COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-97278 **RELEASED** November 9, 1979

The Honorable Howard W. Cannon
Chairman, Committee on Commerce, SEN06200
Science, and Transportation
United States Senate

Dear Mr. Chairman:

Subject: Inquiry Into Certain Allegations Concerning the Chairman of the Federal Maritime Commission (CED-80-25)

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On September 26, 1979, you and Senators Packwood, Inouye, and Warner requested that we inquire into specific allegations contained in two recent newspaper articles concerning the Chairman of the Federal Maritime Commission. You requested this inquiry solely to determine if specific allegations in the articles raise substantial questions relating to the committee's oversight responsibilities which the committee should investigate further.

Because of the relatively brief time we had in which to respond to your request, we obtained information through interviews with key agency officials, including those suggested by your office, and a cursory review of certain agency documents and records.

The results of our inquiry indicate that four of the seven allegations do not warrant any further attention by the committee. Of the remaining three allegations, which concern how policies and decisions are made within the Commission, the committee might want to investigate two and a part of the third one.

We found no evidence of specific improprieties on the Chairman's part. It appears, however, that he may not be taking sufficient care to avoid actions, proscribed by the Commission's general standards of conduct, which might create the appearance of impropriety. Accordingly, the committee might want to bring to the Chairman's attention the need to avoid even the appearance of improper action.

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Following is a summary of the information we obtained on each allegation and our evaluation.

ALLEGATION 1

"That [the Chairman] pursued his own policies with little regard for agency regulations."

We interviewed eight Commission officials, including two Commissioners, five of whom did not know if the Chairman violated agency regulations. Three of the officials believed that the Chairman had violated Commission Order 87, which allows a maximum of 35 days for issuance of a report following a decision by the Commission. According to Commission Order 87, deviations from these procedures are to be made only by vote of the Commission.

In our opinion, the most serious problem mentioned by the interviewees was that the Chairman, after a vote by the Commission, would often revise draft reports without advising the other Commissioners. While most changes were considered to be nonsubstantive by the three interviewees, this was not always the case. Also mentioned was the fact that the Chairman would change or revise something previously approved by the Commission and then bring the matter up for another vote at a later Commission meeting. Although we reviewed some correspondence relating to these matters, we did not have time to verify completely these statements to records of actual cases cited to us or to determine whether there were extenuating circumstances to justify the Chairman's actions, as some interviewees believed.

Another problem cited was the Chairman's failure to "consult" with all other Commissioners on appointments to positions within the Commission. Reorganization Plan No. 6 of 1949 (63 Stat. 1069), which established the U.S. Maritime Commission as the predecessor of the Federal Maritime Commission, provides "That the heads of the major administrative units shall be appointed by the Chairman only after consultation with the other members of the Commission." "Consultation" would seem to require the Chairman to obtain the recommendations and views of the other Commissioners. (See Mid-American Regional Council v. Mathews, 416 F. Supp. 896, 904 (W.D.Mo. 1976).)

It is questionable whether the Chairman properly consulted the other Commissioners when he recently appointed a new General Counsel. The two Commissioners we interviewed

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said they had not been consulted about the appointment. The Chairman told us that he considered two individuals for the position and then informed the Commissioners of his selection. One of the Commissioners objected strenuously to the Chairman's selection, but to no avail.

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Concerning how Commission policies and decisions are made, the committee might wish to consider further investigations of this allegation from the standpoint of the committee's oversight responsibilities.

ALLEGATION 2

> "That top FMC officials fear their telephones are tapped and their desks are rifled. [The Chairman's] personal [counsel] was caught red-handed going through one desk."

Three of eight persons interviewed thought that their telephones were tapped. Two informed us that they took some actions concerning their suspicions, such as checking their telephones for listening devices, but found no evidence that their telephones had been tapped.

Four persons expressed concern that someone had been looking through their desks or files. These people took various actions, such as informing their supervisor, writing a memorandum to the file, and discussing the matter with other employees.

The incident referred to in the allegation is explained in a March 12, 1979, memorandum to the file prepared by a Commission Deputy General Counsel. The memorandum stated that the Chairman's personal counsel was seen by a Commission lawyer removing papers from the desk of the Deputy General Counsel on Sunday, March 4, 1979. We were informed that the papers removed consisted of a draft prepared by an official of the Bureau of Ocean Commerce Regulation for incorporation into congressional testimony being prepared for the Chairman. The Deputy General Counsel received the draft for review before submission to the Chairman's office where it would be reviewed by the Chairman's personal counsel.

We discussed this matter with the Chairman's personal counsel, who informed us that she did remove the draft from the top of the Deputy General Counsel's desk to make a

copy so she could begin her review. She stated that she did this with the author's knowledge, and the author confirmed her statement.

On the following day, after learning of the incident from his employee, the Deputy General Counsel visited the Chairman's personal counsel in her office and confronted her. She advised him that she was only trying to help get the draft submission finished. Later, the Deputy General Counsel wrote the memorandum to the file concerning this incident.

The Chairman stated that he had heard of the incident the day his advisor was confronted by the Deputy General Counsel. However, he stated that the first time he saw the memorandum to the file was on September 21, 1979.

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While some Commission officials expressed concern about their telephones being tapped and someone going through their desks, the information obtained during our inquiry suggests that no further investigation is warranted by the committee.

ALLEGATION 3

> "[She, the Chairman's] former personal [counsel], was hired by him against the General Counsel's advice as a $16,000 a year law clerk in the General Counsel's office. Nine months later she was named [the Chairman's personal counsel] at $27,000 a year. The Office of Personnel Management looked into charges that [she] received special treatment. [She] resigned. [The newspaper reported that the Chairman] said [his personal counsel] resigned because she wanted to go back to Harrisburg, [Pennsylvania]. [The newspaper article said the Chairman's personal counsel] said she hopes to work in Washington."

We interviewed the former General Counsel, who stated that he did not advise against hiring the Chairman's former personal counsel. We spoke with the Deputy General Counsel, who did say he recommended against hiring her because he did not believe she was as qualified as some of the other applicants being interviewed and considered for the position. The individual hired was interviewed by the Chairman, who

directed the Deputy General Counsel to hire her. The Chairman told us that he has since made it a practice to interview all new lawyer applicants because he was dissatisfied with past practices in hiring lawyers.

The personal counsel was appointed on August 28, 1978, to a law clerk position as a GS-9 ($15,090). Her conversion from law clerk to general attorney took place on October 30, 1978, after she passed her bar examination. On March 11, 1979, she received a promotion to GS-11 ($19,263). At that time, she converted from a general attorney position to that of attorney-advisor to the Chairman. On May 20, 1979, she was promoted to GS-13 ($27,453). She resigned her position on August 6, 1979, effective August 31, 1979, after having worked a total of 1 year and 4 days at the Commission.

The Chairman has stated that the allegation that her promotion to serve as his counsel was due to "flagrant favoritism" is groundless. He stated that her promotion was based solely upon merit, and the work that she performed at the Commission fully justified the job level and classification to which she was assigned.

As the result of an allegation, a representative of the Merit Service Protection Board's Special Counsel Office 1/ contacted the Commission's personnel director and reviewed the Chairman's personal counsel's personnel file concerning her promotions from GS-9 to GS-13. This representative advised us that the "Whitten Amendment," which used to require minimum time periods between promotions, had expired. Therefore, there is no law prohibiting promotions in less than a year for excepted service positions such as lawyers. The representative of the Special Counsel Office informed us that he is no longer actively working on this case because the complaint was not put in writing and the individual in question has resigned.

The Commission officials we spoke with gave us various reasons for the personal counsel's resignation, but apparently no one knew for sure. The Chairman stated in a letter to his former personal counsel that the assertion that she was asked to resign from the Commission after an Office of Personnel Management representative began looking into

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1/The newspaper article and the Chairman's letter were both in error. The representative was from the Merit Service Protection Board, not the Office of Personnel Management.

charges that she had received "special preferences" was not true. The Chairman also told us that she resigned because she "angered" many Commission officials and because of her desire to join her husband in Pennsylvania.

The former personal counsel told us she had many reasons for resigning--primarily, the antagonism toward her in the agency that was not abating and her family's return to Pennsylvania.

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The information obtained during our inquiry suggests that no further investigation is warranted by the committee.

ALLEGATION 4

> "As evidenced by an internal FMC memorandum, [the Chairman] acted with 'impropriety' in a quasi-judicial case involving the lease of a New Orleans port facility."

The case concerned an amendment to Agreement T-1792 between the Board of Commissioners of the Port of New Orleans and the New Orleans Cold Storage and Warehouse Company, Ltd. This amendment involved the substitution of a new mortgage for an old one in the New Orleans Cold Storage terminal leasing agreement, which had previously been approved by the Commission. The eight Commission officials with whom we discussed this case agreed that the subject matter of the amendment was of minor significance but that questions had been raised about the procedure used.

On February 19, 1979, a request was made to the Commission to amend Agreement T-1792 by the Port of New Orleans and New Orleans Cold Storage and Warehouse Company, Ltd. We were informed by the Commission's Chief, Shoreside Agreements Division, that he, along with a lawyer from the Office of General Counsel and the Director, Bureau of Ocean Commerce Regulation, explained to the parties' representatives that it was Commission policy that an amendment to a previously approved agreement must also be approved by the Commission.

The Division Chief explained that the problem was one of timing. The New Orleans parties needed approval by March 1, 1979, or within 9 days, because that was when settlement on the new mortgage was to occur resulting in cancellation of

the old mortgage. He stated that although Commission procedures provide a couple of methods for obtaining Commission approval of an agreement, none of them could be carried out in just 9 days.

The Chairman informed us that he had received a call from a congressman concerning this matter. He then met with the Director, Bureau of Ocean Commerce Regulation, and discussed possible solutions. Since the subject matter was of minor significance and needed to be expedited, he had the staff prepare a recommendation for Commission consideration which provided that the amendment was not subject to Commission approval.

On February 26, 1979, the staff formally submitted such a recommendation to the Commission. The recommendation stated that the staff could not perceive any valid regulatory purpose to be served by requiring that this amendment be approved by the Commission. On February 28, 1979, by a 3 to 2 decision, the Commission agreed with the staff's recommendation that the amendment did not need its approval. Therefore, the amendment did not need to undergo the longer review and approval process.

With regard to this allegation, we found two memorandums relating to the New Orleans port facility case. Prior to the Commission decision, the Office of General Counsel had prepared a memorandum expressing its opinion that the amendment should be subject to Commission approval. The Chairman subsequently expressed his displeasure to the former General Counsel concerning this memorandum. The former General Counsel then prepared a handwritten memorandum to the file concerning his discussion with the Chairman. Neither memorandum, however, cited any impropriety on the Chairman's part.

The Chairman stated that, in retrospect, the manner in which he directed the staff to proceed may not have been the best approach. He stated that another method (approval by exemption under another section of the law), which one Commissioner suggested, may have been better but it was not offered at the time of the staff meeting as a possible solution to the problem.

What the Chairman did was to speed up the regulatory process on a relatively minor matter, and two Commissioners agreed. The other two Commissioners agreed it was a minor matter but disagreed with the method the Commission used to speed up the regulatory process.

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Everyone agreed that this was a minor issue. The only question raised was one of procedure and this was resolved by Commission vote. Therefore, we see no need for the committee to investigate this matter further.

ALLEGATION 5

> "[The Chairman] has repeatedly shrugged off warnings by his top advisors about contacts with carrier representatives. 'I would read him the section (of Federal regulations) on ex parte contact,' his former [personal counsel] * * * told us. 'I tried as hard as I could to get him to avoid the appearance of impropriety.'"

Of the eight people we interviewed concerning this allegation, none knew of any specific examples where the Chairman had ex parte contacts with carrier representatives. The Commission's former General Counsel informed us that, as part of his normal duties, he had cautioned the Chairman about such contacts. Also, the Commission Secretary said that on occasion the Chairman would ask him about whether an individual he was meeting with had any cases pending before the Commission and the Secretary would advise him on the matter.

The Chairman's personal counsel told us that she was quoted out of context. She said that she often reminded the Chairman about ex parte contacts because he had long-time professional acquaintances in the shipping industry. As far as she knew, the Chairman had always avoided ex parte contacts with carrier representatives. The Chairman said that his personal counsel was always telling him about ex parte communications in regard to what matters certain people may be interested in when he would, for example, go to make a speech.

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Based on our inquiry, we see no need for the committee to investigate this matter further.

ALLEGATION 6(a)

> "[The Chairman] has been heard to say on a number of occasions that he wants to 'check it out * * * first' [with a Washington, D.C., lawyer who represents members of the shipping

> industry and a long-time personal friend of the Chairman] before deciding his stand on a particular matter before the Commission."

Of the seven people we interviewed, three stated that they had heard the Chairman make this statement or something like it. However, none had heard the comment when related to a case pending before the Commission.

The Chairman's personal friend informed us that he had talked about general maritime matters with the Chairman. Further, he stated that they had not talked about any case pending before the Commission.

The Chairman informed us that he had discussed general matters on maritime policies and issues with his friend. The Chairman advised us that he had talked to a number of people concerning general matters and that it is part of the job to talk to people in the industry. Further, he stated that he and his friend never discussed cases that were pending before the Commission.

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Our inquiry did not disclose any evidence of improper action by the Chairman that would warrant further investigation by the committee.

ALLEGATION 6(b)

> "Last June, [the Chairman] personally intervened in an unusual application by a firm his buddy represented - U.S. Cruise Lines - to have a ship certified for passenger service before it had even been purchased or leased by the company. Despite the lack of precedent for such a prior arrangement, U.S. Cruise Lines got its license after [the Chairman] spoke up strongly in favor of it at a Commission staff meeting."

None of the Commission officials we interviewed felt that the Chairman had intervened in the U.S. Cruise Lines application for a passenger certification, including the Division Chief, Office of Passenger Vessel Certification. However, three Commission officials felt that the Chairman had expedited the matter before the Commission's public meeting.

The Division Chief stated that the application had come to the Commission in November 1978, and that it took a while for the Commission and U.S. Cruise Lines to reach an agreement on how to handle the financial aspects of the case. The Division Chief explained that the Chairman had briefly appeared at one staff meeting in March 1979 in which the financial arrangements were being discussed with representatives of U.S. Cruise Lines. At that time, the Chairman suggested that it might be appropriate to get the Office of General Counsel involved. The Chairman acknowledged to us that he briefly appeared at the meeting.

The Division Chief stated that the newspaper article is misleading when it states that a passenger vessel certificate was sought and given prior to U.S. Cruise Lines' having acquired the vessel. We were informed that U.S. Cruise Lines had contracted to purchase the vessel for $5 million in September 1978 and had made a $500,000 down payment. Further, the Division Chief stated, and we reviewed files which showed, that it is not unusual to obtain a passenger certification before owning or chartering a vessel. At the June 12, 1979, Commission meeting the Commission approved the passenger certification by a 4 to 1 vote.

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Based on our inquiry, we found no evidence that the Chairman personally intervened in this case. Therefore, we see no need for the committee to investigate this allegation further.

ALLEGATION 6(c)

> "In another case, Seatrain Lines, Inc., [hired the Chairman's personal friend] to represent the firm in the settlement of a penalty assessment. Though the penalty ordered by the Commission was substantial--$2.5 million--the payment terms were benevolent: no interest and 10 years to pay. The procedures were irregular, a Commission source said."

The Commission has no established guidelines for the staff to follow in settling rebating cases. For the most part, the negotiations and settlements are handled by the Office of General Counsel. Settlement cases concerning

the large ocean liner firms do, however, come before the Commission for approval.

On June 14, 1978, the Chairman's personal friend made a presentation concerning Seatrain's financial problems before a closed meeting of the Commission. The Commission had previously agreed to permit Seatrain to make its presentation. This may have been unusual in rebate settlements but was not irregular. The Commission does permit outside parties to make such presentations. The Chairman's personal friend informed us that he has represented Seatrain since 1975. Further, he stated that just prior to June 14, 1978, he had represented Seatrain's financial problem before another Federal agency and that is why he made Seatrain's financial presentation before the Commission.

The Commission staff had suggested that Seatrain be fined $3 million to be paid over 5 years. Seatrain indicated that it could not tolerate a fine of more than $1 million. On June 19, 1978, the Commission, by a 5 to 0 decision, agreed to fine Seatrain $1.5 million to be paid over 5 years. On June 20, 1978, apparently because of information concerning Seatrain's financial condition, the Commission reconsidered its earlier decision and by another 5 to 0 decision agreed to fine Seatrain $2.5 million to be paid over 10 years. This is the first Commission settlement with no interest. It also contained a longer payment period than any other settlement.

Each rebate case and settlement is unique. Since every settlement depends upon factors such as scope of rebating, degree of cooperation with Commission investigators, extent of disclosure, and ability to pay, and since there are no guidelines or procedures to be followed, it would not be appropriate to say the Seatrain settlement was benevolent or the procedures irregular. Furthermore, the Commission unanimously approved the settlement.

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In view of the information presented above, we see no need for the committee to investigate this specific settlement further. It would seem appropriate, however, for the committee to encourage the Commission to establish some general procedures and guidelines for settling rebating cases, especially since it has settled a number of cases in the last 2 years.

ALLEGATION 7

> "Even more blatant was [the Chairman's] action in the case of an application by Pacific Australia Direct Line for an additional ship on a particular route--a move that was opposed by another carrier, Farrell Lines. The day the case came up in Federal court, a Farrell official called [the Chairman] and asked him to intervene, an astonishing request that was properly rejected by the court."

We interviewed six Commission officials; five believed that the Chairman's actions in this case were improper in one way or another, and the other official did not know. The two Commissioners we interviewed told us that they thought it was improper for the Chairman to contact the court on a matter involving potential Commission policy without the prior concurrence of the other Commissioners. Some officials also believed the action was improper because (1) only legal counsel may properly contact the court and/or (2) there was a companion adversary proceeding before the Commission at the time. At best, it appears that the Chairman's action was imprudent and reflected unfavorably on the Commission. Pertinent details on this matter follow.

Sometime prior to the court date, an attorney for Farrell Lines asked the General Counsel's office to intervene in the case. After reviewing pertinent documents in the case, the Deputy General Counsel concluded that the court case was a matter between private parties and that the Commission had no legal basis for intervention. Attorneys for both parties were advised of this decision. The authority to make such decisions has been delegated to the General Counsel by the Commissioners.

Shortly before the court hearing, the President of Farrell Lines contacted the Chairman and requested intervention to prevent overtonnaging in the trade. The Chairman began to look into the matter within the Commission. Then, on March 23, 1979, the date of the court hearing, Farrell Lines sent a telegram to the Chairman, again requesting the Commission to intervene on its behalf.

The Chairman told us that he never saw the telegram; however, he did call the Clerk of the Court and, in his absence, talked to the Judge's Clerk. He later explained to the Commission that his only objective was to ask the court for

1 week's postponement in order to permit the Commission to determine whether it should intervene. The Chairman informed us that he believed this might be an opportunity for the Commission to extend its jurisdiction. He said the purpose of his call was to determine whether a Commission employee who was not an attorney could present a pleading to the Judge asking for a postponement if such a request was transmitted electronically. We noted, however, that there was considerable controversy between the Chairman's office and the General Counsel's office as to whether the Chairman called to obtain information about a postponement or to seek intervention. We were unable to establish the nature of the call because the Judge's Clerk is on an extended vacation and will not return until January 1980.

At the Chairman's direction, the former General Counsel arranged for an attorney from the Department of Justice to appear in court on March 23, 1979, on the Commission's behalf. The Judge denied the Commission's request for postponement and dismissed the Farrell complaint. Subsequently, the parties settled their differences and withdrew the adversary proceeding before the Commission.

It is difficult to determine exactly what transpired in this instance, but the Chairman seems to have acted imprudently in two respects. First, contacts with the court are usually made through counsel--the Commission's own General Counsel or the Department of Justice. Second, deciding whether to intervene for the purpose of extending the Commission's jurisdiction is a policy matter that could have and should have been brought to the Commission's attention before any action was taken.

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The committee may wish to consider this matter further from the standpoint of its oversight responsibilities.

AGENCY COMMENTS

The Chairman reviewed a draft copy of this report and essentially agreed with the facts. As a result of his review, we did make minor changes for clarification.

SUMMARY

We found no evidence indicating that the committee should further investigate allegations 2, 3, 4, 5, and portions of 6. On the other hand, the committee, in view of its oversight responsibilities, may wish to consider how policies and decisions are made within the Commission, which is the subject of allegations 1 and 7 and a portion of 6.

Although we found no evidence of specific improprieties on the part of the Chairman, it appears that the Chairman may not be taking sufficient care to assure that his actions do not give the appearance of impropriety. According to the Commission's general standards of conduct, employees are to avoid any action which may result in or create the appearance of giving preferential treatment to any person, losing complete independence or impartiality, making a Government decision outside official channels, and similar actions. The actions of the Chairman as reported in this letter appear to fall into this category. This is especially true regarding allegations 6 and 7. Accordingly, the committee might want to bring to the Chairman's attention the need to avoid even the appearance of improper action.

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As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time, we will send copies to interested parties and makes copies available to others upon request.

Sincerely yours,

R. F. Keller

Acting Comptroller General
of the United States