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In the

Supreme Court of the United States

FEDERAL MARITIME COMMISSION,

Petitioner,

v.

SEATRAIN LINES, INC., et al.,

Respondents.

No. 71-1647

Washington, D. C.
March 21, 1973

Pages 1 thru 43

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

FEDERAL MARITIME COMMISSION, Petitioner,	:	
v.	:	No. 71-1647
SEATRAIN LINES, INC., et al., Respondents.	:	

Washington, D. C.
Wednesday, March 21, 1973

The above-entitled matter came on for argument at 1:00 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

EDWARD G. GRUIS, Esq., Deputy Counsel General, Federal Maritime Commission, Washington, D. C. 20573; for the Petitioner.

IRWIN A. SEIBEL, Esq., Antitrust Division, Department of Justice, Washington, D. C. 20530; for Respondent United States of America.

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1647, Federal Maritime Commission against Seatrain Lines.

Mr. Gruis, you may proceed whenever you are ready.

ORAL ARGUMENT OF EDWARD G. GRUIS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GRUIS: Mr. Chief Justice, and may it please the Court:

The practical here before this Court is whether or not the Federal Maritime Commission is going to be able to continue under its present statutory authority to effectively regulate and supervise America's maritime industry.

The matter here this morning comes by way of a writ of certiorari to the D. C. Court of Appeals which vacated the Federal Maritime Commission order approving the merger of assets of one shipping company to that of another shipping company.

In overruling the commission's order, the D. C. Court of Appeals found that the commission had no authority under Section 15 of the Shipping Act authorizing it to approve such sales, thereby giving such transactions immunity under the antitrust laws.

So that we are real certain as to what the facts of the situation is, in this particular case along about

1970 Pacific Far East Lines entered into a contract with one of Matson's subsudiaries, Oceanic Steamship Company, for the sale of four ships then in operation, two ships that were under construction, and associated facilities like personnel and so on that went along with those ships.

There was a protest on this matter at the commission level, the commission finding this protest without substance. And upon the briefs submitted by the parties, approved the transaction. It was immediately appealed by the protestant to the D. C. Court of Appeals.

In the D. C. Court of Appeals, the question was raised for the first time as to the commission's Section 15 jurisdiction over this type of transaction. Since the language of Section 15 is so critical to our understanding this morning, I would like to direct your attention either to page 2 of our brief or to the language of Section 15 itself in the first or second paragraph, I believe, wherein the third clause or category says that agreements between carriers shall be committed to the commission which are controlling, regulating, preventing, or destroying competition.

In addition to that, this paragraph goes on to indicate that agreements also include understandings, conferences, and other arrangements.

Section 15 also makes specific provision for an

antitrust exemption, for agreements that have come before the commission and are lawfully approved. The commission has operated with this law for over two decades, approving some transactions formally, others informally, and even rejecting some transactions that had been presented to it.

The question presented here today was really not raised in a judicial setting until 1968, some time after the commission had been operating with this law in approving merger and acquisition, consolidation transactions. When before the commission and subsequently in the Ninth Circuit Court of Appeals the question was raised as to whether or not the last clause of the first paragraph in Section 15, which is sort of a catch-all clause at the end of that paragraph and reads, "Or in any manner providing for an exclusive, preferential, or cooperative working arrangement," whether or not that clause limits the foregoing six categories under the Shipping Act that are to be presented to the commission.

This clause was originally rejected in the Ninth Circuit Court by Matson, the Ninth Circuit Court case, on the basis of Justice Stewart's decision in Volkswagenwerk wherein he indicated that Section 15 and the language used in that part of the statute is very broad and is very expansive and probably would not be circumscribed by this one category at the end of Section 15.

I think it is important here for us to understand

the type of industry that we are operating in, and I think it should be immediately apparent that we are really having problems reconciling two conflicting statutes or perhaps three conflicting statutes--namely, the Shipping Act, the Sherman Act, and the Clayton Act.

But we submit, first of all, that the initial purpose and concept behind enactment of the Shipping Act back in 1916 was to create a specialized and expert agency to regulate maritime affairs. If this was the goal or objective behind the original Shipping Act, then the Maritime Commission would not be able to accomplish this if it has one arm tied behind its back, so to speak, being unable to act or to oversee transactions that may involve mergers or consolidations or acquisitions between shipping companies.

Q In this connection, did the Maritime Commission exercise jurisdiction over any merger prior to 1940?

MR. GRUIS: Not that I know of, no, sir. There is no recorded--what I mean by that is that it well may have been that papers had been submitted to it. But we have no reference of any recorded transaction that had acted unofficially, no, sir.

Q Was what you just said equally applicable to those earlier years as to the later ones?

MR. GRUIS: Yes, sir. Yes, sir.

In this connection, if I may, Mr. Justice Blackmun, is suggest this, that there was a change in the structure of the maritime agency back in 1960 when the regulatory arm was split off from the promotion arm of the maritime industry insofar as Government regulation was concerned. It was when this regulatory arm, namely, the Federal Maritime Commission, was set up for the purpose of effectively regulating the Shipping Act statutes it became much more concerned and interested in the various transactions that were going on in the maritime industry insofar as acquisitions and mergers were concerned.

I suggest, gentlemen, that with these two conflicting statutory goals--namely, the goal of the antitrust law to preserve a competitive environment and the goal of the Shipping Act which uses antitrust standards, is only one of the criteria--the commission has looked upon these transactions in the past and endeavored to balance both of these conflicting public policy aims.

I suggest that in treating this question, for example, if Justice, for example, were to prevail--the Department of Justice on this--we would have two different types of transactions very closely related but entirely judged by different standards. It has been suggested in the brief, for example, that a single ship's sail to an area

where service may be needed could by Justice Department's move, or the Federal Trade Commission for that matter of fact, enjoined that if it met the tests of Section 7 of the Clayton Act and the transaction was viewed only as limiting competition or tending towards monopoly.

The Maritime Commission, I believe, has a bigger goal, a bigger objective than this under the Shipping Act. The standards given to that were several sets of standards aside from purely competitive standards, and those included--and I think they are also listed in Section 15 of the Shipping Act--to make a determination as to whether or not this transaction would be unjustly discriminatory or unfair between carriers and suppliers, whether or not it would operate to the detriment of the commerce of the United States, whether it would be in violation of any other Shipping Act provision, or whether it would be contrary to public interest.

Whether or not it would be contrary to public interest has been read by this Court as including antitrust standards. That appeared, I believe, in the decision in Spensco where the Court here read right into it that the commission could not ignore antitrust considerations in passing or making rulings on any of the transactions coming before it for approval under Section 15 or upon which the commission may act on its own motion with respect to

transactions.

There has been a question here presented as to whether or not since the transaction is consummated, completed, so to speak, it is not saved, according to lower court, perhaps by having a conditional covenant or some type of revenuable or reversionary interest follow the sale of a ship or the closing of an acquisition transaction. And the commission has great doubts as to whether or not this is a very practical approach, because it soon becomes a technique in the way you would draft acquisition agreements. The court below has listed a series of cases, all of which it points to as containing some sort covenant not to compete, but those are not unusual in merger acquisition transaxtions if you are buying somebody out. And still we do not feel that that is crucial or critical enough to save this type of transaction from going under antitrust judgment.

In other words, believe it has stayed fully under the Shipping Act in all respects.

I believe one of the problems here that is posed most pregnantly with respect to the policy consideration is basically this, that when a transaction comes before the commission, whether it is in the form of an acquisition or merger, the question always raised is, Is this going to be tested strictly by competitive standards or is it going to

be tested by that criteria that I have explained to you under the Shipping Act, Section 15.

If the transaction is to be tested either by the Federal Trade Commission or by the Department of Justice in a court someplace strictly on competitive standards, frequently the transactions will fall, even though it may well satisfy all the other standards of the Shipping Act, even though it may in the overall view be in the best public interest, but neither the Federal Trade Commission, operating under the authority of the Clayton Act, Section 7, nor the Department of Justice, either under the Sherman Act or the Clayton Act, could stray too far from that set of competitive criteria in order to demonstrate that this merger should or should not be effectuated because of the public interest.

I suggest what is embraced in those two antitrust laws is pitted solely on competitive situations, whereas in the Shipping Act we have other considerations. Because there are instances where a segment of the shipping may be competitively restrained. It well may be that there is an absolute monopoly. This is true perhaps in many instances with port areas where there is a transaction between a port and a carrier or a port and various servicing functions in that port which would fully qualify under Section 15.

They would fully also qualify as an asset under

Section 7 standards. But that port or that area that is served by this in many instances is a monopoly in and of itself. Nobody else can operate this because it is usually done by some type of public authority.

If these transactions are thrust into district court, and I believe Judge Merrill in the Matson case points this out, you would have this paradox where under one set of standards the transaction should be carried out but on another set of standards the transaction should fail because of the competitive overtones to it that would substantially restrain trade. Judge Merrill in Matson felt that this was an impossible situation and such a test should not be cast; the Federal Trade Commission, for example, who jointly with the Department of Justice, entertains jurisdiction to enforce Section 7 standards.

With due deference to our sister agency, they may be very specialized in competitive relationships, but we feel, the Maritime Commission, is best equipped to consider what is necessary for our commerce in terms of maritime and shipping interests, though shipping interests--and we speak in those terms--also extend to the shipper and ultimately to the consumer in the final analysis.

We think, for this reason, that based on these two considerations the commission is in the best position, under the present statutory scheme, to weigh and evaluate

policy considerations of these two laws. As I have indicated, the Court has already told the commission that it has to take into consideration antitrust standards when it makes evaluations under Section 15.

So, in effect, what you are doing is you are ameliorating the relationship between the interest under the Clayton Act, for example, together with the interest under the Shipping Act before a judgment is made, and that judgment is subsequently reviewed by a court, under both those standards.

I suggest this difference in policy has also been done with respect to other statutes and perhaps the one most significant at this time is the labor statute wherein again the commission was sitting in a position or had a role wherein it had to look both to in some respects labor interest as well as the shipping interest in order to look at this particular transaction and pass on it.

I would suggest that my agency, with its expertise, with its flexibility, which was one of the designs of an administrative agency, can best balance both of those considerations.

I also submit that if this is thrown into the court on the antitrust laws too frequently, those other considerations of other statutes, including the Shipping Act statutes, will fail if it is measured solely on hard

old Sherman Act or Clayton Act standards.

An argument has been raised--and it was also suggested in the court below's opinion, that because of the nature of the language and the way it is used in Section 15, and much of this case turns on how that Section 15 language is going to be read, is that there was an implied repeal of the antitrust laws. And the commission is the first to concede that the docking of antitrust laws not repealed by implication or exemption, unless fully spelled out, we fully agree with that. But we do not think that is the particular case in this instance. We think Section 15's language is hard, cold, and clear, that that exemption is given wherever the commission properly approves a transaction under Section 15 standards.

What has been cited contrary to our position have been other types of cases--namely, the Milk Producers Association case, the Federal Power Commission case, California v. Federal Power Commission, and the United States v. Philadelphia National Bank case, which in each instance was an extension by those other agencies or departments of antitrust laws to associate with the transaction before it or just a usurption of an authority that was really not there in the first place, and they went off on an implication that such authority must have been meant if they were to consider these antitrust considerations.

I also submit to you, gentlemen, that in issuing your decision in the United States v. Philadelphia National Bank, you will look to the Federal Maritime Commission's law to explain to the Controller of the Currency that here is an instance where specific statutory authority is given to the Maritime Commission to exempt such transactions. You do not have this. It is strictly by implication.

Another argument has been raised in an effort to erode what the commission purports to have as its jurisdiction, is the specific authority that has been given to two other sister agencies, namely, the ICC and the CAB. Those agencies are looked at because in fact it is true that there is specific language written into their statutes enabling them to expressly treat questions of pooling, questions of merger, questions of acquisitions, et cetera. But I would like briefly to go back a little bit to explain how that statutory language in those other statutes came into existence as compared with the Federal Maritime Commission.

When the Federal Maritime Commission Act was passed in 1916, that antitrust exemption language was already there. The drafters of legislative history, the people who were the moving forces behind the Shipping Act recognized the antitrust overtones involved with shipping both domestic and in the international waters and was real

certain that this type of exemption was going to be squarely put into the Federal Maritime Commission act--I am sorry, the Shipping Act, 1960.

This was not true with the ICC Act that was originally passed, the organic statute, in 1887. They did not have any such antitrust exemption. In fact, that act, what has come to be known today, made an express prohibition against pooling, and the ICC was to declare those illegal under any circumstances. And it was not until 1912 that some further consideration was given under the Panama Canal Act as to acquisitions and mergers and relationships concerning railroads and shipping interests in the United States, that the ICC Act was amended so as to enjoin railroads primarily from acquiring shipping interests that would be competitive or, if they acquired these interests, to enjoin them from using the Panama Canal.

But we still do not feel that 1912 has had any serious bearing upon the Maritime Commission's authority that was given to it some 40 years later with all of this background in mind.

By 1920, the ICC Act was again amended, this time to approve pooling and to commit certain types of consolidation. And in 1920 I think the thinking behind that law was to allow some of our railroads to consolidate

and merge and, therefore, the ICC was supposed to undertake a study or come up with a plan for extending its railroad systems in the United States. And this more or less was really not accomplished, they played with it for a while, and it was not too efficacious insofar as the way the legislation was drafted. So, by 1933 the authority that had been given to the ICC to devise these plans had been taken back, and ICC was just given war authority to approve various types of acquisitions and mergers in the railroad industry and to give antitrust exemptions with such acquisitions and mergers.

Again I say this is in 1933. Meanwhile, the Federal Maritime Commission throughout has had this antitrust authority. It was written in broad language. In fact, the language is sometimes characterized to that of the Sherman Act where it is very simple. It just says any agreement that restrains or prevents or stops competition is covered by Section 15.

By 1940, there is another amendment to the ICC Act in this. There were certain grandfather rights given in a codification, but it had no immediate bearing on ICC's authority or power that was specifically developed over a period of, oh, some 40 years to give this express antitrust authority to certain types of transactions that really grew up as a result of the industry structure of

the railroads and overland transportation in the United States.

I would submit that with respect to this ICC Act the present bearing of that express language in ICC I do not think can be used to say that with ICC being given this, as new situations cropped up and presented themselves in the railroad and overland trucking industry and so on, that that is a denial that the Federal Maritime Commission had such general authority way back in 1916 when the law was enacted.

So, too, with CAB. When that act was originally passed in 1938. And they looked at that, to various statutes, and CAB was given specific authority both in Section 402 and in general authority in Section 412. But again the language of both of those sections of the CAB statute is expressly tailored or geared to aviation or to airlines or to airplane industry. And, because by certain qualifiers it has, it just does not necessarily apply to the type of problems the Maritime Commission runs into.

I submit to this Court that neither Section 408 nor Section 412, even though it gives express grants to CAB, in any way derides or undermines the general authority given the Federal Maritime Commission back in 1916.

With respect to how the commission and the courts and, for that matter of fact, Congress has looked at this

authority given to the commission in 1916, I would like to call the Court's attention to the 1950 amendments that were made to Section 7 of the Clayton Act.

There is some argument here whether or not we are looking to post-enactment legislative history, so to speak, for coming up with Congress thinks some 30 so years after the Shipping Act was amended. But, nonetheless, it certainly shows that Congress at that time was fully aware, it shows that the commission at that time had the intent to have its jurisdiction applied to acquisitions and mergers.

Section 7, as you recall, was amended to include asset as well as stock acquisitions under its coverage. In addition to that, there was a specific exception section written into Section 7 at that time. Although there is some reference in one of the committee reports that this exemption language was not intended to give any further rights than a particular agency already have, certainly the argument is there that if the agency had no rights they would not put this exemption in in the first place. The commission made itself very plain when it appeared and testified in connection with this amendment in 1950 that it had this authority, it had this power, and it was exercising it. And there was no challenge by either the Congress or its members or, for that matter of fact, the Department of

Justice at that time, as to whether or not this was authority properly being exercised by the Federal Maritime Commission.

Q You do not claim that those '50 amendments were an affirmative grant of authority to the commission--

MR. GRUIS: I do not.

Q --you just said they were a recognition of the existence--

MR. GRUIS: It is a recognition of the existence of that. But I will come to that point in a second, Your Honor.

This type of thinking, Mr. Justice, also prevailed throughout the Celler hearings and the Celler report when the commission was again put under the Congressional microscope as to how it was operating under its new structure; namely, it was reconstituted, I guess you would say, under Executive Order Seven in 1960, and you now had a new type of regulatory agency that they were looking at rather closely to see how they were carrying it out, their functions particularly with respect to mergers and acquisitions and concentrations in the shipping industry. And throughout those Celler hearings and the Celler Report there is constant reference to the commission having this authority and exercising this authority. And we have searched,and I have not come up with any authority to the

contrary, in the Celler Report of those hearings that the commission was ever denied having this.

Along this line, in 1958 there was a major decision by this Court in the Isbrandtsen Line wherein the question of dual rights under the Shipping Act came into play, and this Court found that the statute, as it was then constituted, did not cover these types of transactions and they would be subject to antitrust laws, and I believe there is immediate congressional action to extend the period of time before these became unlawful so they could look at the Shipping Act, perhaps include some amendments, which they subsequently did.

And I would like to talk about this just briefly because those amendments, those 1961 amendments to the Shipping Act and particularly Section 15, did make substantial revision under the law that we are currently talking about here. There were additions; there were new procedures; there was a new public interest test that was introduced into that Section 15 amendment in 1961, and some of this of course flowed as a result of the Isbrandtsen decision some two years, three years, earlier, also to include coverage under the new Section 14(b) relating to dual rights.

Arguably, this amendment to Section 15 in 1961 allowed Congress to relook at what it did. It had at that

time all the language of Section 15, and it reviewed that language and it reviewed Section 15's provisions, deleting some and including new ones, so that there is almost a complete overhaul or, as some referred to it, a re-enactment of Section 15 with that congressional intent real clear. There is no doubt about that from our reading or from what has been reported on that. And that is the language that we are essentially faced with today.

Throughout those hearings and the amendments leading to it, the Justice Department had appeared and was given opportunity to speak on this issue but did not address itself to it and did not object.

I will reserve my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Seibel.

ORAL ARGUMENT OF IRWIN A. SEIBEL, ESQ.,

ON BEHALF OF RESPONDENT UNITED STATES

OF AMERICA

MR. SEIBEL: Mr. Chief Justice, may it please the Court:

I would like first to address myself to a couple points that my Brother Gruis raised during the course of his argument. And one was that the question as to the commission's jurisdiction was first raised in the court of appeals. I do not think it is relevant. But lest it may seem relevant to Your Honors, I would like to point out that

it was raised--I could find at least two places in the record where it was raised before the commission. One, in the appendix at page 33 in a letter from the applicant to the commission, the applicant for approval of the transaction. In the second paragraph at page 33 the applicants say that they have been advised by their counsel--I am skipping--that their transaction does not require approval by the commission. Nevertheless, they are submitting their papers for approval in the event the commission should differ with them. So that I think it was there clearly raised by the applicants, the question of the commission's jurisdiction to pass on their transaction.

Again, Your Honor, I find that on page 52 of the appendix in footnote one, where the applicants again say, "We preserve our position that the PFEL/Oceanic agreement is not subject to Section 15, Shipping Act, 1916."

I do not think it makes any difference, but it may to Your Honors.

The other point to which I would like to address myself immediately is the rather lengthy policy argument that my Brother Gruis made. He says that it is desirable as a matter of policy that the commission be given the jurisdiction over acquisitions and merger agreements because he says that the commission is more flexible and it does take into account antitrust considerations in its decisions.

That is certainly an arguable question of policy. Two courts differed as to whether or not it would be desirable. Judge Merrill in the Ninth Circuit, speaking for the majority of his panel, thought it would be desirable. On the other hand, Judge Wilkey, speaking for the court below in this case, raised a question as to whether or not it would be desirable.

But that, Your Honors, is a question for Congress. The question before this Court is whether Section 15 was intended to grant the Federal Maritime Commission jurisdiction over mergers and acquisitions, and that is the question Your Honors have to decide.

I think that my Brother Gruis was assuming that the commission had jurisdiction and was pointing out how good it is and how desirable it is that they should have it.

The Shipping Act does not provide a pervasive regulatory scheme for the shipping industry. It was never intended to do that and it does not do it today. It does not regulate entry; it does not have the general power to set rates, maximum-minimum rates.

What the Shipping Act was intended to do was to place under Government supervision the practices of shipping lines which banded together in setting up trade restraining agreements through the instrumentality of conferences. These are associations of shipping lines. And essentially

that was what was intended where the shipping lines worked out agreements whereby they regulated rates among themselves, they regulated sailings, they allotted ports, and it was that type of trade restraining agreement that Section 15 was designed to cover.

I would like to turn to the language of Section 15 very briefly. While I think it is inconclusive, I think our reading of Section 15 is more reasonable than the one that the commission suggests. Your Honors, I think you will find the pertinent parts of that set forth in the appendix to the cert petition. It is a grey covered document. And on page 19 it reproduces Judge Wilkey's opinion in this case where he sets forth the Shipping Act or portions of it as it was originally enacted. I do not think any pertinent changes were made in 1961 for our purposes.

On page 19, Judge Wilkey sets forth in a series the seven categories of agreements which Section 15 covers. Your Honors, if we remove the middle category, which the opinion labels clause three and on which my Brother Gruis relies principally, that is the category of agreements controlling, preventing, and so forth, competition. If we remove that for a moment and examine all the other categories, the first is an agreement fixing rates, clearly an ongoing type of agreement.

The second is agreements giving special rates

and accommodations, another of the same type. I will skip the third, which is the one my Brother Gruis relies on.

The fourth are agreements pooling or apportioning earnings. Again, an agreement of an ongoing type that is susceptible to continuing supervision by the agency.

The fifth are agreements allotting ports or regulating sailings. Again, an agreement of the same type.

The sixth are agreements regulating the volume of traffic. Again, these are agreements of an ongoing nature.

And then, finally, there is a catchall provision. Agreements in any manner providing for an exclusive preferential or cooperative working agreement.

Clearly, those five agreements are all of the same type as the one in the final clause. They are specific and unambiguous agreements of an ongoing nature. And the last is obviously a generalized type describing the same type of agreements as were previously described. It seems to be quite reasonable to read--

Q Mr. Seibel, the last is obviously a generalized step. I can see how you can argue it, but it is not to me crystal clear that that--

MR. SEIBEL: I mean, obviously in the sense that it is generalized rather than specific, Your Honor, is what I meant, rather than--all I am suggesting, Your Honor, is not that the language is conclusive. I am suggesting that

it is failure to read the language as we urge rather than as the commission urges. And in view of the fact that the language on which it relies is in the middle of the specific and unambiguous clauses that it is intended to be of the same type as the other clauses immediately preceding it and following it, and that the last clause, the generalized clause, was summarizing the kinds of agreements that preceded it; that is, trade restraining agreements, agreements of an ongoing nature which are susceptible of continuing supervision by the agency.

Support for this construction is provided in the paragraphs immediately following. I will take one. Perhaps we cannot dwell on this too long because I think the conclusive answers are in the legislative history and in contemporaneous and subsequent legislation where Congress was very explicit when it wanted to give an agency authority over acquisitions and mergers, wherein the same statute Congress gave the agency jurisdiction over agreements in one clause and in a separate clause specifically addressed itself to acquisitions and consolidations. Conceptually Congress thought of them as being of a different breed, and I think this is true in the case of the Shipping Act.

In the paragraph immediately following the clauses I just quoted--this appears on page 20 of the appendix--I

will take one. There are three such paragraphs. I think one is sufficient to illustrate the point I am trying to make. It provides that the commission may disapprove an agreement--I am skipping--whether or not previously approved by it.

But that I think that an acquisition agreement is not readily susceptible of that type of treatment. That is, once it is consummated, why it is gone and has disappeared generally. Whereas, an agreement of a continuing nature, that is, the conference agreements which regulate rates involve the participation of the parties over a period of time and therefore, when the commission may originally approve it, it may later disapprove it. It is that type of distinction which I am urging on the Court. And I think the legislative history bears this out. I think it is quite clear--it is not that the legislative history does not reflect a concern by the committee, the Alexander Committee, which is, as Your Honors know, the committee that investigated the shipping industry in this period, it is not that that committee was unaware of or was unconcerned with the problems of acquisitions--indeed they were. In the domestic trade they discussed them at length, and they were quite concerned about the railroads gobbling up the water-lines in the intercoastal trade and on the Great Lakes. They pointed out that 50 percent of all the tonnage in the

country was moving through water carriers that were owned or controlled by the railroads.

Q This was back in nineteen--

MR. SEIBEL: 1910-11-12, yes, Your Honor.

The point is not merely that they were concerned but that they simply did not recommend any legislation because the Panama Canal Act, to which they explicitly refer in the Alexander Report, because that act, which was passed in 1912, they say, went very far towards eliminating the evils that were presented by railroad domination of the water carriers in the domestic trade.

In contrast, Your Honors, the language in the Panama Canal Act with the language with which we are concerned here, remembering that the Panama Canal Act is specifically referred to in the report containing the recommendations which Congress adopted in the Shipping Act. The Panama Canal Act excerpts which I have set forth in Justice's brief on page 24--in the Panama Canal Act, Congress made it unlawful for any railroad--and I quote--"to own"--it did not use the word "agreements"--"to own or control or have any interest whatsoever by stock ownership or otherwise, either directly or indirectly"--et cetera, et cetera--"of any common carrier by water." It did not use the word "agreements."

Also contrast the later amendment--this was an

amendment to Section 5 of the Interstate Commerce Act--contrast the laguage Congress used in the 1920 amendment, which occurs very shortly after the Shipping Act. That amendment dealt both with agreements, both with the pooling agreements and agreements of a continuing character and with acquisitions and mergers.

The pertinent language of that statute, Your Honor, is set forth on the top of page 26 and in the footnote.

The amendment to the Interstate Commerce Act at that time, which was Section 5(1), dealt with agreements and it made it unlawful, unless approved by the commission, Interstate Commerce Commission, I quote, "for any common carrier to enter into any contract, agreement, or combination with any other common carrier through the pooling of freights or to divide between them the aggregate or net proceeds of the earnings."

There we are talking about agreements, which is what we have here. And in the immediately following paragraph of that statute in 1920, which we have quoted in the text on page 26, the same page, Congress banned interlocking ownership. They are talking about acquisitions there. And I am quoting: "The acquisition by one carrier, in brackets, of the control of another, in brackets, under release or by the purchase of stock in any

other manner not involving the consolidation of such carriers into a single system."

The point of this contrasting language is to show that Congress knew how to use the different jargon to describe the difference between an agreement, which is involved in Section 15, and an acquisition or merger consolidation, which is a very different breed of animal, at least conceptualistically in the minds of the Congress. And, as a matter of fact, if Your Honors go through the very lengthy Alexander Report, as I am sure Mr. Justice Stewart probably had to for the Volkswagen opinion, Your Honors, will find that the word "agreement" is used from beginning to end to refer only to cooperative working agreements, agreements of a continuing kind, rate making agreements, pooling agreements; never, never to acquisitions or mergers.

And the Alexander Committee did use the words "acquisitions, consolidations, and mergers," but it used them to refer precisely to that. And I would like to read one paragraph which shows the contrasting use in the same sentence by that committee of an agreement and an acquisition. I am reading from the--I have xeroxed copies--from the Alexander Report, and I am reading from page--or I thought I was--409 of that report. This is rather brief. And the committee is talking about the domestic trade. And it

describes the numerous methods of controlling competition between carriers.

The first method is control through the acquisition of water lines or the ownership of accessories to the lines. No worry about agreements in that. Control through the acqusition of water lines or the ownership of accessories to the lines.

Two, control through agreements or understandings. Now, the committee understood very well the difference between agreements that it meant in acquisitions. And the fact that it used it in the very same sentence, it seems to me, is a rather eloquent indication of the difference it was drawing in its mind. And this is not really accidental. If Your Honors will review the focus of the committee on the problem that was bothering it, the problem of conference abuses at the time, which led the committee to recommend the enactment of particularly Section 15, with which we are here concerned.

During the last half of the 19th century, there were a great many vessels that were built which produced a surplus capacity. And this surplus capacity led to rate wars. This was undesirable from the standpoint of shippers because of the instability it created. They never could tell when they were going to have a vessel available for importers and exporters. It was undesirable from the

standpoint of the carriers because of the potential for destruction, these destructive rate wars.

To avoid costly struggles, most of the lines banded together to regulate the terms on which they competed. Most of the lines belonged to cartels. This is all reflected in the Celler Report which is cited in both briefs. Most belonged to cartels known to us as conferences, associations of shipping lines.

Through these conferences the lines were able to agree in ways to moderate the rigors of competition, how to punish the disloyal shipper who shipped on a non-conference vessel, how to regulate the rates between them.

While this brought about some stability, it understandably led to abuses. And so Congress in 1912 authorized a committee to investigate these practices. The committee wrote a detailed report, which we referred to many times--my Brother Gruis did and I have. It is the Alexander Report. The report was based in large part, so far as the foreign trade was concerned, on an examination of 80 agreements, 80 written agreements. There were many secret agreements, a practice which the Shipping Act was designed to correct, to bring them out in the open and put them under Government supervision.

What is striking about these 80 agreements is that every single one of the 80 agreements is a cooperative

working agreement, the pooling type, regulating rates. Not a single one of the 80 agreements examined by the committee in the foreign trade was a merger agreement or an acquisition agreement. All were of an ongoing nature.

The committee recognized that these agreements had many advantages. The problem was how to preserve the advantages while minimizing their potential for abuse. The advantages were clear. The regularity of sailings; if they were assured of particular rates, the vessels would sail regularly. The importers and exporters were fairly certain about the rates that were going to be charged. So, they knew what to charge themselves.

If unrestricted competition--if the committee were to recommend outlawing these agreements and unrestricted competition were the mode of life in the shipping industry, the inevitable result would be--and this the committee describes rather picturesquely and at great length--the inevitable result would be rate wars resulting in uncertainty in rates and schedules, the destruction of weaker lines, and protective mergers and consolidations, with monopoly as a consequence. That was the analysis made by the committee.

On the other hand, if they allowed these trade restraining agreements, the fixing of rates, the pooling, and it were placed under Government supervision, the advantages would be preserved, the committee pointed out,

and also this would avoid the harm to structural concentration in the industry. You would not have as a result of destructive rate wars the lines either going out of business or getting together and consolidating. So, one reason for recommending that these agreements of an ongoing nature be authorized under Government supervision was to avoid forcing these irretrievable and permanent consolidations among the shipping lines.

Agreements to merge were simply not the kind of agreement the committee deemed necessary to immunize from attack under the antitrust laws.

I have already mentioned that the committee was aware of the problem of acquisitions and mergers in the domestic trade and made no recommendation as to those. I have mentioned that the committee used the word "agreements" in a very distinctive sense, certainly not to include mergers and consolidations.

I think the question before Your Honor, whether or not it would be desirable, as my Brother Gruis suggests, as a matter of policy I think is debatable. But the question before Your Honor is whether Congress intended in Section 15 to give the agency the authority to pass on mergers and acquisitions, and that is the only question before Your Honors, and I submit that the evidence is overwhelming against that grant of authority.

Q Would you suppose, if you are correct on this issue, which is the only issue before us, whether or not Section 15 gives the commission--whether this is something that is filable under 15 and if the commission approves is immune from the antitrust acts, that is the question--

MR. SEIBEL: Yes, Your Honor.

Q --would you suppose that, if you are right, that it is not that the full force of the antitrust laws would--it would follow they would apply to this acquisition.

MR. SEIBEL: Yes, sir. I am not suggesting a particular transaction involved in this case is in violation--

Q Is necessarily a violation, no.

MR. SEIBEL: No.

Q And that, of course, is not the point.

MR. SEIBEL: Judge Wilkey expressed no opinion. We express no opinion as to that.

Q Because certainly the legislative history does show a realization by Congress of the fact that this industry is sui generis, if you will--

MR. SEIBEL: Yes.

Q --and, therefore, is probably not to be the target of the full force of the antitrust laws as such.

MR. SEIBEL: That is right.

Q You would agree with that, would you not?

MR. SEIBEL: Oh, yes, Your Honor. It does recognize that. The problem it had before it was what to do about the conferences and what kind of agreements that it had before them. And I think it quite clear, I think it is quite clear from an examination of the history, that even though they were aware of acquisitions, they did not mean to include them in Section 15; they did point out in their report--they did refer to the Panal Canal Act which deals specifically with that problem.

Q Of course, at that time a sale of assets was not covered by the antitrust laws.

MR. SEIBEL: Well, I think it was later found out from this Court that--

Q That it was.

MR. SEIBEL: --it probably was.

Q But nobody knew it was at that time.

MR. SEIBEL: No. Stock acquisitions, I think, were the predominant mode of mergers and acquisitions, but that is right, Your Honor.

I would like to point out, though, my Brother Gruis, if I may have one further word, has indicated that it probably would not make much sense to say that an acquisition, if it is covered--he referred to a transaction where an acquisition was accompanied by an ancillary,

ongoing covenant not to compete. The latter by itself would be the kind of agreement, we would concede, that is within Section 15. He suggests that it would not make sense to make the distinction to say it is, and therefore the commission can pass on the whole transaction.

I agree with him that it would not make sense to say, if the acquisition is not subject to the commission jurisdiction, I do not think that the Court should say that the acquisition--we deal with that at the end of our brief--that the acquisition accompanied by the ancillary covenant not to compete or some ancillary restraint, would, just because the parties cast their agreement in a particular form, should bring the transaction within the commission's jurisdiction for that reason.

Q Why is the Department of Justice in this case?

MR. SEIBEL: We are a statutory--

Q What do you mean?

MR. SEIBEL: The statute on petitions for review of the agency's decision requires that the United States be a party.

Q Is that true of other agencies?

MR.SEIBEL: Some other agencies, the Interstate Commerce Commission.

Q The Controller of the Currency--

MR. SEIBEL: I do not think so, not in the case of the Controller.

Q The department is an actual party here?

MR. SEIBEL: Yes. We were served with the petition for review and the statute, which is Title 28, U.S.C., 23-42--

Q It did not command you to take a position one way or another, did it?

MR. SEIBEL: No, no.

Q I am just curious. Are there other instances where--

MR. SEIBEL: Yes. The Interstate Commerce Act, the United States is a statutory defendant. We normally do not. We normally join together like good sisters and brothers.

Q If Justice Frankfurter were here, he would be going through the roof. [Laughter]

And it was necessary for the department to consent under the statute also for the Maritime Commission to file a brief and appear here?

MR. SEIBEL: Oh, no, Your Honor. Under the statute the Maritime--

Q I know, but under some other statute?

MR. SEIBEL: Yes, that is right. I think perhaps under the Civil Aeronautics Act that is true.

Q STill, both of you should not be here, should you?

MR. SEIBEL: I am sorry. I did not hear you, Your Honor.

Q Should both of you be here?

MR. SEIBEL: We are. Yes.

Q Who is speaking for the United States?

MR. SEIBEL: I do, Your Honor. Nominally, at least. I am not sure I know how to answer that.

Q Is it still true that you had to pay for that brief?

MR. SEIBEL: For this?

Q Is it still true?

MR. SEIBEL: We did. [Laughter]

We did pay for both. The printing costs, Your Honor?

Q Yes.

MR. SEIBEL: Yes.

Q This is a suit, then, of the United States v. United States?

MR. SEIBEL: No. It is the Federal Maritime Commission. There are other parties, Mr. Justice Douglas, as well. They have ceded their time. They have ceded their time--

Q As a matter of fact, Maritime could not be

here without the consent of the Solicitor General.

MR. SEIBEL: I think he could. I think the Solicitor General's office--

Q I notice the Solicitor General consented to it.

MR. SEIBEL: As a matter of form in this case. I think under the statute--perhaps I am misspeaking, but I do think under the statute they have the right.

Q My understanding is this is exactly what the statute contemplates.

MR. SEIBEL: Exactly. But they will have the right--

Q That is right.

MR. SEIBEL: I think so.

Q The uniqueness is that Seatrain has yielded all its time to you, if there is any uniqueness to that. They could have been here.

MR. SEIBEL: They could have been here and they are here through counsel sitting--

Q I mean physically.

MR. SEIBEL: Yes. Yes, they could have been here. I think they--Seatrain did not happen to take a position on jurisdiction in the court below.

Q They just asked for a hearing?

MR. SEIBEL: Yes, Your Honor.

I am sorry, Mr. Justice Powell, were you--

Q I think you have a minute. I will ask this question. You are here, as I understand it, asking this Court to affirm the judgment below?

MR. SEIBEL: Yes, Your Honor.

Q But, in addition, you say at the end of your brief that you think the opinion of the court below erred in the distinction it made between what was called a simple merger or sale of assets and one that had some ongoing characteristic such as a convenant not to compete. So, is it your position that if we should affirm that you think we should address that issue also?

MR. SEIBEL: Yes, Your Honor, because of the great uncertainty I think would result as to the scope of the commission's jurisdiction. I think what you would have are lawyers simply restructuring an acquisition with an agreement not to compete. And I am not quite sure that Judge Wilkey meant to go that far.

I think it would be desirable--Your Honors do not often do that--but it seems to me it would be appropriate in this case so that we do not--

MR. CHIEF JUSTICE BURGER: Do you have anything further?

[Continued on page following.]

REBUTTAL ARGUMENT OF EDWARD G. GRUIS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GRUIS: I would like to add only one point, Mr. Chief Justice. With respect to legislative history, I did not address myself to that because there is really nothing definitive in the legislative history one way or another. Mr. Seibel addressed himself in his brief very appropriately as to what it says one way. We think we have equally covered the ground on the other side of the brief as to what it says on the other side.

We believe Justice Stewart in Volkswagen points out one particular section of the committee's recommendation wherein it expressly covers agreements by vessels engaged in the foreign commerce of the United States.

Secondly, I would like to raise one further question. As with the schematics of putting Section 15 together, about clause three standing out or being the single exception to all the other ongoing type of clauses. I submit, Your Honor, if this is what the committee had in the back of their mind, we could have eliminated clause three completely because it would have been covered by clause seven, according to Mr. Seibel's discussion.

We think this Court should reverse the court below and find that the commission does have authority under Section 15 of the Shipping Act to pass on mergers and

acquisitions. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gruis. Thank you, Mr. Seibel.

The case is submitted.

[Whereupon, at 2:00 o'clock p.m., the case was submitted.]

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