FEDERAL MARITIME BOARD PROCEDURE AND THE LEGALITY OF DUAL RATE SHIPPING CONTRACTS*

THE exclusive patronage dual rate contract is a device employed by many shipping conferences to induce shippers to restrict their trade to carriers who are conference members.[1] Under this type of contract, a shipper agreeing to move his goods exclusively in conference carriers receives a percentage reduction from the non-contract rate, regardless of the volume of goods shipped.[2] The contract discourages a shipper from using non-conference carriers, since a single defection normally means that he must make a substantial penalty payment [3] and that he is deprived of the future benefits of the reduced rates.[4]

Section 15 of the Shipping Act requires that rate agreements between carriers must be filed with the Federal Maritime Board,[5] and provides that

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*Isbrandtsen Co. v. United States, 81 F. Supp. 544 (S.D.N.Y. 1948), *appeal dismissed sub nom.* A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 336 U.S. 941 (1949); 96 F. Supp. 883 (S.D.N.Y. 1951), *aff'd by an equally divided court sub nom.* A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 342 U.S. 950 (1952); 211 F.2d 51 (D.C. Cir.), *cert. denied,* 347 U.S. 990 (1954).

1. A shipping conference is an association of water freight carriers loosely joined together to regulate competition, stabilize operations, and provide other mutual benefits. See MARX, INTERNATIONAL SHIPPING CARTELS 3 (1953).

Of the 105 conferences now using American ports, 62 employ dual rate systems. Petition for Writ of Certiorari filed by FMB, p. 21, Isbrandtsen Co. v. United States, 211 F.2d 51 (D.C. Cir. 1954). See also MARX, *op. cit. supra,* at 50-51, 207. For purposes of dual rate contracts, see generally MARX, *op. cit. supra,* at 207.

2. Percentages usually vary from 10-20% below the regular non-contract conference rates. MARX, *op. cit. supra* note 1, at 202; ROSENTHAL, TECHNIQUES OF INTERNATIONAL TRADE, 43 n.6 (1950). See, *e.g.,* First Isbrandtsen Case, 81 F. Supp. 544 (S.D.N.Y. 1948) (20%); Third Isbrandtsen Case, 211 F.2d 51, 54 (D.C. Cir. 1954) (9½%); Pacific Coast European Conference Agreement, 3 U.S.M.C. 11, 14 (1948) (15%).

3. See MARX, *op. cit. supra* note 1, at 209; ROSENTHAL, *op. cit. supra* note 2, at 49. *Compare* Pacific Coast European Conference Agreement, 3 U.S.M.C. 11 (1954) (repayment of all rebates previously received held unlawful), *with* Isbrandtsen Co. v. North Atlantic Continental Freight Conference, 3 F.M.B. 235, 246 (1950) (percentage of price of freight shipped might be valid).

4. MARX, *op. cit. supra* note 1, at 209; Contract Routing Restrictions, 2 U.S.M.C. 220, 222-23 (1939). But see Pacific Coast European Conference Agreement, 3 U.S.M.C. 11, 18 (1954) (shipper loses benefits only until payment of penalty).

5. 39 STAT. 733 (1916), 46 U.S.C. § 814 (1952).

The Federal Maritime Board, established in 1950 by Reorganization Plan No. 21, 64 STAT. 1273 (1950), succeeded the United States Maritime Commission which had been created by the Merchant Marine Act of 1936, 49 STAT. 1987 (1936), 46 U.S.C. § 1111 (1952). The Maritime Commission took over the functions performed by the Department of Commerce under Executive Order No. 6166, § 12, June 10, 1933, 5 U.S.C. § 132 (1952) (note). The Department of Commerce succeeded the United States Shipping Board, 39

it is "unlawful to carry out" such agreements unless "approved" by the Board.[6] Agreements lawful under the Act are granted an exemption from the anti-trust laws.[7] Section 15 authorizes the FMB to "disapprove, cancel or modify" agreements which it finds "unjustly discriminatory or unfair" as between carriers or shippers or which are in violation of the Act,[8] but directs it to approve all other agreements.[9] However, the Shipping Act fails to define what constitutes FMB approval.

The recent cases of *Isbrandtsen Co. v. United States* [10] considered the requisites of FMB approval of conference agreements establishing dual rate contract systems. In 1948, the Board, without a hearing, authorized two such conference agreements.[11] A district court in the *First Isbrandtsen Case* upheld the contention of Isbrandtsen, a competing independent carrier, that it would be "gravely prejudiced" by conference initiation of the dual rate system.[12] The court therefore granted Isbrandtsen's request for a temporary injunction against enforcement of the rates until the FMB had an opportunity to pass upon the validity of the agreements in an "adversary proceeding."[13] The Board subsequently approved the dual rates after a full hearing at which all parties were represented.[14] The district court in the *Second Isbrandtsen Case*, although not questioning the sufficiency of the FMB hearing, permanently enjoined the enforcement of the rates.[15] It found that the conference rate system approved by the Board had been based upon a concededly "arbitrary" rate differential, without reference to an adequate standard, and was therefore

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STAT. 729 (1916). For convenience, these various agencies are referred to herein as the FMB.

6. 39 STAT. 733 (1916), 46 U.S.C. § 814 (1952).

7. *Ibid.*

8. *Ibid.* The FMB is also authorized to disapprove agreements which "operate to the detriment of the commerce of the United States." *Ibid.* When the Board finds a rate or practice to be "unjust or unreasonable," it is empowered to prescribe and order enforcement of one which is "just and reasonable." 39 STAT. 735 (1916), 46 U.S.C. § 817 (1952).

9. 39 STAT. 733 (1916), 46 U.S.C. § 814 (1952).

10. 81 F. Supp. 544 (S.D.N.Y. 1948), *appeal dismissed sub nom.* A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 336 U.S. 941 (1949); 96 F. Supp. 883 (S.D.N.Y. 1951), *aff'd by an equally divided court sub nom.* A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 342 U.S. 950 (1952); 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

11. Conference Agreements No. 4490-6 (Jan. 2, 1948) and No. 7920-1 (Aug. 24, 1948), cited in Isbrandtsen Co. v. United States, 81 F. Supp. 544 (S.D.N.Y. 1948).

12. First Isbrandtsen Case, 81 F. Supp. 544, 547 (S.D.N.Y. 1948).

For a brief summary of Isbrandtsen's diverse independent activities and long-standing opposition to shipping conferences, see Business Week, Oct. 17, 1953, pp. 114-118.

13. *Id.* at 546. The injunction was conditioned on Isbrandtsen's "diligent prosecution" of a complaint before the Board challenging the dual rate system. *Id.* at 547.

14. Isbrandtsen Co. v. North Atlantic Continental Freight Conference, 3 F.M.B. 235 (1950).

15. Isbrandtsen Co. v. United States, 96 F. Supp. 883, 893 (S.D.N.Y. 1951), *aff'd by an equally divided court sub nom.* A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 342 U.S. 950 (1952).

"unjustly discriminatory."[16] The FMB subsequently promulgated General Order 76 requiring any conference filing a dual rate contract agreement for approval to justify its use of such a system and specify its reasons for the rate differential employed.[17] Shortly thereafter, another conference in competition with Isbrandtsen filed its proposed dual rate system with the FMB.[18] Over the objections of Isbrandtsen and the Department of Justice, the Board authorized immediate initiation of the system, granting a hearing at a later date.[19] On review in 1954, a court of appeals in the *Third Isbrandtsen Case* again enjoined initiation of the dual rates pending a hearing, holding that the FMB action allowing them to go into effect "prior to approval" violated section 15.[20] Following a full hearing,[21] the Board is presently considering this proposed dual rate system.[22]

Due to the conflict between the Board and the courts over the interpretation of FMB procedures, the legality of the dual rate contract systems in *Isbrandtsen Co. v. United States* has remained undecided for seven years. It now seems clear that final FMB approval of conference agreements establishing dual rate systems is mandatory before they can become effective.[23]

16. *Id.* at 889.

17. General Order 76, 46 C.F.R. § 236.3 (Supp. 1952). Section 236.3 provides that interested parties may file with the Board written comments concerning the rates together with a request for a hearing.

In Contract Rates—North Atlantic Continental Freight Conference, 4 F.M.B. 355 (1954), the FMB after hearing approved a dual rate agreement with a 10% differential filed pursuant to General Order 76.

18. Isbrandtsen Co. v. United States, 211 F.2d 51, 53 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954).

19. *Id.* at 54. The FMB order authorizing a dual rate system with a 9½% differential was based solely on information filed pursuant to General Order 76. *Ibid.*

20. *Id.* at 57. The court also held that the FMB order allowing the rate system to go into effect pending a hearing was a "final order" and therefore subject to judicial review, citing the "immediate and incalculable" harm to Isbrandtsen's rights which the order would bring about. *Id.* at 55-56. See note 31 *infra*.

The granting of judicial relief pending agency determination in the *First* and *Third Isbrandtsen Cases* contrasts with earlier Supreme Court denials of injunctions in dual rate cases on primary jurisdiction grounds. Even where conferences, in disregard of the Shipping Act, failed to file their dual rate agreements, the Court held that the complainants had to make prior resort to the Board before judicial action was possible. U.S. Navigation Co. v. Cunard S.S. Co., 284 U.S. 74 (1932); Far East Conference v. United States, 342 U.S. 570 (1952). *Cunard* may be distinguished if the *Third Isbrandtsen Case* is viewed merely as a review of prior final action by the FMB. Moreover, Isbrandtsen was seeking only to restrain the conference *temporarily* pending agency action, unlike the complainants in *Cunard* and *Far East Conference*, who sought *permanent* injunctions against initiation of dual rate systems.

21. See Japan-Atlantic and Gulf Freight Conference, F.M.B. Docket No. 730 (Recommended Decision of Robert Furness, Examiner) (Sept. 13, 1954).

22. The FMB has remanded the Examiner's Report for further findings prior to Board consideration of the problem. Letter from Clarence G. Morse, General Counsel, FMB, to the *Yale Law Journal*, Dec. 23, 1954, on file in Yale Law Library.

23. See Third Isbrandtsen Case, 211 F.2d 51, 56-57 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954). The FMB has never denied that it was required to approve agreements

Moreover, although there is no statutory provision for a hearing prior to initiation of rate systems, courts have interpreted "approval" in section 15 as requiring an adversary proceeding if one is sought.[24]

The FMB has never had authority to regulate shipping rates, except indirectly through its power to disapprove conference agreements.[25] Since the Board cannot possibly scrutinize the large number of rates filed by carriers, its practice has been to allow these rates to become effective upon submission.[26] To hold *all* shipping rates unlawful and enjoinable except upon FMB approval following a hearing would impose an extraordinarily heavy burden on the Board [27] and would severely impair conference flexibility in adjusting rates to meet changing economic conditions.[28] However, the *Third*

before they could become effective. However, its "approval" normally consisted only of routine inspection of agreements and supporting information without a hearing. See *Ex parte* 4, Section 15 Inquiry, 1 U.S.S.B. 121, 124 (1927); Third Isbrandtsen Case, *supra*, at 54-55; notes 24, 26 *infra*.

24. Third Isbrandtsen Case, 211 F.2d 51 (D.C. Cir.), *cert. denied*, 347 U.S. 990 (1954). See also First Isbrandtsen Case, 81 F. Supp. 544 (S.D.N.Y. 1948), *appeal dismissed sub nom.* A/S J. Ludwig Mowinckels Rederi v. Isbrandtsen Co., 336 U.S. 941 (1949). Although the *Third Isbrandtsen Case* did not specifically state that the FMB was required to hold an adversary hearing in order to approve the dual rate system, the apparent grounds upon which the decision rested was the Board's failure to hold adversary proceedings prior to its initiation.

Moreover, the court of appeals is directed to (1) "determine whether a [agency] hearing is required by law" and (2) "pass upon the issues presented" when no hearing is required. 64 STAT. 1130 (1950), 5 U.S.C. § 1037 (1952). If a hearing had not been required in the *Third Isbrandtsen Case*, the court under this section would have been required to pass on the substantive issues.

Due process requires that a hearing be allowed at some period prior to the time when governmental action becomes final. DAVIS, ADMINISTRATIVE LAW § 75 (1951). Section 23 of the Shipping Act requires orders of the FMB "relating to any violation" of the Act to be made only after "full hearing." 39 STAT. 736 (1916), 46 U.S.C. § 822 (1952). The FMB's practice has been to hold a hearing if either the Board or any interested party opposes a rate agreement. The Board has had no fixed practice concerning the time within which such a hearing is held. And in the past, it has frequently allowed rate agreements to go into effect temporarily pending a hearing. See ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 9, 13 (Monograph No. 4, 1940). The Shipping Act appears to provide no specific authority for this procedure. See generally DAVIS, *op. cit. supra* § 73 (1951).

25. MARX, INTERNATIONAL SHIPPING CARTELS 130-31, 295 (1953); ROSENTHAL, TECHNIQUES OF INTERNATIONAL TRADE 50 (1950); Petition for Writ of Certiorari filed by FMB, p. 15, Third Isbrandtsen Case, 211 F.2d 51 (D.C. Cir. 1954); Second Isbrandtsen Case, 96 F. Supp. 883, 896 (S.D.N.Y. 1951). See generally S. REP. No. 2494, 81st Cong., 2d Sess. 84 (1950).

26. The FMB claims that it cannot possibly subject the approximately 2,000 rates filed each month to anything more than perfunctory scrutiny. See Petition for Writ of Certiorari filed by FMB, *supra* note 25, at 18-20. The Board has authorized almost all rate agreements as a routine matter. See ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 11-13 (Monograph No. 4, 1940); MARX, *supra* note 25, at 110-13.

27. See Petition for Writ of Certiorari filed by FMB, *supra* note 25, at p. 19.

28. The necessity for conferences to be able to adjust rates promptly to changing economic conditions was one of the reasons why the Shipping Act gave the FMB no affirma-

Isbrandtsen Case may be read narrowly to require a hearing prior to approval only for an agreement which embodies a comprehensive "new scheme of rate combination and discrimination."[29] The public interest in granting a blanket antitrust exemption to these Shipping Act agreements would seem to require that their approval be preceded by careful agency consideration.[30]

Furthermore, prior FMB approval will probably result in more rapid effectuation of conference rate systems. Reviewing courts have discretion temporarily to enjoin administrative agency orders,[31] and have exercised this power upon a finding of "irreparable injury" even after full agency hearings.[32] However, it is less likely that such injury will be found once the FMB, following a hearing, has approved the reasonableness of a particular rate system.[33] And FMB approval after a hearing will at least allow prompt

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tive power of rate making. *Report of the House Committee on the Merchant Marine and Fisheries*, H.R. Doc. No. 805, 63d Cong., 2d Sess. 309-11, 420-21 (1914); MARX, *op. cit. supra* note 25, at 130.

29. Isbrandtsen Co. v. United States, 211 F.2d 51, 56 (D.C. Cir. 1954). See also *Ex parte* 4, Section 15 Inquiry, 1 U.S.S.B. 121, 124-25 (1927).

30. See Third Isbrandtsen Case, *supra* note 29, at 57; Far East Conference v. United States, 342 U.S. 570, 578 (1952) (dissenting opinion).

31. The court of appeals has "exclusive jurisdiction" to enjoin, set aside, or suspend all "final orders" of the Federal Maritime Board. 64 STAT. 1129 (1950), 5 U.S.C. § 1032 (1952). A reviewing court may postpone the effective date of any agency action pending conclusion of the review proceedings where necessary to prevent "irreparable injury." 60 STAT. 243 (1946), 5 U.S.C. § 1009(d) (1952). See also 64 STAT. 1131 (1950), 5 U.S.C. § 1039(b) (1952).

However, even in the absence of statute, it appears to be within the equity discretion of federal courts to issue temporary injunctions pending either administrative determination or judicial review, on showing of irreparable injury. See Note, *Interim Injunctive Relief Pending Administrative Determination*, 49 COLUM. L. REV. 1124, 1126 (1949). For cases in which temporary injunctions were issued pending administrative determinations, see West India Fruit & S.S. Co. v. Seatrain Lines, Inc., 170 F.2d 775 (2d Cir. 1948); Montana State Federation of Labor v. School District, 7 F. Supp. 82 (D. Mont. 1934). For cases where temporary injunctions were issued pending judicial review, see United States v. United Mine Workers, 330 U.S. 258, 290-95 (1947); Continental Illinois National Bank & Trust Co. v. Chicago, R.I. & P. Ry., 294 U.S. 648, 675 (1935).

32. In Columbia Broadcasting System v. United States, 316 U.S. 407, 425 (1942), a stay was granted pending completion of appellate review even following "extensive hearings" by the FCC, to protect against "irreparable injury." For other cases in which administrative agency orders made after hearings were enjoined pending judicial review, see American Air Transport v. CAB, 206 F.2d 423 (D.C. Cir. 1953) (CAB); United States *ex rel.* Cammarata v. Miller, 79 F. Supp. 643 (S.D.N.Y. 1948) (Immigration Service); United States v. Baltimore & Ohio R.R., 225 U.S. 306 (1912) (ICC).

33. The power to stay is not a matter of right but of judicial discretion. Scripps-Howard Radio Inc. v. FCC, 316 U.S. 4 (1942). In Louisville & N.R.R. v. Railroad Commission of Alabama, 208 Fed. 35 (M.D. Ala. 1913), a reviewing court, in denying a temporary injunction, held that a "presumption of reasonableness" attached to an agency order which had been issued following a hearing. *Cf.* Virginian Ry. v. United States, 272 U.S. 658, 672-75 (1926).

Temporary injunctions have been denied following full agency hearings in Seas Shipping Co. v. Cardillo, 86 F. Supp. 531 (E.D.N.Y. 1949) (FSA); Koppers Gas & Coke Co.

judicial review, thus preventing successive wasteful remands to the Board for prior administrative determination of substantive issues.[34]

Regardless of the procedure followed, it is questionable whether the FMB had statutory authorization to approve the dual rate systems in the *Isbrandtsen* cases. Section 14(3) of the Shipping Act forbids a carrier to "retaliate against any shipper" by resorting to "discriminating or unfair methods" because that shipper has "patronized any other carrier."[35] In *Isbrandtsen*, the Board affirmed the position it has consistently taken—that this section did not bar it from approving dual rate contract systems where necessary and reasonable.[36] And it claimed that conference use of such a system did not constitute retaliation because it operated without "vengeance" against all shippers who "voluntarily" failed to sign the contracts, whether or not they patronized non-conference carriers.[37] But, in *Far East Conference v. United States*,[38] two dissenting Supreme Court justices persuasively argued that when a shipper was charged higher rates solely for failing to give his exclusive patronage to the conference, he was "being retaliated against for shopping around among carriers," and that section 14(3) therefore made any dual rate contract system "illegal."[39]

The Alexander Committee, whose report formed the basis for the Shipping Act, recommended that such conference practices as deferred rebates and "fighting ships" be flatly prohibited,[40] without making a similar recommenda-

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v. United States, 11 F. Supp. 467 (D. Minn. 1953) (ICC). And see Truax-Traer Coal Co. v. National Bituminous Coal Commission, 95 F.2d 218 (7th Cir. 1938); American Air Lines v. Standard Air Lines, 80 F. Supp. 135 (S.D.N.Y. 1948) (CAB), where agency orders made without hearings were enjoined pending administrative proceedings.

34. See text at notes 12-20 *supra*. This prior agency consideration of issues within its area of special competence is required under the doctrine of primary jurisdiction. See U.S. Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932). For an excellent discussion and criticism of the primary jurisdiction doctrine, see Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 438, 466, 471-74 (1954). For a contrary view, see von Mehren, *The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction*, 67 HARV. L. REV. 929 (1954).

35. 39 STAT. 733 (1916), 46 U.S.C. § 812(3) (1952).

36. See Isbrandtsen Co. v. North Atlantic Continental Freight Conference, 3 F.M.B. 235, 239-44 (1950). For statements of the FMB's position, see Eden Mining Co. v. Bluefields Fruit & S.S. Co., 1 U.S.S.B. 41, 46 (1922); W. T. Rawleigh Co. v. Stoomvaart, 1 U.S.S.B. 285, 293 (1933); Pacific Coast European Conference Agreement, 3 U.S.M.C. 11, 16 (1948).

37. Isbrandtsen Co. v. North Atlantic Continental Freight Conference, 3 F.M.B. 235, 242 (1950).

38. 342 U.S. 570 (1952).

39. Far East Conference v. United States, 342 U.S. 570, 578-79 (1952) (dissent by Douglas and Black). The majority opinion, which remanded the case to the FMB on grounds of primary jurisdiction, expressed no opinion as to the lawfulness of dual rate contracts.

40. *Report of the House Committee on the Merchant Marine and Fisheries*, H.R. Doc. No. 805, 63d Cong., 2d Sess. 421 (1914) (Alexander Report).

tion with respect to dual rate contract systems. The Supreme Court appears to have accepted the fact that the Committee investigated these systems without expressly condemning them as evidence that Congress did not intend to make dual rate contracts unlawful per se.[41] However, dual rate contract systems did not come into general use until after passage of the Shipping Act.[42] And the Committee's great concern about "discrimination between shippers in the matter of rates,"[43] coupled with its unqualified recommendations that this be "prohibited,"[44] seem to support the proposition that the Committee would have specifically condemned dual rate systems if it had considered them of enough significance.

An analogous provision of the Interstate Commerce Act flatly prohibiting differing rates for similar services[45] has in the past been interpreted to prohibit only those rate discriminations which were "unreasonable."[46] A like interpretation of the Shipping Act would harmonize "discriminating" in section 14(3) with "unjustly discriminatory" in Section 15.[47] However, another provision of the Interstate Commerce Act, stating that carriers "shall not discriminate" in rates between connecting rail lines,[48] has been interpreted to impose an absolute prohibition on such discrimination.[49] Under this construction, section 14(3) would establish a strict standard of non-discrimination for the shipping industry.

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41. See Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 307 n.3 (1937). The Court quoted the Committee as "recognizing" that the dual rate system, in contrast to deferred rebates, did not place shippers in "continual dependence" on the carrier. *Ibid.* However, a careful reading of the Alexander Report, *supra* note 40, at 307, reveals no such committee opinion, but only a comment that the above position was "argued." For discussion of *Swayne & Hoyt*, see text at notes 74-76 *infra*.

42. MARX, INTERNATIONAL SHIPPING CARTELS 210 (1953). One of the reasons for the increased use of dual rate systems may have been the fact that the Shipping Act outlawed deferred rebates, the form of exclusive patronage contract previously most widely used.

43. Alexander Report, *op. cit. supra* note 40, at 313.

44. *Id.* at 421. For discussion of the underlying purpose of the Shipping Act to prevent "every form of favoritism," see Intercoastal Investigation, 1 U.S.S.B.B. 400, 451-52 (1935).

45. 24 STAT. 379-80 (1887), 49 U.S.C. § 2 (1952).

46. See early decisions in Texas & Pacific Ry. v. ICC, 162 U.S. 197, 219 (1896); ICC v. Baltimore & Ohio R.R., 145 U.S. 263, 276 (1892). See generally II SHARFMAN, THE INTERSTATE COMMERCE COMMISSION 443 (1931), III-B *id.* at 374-78, 381, 542-47, 556-57. However, the Interstate Commerce Act, as amended by the Elkins and Hepburn Acts, has since been interpreted as ruling out *all* discrimination. See Louisville & Nashville R.R. v. Mottley, 219 U.S. 467, 478 (1911); Hocking Valley Ry. v. United States, 210 Fed. 735 (6th Cir.), *cert. denied*, 234 U.S. 757 (1914).

47. See Isbrandtsen Co. v. North Atlantic Continental Freight Conference, 3 F.M.B. 235, 242 (1950) (dictum).

48. 24 STAT. 380 (1887), as amended, 54 STAT. 903 (1940), 49 U.S.C. § 3(4) (1952), formerly 49 U.S.C. § 3(3).

49. See Baltimore & Ohio R.R. v. United States, 22 F. Supp. 533, 538 (N.D.N.Y. 1937). The court contrasted this provision with a related provision, 24 STAT. 380 (1887),

The FMB may also lack authority to approve dual rate contract systems because they are either "unjustly discriminatory" or amount to the giving of an "undue or unreasonable preference" in violation of sections 15, 16, and 17 of the Shipping Act.[50] But, in accordance with its recent tendency to validate such agreements,[51] the Board upheld the reasonableness of the dual rate systems in the *Isbrandtsen* cases on the grounds that these formal agreements were "necessary" to the effective functioning of shipping conferences and to the "dependability and stability" of freight rates and service.[52] Following the *Second Isbrandtsen Case*, which rejected an FMB-approved arbitrary conference rate differential of twenty percent,[53] the Board endorsed a dual rate contract system with a duration of six months and a differential of ten percent.[54] It found that these contracts were not "coercive" but offered shippers a reasonable "inducement" for their exclusive patronage without "binding" them for an overly long period.[55] The FMB also found that the ten percent differential merely enabled the conference to meet Isbrandtsen's rates, thus allowing shippers a "reasonable choice of carriers."[56] It concluded that the system was not designed to drive the independent carriers out of business because they were free to join the conference at any time.[57]

The need for shipping conferences to stabilize and regulate the foreign maritime trade has been well recognized.[58] Nevertheless, conferences have been prohibited from initiating dual rate contract systems which had the effect of achieving monopoly by excluding competing carriers.[59] Yet the

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as amended, 54 STAT. 902 (1940), 49 U.S.C. § 3(1) (1952), which forbade only "undue or unreasonable preference[s]."

50. Sections 16, 17, 39 STAT. 734 (1916), 46 U.S.C. §§ 815, 816 (1952). For the provisions of section 15, see text at notes 5-9 *supra*.

51. Contract Routing Restrictions, 2 U.S.M.C. 220 (1939), is the last reported case of FMB invalidation of a dual rate system. Up to 1950, the FMB had affirmed some 32 such agreements. See Isbrandtsen Co. v. North Atlantic Continental Freight Conference, 3 F.M.B. 235, 241 (1950) (dictum).

52. Isbrandtsen v. North Atlantic Continental Freight Conference, 3 F.M.B. 235, 244-45 (1950); Contract Rates—North Atlantic Continental Freight Conference, 4 F.M.B. 355, 371-72 (1954).

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

54. Contract Rates—North Atlantic Continental Freight Conference, 4 F.M.B. 355, 372-74 (1954).

55. *Ibid.*

56. *Ibid.* According to Marx, Isbrandtsen has filed exact replicas of conference agreements but with rates reduced. See MARX, INTERNATIONAL SHIPPING CARTELS 189, 195-97 (1953). However, Isbrandtsen has claimed that it follows an independent rate policy. Japan-Atlantic and Gulf Freight Conference, FMB Docket No. 730, p. 15 (Recommended Decision of Robert Furness, Examiner) (1954).

57. Contract Rates—North Atlantic Continental Freight Conference, 4 F.M.B. 355, 373-74 (1954).

58. See, *e.g.*, SEN. REP. No. 2494, 81st Cong., 2d Sess. 84-86 (1950); MARX, *op. cit. supra* note 56, at 299-304.

59. See Contract Routing Restrictions, 2 U.S.M.C. 220, 225-26 (1939); Gulf Intercoastal Contract Rates, 1 U.S.S.B.B. 524, 529-30 (1936), *aff'd sub nom.* Swayne & Hoyt,

dual rate system appears by its very nature to have this exclusionary effect.[60] On most trade routes, the service offered by independent lines, such as Isbrandtsen, is insufficient to move all the goods of large shippers.[61] Therefore, even though the independent and conference contract rates are identical, these shippers have no real choice of carriers: they will be forced either to deal exclusively with the conference or to ship a portion of their goods at a competitive disadvantage with respect to goods of contracting shippers.[62] And although independent carriers have continued to compete even against conferences employing dual rates,[63] these systems could eventually cripple them or drive them into the conferences.[64] The freedom of the independents to join the conferences [65] does not disguise the effect of dual rates in hampering their independent operations. Although dual rate systems might possibly be justified if necessary to preserve shipping conferences, the fact that many

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Ltd. v. United States, 300 U.S. 297 (1937). Intercoastal Investigation, 1935, 1 U.S.S.B.B. 400, 452 (1935). In W. T. Rawleigh Co. v. Stoomvaart, 1 U.S.S.B. 285 (1933), the FMB approved a dual rate system instituted by a conference where there was a "choice" of carriers as contrasted with one initiated by a single carrier in which there was no such choice. See Eden Mining Co. v. Bluefield Fruit & S.S. Co., 1 U.S.S.B.B. 41 (1922). And the Board has never expressly repudiated this distinction. *But cf.* Intercoastal Investigation, *supra* at 452. However, when all members of a conference are charging the same rates, a shipper's choice of carriers may be illusory.

60. The FMB has admitted that the dual rate contract is "a device tending towards the monpolization of ocean commerce." FMB Brief, Second Isbrandtsen Case, quoted at 96 F. Supp. 883, 888 n.13 (S.D.N.Y. 1951). See also Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 304 (1937), *affirming* 18 F. Supp. 25, 27 (D.D.C. 1936).

Menacho v. Ward, 27 Fed. 529, 534 (C.C.S.D.N.Y. 1886), found that exclusive patronage contracts were coercive and tending toward monopoly, and therefore held them "not only unreasonable but . . . odious" at common law.

61. MARX, *op. cit. supra* note 56, at 215. See also Trans-Pacific Freight Conference of Japan, FMB Docket No. 743, finding of fact No. 56 (Oct. 1, 1954) (recommended Decision of A. L. Jordan, Examiner).

62. See Contract Routing Restrictions, 2 U.S.M.C. 220, 226 (1939); Swayne & Hoyt, Ltd. v. United States, 18 F. Supp. 25, 28 (D.D.C. 1936), *aff'd*, 300 U.S. 297 (1937).

63. According to the FMB, Isbrandtsen has "continued its operation" for a number of years on one or more trade routes where dual rate systems were in force. Contract Rates—North Atlantic Continental Freight Conference, 4 F.M.B. 355, 374 (1954). See also Isbrandtsen Co. v. North Atlantic Continental Freight Conference, 3 F.M.B. 235, 244 (1950).

Because numerous additional economic factors, such as relative efficiency of operation, types of vessels competing, and amounts of freight available with relation to total carrier capacity, must be considered in weighing the effect of a dual rate system on an independent carrier, the fact that he has continued to operate—standing alone—should not be taken as conclusive.

64. See Trans-Pacific Freight Conference of Japan, Docket No. 743, p. 31 (Oct. 1, 1954) (recommended Decision of A. L. Jordan, Examiner). See also Swayne & Hoyt, Ltd., v. United States, 18 F. Supp. 25, 28 (D.D.C. 1936), *aff'd*, 300 U.S. 297 (1937).

65. Black Diamond S.S. Corp. v. Compagnie Maritime Belge S.A., 2 U.S.M.C. 755, 760 (1946). See Pacific Coast European Conference, 3 U.S.M.C. 11, 14 (1948). See also W. T. Rawleigh v. Stoomvaart, 1 U.S.S.B. 285, 290 (1933); MARX, *op. cit. supra* note 56, at 22-125.

conferences have operated successfully without them would seem to cast substantial doubt on their necessity.[66]

Under the dual rate system, a shipper contracts only to give his exclusive patronage to the conference.[67] Since the amount of patronage may vary considerably during different periods, it is difficult to justify the contention of the conferences and the FMB that the system facilitates planning or promotes dependability of service.[68] Contracts granting discounts for regularity or quantity of consignments would seem to fulfill these functions more effectively than dual rate contracts, and would be no less effective in stabilizing rates.[69] These contract discounts do not necessarily have to be based on quantities of such size as to give advantages to large shippers.[70]

The right of each shipper to be charged the same rates as other shippers receiving identical services has been expressly held by the FMB to be provided by the Shipping Act.[71] Under a dual rate system, the services furnished to contract signers and non-signers are identical.[72] Therefore any difference in rates which is predicated solely upon exclusive patronage and which bears slight relation to profits and costs seems unjustly discriminatory.[73] In *Swayne & Hoyt, Ltd. v. United States*,[74] the Supeme Court found

66. For the number of conferences now using dual rate systems see note 1 *supra*. In *Swayne & Hoyt*, evidence showed that Intercoastal Conferences operated successfully from Atlantic ports without the dual rate system even while conferences moving out of Gulf coastal ports claimed they were necessary to assure stability. Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 305 (1937). However, numerous independent economic factors must also be considered. See note 63 *supra*. See also MARX, *op. cit. supra* note 56, at 218-222.

67. MARX, *op. cit. supra* note 56, at 207. See Eden Mining Co. v. Bluefields Fruit & S.S. Co., 1 U.S.S.B. 41, 43 (1922).

68. See Eden Mining Co. v. Bluefields Fruit & S.S. Co., 1 U.S.S.B. 41, 44-45 (1922). *But see* W. T. Rawleigh Co. v. Stoomvaart, 1 U.S.S.B. 285, 289 (1933). See also note 73 *infra*.

69. *Ibid.* See also Contract Routing Restrictions, 2 U.S.M.C. 220, 225 (1939); Menacho v. Ward, 27 Fed. 529 (C.C.S.D.N.Y. 1886).

70. One of the aims of the Shipping Act was to place large and small shippers on a parity. See Intercoastal Investigation, 1935, 1 U.S.S.B.B. 400, 452 (1935). One of the arguments usually made against quantity discounts is the advantage which they are supposed to give to large shippers. See, *e.g.*, Isbrandtsen Co. v. North Atlantic Continental Freight Conference, 3 F.M.B. 235, 245 (1950); W. T. Rawleigh v. Stoomvaart, 1 U.S.S.B. 285, 292 (1933).

71. See Intercoastal Investigation, 1935, 1 U.S.S.B.B. 400, 452 (1935); Atlantic Refining Co. v. Ellerman & Bucknall S.S. Co., 1 U.S.S.B. 242, 250 (1932).

72. Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 303 (1937); Intercoastal Investigation, 1935, 1 U.S.S.B.B. 400, 452 (1935); Eden Mining Co. v. Bluefields Fruit & S.S. Co., 1 U.S.S.B. 41, 45 (1922).

73. The statement in United States v. Illinois Central R.R., 263 U.S. 515, 524 (1924), that any "difference in rates" had to be justified by "cost of services," was held applicable to the shipping industry in Atlantic Refining Co. v. Ellerman & Bucknall S.S. Co., 1 U.S.S.B. 242, 250 (1932). For an exhaustive analysis showing that a dual rate discount of 9½% was unjustified by costs where a conference controlled 90% of the trade, see Trans-Pacific Freight Conference of Japan, FMB Docket No. 743 (Oct. 1, 1954) (recom-

that the dual rates charged by an intercoastal shipping conference for identical services furnished contract and non-contract shippers were "prima facie discriminatory,"[75] and provided sufficient evidence so that the court would not reverse an "informed" administrative judgment that the system constituted an unreasonable preference enabling the conference to "exclude competitors" and establish a "practical monopoly."[76]

The FMB is the proper body to make prior determination of the legality of dual rate contract systems under the Shipping Act.[77] Its findings that particular systems are not unjustly discriminatory must be affirmed if supported by "substantial evidence" and if not contrary to law.[78] However, any exemption from the broad policy of the antitrust laws should be strictly construed.[79] And whether dual rate systems are inherently either retaliatory or unjustly discriminatory within the meaning of the Shipping Act would seem to involve substantial questions of statutory interpretation, justifying careful analysis by a reviewing court.[80] The forthcoming FMB decision

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mended Decision of A. L. Jordan, Examiner). See generally RADIUS, UNITED STATES SHIPPING IN TRANSPACIFIC TRADE 1922-1938, pp. 17-20 (1944).

Dual rates may be justifiable on a cost basis in that they provide conferences assurance of "some dependable volume of traffic." Contract Rates—North Atlantic Continental Freight Conference, 4 F.M.B. 355, 373 (1954). Carriers could thereby arrange sailings accordingly. W. T. Rawleigh Co. v. Stoomvaart, 1 U.S.S.B. 285, 289 (1933). But see text at note 68 *supra*.

74. 300 U.S. 297 (1937).

75. Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 303 (1937).

76. *Id.* at 303, 306. The district court in *Swayne & Hoyt* found as a matter of law that since the lower rate charged was "remunerative," the higher rate for similar services must be an "undue and unreasonable exaction" which penalized the nonsigning shipper. Swayne & Hoyt, Ltd. v. United States, 18 F. Supp. 25 (D.D.C. 1936). However, the Supreme Court, in affirming, placed its reliance on the decision of the *agency* that the particular rates were unreasonable.

77. U.S. Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932); Far East Conference v. United States, 342 U.S. 570 (1952). For general discussion of the doctrine of primary jurisdiction, see note 34 *supra*.

78. Section 10(e) of the Administrative Procedure Act, 60 STAT. 243 (1946), 5 U.S.C. § 109(e) (1952); Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 304 (1937). See also Corn Products Refining Co. v. FTC, 324 U.S. 726, 739 (1945) (FTC); Seaboard Air Line Ry. v. United States, 254 U.S. 57, 62 (1920) (ICC).

79. The Supreme Court has given strict construction to acts which provided exemptions from the antitrust laws. See United States Alkali Export Ass'n v. United States, 325 U.S. 196, 205-06 (1945) (Webb-Pomerene Act); Georgia v. Pennsylvania R.R., 324 U.S. 439, 456-57 (1945) (Interstate Commerce Act); United States v. Borden Co., 308 U.S. 188, 198-203 (1939) (Agricultural Marketing Agreement Act). See generally Jaffe, *Primary Jurisdiction Reconsidered—The Antitrust Laws*, 102 U. PA. L. REV. 577, 592-603 (1954).

80. The extent to which courts will review determinations of administrative agencies cannot be predicted with certainty at the present time. See DAVIS, ADMINISTRATIVE LAW §§ 247-48 (1951). For judicial reversals of agency determinations on questions of statutory interpretation, see Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946); Davis Warehouse Co. v. Bowles, 321 U.S. 144, 156 (1944). *Cf.* Universal Camera Corp.

in the latest *Isbrandtsen* case will present an opportunity for a conclusive determination of the validity of the dual rate contract system.

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v. NLRB, 340 U.S. 474 (1951). But in other cases, similar administrative holdings have been affirmed as matters exclusively for agency determination. See, *e.g.*, SEC v. Chenery Corp., 332 U.S. 194 (1947); NLRB v. Hearst Publications, Inc., 332 U.S. 111 (1944). For criticism of the present judicial policy of non-interference with agency findings on questions of "law," see Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsiblity*, 67 HARV. L. REV. 436, 471-75 (1954). See, generally, DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW, 159-74 (1927).