CALIFORNIA SHIPPING LINE INC., Complainant
v.
YANGMING MARINE TRANSPORT CORP., Respondent
Federal Maritime Commission,
October 19, 1990

No. 88-15

Before: Carey, Acting Chairman; Hsu, Hathaway, Ivancie and Quartel, Commissioners

Andrew B. Sachs and David P. Street for Complainant *California Shipping Line, Inc.*

Paul M. Keane, Stephen H. Vengrow and Joseph F. DeMay for Respondent *Yangming Marine Transport Corp.*

Ronald D. Murphy, Joseph B. Slunt and Seymour Glanzer for *Bureau of Hearing Counsel*

Charles F. Warren, George A. Quadrino and Benjamin K. Trogdon for *Trans-Pacific Freight Conference of Japan* and *Japan-Atlantic & Gulf Freight Conference*

Ronald N. Cobert and Andrew M. Danas for *American Institute for Shippers' Associations, Inc.*

Raymond P. deMember for *International Association of NVOCCs*

Martin J. Lewin and Gregory J. Spak for *American Import Shippers Association, Inc.*

REPORT AND ORDER (in part):

This proceeding is before the Federal Maritime Commission ("FMC" or "Commission") on the Exceptions to the Initial Decision ("I.D.") of Presiding Administrative Law Judge Joseph N. Ingolia ("ALJ" or "Presiding Officer "), filed by both Complainant California Shipping Line, Inc. ("complainant" or "CSL") and Respondent Yangming Marine Transport Corp. ("respondent" or "Yangming"). [FN1] For the reasons set forth below, the Initial Decision is reversed in several respects and the relief requested in the complaint is denied.

> FN1. Exceptions were also filed by the Commission's Bureau of Hearing Counsel ("Hearing Counsel"). In addition, the following

submitted amicus curiae briefs:the International Association of NVOCCs ("IAN"), the American Institute for Shippers' Associations, Inc. ("AISA"), the American Import Shippers Association, Inc. ("Import S.A."), and two conferences serving the U.S./Japan trades-the Transpacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference ("Japan Conferences"). The Commission heard oral argument on the Exceptions.

Proceeding

This proceeding was instituted by complaint filed by CSL, a non-vessel-operating common carrier ("NVOCC"). [FN2] CSL claimed that Yangming failed to make the essential terms of three service contracts available to it, and that such conduct violated 8(c), 10(b)(5), and 10(b)(12) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1707(c), 1709(b)(5) and 1709(b)(12). [FN3] CSL sought a cease and desist order and reparations of $500,000.

FN2. An NVOCC is statutorily defined as ". a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. app. 1702(17).

FN3. Section 8(c) states: "An ocean common carrier or conference may enter into a service contract with a shipper or shippers' association subject to the requirements of this Act. Except for service contracts dealing with bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, each contract entered into under this subsection shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include- (1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements; (2) the commodity or commodities involved; (3) the minimum volume; (4) the line-haul rate; (5) the duration; (6) service commitments; and (7) the liquidated damages for nonperformance, if any. The exclusive remedy for a breach of a contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree." 46 U.S.C. app. 1707(c). Section 10(b)(5) makes it unlawful for a common carrier to ". retaliate against any shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the

shipper has patronized another carrier, or has filed a complaint, or for any other reason." 46 U.S.C. app. 1709(b)(5). Section 10(b)(12) provides that no common carrier may ". subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 46 U.S.C. app. 1709(b)(12).

Section 8(c) of the 1984 Act requires that the essential terms of all service contracts [FN4] must be made available to all shippers similarly situated, 46 U.S.C. app. 1707(c). [FN5] CSL on three separate occasions sought access to the essential terms of service contracts entered into between Yangming and three different shipper parties. The facts relating to these access requests are as follows:

FN4. The 1984 Act defines "service contract" as ". a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level-such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party." 46 U.S.C. app. 1702(21).

FN5. Once service contracts are filed with the Commission, their essential terms are made available to the public by means of an Essential Terms Statement that is published in a carrier's Essential Terms Publication. See 46 C.F.R. 581.3(a)(2), 581.3(b), 581.5, and 581.6(a).

Grace Contract, S.C. 37

On June 27, 1985, Yangming entered into a service contract with the W.R. Grace Group Companies ("S.C. 37" or "Grace Contract"). It covered the movement of certain commodities [FN7] between Taiwan and Hong Kong, on the one hand, and U.S. East Coast and West Coast ports, on the other. The minimum volume was 500 FEUs, [FN8] and the maximum, 1,300. In addition, the shipper was limited to a maximum tender of 50 FEUs per sailing. If the shipper failed to meet the minimum volume, it was required to pay $3,000 per FEU. The contract term was July 1, 1985, to June 20, 1986.

FN7. The commodities included:lounge chairs, chairs, patio furniture, KD (knocked down) furniture, tables, electric fans, and "other commodities (FAK)," including a specific list.

FN8. Forty-foot equivalent units.

On July 11, 1985, CSL sent a telex to Yangming requesting the "same or similar contract as #37" and containing a "proposal to Yang Ming Taiwan H.Q." which listed certain rates for specific commodities. One day later, CSL formally requested that the same essential terms and conditions of S.C. 37 be made available to it. On July 15, 1985, Yangming denied CSL's access request because the Grace Contract was negotiated and filed for a direct customer only. Yangming further stated that it would not "offer/sign same with any NVOCC", but proposed a counter-offer for another arrangement.

Ford Pointer Contract, S.C. 180

On or about January 1, 1987, Yangming entered into service contract No. 180 with Ford Pointer Trading Co., Ltd. ("S.C. 180" or "Ford Pointer Contract "). This one-year contract covered cargo moving from Taiwan and Hong Kong to designated ports on the U.S. East, Gulf, and West Coasts. The commodities were divided into four groups [FN9] and the minimum commitment was 1,000 FEUs. In addition, the shipper was limited to a maximum tender of 50 FEUs per sailing, and cargo to East Coast ports had to exceed 50 percent of the minimum volume. More than 450 FEUs had to originate in Hong Kong and Group 1 commodities could not exceed 350 FEUs. The penalty for failure to meet the minimum cargo commitment was $500 per FEU short-shipped or rerating of the cargo actually shipped, whichever was lower.

FN9. Group 1-Rattan/Bambooware. Group 2-Toys, Furniture NOS, Electric Fans, Bicycles and Parts, Vinyl Sheeting. Group 3-PVC Products, Chinaware, Artificial Flowers, Kitchenware, Woodenware, X'mas Ornaments, Sporting Goods. Group 4-Department Store Goods.

On January 16, 1987, CSL formally sought access to S.C. 180. On January 23, 1987, Yangming Taipei sent a message to its U.S. agent, Solar NY, directing it to send a formal notice to CSL rejecting the request because of insufficiency of capacity. That same day, Yangming's attorney advised CSL that Yangming could not extend the service contract ". since your company is not similarly situated so as to obtain the benefits of the service contract on file with the Federal Maritime Commission." The attorney further advised that even if CSL were similarly situated, it was commercially impossible for Yangming to extend the contract due to delivery delays with its new vessels. CSL challenged this decision in a telex dated January 26, 1987, and on that same date Yangming's attorney advised CSL that the Ford Pointer Contract had been "terminated by mutual consent." Prior to denying CSL's request, Yangming Taipei requested Solar NY to consult with Yangming's attorney on whether the request could be turned down for a variety of reasons. At that

time, Yangming noted that it was an all-water carrier focusing mainly on U.S. East Coast cargo and that CSL handled cargo primarily destined to the U.S. West Coast with very little to the U.S. East Coast.

G.E. Contract, S.C. 1065

On February 16, 1988, Yangming and General Electric Corporation ("G.E. ") entered into service contract No. 1065 ("S.C. 1065" or "G.E. Contract"). The essential terms were published on February 29, 1988. The contract covered movements from designated Far East ports to ports on the U.S. East, Gulf, and West Coasts, plus designated inland points. The commodities involved were those used by G.E. in its manufacture, assembly, distribution or sale and included a list of approximately 150 commodities. The minimum volume was 500 FEUs, with a maximum tender of 70 on "Sun" type vessels and 120 on "P" type vessels. The contract period was one year, and the penalty for failure to meet the volume commitment was $500 per FEU short-shipped or rerating, whichever was lower.

On March 7, 1988, CSL formally requested access to the G.E. Contract. The next day, Yangming, through Solar NY, requested the following from CSL:
"1. Past records of service contracts with other lines. How many contracts you now have in effect with other lines and if so the amount of cargo moved up until this time.
2. Have you fulfilled past contracts and if not have you paid the deadfreight liability/penalty.
3. An updated financial statement listing company's total assets, liabilities and net worth."

CSL responded on the same date, addressing the points raised by Yangming and possibly offering to disclose additional financial information if Yangming agreed to keep it confidential. [FN10] Subsequently, on March 15, 1988, Yangming denied CSL's access request. CSL responded to this denial by rebutting several statements in it.

> FN10. It is unclear whether an offer to provide additional financial information on a confidential basis was ever sent by CSL or received by Yangming.

The Initial Decision

The I.D. [FN11] contained the following legal findings that the ALJ termed his "Ultimate Findings of Fact":

- Under 8(c) of the Shipping Act of 1984 and its legislative history, the reasons given to reject CSL's "me-too" requests [FN12] are invalid because they are not transportation factors.
- Since the respondent never raised or considered co-loading as a reason for denying any of the "me-too " requests, it cannot use co-loading as an affirmative defense. Further, the evidence of record does not establish that CSL would have had to co-load if it were required to do so.
- The termination of the Ford Pointer SC is not a valid basis for denying a "me-too" request made after the service contract was filed with the Commission but before the contract was terminated.
- In enacting 8(c) of the Shipping Act of 1984, Congress did not intend that service contracts be used to discriminate against small shippers and all who rely upon the common carriage traditions of the liner system.
- Congress did not intend that carriers could unilaterally determine whether or not a "me- too" request would be denied on the bases used by the respondent, and the respondent has not established that the complainant was not a similarly situated shipper within the meaning of 8(c) as to each of the service contracts involved.
- In denying the "me-too" requests the respondent acted arbitrarily and unreasonably and not only violated the Shipping Act, but caused measurable damage to the complainant.
- The Commission's staff did not refuse to provide guidance to CSL as to the meaning of the term "similarly situated" and where the Commission did correspond with the respondent it failed to follow Commission advice and responded falsely in answer to a Commission request.
- The preponderance of evidence warrants the payment of reparations by the respondent to the complainant of $260,731,000 (sic), plus interest, but no double damages.
- The respondent is liable for penalties of $15,000 for violations of 10(b)(5) and 10(b)(12), respectively, of the Shipping Act of 1984.

FN11. 25 S.R.R. 400 (1989).

FN12. The Presiding Officer and the parties refer to a shipper's request to access the essential terms of a service contract as a "me-too " request.

Discussion

The parties filing Exceptions and amicusbriefs have taken issue with virtually every aspect of the I.D. The major issues raised on Exceptions are what is meant by the term "shippers similarly situated" in 8(c) of the 1984 Act and whether Yangming's actions in denying CSL's three requests to access service contracts violated 8(c) or 10(b)(5) or 10(b)(12) of the Act. In addition, the parties have raised several other subsidiary or related issues. Rather than address each party's Exceptions separately, the Commission will consider them in the context of an issue-by-issue discussion.

A. Similarly Situated Shipper

The most important issue facing the Commission in this proceeding is what is meant by the term "shippers similarly situated" in the context of the access provision of 8(c) of the 1984 Act. In discussing the meaning of "similarly situated," the ALJ noted that neither the 1984 Act nor its legislative history provides any elaboration on the term. He did point out, however, certain language in a report of the House Merchant Marine and Fisheries Committee, [FN13] stating that the requirement that the essential terms of a service contract "are available to all other shippers who may wish to use them, will preserve an important element of the common carriage concept that the bill is based on," and other language in a Senate report, [FN14] indicating that service contracts are subject to the common carrier obligations of the bill.

FN13. H.R. Rep. No. 53, 98th Cong., 1st Sess., pt. 1 (1983) ("House Report").

FN14. S. Rep. No. 3, 98th Cong., 1st Sess. (1983) ("Senate Report").

The Presiding Officer found that the phrase "similarly situated shipper" has been in use for some time and has meant "where the parties involved are engaged in transporting cargo under substantially similar transportation conditions. " He concluded that Congress used the term "similarly situated" as it was understood in the industry at the time and did not intend an entirely new meaning. The phrase, the ALJ explained, is limited to transportation factors only. He stated that if other factors could be considered by carriers, the issues raised could be limitless and insoluble. He held, moreover, that under the facts before him, CSL was able to satisfy the

essential terms of the service contracts and was similarly situated within the meaning of 8(c).
The ALJ conceded that a service contract is a commercial document and a carrier has a right to "look into" a shipper's financial condition, ability to perform, past history, etc. In addition, he opined that under the right set of circumstances, the Commission might broaden his present "transportation factors " to include additional considerations, such as space problems, bonding where ability to perform is questionable, or co-loading.

* * *

Section 8(c) of the 1984 Act requires ocean common carriers that enter into service contracts to publish the essential terms of such contracts and ". those essential terms shall be available to all shippers similarly situated." 46 U.S.C. app. 1707(c) (emphasis added). The legislative history to the 1984 Act provides little in the way of guidance as to what is meant by this. The Conference Report simply notes that the Conferees adopted the Senate language concerning service contracts. H.R. Rep. No. 600, 98th Cong., 2d Sess. 38, 39 (1984) ("Conference Report"). The Senate Report states that essential terms must be published and filed in tariffs to ensure that they shall be available to all shippers similarly situated. Senate Report at 31. The Senate Report does further advise that.

> ". the disclosure reflected in each specified" "essential term" of a "service contract" must be at least the minimum necessary, when read in context with each other, to inform other shippers of rates and services available to them. " Id. at 32.

We cannot agree with the ALJ that the use of the words "shippers similarly situated" in 8(c) was to be limited to an analysis of transportation factors. Any shipper seeking to access the essential terms of a service contract will necessarily be seeking transportation under the same terms and conditions as the original contract shipper-i.e., moving the same commodities, between the same points, during the same time periods-or it would not be seeking such access. The ALJ's interpretation of "similarly situated" would effectively read those words out of the statute, something that we are unable and unwilling to do.

Courts have made it clear that federal agencies must give effect to every word of a statute so that no part will be rendered inoperative, superfluous, void, or insignificant. National Association of Recycling Industries, Inc. v. ICC, 660 F.2d 795, 799 (D.C. Cir. 1981); In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1362 (D.C. Cir. 1980). In addition, the interpretation of a statute begins with the language of the statute and courts presume that Congress intended the words to be given their plain and ordinary meaning.

National Insulation Transportation Committee v. ICC, 683 F.2d 533, 537 (D.C. Cir. 1982). In light of these directives, we believe that meaning must be given to the words "shippers similarly situated." If Congress had intended access contracts to be provided to any shipper that desired one, there would have been no need to use the words "similarly situated." We conclude, therefore, that the words "shippers similarly situated" must be interpreted to mean more than simply a shipper who desires to access a service contract.

In Docket No. 84-21, the Commission stated that it would not attempt to define what constitutes a similarly situated shipper because it was a matter more appropriately resolved on a case-by-case basis. Docket No. 84-21, Service Contracts, 22 S.R.R. 1424, 1435 (1984). And we later noted that ". concepts like "similarly situated' are perhaps best left to resolution on an ad hoc basis, especially given the infinite variety of terms in a service contract. " Docket No. 86-6,Service Contracts, 24 S.R.R. 277, 283 (1987). More recently, we stated:

> "(p)resumably, requests for "me-too' contracts are not automatically granted by carriers or conferences and are scrutinized to ensure that the shipper can meet all the terms of the contract." Docket No. 88-16,Service Contracts, Order Denying Petition, 25 S.R.R. 398, 400 (1989) (emphasis added).

Thus, the Commission has long recognized that some carrier analysis of access requests is necessary to determine whether an accessing shipper can meet the essential terms of a service contract.

The Commission did employ the term "similarly situated shipper" in cases under the 1916 Act. However, it was used there to describe the type of relationship that must exist before a finding of unjust discrimination or unjust preference, prejudice or disadvantage could be made. Thus, in Agreement 8765 Between U.S. Flag Carriers in the Gulf/Mediterranean Trade, 7 F.M.C. 495, 500 (1963), the Commission noted that:

> "(t)here can be no unjust discrimination against a shipper under the Shipping Act unless another similarly situated shipper with whom the complaining shipper competes is preferred."

See also Incheon Arbitrary United States Import/Export Trades, 21 F.M.C. 522, 524 (1978); and North Atlantic Mediterranean Freight Conference, 11 F.M.C. 202, 213 (1967), where it was held that:

> "To constitute unjust discrimination, there must be two shippers of like traffic over the same line between the same points under the same circumstances and conditions but who are paying different rates."

These references to "similarly situated shipper" have no relevance here, however, for, as indicated earlier, an accessing shipper will always be moving like traffic over the same line between the same points and under the same circumstances and conditions.

The most relevant 1916 Act case dealing with a carrier's obligations to offer contract space to shippers of the same commodity is Banana Distributors, Inc. v. Grace Line, Inc., 1959 AMC 1446 , 5 F.M.B. 615 (1959). The Commission's predecessor there held that Grace Line was a common carrier and as such had a duty to serve similarly situated shippers alike. Id., 1959 AMC at 1454- 55 , 5 F.M.B. at 622. However, in setting out Grace's responsibilities, the Federal Maritime Board ". recognized the danger of any requirement that the carrier be required to enter into the prescribed forward booking contracts indiscriminately, and put appropriate safeguards in the Order." Schwartz v. Grace Line, Inc., 12 F.M.C. 254, 295 (1969).

Most significantly, one of the safeguards was a provision allowing the carrier offering contract space to inquire into boththe financialand commercial competence of applicants. Id. These provisions were not intended to protect the carrier alone, but also to assure that space needed to fulfill the genuine demand of the trade not be diverted to incompetent, irresponsible, or otherwise unqualified shippers. Id., at 295-96.

Our determination that an access shipper must establish its ability to meet the contract terms should achieve similar results. In this regard, moreover, we note that, when an ocean common carrier enters into an original service contract, it has had the opportunity to examine whether the shipper seeking the contract can meet its terms. It appears to us incongruous to suggest that a carrier cannot conduct the same examination of a shipper seeking to access the contract, especially someone whom the carrier has not sought out, but who rather has been statutorily imposed upon it.

We conclude, therefore, that in the context of an access request to a service contract, the words "similarly situated shipper" mean a shipper willing and able to meet all the essential terms of a particular contract. This is consistent with the criterion that has been applied in other regulated markets requiring a carrier offering certain rates to make them available to any shipper willing and able to meet the terms of a specific contract. See Change of Policy, Railroad Contract Rates, [FN15] 361 I.C.C. 205 (1979); and Sea-Land Service, Inc. v. ICC, 738 F.2d 1311 (D.C. Cir. 1984). For our purposes, Congress has

indicated certain terms it considers essential and has required that those essential terms must be made available to all shippers similarly situated. A shipper is similarly situated if it is not only willing but also able to meet those essential terms.

FN15. In Change of Policy , the ICC emphasized that the key factor in determining whether contract rates must be offered to any particular shipper is the presence of substantially similar circumstances and conditions. The Commission concluded that, as with other aspects of contract ratemaking, the existence of these circumstances and conditions can best be determined on a case-by-case basis.

We cannot agree, however, with the suggestion of Hearing Counsel that there must be proof of a competitive relationship between the original contract shipper and an accessing shipper. Hearing Counsel's position relies on Philadelphia Ocean Traffic Bureau v. Export Steamship Corp., 1 U.S.S.B. 538, 541 (1936), which stands for the proposition that when a shipper alleges unlawful rate discrimination under the 1916 Act, there must be a "competitive relation between the prejudiced and preferred shipper." We do not believe that this principle is applicable to service contracts under the 1984 Act. The original contract shipper and an accessing shipper will always be moving the same commodities between the same points and under the same terms and conditions. Under the circumstances, a competitive relationship between these two shippers is, therefore, unnecessary. This finding is consistent with Congress's making the identity of the contract shipper confidential, as a matter of law. The original service contract is "filed confidentially with the Commission" and the concise statement of its essential terms does notinclude the identity of the contract shipper. See 46 U.S.C. app. 1707(c). An accessing shipper could never, therefore, establish a competitive relationship between itself and the contract shipper.

Nor do we believe that an NVOCC should be precluded from attempting to access a service contract originally entered into with a proprietary interest shipper. We realize that those advancing the contrary position do so, not on the ground that an NVOCC is not the beneficial owner of the cargo it proposes to ship, but rather because NVOCCs allegedly do not have possession, control or likely access to cargo sufficient to meet a service contract's volume requirement. Nonetheless, NVOCCs have been defined specifically by 3(17) of the 1984 Act as:

> ". a common carrier that does not operate the vessels by which the ocean transportation is provided,and is a shipper in its relationship with an ocean

> common carrier." 46 U.S.C. app. 1702(17) (emphasis added).

The Senate Committee on Commerce, Science, and Transportation confirmed the NVOCC's special status:

> "The shipper status of an NVO, in its relationship with the vessel operator, is intended to accord to NVOs the same protection as is accorded other shippers, such as the prohibition against unjust discrimination." Senate Report at 20 (emphasis added).

In light of this clear statutory language and legislative history, there exists no basis to distinguish between NVOCCs and other shippers for purposes of 8(c)'s access provision on the basis of cargo ownership. However, like any other accessing shipper, an NVOCC would have to establish its ability to fulfill the essential terms of a particular service contract.

B. Burden of Proof

Based on his finding that CSL was able to satisfy the essential terms of all three contracts, the ALJ concluded that it was unnecessary to determine who has the burden of proof initially. He nonetheless found that the 1984 Act and Commission regulations seem to indicate that a shipper does not have to satisfy the carrier, or the Commission, that it is similarly situated. He concluded instead that a carrier must show why the accessing shipper is not similarly situated in denying its request. Lastly, because the identity of the contract shipper is confidential, the Presiding Officer explained that it would place an unfair and impossible burden on an accessing shipper to prove it was similarly situated.

As an initial matter, we note that there are actually two burdens at issue in this proceeding. The first concerns what information, if any, must be presented to the carrier by a shipper seeking access to a service contract for the purposes of 8(c) of the 1984 Act-and can be characterized as the shipper's burden of persuasion. The second concerns who has the burden of establishing a violation of 8(c), if a carrier denies an access request and a complaint is filed with the Commission.

As for the latter situation, we agree with Hearing Counsel that the party seeking affirmative relief from the Commission has the initial burden of establishing a violation of the Act. This is consistent with Commission regulation, 46 C.F.R. 502.155, and prior statements of the Commission that in a complaint proceeding, the ultimate burden of proof or persuasion remains fixed throughout the litigation on the complainant. See e.g.,Boston Shipping

Association, Inc. v. FMC, 1984 AMC 1351 , 1364 , 706 F.2d 1231, 1239 (1 Cir. 1983); West Gulf Maritime Association v. Port of Houston Authority, 21 F.M.C. 244, 247 (1978), aff'd mem., 610 F.2d 1001 (D.C. Cir. 1979), cert. denied, 449 U.S. 822 (1980); Port of Houston Authority v. Lykes Bros. Steamship Co., Inc., 19 F.M.C. 192, 200 (1976). Thus, in a complaint proceeding like this one, the burden should be on the shipper claiming it was unlawfully denied access to a service contract to prove that it was indeed a similarly situated shipper.

As for the question of who has the burden of establishing that a shipper seeking access to a service contract is or is not similarly situated, the Commission's rules advise only that a request to access a service contract must be submitted to a carrier or conference in writing (46 C.F.R. 581.6(b)(2)), and that carriers must respond to the request with either a contract offer or ". an explanation in writing why the applicant is not entitled to such a contract." Id. 581.6(b)(3). Beyond that, carriers are free to require advance information from a shipper to establish its status as similarly situated. A shipper seeking to access a service contract is the party with the most relevant and reliable information as to its ability to meet the essential terms of the contract and carries the burden of proof.

Carriers could establish rules of general applicability in their Essential Terms Publications, informing all prospective access shippers of the information they must provide to establish that they are similarly situated. This would be consistent with our permitting carriers to require advance information from entities claiming to be lawfully operating as shippers' associations under the 1984 Act. In the Matter of Petitions for Rulemaking Concerning Shippers' Associations, 22 S.R.R. 1624, 1627 (1985). Carriers could also address access requests on an ad hocbasis and require relevant information only when they entertain doubts about an accessing shipper's abilities. If carriers choose this latter course, they must exercise their discretion in a non-discriminatory manner.

C. Alleged Violations of the 1984 Act

1. Section 8(c)

Having determined that a shipper seeking to access a service contract pursuant to 8(c) of the 1984 Act must establish that it is not only willing but also able to meet the essential terms of the contract, our next task is to determine whether CSL met its burden of proof on this issue for each of the three subject contracts. The ALJ simply held, without record citations, that under the facts of the case, CSL was able to satisfy the essential terms of the service contracts. [FN16] Our review of the record leads us to a contrary conclusion. We do not believe that CSL adequately established that it could

move the particular commodities from the specified points and in the required amounts for each contract.

FN16. Exceptions were also filed by the Commission's Bureau of Hearing Counsel ("Hearing Counsel"). In addition, the following submitted amicus curiae briefs:the International Association of NVOCCs ("IAN"), the American Institute for Shippers' Associations, Inc. ("AISA"), the American Import Shippers Association, Inc. ("Import S.A."), and two conferences serving the U.S./Japan trades-the Transpacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference ("Japan Conferences"). The Commission heard oral argument on the Exceptions.

Without barring other possible alternatives, the easiest way for CSL to have shown that it could have met the essential terms of the contracts was to move the requisite amount of cargo via other means-tariff rates or service contracts with other carriers. However, if CSL could have established that it could only move the cargo covered by the service contracts at the rate denied to it, it could nonetheless meet its burden of proof if it established that it indeed had that cargo available to move. In this particular case CSL failed to establish that it could satisfy the essential terms of the three service contracts under either method.

The primary evidence that CSL could have fulfilled the requirements of the three service contracts is the testimony of its president, Mr. Wylie Walker, and Exhibit FFF, Volume I. This document is 100 percent the work of Mr. Walker and is based on his estimates of the amount and types of cargo he could have generated if he were given access to the subject contracts. Certain information in Exhibit FFF is based on CSL's "sense of the market." In fact, CSL's expert witness testified that he requested from Mr. Walker:

> "His recollection of what was taking place in the trade, his sense of timing, his understanding of what shippers were paying and willing to pay, his notion of how large a margin he could extract or how competitive he would want to be."

He further noted that much of CSL's information was "subjective" in nature.

Mr. Walker's estimate as to cargo CSL would have carried if not denied the instant contracts is further clouded by the fact that CSL permitted, if not relied upon, certain foreign NVOCCs to move their cargo under CSL's contracts. Although Mr. Walker contended that he would not have had to "co-load" to fulfill the minimums on the Ford Pointer and G.E. Contracts, the record reveals that he contacted certain of his "agents" before submitting an access request on the Ford Pointer Contract and that Turbo, one of his

"agents," would have "co-loaded" under the G.E. Contract. In fact, foreign NVOCCs would have been able to use all three contracts, if CSL had obtained them. Id. There is no indication as to what proportion of CSL's cargo estimates are its own and what are those of its "agents". However, Mr. Walker did indicate that a "good portion" of cargo moving to the East Coast would have been that of his "agents. " [FN17]

FN17. Exceptions were also filed by the Commission's Bureau of Hearing Counsel ("Hearing Counsel"). In addition, the following submitted amicus curiae briefs:the International Association of NVOCCs ("IAN"), the American Institute for Shippers' Associations, Inc. ("AISA"), the American Import Shippers Association, Inc. ("Import S.A."), and two conferences serving the U.S./Japan trades-the Transpacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference ("Japan Conferences"). The Commission heard oral argument on the Exceptions.

CSL did provide lists of potential customers. However, these lists were generated by CSL's salesmen and included many customers that were not strictly CSL's, but those of its "agents". Moreover, these were lists of customers on which they could show only a limited potential, as opposed to a probable, commitment to ship a certain amount of cargo through CSL. CSL offered only two shipper witnesses. One moved ten to twenty percent of its shipments through CSL and would have increased its shipments if offered a lower price. However, this shipper had no loyalty to CSL and used six other NVOCCs in 1987. The other shipper used CSL exclusively and stated that, if freight rates were substantially lower, it would increase its shipments. However, that shipper indicated that it would consider shipping with another NVOCC with rates only $100 a container less. There is no convincing evidence, therefore, that CSL had a sufficient customer base to satisfy the particular volumes required by each contract.

CSL's claim that it could have fulfilled the Grace Contract is particularly tenuous. One week prior to seeking access to the Grace Contract, CSL entered into a service contract with EAC Lines Transpacific Service ("EAC"). Every commodity contained in the EAC contract was included in the Grace Contract, as were the origin and destination ports. CSL failed to meet its minimum volume commitment under the EAC contract, as well as under four other service contracts during that same approximate time period. While the Grace Contract contained a "most-favored-shipper" clause that might have offered CSL some relief in a down market, the fact remains that CSL had an extremely difficult time fulfilling its existing contracts. Under the circumstances, it is unlikely that it could have met the significant additional volume requirement of the Grace Contract.

There is some evidence that CSL was an active NVOCC during periods covered by some of the contracts. Journal of Commerce data shows that for an eighteen-month period beginning August 1988, CSL moved a total of 3,553 container units. In addition, for 1986, 1987, and 1988, CSL moved an average of 3,000 containers a year. Moreover, CSL did obtain information from the Bureau of Census indicating that the various commodities included in the Ford Pointer Contract were moving from Hong Kong and Taiwan to the U.S. However, this evidence is insufficient to substantiate Mr. Walker's otherwise unsupported assertions that he could have moved the cargoes required by the contracts and fulfilled them without the need to aggregate the cargo of other NVOCC shippers.

In light of the above discussion, we conclude that CSL has not established that it could have fulfilled the essential terms of each of the three service contracts to which it sought access and as a result we do not find a violation of 8(c) of the 1984 Act. [FN18]

FN18. Exceptions were also filed by the Commission's Bureau of Hearing Counsel ("Hearing Counsel"). In addition, the following submitted amicus curiae briefs:the International Association of NVOCCs ("IAN"), the American Institute for Shippers' Associations, Inc. ("AISA"), the American Import Shippers Association, Inc. ("Import S.A."), and two conferences serving the U.S./Japan trades-the Transpacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference ("Japan Conferences"). The Commission heard oral argument on the Exceptions.

2. Section 10

The Presiding Officer rejected an argument raised by the Japan Conferences that the anti-discrimination provisions of 10(b) do not apply at all to service contracts. He noted that Congress specifically exempted service contracts only from 10(b)(6) and 10(b)(11), and not from the provisions at issue-10(b)(5) and 10(b)(12). The ALJ, moreover, questioned how Congress could have intended to exempt service contracts from allof 10(b) when it called on the Commission to be aware of service contract abuses, citing the House Report at 182.

The Japan Conferences except to these findings, continuing to argue that none of the anti-discrimination provisions of the 1984 Act should be made applicable to shipments carried under service contracts. The Conferences contend that exempting service contracts from 10(b)(6) and 10(b)(11), but not from 10(b)(10) and 10(b)(12) is inherently inconsistent; on the one hand, legalizing an undue preference, but on the other seemingly outlawing the resulting undue prejudice or disadvantage. The Conferences submit,

therefore, that these provisions should be read as a whole, and in light of Congress's overall intention to free service contracting from all forms of unlawful discrimination and preference.

In support of their position, the Conferences rely in part on the House Report. They contend that the Merchant Marine and Fisheries Committee understood that, by explicitly authorizing service contracting, it was insulating service contracts from the anti-discrimination provisions of the bill, including both unreasonable preference or advantage and unreasonable prejudice or disadvantage. The Japan Conferences further point out that, in conference, what was previously 10(b)(10) was separated into what became 10(b)(11) and (12) of the 1984 Act, and that service contract exceptions were only included in subparagraphs 10(b)(6) and (10). They maintain that the only purpose for including these exceptions was that otherwise the rate differentials arising from the very nature of service contracts might be attacked on their face. The Conferences submit that their construction results in a harmonious reading of 10(b). Applying 10(b)(10) and (12) to service contracts would allegedly seriously curtail or eliminate the use of service contracts by carriers and conferences.

IAN takes issue with the Conferences' interpretation of the anti-discrimination provisions of 10(b) of the 1984 Act. It is allegedly not inherently inconsistent to except service contracts from 10(b)(6) and 10(b)(11) but not from 10(b)(10) and 10(b)(12). IAN states that Congress must be presumed to have acted intentionally in this regard, and further, that these provisions can be read in such a way as to make them consistent. The distinction IAN draws is between what carriers may do with service contracts once they are in effect and what they may do when entering into them and dealing with access requests.
The Conference Report explains that the prohibited acts contained in the House version were adopted by the conferees, with certain modifications. Conference Report at 40. It then states:

> "Because service contracts will selectively favor some shippers, several of the proscribed acts (10(b)(6) and (11)) were amended to assure that service contracts may discriminate as to rates and cargo classifications, and provide distinct advantages or preferences that might otherwise be in violation of the Act. Such differentials are the very nature of contract service."

Congress thus specifically exempted service contracts from only some of the prohibited acts-i.e., 10(b)(6) and (11). If Congress had intended to exempt service contracts from other prohibited acts, specifically, 10(b)(10) and (12), it could have done so at that time. We are constrained by these actions and

must, therefore, conclude that service contracts are only exempt from 10(b)(6) and (11) and not the other anti-discrimination provisions in 10(b). This conclusion comports with the express language of 10. The Commission has alerted Congress to this situation in its 18 Report. Pending any Congressional clarification on this matter, the Commission's action must be governed by the existing, unambiguous language of the statute.

We turn to the issue of whether Yangming's conduct violated either 10(b)(12) or 10(b)(5), as found by the ALJ. Section 10(b)(5) will be addressed first.
Section 10(b)(5) of the 1984 Act provides that no common carrier, directly or indirectly, may-

> "retaliate against any shipper by refusing, or threatening to refuse, cargo space accommodations when available,or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint or for any other reason." 46 U.S.C. app. 1709(b)(5) (emphasis added).

The Presiding Officer found that Yangming had violated the above provision, not because of the two instances of retaliation alleged by CSL, but because of Yangming's discriminatory conduct concerning CSL's requests to access the three contracts. He rejected an argument that 10(b)(5) applies only to "retaliation " and that the above underlined language is subject to the rule of "ejusdem generis." [FN19]

FN19. Ejusdem generis is a canon of statutory construction where general words following the enumeration of particular classes of things are construed as applying only to things of the same class as those enumerated. Black's Law Dictionary 464 (5th ed. 1979).

Yangming excepts to this conclusion, contending that 10(b)(5), taken as a whole, prohibits discrimination only in terms of retaliation, and not discrimination in general. Yangming notes that the language of 10(b)(5) is the same as 14 Third of the 1916 Act. It contends that the "resort to" clause has been limited to the generic types of retaliatory conduct described therein, citing FMB v. Isbrandtsen Co., 356 U.S. 481, 1958 AMC 1196 (1958). Yangming argues that the Presiding Officer's interpretation of 10(b)(5) (permitting a violation to be found for discriminatory conduct) would render 10(b)(1), (6), (11) and (12) of the 1984 Act mere surplusage. The Japan Conferences agree with Yangming that 10(b)(5) requires a finding of actual retaliation.

CSL disagrees. It argues that 10(b)(5) is intended to prohibit carriers from engaging in two separate but related types of conduct, i.e., a carrier may not (1) "retaliate" or (2) "resort to other unfair. methods." CSL thus argues that a carrier can violate 10(b)(5) without retaliating against anybody. Any "unfair or unjustly discriminatory" carrier practice that stifles outside competition allegedly violates 10(b)(5).

The importance of 10(b)(5) of the 1984 Act to this proceeding is that it is one of the prohibited acts for which 11(g) of the Act permits the Commission to direct the payment of additional amounts, not to exceed twice the amount of a complainant's actual injury. See 46 U.S.C. app. 1710(g). The wording of 10(b)(5) is virtually the same as that of 14 Third of the 1916 Act. See 46 U.S.C. app. 812 Third. There is no explanation as to the intent of 10(b)(5) in the legislative history to the 1984 Act. The Senate Report merely observes that it ". derives from 14, Third of the 1916 Act." It is appropriate, therefore, to rely upon prior interpretations of 14 Third in order to ascertain the reach of 10(b)(5).

In Isbrandtsen Company v. United States, 1957 AMC 813 , 239 F.2d 933 (D.C. Cir. 1956), the Court of Appeals considered the legality of a dual rate system under 14 Third of the 1916 Act. The Court there noted that, where conduct is retaliatory and constitutes discrimination, it is unlawful under 14 Third and that absent retaliation, preference or discrimination it is unlawful only if undue, unreasonable, unfair or unjust. Id. 1957 AMC at 818 , 239 F.2d at 937. In affirming the Court of Appeals, the Supreme Court explained that 14 Third prohibits:

> ". another practice common in 1913:to "(r)etaliate against any shipper by refusing. space accommodations when such are available.'; that prohibition, moreover, is enlarged to condemn retaliation not only when taken "because such shipper has patronized any other carrier' but also when taken because the shipper "has filed a complaint charging unfair treatment,or for any other reason.' " FMB v. Isbrandtsen Co., 356 U.S. at 491, 1958 AMC at 1204 (emphasis added).

The Court noted that Congress was aware of other devices that might achieve the same results as the specified prohibitions and that the "resort to" clause was added ". as a catchall clause. to prohibit other devices not specifically enumerated but similar in purpose and effect to those barred by 14, First, Second, and the"retaliate' clause of 14 Third." Id., 356 U.S. at 492, 1958 AMC at 1204-05. The Supreme Court held that the practices outlawed by the "resort to" clause of 14 Third ". take their gloss from the abuses specifically

proscribed by the section; that is, they are confined to practices designed to stifle outside competition." Id. 356 U.S. at 495, 1958 AMC at 1207.

In North River Insurance Co. v. Federal Commerce & Navigation Co. Ltd., Motion to Dismiss Granted in Part, 1983 AMC 2500 , 20 S.R.R. 1078 (1981) (administratively final, June 4, 1981), the complainant argued that 14 Third covered both retaliation and resorting and resorting to "other discriminatory or unfair methods" when retaliation as such is not involved. The administrative law judge rejected that argument and, relying on FMB v. Isbrandtsen, interpreted the "resort to" clause as "prohibiting retaliatory devicesemployed by carriers against shippers who had or sought to use the services of competitive carriers." 1983 AMC at 2505 , 20 S.R.R. at 1082 (emphasis added).

The courts' and the Commission's interpretations of 14 Third of the 1916 Act are also consistent with the Merchant Marine and Fisheries Committee's views of the prohibited acts. The Committee has indicated that the "(c)onduct of a common carrier or conference for which sanctions may be imposed includes. taking various listed retaliatoryactions." House Report at 35 (emphasis added). The reference to "various listed retaliatory actions" includes 10(b)(5).

If 10(b)(5) were applied to any act of discriminatory conduct, as was done by the ALJ, it could render other provisions of the Act prohibiting discrimination superfluous. It should also be noted that the other prohibited acts for which excess damages can be awarded constitute the most egregious forms of carrier or conference conduct:fighting ships (10(b)(7)), boycotts or unreasonable refusals to deal (10(c)(1)) and predatory practices against nonconference competition (10(c)(2)). Making the conduct prohibited by 10(b)(5) also subject to double damages under 11(g) would appear to reflect a Congressional understanding that it applies to more than traditional discriminatory conduct and requires proof of a more serious retaliatory motive or intent.

We conclude, therefore, that 10(b)(5) of the 1984 Act applies solely to retaliatory acts of a carrier against a shipper who has sought the services of another carrier, including retaliatory practices designed to stifle outside competition.

CSL has excepted to the Presiding Officer's failure to find that Yangming unlawfully retaliated against it in violation of 10(b)(5). It asserts that unrebutted evidence demonstrates that Yangming retaliated against it on two occasions. The first is said to be when Yangming withdrew favorable tariff rates after CSL filed its request to access the Grace Contract. The second allegedly relates to Yangming's denials of CSL's requests to access the Ford

Pointer and G.E. Contracts because CSL had filed a complaint against another carrier, Korea Shipping Line.

Yangming agrees with the ALJ's conclusion that CSL's allegations of unlawful retaliation lacked merit, but nonetheless rebutted several of CSL's allegations on this issue.

We find that the two alleged instances of retaliatory conduct are not sufficient to base a finding of retaliation under 10(b)(5). Although 10(b)(5) does prohibit retaliation against a shipper because the shipper has filed a complaint, we believe that this provision is limited to situations where the shipper has filed a complaint against the carrier who is allegedly retaliating against it. This is not the case in the instant situation.

The other alleged instance of retaliation is based solely on the testimony of CSL's president. He claimed that because of CSL's request to access the Grace Contract, Yangming subsequently cancelled a "special rate" which had been negotiated by another NVOCC, Turbo. CSL's only relation to this rate is as Turbo's "routing agent" within the United States. There is no identification of this particular tariff rate, nor any further description of Yangming's actions concerning it. The only nexus between the access request and the cancellation of the rate comes from Mr. Walker. This is an inadequate basis upon which to find a violation of 10(b)(5), even assuming that it could somehow be interpreted as a retaliatory act against CSL.

We will now evaluate Yangming's actions under 10(b)(12), which embodies two separate prohibitions-(1) engaging in an unreasonable refusal to deal and (2) subjecting someone to an undue or unreasonable prejudice or disadvantage. The latter prohibition is derived from 16 First of the 1916 Act. See 46 U.S.C. app. 815 First. The former has no analog in the 1916 Act and was added without explanation to the 1984 Act.

As an initial matter, it is questionable whether the latter prohibition in 10(b)(12) applies at all to the instant case. One of the essential elements of a 10(b)(12) violation has generally been the presence of a competitive relationship between two or more shippers. [FN20] As the Commission has previously noted, the prohibition against undue or unreasonable prejudice or disadvantage was ". designed to deal with two or more competing shippers or localities receiving different treatment which is not justified by differences in competitive or transportation conditions." North Atlantic Mediterranean Freight Conference-Rates on Household Goods, 1968 AMC 2407 , 2415 , 11 F.M.C. 202, 209 (1967). The Commission further explained that "(s)ince the section is intended to prevent unlawful favoritism among competitors in the same marketplace, the allegedly preferred shipper must ordinarily be in competition with the allegedly prejudiced shipper." Id. at 210. See also 3M Co. v. Inter-American Freight Conference, D, 24 S.R.R. 728

(1987). There have been no allegations or proof that CSL was in any way a competitor of the three contract parties-W.R. Grace, Ford Pointer, or G.E. Nor did the Presiding Officer find such a relationship in the context of finding 10(b)(12) violations. Even if the latter prohibition did not require a competitive relationship or Yangming's conduct otherwise fit into one of the exceptions to the general rule, we do not find that Yangming subjected CSL to an undueor unreasonableprejudice or disadvantage, under the facts of this case. As we have indicated elsewhere in this decision, Yangming's actions vis-a-vis CSL's three access requests were not undue or unreasonable, but rather based on legitimate concerns about CSL's ability to fulfill the essential terms of each contract. We must conclude, therefore, that Yangming did not subject CSL to undue or unreasonable prejudice or disadvantage under 10(b)(12) and will

FN20. Exceptions were also filed by the Commission's Bureau of Hearing Counsel ("Hearing Counsel"). In addition, the following submitted amicus curiae briefs:the International Association of NVOCCs ("IAN"), the American Institute for Shippers' Associations, Inc. ("AISA"), the American Import Shippers Association, Inc. ("Import S.A."), and two conferences serving the U.S./Japan trades-the Transpacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference ("Japan Conferences"). The Commission heard oral argument on the Exceptions.

now review Yangming's actions only under the "unreasonable refusal to deal " provision of that section.

As for the Grace Contract, CSL sought access to it on July 12, 1985. On July 15, Yangming denied the request on the ground that the service contract was filed for "direct customers only." Yangming further stated by telex ". WE WONT OFFER/SIGN SAME WITH ANY NVOCC (INCL UR ESTEEMED COMPANY) FOR THE TIME BEING. " The Presiding Officer found that, prior to denying CSL's request, Yangming did not obtain a Dun & Bradstreet ("D&B") report on CSL, never asked CSL for any financial data, never asked whether CSL could satisfy the contract's minimum requirements, and never inquired as to CSL's co-loading practices. He concluded that CSL was denied the Grace Contract solely because it was an NVOCC. The ALJ rejected respondent's arguments that Yangming's telex did not mean what it said. He determined that respondent's actions after the denial demonstrate its bad faith. In this regard, the I.D. states that Yangming disregarded FMC staff advice, subsequently informed CSL by letter that the reason for rejection was equipment and space problems, and failed to follow its agent's advice. The Presiding Officer concluded that the denial of access to the essential terms of the Grace Contract was "blatant and unjust discrimination" in violation of 10(b)(5) and 10(b)(12) of the 1984 Act.

CSL sought access to the Ford Pointer Contract on January 16, 1987. On January 23, counsel for Yangming denied CSL's request because it was not similarly situated and because of an alleged lack of space. The Presiding Officer found that at the time of the denial Yangming had not considered D&B reports on either CSL or Ford Pointer. He concluded that, because the Ford Pointer D&B report was not available until February 25, 1987, there was no valid basis to determine that CSL was not similarly situated to Ford Pointer. The ALJ further determined that, although CSL had preliminarily met with Yangming in an attempt to negotiate a contract similar to the Ford Pointer Contract, at the time of CSL's access request, Solar LA, one of Yangming's U.S. agents, was already working to deny it. The I.D. explains that Yangming's rejection of CSL came after Solar NY indicated a need for D&B reports and after Solar LA reported that CSL's business had developed over the past two years. The Presiding Officer found that, prior to denying CSL's request, Yangming had not received a D&B report on CSL, had not asked CSL to provide any financial data, did not inquire as to whether CSL could satisfy the minimum volume requirement of the contract and never sought any information concerning CSL's co-loading practices.

The Presiding Officer noted that, in responding to Yangming's denial, CSL stated that Yangming was continuing to sign/accept service contracts in excess of the volume CSL sought, and offered to negotiate a contract based on a lower volume commitment. The ALJ found that after denying CSL's request, Yangming wanted Solar NY to determine from counsel the ramifications of giving space to other shippers. Lastly, the Presiding Officer pointed out that Yangming did not obtain a D&B on Ford Pointer until thirty-one days after denying CSL's request.

The Presiding Officer concluded that Yangming's denial of CSL's access request to the Ford Pointer Contract violated 10(b)(5) and 10(b)(12) of the 1984 Act. He found the not similarly situated basis to be inappropriate because there were no D&B reports on either CSL or Ford Pointer and because Yangming ignored Solar's advice that CSL's business had improved. He further found that denial on a lack of space basis was inappropriate because it was not a valid transportation factor justifying the unequal treatment of shippers.

CSL attempted to access the G.E. Contract on March 7, 1988. On March 8, Solar NY requested certain information from CSL, to which request CSL responded. On March 15, 1988, Yangming denied CSL's request on the grounds that: (1) unlike G.E., CSL was not a multi-billion dollar company that both manufactured and imported goods; (2) CSL's assets were not sufficient to cover the liquidated damages specified in the contract; (3) CSL had outstanding loans in the five figure range; (4) CSL admitted that it had previously entered into some service contracts for which it had failed to meet

the minimum volume requirements and was in litigation over these contracts; and (5) CSL appeared to be lumping its freight forwarder income with its NVOCC income.

Although the Presiding Officer found that Yangming's handling of CSL's request for the G.E. Contract was not as "overtly discriminatory" as the other requests, he nonetheless concluded that at the time Yangming received the request, it intended to reject it. He determined that Yangming failed to consider CSL's growth and relied upon "clearly questionable" statistics from the Journal of Commerce. He also determined that Yangming failed to follow up on its request for information, even though CSL expressed a willingness to provide more information. Further, Yangming's concerns about CSL's ability to pay deadfreight were held to be "shallow" in light of the fact that Solar NY was instructed by Yangming not to offer CSL a bonding option. The Presiding Officer, therefore, concluded that the denial of CSL's request to access the G.E. Contract violated 10(b)(5) and 10(b)(12) of the 1984 Act. As the above discussion indicates, the ALJ found that Yangming violated 10(b)(12), not because it engaged in an unreasonable refusal to deal, but rather because Yangming's actions constituted "blatant and unjust discrimination." We have already determined that Yangming's conduct did not violate the anti-discrimination provision in 10(b)(12). Nor, after thoroughly reviewing the record, do we find that Yangming's actions in denying the three access requests rise to the level of a refusal to deal, let alone an unreasonable refusal to deal.

* * *

D. Other Issues

Because we have found no violations of the 1984 Act, several of the other issues raised on Exceptions become moot, and the Commission need not address them. However, in view of the precedential nature of this proceeding and the importance of these issues to the regulated industry generally, we believe their resolution might provide useful guidance for the future.

1. Damages

The Presiding Officer found that no damages resulted from Yangming's denial of the Grace Contract. He noted that the damages were based on what return CSL thought it could get using tariff rates, because the contract contained a most-favored-shipper clause guaranteeing access to tariff rates in a "down market. " This was deemed to be too remote and inconclusive to establish compensable injury. [FN21]

FN21. Exceptions were also filed by the Commission's Bureau of Hearing Counsel ("Hearing Counsel"). In addition, the following submitted

amicus curiae briefs:the International Association of NVOCCs ("IAN"), the American Institute for Shippers' Associations, Inc. ("AISA"), the American Import Shippers Association, Inc. ("Import S.A."), and two conferences serving the U.S./Japan trades-the Transpacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference ("Japan Conferences"). The Commission heard oral argument on the Exceptions.

As for the Ford Pointer and G.E. Contracts, the Presiding Officer first addressed various arguments raised by respondent and rebutted each. He did not agree that complainant's damage calculations were too speculative, even though CSL could not identify and list specific customers who would use each contract and relied upon estimated profit margins. Both the estimates were determined to be supported by logical and legally sufficient inferences from the record. The ALJ further found that CSL's measure of damages was acceptable because it was based on the difference between CSL's selling price and its purchase price, less expenses. He also found extensive corroboration of lost profits.

The Presiding Officer found nothing inherently objectionable with CSL preparing its own damage summaries. He stated that although a party claiming damages need not use an expert, CSL's expert, Dr. Nadel, corroborated what CSL did. Yangming was found to have done nothing to rebut CSL's evidence on damages. Lastly, the Presiding Officer concluded that CSL's damages were proximately caused by Yangming's denial.

On the basis of these findings, the Presiding Officer concluded that CSL was entitled to reparations of $260,731, plus interest. This included $210,856 for the Ford Pointer Contract and $49,875 for the G.E. Contract. It is based on low volume carriage under CSL's "Market Evaluation" method.

* * *

Section 11(g) of the 1984 Act requires the Commission to ". direct payment of reparations to the complainant for actual injury. caused by a violation of this Act." [FN22] There are certain general principles pertaining to damage awards that are relevant to an award of reparation. The term "actual damages, " at common law, means those recoverable from a wrongdoer as compensation for the actual loss or injuries sustained by reason of the wrongdoing. It includes all damages sustained, except punitive or exemplary damages. 22 Am. Jur. 2d Damages 24 at 50 (1988). Actual damages may not be presumed, however, but must be proved by the party seeking them. To warrant recovery, the actual detriment must be shown by competent evidence and with reasonable certainty. Id. 904 at 926. The Supreme Court has indicated that the loss of expected profits resulting from an unjust and illegal denial of shipping space is real and compensable under the 1916 Act.

Consolo v. FMC, 383 U.S. 607, 626, 1966 AMC 831 , 845 (1966). In addition, in situations where a wrongdoer has by its own action prevented the precise computation of damages, the Court has stated that the wrongdoer must bear the risk of the uncertainty and that damages can be shown by just and reasonable estimates based on relevant data. Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65 (1945). However, courts have also held that damages can be awarded only if the evidence provides a sufficient

FN22. This provision is similar to its predecessor, 22 of the Shipping Act, 1916, 46 U.S.C. app. 821, except that the latter gives the Commission discretion to award ". full reparation to the complainant for the injury caused by such violation." There is little in the way of explanation as to why Congress chose the words "actual injury," although the Conference Report does indicate that 11(g) serves to "limit damages to the amount of actual injury." Conference Report at 41.

basis for estimating them with a reasonable degree of certainty. See, e.g., Vigano v. Wylain, Inc., 633 F.2d 522, 528 (8 Cir. 1980).

The Commission's predecessors have had occasion to address proof of damages for failure to make vessel space available to shippers. In one of the earliest published decisions, the Shipping Board found that an exclusive patronage arrangement violated the 1916 Act. Eden Mining Co. v. Bluefield Fruit & S.S. Co., 1 U.S.S.B. 41 (1922). However, the Shipping Board declined to award reparations even though the aggrieved shippers established the amounts they had paid for carriage and the discount they could have obtained under the loyalty arrangement. The Board noted that no evidence was submitted as to expenses incurred, loss of profits, or damages suffered as a result of the wrong. It further held that the language of 22 contemplated reparations only for "actual damage incurred" and that "the fact of injury and the exact amount of pecuniary damage must be shown by further and other proof." Id. at 47.

In Waterman v. Stockholms Rederiaktiebolag Svea et al., 3 F.M.B. 248 (1950), the Federal Maritime Board found that respondents had violated the 1916 Act because they refused to provide complainant with an equal opportunity to secure space to ship fresh fruit to Brazil. The Board, however, reversed the administrative law judge's damages award noting that the claim was based on loss of profits, but that the proof amounted to little more than a showing of a possibility which was highly speculative, uncertain, conjectural, and lacking in certainty. Id. at 250. The Board further noted:

> "To award damages alleged to have been incurred by reason of unjust discrimination, there must be that degree of certainty and

> satisfactory conviction in the mind and judgment of the Board as would be deemed necessary under the well-established principles of law in such cases as a basis for a judgment in court." Id., at 253.

See also Philip R. Consolo v. Flota Mercante Grancolombia, 1961 AMC 2309 , 6 F.M.B. 262 (1961), where detailed proof of damages was offered to support reparations for refusal to carry shipments of bananas.

Applying the above principles to the instant case, we find that CSL has not established its actual injury with a reasonable degree of certainty. Its proof is so speculative and conjectural that it lacks the requisite degree of certainty. The crux of CSL's proof is Exhibit FFF, Volume I. As indicated earlier, this damage summary was entirely the work of CSL's president and was based on his estimates of the amounts and types of cargoes he could have generated if given access to the three contracts. This summary also contains Mr. Walker's estimates of profit margins and payments to foreign agents. Although some of these estimates are supported by additional evidence in an attempt to establish their reasonableness, we find the basic damage summary to be an unconvincing basis upon which to award damages.

The issue of CSL's injury is further clouded by the fact that CSL permitted certain non-signatory NVOCCs to move their cargo under its service contracts. As we noted earlier, such conduct is not permitted under the 1984 Act. It appears that CSL would have permitted other NVOCCs to share the three contracts at issue. Although CSL's president maintains that he would have been able to fulfill the minimums on the Ford Pointer and G.E. Contract, we remain unconvinced. There is certainly no indication in the damages summary as to what proportion of CSL's cargo estimate would have been its own and what would have been cargo supplied by its "agents."

The issue of damages is further complicated by the fact that the two service contracts for which the Presiding Officer awarded damages both contained provisions that could be viewed as negating the carrier's commitment to carry the shipper's cargo and thereby rendering the payment of any damages unlikely. If the shipper was unable to secure space from the carrier, one of its remedies under these contracts was a concomitant reduction in its cargo commitment. The Ford Pointer Contract stated:

> "In the event the Shipper is unable to secure space from the Carrier for shipment tendered under this contract per above (A), then upon written request of the Shipper, the Minimum Quantity Commitment specified in Clause 3 of

> this contract shall be reduced by the same amount of FEU tendered but not carried on the intended vessel(s)." Article 7.B.

The G.E. Contract contains virtually the same language at Article 6.B. As a result, even if CSL had obtained these two contracts, Yangming might have been able to refuse its cargo and CSL's only remedy might have been a reduction in its cargo commitment. This would, of course, make the contracts much less valuable to CSL and any "damages" at best, uncertain in that a shipper's damages will likely be limited to those specified in the original contract.

We also question whether CSL took appropriate measures to mitigate its damages or avoid the consequences of Yangming's actions. Yangming introduced eight service contracts which CSL had signed during 1987 and 1988 and which allegedly cover the same routes and commodities as the Ford Pointer and G.E. Contracts. In many instances, the rates charged in these contracts are less than the rates applicable under the subject contracts. CSL has offered several reasons why these contracts were not adequate substitutes for the Ford Pointer or G.E. Contracts: (1) COSCO No. 101 was terminated at the carrier's election, after the minimum had been met; (2) only a certain amount of importers are willing to ship via COSCO because of its slower transit times; (3) some of the contracts only overlap for a few months; (4) Hanjin refused bookings for lounge chairs and patio furniture under Hanjin No. 450; (5) Evergreen limited CSL to two to four containers per sailing at major ports; (6) Mexican Lines and National Shipping Corporation's transit times were higher than Yangming's; and (7) Korea Shipping limited CSL to thirteen containers per vessel, and to only two from Japan. CSL's president also testified that CSL would have been able to meet the minimums under the Ford Pointer and G.E. Contracts while at the same time meeting its obligations under its other service contracts.

Nonetheless, the other contracts do in many instances have rates that are lower than those in the Ford Pointer and G.E. Contracts. In addition, although some had maximum amounts that could be shipped under them, these amounts were high in relation to the minimum. The other contracts had no limits on the maximum amount of cargo that could be shipped once the minimum was met, so they presumably could be used to ship additional cargoes. Mr. Walker noted that under the Mexican Line contract he could ship above the minimum without limitations. He further testified that even if other contracts contained rates $100 higher to the East Coast, he might have shipped under them. Moreover, many of the commodities covered by these contracts were not time sensitive.

At the very least, therefore, CSL had available some alternative space under competitive rates. Exactly how much space was available and under what

restrictions, if any, is not readily apparent. To some extent, however, CSL did fail to take action to minimize its damages. If we had determined that CSL was entitled to damages in the first instance, we would likely have remanded this case for a further hearing to ascertain the exact level of mitigation.

2. Civil Penalties

The Presiding Officer assessed penalties of $15,000 against Yangming for violations of 10(b)(5) and 10(b)(12). Although he believed that Yangming's conduct could have justified a far greater penalty, he declined to do so given the substantial damages award to Complainant, who was the only party directly injured. Yangming, Hearing Counsel, and the Japan Conferences have excepted to this action.

Section 13(a) of the 1984 Act provides that whoever violates a provision of the Act ". is liable to the United States for a civil penalty." 46 U.S.C. app. 1712(a). Section 13(c) further provides that the Commission may, after notice and an opportunity for a hearing, assess each civil penalty provided for in the Act, id. app. 1712(c). In addition, 11(a) allows a private party to file a complaint alleging a violation of the Act and to seek reparations. Id. 1710(a). This statutory scheme does not contemplate the imposition of civil penalties in a private party complaint proceeding. This is consistent with Commission precedent under the 1916 Act. See East Coast Colombia Conference and Agropecuranci Maritima Santa Rosa Ltd.-Petition for Investigation, 22 S.R.R. 723 (1984).

Even assuming that civil penalties could be imposed in a complaint proceeding, they are nonetheless inappropriate in the instant case. The Administrative Procedure Act, 5 U.S.C. 554(b), 13(a) of the 1984 Act, and the Commission's Rules at 46 C.F.R. 505.3(a), all require proper notice before the Commission can assess a civil penalty. In this case, Yangming had no prior notice that a civil penalty was possible. The Presiding Officer's imposition of a civil penalty is, therefore, reversed
.

3. Co-Loading

During the proceeding below, Yangming raised as an issue CSL's practice of permitting other NVOCCs to use service contracts that CSL had originally entered into as the contract shipper-a practice referred to by CSL as "co-loading." The Presiding Officer determined that none of the three subject contracts contained any mention of co-loading or a prohibition against it. In addition, he found that co-loading was not cited by Yangming as a basis for its denial of CSL's requests to access. The ALJ determined that, even if co-loading were illegal as a matter of law, there was no evidence that CSL would have had to co-load to satisfy any of the three contracts and that Yangming failed to carry the burden of its affirmative defense. He found nothing in the

1984 Act or the Commission's rules which prohibited co-loading on service contracts, as a matter of law. The ALJ suggested that the Commission may wish to address some of the implications raised by such practices at a more appropriate time.

Yangming asserts that the Presiding Officer completely misunderstood the co-loading issue. It was allegedly raised, not as a reason for denying CSL's access requests, but rather to demonstrate that CSL could never be considered a similarly situated shipper if it needed non-signatory shippers to ship under the contracts. Yangming maintains that co-loading was the means by which CSL allowed a large number of foreign NVOCCs, many of which did not have tariffs on file with the Commission, to use CSL's service contracts to move their customers' cargo in full container loads. Yangming claims that these foreign NVOCCs were not affiliates or subsidiaries of CSL and were not signatories to CSL's service contracts. Yangming alleges that CSL did not issue bills of lading to these NVOCCs and the NVOCCs were able to use the service contracts as if they were a party, if they paid a fee, not a tariff charge, to CSL.

Yangming states that the reason it did not cite co-loading as the basis for its denials is that it only learned of this practice during depositions. As to whether CSL would have co-loaded on the subject contracts, Yangming points out that the only evidence supporting a finding that it would not came from CSL's president, five days after the full extent of his co-loading practices were revealed. Yangming claims that the Presiding Officer ignored evidence indicating that CSL's standard practice was to co-load on service contracts, that it gave other NVOCCs access to every service contract it had entered into, and that non-signatory NVOCCs would have been given access to the three contracts. It states that before CSL ever made an access request, it solicited foreign NVOCCs.

Yangming argues that the Commission has consistently stated that only parties to a service contract may take advantage of a service contract rate. It notes that, in revising its service contract rules, the Commission tightened up the definition of "contract party" and refused to permit unrelated shippers to enter into service contracts. CSL's co-loading tariff rule is said to be irrelevant to service contracts and, in any event, CSL allegedly did not comply with its own rule. Yangming points out that 46 C.F.R. 581.4(a)(1)(vi) requires every affiliate of a contract party entitled to receive transportation under a contract to be specifically named. It claims, however, that the foreign NVOCCs that used CSL's service contracts were neither affiliates nor subsidiaries of CSL; nor were they named in the contracts.

Yangming contends that the definition of "service contract" supports its position, in that a shipper commits "to provide itscargo." It argues that CSL, as an NVOCC shipper, had to book its own cargoes and could not allow non-

signatory NVOCCs to book their cargoes. Although CSL may appear on the underlying ocean carrier's bill of lading as the "consigne" or "notify party", this is said to be part of the deception being played upon the underlying carrier and the Commission. The Japan Conferences support Yangming's exceptions on this issue.

CSL asserts that its past co-loading under service contracts was legal. It states that the Commission has recognized co-loading by NVOCCs as a customary, lawful and beneficial practice. It claims that when it co-loaded under service contracts, it was the contract party, was named as shipper or consignee on each bill of lading, and was responsible by terms of those bills of lading for the payment of freight charges. CSL does not believe that a co-loader must be named as an affiliate of the contract party because the co-loader is not the party tendering the cargo to the ocean common carrier. An NVOCC that has obtained cargo by co-loading from another NVO which is then tendered to an ocean carrier is said to be tendering itscargo, consistent with the service contract rules. CSL opines that if the Commission intended to limit co-loading under service contracts, it could have done so in its service contract rules or co-loading decision, both of which were issued contemporaneously.

CSL advises that on three quarters of the shipments questioned by Yangming, it was the "consignee" and the terms of shipment were "freight collect." CSL argues that under relevant bills of lading conditions it was primarily responsible for payment of freight collect charges and was legally responsible for payment of transportation charges even on those shipments moving "freight prepaid." In those cases where CSL did not issue a bill of lading to its co-loading NVOCC, it was allegedly engaging in carrier-to-carrier co-loading.

Even if co-loading were illegal on service contracts, CSL argues that it has no relevance to this case. It claims that it would not have needed to co-load to fulfill the contracts at issue. It refers to the testimony of its president, which is said to be corroborated by its customer lists, its past shipments, and an analysis of market rates conducted by its expert. CSL argues that its intentionto co-load is irrelevant, unless Yangming could show that it could not fulfill the contracts without co-loading.

The use of the term "co-loading" to describe CSL's practice of permitting other NVOCCs to use its service contracts is not the type of "co-loading " defined by the Commission in its rule governing NVOCC co-loading. That rule defines "co-loading" as ". the combining of cargo, in the import or export commerce of the United States, by two or more NVOCCs for tendering to an ocean carrier under the name of one or more of the NVOCCs." 46 C.F.R. 580.5(d)(14)(i).

Here, it does not appear that CSL is combining its cargo with other NVOCCs for tendering in its name to an ocean carrier. Rather, NVOCCs other than CSL would issue their own bills of lading to their underlying shippers, but on the underlying ocean carrier's bill of lading would list CSL as "shipper" or "consignee" and use CSL's previously executed service contract to obtain a lower rate. These were generally reciprocal arrangements between CSL and the other NVOCCs and were not committed to writing. An NVOCC desiring to use CSL's contract rate simply obtained its permission and paid CSL a fee. Recognizing that certain types of co-loading activities were engaged in by NVOCCs, the Commission adopted the above-referenced tariff rule to protect the underlying shippers. Its goal was ensuring that the shipping public is made fully aware of an NVOCC's co-loading activities. Docket No. 84-27,Co-Loading Practices by NVOCCs, 23 S.R.R. 123, 130 (1985). To this end, the special co-loading rule requires certain disclosures and contains certain documentation requirements. For example, an NVOCC's tariff must contain a rule describing its co-loading practices and an NVOCC must annotate its bill of lading with the identity of the other NVOCC to which it tendered cargo for co-loading. Even assuming that CSL's practices fell within the ambit of this tariffrule, it appears that CSL and some of the NVOCCs with which it dealt did not comply with the basic requirements of the rule. Many of these NVOCCs apparently did not have tariffs on file with the Commission. As a result, their compliance with the tariff aspects of the co-loading rule would have been especially difficult. [FN23]

FN23. An NVOCC that does not have a tariff on file with the Commission, as required by 8(a) of the 1984 Act, is nonetheless an NVOCC if it meets the 1984 Act definition of "non-vessel-operating common carrier".

Service contracts are, of course, contracts, and as such create rights and obligations on the part of both parties. There is nothing in the 1984 Act or its legislative history indicating that a non-party can receive the benefits of a service contract. In fact, the Commission's rules, while not specifically addressing the type of practice engaged in by CSL, preclude such practices.

A service contract is defined in both the governing statute and Commission rules as a contract ". in which the shipper makes a commitment to provide a certain minimum quantity of its cargo.." 46 C.F.R. 581.1(n) (emphasis added). The cargo of another NVOCC who is taking advantage of an NVOCC's service contract does not qualify as the cargo of the contract NVOCC.

Additionally, the Commission has repeatedly expressed its concern that service contracts be limited to named parties. In adopting a revised definition of "contract party" in Docket No. 84-21, the Commission emphasized:

> "While the designation of contract parties is not an essential term subject to public disclosure under the Act, the Commission believes that all parties able to take advantage of the contract must be named in the contract itself. This will allow the Commission to determine which shipments by a carrier (sic) are covered by a contract and therefore entitled to a contract rate, and which must be charged the tariff rate. Without such disclosure, it would be virtually impossible to enforce the tariff adherence requirements of the Act. Accordingly, the Rule has been revised to require that all persons or entities entitled to receive or authorized to offer the service contract's nontariff rates be expressly named in the contract as contract parties." 22 S.R.R. at 1429.

The Commission subsequently amended this definition to make it consistent with the concept that the only entity that can be a party to a service contract is one which signs the contract. Docket No. 86-6, 24 S.R.R. at 280. The Commission further advised that affiliated entities may take advantage of the provisions of a service contract only if namedas an affiliate. Id. But perhaps more importantly, the Commission declined to adopt a proposed definition of "service contract" which would have permitted one or more shippersto enter into service contracts, cautioning that". shippers can continue to affiliate to take advantage of service contracts, if that affiliation meets the definition of a "shipper association.' " Id.

As a result of these rule makings, non-parties can take advantage of a service contract only if named as an "affiliate," 46 C.F.R. 581.4(a)(1)(vi), and two or more shippers can enter into a service contract only by way of a shippers' association. Neither of these situations applies to CSL's activities. The other NVOCCs which used its contracts were not named as affiliates in the contract and were not affiliated with CSL in any event. Moreover, CSL was not attempting to, nor did it, operate as a statutory shippers' association in its dealing with the underlying ocean common carriers.

As a general rule, a party to a contract can assign its rights under the contract to another. 6 Am. Jur. 2d,Assignments 9 at 194 (1963). CSL's practice of permitting other NVOCCs to take advantage of the service contract might therefore be viewed as an assignment of its rights under the contract. However, as noted elsewhere, service contracts are not simply private contracts but rather are a form of public contract statutorily subject to regulation by the Commission to prevent abuses. The Commission's service contract rules provide that the essential terms of a service contract shall

include contract clauses which permit deviations from an original essential term. 46 C.F.R. 581.5(a)(3)(viii). This deviation clauses requirement applies to several listed situations, including assignment of the contract. Id. 581.5(a)(3)(viii)(F). [FN24] Consequently, rights under a service contract cannot be assigned unless the contract so expressly permits. [FN25] None of the contracts at issue herein provides for an assignment.

FN24. The Commission's original service contract rules required a clear description of any circumstances which would permit any deviation from the terms of the contract. 46 C.F.R. 580.7(g)(2)(viii)(D) (1984). Although not specifically mentioned, a provision permitting assignment of contract rights would have been included in this general deviations provision. When the Commission subsequently revised its service contract rules, it specifically listed "assignment of the contract" as one of the types of deviations that must be clearly set forth in the contract. Docket No. 86-6, 24 S.R.R. at 294.

FN25. In Banana Distributors , the Commission permitted a carrier to protect itself by placing prohibitions against the transfer of rights secured under a contract to carry. Such a provision was found not only to protect the carrier but also to provide assurance that space needed to fulfill the genuine demands of a trade not be diverted to incompetent or unqualified operators. Grace Line , 12 F.M.C. at 295.

A carrier enters into a service contract with a shipper because it believes that that particular shipper will provide the minimum amount of its own cargo. The shipper in turn receives a lower rate than that contained in the carrier's tariff. This arrangement is predicated on the understanding that other shippers, who have less volume, will use the carrier's higher tariff rates. Permitting a non-contract signatory, or affiliate thereof, to obtain the lesser contract rates undermines the regulatory scheme established by Congress. Not only is that shipper obtaining a contract rate to which it is not entitled, but it is also evading the tariff rate that would otherwise be applicable.

CSL has argued that because it appears as "consignee" or "shipper" on the ocean carrier's bill of lading, it was one of the parties technically responsible for payment of the freight charges under the terms of the bill of lading and was therefore a "shipper" for purposes of the service contract. However, CSL did not solicit the cargo of the underlying shippers; that was done by the NVOCCs that used its contracts. It would appear that CSL was included on the ocean carrier's bill of lading so that the CSL service contract number could be used and the rate obtained. Regardless of whether CSL was technically a "shipper" under these circumstances, CSL and the other NVOCCs may have violated 10(a)(1) of the 1984 Act which prohibits the obtaining of ocean transportation at less than rates that would otherwise be applicable by means of an unjust or unfair device. 46 U.S.C. app. 1709(a)(1).

On the issue of whether CSL would have had to engage in contract sharing in order to fulfill the minimum volume requirements of the three service contracts at issue, the Presiding Officer found no evidence to support that conclusion. Nonetheless, the record reveals that CSL did allow other NVOCCs access to its service contracts and that, in fact, any NVOCC could have access to CSL's service contracts at Mr. Walker's discretion. Moreover, in every service contract previously entered into by CSL, it had given access to non-signatory NVOCCs. Mr. Walker conceded that he would have permitted non-signatory NVOCCs to access the three service contracts at issue in this proceeding. In addition, it was CSL's practice to contact foreign NVOCCs prior to attempting to access a service contract to ascertain what volume of cargo they might generate in order to fulfill the minimum volume under the contract.

Therefore, it is likely that CSL would have had to use "co-loaded" cargo to fulfill the minimums under the three contracts. The Commission is unconvinced by Mr. Walker's testimony that, since 1986, CSL did not need to rely upon "co- loaded" cargo to fulfill its minimum volumes. This is a self-serving statement from the witness most likely to benefit from a favorable ruling in this proceeding and has been accorded little weight in light of the other evidence concerning the extent of CSL's contract sharing practices.

4. Bonding

The Presiding Officer found Yangming's concerns about CSL's ability to pay deadfreight claims "shallow" because Yangming Taipei instructed its New York agent not to offer CSL a bond, even though the agent believed it would protect Yangming. He further opined that there was no reason to deny a bonding option except that Yangming was not really interested in being protected.

CSL contends that, if a carrier has legitimate concerns about an accessing shipper's ability to fulfill the terms of a particular contract, it could protect itself by requiring a reasonable and non-discriminatory performance bond. It notes that, at one point, Yangming's agents considered asking CSL to post a performance bond. CSL maintains that Yangming's argument that it was precluded from requiring a bond because of language in its Essential Terms Publication merely reflects a failure to protect itself originally.

A performance bond can protect a carrier from a shipper's failure to perform a service contract by not meeting its minimum cargo commitment. However, the use of a performance bond is not really at issue in this proceeding because Yangming was under no obligation to offer a bond to CSL, and chose not to do so. Nonetheless, we offer the following observations on bonding in the context of access requests for future reference.

Under somewhat analogous circumstances, the Commission has held that a common carrier offering space under a forward booking contract could require prospective shippers to post a bond covering the space assigned and may otherwise establish reasonable rules covering, among other things, deadfreight. Banana Distributors, 5 F.M.B. at 626. We believe that a carrier offering service contracts under the 1984 Act should have a similar ability to protect its interests by agreeing to accept a performance bond from an access shipper. This is not to suggest that in all instances carriers mustaccept a performance bond from an accessing shipper. However, if a carrier entertains doubts about an accessing shipper's ability to meet all the essential terms of a service contract, it could accept a performance bond in lieu of denying the access request. A carrier electing such a course of action must do so on a non-discriminatory basis.

5. Lack of Capacity

With respect to the Ford Pointer Contract, the Presiding Officer found that denial of CSL's request because of lack of space was inappropriate because lack of space or equipment is not a valid transportation factor justifying unequal treatment of shippers. Moveover, the ALJ concluded that, even if lack of space were a legitimate reason for denying a request to access a service contract, the record here does not indicate that there was a space problem. He further determined, without record references, that after denying this particular request, Yangming committed space to other shippers.

Commission precedent indicates that, because of the common carriage aspects of service contracts, carriers lacking sufficient space must pro-rate their available space among contract shippers as an alternative to possibly acquiring additional capacity. In Banana Distributors, the Federal Maritime Board required a common carrier by water in the Ecuador/U.S. East Coast trade to pro-rate its reefer space, on a fair and reasonable basis, among qualified banana shippers, under two-year forward booking contracts. The Board there noted that: "(w)here the demand for space exceeds the supply, the law is clear:a common carrier must equitably pro-rate its available space among shippers. " 1959 AMC at 1458 , 5 F.M.B. at 625. See also Philip R. Consolo v. Grace Line, Inc., 4 F.M.B. 293, 303 (1953); Levantino & Sons v. Prudential-Grace Lines, 18 F.M.C. 89, 194 (1974) ("A carrier must establish a reasonable plan in order to cope with periods of congestion and must fill its capacity in a reasonable and just manner when such periods occur."). Specifically, with respect to 1984 Act service contracts, the Commission has advised:

> "Section 8(c) requires a carrier which enters into a service contract to enter into similar contracts

> with other similarly situated shippers if they desire the same essential terms. This requires, of course, the exercise of sound business judgment on the part of the carrier. However, if a carrier chooses to induce business by means of a service contract, it should be prepared to offer the same essential terms to other similarly situated shippers." Docket No. 84- 21, 22 S.R.R. at 1435.

This reasoning would apply here. If carriers offer service contracts, they should have reasonably available adequate space to meet the needs of all shippers similarly situated who attempt to access the contract. If a carrier is booked 100 percent with contract cargo, barring other reasonable accommodations, it may have to charter other space or pro-rate its capacity among all its service contract shippers.

6. Service Contract Termination

The Ford Pointer Contract was filed with the Commission on December 29, 1986. Yangming received CSL's request to access the terms of the contract on January 15 or 17, 1987, and denied same on January 23, 1987. Subsequently, on January 26 Yangming and Ford Pointer agreed to terminate their contract and, through counsel, Yangming informed CSL that ". there is no contract which can be offered to you at this time on similar terms." Yangming argued below that termination of the contract within the fourteen days to respond, provided by 46 C.F.R. 581.6(b)(3), precluded CSL from accessing that contract.

The Presiding Officer found that the termination of the Ford Pointer Contract did not affect CSL's right to access the contract. First, he determined that the regulations relied upon by Yangming became effective six months after the termination of the Ford Pointer Contract. Without these regulations, he concluded that the only basis for denying access would be that CSL was not similarly situated. However, the ALJ explained that, even if the regulations are considered applicable, he would reach the same result. He found no "right " of a common carrier to reject access requests within fourteen days. Instead, he read the rules as placing an "obligation" on a carrier to respond to such a request within fourteen days. The Presiding Officer held that carriers cannot invoke 8(c) by entering into a service contract and then avoid its consequences afteran access request is made. This, he concluded, would render a shipper's ability to access a contract meaningless.

* * *

There is nothing that prevents parties to a service contract from mutually terminating the contract at any time during its term. Indeed, the

Commission's service contract rules clearly recognize such a right. See 46 C.F.R. 581.7(c). However, if the parties to a service contract mutually decide to terminate it, they are also subject to certain regulatory requirements, including,inter alia, rerating the cargo carried and notice to the Commission. Id. The reasons for any such termination would generally appear to be irrelevant. The real issue is what effect mutual termination has on a pending request to access a service contract. [FN26]

FN26. In this particular case, Yangming had denied CSL's request to access the Ford Pointer Contract prior to the eventual termination of the contract.

The publication by Yangming of the statement of essential terms of the Ford Pointer Contract was an open offer to provide those same essential terms to any shipper who qualified as being "similarly situated." If CSL had qualified as a similarly situated shipper, its subsequent request to access those terms would have been considered an acceptance of Yangming's offer. Yangming's subsequent decision, with the acquiescence of Ford Pointer, to terminate their contract would have had no effect on CSL's right to its own service contract, assuming, of course, that it was similarly situated.

We therefore hold that the mutual termination of a service contract does not extinguish the rights of a shipper who has requested access prior to termination of the contract. This should not prejudice a carrier because it has only recently indicated a willingness to transport cargo under the same conditions with the original contract shipper. Moreover, it is also consistent with Congress's intent to subject service contracts to some common carriage principles by making them available to all shippers similarly situated.

Order

The Exceptions to the Initial Decision are granted to the extent indicated above and are denied in all other respects;
The Initial Decision is reversed to the extent indicated above and the relief requested by complainant is denied; and
This proceeding is discontinued.