States Shipping Board, the United States Shipping Board Bureau of the Department of Commerce, the United States Maritime Commission, and the Federal Maritime Board [all of which are referred to hereinafter as the "shipping agency"].

³ Shipping Act of 1916, § 15, 39 Stat. 733 (1916), 46 U.S.C. § 814 (1952), authorizes the shipping agency to approve, and thereby exempt from the antitrust laws, conference agreements "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allocating ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or co-operative working arrangement."

⁴ Probably the fundamental issue before the Committee was, as stated by its chairman, Congressman Alexander, on the floor of the House: "Whether or not we should recognize the agreements existing between carriers by water or recommend that the Sherman antitrust law should be enforced against them and these combinations be broken up." 53 CONG. REC. 8077 (1916).

probed the role of conferences in the field of ocean shipping and in its report⁵ concluded.⁶

It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results; the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.

More recently, the Senate Interstate and Foreign Commerce Committee similarly found that the conference system is valuable to the foreign commerce of the United States and important to the survival of an American merchant marine. The Committee stated:⁷

It must be clearly recognized that the conference system has assisted in the establishment of an American merchant marine where before it had little chance of survival. Before 1914, we carried only 9.4 per cent of our foreign trade in our own ships. The rates have been set high enough to allow the American operator to at least meet his out-of-pocket costs of operation, and while the foreign operator has many advantages, not the least of which is greater profits on his operation, the fact remains that from the standpoint of national security and from the point of view of the American shipper, the conference system has paid off in stability of rates and improved quality of service.

The economic forces which underlie the tendency toward rate wars in foreign ocean shipping are no less present today than in 1916, when the Alexander Committee and Congress decided to foster the conference system in an attempt to curb rate wars and their destructive consequences. These forces may be summarized as follows:

1. There is complete freedom of entry into international shipping upon the high seas.⁸ Any vessel of any flag may, with exceptions here insignificant, call at any port.

⁵ The proceedings before the Committee were published in four volumes [referred to hereinafter as the Alexander Report (ALEX. REP.)], the last of which, containing a summary of the evidence and arguments and the Committee's conclusions and recommendations for legislation, is House Comm. on the Merchant Marine and Fisheries, *Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H.R. Doc. No. 805, 63d Cong., 2d Sess. (1914).

⁶ 4 ALEX. REP. 416-17.

⁷ Senate Comm. on Interstate and Foreign Commerce, *Merchant Marine Study and Investigation*, S. REP. No. 2494, 81st Cong., 2d Sess. 86 (1950).

⁸ See MARX, *op. cit. supra* note 1, at 279-84.

In desirable trades, this leads to overtonnaging and keen competition, with both new ships built to meet peak demands and older ships transferred from depressed trades. If the abundance of cargo is temporary, the fight for existence will be even more intense when traffic declines, especially from new lines which have come into the trade. In contrast, carriers in other fields of transportation are permitted to enter a particular service only after authorization, based usually on considerations of "public convenience and necessity," has been granted by a regulatory body.⁹

2. Because historically the seas have been free and the commerce on them international in nature, it is difficult or impossible for a single government to fix minimum rates and thereby prevent rate wars.¹⁰ In domestic commerce, however, regulatory bodies have this power. For example, the Interstate Commerce Commission has authority to fix minimum rates "to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them."¹¹

3. Characteristically, ocean liners involve capital and operating costs which are fixed and high, and which will be substantially the same whether the vessel sails full or half-full. Once committed to a voyage, the vessel is under strong compulsion to attempt to fill any empty space at any rate which exceeds the cost of loading and discharging. Where there is no effective restraint upon competition, there is likely at every port to be a fierce and destructive struggle to attract cargo by reducing rates to the level which will fill the vessel.¹²

4. Liner steamship services, also known as berth and common-carrier services, are those which operate on regular schedules between regular ports of call. Since the liner, with its tremendous capacity, must call at each port, it would often be in the interest of a liner to cut its rates at a given port, rather than to abandon the port completely to its competition or to sail empty. In contrast, a railroad can dispatch to any particular point only the number of freight cars which are necessary.

5. There are great differences in the operating and capital costs of carriers of

⁹ The Transportation Act of 1920 made the initiation of new railroad service conditional upon a finding by the Interstate Commerce Commission that the new service was required for the "public convenience and necessity." 41 STAT. 477, 49 U.S.C. § 1(18) (1952). Upon enactment of regulatory authority over domestic motor and water transportation in 1935 and 1940, respectively, similar conditions were imposed upon new services in those fields of transportation. 49 Stat. 551 (1935), as amended, 49 U.S.C. § 306 (1952); 54 Stat. 941 (1940), 49 U.S.C. § 909 (1952). The Civil Aeronautics Act of 1938 made the initiation of new domestic or foreign air service conditional upon a finding of the Civil Aeronautics Board that the new service provided by citizens of the United States was required for the "public convenience and necessity" or that the new service provided by noncitizens "will be in the public interest." 52 Stat. 987, 49 U.S.C. § 481 (1952).

¹⁰ H.R. 10500, 64th Cong., 1st Sess. (1915), proposed a direct system of governmental regulation of foreign commerce whereby conferences would not be specifically recognized and an administrative board would be established with power "to determine and prescribe just and reasonable rates or charges to be demanded or collected for the transportation of passengers and property", and to issue licenses to engage in the foreign trade of the United States. See the testimony outlining the objections to such a system of regulation, in *Hearings Before the House Committee on the Merchant Marine and Fisheries on H.R. 10500, A Bill to Establish a United States Shipping Board*, 64th Cong., 1st Sess. 516-21 (1915). The Alexander Committee already had concluded that ocean foreign commerce is not susceptible to direct rate control by any one government. 4 ALEX. REP. 309-11, 420-21.

¹¹ *New York v. United States*, 331 U.S. 284, 346 (1947).

¹² See MARX, *op. cit. supra* note 1, at 21-22.

different nationalities.¹³ In an overtonnaged trade, the carriers whose costs are low can profitably attract cargo at rates which are nonremunerative to vessels of other nations. American-flag ships are particularly vulnerable in such situations because generally their operating and capital costs are considerably higher than those of the other maritime nations.¹⁴

6. In many trades, there is a severe imbalance between outbound and inbound traffic. The fleet necessary to carry the cargo moving in the preponderant direction¹⁵ will tend to overtonnage the trade in the other direction.¹⁶ This will tend to create rate instability in the overtonnaged direction.

Notwithstanding the existence of such unstabilizing forces in foreign ocean shipping, an effective conference operating under the provisions of the Shipping Act of 1916 can normally prevent the outbreak of rate wars in a trade by providing a forum in which its membership can agree to establish and abide by a single tariff of rates. When, however, a trade becomes overtonnaged and one or more strong independent lines exist, the conference lines are likely to lose their ability thus to control rates because an independent, by undercutting the conference rates by a fixed percentage, can divert substantial quantities of traffic from conference vessels.¹⁷

By thus filling its vessels to a greater degree, such an independent reduces its carrying cost per ton and is enabled to operate profitably, and ordinarily more profitably than the conference lines, despite its lower rates. If seriously hurt by the independent's rate-cutting, the conference lines are strongly impelled to abandon their rate structure and declare the rates "open," which means that each member is permitted to fix its own rates. The result, obviously, is that all lines in the trade are then in unrestrained competition, rate wars flourish, and low operating costs become the main index of ability to survive. These are the conditions which were condemned by the Alexander Committee as being detrimental to shippers¹⁸ and car-

¹³ Contract Rates—Japan/Atlantic and Gulf Freight Conference, 4 F.M.B. 706, 733 (1955).

¹⁴ See U.S. DEP'T OF COMMERCE, REVIEW OF DIRECT AND INDIRECT TYPES OF MARITIME SUBSIDIES 20 (1956).

¹⁵ In the trades to and from the United States, the outbound traffic is generally heavier. A prime example of overwhelmingly heavy outbound traffic is the U.S. Gulf/United Kingdom-Continent trade (Trade Route 21), where, in 1956, 2,830,000 long tons of commercial dry cargo moved outbound compared to 710,000 long tons inbound. (Source: Maritime Administration, Office of Statistics and Special Studies.)

¹⁶ See Contract Rates—Trans-Pacific Freight Conference of Japan, 4 F.M.B. 744, 748 (1955).

¹⁷ See MARX, *op. cit. supra* note 1, at 196.

¹⁸ Shippers whose activities were studied by the Alexander Committee as well as those who have testified before the FMB in numerous hearings have indicated a need for rate stability rather than the low rates which prevail during rate wars. They testified that rate stability eliminates the undesirable speculative risk which exists under open-rate conditions; that it reduces complaints from buyers abroad; that it enables shippers and merchants to calculate laid-down costs and to arrange sales for delivery in the future; and that it permits forward trading and the building of inventories. 4 ALEX. REP. 297-98, 288, 299. See also Senate Comm. on Interstate and Foreign Commerce, *Continuing in Effect Until June 30, 1960, Dual-Rate Contract Agreements Approved Under Section 15, Shipping Act, 1916*, S. REP. No. 1709, 85th Cong., 2d Sess. 3 (1958), where the Committee stated: "If, as alleged, Conference rates are higher than need be, the benefits from the dual-rate system must be an overriding consideration, for many of the largest exporters, industries and corporations have urged upon your Committee enactment of this legislation to permit continuance of the dual-rate system. Opposition from industry to enactment is negligible by comparison."

riers¹⁹ alike. The prevention of these conditions is the very reason the conference system was legalized under the Shipping Act of 1916.

II

NATURE AND LEGAL STATUS OF THE DUAL-RATE SYSTEM

As we have seen, the Government-regulated conference system is needed and recognized as legal in the foreign ocean commerce of the United States. We have also seen that under certain conditions, conferences cannot prevent rate wars and create stability simply by agreement on rates between themselves. Almost from their inception, conferences have utilized one means or another to tie shippers to the conference and thereby protect the conference rate structure from outside competition.²⁰ The principal shipper ties used in world trade, historically and today, are the deferred-rebate system and the dual-rate system, or something akin to it.

The deferred-rebate system may be described as the return of a portion of freight money contingent upon the shipper's exclusive use of conference carriers during a specified period, coupled with a specified subsequent deferment period.²¹ It has been used by conferences since 1877, when it was inaugurated in the United Kingdom-Calcutta trade after the unsuccessful use of a form of contract-rate system.²² The Royal Commission on Shipping Rings, which investigated the British shipping industry and filed its report in 1909, five years before publication of the Alexander Report, found that the deferred-rebate system was the most effective device for insuring all the advantages of the conference system and refused to recommend that it be made illegal.²³ The system, which is still widely used in trades between foreign nations, was condemned by the Alexander Committee because its deferral feature placed the shipper "under constant obligations to the conference lines,"²⁴ and it was specifically prohibited in section fourteen of the Shipping Act of 1916.²⁵ On the other hand, an exclusive-patronage-contract system similar to the dual-rate system was described in the Alexander Report, but was not explicitly prohibited by the Shipping Act.

¹⁹ The high capital costs characteristic of ocean shipping make it necessary for carriers to realize revenues which will enable them to establish and maintain funds for the replacement of vessels. Obsolete ships cannot be replaced, and improved equipment and techniques cannot be introduced if carriers waste their assets in fighting rate wars. See 4 ALEX. REP. 497; Senate Comm. on Interstate and Foreign Commerce, *Continuing in Effect Until June 30, 1960, Dual-Rate Contract Agreements Approved Under Section 15, Shipping Act, 1916*, S. REP. NO. 1709, 85th Cong., 2d Sess. 2 (1958).

²⁰ In addition to the use of shipper ties, conferences have attempted, at times, to control outside competition by such crude devices as the "fighting ship," which is supported by the conference to drive a competitor out of a trade, and refusal of space to shippers who have patronized outside lines. Both these devices were specifically outlawed by the Shipping Act of 1916, § 14, 39 Stat. 733, 46 U.S.C. § 812 (1952).

²¹ See also the description of the deferred-rebate system. *Ibid.*

²² See MARX, *op. cit. supra* note 1, at 47.

²³ Royal Commission on Shipping Rings, *Report*, CMD. NO. 4668, at 50-52 (1909).

²⁴ 4 ALEX. REP. 287. The Alexander Committee pointed out that: "In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system. *Id.* at 307.

²⁵ 39 Stat. 733, 46 U.S.C. § 812 (1952).

Soon after passage of the 1916 Act, conferences began using the dual-rate system in place of the prohibited deferred-rebate contracts, and the successive shipping agencies charged with administering the Act were faced with questions of whether they had authority to approve the dual-rate system and, if so, what criteria should be used for approval or disapproval. The dual-rate system was attacked before the shipping agencies and the courts as being illegal *per se* on two grounds.²⁶ First, it was contended that by its terms, the system violates section fourteen, Third, of the Shipping Act of 1916. Under the system, signatory shippers pay one rate and non-signatory shippers pay a higher rate for the same service. This has been held *prima facie* discriminatory.²⁷ In addition, the contract contains a liquidated damages provision which applies if a signatory shipper moves any of his shipments via a non-conference vessel. From this it is argued that the system is necessarily violative of section fourteen, Third, which makes unlawful any "retaliation" against shippers by resort to discriminating or unfair methods because the shipper has patronized another carrier, or for any other reason.²⁸

Second, it was contended that the system is necessarily violative of the unjust discrimination provisions of sections fifteen and seventeen of the Shipping Act of 1916.²⁹ Although these sections appear to outlaw only *unjust* discrimination, it is argued that the judicial history of "unjust discrimination," as revealed by decisions under section two of the Interstate Commerce Act of 1887³⁰ and section ninety of the English Railway Clauses Consolidation Act of 1845,³¹ makes unlawful as unjustly discriminatory any difference in the rates charged to shippers for carrying identical cargoes over the same line, for the same distance, and under the same circumstances of carriage, and this applies equally to the charging of different rates for moving identical goods on the same vessel between the same ports.

The Federal Maritime Board and its predecessors have generally rejected these two arguments and held that dual-rate systems are not illegal *per se*.³² They have found important support for their position in the fact that the Alexander Committee described an exclusive-patronage-contract system similar to the dual-rate system, but the Committee and Congress did not undertake to outlaw it, at least by name or description, as was done with deferred rebates and other competitive devices considered unacceptable.³³

²⁶ For a full review of litigation before the courts and the shipping agencies concerning approval of dual-rate systems, see *Contract Rates—Japan/Atlantic and Gulf Freight Conference*, 4 F.M.B. 706 (1955).

²⁷ See *Swayne & Hoyt v. United States*, 300 U.S. 297, 303 (1937).

²⁸ Shipping Act of 1916, § 14, Third, 39 Stat. 733, 46 U.S.C. § 812 (1952), is quoted in pertinent part in note 51 *infra*.

²⁹ 39 Stat. 733, 46 U.S.C. §§ 814, 816 (1952).

³⁰ 24 Stat. 379, as amended, 49 U.S.C. § 1 (1952).

³¹ 8 & 9 Vict. c. 20, § 90.

³² In *Eden Mining Co. v. Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922), the first dual-rate case before the shipping agency, it was held that the dual-rate practice of a single line (not a conference) violated §§ 16 and 17 of the Act. Thereafter, dual-rate systems were upheld, at least in every case where they were found to conform to the criteria and safeguards discussed in the text.

³³ The FMB was convinced that the dual-rate system was in use at the time of the Alexander Committee's investigation. *Contract Rates—Japan/Atlantic and Gulf Freight Conference*, 4 F.M.B. 706, 729-30

In their dual-rate decisions, the courts and the shipping agencies developed criteria, as well as safeguards to independent lines and the public, which had to be met before a particular system would be approved. The basic considerations set forth by the Supreme Court in 1937, and adhered to by the shipping agencies since then, are as follows:³⁴

In determining whether the present discrimination was undue or unreasonable the [agency] was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether . . . it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter.

Consequently, since 1937, approval of any system has depended upon a weighing of whether it is necessary to prevent rate wars, to permit forward trading by shippers, and to assure rate stability and regularity of service, as against whether, and to what extent, it would exclude independent competition in the trade.³⁵

In judging a dual-rate system, the shipping agency will not allow a greater limitation upon competition than is absolutely necessary to prevent instability of rates and service. Thus, a dual-rate system instituted by a single line which seeks to exclude from the traffic all competitors will not be approved.³⁶ Nor will one be approved in the domestic trades, where the shipping agency has power to control minimum and maximum rates.³⁷ And approval will be denied where the system is used to forbid shippers to route traffic via a port not served by the conference lines.³⁸ The system will not be approved unless conference membership is open to any carrier in the trade³⁹ upon payment of no more than a reasonable membership admission fee.⁴⁰ The differential between the contract and noncontract rates may not be arbi-

(1955). It argued to the courts that Congress was aware that dual-rate contracts existed prior to 1916, did not prohibit them, and, therefore, implicitly allowed them. See, e.g., *FMB v. Isbrandtsen Co.*, 356 U.S. 481, 493 (1958). The Board's argument was grounded principally on the following description, included in the Alexander Committee's statement of what it had found in the industry:

"3. Contracts with shippers which may be classified as:

"(a) *Joint contracts made by the conference as a whole.* Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i.e., are willing at all times to contract with all shippers on the same terms." 4 ALEX. REP. 290.

³⁴ *Swayne & Hoyt v. United States*, 300 U.S. 297, 304 (1937).

³⁵ See, e.g., *Contract Rates—Trans-Pacific Freight Conference of Japan*, 4 F.M.B. 744, 758-59 (1955).

³⁶ *Eden Mining Co. v. Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922).

³⁷ *Intercoastal Investigation*, 1 U.S.S.B.B. 400 (1935); *Gulf-Intercoastal Contract Rates*, 1 U.S.S.B.B. 524 (1936).

³⁸ *Contract Routing Restrictions*, 2 U.S.M.C. 220, 226 (1939).

³⁹ *Phelps Bros. & Co. v. Cosulich Societa*, 1 U.S.M.C. 634, 640-41 (1927).

⁴⁰ *Pacific Coast-European Conference*, 3 U.S.M.C. 11, 14 (1948).

trary⁴¹ or so great as to prevent the use of nonconference lines.⁴² The system cannot be used to prevent routing of traffic on independent lines by buyers who are not signatories to dual-rate contracts and who have, in fact, retained the right under their sales contracts to designate the carrier, even though the seller is a signatory to a dual-rate contract.⁴³ Approval will not be given if the liquidated damage provision is too severe.⁴⁴ And it will be withheld with respect to so much of a proposed dual-rate system as would have been applicable to commodities not carried by non-conference competitors.⁴⁵

It cannot be said, however, that all the currently existing dual-rate systems meet these criteria and safeguards. For one thing, many of them have never been specifically approved by the shipping agencies because the agencies believed that their approval of the basic or organic conference agreement authorizing the fixing of lawful rates carried with it the cover of authority to change rates; and the agencies considered the inauguration of a dual-rate system to be a rate change.⁴⁶ Of course, upon complaint or its own motion, the shipping agency could review any dual-rate system and disapprove it if it failed to meet the prevailing standards.⁴⁷

In 1954, the Court of Appeals for the District of Columbia rejected the "cover of authority" doctrine on the ground that section fifteen of the Shipping Act of 1916 required specific FMB approval as "a necessary condition precedent to initiation of [a dual-rate] agreement."⁴⁸ Because of the tremendous administrative burden and the cases then in litigation which cast doubt on its authority to approve dual-rate systems, the Board did not, subsequent to this decision, embark upon an investigation of all existing dual-rate systems.

It is also true that some of the existing dual-rate systems may not meet all of the above-specified criteria and safeguards because of changed conditions in the trade. There is no provision in the statute or in the FMB regulations for periodic review of dual-rate systems; hence, a system which was approved as necessary to prevent a rate war may no longer be necessary for that purpose.

The position that the dual-rate system is not illegal per se, but rather is approvable if found consonant with the mentioned criteria and safeguards, was first overruled by the courts forty years after passage of the 1916 Act in *Isbrandtsen Co. v. United States*.⁴⁹ There, the court reviewed the FMB's approval of a dual-rate

⁴¹ *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 886 (S.D. N.Y. 1951).

⁴² North Atlantic Freight Conference, 4 F.M.B. 355 (1954); Contract Rates—Japan/Atlantic and Gulf Freight Conference, 4 F.M.B. 706 (1955).

⁴³ *Mitsui Steamship Co. v. Anglo-Canadian Shipping Co.*, 5 F.M.B. 74 (1956); Contract Rates—Japan/Atlantic and Gulf Freight Conference, 4 F.M.B. 706 (1955); Secretary of Agriculture v. North Atlantic Continental Freight Conference, 5 F.M.B. 20 (1956).

⁴⁴ Pacific Coast European Conference, 3 U.S.M.C. 11, 19 (1948); cf. *Isbrandtsen Co. v. North Atlantic Freight Conference*, 3 F.M.B. 235, 246 (1955).

⁴⁵ Contract Rates—Japan/Atlantic and Gulf Freight Conference, 4 F.M.B. 706 (1955).

⁴⁶ Contract Rates North Atlantic Continental Freight Conference, 4 F.M.B. 98, 104-05 (1952); Section 15 Inquiry, 1 U.S.S.B. 121, 125 (1927).

⁴⁷ Contract Routing Restrictions, 2 U.S.M.C. 220 (1939).

⁴⁸ *Isbrandtsen Co. v. United States*, 211 F.2d 51, 57 (D.C. Cir. 1954); see also *River Plate and Brazil Conferences v. Pressed Steel Car Co.*, 227 F.2d 60 (2d Cir. 1955).

⁴⁹ 239 F.2d 933 (D.C. Cir. 1956).

system in the Japan/Atlantic and Gulf inbound trade⁵⁰ and held that the Board was without power to approve *any* dual-rate system, since the system by its terms constituted retaliation by a discriminatory method in violation of section fourteen, Third, of the Act.⁵¹

The Supreme Court granted certiorari and affirmed the decision of the court of appeals.⁵² Although the Supreme Court rested its decision entirely upon section fourteen, Third, it is not clear whether it held that this section prohibits *all* dual-rate systems or only those which the FMB finds "are employed as predatory devices" having the intent and effect of stifling nonconference competition. The following, we believe, is its central holding in the case:⁵³

Congress was unwilling to tolerate methods involving ties between conferences and shippers designed to stifle independent carrier competition. Thus Congress struck the balance by allowing conference arrangements passing muster under §§ 15, 16, and 17 limiting competition among the conference members while flatly outlawing conference practices designed to destroy the competition of independent carriers. Ties to shippers not designed to have the effect of stifling outside competition are not made unlawful. Whether a particular tie is designed to have the effect of stifling outside competition is a question for the Board in the first instance to determine.

Since the Board found that the dual-rate contract of the Conference was "a necessary competitive measure to offset the effect of nonconference competition" required "to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in this trade," it follows that the contract was a "resort to other discriminating or unfair methods" to stifle outside competition in violation of § 14 Third.

It is significant that in a footnote to the second quoted paragraph, the Court undertook to support its rejection of the system in question by pointing out that "the Board estimated that Isbrandtsen would lose approximately two-thirds of its 1952 volume." Further, in discussing the argument that a decision along the lines it adopted would be inconsistent with the decisions in two previous Supreme Court cases which were dismissed not on the ground that the system was unlawful, but because primary jurisdiction to determine the validity of a dual-rate system rested with the shipping agency, the Court stated:⁵⁴

Since, as we hold, § 14 Third strikes down dual-rate systems only where they are employed as predatory devices, then precise findings by the Board as to a particular system's intent and effect would become essential to a judicial determination of the system's validity under the statute.

Thus, the Supreme Court left unanswered the question of whether the Court would strike down a system which is purely defensive in design and has the purpose

⁵⁰ See *Contract Rates—Japan/Atlantic and Gulf Freight Conference*, 4 F.M.B. 706 (1955).

⁵¹ Shipping Act of 1916, § 14, Third, 39 Stat. 733, 46 U.S.C. § 812 (1952), provides in pertinent part:

"No common carrier by water shall—

"Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."

⁵² *FMB v. Isbrandtsen Co.*, 356 U.S. 481 (1958).

⁵³ *Id.* at 492-93. (Footnotes omitted.)

⁵⁴ *Id.* at 499.

and effect only of maintaining for the conference lines all or a given portion of the cargo they carried prior to the initiation of the system. The Court's emphasis on the stifling⁵⁵ effect on independent competition which must be present if the particular system is to be considered a violation of section fourteen, Third, portends that such a system will not be found to violate the section. On the other hand, Justice Frankfurter, in a dissenting opinion, joined by Justices Burton and Harlan, stated: "Of course these exclusive patronage contracts and the dual-rate systems of which they are an integral part are designed to meet nonconference competition. And there should be no mistake but that today's decision outlaws such systems."⁵⁶

A second important question left unanswered by the Supreme Court is whether it would hold illegal the use of a contract-rate system similar to those recognized by the Alexander Committee. The Supreme Court distinguished the contracts described in the Alexander Report, on which the shipping agencies had heavily relied, from the one before it. It pointed out that the former subjected the shipper only to ordinary damages for a breach and were very much like ordinary requirement contracts in that they obligated conference members "to furnish steamers at regular intervals and at rates effective for a reasonably long period"; in the latter, however, there is no guarantee of service and rates for a reasonably long period and the shipper who commits a breach is obligated to pay liquidated damages of fifty per cent of the amount of freight which would have been paid had the shipment been made on a conference vessel.⁵⁷

It seems probable that the conferences would provide shipper agreements with the features the Court ascribes to the contracts reported in the Alexander Report if this would remove the legal encumbrance from the use of the dual-rate system. Dual rates are vital only when a trade is overtonnaged, and in such a circumstance, it should not burden the carriers to guarantee space and rates for reasonably long periods. The contract now used by the North Atlantic Continental Freight Conference provides for a six-month rate guarantee and does not contain a liquidated damages provision.⁵⁸

As a direct result of the Supreme Court's *Isbrandtsen* decision, Congress enacted, on August 12, 1958, Public Law 85-626, which amends section fourteen to provide that nothing in the Shipping Act of 1916 "shall be construed or applied to forbid or make unlawful any dual rate contract arrangement" in use by conference members on May 19, 1958, the date of that decision, "unless and until such regulatory body disapproves, cancels, or modifies such arrangement in accordance with the standards set forth in section 15 of this Act."⁵⁹ The amendment expires by its terms on June

⁵⁵ WEBSTER'S NEW COLLEGIATE DICTIONARY 832 (1953) gives the following definitions of stifle: "1. To stop the breath of; to choke; to suffocate; also to cause the death of by such means. 2. To extinguish; quench; as to stifle a fire. 3. To smother; to keep or choke back; as to stifle one's sobs—v.i., 1. To die by reason of obstruction of breath. 2. To suffer difficulty in breathing, as by reason of air charged with smoke."

⁵⁶ 356 U.S. at 502.

⁵⁷ *Id.* at 494-95.

⁵⁸ *Secretary of Agriculture v. North Atlantic Continental Freight Conference*, 5 F.M.B. 20, 29 (1956).

⁵⁹ 72 Stat. 574, 46 U.S.C.A. § 812 (Supp. 1958).

30, 1960. Its stated purpose is "to provide a reasonable time for thorough [congressional] study of the entire operation of steamship conferences and their practices, the first in 44 years."⁶⁰ It validates dual-rate arrangements existing at the time of the decision unless cancelled or modified by the FMB, and it thus continues, on a temporary basis, a system that has been used by both shippers and the shipping lines over the years.⁶¹

As it now stands, the law (a) precludes the FMB from allowing the inauguration of a new dual-rate system which has the intent and effect of reducing the independent lines' participation in a trade to a level below that which existed before initiation of the system; (b) leaves doubt as to whether the Board may approve a new system not having such intent and effect; and (c) empowers the Board to disapprove any existing agreement which does not meet the criteria and safeguards developed by the Board in accordance with the standards of section fifteen.⁶² The law also is unclear as to whether the Board may approve new exclusive-patronage-contract systems similar to those the Supreme Court found were reviewed by the Alexander Committee.⁶³

III

CONFERENCES IN OTHER FIELDS OF TRANSPORTATION

A. Foreign Air Transportation

International air transportation, like ocean foreign commerce, is largely regulated by means of a conference system. However, as we shall see, the competitive forces in the two fields are different, and, as a result, the conference practices are different.

International air travel rates and practices are initially fixed and agreed upon through the medium of the International Air Transport Association (IATA), a private trade association whose member lines carry approximately ninety-five per cent of the world's international air traffic.⁶⁴ Unlike maritime conferences, each of which operates in a particular trade, IATA, through its three subconferences, sets coordinated rates on a world-wide scope.⁶⁵

The Civil Aeronautics Board approved in 1945, under section 412 of the Civil Aeronautics Act of 1938,⁶⁶ the agreements that embody IATA's articles of incorpora-

⁶⁰ House Comm. on Merchant Marine and Fisheries, *Temporary Extension of Use of Dual Rates by Steamship Conferences*, H. REP. No. 2055, 85th Cong., 2d Sess. 1 (1958).

⁶¹ Senate Comm. on Interstate and Foreign Commerce, *Continuing in Effect Until June 30, 1960, Dual-Rate Contract Agreements Approved Under Section 15, Shipping Act, 1916*, S. REP. No. 1709, 85th Cong., 2d Sess. 2 (1958).

⁶² The Court of Appeals for the District of Columbia has already remanded a case in which the Board had approved a dual-rate system which went into use prior to the date of the Supreme Court's *Isbrandtsen* decision, so that the Board could reconsider the case in the light of the "unless and until" clause of P.L. 85-626. *Benson v. United States*, 263 F.2d 899 (D.D.C. 1959).

⁶³ See *supra* notes 33 and 57 and text to which cited.

⁶⁴ *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary on Monopoly Problems in Regulated Industries*, 84th Cong., 2d Sess. pt. 1, vol. 1, at 375 (1956).

⁶⁵ Antitrust Subcomm. of the House Comm. on the Judiciary, *The Airlines Industry*, H. REP. No. 1328, 85th Cong., 2d Sess. 220-21 (1958).

⁶⁶ 52 STAT. 1004, 49 U.S.C. § 492 (1952).

tion, thereby exempting them from the antitrust laws.⁶⁷ Since then, it has periodically approved IATA's world-wide international rate and fare-fixing agreements. Although the CAB does not have direct authority over the level of rates and fares in international air travel, it may disapprove any IATA agreement which it finds does not conform to the standards of section 412. Thus, through the medium of approval of IATA agreements, the CAB exercises some control over the level of international air rates which it would not otherwise be in a position to do.⁶⁸ The inability of the CAB directly to regulate foreign air travel rates has caused it "reluctantly" to grant its approval of IATA's rate-making machinery.⁶⁹ It has repeatedly asked Congress for direct rate control over American air carriers in foreign commerce.⁷⁰

IATA is principally concerned with passenger traffic, which, by its nature, is not susceptible to a system of shipper-tying contracts. Similarly, passenger conferences in the maritime field cannot use shipper-tying contracts. Both IATA and maritime passenger conferences, however, exercise control of the travel agents of their lines and limit the extent to which conference-approved agents may deal with non-conference lines.⁷¹ Thus, an indirect method of tying passenger traffic to conference lines is used in both air and ocean passenger transportation.

In the field of air transportation, whether passenger or air freight, competition from independent lines is not an important problem.⁷² This is basically attributable to the fact that, unlike the seas, which are traditionally free, there is no right of entry into the air space over the various nations.⁷³ Rate stability in the international air carrier field, therefore, stems from a condition which does not exist in the maritime field, and it cannot be said that the ability of international air lines to regulate themselves without the benefit of shipper-tying contracts is proof that the maritime freight conferences should be able to do the same.

B. Domestic Land Transportation

The railroads and other domestic carriers have long been organized into associations to facilitate joint action on rates and other matters. These organizations were encouraged by the ICC because they provided a method by which proposed actions

⁶⁷ Agreements approved by the CAB under § 412 are exempted from the antitrust laws by Civil Aeronautics Act of 1938, § 414, 52 Stat. 1004, 49 U.S.C. § 494 (1952).

⁶⁸ Antitrust Subcomm. of the House Comm. on the Judiciary, *supra* note 65, at 217. The FMB, which similarly does not have direct authority to regulate rates in foreign ocean commerce, has stated that if the rates of any conference become unreasonably high, it will disapprove the basic conference agreement as detrimental to the foreign commerce of the United States. See *Weil v. Italian Line*, 1 U.S.S.B.B. 395 (1935).

⁶⁹ Antitrust Subcomm. of the House Comm. on the Judiciary, *supra* note 65, at 217-18.

⁷⁰ *Id.* at 225.

⁷¹ See *id.* at 204 with respect to IATA-approved travel agents; and FMB Agreement No. 120-74, in Trans-Atlantic Passenger Steamship Conference, p. 15, on file with the FMB, as an example of a maritime passenger conference travel-agent provision.

⁷² See *Hearings*, *supra* note 64, at 1062-64, 1068.

⁷³ For a statement of the specific factors which tend to inhibit rate instability in international air traffic, but which do not pertain to maritime traffic, see Kharasch, *Conferences of Carriers by Sea: Freedom of Rate Fixing*, 23 J. AIR L. & COM. 287, 288 (1956). See also JOHN G. COOPER, *THE RIGHT TO FLY* 122-96 (1947).

of the carriers jointly could be initiated and submitted to that agency for approval.⁷⁴ Antitrust suits against these associations were brought to the attention of Congress,⁷⁵ which, as a result, amended the Interstate Commerce Act so as to add section 5a,⁷⁶ often referred to as the Reed-Bulwinkle Act, empowering the ICC to approve such joint organizations and exempt them from the antitrust laws if they meet specified statutory conditions.

The conditions specified in section 5a are that:

1. No agreement shall be made between different classes of carriers—railroads, pipelines, motor carriers, etc.—unless it is limited to joint or through rate matters.
2. Agreements covered by section five of the Interstate Commerce Act—pooling, division, merger, etc.—shall not be subject to, or approvable under, section 5a.
3. Agreements dealing with rates and service shall not be approved unless they provide that members not concurring in any determination shall have the right to act independently of it.
4. Any agreement not prohibited under the above conditions may be approved if, “by reason of the furtherance of the national transportation policy,” the Commission finds relief from the antitrust laws should be provided.

There is a striking resemblance between the standard for approval under section fifteen of the Shipping Act of 1916 set forth in the *Swayne & Hoyt* case⁷⁷ and the following direction of the House Committee on Interstate Commerce to the ICC:⁷⁸

Congress . . . directs the Commission to determine whether the advantages to the public interest, through furtherance of the national transportation policy, are such as to outweigh the disadvantages to the public interest intended to be guarded against by the antitrust laws.

Thus, Congress directed the ICC to judge association rate agreements under a test similar to the one the shipping agencies had been applying to dual-rate systems since the date of the *Swayne & Hoyt* decision.

The right of a nonconcurring member to act independently of the association action with which it disagrees creates no impetus toward excessive rate instability mainly because carriers regulated by the ICC are under a duty to charge “just and reasonable” rates⁷⁹ and the Commission is authorized to establish maximum and min-

⁷⁴ House Comm. on Interstate and Foreign Commerce, *Amending the Interstate Commerce Act, With Respect to Certain Agreements Between Carriers*, H. REP. NO. 1100, 80th Cong., 1st Sess. 3 (1947). “Since the law places upon the carriers the duty to initiate rates which meet the same standards that are applied by the Commission in reaching its determinations as to their lawfulness, it is difficult to see how the carriers can perform their duty in that regard without following a procedure similar to that employed by the Commission.” *Id.* at 9-10. The joint associations provide a method by which such a procedure can be employed by the carriers.

⁷⁵ *Id.* at 3-4.

⁷⁶ 62 Stat. 472 (1948), 49 U.S.C. § 5b (1952).

⁷⁷ *Swayne & Hoyt v. United States*, 300 U.S. 297, 304 (1937).

⁷⁸ House Comm. on Interstate and Foreign Commerce, *supra* note 74, at 14. For a complete expression of the standards of § 5a, as interpreted by the ICC, see Western Traffic Ass’n—Agreement, 276 I.C.C. 183 (1949).

⁷⁹ Interstate Commerce Act § 1(4), 24 Stat. 379 (1887), 49 U.S.C. § 1(4) (1952).

imum rates encompassing the zone of reasonableness.⁸⁰ Other distinctions pointing up the marked tendency to rate instability in ocean foreign commerce and the lack of it in regulated transportation have already been discussed.⁸¹

There has been a recent development of dual rates in the railroad industry which is worthy of note here, despite the fact that a conference is not concerned. It is reported that the Soo Line Railroad proposes to introduce the so-called "guaranteed rate" system, which is substantially the same as the dual-rate system, so that it can divert steel products from competitive modes of transportation.⁸² A guaranteed-rate system applicable to the intrastate movement of crushed stone between two points in New York has been published, effective March 2, 1959, by the Delaware, Lackawanna, and Western Railroad Company.⁸³ Thus, even in the Government-regulated railroad fields, at least some carriers think that a dual-rate system is necessary to meet the competition of other forms of regulated transportation.

IV

POSSIBLE LEGISLATIVE ACTION

The conference and dual-rate systems are presently undergoing thorough study by the House Merchant Marine and Fisheries Committee and by the Antimonopoly Subcommittee of the House Judiciary Committee. Our conclusions as to the legislative possibilities described here are based on the facts regarding conferences and dual-rate systems that have so far come to our attention at the time this article is being written. Different or additional facts may be revealed by the current inquiries which could, of course, affect the validity of our views.

A. Open Competition

Congress can achieve unrestrained competition in the ocean foreign commerce of the United States by subjecting the carriers to the antitrust laws. The Alexander Committee decided against this course for reasons which seem still to be appropriate.⁸⁴ It would be contrary to the desire of the great majority of shippers and carriers.⁸⁵ It would, we believe, cause rate wars in times of overtonnaging, with the weaker lines⁸⁶ being either destroyed or taken over by the stronger ones.⁸⁷ The victors in a rate war would ultimately have to learn to live together, probably through some form of tacit agreement, in order to recover their rate war losses. The tendency

⁸⁰ Interstate Commerce Act § 15(4), 24 Stat. 384 (1887), 49 U.S.C. § 15(4) (1952).

⁸¹ See *supra* notes 8-16 and text to which cited.

⁸² Traffic World, Dec. 13, 1958, p. 27; *id.*, Dec. 20, 1958, p. 42.

⁸³ Freight Tariff 601 Filed by the Delaware, Lackawanna & Western R.R. Co., No. 5810, N.Y.P.S.C., June 29, 1959.

⁸⁴ 4 ALEX. REP. 416-17.

⁸⁵ *Id.* at 290.

⁸⁶ These would tend to include at least some American lines. Although American lines are eligible for a subsidy to meet the difference between their capital and operating costs and those of foreign competitors, the conditions attached to the subsidy are not conducive to short-run competitive warfare.

⁸⁷ According to the records of the Maritime Administration, Isbrandtsen Co., which cut rates and then successfully opposed in the courts the inauguration of a dual-rate system in the Japan/Atlantic and Gulf trade, has had a constant and drastic decline in carryings from Japan to North Atlantic ports in the United States since the conference opened rates in March 1953.

then would be for the remaining strong lines to concentrate on preventing new entries into the trade. The latter would find it almost impossible to commence service in the face of all-out rate competition. We, accordingly, do not think that open competition is feasible or long maintainable in the steamship industry.

B. Direct Rate Regulation

Congress could eliminate rate wars by requiring rigid rate regulation. The shipping agency probably would have to undertake this by setting a zone of reasonableness limited by maximum and minimum rates for all commodities in all trades, but it would be an almost impossible administrative task, for there are innumerable commodities and trades, and in each trade, there are many different lines with varying costs of operation and rate bases. It is questionable whether the shipping agency could obtain the true costs and capital expenditures of all foreign lines. Also, the agency would have to take account of the constantly changing tramp charter rates because these are largely controlling on liners as to many bulk commodities. A further, and perhaps paramount, obstacle is the fact that rate regulation would violate the traditional freedom of the seas and could lead to rate regulation and the setting of different rate levels by the nations overseas with whom this country trades. Obviously, the carriers could not operate under such circumstances, either as a practical matter or legally, unless the national differences were resolved.

C. Continuance of the Conference System

Congress can continue the conference system and either eliminate all tying agreements, authorize a standard dual-rate system in all trades, or allow the use of dual rates contingent upon certain trade conditions and safeguards.

If dual rates are to be eliminated without resulting rate instability, some provision for control of the practices of independent lines must be enacted. The form this should take is no easy problem. One suggestion is that it could be made an unfair practice for an independent to cut rates below a level that would be compensatory to the independent if it were carrying cargo at the average rate of vessel utilization in the trade. This qualification is necessary because, as we have seen, the compensatory rate per ton is normally much lower for the vessel which fills its ships by cutting rates than for the carrier which sails with substantial free space because it has adhered to the conference rates. It would solve nothing to calculate the compensatory rate of the independent upon a basis which includes cargo obtained through rate-cutting. Since the costs of only a single carrier would generally be involved, it should not be too difficult to test the allegedly "fair compensatory rate" of the independent. This, however, would take time, and litigation for the purpose would necessarily lag behind the actual practices of the independent. The conference might find it more practical to open rates rather than to await the outcome of the litigation. Under such circumstances, this legislative suggestion could lose some of its value.

It is at least arguable that dual rates should be expressly sanctioned by legislation. Both dual rates and deferred rebates are permitted under British law.⁸⁸ The conference system provides many benefits which are attainable only by the use of a tying device. In view of this, it has been contended that the most effective tying arrangement should be used, even if it eliminates independent competition.⁸⁹ Such an arrangement could, however, deprive our foreign commerce of the stimulus of independent competition. That would not be so if Congress enacted a provision which would allow the dual-rate system only where needed to prevent rate instability and conditioned upon appropriate safeguards for shippers and independent carriers.

Such a statute has much to recommend it. It could include the safeguards which have been delineated in the shipping agency decisions. Among other things, this would insure that the system will be adopted only where necessary for rate stability, and not for other reasons, such as preventing independents from entering trades in which they do not at the time operate. The legislation also could provide for periodic review (perhaps every two years) of each system by the shipping agency as a useful safeguard in discontinuing systems that are no longer needed and bringing to light other changed conditions.⁹⁰ To prevent the deterioration of trades pending the results of the proceedings upon applications to institute dual-rate systems, it would be well to authorize the agency to approve, prior to hearing, systems which it finds are *prima facie* necessary to prevent instability. A time limit for such prehearing approval might be written into the statute.

D. General Observation Regarding Possible Legislative Action

The shipping agencies have historically considered that they must authorize the use of the dual-rate system under certain circumstances if our ocean foreign commerce is to be free of harmful instability and ruinous competition. The Supreme Court has very recently found that the Shipping Act does not empower the FMB to approve dual-rate systems, at least where their intent and effect is to stifle independent carriers in the trade. This decision, as was the decision of the Court of Appeals for the District of Columbia holding dual rates illegal *per se*, was based entirely on the intent of Congress in passing the 1916 Act. Neither of these decisions held that the Board should not have the power to approve the use of a dual-rate system limited by proper safeguards, nor that it would be illegal for it to be given such power.

It is to be hoped that the proposal to enact legislation will not be considered an effort to overrule, by legislation, the decision of the Supreme Court. Actually, the issue before the Court was not the same as that now before Congress. The question before the Court was simply to interpret the meaning of a statute (sections

⁸⁸ Royal Commission on Shipping Rings, *supra* note 23, at 50-52.

⁸⁹ *Cf.* dissenting opinion in *Contract Rates—Trans-Pacific Freight Conference of Japan*, 4 F.M.B. 744, 763 (1955).

⁹⁰ *Cf.* the annual review of charters provided for in 60 Stat. 43 (1946), 50 U.S.C. App. § 1738(e) (1952).

fourteen and fifteen of the Shipping Act of 1916). The question now before Congress is the merit of the dual-rate system. Thus, if Congress decides that it is now necessary to give the FMB power to approve dual-rate systems, this would in no way conflict with the decision of the Supreme Court.

On the basis of its current investigations, Congress will be able to determine fairly whether the regulatory pattern that has been in practice under the 1916 Act, and which is fundamentally based on the conference system, is still useful. If the answer is negative, a new regulatory pattern can be enacted. If, on the other hand, Congress determines that the 1916 Act employs a pattern of regulation which is still fundamentally the most practical method of regulating foreign shipping, it can modify the system to eliminate the problem areas which have manifested themselves since 1916. The most important problem area is, of course, the use of the dual-rate system. The Board will undoubtedly welcome a new delineation of its powers and any guidance Congress can provide.