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June 28, 2022

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The Federal Maritime Commission makes decisions in cases brought by parties who claim they have been harmed because of a violation of the legal prohibitions in the Shipping Act of 1984, 46 U.S.C. Chapters 401-143. The Commission can also determine to investigate a possible violation of the same law. In the first instance, these claims are heard by an Administrative Law Judge who issues an Initial Decision. That Initial Decision may become the final decision of the Commission 30 days later. However, the Initial Decision can be appealed by the parties to the proceedings, or any Commissioner can ask to review the Initial Decision. In either case, the Commission would then review the Initial Decision and issue a Final Decision in the case. This publication provides a compendium of Initial and Final Decisions in these matters and selected other Orders that may be significant or establish a new legal precedent.

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FEDERAL MARITIME COMMISSION

Office of the Administrative Law Judges

TCW, INC., *Claimant*

v.

EVERGREEN SHIPPING AGENCY (AMERICA) CORPORATION, & EVERGREEN LINE JOINT SERVICE AGREEMENT, *Respondents*.

DOCKET NO. 1966(I)

Served: February 19, 2021

BEFORE: Theresa DIKE, *Small Claims Officer*.

INITIAL DECISION[1]

[Notice of Commission Determination to Review served 02/24/21.]

I. INTRODUCTION

Claimant TCW, Inc. ("TCW") initiated this proceeding by filing a complaint against Respondents Evergreen Shipping Agency (America) Corporation and Evergreen Line Joint Service Agreement (collectively "Evergreen"). Claimant alleges that Respondents overcharged it for per diem by $510.00, in connection with an inland delivery by TCW which was part of a through transportation provided by Evergreen Line Joint Service Agreement ("Evergreen-Principal") to Yamaha Motor Company, Ltd. ("Yamaha") from Japan to the United States. The per diem at issue was imposed by Evergreen-Principal's agent, Respondent Evergreen Shipping Agency (America) ("Evergreen-Agent"). TCW asserts that Respondents' imposition of the disputed per diem constitutes a violation of 46 U.S.C. § 41102(c) of the Shipping Act and runs contrary to the guidance set forth at 46 C.F.R. § 545.4(d) of the Commission's regulations.

A. Background

Evergreen-Principal and Yamaha entered into an agreement to deliver Yamaha's shipment from Japan to Yamaha's facility in Newnan, Georgia. On March 14, 2020, Evergreen-Principal issued Yahama a non-negotiable sea waybill reflecting the port of loading as the Port of Shimizu, Japan and the place of delivery as Newnan, Georgia. Answer Exh. 10 (Evergreen-Principal Sea Waybill). As part of the through transportation arrangement for the shipment, Yamaha designated Claimant as its preferred trucker for transporting the shipment from the Port of Savannah to Yamaha's facility in Newnan, Georgia. As an additional part of that arrangement,

[1] Pursuant to 46 C.F.R. § 502.304(g), this decision will become final unless the Commission elects to review it within 30 days of service.

Yamaha, TCW, and Evergreen-Agent, "as agent for Evergreen[-Principal]," signed a "Preferred Trucker Agreement" in which, among other terms in the contract, Respondents agreed to the designation of TCW as the preferred trucker for Yamaha's import and export cargoes. Resp. Exh. 9 (Preferred Trucker Agreement).

The Preferred Trucker Agreement incorporates the terms of a service contract between Evergreen-Principal and Yamaha, the terms of Evergreen Principal's non-negotiable sea waybill for the transportation, and Evergreen-Principal's tariff, but notes that the terms and conditions of the Preferred Trucker Agreement control in the event of a conflict. Exh. 9 at 2. "As a condition precedent to being authorized" as the preferred trucker, the Preferred Trucker Agreement requires TCW to be a signatory to the Uniform Interchange and Facilities Access Agreement ("UIIA") and Evergreen Line's individual addendum to the UIIA ("Evergreen Addendum"). Respondents Exh. 9 at 1; Answer Pg. 4. The UIIA is "a contract between the industry's Motor Carriers on the one hand, and industry's Equipment Providers . . . on the other hand [which] regulates Motor Carriers' access to and use of the Providers' containers and chassis, in the land transportation of cargo." Answer at 4. The Evergreen Addendum "supplements the industrywide, general provisions of the UIIA by including details such as free time and per diem rates that are specific to respondent's business." Answer Pg. 4.

As part of the parties' arrangement, Evergreen provided a free chassis to TCW for use in transporting the Yamaha shipment but TCW was required to pay per diem charges for any unreturned equipment after expiration of the free time granted by Evergreen for the equipment, including on weekends and holidays. Amended Cl. Pg. 2[2] at III. However, while Evergreen provides a free chassis to its preferred truckers, TCW was not obligated to use the provided chassis and could have used a different chassis of its choosing. Answer Pg. 4 - 5; Resp. Exs. 1 and 4. Under the transportation agreement Yamaha was entitled to receive 21 days of free time for the container and four days of free time for use of the chassis. Amended Cl. Exh. F (Evergreen-Agency Per Diem Invoice); Answer to Amended Cl. at 17.

TCW picked up the equipment in question on April 28, 2020, and by the time it returned them on May 26, 2020, their allotted free time had expired (May 19, 2020, for the container and May 4, 2020, for the chassis). Cl., Exh. F. Evergreen-Agent then invoiced TCW for per diem charges for the equipment in the amount of $1,050 for 7 days of per diem for the container and $440.00 for 22 days of per diem for the chassis. Amended Cl. Pg. 2-3 at IV; Amended Complaint Exh. F; Answer to Amended Cl. Pg. 17.

TCW disputed the charges on the basis that it should not have been charged per diem from May 23, 2020, to May 26, 2020, totaling $510.00, because the Port of Savannah was closed on those days, making TCW unable to return the equipment to the port, but Respondents declined to waive the charges. Amended Cl. Pg. 2 – 3 at VI. TCW then filed this complaint with the Commission seeking reparations for the $510.00 per diem charges, and an order directing Respondents not to impose per diem charges on days when a motor carrier has no ability to return equipment due to a port closure, and to bill per diem charges directly to the BCO rather than invoicing the motor carrier.

[2] The pages in all documents without a page number that are cited in this decision are numbered sequentially from the first page of that document to its last page.

As discussed in greater detail below, I find that the evidence supports Claimant's allegation that by imposing the per diem charges for the days the equipment could not be returned, Respondents violated section 41102(c).

B. Procedural History

On June 18, 2020, the Secretary of the Federal Maritime Commission ("FMC" or "Commission") issued a Notice of Filing of Small Claims Complaint and Assignment ("Notice"), noting that Complainant TCW had commenced this proceeding against Respondent Evergreen Shipping Agency (America) Corporation ("Evergreen-Agent").[3] In the Notice, Evergreen-Agent was instructed to file its response to the complaint by July 13, 2020, and to indicate whether it consented to the use of the Commission's informal procedures set forth at Subpart S for adjudication of the complaint. On July 9, 2020, Evergreen-Agent filed a response to the complaint and stated that it consented to the use of the informal procedures.

Pursuant to 46 C.F.R. § 502.301(a) and (e), which authorize the Small Claims Officer ("SCO") in a Subpart S proceeding, to, if deemed necessary, request additional documents or information from the parties, on July 21, 2020, an order was issued directing TCW and Evergreen-Agent to submit any discovery requests that would aid them in establishing their claims and defenses. Order to Submit Discovery Requests, July 21, 2020 ("Order for Discovery Requests"). The Order for Discovery Requests further stated:

> Any party objecting to a discovery request submitted to the undersigned by another party may file an objection to the request, stating why the required income information cannot be disclosed. The requesting party will then be provided 14 days to explain to the undersigned why the information sought is relevant to this proceeding and why it cannot be obtained in some other manner.
>
> Upon receiving the discovery requests and any objections thereto, the undersigned will review the submissions and issue an order for supplemental information to the parties, incorporating the information requested by the parties determined to be appropriate and any additional information deemed to be helpful to the proper adjudication of this proceeding.

Order for Discovery Requests at 2.

On August 5, 2020, Respondent Evergreen-Agent submitted its discovery requests. On August 10, 2020, Claimant TCW submitted objections to Evergreen-Agent's discovery requests, asserting that the requests objected to were either irrelevant or unduly burdenson.[4] On August 11, 2020, Evergreen Shipping was directed to explain why the discovery sought was relevant and

[3] As explained below in greater detail, TCW initially filed this complaint against Evegreen-Agent but later amended its complaint to add Evergreen-Principal as a respondent.

[4] In the interest of brevity, the Order to Submit Discovery Requests, the parties' responses, and the Order for Supplemental Information are summarized.

could not be obtained elsewhere. For its part, TCW did not submit any discovery requests but instead, submitted on August 20, 2020, a brief arguing the merits of its case. On August 21, 2020, Evergreen-Agent submitted an objection to TCW's brief and an explanation supporting its discovery requests. In the event that the brief was allowed in the record, Evergreen-Agent asked that it be permitted to respond to the brief. On August 28, 2020, an order was issued directing the parties to provide additional information and documents. The order incorporated some of Evergreen-Agent's's discovery requests but denied the remainder for lack of relevance. Order to Submit Supplemental Information ("Order for Supplemental Information"), August 28, 2020. The Order for Supplemental Information also permitted Evergreen-Agent to respond to TCW's brief.

Further, because Evergreen-Agent had stated in its answer that it was an agent for Evergreen-Principal, the order required Claimant to state whether it wished to amend its complaint to add Evergreen-Principal as a respondent. Order for Supplemental Information at 5. On September 21, 2020, Claimant submitted a request to amend its complaint to add Evergreen-Principal as a respondent, and attached a copy of the amended complaint. Email from TCW with Attached Amended Complaint, dated September 21, 2020. Claimant's request was granted the same day.

On September 25, 2020, Evergreen-Agent submitted a response to the Order for Supplemental Information titled "Respondents' Response to the S.C.O.'s Questions [Order dated August 28, 2020], and a Request to Dismiss the Amended Informal Complaint as to Both Respondents Based on Claimant's Discovery Production" ("Request for Dismissal"). Evergreen-Agent argued in the Request for Dismissal that the complaint against it and its principal should be dismissed because, according to Evergreen-Agent, TCW had suffered no monetary damages since the evidence showed that it had been reimbursed by Yamaha for the disputed per diem charges. Request for Dismissal at 1-4. In addition, Evergreen-Agent argued that the remainder of TCW's claims are not in the nature of reparations and therefore, could not be granted by a small claims officer. Request for Dismissal at 1, 5.

On September 30, 2020, the Secretary of the Commission served the amended complaint on Respondents. Evergreen-Principal was directed to respond to the complaint within 25 days in accordance with the Commission's Rules. On October 8, 2020, Evergreen-Principal consented to the use of the Subpart S informal procedures and, appearing through counsel, requested that it be allowed to mount a common defense with Evergreen-Agent and to join in Evergreen-Agent's request to dismiss the amended complaint. Should its response to the amended complaint be required, Evergreen-Principal asked that an extension of time be granted to it to file its response.

On October 15, 2020, Respondents' Request for Dismissal was denied. Order Denying Respondents' Request for Dismissal and Granting Additional Time to Evergreen Line to Respond to the Amended Complaint ("Order Denying Dismissal"), October 15, 2020. The Order Denying Dismissal stated *inter alia*:

> Commission's regulations do not limit small claims officers to awarding only monetary judgments. Indeed, small claims officers have issued non-monetary judgments in the past, including cease and desist orders against respondents found

> to have violated the Shipping Act. As an example, in *GEO Machinery*, the small claims officer ordered the respondent to release the title of a boat to the claimant and noted that a "cease and desist order may be issued when there is a violation of the Shipping Act." *Geo Machinery FZE v. Watercraft Mix, Inc.* Docket No. 1935(I), Initial Decision at 6 (SCO May 21, 2013) (internal citations omitted), aff'd, 33 S.R.R. 329 (FMC 2014) (Order Affirming Settlement Officer's Decisions). The small claims officer further stated: "I am issuing this order to 'alert the shipping industry, serve to forestall future violations, and facilitate injunctions against possible future unlawful activity.'" *GEO Machinery,* Initial Decision at 7.
>
> The amount claimed as damages and the conduct alleged to violate the Shipping Act fall within the jurisdictional purview of a small claims proceeding. Thus, dismissal of the proceeding at this early stage before adjudicating all allegations raised in Claimant's complaint would not be appropriate. Further adjudication will help to resolve the issues in dispute and to determine the appropriate course of action with regard to Claimant's allegations and the relief requested.

Order Denying Dismissal at 2. Evergreen-Principal was granted until October 30, 2020, to file its response and permitted to mount a common defense with Evergreen-Agent, as well as to adopt Evergreen-Agent's responses and submissions. Order Denying Dismissal at 3.

On October 30, 2020, Respondents filed their response to the amended complaint. In addition, Respondents submitted a second request for discovery. On November 3, 2020, Claimant submitted objections to Respondents' second request for discovery. On November 15, 2020, Respondents submitted a reply to TCW's objections. On December 3, 2020, an order was issued, denying Respondents second discovery requests. Order on Respondents' Second Request for Discovery and to Submit Briefs ("Order Denying Second Discovery Request"), November 15, 2020. The Order Denying Section Discovery Request stated:

> The intention behind the Subpart S informal procedures is to facilitate the adjudication of claims "without the necessity of formal proceedings." 46 C.F.R. § 502.301(b). To this end, the Commission's Rules guiding discovery in formal proceedings are not made applicable to small claims proceedings. Rather, the small claims officer is given the authority to, "if deemed necessary, request additional documents or information" from the parties in a proceeding. 46 C.F.R. § 502.304(a) and (e). Although Respondents' first discovery requests, which were similarly crafted, were accepted because they were submitted in compliance with the small claims officer ("SCO")'s July 21, 2020, order to submit discovery requests and were incorporated into the SCO's August 28, 2020, order for supplemental information, Respondents second discovery requests were not requested by the SCO. The second discovery requests are akin to the discovery procedures utilized in formal proceedings and are not contemplated under the Subpart S informal procedures. Moreover, since informal procedures seek to provide a prompt and cost effective adjudication of complaints prolonged and

> complicated discovery defeats that purpose. Claimant should already have provided relevant evidence regarding its claims.

Order Denying Second Discovery Request at 4-5.

In addition, the Order Denying Discovery Request directed the parties to brief the issues:

1. Whether Claimant had the ability to return the chassis in question on the days the per diem was charged.

2. Whether Respondents' imposition of a per diem charge for the days at issue gives rise to a violation of section 41102(c). In particular, the parties should discuss whether Respondents' imposition of the per diem charges was "unjust and unreasonable" under the elements set forth in sections 545.4 and 545.5.

3. Whether Claimant is entitled to the relief requested in light of the Commission's statements in the final rules for sections 545.4 and 545.5.

Order Denying Second Discovery Request at 5-6.

On January 8, 2021, Claimant submitted its brief on the outlined issues. On January 11, 2021, Respondents' brief on the issues was also received. On January 18, 2021, Claimant submitted its reply brief and on January 25, 2021, Respondents' reply brief was received.

C. Argument of the Parties

Claimant alleges that Respondents' practice of charging per diem for weekends, holidays and temporary port closures, such as closures due to Covid-19, when Claimant has no ability to return empty containers to the port violates section 41102(c), and runs contrary to the guidance in section 545.4(d). Amended Cl. Pg. 2 at III(a). Claimant posits that "such practice serves as no motivating factor for increasing cargo fluidity, is not in harmony with the intent of the Shipping Act and serves only to financially benefit the Respondent." Amended Cl. Pg. 2 at III(a). Claimant maintains that had the port been operating as normal rather than under Covid-19 hours, Claimant would have had 3 days less of per diem charges for the container ($150 per day), and 22 days less of per diem charges for the chassis ($20 per day), totaling $510.00. Amended Cl. Pg. 3 at IV.

Claimant contends that there are more economical choices available on the market than Respondents' chassis fee rates of $20 per day past four free days, and argues that since chassis fees are negotiated solely with the BCO, Respondents should be directed to invoice the BCO directly. Amended Cl. Pg. 2 at III(c) and Pg.4. Claimant asserts in addition, that it "has access to better equipped, safer and more affordably priced chassis than the daily chassis per diem rate of $20 invoiced by Respondent." Amended Cl. Pg. 4.

While Claimant "understands the reasoning behind per diem charges, it does not see the charges justified when they are billed through port closures." Amended Complaint at 3 – 4. Claimant posits that "Respondent[s] and all marine lines should be required to bill their

customers directly for per diem, where the customer can review the accuracy of any charges against the contract between the marine line and BCO." Amended Cl. Pg. 4.

Respondents argue that the complaint against Evergreen-Agent warrants dismissal for lack of jurisdiction because Evergreen-Agent is merely the North American agent for Evergreen-Principal and not a regulated entity subject to the provisions of 46 C.F.R. § 545.5(b), such as a Vessel-Operating Common Carrier ("VOCC"), Marine Terminal Operator ("MTO"), or Ocean Transportation Intermediary ("OTI"). Answer Pg. 4 and 6 at Part 3; Answer to Amended Cl. at Pg. 6 Nos. 6 - 7; Resp. Brief Pgs. 5 - 7 at Point 3. Respondents argue, in addition, that the complaint warrants dismissal because, according to them, Claimant has suffered no monetary damages as the BCO reimbursed Claimant the per diem charges at issue, and opine that the rest of the relief sought by Claimant cannot be granted by the SCO as only monetary damages may be awarded in small claims proceedings. Resp. Brief Pg. 2; Answer to Amended Cl. Pg. 5. In addition, Respondents argue that that the Commission lacks subject matter jurisdiction over this complaint because, "the performance of private number maritime contracts between ocean carriers and motor carriers is not generally within the Commission's jurisdiction." and, according to them, the Commission's jurisdiction may only be found where through bills of lading terms are applicable to resolving the dispute; the ocean carrier's tariff is applicable to resolving the dispute; or terms that are objectionable under Section 41102(c) are contained only in the individual carrier's UIIA Addendum. Resp. Brief Pgs. 3 - 5 at Point 2.

Respondents further argue that before receiving Respondents' equipment Claimant signed a Preferred Trucker Agreement which required Claimant to be bound by the provisions of the UIIA and Evergreen Addendum, the UIIA provisions obligate Claimant to pay per diem for late returned equipment, and Claimant offers no just reason why its should be relieved of its contractual obligations or state that it was a victim of fraud or duress in agreeing to the UIIA, Evergreen Addendum, and Preferred Trucker Agreement. Answer Pg. 7 - 8. In addition, Respondents assert that Claimant was well aware the port would be closed on Saturday, May 23rd and that Claimant's free time expired before May 23rd "[t]herefore, under the well-established principle of 'Once on demurrage, always on demurrage,' as well as the UIIA, the Addendum and respondent's per diem rule, claimant's failure to return the equipment before May 23rd entitled respondent to the now disputed per diem." Answer Pg. 10. Respondents state that Claimant contractually assumed the risk of a late return of equipment by its BCO and it was that late return that caused its loss. Answer Pg. 10.

Respondents argue moreover, that Claimant cannot meet the Rule 545.4 criteria for establishing a Section 41102(c) claim as, according to them, Claimant has not proven the elements set out in Section 545.4. Resp. Brief Pg. 7 at Point 4; Answer to Amended Cl. Pg. 12. Respondents state that Claimant has not alleged facts sufficient to show that the issues in dispute rise to the level of "unjust" or "unreasonable." Answer to Amended Cl. Pg. 12. In addition, Respondents note that Claimant billed Yamaha for per diem in an amount higher than Claimant was billed for the disputed per diem charges. This fact, argue Respondents, contradicts Claimant's allegation that the practice of billing per diem during port closures "serves only to financially benefit the Respondent" and also goes to the issue of whether the billing arrangement is "just and reasonable." Answer to Amended Cl. Pg. 12. Respondents argue that if Claimant is marking up the per diem it cannot argue that the practice is either unjust or unreasonable. Answer to Amended Cl. Pg. 12. Respondents state that were Claimant's request for relief to be

granted it would deprive Respondents of contract rights and impose obligations on Respondent that are not imposed on any other FMC regulated entities. Answer Pg. 2 at Part 1, No. 4.

II. PERTINENT FACTS ESTABLISHED BY THE RECORD ("PF")

1. Claimant TCW, Inc., a corporation based in Nashville, Tennessee, is one of the largest asset-based transportation providers in the Southeast. Amended Cl. Pg. 1 at I.

2. Respondent Evergreen-Agent is a New Jersey corporation, which acts as a North American general agent for Respondent Evergreen-Principal. Answer Pgs. 3 – 4 at Part 3 Nos. 1 and 2.

3. "As part of Evergreen-Agent's agency responsibilities, it engages the services of motor carriers, such as claimant, to perform inland carriage of certain import cargoes, as may be required by Evergreen-Principal's various intermodal bills of lading or sea waybill contracts with beneficial cargo owners." Answer Pg. 4 at Part 3 No.3.

4. Respondent Evergreen-Principal is an ocean/intermodal common carrier of goods by sea in the foreign commerce of the United States. Answer to Amended Cl. Pg. 2 at II.2.

5. Yamaha Motor Company, Ltd. ("Yamaha") is the beneficial cargo owner ("BCO") for the cargo on which the disputed per diem was charged. Resp. Exh. 10 (Evergreen Line Sea Waybill).

6. Evergreen-Principal and Yamaha entered into a port to door transportation agreement to deliver Yamaha's cargo from the Port of Shimizu, Japan to Yamaha's facility in Newnan, Georgia. Resp. Exh. 10 (Evergreen-Principal Sea Waybill).

7. On March 14, 2020, Evergreen-Principal issued Yamaha a non-negotiable sea waybill. Resp. Exh. 10.

8. The non-negotiable sea waybill reflected the port of loading for the cargo as the Port of Shimizu, Japan and the place of delivery as Newnan, Georgia. Resp. Exh. 10 (Evergreen Principal Sea Waybill).

9. As part of the through transportation arrangement, Yamaha designated Claimant as its preferred trucker for transporting the shipment from the port of Savannah to Yamaha's facility in Newnan, Georgia. Resp. Exh. 9.

10. As an additional part of the arrangement, Yamaha, TCW, and Evergreen-Agent "as agent for Evergreen[-Principal]," signed a "Preferred Trucker Agreement" in which, among other terms in the contract, Respondents agreed to the designation of TCW as the preferred trucker for Yamaha's import and export cargoes. Resp. Exh. 9 (Preferred Trucker Agreement) at 1.

11. The Preferred Trucker Agreement incorporates the terms of a service contract between Evergreen-Principal and Yamaha, the terms of Evergreen-Principal's non-negotiable sea waybill for the transportation, and Evergreen-Principal's tariff, but notes that the terms

and conditions of the Preferred Trucker Agreement will control in the event of a conflict. Resp. Exh. 9 (Preferred Trucker Agreement).

12. "As a condition precedent to being authorized" as the preferred trucker, the Preferred Trucker Agreement requires TCW to be a signatory to the UIIA and Evergreen Addendum. Resp. Exh. 9 at 1; Answer Pg. 4 at Part 3 No.4.

13. The UIIA is "a contract between the industry's Motor Carriers on the one hand, and industry's Equipment Providers . . . on the other hand [which] regulates Motor Carriers' access to and use of the Providers' containers and chassis, in the land transportation of cargo." Answer Pg. 4 at 4(a).

14. The Evergreen Addendum "supplements the industrywide, general provisions of the UIIA by including details such as free time and per diem rates that are specific to Respondent's business." Answer Pg. 4 at 4(b).

15. The UIIA and Evergreen Addendum require motor carriers to pay per diem charges for unreturned equipment once free time has expired. Answer Pgs. 4 – 5 at 4(c); Resp. Exh. 1 Pg. 7 at 6(b - c).

16. The UIIA provides that an equipment provider may permit a period of uncompensated use of equipment and thereafter impose per diem. Resp. Exh. 1 Pg. 7 at Section E.6(a).

17. The UIIA does not require that per diem be imposed on weekends and holidays. Resp. Brief Pg. 5 at Point 2(c)(i); Resp. Exh. 1 Pg. 7 at Section E.6(a) ("Provider may . . . impose Per Diem . . . as set forth in its Addendum").

18. The provision imposing per diem charges on weekends and holidays are contained in the Evergreen Addendum. Answer Pg. 4 – 5 at No. 4(c); Resp. Exh. 4 Pg. 2 at 3(b) (Evergreen Addendum).

19. The UIIA provides that the Motor Carrier shall be responsible for Per Diem and the Provider shall invoice the Motor Carrier for Per Diem. Resp. Brief Pg. 5 at Point 2(c)(ii); Resp. Exh. 1 Pg. 7 at Section E.6(b - c).

20. As was Respondents' practice, Respondents provided a free chassis to TCW for use in transporting the Yamaha shipment. Answer Pg. 11 at Part 3 No. 21.

21. Respondents did not require Claimant to use Respondents' containers or chassis. Answer Pg. 11 at Part 3 No.21; Answer to Amended Cl. Pg. 13 at No. 34.

22. Under the shipping agreement Yamaha was entitled to receive 21 days of free time for the container and 4 days of free time for use of the chassis. Amended Cl. Exh. F, G; Answer to Amended Cl. Pg. 17 at No. 42.

23. Claimant picked up the equipment at issue on April 28, 2020, and returned the equipment on May 26, 2020. Amended Cl. Exh. F (Evergreen-Agency Per Diem Invoice).

24. The Port of Savannah, where the equipment was to be returned, was closed for business from May 23, 2020, to May 25, 2020. Amended Cl. Pg. 4; Resp. Brief Pg. 8 at Point 5.

25. Effective March 2, 2020, the Port of Savannah was temporarily closed on Saturdays, including Saturday, May 23, 2020, due to reduced business as a result of the COVID-19 pandemic. Cl. Exh. E.

26. The Port of Savannah is regularly closed on Sundays, including on Sunday, May 24, 2020. Cl. Brief at 2; Cl. Exh. E; Resp. Brief Pg. 8 at Point 5.

27. The Port of Savannah was closed on Monday, May 25, 2020, for the Memorial Day holiday. Amended Cl. Pg. 4; Cl. Exh. E.

28. The free time for the container ended on May, 19, 2020, and the free time for the chassis ended on May 4, 2020. Amended Cl. Exh. F (Evergreen-Agency Per Diem Invoice).

29. By the time the equipment was returned the free time for the container had expired by 7 days and by 22 days for the chassis. Amended Cl. Pg. 3 at IV.; Amended Cl. Exh. F.

30. After expiration of the equipments' free time, Respondents imposed a charge of $150 for each day after the container's expiration time and $20 for each day after the chassis' expiration time. Amended Cl. Exh. F; Resp. Brief Pg.7 n.2.

31. Evergreen-Agent charged TCW per diem charges of $1,050.00 for 7 days for the container and $440.00 for 22 days for the chassis. Amended Cl. Exh. F; Answer Pg. 3 at Part 2.

32. Respondents invoice per diem for weekends and holidays. Amended Cl. Pg. 2 at III; Amended Cl. Exh. G; Answer to Amended Cl. Pg. 2 at III.a.

33. On June 2, 2020, TCW emailed a request to Respondents to remove the per diem charges stating:

> The empty was available for pick up on 5/23. We picked up then and sent to our Savannah yard. Had Savannah been operating under normal hours (prior to Covid 19), we could have ingated Saturday. Monday the 25th was Memorial day, so we then ingated the next open day on 5/26.

Amended Cl. Exh. G (Email from Ben Banks, TCW Inc., to Thierry Turquet, Evergreen Shipping Agency (America) Corp., dated 06/02/2020).

34. On June 2, 2020, Evergreen responded:

> The free time under this contract is 21 Calendar days, so everday count[s], holidays and weekends included. Charges are correct . . .

Amended Cl. Exh. G (Email from Thierry Turquet, Evergreen Evergreen Shipping Agency (America) Corp., to Ben Banks, TCW, Inc. dated 06/02/2020).

35. On June 6, 2020, Claimant paid Respondents the disputed $510.00 per diem charges. Amended Cl. Pg. 3 at IV; Answer Pg. 11 at IV; Answer to Amended Cl. Page 3 at IV.

36. Although Claimant paid Respondents $1,490 for per diem charges on the equipments at issue, Claimant invoiced Yamaha, the BCO, in the amount of $1,788 for the same charges, and the BCO paid Claimant's invoice. Claimant Invoice No. 084001 to Yamaha dated 06/05/20 (submitted with Cl. Response to Order for Supplemental Information).

37. Claimant charged Yamaha $1260.00 for 7 days of per diem for the container, a rate of $180 per day, and $528.00 for 22 days of per diem for the chassis, a rate of $24 per day. Claimant Invoice No. 084001 to Yamaha dated 06/05/20.

38. Yamaha paid Claimant $1788.00 for the per diem charges. Yamaha ACH Payment Advice dated 08/21/2020 (submitted with Cl. Response to Order for Supplemental Information).

III. DISCUSSION

Respondents deny Claimant's allegations but also assert that the Commission lacks both personal and subject matter jurisdiction to adjudicate this claim. Respondents also assert that the relief sought by Claimant cannot be granted in a small claims proceeding. The submissions by the parties and SCOs orders herein discussed constitute the evidence of record for this decision.

A. Controlling Authority

Respondent Evergreen-Principal is a vessel-operating-common carrier. A vessel-operating-common carrier is defined under the Shipping Act as "a person that -- (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(19).

A "common carrier" is a person that –

(i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;

(ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 U.S.C. § 40102(7).

The Commission's jurisdiction extends to ocean transportation involving through transportation. "The term 'through transportation' means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States port or point and a foreign port or point." 46 U.S.C. § 40102(26).

Claimant alleges that Respondents violated the Shipping Act. Under 46 U.S.C. Chapter 411, a complaint may be filed with the Commission alleging a violation of the Shipping Act and seeking reparations. In instances where the amount sought for damages does not exceed $50,000, a complainant has the choice to file a formal or informal complaint. A respondent sued under the Commission's informal procedures has the option not to consent to adjudication of the dispute under the informal procedures. The Rules governing informal procedures are set forth at Subpart Part S, 46 C.F.R. §§ 502.301 - 502.305. If the respondent does not consent to the use of informal procedures, the complaint is converted to a formal proceeding and adjudicated by an administrative law judge, using the formal procedures set forth in the Commission's Rules at Subpart T, 46 C.F.R. §§ 502.311 – 502.321. Here, Claimant filed its complaint under Subpart S and Respondents consented to the use of the informal procedures. The Subpart S Rules are thus controlling.

Section 502.301 at Subpart S provides:

> (a) Section 11(a) of the Shipping Act of 1984 (46 U.S.C. 41301(a)) permits any person to file a complaint with the Commission claiming a violation occurring in connection with the foreign commerce of the United States and to seek reparation for any injury caused by that violation.
>
> (b) With the consent of both parties, claims filed under this subpart in the amount of $50,000 or less will be decided by a Small Claims Officer appointed by the Federal Maritime Commission's Chief Administrative Law Judge, without the necessity of formal proceedings under the rules of this part. Authority to issue decisions under this subpart is delegated to the appointed Small Claims Officer.
>
> (c) Determination of claims under this subpart shall be administratively final and conclusive. [Rule 301.]

46 C.F.R. § 502.301. "Where appropriate, the Small Claims Officer may require that the respondent publish notice in its tariff of the substance of the decision." 46 C.F.R. § 502.304(g).

Claimant alleges that Respondents violated section 41102(c) of the Shipping Act which provides: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). To establish a successful claim for reparations under section 41102(c), the claimant must demonstrate that:

> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

Claimant also alleges that Respondents' imposition of per diem charges for the days at issue runs contrary to the guidance provided by the Commission in the Commission's interpretive rule on Demurrage and Detention Rules under Section 41102(c), 46 C.F.R. § 545.5. On May 18, 2020, the Commission issued an Interpretive Rule "clarifying its interpretation of the Shipping Act prohibition against failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property with respect to demurrage and detention." Interpretive Rule on Demurrage and Detention Under the Shipping Act ("Final Rule"), 85 FR 29638 (May 18, 2020). The Final Rule adopts with minor changes the interpretive rule published on September 17, 2019, in the Commission's Notice of Proposed Rulemaking: Interpretive Rule on Demurrage and Detention Under the Shipping Act ("NPRM"), 84 FR 48850 (Sept. 17, 2019). The Final Rule provides "guidance as to what [the Commission] may consider in assessing whether a demurrage or detention practice is unjust or unreasonable." 85 FR at 29638. Section 545.5, provides in pertinent part:

> (a) *Purpose.* The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and §545.4(d) in the context of demurrage and detention.
>
> (b) *Applicability and scope.* This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including "per diem," assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries ("regulated entities") related to the use of marine terminal space (*e.g.,* land) or shipping containers, not including freight charges.
>
> (c) *Incentive principle* — (1) *General.* In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.
>
> (2) *Particular applications of incentive principle*—(i) *Cargo availability.* The Commission may consider in the reasonableness analysis the extent to which

demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.

(ii) *Empty container return.* Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.

46 C.F.R. § 545.5.

B. Evidence and Burden of Proof.

Claimant has the burden to prove its allegations against Respondents. "In all cases governed by the requirements of the Administrative Procedure Act, 5 U.S.C. 556(d), the burden of proof is on the proponent of the motion or the order." 46 C.F.R. § 502.203. Thus a claimant alleging a violation of the Shipping Act bears the burden of proving its allegations against the respondent. The term, "burden of proof" is understood to mean "the burden of persuasion." *Director v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. *See Steadman v. SEC*, 450 U.S. 91, 102 (1981). When the party with the burden of persuasion produces sufficient evidence (characterized as a prima facie case), the burden of production shifts to the other party to produce evidence rebutting that case. *In re South Carolina State Ports Auth. for Declaratory Order*, 27 S.R.R. 1137, 1161 (FMC 1997). *See also Steadman*, 450 U.S. at 101 ("Where a party having the burden of proceeding has come forward with a prima facie or substantial case, he will prevail unless his evidence is discredited or rebutted."). When direct evidence is unavailable inferences may be drawn from certain facts and circumstantial evidence may be sufficient so long as the fact finder does not rely on mere speculation. *Waterman S.S. Corp v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993). If the evidence produced by both parties is evenly balanced the party with the burden of persuasion will not prevail. *See Greenwich Collieries*, 512 U.S. at 281.

C. The Commission has Jurisdiction to Adjudicate this Proceeding

"It is elementary law that a tribunal should determine its jurisdiction before proceeding to the merits of a controversy" *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, 28 S.R.R. 1178 (ALJ 1999). *See also River Parishes Co. Inc. v . Ormet Primary Aluminum Corp.*, 28 S.R.R 751, 762 (FMC 1999) ("As the ALJ correctly held, an agency must reach the jurisdictional issues before adressing the merits of the case") (internal citations omitted).

Respondents argue that the Commission lacks jurisdiction over Evergreen-Agent, asserting that Evergreen-Agent is merely an agent for Evergreen-Principal, not a regulated entity subject to the provisions of 46 C.F.R. § 545.5(b). Answer Pgs. 4 and 6 at Part 3; Answer to Amended Cl. at Pg. 6 Nos. 6 - 7; Resp. Brief Pgs. 5 - 7 at Point 3. Respondents further assert that Evergreen-Agent is not a common carrier, marine terminal operator, or an ocean transportation intermediary, and state that determining whether one is a regulated entity is a fact intensive analysis taking into account statutory definitions. They maintain that Claimant has neither shown nor alleged conduct on the part of Evergreen-Agent that makes Evergreen-Agent one of the entities regulated under section 41102(c). Resp. Brief at 5 - 6.

Claimant did not submit any arguments on the issue of whether the Commission has jurisdiction to adjudicate its claim but asserted in its reply brief: "The fact that the respondents act as an ocean common carrier is undeniable. If they do not meet the description of a regulated entity, then what ocean common carrier does?" Cl. Reply Brief at 1.

The evidence shows that Evergreen-Agent imposed the per diem charges at issue on an oceanborne through transportation, over which the Commission has jurisdiction, and forwarded the per diem payments to Evergreen- Principal, the VOCC for the transportation. *See,* Respondents' Response to Order for Supplemental Information Pg. 2 at Question 3:

> **Question 3**: Is any of portion of the per diem payment forwarded to Evergreen Line?
>
> **Answer 3**: Yes. The per diem is forwarded to Evergreen Line

Because the facts show that the practice at issue occurred during the through transportation of international oceanborne shipping provided by a VOCC, Evergreen-Principal, the Commission has jurisdiction to adjudicate whether the per diem charges imposed by Evergreen-Principal's agent during the inland portion of the through transportation, which it then passed on to Evergreen-Principal, violate the Shipping Act. The fact that the practice in question was facilitated by aid of the VOCC's agent does not remove the challenged practice from the Commission's purview. Additionally, as Respondents note, Evergreen-Agent "signed the UIIA and UIIA addendum [under which the per diem charges were imposed] as principal and not in any representative capacity, thus assuming the contracts' obligations itself." Resp. Brief at 6. The UIIA Addendum, which Evergreen-Agent signed as a principal contains terms that may violate the Shipping Act. Respondents state that Claimant is obligated to abide by those terms under Claimant's agreement with them. Thus, as the principal behind the imposition of the per diem charges subject to the Commission's purview, the Commission has the authority to require Evergreen-Agent, along with Evergreen-Principal, to participate in this adjudication whether the imposed per diem violates the Shipping Act. "A court may assert pendent personal jurisdiction over a defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction." *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F. 3d 1174, 1180 (9th Cir. 2004) (citations omitted). Here, the claim against Evergreen-Agent arises "out of a common nucleus of operative facts" with the claim against Evergreen-Principal, over which the Commission has jurisdiction as a VOCC. Moreover, because by law a principal is responsible for conduct of its agent in the performance of the agent's duties, if reparations were found to be warranted, Evergreen-Principal, not Evergreen-Agent, would bear the cost of the award. *See, e.g., United States v. Dish Network L.L.C,* 954 F.3d 970, 976 (7th. Cir. 2020) ("The norm of agency is that a principal is liable for the wrongful acts of the agent taken within the scope of the agency – that is, the authority to complete the task assigned by the principal.") (citing *Restatement (Third) of Agency §7.08*).

Further, the fact that the practice in dispute involves the inland portion of the through transportation does not deprive the Commission of subject matter jurisdiction.

> Nothing in [the Final Rule] limits its scope to shipping activities occurring at ports or marine terminals. Rather, section 41102(c) concerns ocean carrier, marine operator, and ocean transportation intermediary practices and regulations "relating to or connected with receiving, handling, storing, or delivering property." Ocean carrier demurrage and detention practices are subject to section 41102(c) and Commission oversight, regardless of whether the practices related to conduct at ports or in land, with some caveats. First, not everything an ocean carrier marine terminal operator does is within the Commission purview - an ocean carrier marine terminal operator must be acting as a common carrier or marine terminal operator as defined by the Shipping Act with respect to the conduct at issue. Second, the Commission must be careful not to encroach into the jurisdiction of other agencies such as the Surface Transportation Board, which is itself considering issuing guidance similar to that in the Commission's rule.

85 FR at 29650. Here, Evergreen-Principal was the VOCC for the transportation at issue and Evergreen-Agent imposed the disputed per diem charges in connection with a port to door transportation from Japan to Newnan, Georgia. The Commission thus has jurisdiction to adjudicate this matter.[5]

Respondents further argue that, "the performance of private number maritime contracts between ocean carriers and water carriers is not generally within the commission's jurisdiction" as, according to them, the commission's jurisdiction may only be found where through bills of lading terms are applicable to resolving the dispute; the ocean carrier's tariff is applicable to resolving the dispute; or terms that are objectionable under Section 41102(c) are contained only

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[5] Claimant's allegations regarding the per diem charges encompass charges related to the late return of a container and a chassis. In the Final Rule, the Commission defines "demurrage" and "detention" to "cover all charges customarily referred to as demurrage, detention, or per diem," but "limits these definitions to 'shipping containers' to exclude all charges related to other equipment, such as chassis. . . ." 85 F.R. at 29649. While none of the parties have raised the issue of whether per diem charges related to chassis may be adjudicated, a brief discussion touching on this issue may be warranted (*see, e.g., Buford v. Resolution Trust Corp*, 991 F.2d 481, 485 (8th Cir. 1993) (lack of subject matter jurisdiction, unlike many other objections to jurisdiction cannot be waived)). *See also, In re Ben Carter*, 618 F.2d 1093, 1100 (5th Cir. 1980) (subject matter jurisdiction is limited by the constitution and Congress, and cannot be expanded by judicial interpretation or by the acts or consent of the parties to a case).

The Commission indicates in the Final Rule that it "may, in an appropriate case, consider chassis availability in the analysis. In doing so the Commission would be especially careful to analyze how the chassis supply model at issue relates to the primary incentive purpose of the demurrage and detention." 85 FR at 29655. More importantly, the Commission notes that "Section 41102(c) does not cover chassis providers who do not otherwise fall within the definition of a regulated entity under the Shipping Act." 85 FR at 29650 n.185. I infer from this statement that section 41102(c) covers a situation such as this, where Evergreen-Principal is an ocean common carrier and Evergreen-Agent imposed the per diem on its behalf.

in the individual carrier's UIIA Addendum. Resp. Brief Pgs. 3 - 5 at Point 2. In addition, Respondents argue that the per diem charges are regulated by the UIIA, and the Evergreen Addendum, and Evergreen-Agent executed those documents as a principal. Answer at 4 - 6. Respondents also argue that "[t]he Shipping Act was enacted to protect the shipping public, not private land-based carriers who might contract with a VOCC, MTO, or OTI" (citing *Pro Transport, Inc. v. Seaboard Marine of [Florida, Inc.*, Docket No. 16-12] (ALJ 2017)). Also, they argue, that Claimant is a land carrier who entered into a private agreement which required it to be responsible for per diem, therefore, Claimant "has no right of action in regard to a private drayage agreement under the Shipping Act." Answer to Amended Cl. Pg. 6. Further, Respondents argue that this litigation concerns a non-maritime, domestic, land-based, Preferred Trucker Agreement governing the land use and compensation of containers and chassis, and that these are matters not contemplated by the Shipping Act which is intended to regulate sea carriage, not private agreements between ocean and land carriers. Answer to Amended Cl. at 7. They state that the fact that the UIIA and Evergreen Addendum were incorporated by reference into the Preferred Trucker Agreement gave them private contract status. Answer to Amended Cl. at 7.

That the parties are signatories to the UIIA does not prevent the Commission from asserting jurisdiction over the issue whether the per diem charge is unjust and unreasonable. As the Commission notes: "Ocean carrier practices, whether incorporated in the UIIA, or not, are within the Commission's purview under section 41102(c))." Final Rule, 85 FR at 29649. Commenters to the NPRM raised similar arguments that the interpretive rule would "interfere with private and lawful commercial arrangements." 85 FR at 29648. The Comission responded:

> But whether commercial arrangements are lawful is the point. Ocean carriers and marine terminal operators(and ocean transportation intermediaries) do not have an unbound right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c). Although the general trend in the industry has been regulatory, Congress retained section 41102(c) when it enacted the Ocean Shipping Reform Act in 1998. In this sense, ocean carriers and marine terminal operators are no different from participants in other regulated industries.
>
> Ocean carriers and marine terminal operators benefit, however, from limited antitrust immunity for their agreements with their competitors, and they are also the beneficiaries of cargo lien laws and law regarding tariffs and published marine terminal schedules, all of which may affect the negotiating playing vis-à-vis shippers, intermediaries, and truckers. Whatever their merits, both tariffs and marine terminal schedules share elements of contracts of adhesion: they are presented on a take-it-or-leave it basis, without the chance for much negotiation . . This is not to say that shippers and intermediaries do not negotiate certain aspects of demurrage and detention, such as free time, in service contracts. But many, if not, most, shippers lack significant bargaining power as compared to ocean carriers. The same goes for intermediaries and truckers. Under such circumstances, there is reason for the Commission to carefully scrutinize arguments that shippers, intermediaries, and truckers have the ability meaningfully to negotiate contractual terms relating to demurrage and detention.

85 FR at 29648.

Equally misguided, is Respondents' reliance on *Pro Transport*. In that case, a domestic trucker brought a complaint related to an agreement between the trucker and the ocean carrier for the trucker to provide inland trucking services to the ocean carrier. When a dispute arose between the parties based on the ocean carrier's discontinuance of use of the trucker's services and refusal to pay the trucker's outstanding invoices, the trucker sued the ocean carrier, alleging a violation of the Shipping Act. That case was ultimately settled by the parties and the Commission did not have an opportunity to weigh in as to whether jurisdiction existed to adjudicate the case. *Pro Transport*, Docket No. 16-12, Joint Letter Regarding Status (May 2, 2017). Here, by contrast, the claim is brought by a trucker alleging a violation of the Shipping Act in the imposition of per diem flowing from the inland segment of of an international oceanborne port to door through transportation.

Abundant caselaw makes it clear that the Commission has jurisdiction over complaints inherently related to Shipping Act violations. For instance, in *Cargo One*, the Commission held that the appropriate test for the Commission's jurisdiction is whether a complainants' allegations "also involve elements peculiar to the Shipping Act." *Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, 28 S.R.R. 1635, 1645 (FMC 2000). The Commission found in that case that allegations of violations of section 10(d)(1) (the predecessor to section 41102(c)) involving just and reasonable regulations and practices "are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission" *Id.*

Similarly, in *Mitsui*, the Commission held that it has jurisdiction over through intermodal transportation, including the inland segment of the through transportation. *Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc*., 2011 FMC LEXIS 12 at *18-*19 (FMC 2011). The Commission dismissed the respondents' contention that Shipping Act violations apply only to ocean transportation stating: "giving congressional intent that the Commission have jurisdiction over through intermodal transportation, including the inland segment of the through transportation, and the Commission's acknowledgment of this jurisdiction, [Respondent's] argument . . . is not persuasive." *Mitsui*, 2011 FMC LEXIS 12 at *19.

The jurisdictional issues raised in the above-discussed cases are similar to the case at bar. Accordingly, I find that the Commission has personal and subject matter jurisdiction to adjudicate this complaint.

D. Claimant's Requested Relief May be Granted in a Small Claims Proceeding

As previously noted, Respondents asked in their Request for Dismissal that TCW's non-reparations claims be dismissed because, according to Respondents, small claims officers cannot issue non-monetary judgments as "Regulation 502.301 (a - b) allows a small claims officer to decide only 'reparation' claims. A claim for 'reparation' means one for money damages." (Citing 46 C.F.R. 502.62 (a) (4). Request for Dismissal at 1, 5. As also noted, their request for dismissal was denied, finding that the claims were well within the purview of a small claims proceeding. Order Denying Dismissal at 2. Respondents repeated these arguments in their Answer to the Amended Complaint, and noted in their brief that they:

> reserve their right to appeal from[6]: So much of the S.C.O.'s October 15, 2020 Order, at p.2, as held that an Informal Small Claims proceeding may grant relief other than reparations. See, Rachel E. Dickon, 'Filing a Small Claims Complaint' (FMC Web Site) (Accessed 01/09/20) ('A small claim may be filed to seek reparations (damages) from another individual or company (the Respondent) for economic injury not exceeding $50,000 caused by violations of the Shipping Act . . . .' - Making no mention of non-monetary judgments).

Resp. Brief Pg. at (2). See also Answer to Amended Complaint at 5.

Respondents' reliance on the above-quoted statement as proof of their argument is misplaced. While it is true, as noted in the statement, that a small claim may be filed to seek damages for economic injury not exceeding $50,000, what that statement does not say, however, is that only a money judgment may be issued in small claim proceedings. Of note, the website also states with regard to formal proceedings that "[a] formal complaint may be filed with the Commission to allege violations of the Shipping Act under 46 U.S.C. Chapter 411 and to seek reparations (damages)." Fmc.gov/resources-services/filing-a-formal-complaint/ (Accessed February 3, 2021). This statement equally makes no mention of non-monetary judgments. Following Respondents' logic, one could equally conclude that non-monetary judgments may not be issued in formal proceedings.

Section 502.301, governing Subpart S proceedings, provides in pertinent part:

> (a) Section 11(a) off the Shipping Act of 1984 (46 U.S.C. 41301(a)) permits any person to file a complaint with the Commission claiming a violation occuring in connection

[6] Respondents also "reserve their right to appeal from" the order denying their second request for discovery. Resp. Brief Pg. 2 at No. 2. As a clarification regarding the small claims procedures, section 502.304(g) states that small claims decisions "shall be final" unless reviewed by the Commission, and sections 502.304(a) and (e) make it clear that only the small claims officer may request information and documents from the parties. *See* 46 C.F.R § 502.304(a) and (e).

Similarly, Respondents asked that this case "be stayed pending resolution of the Docket No. 20-14 complaint in which the jurisdictional and other issues mirror those raised by Claimant in this case." Answer to Amended Cl. Pg. 7 - 8. While the request to stay this proceeding is now moot given that a decision has been issued, it should be clarified that the informal procedures do not make provision for staying a small claims proceeding. Moreover, Respondents do not articulate a basis why small claims proceedings should be stayed when similar claims are raised in a formal proceeding.

> with the foreign commerce of the United States and to seek reparation for any injury caused by that violation.

46 C.F.R. § 502.301(a).

Thus, the provisions of section 11(a) are applicable to small claims proceedings. "Furthermore, section 11(a) of the Shipping Act makes it clear that one may, but need not, seek reparations in a filed complaint." *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 2006 FMC LEXIS 19 at *34 (FMC 2006) (Chairman Blust and Commission Dye Concurring).

Moreover, section 502.304(g) plainly states that "[w]here appropriate, the Small Claims Officer may require that the respondent publish notice in its tariff of the substance of the decision," giving authority to the small claims officer entailing the issuance of a non-monetary order. 46 C.F.R. § 502.304(g). More importantly, as explained to Respondents in the Order Denying Dismissal:

> Commission's regulations do not limit small claims officers to awarding only monetary judgments. Indeed, small claims officers have issued non-monetary judgments in the past, including cease and desist orders against respondents found to have violated the Shipping Act. As an example, in *GEO Machinery*, the small claims officer ordered the respondent to release the title of a boat to the claimant and noted that a "cease and desist order may be issued when there is a violation of the Shipping Act." *Geo Machinery FZE v. Watercraft Mix, Inc.* Docket No. 1935(I), [32 S.R.R. 1675] (SCO May 21, 2013) (internal citations omitted), aff'd, 33 S.R.R. 329 (FMC 2014) (Order Affirming Settlement Officer's Decisions). The small claims officer further stated: "I am issuing this order to 'alert the shipping industry, serve to forestall future violations, and facilitate injunctions against possible future unlawful activity.'" *GEO Machinery*, [32 S.R.R. at 1677].

Order Denying Dismissal at 2. Respondents argue that "the respondent [in *Geo Machinery*] defaulted in appearing so the right of a S.C.O. to issue non-reparations relief was not litigated." Answer to Amended Complaint Pt. 7 at 8(b). This argument fails to recognize that the SCO's decision was reviewed de novo by the Commission and affirmed in all respects. Respondents' arguments that Claimant's non-reparations claims cannot be adjudicated in this proceeding are thus refuted by the above evidence.

E. The Evidence Establishes a Violation of Section 41102(c)

Claimant alleges that Respondents' imposition of per diem charges for weekends, holidays and temporary port closures due to Covid-19, when Claimant has no ability to return empty containers is a violation of section 41102(c), and runs contrary to the guidance set forth in 545.4(d). Amended Cl. Pg. 2 at III(a). Claimant asserts that the requirements of section 41102(c) are met because Respondents are an ocean common carrier and therefore a regulated entity; Respondents "have billed and continue to have intentions to bill" the per diem charges at issue; the conduct at issue is connected with the delivery of cargo from the Port of Savannah to Yamaha Motors in Newnan GA; the practice or regulation is unjust because it involves the billing of per diem for periods when equipment cannot be returned due to port closure resulting

from holidays, weekends, or reduced port-operating hours, as stated in the Commission's Final Rule on demurrage and detention; and the loss suffered by Claimant directly results from the unreasonable practice. Cl. Brief Pg. 1.

Respondents argue that to establish a claim under section 41102(c), Claimant must prove all elements set out in Section 545.4 which, according to Respondents, Claimant cannot do. Resp. Brief Pg. 7 at Point 4. Respondents posit that while the billing and per diem issues in dispute relate to, or are connected with, receiving, handling, storing, or delivering property, Claimant's complaint is not within the Commission's jurisdiction because Claimant is a motor carrier; the matters complained of are not unjust or unreasonable; and Claimant cannot show damages or proximate causation because it was reimbursed for the per diem charges in dispute by the BCO. Resp. Brief Pg. 7 at Point 4.

1. Criteria Required to Prove a Section 41102(c) Claim for Reparations

Section 545.4 provides that to establish a successful claim for reparations under section 41102(c), (which states: "a common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property"), a claimant must demonstrate that the respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary; that the alleged conduct is "occurring on a normal, customary, and continuous basis;" the practice or regulation in dispute relates to or is connected with receiving, handling, storing or delivering property; is unjust or unreasonable, and is the proximate cause of the claimed loss. *See* 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.4(d).

In addition, on May 18, 2020, the Commission published at section 545.5, a rule containing guidance as to what the Commission would consider in assessing whether a demurrage or detention practice is "unjust or unreasonable." Of note, that section provides that "in assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity." 46 C.F.R. § 545.5(c).

a. Respondent Evergreen-Principal is an Ocean Common Carrier and Evergreen-Agent Imposed the Per Diem on Evergreen-Principal's Behalf

Claimant argues that the fact that Respondents "act[ed] as an ocean common carrier is undeniable. If they do not meet the description of a regulated entity, then what ocean common carrier does?" Cl. Brief Pg. 1. Respondents state that Evergreen-Principal's status as a regulated entity is undisputed but that "missing from Claimant's case is any evidence that Evergreen-Agent is regulated." Resp. Reply Brief Pg. 1.

Evergreen-Principal is an ocean common carrier (see PF 4), and Evergreen-Agent imposed the per diem charges at issue on the ocean common carrier's behalf. Claimant thus demonstrates the first element to prove its section 41102(c) claim for reparations.

b. The Claimed Act is Occurring on a Normal, Customary, and Continuous Basis

Claimant argues that the claimed acts are occurring on a normal, customary, and continuous basis because Respondents "have and continue to have intentions to bill per diem" for the days that equipment cannot be returned due to port closure resulting from holidays, weekends or reduced port operating hours during the COVID-19 pandemic, and "have and continue to have" intentions to bill Claimant for per diem charges rather than directly to the BCO with whom they negotiate the shipping contracts[7]. Cl. Brief Pg. 1 - 2. Respondents do not address the issue whether the element requiring the claimed act to be occurring on a normal customary and continuous basis is satisfied but note that "Evergreen's only intent is to bill per diem allowed by the [Preferred Truck Agreement] that Claimant freely agreed to." Resp. Reply Brief Pg. 2.

Respondents indicate that the requirement to pay per diem charges on weekends and holidays, as well as during temporary port closures are contained in the Evergreen Addendum, and that it is "a condition precedent to being authorized" as a preferred trucker that a trucker agree to terms of the Evergreen Addendum. PFs 12, 18. In addition, Evergreen expresses an intention to continue to impose the per diem as authorized under the Evergreen Addendum. Resp. Reply Brief at 2. The evidence thus establishes that imposition of the disputed per diem charged by Respondents is "occurring on a normal, customary, and continuous" basis and is a part of Respondents' normal business practices. Accordingly, this element required to demonstrate a section 41102(c) violation is also demonstrated.

c. The Practice in Dispute Relates to or is Connected with Receiving, Handling, Storing, or Delivering Property

The parties do not dispute that the per diem charges at issue relate to or are connected with receiving, handling, storing, or delivering property. Claimant posits that this element is "[c]onfirmed, as Respondents provide[d] delivery orders to Claimant to move from the [P]ort of Savannah to Yamaha Motors in Newnan, Georgia." Cl. Brief Pg. 2. Respondents assert: "While the billing and per diem matters complained of relate to, or are connected with, receiving, handling, storing, or deliverirng property, the Claimant is a motor carrier. Claimant's claims are outside of the Commission's jurisdiction."

The disputed per diem charges were imposed in connection with the delivery of cargo to the shipper's facility as part of a through transportation between Evergreen-Principal and Yamaha. PFs 6 – 7. Respondents' suggestion that this provision does not apply to motor carriers is inaccurate. In the Final Rule, the Commission identified truckers as one of the entities it sought to protect when it issued the interpretive rule on demurrage and detention practices under section 41102(c), noting that the interpretive rule was intended to reflect, the principle that *inter alia*, "importers, exporters, intermediaries, and *truckers* should not be penalized by demurrage and detention practices when circumstances are such that they cannot retrieve equipment from or return equipment to marine terminals . . . ." Final Rule, 85 FR at 29638 (emphasis added). The

[7] While Claimant raises objections to invoicing it for per diem charges rather than the BCO, it does not allege that the conduct violates section 41102(c), but merely requests that Respondents be ordered to send the invoices directly to the BCO.

element requiring that the practice be connected with receiving, handling, storing, or delivering property is thus also established.

d. The Practice in Dispute is Unjust and Unreasonable

Respondents assert that "Regulations and Practices" refers only to tariffs, not private contracts (citing to 46 C.F.R. § 520.2 "Tariff means a publication containing the actual . . . *regulations and practices* of a common carrier . . . . The term 'practices' refers to [] usages, customs or modes of operation . . . ." Resp. Brief Pg. 4 at Point 2(b) (emphasis in original)). In addition, Respondents argue that the per diem charges at issue are not practices but merely "contractual provisions in the [Preferred Trucker Agreement] that Claimant freely signed." Resp. Reply Brief Pg. 8. Respondents posit: "[t]he fact that the charges billed to Claimant were due under the [Preferred Truck Agreement] means that they were not unilaterally imposed penalties as Claimant argues, but freely accepted contractual obligations in consideration of getting Evergreens' B.C.O haulage -- work that would have gone to another motor carrier." Resp. Reply Brief Pg. 8.

On December 17, 2018, the Commission issued a Final Rule adopting the interpretive rule revising the elements required to prove a claim for reparations under Section 41102(c), codified at section 545.4 ("Section 41102(c) Final Rule"), 83 FR 64478 (Dec. 17, 2018). The Commission stated in the Section 41102(c) Final Rule:

> In drafting the 1916 Act, and through its revisions and reenactment in 1984, Congress chose the word 'practice' and the phrase, 'establish, observe, and enforce just unreasonable regulations and practices,' to describe actions or omissions engaged in on a normal, customary, and continuous basis. From its origin and as recently as 2001, § 41102(c) was interpreted in line with this understanding. To find a violation of § 41102(c), the Commission consistently required that the unreasonable regulation of practice was the normal, customary, often repeated, systematic, uniform, habitual, and continuous manner in which the regulated common carrier was conducting business. This understanding as to what constitutes 'regulations and practice' under the Shipping Act is supported by multiple accepted rules of statutory construction.

Section 41102(c) Final Rule, 83 FR at 64479.

As discussed, Respondents indicate that the requirement to pay per diem charges on weekends and holidays, as well during port closures are contained in the Evergreen Addendum, and that it is "a condition precedent to being authorized" as a preferred trucker that a trucker agree to terms of the Evergreen Addendum (PFs 12, 18). I find, therefore, that Respondents' imposition of the per diem charges in question derives from a "regulation or practice" as defined in the Section 41102(c) Final Rule because the evidence shows that Respondents' imposition of per diem charges for weekends, holidays, and other port closures is a "normal, customary, often repeated, systematic, uniform, habitual, and continuous" part of Respondents' business process as articulated in the Section 41102(c) Final Rule. 83 FR at 64479. *See also J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416, 420 (ALJ 1962) (stating that in order to constitue a practice

the alleged act must involve a "series of such occurrences," rather than "an isolated or one shot occurrence").

Claimant asserts that Respondents' invoicing of per diem charges for weekends, holidays and temporary port closures violates section 41102(c) and runs contrary to the provisions of section 545.4(d) because "[s]uch practice serves as no motivating factor for increasing cargo fluidity, is not in harmony with the intent of the Shipping Act and serves only to financially benefit the Respondent." Amended Cl. Pg. 2 at III(a). Claimant explains that the per diem charges were imposed despite Claimant's "best attempts to work with the BCO and ensure cargo and equipment . . . moved as fluidly as possible," and despite the fact that Claimant could in no way have returned the equipment sooner as the BCO's plant was shut down due to COVID-19 and the Port of Savannah was closed from May 23rd to May 26th due to lower volumes on Saturdays caused by the COVID-19 pandemic and the fact that May 25th was a Memorial Day holiday. Amended Cl. Pg. 3 - 4; Cl. Brief at 1.

In addition, Claimant argues that the Commission's demurrage and detention rule provides that importers, exporters, intermediaries, and truckers should not be penalized by demurrage and detention practices when circumstances are such that they cannot retrieve containers from, or return containers to, marine terminals because under those circumstances the charges cannot serve their incentive function. Cl. Brief Pg. 2 – 3. Claimant states that its argument is supported by this rule "as the port closure directly satisfies 'circumstances as such that they cannot . . . return containers to marine terminals' because under those circumstances the charges cannot serve their incentive function." Cl. Brief Pg. 3. Claimant notes that moreover, in the Final Rule at 29655, the Commission states that "absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found to be unreasonable." Cl. Brief Pg. 3. Claimant asserts that this statement likewise supports its claim. Cl. Brief Pg. 3. Claimant argues that the per diem charges imposed on it were "clearly unreasonable charges" because there were no "extenuating circumstances" justifying imposition of the charges when the container in question could not be returned. Cl. Brief Pg. 4.

Respondents note that to prevail on a claim under section 41102(c) and Rule 545.4(d), Claimant must show by a preponderance of the evidence that the practices are unjust or unreasonable under section 41102(c). Answer to Amended Cl. Pg. 11 at No. 26. Respondents argue that Claimant has not alleged facts sufficient to show that the matters complained of rise to the level of unjust or unreasonable. Answer to Amended Cl. Pg. 12 at No. 28. Respondants posit:

> "Unjust" or "unreasonable" (terms that are not defined in the Shipping Act), must mean something more than just that [a] claimant thinks he or she has a way of doing something that is "better suited." Claimant must show that the practice is "contrary to right or justice" or "irrational, foolish, unwise, absurd, silly, preposterous, senseless [or] stupid. [] Otherwise, the F.M.C. is reduced to micromanaging the industry and substituting its business judgment for that of the regulated entities in ordinary business matters.

Answer to Amended Cl. Pg. 11 - 12 at No. 27 (Citing *Black's Law Dictionary*, (6th Ed. 1991)).

As noted by Claimant, Section 545.5, provides in pertinent part:

> In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.

46 C.F.R. § 545.5(c). The Commission also states in the Final Rule that the Interpretive Rule on demurrage and detention under 41102(c) is intended to reflect *inter alia*, the principle that:

> importers, exporters, intermediaries, and truckers should not be penalized by demurrage and detention practices when circumstances are such that they cannot retrieve equipment from or return equipment to marine terminals "because under those circumstances the charges cannot serve their incentive function."

85 FR at 29638. "The Commission explained in the NPRM that practices imposing demurrage and detention charges are incapable of incentivizing cargo movement, such as when a trucker arrives at a marine terminal to retrieve a container but cannot do so because it is in a closed area or the port is shut down, might not be reasonable." Final Rule, 85 FR 29651 (citing the NPRM, 84 FR at 48852). In addition, as the Commission noted with regard to return of empty containers:

> The rule states that absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable. The Commission explained that such practices, absent extenuating circumstances, weigh heavily in favor of a finding of unreasonableness, because if an ocean carrier directs a trucker to return a container to a particular terminal, and that terminal refuses to accept the container, no amount of detention can incentivise its return

85 FR at 29655.

Here, Claimant explains that it was unable to timely return the equipment in question despite its "best efforts to work with the BCO to ensure that the cargo and equipment . . . moved as fluidly as possible," because the BCO's plant was shut down due to COVID-19. Amended Cl. Pgs. 3 - 4; Cl. Brief at 1. Claimant also explains that it was prevented from returning the equipment on Saturday, May 23rd, because the Port of Savannah was closed on Saturdays due to lower volumes resulting from the COVID-19 pandemic, and that it was prevented from doing so on Sunday May 24th, because the port is regularly closed on Sundays. In addition, Claimant states that it was prevented from returning the equipment on Monday, May 25th, because the port was also closed on that day due to the Memorial Day holiday. Amended Cl. Pgs. 3 - 4; Cl. Brief at 1. No evidence contradicts these claims. Therefore, I find that the per diem charges imposed by Respondents from May 23rd to May 25th were unreasonable because they could not have incentivized cargo movement given that the port was closed on those days, making it impossible for Claimant to return the equipment. Accordingly, Respondents' imposition of the per diem charges in question was an unjust act.

Respondents' argue that the port was not closed on Saturday, May 23rd, due to Covid-19 but rather, for commercial reasons and that the closure was not a temporary one. Answer Pg. 9 - 10 at No. 17. This argument is contradicted by an advisory notice from the Georgia Ports Authority ("GPA") titled "COVID-19 (Coronavirus) Update," stating in pertinent part that the GPA had temporarily discontinued Saturday truck gate hours and had experienced a precipitous drop in imports bookings but was "receiving multiple reports that indicate Chinese supply lines and factories are resuming normal production." Answer Exh. E, Email from Georgia Port Authority to TCW, Inc. dated March 12, 2020. The notice thus indicates that the Saturday port closure is connected to the COVID-19 pandemic. Moreover, even if, for the purpose of this argument, the port was closed due to commercial reasons, such a closure would not have made the port any less inaccessible.

Further, by extending protections against unreasonable detention and demurrage practices to entities connected with the movement of ocean cargo, the Commission is not "micromanaging the industry and substituting its business judgment for that of the regulated entities in ordinary business matters" as Respondents suggest (Answer to Amended Cl. Pg. 11 - 12 at No. 27), but rather, acting in line with the Shipping Act's purpose to "provide an efficient and economic transportation system in the ocean commerce of the United States . . . ." 46 U.S.C. § 40101(2).

Respondents state: "Per diem serves not just an incentivizing purpose (encouraging prompt return of ocean carrier equipment such as containers), but a compensatory one, as well. When such equipment is not timely returned, an ocean carrier can suffer two kinds of loss: (i) loss of use of the equipment and its revenue generating capacity; and (ii) in Evergreen's case usage charges which it must pay to any third party equipment providers from whom it obtained the equipment." Resp. Brief Pg. 19 - 20. Respondents explain that the chassis at issue were trip leased during the time in question from a leasing company. Resp. Brief Pg. 20. Respondents state in addition: "in this case, where neither the ocean carrier nor the motor carrier has control over the normal hours of operation set by the Savannah terminal, there will inevitably be a loss period it is just and reasonable that the parties be allowed, by contract, to allocate those losses." Resp. Brief Pg. 20. Respondents state that Evergreen paid its own equipment providers for the chassis let out to Claimant and thus it would be "manifestly unfair" for Claimant not to pay the per diem for the same period Evergreen paid its equipment providers. Answer to Amended Cl. Pg. 18 at No. 47.

The Commission dismissed similar arguments from comment during the rulemaking for section 545.5 that demurrage and detention serve a function of compensating for costs associated with the equipment. The Commission stated in the Final Rule that imposition of per diem to cover operational costs is not a reasonable basis for imposition of demurrage and detention charges. 85 FR 29651. While recognizing that historically, demurrage and detention might have had a compensatory effect, the Commission drew a distinction between compensation stemming from additional costs associated with the expiration of free time, as opposed to compensation to recover capital investment and container costs, stating:

> It is important to specify however what this compensatory aspect of demurrage traditionally meant. To the extent demurrage had a compensatory aspect, it was to reimburse ocean carriers for costs incurred *after* free time expired – "costs" in this context meant *additional* costs associated with cargo remaining on a pier after

> free time in other words, demurrage and detention and not the mechanism by which ocean carriers recover all costs related to their equipment, and the Commission cannot assume that discharges are the primary method by which ocean carriers recover their capital investment and container costs as some commenters suggest.

85 FR 29651 (emphasis in original, internal citations omitted). The Commission explicitly stated that "demurrage and detention are not the mechanism by which ocean carriers recover all costs related to their equipment." *Id*. Further, Respondents argue that it would be "manifestly unfair" for Claimant not to pay the per diem charges since Respondents themselves paid their own equipment providers for the same period. However, Respondents do not state that the per diem charges at issue were pass through per diem charges from their providers for the days in question, and have not submitted any evidence indicating so.

Respondents also argue that Claimant's free time expired before May 23rd. According to Respondents:

> Therefore, under the well-established principle of 'once on demurrage, always on demurrage,' as well as the UIIA, the Addendum and respondent's per diem rule, claimant's failure to return the equipment before May 23rd entitled respondent to the now disputed per diem. Claimant contractually assumed the risk of a late return of equipment by its BCO and it was that late return that caused its loss.

Answer, Pg. 8 - 10. Addressing similar contentions by commenters in the Final Rule, the Commission stated:

> Ocean carriers remain subject, however, to section 41102(c) and its requirement that demurrage practices be tailored to meet their purposes - acting as financial incentives for cargo and equipment fluidity. If demurrage cannot act as an incentive for cargo and equipment fluidity because, for instance a marine terminal is closed for several days due to a storm, charging demurrage in such a situation, even if a container is already in demurrage, raises questions as to whether such demurrage practices are tailored to their intended purpose in accordance with section 41102(c).

85 FR at 29653. Continuing, the Commission stated:

> The Commission therefore does not agree with . . . arguments that it is always a reasonable practice to charge detention and demurrage after free time regardless of cargo availability or the ability to return equipment. The rules and the principles therein apply to demurrage and detention practices regardless of whether containers at issue are "in demurrage" or "in detention". That is, in assessing the reasonableness of demurrage and detention practices the Commission will consider the extent to which demurrage and attention are serving their intended primary purposes as financial incentives to promote freight fluidity, including how demurrage and attention are applied after free time has expired.

85 FR at 29653.

Respondents also note that Claimant signed their Preferred Trucker Agreement which incorporates the UIIA and the Evergreen Addendum in order to get business from Evergreen Line, and does not allege any fraud or coercion. Resp. Brief at 20. Respondents posit that it is not unjust or unreasonable that Claimant be bound by its contracts after it has received the benefit of performing the Evergreen Line moves. Resp. Brief at 20. Respondents' suggestion that a practice may not be challenged simply because it is contractually agreed upon lacks merit. "Ocean carriers and marine terminal operators (and ocean transportation intermediaries) do not have an unbound right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c)." 85 FR at 29648. Moreover, "most, shippers lack significant bargaining power as compared to ocean carriers. The same goes for intermediaries and truckers. Under such circumstances, there is reason for the Commission to carefully scrutinize arguments that shippers, intermediaries, and truckers have the ability meaningfully to negotiate contractual terms relating to demurrage and detention." 85 FR at 29648.

Additionally, Respondents note the statement in section 545.5(d) that policies implementing detention will be judged, among other things, by the sufficiency of applicable dispute resolution options and argue that in line with this provision the UIIA provides for a dispute resolution process that includes binding arbitration at no cost. Resp. Brief at 21 - 22. Notwithstanding this provision, dispute resolution mechanisms, including arbitritration clauses in contracts, do not supercede the Commission's authority over disputes inherently related to the Shipping Act. For example, in *Anchor Shipping*, where the administrative law judge dismissed a service contract dispute because the parties had arbitrated the issues in dispute, the Commission reversed that decision, finding that "[t]he arbitration clause in the parties' service contract does not outweigh the Commission's duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act." *Anchor Shipping*, 2006 FMC LEXIS 19 at *25. Since Claimant disputed the charges with Respondents, and Respondents declined to waive the charges, it is well within Claimant's right to pursue its dispute through a Commission proceeding.

In light of the foregoing analysis, I conclude that Claimant demonstrates that Respondents' imposition of the per diem charges when it was impossible for Claimant to return the equipment at issue was unjust and unreasonable.

e. The Practice is the Proximate Cause of the Loss Suffered by Claimant

Claimant alleges that it was forced to pay the disputed per diem by Respondents and thus that it suffered a loss in the amount of the per diem it was forced to pay. Respondents note, however, that Claimant's supplemental information shows that Claimant billed the BCO for the disputed per diem at an amount higher than Respondents charged it for per diem. Answer to Amended Cl. Pg. 12 at No. 28. Further, Respondents contend that Claimant cannot show damages or proximate causation because it was reimbursed for the $510 per diem by the BCO plus a markup of the per diem Claimant was charged. Respondents state that the mark up Claimant added to their charges should have covered any administrative cost Claimant incurred, plus a profit. Answer to Amended Cl. Pg. 11 at Nos. 24 - 25; Pg. 12 at No. 32; Resp. Brief Pg. 7

at Point 4. Respondents argue moreover, that it was Claimant's late return of the equipment that caused its loss. Answer Pg. 10.

The evidence shows that Claimant was indeed reimbursed by the BCO for the per diem charges (PF30), however, I find that forcing Claimant to pay the per diem charges when the Port of Savannah was closed, and Claimant could not return the equipment at issue, was the proximate cause of the loss suffered by Claimant. The BCO was not acting as Respondents' agent in reimbursing the charges to Claimant, thus a payment received from the BCO to cover that loss was not a reimbursement from Respondents. As discussed in more detail below, Claimant must return the BCO's payment to the BCO, to avoid a double recovery.

F. Damages

Clamaint seeks an order: 1) directing Respondents to reimburse the disputed per diem payments (Amended Cl. Pg. 3 at VI.); 2) directing Respondents not to charge per diem for weekends, holidays and during port closures when equipment cannot be returned to the port (Amended Cl. Pg. 3 at VI.); and 3) directing Respondents and "all marine lines" to bill per diem charges directly to their customers (Amended Cl. Pg. 2 at III(c) and Pg.4).

1. Reparations

Claimant requests reparations against Respondents in the amount of $510.00 for Claimant's payment of the per diem charges. Respondents note that the BCO has already refunded the per diem payments to Claimant. Respondents argue that Claimant is not entitled to a double recovery. Answer to Amended Cl. Pg. 11 at Nos. 24 – 25. However, Claimant states that it "would welcome an order to pass along recovery of damages to the BCO, but will do so, regardless." Cl. Brief Pg. 4

As previously noted, as the BCO was not acting as Respondents' agent when it reimbursed Claimant for the disputed per diem charges, Respondents cannot claim that payment. Accordingly, I find that Claimant is entitled to reparations in the amount of $510.00, the amount it paid for the unjust and unreasonable per diem charges from May 23rd to May 25th. However, to avoid a double recovery Claimant is directed to return to Yamaha the per diem payment it received from Yamaha. Claimant charged Yamaha per diem at a rate of $180 per day for the container and $24 per day for the chassis (PF 37), totaling $612.00 ($540 + $72). Thus, Claimant must return $612.00 to the BCO.

2. Claimant's Request for Cease and Desist Orders

Claimant requests that a cease and desist order be issued against Respondents prohibiting them from continuing to charge per diem when equipment cannot be returned. The Commission has found that a cease and desist order may be issued when there is a violation of the Shipping Act. *See. e.g.. Bimsha Int'l v. Chief Cargo Svcs. Inc.*, 2013 FMC LEXIS 32 at *22 - *23 (FMC 2013) (stating that a cease and desist order may be issued when there is a violation of the Shipping Act). Respondents have been found to have violated section 41102(c), thus a cease and desist order is appropriate.

a. Claimant's Request for Relief Ordering Respondents not to Charge Per Diem When Equipment Cannot be Returned is Granted

Claimant argues that directing Respondents not to charge per diem on days that a motor carrier has no ability to return empty containers such as weekends, holidays and other days that the port is closed is appropriate because "such practice serves as no motivating factor for increasing cargo fluidity, is not in harmony with the intent of the Shipping Act, and serves only to financially benefit the respondent." (Amended Cl. Pg. 3 at III(a).) Respondents argue that weekend and holiday billing of per diem provides added incentive for early return of equipment and that holding of equipment by BCOs is now a major problem. Resp. Brief Pg. 25.

Respondents also note that the payment of per diem is ultimately the responsibility of the BCO for whose benefit the transportation services and equipment are provided by ocean motor carriers. Respondents state that, therefore, if the BCO has not objected to the weekend and holiday charges, then the motor carrier has no standing to contest them. Resp. Brief Pg. 25. Respondents have argued that Claimant should be held to its contract to pay the per diem charges, and yet they now argue that Claimant has no standing to contest the charges as the charges are for the BCO's account. Respondents' arguments in this respect are contradictory.

Respondents also state that if ordered to cease and desist charging per diem for Saturdays, Sundays or holidays they would be prejudiced in that they would still be charged by their chassis providers for use of chassis on those days but would be unable to recover those charges from Claimant or any other trucker to whom Respondents provide a chassis. Amended Cl. Pg. 8 No. 15. The above order does not prevent Respondents from recovering per diem charges imposed by Respondents' chassis providers on days equipment are returned late.

Respondents argue in addition that a cease and desist order prohibiting them from charging per diem on weekend days and holidays would discriminate against them as Claimant provides carrier haulage for other VOCCs and utilizes chassis provided by independent equipment providers who do not allow free time and charge equal or higher chassis usage charges than Respondents' post-free time per diem charges. Respondents state that the order would prevent it from charging per diem for weekend days and holidays that other independent equipment provider would continue to charge. Amended Cl. Pg. 8 No. 15. It is clear from the evidence that Respondents' practice of charging per diem when a container cannot be returned is based on a business decision to allocate losses resulting from a port closure, not because of an intent to do wrong. Resp. Brief Pg. 20. Also, Respondents' practice to provide the use of chassis to their preferred truckers at no charge is a benefit that is not extended by every equipment provider. However, the Commission has found that charging per diem when a trucker is unable to return the equipment because the port is closed weighs heavily in favor of a finding of unreasonableness, because if an ocean carrier directs a trucker to return equipment to a particular terminal, and that terminal refuses to accept the equipment, no amount of detention can incentivize its return. 85 FR at 29655. Since this practice is found to be unjust and unreasonable and Respondents evidence an intention to continue this practice in accordance with their policy, I find that it is appropriate to issue an order against this practice in order to forestall future possible violations. *See Bimsha Int'l.*, 2013 FMC LEXIS 32 at *22 - *23 (finding that a cease and desist order may be issued "to protect the shipping public from future possible violations"). In order to remedy the violation found, cease and desist orders should "generally mirror[] the

violations committed coupled with the statutory language." *Bimsha Int'l.*, 2013 FMC LEXIS 32 at *24 (citing *Universal Logistic Forwarding Co. Ltd., - Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 474, 476 (FMC 2002)).

Accordingly, Respondents are ordered absent extenuating circumstances, to cease and desist from imposing per diem charges when imposition of per diem charges does not serve its incentivizing purposes, such as when empty equipment cannot be returned on weekends, holidays, and port closures. This order applies the language used in 46 C.F.R. § 545.5(c)(ii) and the Commission's Interpretive Rule on Demurrage and Detention Under the Shipping Act. This order does not apply to situations when it was possible to return equipment on the day the per diem was charged.

b. Claimant's Request to Order Respondents to bill Per Diem Charges Directly to Customers is Denied

As noted, Claimant also asks that Respondents and "all marine lines[8]" be directed to bill per diem charges directly to their customers. Amended Cl. Pg. 2 at III(c) and Pg. 4. Claimant argues that Respondents negotiate per diem free time contracts directly with the beneficial cargo owner and thus that the beneficial cargo owner would be better suited to audit and process any applicable per diem invoices. Amended Cl. Pg. 4. "Claimant asserts that respondent's practice of funneling discharges through the claimant only places additional financial and administrative burden on the Claimant." Amended Cl. Pg. 4. Claimant opines:

> this results in the claimant being a mere clearinghouse for the respondent, where respondent can leverage interchange rights if invoices are not processed timely. In doing so, additional financial and administrative burdens are placed on the claimant, where the claimant's core responsibility is the safe and timely delivery of cargo-NOT to serve as a billing service for the respondent.

Cl. Brief Pg. 2. Claimant points to the Commission's statement in the Final Rule that ocean carriers should bill their customers rather than imposing charges contractually owed by cargo interest on third parties. Cl. Brief Pg. 2 (citing to 85 FR at 29661).

Respondents note that they do not restrict motor carriers .from using non-Evergreen chassis when picking up Evergreen cargo. Answer to Amended Cl. Pg. 8 at No. 21. Respondents also point out that Claimant billed the BCO 20% to 60% more than Respondents' invoiced charges and argue that at least a portion of the mark up by Claimant represents a profit to Claimant in addition to offsetting any administrative costs or burden alleged by Claimant. Resp. Brief Pg. 18. In addition, Respondents contend that Claimant has made no factual showing that the billing arrangement is an administrative or financial burden, or that Claimant has been forced to absorb charges that were the responsibility of a BCO or to lose BCO business. Respondents argue that to the contrary, Claimant's mark up of the per diem charges to its customers suggests that Claimant "comes out ahead" of the billing arrangement. Resp. Brief Pg. 24. Respondents argue that the billing arrangement makes sense for two reasons: First, that the Evergreen Line

[8] Orders issued in this decision can only apply to Respondents because Claimant did not include any other marine line as a respondent in this proceeding.

equipment is being interchanged to a motor carrier rather than the BCO itself; and secondly, the billing arrangement gives the motor carrier an incentive to see that the equipment is promptly returned. Resp. Brief Pg. 24 - 25.

During the rulemaking process, the Commission received "significant comments" on the issue of billing demurrage and detention directly to the Cargo interests but ultimately chose not to include this billing model in the rule or to adopt it as a part of the reasonableness analysis under section 41102(c). *See* 85 FR at 29661. The Commission noted regarding ocean carriers' billing arrangements:

> As for the argument that ocean carriers billing practices are unreasonable because carrier bills of lading, tariffs, service contracts, or the UIA assigned responsibility for charges to the wrong parties, the Commission believes that whatever the merits of these arguments, they are better addressed in the context of specific fact patterns rather than in this interpretive rule, the purpose of which is to provide general guidance about how the Commission will apply section 41102(c).

85 FR 29661.

I find in light of the fact that Claimant agreed to be billed for the per diem charges and appears to have profited from the billing arrangement, that the evidence does not support its argument that the billing arrangement poses a hardship and a burden to it. Accordingly, Claimant's request that Respondents be made to bill the per diem directly to beneficial cargo owners is denied.

G. Conclusion

Claimant, TCW, Inc. has proven its claim that Respondents Evergreen Shipping Agency (America) Corporation and Evergreen Line Joint Service Agreement's imposition of per diem charges on days when Claimant could not return equipment to the port because the port was closed, constitutes a violation of 46 U.S.C. § 41102(c). Accordingly, reparations in the amount of $510.00 plus interest are granted to Claimant for its payment of the per diem charges to Respondents on the days in question. Claimant paid the per diem charges on June 6, 2020, therefore, interest on the reparations award will be calculated from June 6, 2020, when this decision becomes administratively final. In addition, Respondents are ordered absent extenuating circumstances, to cease and desist from imposing per diem charges when imposition of per diem charges does not serve its incentivizing purposes, such as when empty equipment cannot be returned on weekends, holidays, and port closures. Finally, Claimant's request that Respondents be ordered to invoice per diem charges directly to beneficial cargo owners is denied.

IV. ORDER.

Upon consideration of the evidence of record, arguments of the parties, and the foregoing findings and conclusions that Evergreen Shipping Agency (America) Corporation and Evergreen Line Joint Service Agreement violated the Shipping Act, 46 U.S.C. § 41102(c), it is hereby

ORDERED that TCW, Inc.'s claim for reparations against Evergreen Shipping Agency (America) Corporation and Evergreen Line Joint Service Agreement be **GRANTED**. It is

FURTHER ORDERED that Evergreen Shipping Agency (America) Corporation and Evergreen Line Joint Service Agreement pay reparations to TCW, Inc. in the amount of $510.00 with interest running on the reparation award from June 6, 2020. It is

FURTHER ORDERED that absent extenuating circumstances Evergreen Shipping Agency (America) Corporation and Evergreen Line Joint Service Agreement cease and desist from imposing per diem charges when imposition of per diem charges does not serve its incentivizing purposes, such as when empty equipment cannot be returned on weekends, holidays, and port closures. It is

FURTHER ORDERED that TCW Inc.'s request for an order requiring Evergreen Shipping Agency (America) Corporation and Evergreen Line Joint Service Agreement to invoice per diem directly to beneficial cargo owners be **DENIED**.

FEDERAL MARITIME COMMISSION

TCW, INC., *Claimant*

v.

EVERGREEN SHIPPING AGENCY (AMERICA) CORPORATION, & EVERGREEN LINE JOINT SERVICE AGREEMENT, *Respondents*.

INFORMAL DOCKET NO. 1966(I)

Served: February 24, 2021

NOTICE OF COMMISSION DETERMINATION TO REVIEW

Notice is given that, pursuant to 46 C.F.R. § 502.304(g), the Commission has determined to review the Small Claims Officer's, February 19, 2021, Initial Decision in this proceeding.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

TOYOTA DE PUERTO RICO CORP., *Complainant*

v.

PUERTO RICO PORTS AUTHORITY, CROWLEY PUERTO RICO SERVICES, INC., AND OCEANIC GENERAL AGENCY, INC., *Respondents*.

DOCKET NO. 19-02

Served: March 30, 2021

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION[1]

[Exceptions filed by Respondent 04/21/21, Commission final decision pending.]

I. Introduction

A. Overview and Summary of Decision

Complainant Toyota de Puerto Rico Corp. ("Toyota") alleges violations of the Shipping Act of 1984, as amended ("Shipping Act") in the collection of enhanced security fees by Respondent Puerto Rico Ports Authority ("PRPA") on vehicles shipped to Puerto Rico from 2011 to 2017, which were not subject to scanning under PRPA's cargo scanning program.

Respondent PRPA denies the allegations and raises defenses, including that PRPA is an arm of the Commonwealth of Puerto Rico, or a hybrid entity, entitled to sovereign immunity. Two Respondents in this proceeding, Oceanic General Agency, Inc. and Crowley Puerto Rico Services, Inc., were dismissed by stipulation. Notice of Dismissal (Apr. 25, 2019) (OGA); Notice of Dismissal (May 14, 2019) (Crowley). At this point, PRPA is the only remaining Respondent.

Early in the proceeding, PRPA's motion to dismiss on four grounds, including sovereign immunity, was denied. The parties proceeded with the case and completed discovery. Prior to briefing on the merits, PRPA was granted a stay while the Court of Appeals for the First Circuit reviewed the decision in *Dantzler, Inc. v. Puerto Rico Ports Authority*, 335 F. Supp. 3d 226 (D.P.R. 2018), which addressed PRPA's cargo scanning program and enhanced security fees. On appeal, the First Circuit dismissed the *Dantzler* case on the basis of standing or, in the

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

alternative, sovereign immunity. *Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc.*, 958 F.3d 38, 50 (1st Cir. 2020).

After the First Circuit decision dismissing *Dantzler*, the parties were instructed to supplement their arguments regarding sovereign immunity prior to briefing the other issues in this proceeding. For the reasons discussed below, PRPA is found to be entitled to sovereign immunity for the cargo scanning program, including the enhanced security fees. Therefore, this proceeding must be dismissed.

B. Procedural History

On March 14, 2019, Respondent PRPA filed a motion to dismiss the complaint on the basis of standing, jurisdiction, statute of limitations, and sovereign immunity. Toyota opposed the motion to dismiss. On July 2, 2019, an order was issued denying PRPA's motion to dismiss on all four grounds and finding the sovereign immunity issue premature based on a circuit split and pending First Circuit case. The parties proceeded to conduct discovery.

On December 4, 2019, prior to briefing the case, PRPA filed a motion to stay pending a decision by the First Circuit in the related *Dantzler* case. Toyota opposed the motion to stay. On January 3, 2020, an order was issued staying this proceeding, noting that "if PRPA is entitled to sovereign immunity, the benefit of that immunity would be lost by continuing to litigate the merits of this proceeding." Order on Complainant's Urgent Motion and Respondent's Motion to Stay at 6.

On May 1, 2020, the First Circuit issued a decision in the *Dantzler* case, finding that the plaintiffs failed to establish constitutional standing and that PRPA was entitled to sovereign immunity in its performance of the inspection functions at issue. *Dantzler,* 958 F.3d at 50. On May 29, 2020, a petition for rehearing was filed in the *Dantzler* case. On June 17, 2020, at the parties' request, an order was issued staying this proceeding pending the issuance of a firm and final decision by the First Circuit in *Dantzler*.

On September 2, 2020, the First Circuit denied the request for rehearing. On October 28, 2020, the parties were required to file a joint status report. On November 10, 2020, the parties filed a joint status report indicating, in part, that Supreme Court review was being sought in *Dantzler*.

On November 13, 2020, an order was issued lifting the stay and requiring briefing, stating that obtaining "Supreme Court review is always statistically unlikely and the likelihood of review is not increased where the underlying circuit split has been resolved by a First Circuit decision consistent with now-Justice Kavanaugh's [*Puerto Rico Ports Auth. v. Federal Maritime Commission*, 531 F.3d 868 (D.C. Cir. 2008)] decision. This changed legal landscape is sufficient to lift the stay." Order Lifting Stay and Requiring Briefing at 3. The parties were given time to file briefs limited to supplementing their arguments regarding whether this proceeding should be dismissed on sovereign immunity grounds and raising any arguments regarding the May 2020 decision in *Dantzler*.

On December 16, 2020, Toyota filed a brief ("Brief"), statement of material facts, and appendix. On January 19, 2021, PRPA filed its opposition brief ("Opposition") and appendix. On January 26, 2021, Toyota filed its reply brief ("Reply").

On February 5, 2021, PRPA filed a motion for leave to file a sur-reply and its sur-reply. The motion for leave to file the sur-reply is hereby **GRANTED** and the sur-reply is considered. Briefing on the sovereign immunity issue is complete and the issue is ripe for decision.

C. Arguments of the Parties

Toyota argues that the First Circuit in *Dantzler* did not address all the elements developed by federal courts when determining Eleventh Amendment immunity; *Dantzler* was decided on a motion to dismiss, whereas Toyota has already survived that stage and the parties have concluded discovery, which shows PRPA cannot carry its burden of proving sovereign immunity; PRPA is not an arm of the state and is not entitled to sovereign immunity; and the First Circuit's statement regarding the sovereign immunity issue is dictum. Brief at 3-13.

PRPA asserts that case law supports the position that PRPA is entitled to sovereign immunity and PRPA meets each of the required structural indicators to qualify for sovereign immunity because Act 12 recharacterized PRPA's mission and responsibilities, expanding upon the structure provided by PRPA's enabling act; PRPA is carrying out purely governmental functions in this case; PRPA has a close fiscal relationship with the Commonwealth for purposes of the scanning program; and the Commonwealth's control over PRPA is undisputed. Opposition at 6-15.

Toyota contends in its reply brief that PRPA's role under Act 12 is limited to installing the fast-scanning lanes; the privatization of the implementation and operation of the scanning lane program contradicts the nature of a governmental function; even if the privatization of the scanning program were a governmental function, PRPA has not met the *Thacker* test to avoid its "sue and be sued" clause; and matters outside the question of sovereign immunity are premature and should not be addressed. Reply at 3-7.

PRPA asserts in its sur-reply that Toyota mischaracterized PRPA's opposition brief; the scanning program is PRPA's responsibility and has never been privatized; *Dantzler* footnote 6 entails the First Circuit's finding on sovereign immunity; and Toyota's allegation that its complaint was misconstrued "misses the point." Sur-Reply at 2-6.

D. Evidence

Under the Administrative Procedure Act, an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based on the record, including the pleadings, motions, briefs, and exhibits filed by the parties. To the extent findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Before reaching the analysis and conclusions of law, it is helpful to review the background, including prior rulings on sovereign immunity in this proceeding, sovereign immunity legal developments, and legislation regarding PRPA.

II. Background

A. Prior Rulings on Sovereign Immunity

Earlier in the proceeding, PRPA moved to dismiss the complaint for four reasons, including that PRPA is an arm of the Commonwealth with sovereign immunity under the Eleventh Amendment. Toyota opposed the motion to dismiss, arguing that PRPA has not been considered an arm of the Commonwealth by the Commission.

The order denying PRPA's motion to dismiss addressed sovereign immunity, stating:

> "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Commission v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002). Only "States and arms of the State possess immunity from suits authorized by federal law." *Northern Ins. Co. of N.Y. v. Chatham County*, 547 U.S. 189, 193 (2006). Although immunity extends to entities which are arms of the state, the Supreme Court has repeatedly refused to extend sovereign immunity to municipalities, even when such entities exercise a "slice of state power." *Chatham County*, 547 U.S. at 193-94 (citations omitted); *see also Alden v. Maine*, 527 U.S. 706, 756 (1999) (sovereign immunity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State.").
>
> The Supreme Court specifically has held that state sovereign immunity bars the Federal Maritime Commission from adjudicating a private party's complaint against a state-run port. *South Carolina State Ports Auth.*, 535 U.S. at 747. Commission cases have addressed the Eleventh Amendment immunity of ports in South Carolina, Puerto Rico, and Maryland. In all three cases, the ports were ultimately found entitled to immunity. *South Carolina State Ports Auth.*, 535 U.S. at 743*; Puerto Rico Ports Auth. v. Federal Maritime Commission*, 531 F.3d 868 (D.C. Cir. 2008) ("*PRPA (D.C. Cir. 2008)*"); *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, 30 S.R.R. 358 (FMC 2004).
>
> The issue of sovereign immunity, and specifically whether PRPA is an arm of the state, has been refined and evolving. While the D.C. Circuit in *PRPA (D.C. Cir. 2008)* found that the PRPA was entitled to immunity, the First Circuit distinguished *PRPA (D.C. Cir. 2008)* and found that PRPA was not entitled to sovereign immunity in *Grajales*. *Grajales v. Puerto Rico Ports Auth.*, 831 F.3d 11, 30 (1st Cir. 2016). Another case involving the enhanced security fees at issue in this proceeding is currently on appeal to the First Circuit. *Dantzler, Inc. v. Puerto Rico Ports Auth.*, 335 F. Supp. 3d 226 (D.P.R. 2018).

> Given the circuit split on this issue as well as the pending First Circuit appeal, it would be premature to resolve the issue at this point. It is clear that additional facts regarding the structure of the PRPA and the potential impact of any reparations awarded on Puerto Rico's state finances will be relevant to the determination of this issue. At this point, it does not clearly appear that the case should be dismissed on sovereign immunity grounds.

Order Denying Puerto Rico Ports Authority's Motion to Dismiss at 8-9 (July 2, 2019).

After the related *Dantzler* case was decided by the First Circuit, an order was issued lifting the stay in this proceeding. That order stated in relevant part:

> Previously, there was a circuit split, with the in First Circuit in 2016 in *Grajales* finding that PRPA was not entitled to sovereign immunity while the D.C. Circuit in 2008 in *PRPA (D.C. Cir. 2008)* finding that PRPA was entitled to sovereign immunity. The First Circuit's May 2020 decision in *Dantzler* appears to resolve the circuit split, at least in regard to the cargo scanning program at issue in this proceeding. Although the First Circuit dismissed *Dantzler* based on constitutional standing requirements not at issue here, it specifically addressed the sovereign immunity issue, stating:
>
> > While our conclusion makes it unnecessary to reach PRPA's argument that it is entitled to sovereign immunity, we note that given the analytical framework set forth in *Grajales v. P.R. Ports Auth.*, 831 F.3d 11 (1st Cir. 2016), combined with the fact that the cargo scanning program was implemented to further the governmental purposes of improving national security and ensuring proper tax collection, we find it difficult to see how PRPA cannot be cloaked with sovereign immunity here in its performance of an inspection function that is governmental in nature. *See id.* at 20 n.9; *see also Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 203 L. Ed. 2d 668 (2019). We view this, thus, as an alternative ground supporting our ultimate conclusion vacating and remanding the district court's order and partial judgment.
>
> *Dantzler, Inc.*, 958 F.3d at [50] n.6.

Order Lifting Stay and Requiring Briefing at 2-3 (November 13, 2020).

The orders cited above summarized the law regarding sovereign immunity. Additional background regarding the development of sovereign immunity caselaw in the relevant federal circuits will help put the issue in context.

B. Sovereign Immunity Legal Developments

"Puerto Rico became an American dependency in 1898, and the Supreme Court recognized its common-law sovereign immunity almost immediately thereafter." *Mercado v. Puerto Rico*, 214 F.3d 34, 38-39 (1st Cir. 2000) (citing *Porto Rico v. Rosaly y Castillo*, 227 U.S.

270, 273 (1913)). "Since that time, we consistently have held that Puerto Rico's sovereign immunity in federal courts parallels the states' Eleventh Amendment immunity." *Mercado*, 214 F.3d at 39.

The Supreme Court, in 2002, found sovereign immunity applicable to Federal Maritime Commission private party litigation, although the Court did not discuss the factors to consider when determining whether an entity is an arm of the state. *South Carolina State Ports Auth.*, 535 U.S. at 751-52. Indeed, there is no uniform test to determine whether an entity is an arm of the state, although the parties understandably suggest consideration under the First Circuit approach.[2] This proceeding is analyzed under the First Circuit approach, although the D.C. Circuit approach is similar and would yield the same result. Recent relevant cases are discussed chronologically.

The First Circuit, in 2003, took a two-step approach to determining that the Puerto Rico and the Caribbean Cardiovascular Center Corp. did not have sovereign immunity. *Fresenius Medical Care Cardiovascular Resources, Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56 (1st Cir. 2003). Step one determined whether the state clearly structured the entity to share its sovereignty by considering the enabling act, other state statutes, state court decisions, functions, and control. *Fresenius*, 322 F.3d at 68. "If the factors assessed in analyzing the structure point in different directions, then the dispositive question concerns the risk that the damages will be paid from the public treasury." *Fresenius*, 322 F.3d at 68.

The Commission, in 2004, considered four factors – risk to the state treasury, control, local or statewide concerns, and state law – to determine whether the Maryland Port Administration ("MPA") was an arm of the State of Maryland entitled to Eleventh Amendment protection. *Ceres*, 2004 FMC LEXIS 1, at *40-45. The Commission discussed the various tests, explained the challenges for an agency subject to a multiple-venue review process, and indicated that its approach was consistent with the tests utilized by the Fourth Circuit and the First Circuit. *Ceres*, 2004 FMC LEXIS 1, at *36-37. The Commission concluded that the MPA had not provided enough evidence to show that a judgment against it would impact the Maryland state treasury but because the State of Maryland exercised a significant degree of control over the MPA, "an entity that deals with statewide concerns and that has been treated as an arm of the state by at least one Maryland state court," the Commission found that a proceeding against MPA would therefore infringe upon Maryland's dignity. 2004 FMC LEXIS 1, at *44-45.

The Commission, in 2006, used the *Ceres* test to conclude that PRPA was not an arm of the Commonwealth of Puerto Rico, and therefore not entitled to sovereign immunity, primarily because PRPA's enabling statute, as well as local and federal case law, overwhelmingly indicated that PRPA was not an arm of the Commonwealth and because the Commonwealth's treasury was not at risk from a judgement against PRPA. *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, 2006 FMC LEXIS 7, at *25-26, *30-31 (FMC 2006), *rev'd PRPA*, 531 F.3d at 881. On remand, the ALJ denied PRPA's request for a stay pending an appeal in the D.C. Circuit, however, the D.C. Circuit granted PRPA's motion to stay administrative

[2] Cases from Puerto Rico are typically appealed to the First Circuit. However, federal agency decisions may be appealed to the D.C. Circuit. So, an appeal from a Commission decision could be heard by either the First Circuit or the D.C. Circuit. *Ceres*, 2004 FMC LEXIS 1, at *33 n.4.

proceedings before the Commission. *Odyssea Stevedoring of Puerto Rico, Inc. v. Puerto Rico Ports Authority*, 2007 FMC LEXIS 30, at *2 (FMC 2007).

The D.C. Circuit reversed the Commission's *Ceres* decision and found that PRPA was entitled to immunity. *PRPA*, 531 F.3d at 868. To determine whether an entity is entitled to sovereign immunity, the D.C. Circuit has "generally focused on the 'nature of the entity created by state law' and whether the State 'structured' the entity to enjoy its immunity from suit." *PRPA*, 531 F.3d at 873 (citations omitted). The inquiry "required examination of three factors: (1) the State's intent as to the status of the entity, including the functions performed by the entity; (2) the State's control over the entity; and (3) the entity's overall effects on the state treasury. *Id.* at 873; *see also Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218 (D.C. Cir. 1986).

The D.C. Circuit concluded in *PRPA* that "[w]hen considered together, the three arm-of-the-state factors – intent, control, and overall effects on the treasury – lead us to conclude that PRPA is an arm of the Commonwealth entitled to sovereign immunity." *PRPA*, 531 F.3d at 880. The first factor of intent was established because the enabling act "describes PRPA as a 'government instrumentality of the Commonwealth of Puerto Rico' and 'government controlled corporation;'" PRPA performs functions to promote the general welfare and to increase commerce and prosperity for the benefit of the people of Puerto Rico; PRPA's internal regulations are governed by Puerto Rico laws that apply to Commonwealth agencies generally; PRPA submits yearly financial statements to the legislature and Governor; and the Commonwealth filed an amicus curie brief "emphatically declaring that PRPA is an arm of the Commonwealth entitled to sovereign immunity." *Id.* at 875-76. The second factor of control was established because the Governor controls the appointment of the entire Board and the Governor may remove a majority of the Board at will. *Id.* at 877-78. Although PRPA was financed largely through user fees and bonds, the determination of the overall effects on the treasury, the third factor, weighed in favor of immunity because some of PRPA's actions could create legal liability for the Commonwealth, and payment for judgments for certain torts could come out of the Commonwealth's coffers. *Id.* at 879-80. Given all of these facts, the D.C. Circuit found that PRPA was an arm of the Commonwealth.

The First Circuit, in 2016, applied the *Fresenius* two-step approach to conclude that PRPA was not entitled to sovereign immunity. *Grajales*, 831 F.3d at 30. As part of the structural analysis, the court found that "separate and apart" language in the enabling act points away from PRPA being an arm of the Commonwealth. *Id.* at 23. The nature of functions was inconclusive as PRPA performs a mix of functions. *Id.* at 23-24. The "high degree of separation" in the fiscal relationship between the Commonwealth and PRPA pointed against finding PRPA an arm of the Commonwealth. *Id.* at 24-28. The extent to which the Commonwealth government exerts control over PRPA weighed heavily in favor of finding PRPA an arm of the Commonwealth. *Id.* at 29. Because the structural factors showed mixed signals, the court moved to the second step of the *Fresenius* analysis, finding that "PRPA has failed to show that this action poses any risk to the Commonwealth's fisc" and therefore that PRPA was not entitled to claim sovereign immunity. *Id.* at 29. The court declined to resolve the question of whether a sovereign could structure an entity to be a hybrid, entitled to sovereign immunity only for certain purposes. *Id.* at 20 n.9.

The Supreme Court, in 2019, reviewed a Congressional waiver of sovereign immunity for the Tennessee Valley Authority, a wholly owned public corporation of the United States which

provides electricity to people in seven states. *Thacker*, 139 S. Ct. at 1439. Finding that the Tennessee Valley Authority combines traditionally governmental functions with typically commercial ones and could be a hybrid entity, the Court remanded the case for determination of whether a waiver of immunity applied to the conduct alleged to be negligent. *Thacker*, 139 S. Ct. at 1443-44.

The First Circuit, in 2020 in *Dantzler*, agreed with defendants PRPA, Rapiscan, and S2 that plaintiff Dantzler failed to set forth allegations in its complaint sufficient to establish Article III standing. *Dantzler*, 958 F.3d at 51. The sovereign immunity issue was addressed in a footnote, stating:

> While our conclusion makes it unnecessary to reach PRPA's argument that it is entitled to sovereign immunity, we note that given the analytical framework set forth in *Grajales v. P.R. Ports Auth.*, 831 F.3d 11 (1st Cir. 2016), combined with the fact that the cargo scanning program was implemented to further the governmental purposes of improving national security and ensuring proper tax collection, we find it difficult to see how PRPA cannot be cloaked with sovereign immunity here in its performance of an inspection function that is governmental in nature. See *id.* at 20 n.9; see also *Thacker v. Tenn. Valley Auth.*, 139 S. Ct. 1435, 203 L. Ed. 2d 668 (2019). We view this, thus, as an alternative ground supporting our ultimate conclusion vacating and remanding the district court's order and partial judgment.

Dantzler, 958 F.3d at 50 n.6. Although this is dicta in a footnote ruling on a motion to dismiss, it is nonetheless relevant and persuasive authority.

Given this complex history, it is necessary to utilize the *Fresenius* two-step approach to determine whether PRPA is entitled to sovereign immunity for this claim. However, first it is helpful to review some of the legislation regarding PRPA.

C. Puerto Rico Ports Authority

To determine whether an entity is entitled to sovereign immunity, it is important to review the enabling act and related legislation. The enabling act creating PRPA states:

> (a) A body corporate and politic is hereby created constituting a public corporation and government instrumentality of the Commonwealth of Puerto Rico, with the name of the Puerto Rico Ports Authority. The Puerto Rico Ports Authority shall be the successor of the Puerto Rico Transportation Authority for all effects, including, but without it being understood as a limitation, the collection and payment of debts and obligations pursuant to the terms thereof.
>
> (b) The Authority which is created hereby is and should be a government instrumentality and public corporation with a legal existence and personality separate and apart from those of the Government and any officials thereof. The debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, undertakings and properties of the Authority, its officers, agents

> or employees, shall be deemed to be those of said government controlled corporation, and not those of the Commonwealth of Puerto Rico, or any office, bureau, department, commission, dependency, municipality, branch, agent, officials or employees thereof.

23 P.R. Laws Ann. § 333.

The United States Congress enacted legislation related to port security in the Maritime Transportation Security Act in 2002, and in the Security and Accountability for Every Port Act in 2006. 46 U.S.C. §§ 70101 et seq. (MTSA); 6 U.S.C. §§ 901 et seq. and 46 U.S.C. §§ 70110 et seq. (SAFE Port Act). In 2007, several Puerto Rico agency heads executed an interagency agreement regarding issues including port security. Opposition, Exhibit B at Exhibit 1, page 167 of 189.[3]

The scanning program was implemented pursuant to Act 12, adopted in 2008, which states in relevant part:

> Maintaining maritime transport routes open is a survival requirement for the People of Puerto Rico. The possible use of the seas of Puerto Rico and of the vessels and port facilities therein in order to carry out acts of terrorism, or as a target thereof, is a risk that demands urgent attention. The security of the citizens and of trade — especially in the context of the terrorism threat — is of such importance that implementing security models in the port areas must be a priority for the authorities responsible for this segment of the infrastructure. Due to the challenge that the increasing maritime and containers traffic poses to the Island, one of the primary aims of the Government of Puerto Rico is establishing the minimum elements needed for ensuring the health and security of Puerto Ricans, safeguarding the large capital investment made in the ports, and protecting the public benefit that the good operations of trade and economy entails.
>
> The Interagency Agreement for Implementing the Automated Cargo and Merchandise Control System established among the Department of State, the Ports Authority, the Department of the Treasury, the Department of Transportation and Public Works, the Puerto Rico Police and the Office of Management and Budget was formalized on August 2, 2007. The purpose of this agreement is to integrate the efforts among these agencies to avoid illegal weapons and drug trafficking in our seaports and airports, as well as any other illegal aspect.
>
> The agreement also has the aim of locating resources for acquiring automated systems suitable for customs. . . .
>
> Therefore, the public policy of the Commonwealth is:

[3] The exhibits attached to the Opposition brief are not consecutively numbered. The page numbers referenced are the pages of the FMC docket, where the exhibits begin at page 17 of 189.

> (a) That the maritime ports of Puerto Rico shall comply with all the federal provisions described in the Maritime Transportation Security Act, and its international equivalent, the International Ship and Port Facility Security Code (ISPS), on or before January 1, 2009.
>
> (b) Recognizing the Inter-Agency Agreement for Implementing the Automated Cargo and Merchandise Control System of August 2, 2007.
>
> (c) That on or before October 1, 2008, the Ports Authority shall implement a fast track evaluation model for the goods entering the Island by sea, this date being deferrable by the agencies participating in the Interagency Agreement.
>
> (d) That the measures taken to oversee maritime security are designed so as to limit delays in the fast flow of the cargo to a minimum.

23 P.R. Laws Ann. § 3222.

> Regarding the budget, Act 12 states:
>
> (a) In order to comply, formalize and conduct all procedures or acquisitions needed for exercising the powers and obligations conferred by this chapter or by any other related law of the Legislature of Puerto Rico or the United States Congress within the specified time limits, the Government of Puerto Rico, its dependencies, instrumentalities and political subdivisions shall develop strategies and take steps for financing and/or defraying any costs related to this chapter, by participating in programs that provide federal funds, developing strategic alliances with the national security agencies, or allowing private investments.
>
> (b) For compliance with this chapter, the credit or power to levy taxes of the Commonwealth of Puerto Rico or of any of its political subdivisions shall not be pledged nor made liable for the payment of the principal of any loans, guarantees or bonds issued by any entity, nor shall any public funds of the General Budget approved by the Legislature be used, unless every possibility of federal funding and/or private funds has been previously consumed or exhausted, and it can thus be documented.

23 P.R. Laws Ann. § 3223.

Puerto Rico's treasury department and PRPA entered into a memorandum of understanding in 2011 which sets forth "the functions and responsibilities of each governmental entity in regards to the use of S2 Puerto Rico Scanning at the Locations with the objective of working in cooperation to develop a solution to the contraband problem in Puerto Rico." Toyota Appendix 010 and Opposition, Exhibit A at Exhibit 3, page 108 of 189.

With that background, the *Fresenius* two-step approach is utilized, starting with the structural indicators including state characterization, nature of functions, fiscal relationship, and control.

III. Analysis and Conclusions of Law

A. Structural Indicators

1. State Characterization

Toyota asserts that PRPA's enabling act does not structure it to be an arm of the state but rather a public corporation, with its legal existence separate and apart from that of the government and its officials. Brief at 7. Toyota asserts that "PRPA's role under Act 12 is limited to installing the fast-scanning lanes," Act 12 "does not expand the statutory powers of signatory agencies," and PRPA's role is more akin to that of a proprietor/landlord. Reply at 3-4.

PRPA responds that the enabling act is the starting point but that an "in-depth analysis of Act 12 tips the balance in PRPA's favor" and that "PRPA's implementing contracts with other relevant Puerto Rico instrumentalities further support PRPA's re-characterization as an arm" because it is "actively assisting the Commonwealth in matters directly impacting the fisc" and security. Opposition at 9-11.

The Enabling Act created PRPA as "a public corporation and government instrumentality of the Commonwealth of Puerto Rico" which is "a government instrumentality and public corporation with a legal existence and personality separate and apart from those of the Government and any officials thereof." 23 P.R. Laws Ann. § 333(a-b).

The first *Fresenius* structural indicator broadly considers how state law characterizes the entity. The D.C. Circuit considered PRPA's enabling act which "describes PRPA as a 'government instrumentality of the Commonwealth of Puerto Rico' and 'government controlled corporation'" and found that the "statutory language plainly demonstrates Puerto Rico's intent to create a governmental instrumentality of the Commonwealth and thus strongly suggests that PRPA is an arm of the Commonwealth entitled to sovereign immunity." *PRPA*, 531 F.3d at 875.

Although the First Circuit found PRPA to be cloaked with sovereign immunity in *Dantzler*, because this was an alternative ground, there is limited analysis of the relevant factors. The citation to *Thacker,* which recognizes that entities may have both governmental and non-governmental functions, suggests that the First Circuit may consider PRPA a hybrid entity. In *Grajales*, the First Circuit found that the enabling act "is best read to characterize PRPA in terms that point away from it being an arm of the Commonwealth." *Grajales*, 831 F.3d at 23.

Puerto Rico law characterizes PRPA as both a "government instrumentality" and as a "public corporation with a legal existence and personality separate and apart from those of the Government and any officials thereof." 23 P.R. Laws Ann. § 333(a-b). However, it is clear that at least part of PRPA's function is governmental, for example, PRPA is charged with promoting "the general welfare" and "increas[ing] commerce and prosperity . . . for the benefit of the people of Puerto Rico." 23 P.R. Laws Ann. § 348(a). This factor weighs in favor of finding PRPA to be an arm of the Commonwealth or a hybrid entity, with both governmental and non-governmental functions.

2. Nature of Functions

Toyota asserts that PRPA's functions range from governmental, such as the regulation of certain classes of ship pilots, to proprietary, such as dock-operating and maintenance activities, noting that the *Grajales* court found this indicator not to point in either direction. Brief at 8. Toyota also argues that the scanning is ultimately the responsibility of treasury personnel and that PRPA merely installs the scanning facilities. Brief at 8-9. Toyota further argues that the "privatization of the implementation and operation of the scanning lane program contradicts the nature of a governmental function" and that "[e]ven if the privatization of the scanning program were a governmental function, PRPA has not met the *Thacker* test to avoid its 'sue and be sued' clause." Reply at 5-7.

PRPA responds that its functions under Act 12 are quintessential governmental functions, Puerto Rico can create hybrid entities with sovereign-type functions in certain cases, PRPA's authority to implement the cargo scanning program is well settled, and PRPA is responsible for a whole lot more than merely facilitating the scanning technology. Opposition at 11-13. PRPA further asserts that the scanning program is PRPA's responsibility and has never been privatized. Sur-Reply at 3-4.

The D.C. Circuit found that the enabling act and dock and harbor act indicate "that PRPA performs its functions to promote 'the general welfare' and to increase 'commerce and prosperity' for the benefit 'of the people of Puerto Rico,'" which pointed "in the direction of arm-of-the-Commonwealth status." *PRPA*, 531 F.3d at 875-76.

The First Circuit, in *Dantzler*, focused on "the fact that the cargo scanning program was implemented to further the governmental purposes of improving national security and ensuring proper tax collection" to "find it difficult to see how PRPA cannot be cloaked with sovereign immunity here in its performance of an inspection function that is governmental in nature." *Dantzler*, 958 F.3d at 50 n.6. In *Grajales*, the First Circuit stated that PRPA "performs a mix of functions of which some are characteristic of arms and others are not." *Grajales*, 831 F.3d at 24.

With regard to the scanning program, Puerto Rico identified its goals as: "ensuring the health and security of Puerto Ricans, safeguarding the large capital investment made in the ports, and protecting the public benefit that the good operations of trade and economy entails." 23 P.R. Laws Ann. § 3222. Specifically, Act 12 states that PRPA "shall implement a fast track evaluation model for the goods entering the Island by sea," which is "designed so as to limit delays in the fast flow of the cargo to a minimum." 23 P.R. Laws Ann. § 3222. Health, security, and trade are traditional governmental functions.

Toyota argues that the complaint challenges the application of the scanning fees to its vehicles which were not "container cargo" under Regulation 8067 and asserts that even if the implementation of scanning lanes were a governmental function, that charging a fee for the services is not. Reply at 2-3. However, charging a fee for the service cannot be easily separated from the service. Moreover, if sovereign immunity applies to the scanning program, it prohibits the Commission from hearing cases regarding any part of PRPA's scanning program, including fees charged for it, regardless of the merits of the claim.

PRPA's use of treasury employees in the scanning program only highlights the interagency nature and relationships with other Puerto Rican government entities, which supports

the finding that the cargo scanning program benefits the Commonwealth. PRPA's role is more than just as a landlord and the use of contractors, Rapiscan and S2, to provide the scanning services does not change the nature of the governmental functions. Moreover, Rapiscan and S2 were respondents in the *Dantzler* case, so the First Circuit was well aware of their role, and nonetheless found PRPA entitled to sovereign immunity. *Dantzler*, 958 F.3d at 50.

Toyota argues in its reply that even if the scanning program is a governmental function, PRPA has not met the *Thacker* test to avoid its sue-and-be-sued clause. Reply at 6. However, the D.C. Circuit found that a waiver argument because of PRPA's sue-and-be-sued clause would not prevail. *PRPA*, 531 F.3d at 880-81 (citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999)). The First Circuit also did not find that PRPA waived sovereign immunity for suits in federal court. *Grajales*, 831 F.3d at 27.

It is not necessary to determine whether PRPA is a hybrid entity because for the scanning functions at issue here, as *Dantzler* found, it is clear that the functions are governmental in nature. This factor weighs in favor of finding PRPA to be an arm of the Commonwealth, at least with respect to the scanning program.

3. Fiscal Relationship

Toyota asserts that the *Grajales* court examined the fiscal relationship and concluded that PRPA has independent capacity to raise its own revenues from port operations, to satisfy its judgments without state participation or guarantee, and the Commonwealth bears no legal liability for PRPA's debts. Opposition at 10. Toyota asserts that PRPA has not received substantial government financing, is a financially independent entity, pays its debts with self-generated funds, receives no legislative allotments, and does not participate in the Government's general fund. Opposition at 10.

PRPA responds that PRPA has a close fiscal relationship with the Commonwealth for purposes of the scanning program and that "to ensure compliance with Act 12's mandate, the Commonwealth effectively agreed to pledge its credit and power to levy taxes, agreed to be made liable for the payment of the principal of any loans, guarantees or bonds of PRPA (or any of the Commonwealth's entities), and agreed that funds of the General Budget be used to finance the scanning program, provided that PRPA exhausted every possibility of public or private funding." Opposition at 13-14. PRPA also argues that the scanning program fiscally impacts the Commonwealth by increasing treasury's tax collections. Opposition at 14-15.

Act 12 states:

> For compliance with this chapter, the credit or power to levy taxes of the Commonwealth of Puerto Rico or of any of its political subdivisions shall not be pledged nor made liable for the payment of the principal of any loans, guarantees or bonds issued by any entity, nor shall any public funds of the General Budget approved by the Legislature be used, unless every possibility of federal funding and/or private funds has been previously consumed or exhausted, and it can thus be documented.

23 P.R. Laws Ann. § 3223.

The third structural indicator examines PRPA's overall fiscal relationship to the government, rather than just who would be liable for paying the judgment. The D.C. Circuit noted that "PRPA is financed largely through user fees and bonds; it was created in part to avoid Commonwealth-law limits on how much debt the Commonwealth itself can sustain" and that "the Commonwealth is legally liable for some of PRPA's actions" to find that "PRPA's overall effects on the Commonwealth treasury – weighs in favor of finding PRPA to be an arm of the Commonwealth." *PRPA*, 531 F.3d at 879-80.

The First Circuit in *Dantzler* specifically pointed to "ensuring proper tax collection" as a basis for finding sovereign immunity. *Dantzler*, 958 F.3d at 50 n.6. However, the First Circuit, in *Grajales*, found that the fiscal indicator pointed against a conclusion that PRPA was an arm of the Commonwealth because there was a high degree of fiscal separation. *Grajales*, 831 F.3d at 28.

In general, PRPA is a financially independent entity which pays its debts with self-generated funds and federal grants for capital improvements. Toyota Appendix at 004. However, for the cargo scanning program, the Commonwealth of Puerto Rico specifically left open the possibility that public funds from the general budget approved by the legislature could be used to cover shortfalls if other funding was not available. In addition, limiting PRPA's ability to collect fees to run the scanning program could risk the economic viability of the program. Moreover, the scanning program is related to the economic stability of the Commonwealth. Therefore, this factor points toward finding sovereign immunity, as the scanning program is designed to protect and improve the Commonwealth's fisc.

4. Control

Toyota acknowledges that the First Circuit, in *Grajales*, concluded that control is the only structural indicator that points in favor of PRPA being an arm of the state because the governor exercises a meaningful degree of control over PRPA through his power to appoint and remove the members of its board of directors, among other control indicators. Brief at 11. PRPA agrees that the Commonwealth's control over PRPA is undisputed. Opposition at 15.

The D.C. Circuit focused "primarily on how the directors and officers of PRPA are appointed," to find that the control factor "also weighs heavily in the direction of considering PRPA an arm of the Commonwealth." *PRPA*, 531 F.3d at 877. The First Circuit in *Grajales* also concluded that control indicator "does weigh rather strongly in favor of concluding that PRPA is an arm of the Commonwealth." *Grajales*, 831 F.3d at 28. As discussed in *Grajales*, the Commonwealth closely supervises PRPA's operations, appoints the majority of PRPA's board members, and subjects PRPA to a variety of controls. *Grajales*, 831 F.3d at 28. This element is undisputed and strongly points toward PRPA being an arm of the Commonwealth.

B. Risk to Public Treasury

Because the structural elements all point toward PRPA being an arm of the Commonwealth of Puerto Rico for the scanning program, the second step of the *Fresenius*

approach need not be reached. However, if that second step were reached, it would show a risk to the Commonwealth's treasury from an adverse judgement and from any limitations on the scanning program and the economic benefits it provides.

Toyota asserts that because the Commonwealth would not be liable for a judgment against PRPA in this action, PRPA is not entitled to immunity. Brief at 11-12. PRPA responds that the financial ramifications of an adverse judgment in this case should not be taken lightly because if PRPA is unable to finance the program through user fees or other alternatives, the Commonwealth must finance it or move to repeal Act 12, so that the fiscal impact to the Government is direct and significant, particularly in times of historic financial constraints. Opposition at 14.

As discussed earlier, there is a risk to the Commonwealth's treasury from an adverse outcome in this proceeding, albeit a somewhat limited risk as the Commonwealth treasury would only be impacted as a last resort. However, the fiscal benefits from the scanning program, including secure trade and tax collection, also weigh toward finding a risk to the Commonwealth's treasury. The risk to the Commonwealth's treasury is sufficient to find this step in favor of finding that PRPA is an arm of the Commonwealth of Puerto Rico.

C. Conclusion

For the above-stated reasons, under the *Fresenius* two-step approach, PRPA is entitled to sovereign immunity. The structural indicators show that the Commonwealth of Puerto Rico maintains significant control over PRPA, the enabling act demonstrates that it is at least a hybrid entity, the scanning program is a governmental function, and although generally operating as fiscally independent, there are benefits and risks to the Commonwealth's treasury from the scanning program. Although it is not necessary to reach the second step of the *Fresenius* approach, that step also shows risks to the Commonwealth's treasury from an adverse ruling and from reductions in funding for the scanning program. Accordingly, PRPA is entitled to sovereign immunity for the cargo scanning program, including the enhanced security fees. Because the proceeding is decided on the basis of sovereign immunity, the merits of the claim and the other issues raised are not considered.

IV. Order

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that Toyota de Puerto Rico's complaint be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

_____
Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

PETITION OF KAWASAKI KISEN KAISHA, LTD. AND "K" LINE AMERICA, INC. FOR A TEMPORARY EXEMPTION FROM STANDARD TARIFF & SERVICE CONTRACT FILING REQUIREMENTS

Petition No. P1-21

Served: April 9, 2021

BY THE COMMISSION: Daniel B. MAFFEI, Chairman; Rebecca F. DYE, Michael A. KHOURI , Louis E. SOLA, Carl W. BENTZEL, Commissioners.

ORDER GRANTING IN PART AND DENYING IN PART PETITION FOR EXEMPTION

K Line[1] filed a petition with the Federal Maritime Commission (Commission) seeking an exemption from certain service contract filing and tariff publishing requirements because of a recent cyberattack on its systems. For the reasons described below, the Commission grants the request for exemption from the relevant service contract filing requirements subject to certain conditions. The Commission also grants the request for exemption from the relevant tariff publishing requirements, subject to certain conditions, with respect to cargo received on or after the date of this order. But because the Commission's exemption authority is limited to prospective relief, the Commission denies the request for exemption from the relevant tariff publishing requirements for cargo received prior to the date of this order. Instead, K Line may use other procedures provided by the Shipping Act that allow it to refund or waive collection of freight charges for these shipments due to failure to publish a tariff.

I. BACKGROUND

The petitioners are an ocean common carrier under the Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.* (Shipping Act), and its agent. *See* 46 U.S.C. § 40102(18). K Line states that "[a] malicious cyber-attack against 'K' Line severely inhibited the operation of 'K' Line's information systems starting on March 18, 2021." Pet. at 2. On March 19, 2021, K Line discovered the attack and notified the Commission. *Id.* The attack has impacted K Line's ability

[1] The petitioners include Kawasaki Kisen Kaisha, Ltd. and their agent "K" Line America, Inc., collectively referred to as "K Line."

to timely publish tariff rates and rules and to timely file service contracts and amendments. *Id.*

On March 24, 2021, K Line petitioned the Commission for an exemption from the service contract filing and tariff publishing requirements. With respect to service contracts, K Line requests exemption from 46 C.F.R. §§ 530.3(i), 530.8(a), and 530.14(a) to allow them to apply service contract rates and terms agreed to with their customers but not yet filed with the Commission, provided those service contracts and amendments are filed by May 16, 2021.[2] *Id.* at 1.

With respect to tariffs, K Line requests exemption from 46 C.F.R. §§ 520.7(c), 520.8(a)(1), and 520.8(a)(4)[3] to apply tariff rates, charges, and rules communicated to customers but not yet published, provided that these tariff changes are published by May 16, 2021. *Id.* at 1-2. K Line states that it will not use the flexibility to apply increased tariff rates or charges to customers absent an alternative form of written 30-day notice clearly communicated to customers. *Id.* at 1.

K Line requests that the exemption apply to cargo received on or after March 17, 2021. *Id.* at 1-2. K Line asserts that this flexibility will allow them to apply service contract rates agreed upon with customers and tariff terms offered to customers for shipments received before service contract filing or tariff publication can be accomplished, rather than requiring customers to pay higher tariff rates due to K Line's inability to timely file service contracts and publish tariffs. *Id.* K Line states that granting this exemption would support the flow of U.S. commerce by allowing them to honor rates, charges, and rules offered to their customers. *Id.*

K Line indicates that they are leveraging their currently functional systems to track their commitments to customers and minimize any negative impacts on customers from the cyberattack. *Id.* at 2. K Line further states that the requested exemption is crucial to reducing potential burdens on customers. *Id.* K Line asserts that the requested exemption will not reduce competition or be detrimental to commerce and would instead have the opposite effect by allowing them to continue offering sustainable transportation services to U.S. customers. *Id.*

The Commission issued, on March 25, 2021, a notice of K Line's petition and requested comments from interested parties. The notice was published in the *Federal Register* on March 30, 2021. No comments were received.

II. DISCUSSION

A. Service Contract Filing

[2] K Line requests that the Commission permit it to make all required service contract filings and tariff publications "within 60 days following March 17, 2021," which is May 16, 2021. *See* Pet. at 2.

[3] The petition requests an exemption from "§520.8(4)." The Commission assumes this is a typo and that K Line is seeking an exemption from § 520.8(a)(4), which permits tariff changes that result in a decrease in cost to shipper to become effective on publication.

The Commission's regulations require that carriers file original service contracts (as opposed to amendments) with the Commission "before any cargo moves pursuant to that service contract." 46 C.F.R. § 530.8(a)(1). In addition, § 530.8(b) requires that each original contract include, among other terms, an effective date that is no earlier than the filing date. *See* §§ 530.3(i) (defining "effective date" for original service contracts and amendments); 530.8(b)(8)(i) (requiring every service contract to include its effective date). Similarly, § 530.14(a) provides that "[p]erformance under an original service contract may not begin before the day it is effective and filed with the Commission."

In contrast, the Commission's regulations provide more flexibility to service contract amendments, which can be filed within 30 days after the amendment's effective date. *See* 46 C.F.R. §§ 530.3(i); 530.8(a)(2); 530.8(b)(8)(i); 530.14(a).

On April 27, 2020, the Commission issued a temporary exemption allowing carriers to file original service contracts up to 30 days after they go into effect, mirroring the delayed filing requirements applicable to service contract amendments. *Temporary Exemption from Certain Service Contract Requirements*, 2 F.M.C.2d 65 (FMC 2020). The exemption was originally set to expire December 31, 2020, but the Commission extended the exemption until June 1, 2021. *Temporary Exemption from Certain Service Contract Requirements*, Docket No. 20-06, 2020 FMC LEXIS 206 (FMC Oct. 1, 2020).

K Line requests further exemption from §§ 530.3(i), 530.8(a) and 530.14(a) with respect to original service contracts to permit them to be filed more than 30 days after they go into effect, but not later than May 16, 2021. K Line is also requesting a similar exemption from the current regulatory requirements with respect to service contract amendments to permit them to be filed more than 30 days after they go into effect, but not later than May 16, 2021. The requested exemption would extend to service contracts and amendments applicable to cargo received by K Line on or after March 17, 2021.

Exemptions from the requirements of part 530 are governed by 46 U.S.C. § 40103(a) and the Commission's Rules of Practice and Procedure, specifically 46 C.F.R. §§ 502.10 and 502.92. 46 C.F.R. § 530.13(b). Under 46 U.S.C. § 40103(a), the Commission may grant prospective exemptions from Shipping Act requirements, "if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce."

K Line states that the exemption will allow K Line to apply service contract rates agreed upon with customers before filing can be accomplished. Pet. at 1-2. K Line asserts that the requested exemption will not reduce competition or be detrimental to commerce and would instead have the opposite effect by allowing it to continue offering sustainable transportation services to U.S. customers. *Id.* at 2.

We agree. K Line seeks additional time to file certain service contracts and amendments because of their current inability to make such filings. These contracts and amendments have already been agreed to and would normally need to be filed on or before April 16, 2021 (30 days after March 17, 2021), but K Line is requesting an additional 30

days for filing.

The Commission has granted similar exemptions to mitigate the negative effects of cyberattacks on ocean transportation. Most recently, the Commission granted an identical exemption to the CMA Group after their systems were attacked. *Pet. of CMA CGM S.A. for Temporary Exemption from Standard Tariff & Service Contract Filing Requirements*, Pet. P2-20, 2020 FMC LEXIS 211 (Oct. 20, 2020). And like the CMA Group exemption, this exemption is more limited than the 2017 exemption granted to another carrier, Maersk, following a cyberattack. *Pet. of Maersk Line A/S for an Exemption from 46 C.F.R. § 530.8*, Pet. No. P1-17, slip op. (July 19, 2019). In that case, the Commission granted Maersk's request for an exemption allowing the carrier to agree to service contracts with shippers and apply those terms to cargo received *before* the date agreement was reached on the contractual terms. In this case, K Line and their customers have already agreed on the affected service contract terms, but K Line is currently unable to file the contracts with the Commission, and failure to grant the exemption could result in shippers being charged higher rates or subject to other unfavorable terms. Given these potential harms, the length of the requested filing extension (i.e., an additional 30 days to file), and the limited number of service contracts that would be affected, the Commission finds that the requested exemption will not result in substantial reduction in competition or be detrimental to commerce.

Based on the foregoing, the Commission is granting K Line's request for exemption from the relevant service contract regulations provided that service contracts and amendments applicable to cargo received on or after March 17, 2021 must be filed no later than May 16, 2021, or the otherwise applicable filing deadline, whichever is later.[4]

B. Tariff Publication

The Shipping Act and the Commission's regulations require that common carriers publish tariffs showing all their rates, charges, classifications, rules, and practices between all points or ports on their own routes and on any through transportation route that has been established. *See* 46 U.S.C. § 40501; 46 C.F.R. § 520.3. Changes in rates, charges, rules, regulations, or other tariff provisions that result in a decrease in cost to the shipper may become effective on publication. *See* 46 U.S.C. § 40501(e)(2); 46 C.F.R. § 520.8(a)(4). On the other hand, new or initial rates, charges, or changes in existing rates that result in an increased cost to a shipper may go into effect no earlier than 30 days after publication. 46 U.S.C. § 40501(e)(1); 46 C.F.R. § 520.8(a)(1). Commission regulations also provide that the applicable rates for any given shipment are those in effect on the date the cargo is received

[4] The exemption is not intended to reduce the normal filing deadlines applicable to service contracts and amendments. Under the current regulations for service contract amendments and the temporary exemption for original service contracts, service contracts and amendments may be filed up to 30 days after the effective date.

by the carrier.[5] 46 C.F.R. § 520.7(c).

K Line requests exemption from these provisions so that it can apply tariff rates, charges, and rules communicated to customers but not yet published, provided that these tariff changes are published by May 16, 2021. The requested exemption would apply to tariff rates, charges, and rules that, but for K Line's inability to publish, would have been effective with respect to cargo received on or after March 17, 2021.

Exemptions from the statutory requirements in 46 U.S.C. § 40501 and the regulatory requirements in 46 C.F.R. part 520 are governed by 46 U.S.C. § 40103 and the Commission's Rules of Practice and Procedure (46 C.F.R. part 502). *See* 46 C.F.R. § 520.13(a).[6] As discussed above, § 40103(a) provides that the Commission may grant prospective exemptions from Shipping Act requirements, "if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce."

K Line states that if relief is not granted, shippers making bookings against the quoted rates will instead be invoiced at the higher published rates. Pet. at 1-2. K Line further states that they will not use this flexibility to apply increased tariff rates or charges to customers absent an alternative form of written 30-day notice clearly communicated to customers. K Line asserts that the requested exemption will not reduce competition or be detrimental to commerce and would instead have the opposite effect by allowing them to continue offering sustainable transportation services to U.S. customers.

We agree. K Line seeks permission to apply tariff rates, charges, and rules that have been communicated to shippers but not published due to the cyberattack. Without an exemption, shippers would be invoiced based on the applicable published tariff rates and charges, which could be higher than the quoted terms. And although K Line suggests that they may also use this authority to implement tariff changes that would result in increased rates to shippers prior to or less than 30 days after publication, they have acknowledged the concerns such conduct might raise and committed to providing an alternative form of written 30-day notice to shippers before applying such changes. In short, K Line is trying to approximate the status quo had the cyberattack never occurred.

As noted above, the Commission recently granted an identical exemption to the CMA Group. *Pet. of CMA CGM S.A.*, Pet. P2-20, 2020 FMC LEXIS 21. Given the potential harm to shippers that could be charged higher rates without the exemption, the limited duration and number of shipments subject to the exemption, and K Line's commitment to providing alternative written 30-day notice to shippers before applying any tariff changes that would result in increased rates or charges, the Commission finds that the requested

[5] Although the petition only requests exemption from Commission regulations, because 46 C.F.R. § 520.8(a)(1) and (4) implement the requirements in 46 U.S.C. § 40501(e), the Commission interprets the request to extend to those statutory provisions as well.

[6] This regulation incorporates 46 U.S.C. § 40103 as well as "46 C.F.R. § 502.67." Section 502.67, however, has been moved twice, first to § 502.74, and now to § 502.92.

exemption will not result in substantial reduction in competition or be detrimental to commerce, subject to certain conditions.

Specifically, K Line must provide written notice to shippers at least 30 days in advance of applying tariff changes that result in increased rates or charges, and such notice must be given in a manner that is likely to be seen by shippers. Acceptable forms of notice include: (1) emails to all of K Line's customers; (2) prominent posting on K Line's websites; or (3) other forms of notice determined to be acceptable by the Commission's Director of the Bureau of Trade Analysis. In addition, given that K Line intends to publish all affected tariff changes by May 16, 2021, the exemption is limited to unpublished increases that are set to go into effect on or before June 14, 2021 (i.e., less than 30 days after May 16, 2021). Any increases set to go into effect after June 14, 2021, must comply with the publication and 30-day notice requirements in 46 U.S.C. § 40501(e) and 46 C.F.R. § 520.8(a).

Despite the determination that the requested exemption meets the standard set forth in § 40103, as explained in *Petition of CMA CGM S.A.*, the Commission lacks the authority to provide K Line with all the relief requested. Under § 40103, the Commission may "*exempt for the future* any specified activity of" regulated entities from Shipping Act requirements. 46 U.S.C. § 40103(a) (emphasis added). The Commission's authority under this provision is therefore limited to prospective relief; the Commission cannot exempt past activities from the requirements of the Shipping Act. The Shipping Act and the Commission's regulations require that carriers apply published tariff rates, charges, and rules in effect on the date cargo is received. *See* 46 U.S.C. § 40501(e); 46 C.F.R. §§ 520.7(c); 520.8. K Line is seeking not only a prospective exemption that would allow them to apply unpublished tariff rates, charges, and rules to future shipments, but also an exemption that would permit them to apply unpublished tariff rates, charges, and rules retroactively to cargo that has already been received. Section 40103 does not permit the latter type of relief. Accordingly, the Commission is granting an exemption from the relevant tariff requirements only with respect to cargo that is received on or after the date of this order.

For cargo received prior to the date of this order, the Shipping Act provides an alternative process by which carriers may seek permission from the Commission to refund or waive collection of freight charges if "there is an error in a tariff, a failure to publish a new tariff, or an error in quoting a tariff, and the refund or waiver will not result in discrimination among shippers, ports, or carriers," and the carrier "has published a new tariff setting forth the rate on which the refund or waiver would be based." 46 U.S.C. § 40503. The Commission's regulations at 46 C.F.R. part 502, subpart Q, describe the application requirements and the decision-making process. Such applications must be filed within 180 days from the date of sailing of the vessel from the port at which the cargo was loaded. 46 U.S.C. § 40503(3); 46 C.F.R. § 502.271(b).

The situation described by K Line appears to be the type § 40503 is intended to address. K Line has communicated tariff rate, charge, and rule changes to shippers but failed to publish those changes in its tariffs due to the cyberattack. Providing refunds or waiving

charges in these circumstances would not appear to result in discrimination among shippers, ports, or carriers. Accordingly, for cargo received prior to the date of this order, K Line may use the process in § 40503 and the Commission's regulations in order to refund or waive collection of freight charges to reflect the tariff rates, charges, and rules previously communicated to shippers once it is able to publish those tariff items.[7] To the extent that flexibility is needed with respect to the procedural requirements in 46 C.F.R. part 502, subpart Q, the Commission is willing to consider requests for waiver in accordance with 46 C.F.R. § 502.10.

III. CONCLUSION

For the reasons discussed above, the Commissions grants in part and denies in part the petition, subject to the conditions stated below.

THEREFORE IT IS ORDERED, that K Line's request for an exemption from 46 C.F.R. §§ 530.3(i), 530.8(a) and 530.14(a) is GRANTED provided that:

1. All service contracts and amendments applicable to cargo received by the carrier on or after March 17, 2021, must be filed with the Commission in the manner set forth in 46 C.F.R. part 530 by May 16, 2021, or the otherwise applicable filing deadline, whichever is later; and

2. The exemption expires May 16, 2021.[8]

IT IS FURTHER ORDERED, that K Line's request for exemption from 46 U.S.C. § 40501(e) and 46 C.F.R. §§ 520.7(c), 520.8(a)(1), and 520.8(a)(4) is GRANTED with respect to cargo received by K Line on or after the date of this order, provided that:

1. All tariff rates, charges, and rules subject to the exemption must be published in accordance with the requirements of 46 C.F.R. part 520 no later than May 16, 2021.

2. K Line must provide written notice to shippers at least 30 days in advance before applying any new or initial rate, charge, or change in an existing rate that results in an increased cost to a shipper, and such notice must be given in a manner that is likely to be seen by shippers. Acceptable forms of notice include: (a) emails to all of K Line's customers; (b) prominent posting on K Line's websites; or (c) other forms of notice determined to be acceptable by the Commission's Director of the Bureau of Trade Analysis.

3. The exemption from 46 C.F.R. §§ 520.7 and 520.8(a)(4) expires on May 16, 2021.[9]

4. The exemption from 46 C.F.R. § 520.8(a)(1) is limited to tariff changes effective on or before June 14, 2021.

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[7] Relief under § 40503 is limited to refunding or waiving collection of freight charges. Section 40503 does not allow K Line to apply unpublished increases retroactively.
[8] May 16, 2021, is the last day on which the exemption applies. *See* 46 C.F.R. § 502.101.
[9] May 16, 2021, is the last day on which the exemption applies. *See* 46 C.F.R. § 502.101.

IT IS FURTHER ORDERED, that K Line's request for exemption from 46 U.S.C. § 40501(e) and 46 C.F.R. §§ 520.7(c), 520.8(a)(1), and 520.8(a)(4) is DENIED with respect to cargo received by K Line before the date of this order.

FINALLY, IT IS ORDERED, that this proceeding be discontinued.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

SANTA FE DISCOUNT CRUISE PARKING, INC., D/B/A EZ CRUISE PARKING; LIGHTHOUSE PARKING INC; AND SYLVIA ROBLEDO D/B/A 81ST DOLPHIN PARKING,

Complainants,

v.

THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES; AND THE GALVESTON PORT FACILITIES CORPORATION,

Respondents.

Docket No. 14-06

Served: April 16, 2021

BY THE COMMISSION: Daniel B. MAFFEI, Chairman, Rebecca F. DYE, Michael A. KHOURI, Louis E. SOLA, Carl W. BENTZEL, Commissioners.

ORDER ON INITIAL DECISION ON REMAND

This case is before the Commission on Complainants' exceptions to the Administrative Law Judge's (ALJ) Initial Decision on Remand (I.D.R.). In 2015, the ALJ dismissed Complainants' claims, and the Commission affirmed the dismissal. Complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking (EZ Cruise) and Sylvia Robledo d/b/a 81st Dolphin Parking (81st Dolphin) petitioned for review, and the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated the Commission's decision and remanded the case for further proceedings. The Commission remanded the case to the ALJ, and, on November 16, 2018, the ALJ issued the I.D.R. again dismissing Complainants' claims.

For the reasons set forth below, the Commission: (1) reverses the I.D.R. and finds that Respondent The Board of Trustees of the Galveston Wharves (Board) violated 46 U.S.C. § 41106(2) with respect to EZ Cruise and 81st Dolphin; (2) vacates the I.D.R. with respect to attorney fees; and (3) affirms the dismissal of all other claims. The Commission further remands

this case to the ALJ to determine an appropriate reparations award.

I. BACKGROUND

A. 2003 Tariff and Complainants' Request for Different Treatment

The Board of Trustees of the Galveston Wharves and the Galveston Port Facilities Corporation (GPFC) (collectively, Respondents)[1] operate a cruise ship terminal complex on Galveston Island in Texas. Complainants are private companies that own or operate parking lots located outside the port but within a few blocks of the cruise terminal. Most of Complainants' customers are cruise passengers seeking to park their vehicles for the duration of their cruises. Each Complainant operates shuttle buses to transport customers and their luggage directly to and from the cruise terminal.

In 2003, Respondents issued Tariff Circular No. 6 (2003 Tariff),[2] which, among other things, imposed access fees on certain vehicles for entering the cruise terminal. The access fees were as follows:

2003 Tariff

Vehicle Type	**Per-Trip Fee**	**Annual Decal Fee**
Bus, Charter Bus, Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle	$10 per-trip	
Limousines		$10 per decal per vehicle, annually
Taxis		$7.50 per decal per vehicle, annually

FF 29.[3] Under this tariff, Complainants' shuttle buses and hotel shuttle buses were subject to the $10 per-trip fee. Taxis and limousines did not pay a per-trip fee.

Respondents began assessing access fees in September 2004 and started issuing invoices in January 2005. Although Respondents invoiced Complainants for their access to the cruise terminal, Complainants did not pay. Instead, they sought to negotiate a different amount. For

[1] As noted below, GPFC did not establish or revise the tariffs at issue and has not billed or collected cruise terminal access fees from Complainants. *See* I.D.R. at 35. The ALJ's Findings of Fact, however, refer to the GPFC and the Board collectively. Consequently, this Order refers to Respondents collectively except where a distinction is relevant.

[2] Although this document and others are referred to as "tariffs," they appear to be "marine terminal operator schedules" under Commission regulations. *Compare* 46 C.F.R. § 525.1(c)(17) (defining "schedule") *with* 46 C.F.R. § 520.2 (defining "tariff" as a common carrier publication).

[3] This Order cites Findings of Fact from the I.D.R. as "FF __." It cites other parts of the I.D.R. by page number, e.g., "I.D.R. at ___."

instance, Complainant EZ Cruise Parking asserted that the $10 per-trip fee was too high, and it proposed a flat monthly fee that would allow its shuttle buses unlimited access to the cruise terminal.

Eventually, Complainants and Respondents agreed on a flat fee of $8.00 per month for each parking space in Complainants' lots, which would allow unlimited access to the cruise terminal for Complainants' shuttle buses. Respondents agreed to apply this per-space fee retroactively to January 2005 and to recalculate Complainants' unpaid access fees. The retroactive application of the per-space fee saved Complainants thousands of dollars compared to what they owed based on the $10 per-trip fee.

B. 2006 Tariff: Implementing Per-Space Fees

To memorialize the parties' compromise, on August 28, 2006, Respondents amended Tariff Circular No. 6 so that the access fees were as follows:

2006 Tariff

Vehicle Type	**Per-Trip Fee**	**Annual Decal Fee**	**Per-Space Fee**
Bus, Charter Bus, Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle	$10 per-trip		
Limousines		$10 per decal per vehicle, annually	
Taxis		$7.50 per decal per vehicle, annually	
Off-Port Parking Users [Complainants]			$8.00 per parking space, monthly

FF 44. The "2006 Tariff" stated that the $8.00 per-space fee would be effective as of August 15, 2006. Once Respondents implemented the per-space fee, they stopped counting the trips of Complainants' shuttles. Respondents did not apply the per-space fee to hotels. Rather, they continued to treat hotel shuttle buses as subject to the $10 per-trip fee.

C. 2007 Tariff: Per-Trip Fees Amended to Account for Vehicle Capacity

In December 2007, Respondents amended Tariff Circular No. 6 to change the per-trip fees so that they varied based on vehicle capacity. The $8.00 per-space fee applicable to Complainants did not change. Moreover, certain taxis and limousines still only paid annual decal fees and not per-trip or per-space fees. The "2007 Tariff" provided:

2007 Tariff

Vehicle Type	**Per-Trip Fee**	**Annual Decal Fee**	**Per-Space Fee**	**Terminal Parking Fee**

Charter Bus				$50 parking fee per use
Bus, Commercial Passenger Vehicle, Courtesy Vehicle with seating capacity greater than 15 persons	$50 per-trip	$10 per decal per vehicle, annually		
Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle, or Limousine with seating capacity of 15 persons	$20 per-trip	$10 per decal per vehicle, annually		
Commercial Passenger Vehicle, Courtesy Vehicle or Shuttle with seating capacity of up to 14 persons	$10 per-trip	$10 per decal per vehicle, annually		
Limousines or Taxis with seating capacity of nine to 14 persons	$10 per-trip	$10 per decal per vehicle, annually		
Limousines with seating capacity of not more than 8 persons		$10 per decal per vehicle, annually		
Taxis with seating capacity of not more than 8 persons		$7.50 per decal per vehicle, annually		
Off-Port Parking Users [Complainants]			$8.00 per parking space, monthly	

FF 50-52.

D. July 2014 Tariff: Fees Increase

Approximately six years later, Respondents considered amending Tariff Circular No. 6 to increase both per-trip and per-space access fees but declined to do so. According to Respondents, around the same time, they conducted a review of cruise terminal finances and operations. Among other things, the study disclosed that the employee responsible for counting vehicles accessing the cruise terminal was not aware of the higher per-trip fees for larger buses and shuttle vans in the 2007 Tariff. Consequently, Respondents charged all such vehicles $10 per-trip regardless of capacity. Additionally, the study revealed that limousines were not being charged in accordance with the 2007 Tariff either, at least after September 13, 2008.

On May 19, 2014, Respondents amended Tariff Circular No. 6, effective July 1, 2014, and increased some access fees and combined some vehicle categories. Complainants' per-space fee increased from $8.00 per space to $28.88 per space. Additionally, for the first time, all

limousines were subject to a per-trip fee in addition to the annual decal fee. The "July 2014 Tariff"[4] specifically provides that:

July 2014 Tariff

Vehicle Type	**Per-Trip Fee**	**Annual Decal Fee**	**Per-Space Fee**	**Terminal Parking Fee**
Charter Bus				$60 parking fee per use
Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Limousine with seating capacity of 15 persons or more	$30 per-trip	$25 per decal per vehicle, annually		
Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle, or Limousine with seating capacity of less than 15 persons	$20 per-trip	$15 per decal per vehicle, annually		
Taxis with City of Galveston permit		$7.50 per decal per vehicle, annually		
Off-Port Parking Users [Complainants]			$28.88 per parking space, monthly	

FF 65.

E. Complainants File Suit

On June 16, 2014, Complainants filed a complaint with the Commission alleging that Respondents violated 46 U.S.C. § 41102(c), § 41106(2), and § 41106(3). Complainants' § 41106(2) unreasonable preference claims centered on allegedly preferential treatment given to Respondents' own shuttle buses, two other private parking lots, and hotels (who Complainants argued should have been required to pay per-space fees rather than per-trip fees). Complainants also alleged that the increase in per-space fees in the July 2014 Tariff was unreasonable.[5]

[4] Although Tariff Circular No. 6 was amended May 2014, because it was effective July 2014, this Order refers to it as the July 2014 Tariff.

[5] Complainants also filed a complaint in U.S. district court in Texas seeking, among other things, a preliminary injunction under the Shipping Act to bar Respondents from enforcing the July 2014 Tariff. In August 2014, the court entered an agreed order that permitted Complainants, while the Commission case was pending, to deposit new monthly access fees above $8.00 per space into the court registry while paying $8.00 per space to fee Respondents. The order also provided that Respondents were not to deliver invoices to Complainants related to access fees. Agreed Interim Order, *Santa Fe Discount Cruise Parking v. The Board of Trustees of the Galveston Wharves*, No. 3:14-cv-00206 (S.D. Tex. Aug. 5, 2014), ECF No. 11. Complainants continued to make payments to the court through 2020. The case remains pending. *See, e.g.*,

F. October 2014 Tariff

Respondents amended Tariff Circular No. 6 again on September 22, 2014. The tariff immediately rescinded the July 2014 Tariff to the extent it increased the monthly per-space fee.[6] The tariff also eliminated monthly per-space fees beginning October 1, 2014. From that point forward, Complaints were subject to per-trip fees like others accessing the cruise terminal. This "October 2014 Tariff" did not otherwise change the access fees from the July 2014 Tariff. As a result of the October 2014 Tariff, Complainants never paid the $28.88 monthly per-space access fee. Further, taxis continued to be the only type of vehicle exempt from a per-trip (or in the case of charter buses, per-use) access fee.

As of October 1, 2014, Respondents imposed access fees as follows:

October 2014 Tariff

Vehicle Type	**Per-Trip Fee**	**Annual Decal Fee**	**Per-Space Fee**	**Terminal Parking Fee**
Charter Bus				$60 parking fee per use
Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle or Limousine with seating capacity of 15 persons or more	$30 per-trip	$25 per decal per vehicle, annually		
Commercial Passenger Vehicle, Courtesy Vehicle, Shuttle, or Limousine with seating capacity of less than 15 persons	$20 per-trip	$15 per decal per vehicle, annually		
Taxis with City of Galveston permit		$7.50 per decal per vehicle, annually		

FF 73-76.

Pls.' Mot., *Santa Fe Discount Cruise Parking v. The Board of Trustees of the Galveston Wharves*, No. 3:14-cv-00206 (S.D. Tex. May 14, 2020), ECF No. 50.

[6] It appears that the tariff also imposed a decal fee on Complainants' shuttle buses through October 1, 2014. FF 73.

G. Continued Commission and Court Litigation

In light of the October 2014 Tariff, Complainants filed an amended complaint that was substantially similar to the original complaint but added new allegations. Among other things, the amended complaint alleged that the October 2014 tariff continued to favor taxis, that being subject to per-trip fees constituted an unsubstantiated increase in access fees, and that the October 2014 Tariff did not resolve Respondents alleged failure historically to enforce the tariff against those other than Complainants.

Respondents moved to dismiss, and the ALJ granted in part and denied in part Respondents' motion. *Santa Fe Discount Cruise Parking, Inc. v. The Bd. of Trustees of the Galveston Wharves*, 33 S.R.R. 1283, 2014 FMC LEXIS 31 (ALJ 2014). The ALJ dismissed with prejudice Complainants' § 41102(c) and § 41106(3) claims but allowed the § 41106(2) claims to proceed. 2014 FMC LEXIS 31 at *30, *33, *37-*43. Neither party filed exceptions to the ALJ's order, which became administratively final in December 2014. The parties subsequently filed briefs on the merits of the § 41106(2) claims.

The ALJ issued an Initial Decision dismissing these claims. *Santa Fe Discount Cruise Parking, Inc. v. The Bd. of Trustees of the Galveston Wharves*, No. 14-06, 2015 FMC LEXIS 44 (ALJ Dec. 4, 2015) (2015 Initial Decision or I.D.). The ALJ determined that although Complainants established that they were treated differently than other ground transportation companies, they had failed to prove that: (1) they were similarly situated or in a competitive relationship with those other companies; or (2) that the different treatment caused them injury. *Id.* at *56-*67, *79-*121. Complainants filed exceptions, and the Commission affirmed the lack-of-injury finding. The Commission found the ALJ erred, however, in requiring Complainants to establish that they were similarly situated or in a competitive relationship with other ground transportation companies. *Santa Fe Discount Cruise Parking, Inc. v. The Bd. of Trustees of the Galveston Wharves*, No. 14-06, 2017 FMC LEXIS 1 (FMC Jan. 13, 2017) (FMC Order).

Two of the Complainants – EZ Cruise and 81st Dolphin – petitioned the D.C. Circuit for review of the FMC Order.[7] On May 11, 2018, the D.C. Circuit granted the petition, vacated the FMC Order, and remanded for further proceedings consistent with the court's opinion. *Santa Fe Discount Cruise Parking, Inc. v. Fed. Mar. Comm'n*, 889 F.3d 795, 797 (D.C. Cir. 2018) (D.C. Circuit Opinion). The court described the case as involving the Board's differential treatment of Complainants as compared to taxis and limousines. *Id.* According to the court, the Commission erred in its injury analysis because "Petitioners were plainly injured when they were charged more than the other commercial passenger vehicles." *Id.* The court left open, however, the possibility that the Respondents would be able to show that the differential treatment of the parking lot shuttle buses was justified by legitimate transportation factors, a step of the analysis the Commission did not reach. *Id.*

The Commission remanded this proceeding to the ALJ to address "all remaining issues, including whether the Port's different treatment was justified by valid transportation factors, whether the Shipping Act's statute of limitations bars any of Complainants' claims, and whether

[7] Complainant Lighthouse did not join in the appeal.

Complainants are entitled to relief." *Santa Fe Discount Cruise Parking, Inc. v. The Bd. of Trustees of the Galveston Wharves*, 1 F.M.C.2d 155, 156-57 (FMC 2018). The ALJ requested the parties' views on what issues remained and whether additional briefing was necessary. Complainants identified four outstanding issues: (1) whether Respondents justified the disparate treatment regarding taxis; (2) whether Respondents justified the disparate treatment regarding limousines; (3) whether Respondents justified the disparate selective enforcement of the Tariffs; and (4) whether the statute of limitations barred relief. Both parties stated that no additional briefing was necessary.

On November 16, 2018, the ALJ issued the I.D.R. again dismissing Complainants' § 41106(2) unreasonable preference claims. The ALJ dismissed certain claims as administratively final, dismissed others as abandoned, and dismissed claims against GPFC for the same reasons as in the 2015 Initial Decision. I.D.R. at 4, 18, The ALJ dismissed the claims of unreasonable preference with respect to hotel shuttle buses on the grounds that Complainants had not proved that the unequal treatment was not justified by differences in transportation factors and because Complainants had not shown that they were injured by the difference between the per-space fee as compared to the per-trip fee paid by hotel shuttle buses. I.D.R. at 8, 40-43, 47-61.

The ALJ dismissed the unreasonable preference claims with respect to taxis and limousines because Complainants had not proved that the unequal treatment was not justified by differences in transportation factors. *Id.* at 8, 44-46. The ALJ found, however, that if Respondents' conduct was unjustified, then Complainants were injured by the disparate treatment with respect to taxis. *Id.* at 8, 47, 65. The ALJ also concluded that the statute of limitations would bar reparations for conduct occurring before June 16, 2011 (three years before the filing of the original complaint). *Id.* at 65-66. Finally, the ALJ determined that Respondents would be eligible for reasonable attorney fees for work performed after the effective date of the Coble Act. *Id.* at 13. Complainants filed exceptions to the I.D.R., and Respondents replied.

II. DISCUSSION

At this stage of the proceedings, the main issues are: (1) whether Respondents violated § 41106(2) by imposing a monthly $8.00 per-space access fee on Complainants while exempting taxis from per-space or per-trip fees; (2) whether Respondents violated § 41106(2) by imposing a monthly $8.00 per-space access fee on Complainants while exempting certain limousines from per-space or per-trip fees; (3) whether Respondents violated § 41106(2) by charging hotel shuttle buses (and others) less than the applicable per-trip access fee while consistently charging Complainants per-space fees; and (4) whether Respondents violated § 41106(2) by failing to collect the applicable per-trip access fee from certain limousines while consistently charging Complainants per-space access fees.

Complainants have established that Respondent The Board of Trustees of the Galveston Wharves violated § 41106(2) with respect to limousines (issues (2) and (4)) but have not proved violations relating to taxis and other vehicles (issues (1) and (3)).[8] Consequently, the

[8] Although this Order generally refers to Respondents in the plural, the ALJ dismissed the claims against Respondent Galveston Port Facilities Corporation. I.D.R. at 35. Neither party challenges that dismissal, which the Commission affirms.

Commission reverses the I.D.R. as to the former and remands for further proceedings on reparations. The other issues raised by the parties are either unchallenged or waived.

A. Legal Standards

When the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore reviews the ALJ's I.D.R. *de novo*. *See MAVL Capital Inc. v. Marine Transp. Logistics*, Inc., No. 16-16, 2020 FMC LEXIS 216, at *5 (FMC Oct. 29, 2020). The standard of proof is preponderance of the evidence – Complainants must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transp. Logistics, Inc.*, No. 15-04, 2019 FMC LEXIS 44, at *10 (FMC July 16, 2019).

Under the Administrative Procedure Act (APA) and Commission precedent, Complainants have the burden of proving Respondents violated the Shipping Act, and this burden of proof does not shift. 5 U.S.C. § 556(d); *DSW Int'l Inc. v. Commonwealth Shipping*, Inc., 32 S.R.R. 763, 765 (FMC 2012). The Commission nonetheless applies a burden-shifting framework in unreasonable preference cases.

Section 41106(2) of Title 46 provides that a "marine terminal operator may not . . . give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person." To establish a claim, a complainant must show that: (1) the complainant and another person or entity are similarly situated or in a competitive relationship, (2) the complainant and the other person or entity were accorded different treatment by the respondent, (3) the unequal treatment is not justified by differences in transportation factors, and (4) the resulting prejudice or disadvantage is the proximate cause of injury. *Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 S.R.R. 1251, 1270, 1997 FMC LEXIS 32, at *90 (FMC 1997). "The complainant has the burden of proving that it was subjected to different treatment and was injured as a result and the respondent has the burden of justifying the difference in treatment based on legitimate transportation factors." *Id.*

To reconcile the APA's burden of proof with the Commission's burden-shifting approach, it is important to specify the burdens at issue. A complainant's burden of proof under the APA, which does not shift, is the burden of persuasion. *Maher Terminals, LLC v. The Port Auth. of N.Y. & N.J.*, No. 08-03, 2014 FMC LEXIS 35, at *41-*43 (FMC Dec. 17, 2014);[9] *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994) (holding that "the APA's unadorned reference to 'burden of proof'" refers to the burden of persuasion). The burden of persuasion is the "notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Greenwich Collieries*, 512 U.S. at 272.

The burden that shifts in an unreasonable preference case is the burden of production, *Maher*, 2014 FMC LEXIS at *42, which is "a party's obligation to come forward with evidence

[9] The *Maher* decision was remanded by the D.C. Circuit in 2016 on other grounds, but it was not vacated. *Maher Terminals, LLC v. Fed. Mar. Comm'n*, 816 F.3d 888 (D.C. Cir. 2016).

to support its claim," *Greenwich Collieries*, 512 U.S. at 272; *id.* at 274 (describing burden of production as burden "of going forward with evidence"). Consequently, although a respondent bears the burden of pointing to evidence justifying its conduct, a complaint bears the ultimate burden of proving that the respondent acted unreasonably. *Maher*, 2014 FMC LEXIS at *42; *Petchem, Inc. v. Fed. Mar. Comm'n*, 853 F.2d 958, (D.C. Cir. 1988) (affirming burden-shifting approach in a Shipping Act case). In other words, for the third element of a § 41106(2) claim, a respondent must point to some evidence about why it treated a complainant differently than someone else. If the respondent adduces such evidence, the complainant must then show that the justification is insufficient. For instance, a complainant might dispute the evidence, show that it is outweighed by contrary evidence, or argue that the proffered justification is not of the sort that the Commission legally may consider, i.e., it is not a legitimate factor.

In their exceptions, Complainants assert that the ALJ erroneously placed the burden of proof on them when the ALJ stated that "Complainants have not proved that the unequal treatment is not justified by differences in transportation factors." Complainants' Exc. to I.D.R. at 5, 8, 26-28. According to Complainants, this contradicts the D.C. Circuit Opinion and *Ceres*, 27 S.R.R. at 1270-71. Complainants contend that the burden to justify unequal treatment is on Respondents. Respondents counter that the ALJ appropriately distinguished between the burden of persuasion and burden of production and correctly placed the ultimate burden of establishing a violation on Complainants.

The ALJ did not err in applying the burden of proof. Although the ALJ stated that Complainants were required to show that Respondents' unequal treatment of them was not justified by differences in transportation factors, the ALJ distinguished between the burden of persuasion, which stays on Complainants, and the burden of production, which shifted to Respondents to justify their conduct. I.D.R. at 38. The ALJ relied on *Maher*, which clarified the burden shifting framework from *Ceres*. *Id.* The D.C. Circuit did not foreclose this approach. The court stated that if the complaining party establishes three of the four § 41106(2) elements, "the respondent marine terminal operator has the burden of justifying the differential treatment based on legitimate transportation factors." 889 F.3d at 796 (citing *Ceres*, 27 S.R.R. 1251 (FMC 1997)). The court did not say whether this burden was one of persuasion or production, and given this ambiguity, the ALJ correctly followed Commission precedent regarding the burden of proof.

B. Exceptions Regarding ALJ's Findings and Other Statements

In addition to their substantive arguments Complainants take exception to thirty-two specific statements in the I.D.R. Most of these exceptions dispute the ALJ's characterization of Complainants' claims and need not be discussed in detail.[10] Complainants also dispute Findings of Fact No. 26A, 27, 80, and 84. The challenges to FF26A, 27, and 80 are unpersuasive. Regarding FF26A, the ALJ did not suggest that taxis were common carriers under the Shipping

[10] Specifically, Exception Nos. 1, 2, 6, 7, 13, 14, 15, 23, 24, 26, 28, 29, 30, 31, and 32 fault the ALJ for not fully reflecting the scope of Complainants' arguments. Exception Nos. 3 and 12 involve the burden of proof, which is discussed above. Exception Nos. 4, 5, and 21 involve limousines, which are discussed below. And Exception Nos. 13, 14, 16, 17, 18, 20, 22, 23, 24, 25, 26, and 29 relate to claims and arguments that Complainants forfeited and waived, and thus these exceptions do not require specific Commission attention.

Act. FF27, which involved how much EZ Cruise saved by being charged per-space fees instead of per -trip fees, was based on Respondents' proposed findings of fact, and Complainants did not dispute the dollar amounts in the proposed finding, and thus their attempt to dispute the amount now is untimely. I.D.R. at 28 n.9. Nor is the challenge to FF80 well-taken. The ALJ correctly pointed out that Note D of the various tariffs did not provide a mechanism to determine billable parking spaces for hotels providing parking to cruise passengers. Note D does not define "billable parking spaces" or explain how one might distinguish billable from non-billable parking spaces.

Complainants further except to FF 84, which provides that "[w]ithout a change to City of Galveston taxicab regulations, an access fee imposed on taxicabs by the Port of Galveston could not be passed on to passengers." Complainants assert that this statement is overbroad because City of Galveston regulations would not apply to taxis licensed in other municipalities. Respondents counter that Complainants did not provide evidence on how often non-Galveston taxis access the cruise terminal and that "if Respondents have no control over the regulation of City of Galveston taxicabs, they surely do not have control over regulating taxicabs from other municipalities." There does not appear to be anything in the record about the ability of taxis regulated by other municipalities to pass-on per-trip fees. Consequently, FF 84 is overbroad.

The ALJ made eighty-four Findings of Fact in the I.D.R., all of which are supported by the record except for FF84, and the Commission adopts them. Regarding FF84, the Commission adopts it as amended to state: "Without a change to City of Galveston taxicab regulations, an access fee imposed on Galveston taxicabs by the Port of Galveston could not be passed on to passengers."

C. Claims Based on Tariff Treatment of Taxis

Complainants argue that Respondents violated § 41106(2) by charging Complainants monthly per-space fees under the Tariffs while charging taxis an annual decal fee, i.e., "exempting" taxis from per-space and per-trip fees.[11] This difference in treatment was reflected in the 2006 Tariff, 2007 Tariff, July 2014 Tariff, and October 2014 Tariff (insofar as it rescinded part of the July 2014 Tariff and maintained the $8.00 per-space fee regime through September 2014). Complainants also argue that Respondents violated § 41106(2) because the October 2014 Tariff, which eliminated the monthly per-space fee going forward, *still* treats taxis more favorably than Complainants; taxis are exempt from access fees whereas Complainants (and others accessing the cruise terminal) are charged per-trip fees under the October 2014 Tariff.

The ALJ found in Complainants' favor with respect to three of the four § 41106(2) elements,[12] and the Complainants do not challenge these findings, which are supported by the

[11] The ALJ and Complainants state that taxis were not charged anything under the Tariffs. I.D.R. at 47; Complainants' Exc. to I.D.R. at 23 (stating that Respondents gave taxis "free access" to the cruise terminal). But the ALJ found, and Complainants do not dispute, that taxis were subject to annual decal fees of $7.50 per vehicle. This discrepancy does not, however, appear to be relevant to the merits of Complainants' claims.

[12] These elements are often referred to as the "*Ceres I*" elements after *Ceres Marine Terminal, Inc. v. Maryland Port Admin.*, 27 S.R.R. 1251, 1270, 1997 FMC LEXIS 32 (FMC 1997).

record.[13] Complainants are not required to establish the first element. I.D.R. at 37 (citing FMC Order, 2017 FMC LEXIS 1 at *20-*24). Complainants were also treated differently than taxis under the Tariffs. Id. at 38. And, given the D.C. Circuit opinion, Complainants established that they were injured by Respondents' treatment of them vis-à-vis taxis. Id. at 47 ("When compared to taxicabs, however, the evidence supports a finding that Complainants were charged more – Complainants were charged for access while taxicabs were not charged anything at all."); D.C. Circuit Opinion, 889 F.3d at 797.

The issue, then, is whether Respondents have met their burden of pointing to evidence of legitimate transportation factors justifying their treatment of taxis compared to Complainants, and, if so, whether Complainants have established that the treatment is nonetheless unjustified. The ALJ found that Complainants failed to meet their burden on this element. The ALJ pointed out that Respondents provided evidence that they relied on taxis to move passengers effectively, getting sufficient taxi service had been a problem at the cruise terminal, and charging access fees on taxis would reduce the supply of taxis. I.D.R. at 44-46.

In their exceptions, Complainants maintain that Respondents did not justify the difference in treatment between Complainants and taxis by legitimate transportation factors. First, Complainants argue that the justifications cited by the ALJ were not "legitimate transportation factors." Complainants' Exc. to I.D.R. at 33. Second, they argue that Respondents have not justified exempting all taxis from per-space or per-trip fees when the evidence shows that it is City of Galveston taxis who cannot pass on these fees to customers. Third, Complainants argue that Respondents' statement that taxis "move a significant number of passengers" is (a) illogical because shuttle buses move more passengers than taxis, and (b) contradicted by Respondents' statement in their brief that "a relatively small number of cruise passengers arrive by" taxi. Id. at 34. Respondents maintain that the ALJ correctly decided this issue, and focus on Complainants' non-local taxis argument, asserting that "[i]f Respondents do not have control over the regulation of rates for local taxicabs, how could they have control over the regulation of rates for non-local taxicabs?" Respondents' Reply Exc. to I.D.R. at 34-35.

The ALJ did not err in dismissing Complainants' § 41106(2) claim with respect to taxis. Respondents produced evidence demonstrating that their decision to treat taxis differently than other entities accessing the cruise terminal (including Complainants) was justified by legitimate transportation factors. Legitimate factors for § 41106(2) purposes include relative costs of services and profit, the convenience of the public, and the need to assure adequate and consistent service to a port. *Maher Terminals, LLC v. The Port Auth. of N.Y. & N.J.*, 2016 FMC LEXIS 61, at *9-*11 (FMC Oct. 26, 2016) (citations omitted). The Commission's consideration of these factors is informed by the deference it shows to public port authorities. *Id.* at *10.

Respondents introduced evidence that to retain large cruise ships, they need to move passengers in and out of the cruise terminal safely and efficiently. Respondents' App. at 2076 (Mierzwa Aff. ¶¶ 36-40). The Board's Port Director (and former cruise terminal manager) averred that although cruise passengers have several transportation options, including

[13] Additionally, the Board is a marine terminal operator subject to § 41106(2).

Complainants' lots, "to move the passengers effectively we have to rely on taxicab services." *Id.* ¶¶ 41, 44, 47. The evidence also showed that Respondents have had difficulty maintaining sufficient taxi service at the cruise terminal. Respondents' App. at 1943 (2/27/2006 Meeting Minutes); *id.* at 2077, 2078 (Mierzwa Aff. ¶¶ 45, 47). Respondents concluded that "requiring taxicab companies to also pay Access Fees, or to collect and then remit Access Fees from passengers would be an additional disincentive to taxicabs servicing the Cruise Terminal and further reduce an already inadequate supply of taxicabs." *Id.* at 2077 (Mierzwa Aff. ¶ 45). Respondents pointed out that one problem with charging access fees on taxis was that Respondents could not do so unilaterally, as taxi rates and charges are set by the City of Galveston. *Id.* (Mierzwa Aff. ¶ 46). Additionally, Respondents produced evidence that taxi company representatives agreed that imposing access fees on taxis would reduce service to the cruise terminal. *Id.* at 2077-78 (Mierzwa Aff. ¶ 47); Id. at 2627 (Benham Aff. ¶ 5) ("However, if my company was charged an access fee, we would not be able to pass that fee onto our customers. Therefore, we would not economically be able to provide transportation to cruise terminal customers as we would lose money rather than make a profit."). There is no evidence that Complainants or others accessing the cruise terminal presented similar concerns.

Complainants have not rebutted this evidence or otherwise demonstrated that Respondents' decision to treat taxis differently than Complainants under the Tariffs was unjustified. Contrary to Complainants' suggestion, ensuring adequate and consistent taxi service to the cruise terminal is a legitimate transportation factor that justified Respondents' treatment of taxis as compared to others. *Petchem, Inc. v. Canaveral Port Auth.*, 23 S.R.R. 974, 990 (FMC 1986) (holding that exclusive terminal arrangements could be justified "to provide adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services and generally to advance the port's economic well-being."); *id.* at 992.

Further, Respondents' conclusion that they needed taxis to move passengers safely and efficiently in and out of the cruise terminal and to prevent traffic congestion are the sort of decisions to which the Commission defers. *Petchem*, 23 S.R.R. at 993. Complainants' argument that Respondents fail to justify exempting all taxis from per-trip or per-space fees because the evidence showed only that local (Galveston) taxis could not pass-on access fees is unpersuasive. It was not unreasonable for Respondents to focus on Galveston taxis when setting access fees for a Galveston cruise terminal. Further, Respondents did not justify the treatment of taxis simply because of the need to move "a significant number of passengers" through the cruise terminal. Complainants' Exc. to I.D.R. at 34. Rather, Respondents produced evidence that they needed taxis particularly and had trouble getting enough of them at the cruise terminal. Respondents' App. at 2077 (Mierzwa Aff. ¶¶ 44; *id.* at 1943 (2/27/06 Meeting Minutes). Finally, there is no contradiction between Respondents' statement in their brief that a "relatively small number of cruise passengers *arrive*" by taxi, Respondents' Corrected. Br. at 12 (emphasis added), and their statement that without taxis, Respondents would lack the means to move "a significant number of passengers efficiently *out of* the terminal" on cruise days, *id.* at 36 (emphasis added).

D. Claims Based on Tariff Treatment of Limousines

Complainants' claims about the treatment of limousines under the Tariffs mirror their claims regarding taxis. Namely, Complainants argue that Respondents unreasonably preferred

limousines or unreasonably prejudiced Complainants by charging Complainants monthly per-space fees under the Tariff while "exempting" limousines from per-space or per trip fees in lieu of an annual decal fee. This difference in treatment is reflected in the 2006 Tariff and the 2007 Tariff, although in the 2007 Tariff, only limousines with eight or fewer passengers were exempt from per-trip fees. Limousines with greater capacities were subject to per-trip fees under the 2007 Tariff. The July 2014 Tariff and October 2014 Tariff subject all limousines to per-trip fees.

The ALJ found in Complainants' favor with respect to three of the four § 41106(2) elements regarding limousines. As with taxis, and consistent with the Commission's prior analysis, the ALJ did not address the first element. I.D.R. at 37. The ALJ also determined that Complainants met their burden to show that the Tariffs treated Complainants differently than limousines. *Id.* at 38. As for the fourth element, the ALJ determined that assuming Respondents' treatment of limousines as compared to Complainants was unjustified, "Complainants would be disadvantaged or prejudiced an entitled to a reparation award for their actual injuries." I.D.R. at 47. Complainants do not challenge these findings, and they are supported by the record. *See also* D.C. Circuit Opinion, 889 F.3d at 797.

The ALJ found that Complainants failed, however, to meet their burden the on the third element. I.D.R. at 46. The ALJ first determined that it was reasonable for Respondents to charge limousines a per-trip access fee instead of a per-space fee because taxis and limousines do not have parking facilities. The ALJ then discussed taxis and then mentioned limousines in the conclusion of the taxi analysis. *Id.*

Complainants argue on appeal that this finding as to limousines was unsupported and unexplained. According to Complainants, limousines do not evoke the same alleged transportation factors that justified Respondents' treatment of taxis, and the ALJ failed to explain why the evidence and analysis regarding taxis applied to limousines. Complainants further argue that Respondents failed to produce any evidence justifying their treatment of limousines. Complainants also argue that Respondents have not and cannot justify exempting all limousines from per-trip fees in 2006 Tariff based on legitimate transportation factors when in the 2007 Tariff they only exempted certain limousines from per-trip fees.

Respondents counter that the record is "full of argument and evidence" justifying the differential treatment between Complainants and limousines. Respondents' Reply Exc. to I.D.R. at 35. Respondents rely on the ALJ's finding that limousine companies do not have parking spaces like Complainants. *Id.* at 36. Additionally, they argue that "the record is clear as to the sporadic nature of limousines accessing the Cruise Terminal, which causes problems when attempting to charge and collect Access Fees from individual limousine operators." *Id.*; *see also id.* at 37, 40.

The ALJ did not sufficiently explain his analysis regarding limousines. The only limousine-specific finding was that it was reasonable for Respondents to charge limousines per-trip fees instead of per-space fees. But that finding is not relevant to the issue Complainants raised, which is, why Respondents exempted some limousines from any access fees. The ALJ also erred by lumping limousines in with taxis. The I.D.R. does not explain how the factors that justified Respondents' treatment of taxis applied to limousines. As noted above, Respondents provided evidence that taxis were necessary for safe and efficient passenger transport and that

imposing access fees would result in insufficient taxi service. But there is no evidence that limousines were similarly vital to the cruise terminal or that imposing access fees on limousines would reduce limousine service to the point of impeding terminal operations. Respondents concede that limousines only sporadically access the cruise terminal. Respondents' Reply Exc. to I.D.R. at 37. Moreover, as Complainants point out, Respondents eventually did impose access fees on larger limousines, which undermines the argument that the limousine exemption was necessary to secure limousine service. And Respondents' Tariffs consistently treated taxis and limousines differently and defined them differently.[14]

Reviewing the issue *de novo*, the Commission finds that Complainants have established that Respondents' treatment of Complainants as compared to limousines was unreasonable. This is primarily because Respondents failed to meet their burden of producing evidence justifying the different treatment. Respondents did not address the "justification" element of § 41106(2) with respect to limousines in their 2015 brief. They argued that "differences in operations and transportation factors justify the exemption of *taxicabs*," but they make no similar argument with respect to limousines. Respondents' Corrected Br. at 35-37 (emphasis added).

At most, Respondents identified several differences between limousines and parking lots to show that they are not similarly situated or in a competitive relationship. Respondents provided evidence that: (1) limousines are not in the parking lot business; (2) the federal government classifies limousines and parking lots as different types of businesses; (3) cruise passengers are an incidental part of a limousine's customer base; (4) a relatively small number of cruise passengers arrive by limousines; (5) limousines access the cruise terminal sporadically from a few times a year to two times a month; (6) limousines are typically from out of town; (7) it is difficult to collect access fees from limousines; and (8) a number of limousine companies have refused to service the cruise terminal if they must pay a fee. Respondents' Corrected Br. at 12, 13-14, 14-15, 23 n.6, 29-30; *see also* Respondents' App. at 2086 (Murchison Aff. ¶ 25 ("Historically, it has been difficult to get limousines to pay these fees. Attempting collection efforts for such small fees has not been economically feasible")).

The problem is that Respondents have not shown how these facts relate to their decision to exempt certain limousines from per-trip access fees or that these facts were the bases for their decision. Differences between limousines and parking lots might be relevant to the first § 41106(2) element (which is inapplicable here), but these differences alone do not give the Commission any basis to assess the reasonableness of Respondents' limousine exemption. That limousines access the cruise terminal sporadically or are difficult to collect fees from *might* constitute legitimate transportation factors that *could* justify a port's decision to treat limousines differently than other entities. But Respondents do not make that argument, and there is no

[14] Under the Tariffs, a limousine is a "motor vehicle operated for commercial purposes that shall not have a taximeter, which is a luxury sedan with a manufacturer's rated seating capacity of not more than fifteen(15) passengers that is used for the transportation of people." Compl. Ex. A. A taxi is a "chauffeured motor vehicle[s], but not including limousines, that [are] equipped with a taximeter, and that has a typical rated passenger capacity of eight (8) passengers or less, used for the transportation of passengers for hire over the public streets of the city that typically operates on irregular routes, irregular schedules, and a call and demand basis, and irrespective of whether or not the operations extend beyond the city limits, at rates for distance traveled, or for waiting time, or for both, or at rates per hour, per day, per week, or per month and such vehicle is routed under the direction of the passenger hiring the same." *Id.*

evidence that these were the reasons why Respondents exempted limousines from access fees. That is, Respondents' evidence does not show that they exempted some limousines from access fees *because* collection efforts are not economically feasible. Rather, Respondents suggest that the difficulty of collection might be why they failed to charge other limousines that were subject to per-trip fees. Respondents' App. at 2086-86 (Murchison Aff. ¶¶ 25-27).

The closest Respondents get to a justification is the fact that "a number of [of limousine companies] refus[ed] to service the terminal if they must pay a fee." *Id.* at 23 n.6. But this statement relates to the conduct of limousine companies in 2014, and thus cannot serve as justification for the Tariffs' treatment of limousines in the 2006 Tariff and 2007 Tariff. Respondents' App. at 2087 (Murchison Aff. ¶ 27). Respondents also fail to link this fact to any transportation factor. With taxis, there is evidence that Respondents exempted taxis from access fees because they needed taxis and if they charged them access fees, inadequate taxi service would result. With limousines, there is no evidence that Respondents needed them in the same way and that charging fees would reduce limousine service to an insufficient level. And there is no evidence that Respondents considered taxis and limousines to be equivalent.

In sum, Respondents did not provide evidence that they exempted certain limousines from access fees based on legitimate transportation factors. Post-hoc rationalizations are insufficient. *See Ceres*, 1997 FMC LEXIS 32 at 101 n.52; *"50 Mile Container Rules" Implementation by Ocean Common Carriers Serving U.S. Atl. & Gulf Coast Ports*, No. 81-11, 1987 FMC LEXIS 20, at *210-*211 (FMC Aug. 3, 1987) (expressing skepticism of "post hoc rationalization"). To be clear, a port's burden to justify decisions involving terminal leases or fees like those at issue here is not a heavy one – as noted above, the Commission shows deference to public port authorities and will usually not second guess their reasoning. But a port authority must provide its reasoning before the any deference can be shown. The Commission therefore reverses the ALJ and finds that Respondent The Board of Trustees of the Galveston Wharves violated 46 U.S.C. § 41106(2).

E. Claims Based on Selective Enforcement of Tariff

Complainants also except to the I.D.R. on the grounds that the ALJ failed adequately to address their arguments that Respondents violated § 41106(2) by selectively enforcing the Tariffs. *E.g.*, Complainants' Exc. to I.D.R. at 22,23-25, 32-33, 36, 40, 42. There are two types of selective enforcement arguments. First, Complainants argue that although Respondents consistently charged Complainants the full amount required by the Tariffs, Respondents routinely charged others (such as shuttle buses) $10 per-trip when they should have been charged a higher amount based on the vehicle capacity. Second, Complainants argue that while they were charged the full amount required by the Tariffs, Respondents routinely failed to collect any access fees from limousines that were subject to per-trip fees under the 2007 Tariff and July 2014 Tariff. Respondents contend that the ALJ already addressed the selective enforcement arguments and that the arguments are unfounded.

The ALJ did not address these arguments. Consequently, the Commission reviews them *de novo*. The first selective enforcement claim fails because Complainants have not proved they were injured. Complainants have, however, proved their second selective enforcement claim.

1. Vehicles Charged $10 Per-Trip in Violation of Tariff

Complainants argue that while Respondents consistently charged them the monthly per-space fees in the Tariffs, Respondents did not collect the full amount owed by shuttle buses and other vehicles based on their capacity. The Commission has already determined that the first § 41106(2) element – showing that Complainants and others were similarly situated or in a competitive relationship – is not required in this case. FMC Order, 2017 FMC LEXIS 1 at *20-*24.

As for the second element, Complainants must show that Respondents treated them differently than another person or entity. Complainants point out that they were consistently charged full per-space access fees. Complainants' Exc. to I.D.R. at 42; Complainants' Reply Br. at 30 (citing Complainants' App. at 58-277 (invoices)). In contrast, Complainants contend that Respondents charged vehicles $10 per trip when fees as high as $60 per trip should have been charged. Complainants' Exc. to I.D.R. at 13, 23 n.2, 29, 32, 42. As evidence, Complainants rely on a footnote in Respondents' 2015 brief as a concession. Respondents stated:

> Despite the change [in the 2007 Tariff], the Port did not receive the benefit of this change until after the 2013-2014 review of cruise terminal access issues by Port staff (discussed below) disclosed an inadvertent failure to collect the higher amounts charged for larger buses and shuttle vans required by the amended Tariff. Specifically, the employee responsible for counting vehicles accessing the terminal apparently was not aware of the higher rates, and charged all such vehicles a $10 access fee per trip regardless of size – in violation of the Tariff. As a result, some commercial users paying access fees on a per-trip basis were charged less than they should have been charged. This oversight was corrected in August 2014, when a new employee took over the position.

Respondents' Corrected Br. at 21 n.5. The affidavit of Respondents' Director of Finance confirms these facts. Respondents' App. at 2086 (Murchison Aff. ¶ 23).

In their reply to the exceptions, Respondents acknowledge this footnote, but nonetheless assert that the evidence shows there was no selective enforcement. Respondents' Reply Exc. to I.D.R. at 21, 40. Respondents rely on the affidavit of their expert witness, an accountant. Respondents' Reply Exc. to I.D.R. at 21 (citing Respondents' App. at 2767-69 (Compton Aff.). The cited pages of the affidavit do not, however, address Complainants' selective enforcement claims.

The evidence shows that Respondents consistently charged Complainants the monthly per-space access fees set forth in the Tariffs, but that Respondents did not charge others in accordance with the Tariffs. Instead, Respondents charged vehicles $10 per trip regardless of capacity.[15] This disparate treatment began no earlier than December 17, 2007, the effective date

[15] The Shipping Act requires common carriers to abide by the terms of their published tariffs. 46 U.S.C. § 41104(a)(2). This provision does not apply to marine terminal operators and their schedules.

of the 2007 Tariff, and appears to have ended on July 31, 2014. FF 50 (noting date of 2007 tariff amendment); Respondents' Corrected Br. at 21 n.5 (stating that the "oversight" was corrected in August 2014).[16] Complainants have thus met their burden to show the second element of § 41106(2).

Complainants have also met their burden of showing that Respondents' selective enforcement of the Tariffs with respect to other shuttle buses was unreasonable. Respondents bear the initial burden of producing evidence justifying the differential treatment of Complainants. Respondents have not met that burden – they do not attempt to justify their conduct in response to Complainants' exceptions. The only evidence in the record is the Murchison affidavit and Respondents' acknowledgment in their 2015 brief. Mr. Murchison, Respondents' Director of Finance, explains that Respondents failed to collect full access fees from shuttle buses because the "employee responsible for counting access trips and submitting charges to my staff charged all vehicles at the $10/trip rate regardless of passenger capacity." Respondents' App. at 2086 (Murchison Aff. ¶ 23); id. ("She simply did her job correctly."); Respondents' Corrected Br. at 21 n.5.

Complainants persuasively argue that this justification is not cognizable under § 41106(2). Complainants' Exc. to I.D.R. at 43 (arguing that "it is not within the shelter of a discretionary business decision for a marine terminal operator to routinely enforce its published tariff against only certain port users, while giving advantageous, reduced, and/or free access to other port users"). The Commission considers several factors in the unreasonable preference analysis. *Maher Terminals*, 2016 FMC LEXIS 61 at *9-*11. None of these factors apply here, and the parties cite no authority for the proposition that a marine terminal operator's mistake is a legitimate factor that justifies unequal treatment. And while the Commission defers to a public port authority's decisions based on its familiarity with local business circumstances, there was no decision here to defer to.

This does not mean that every mistake by a marine terminal operator employee that results in some terminal users being treated differently than others is necessarily a § 41106(2) violation. The standard is reasonableness. Here, however, Respondents' failure to apply the tariff endured for years. Moreover, even after Respondents discovered the problem as part of a study, they did not correct it for several months. *See* Respondents' App. at 2084, 2086 (Murchison Aff. ¶¶ 13, 23).[17]

Complainants' selective enforcement claim with respect to shuttle buses nonetheless fails on the fourth § 41106(2) element because Complainants have not established that they were injured by being charged $8.00 per-space access fees when shuttle buses and others only paid $10 per-trip (when they should have paid more under the Tariffs). The ALJ found, and the

[16] There is no evidence regarding when in August 2014 Respondents began enforcing the greater-than-$10 per-trip fees. Given Complainants' burden of proof, the Commission assumes that the Respondents enforced the fees as of August 1, 2014.

[17] The employee's error was discovered by a group studying access fees in 2013-2014. Respondents' App. at 2085 (Murchison Aff. ¶ 23). The study was apparently complete as of May 2014, when the group recommended tariff changes. *Id.* at 2084 (Murchison Aff. ¶ 13). But the tariff-enforcement error was not resolved until August 2014. Respondents' Corrected Br. at 21 n.5.

Commission affirmed, that Complainants were not injured by paying $8.00 per-space instead of $10 per-trip. FMC Order, 2017 FMC LEXIS 1 at *34-*36. As explained below, Complainants never appealed that finding and waived any challenge to it at oral argument. Nor is this conclusion inconsistent with the D.C. Circuit Opinion. The court found that Complainants "were plainly injured when they were charged more than other commercial passenger vehicles." 889 F.3d at 797. But Complainants were not charged *more* than shuttle buses who paid $10 per-trip due to a mistake. The court was comparing Complainants to taxis and limousines. *Id.* at 796 ("The Port charged Petitioners' shuttle buses more than the Port charged taxis and limos. Petitioners challenge that differential treatment.").

Complainants also argue unpersuasively that Respondents' selective enforcement of the Tariffs against shuttle buses caused Complainants to "subsidize" other commercial passenger vehicles' use of the cruise terminal. But Complainants paid access fees at the rate of $8.00 per-space from 2006 through October 2014. This fee did not increase when, beginning in 2007, Respondents failed to collect the correct amounts from shuttle buses. There is also no evidence that Respondents set Complainants' per-space fees at $8.00 to allow Respondents to later misapply the Tariffs against shuttle buses and charge them only $10 per-trip regardless of capacity. In other words, Complainants have not shown that they paid more because of Respondents' error, or that they would have benefited by having the same error applied to them.

2. Limousines Charged Nothing in Violation of Tariff

Complainants' second "selective enforcement" claim is that while Respondents consistently charged them the monthly per-space fee in the Tariffs, Respondents did not charge limousines the per-trip fees set forth in the 2007 Tariff and July 2014 Tariff. Complainants' Exc. to I.D.R. at 36 (arguing that "even limousines that should have been charged Access Fees were granted free access to the Cruise Terminal"). The first § 41106(2) element is not required in this case. FMC Order, 2017 FMC LEXIS 1 at *20-*24.

Complainants have established the second element: different treatment. Respondents consistently charged Complainants full per-space access fees. Complainants' Exc. to I.D.R. at 42; Complainants' Reply Br. at 30 (citing Complainants' App. at 58-277 (invoices)). Beginning in 2008, Respondents did not charge limousines the applicable per-trip fees. According to Respondents' 2015 brief:

> *The same study also determined that limousines were not being charged as well*. Prior to Hurricane Ike's landfall on September 13, 2008, limousines were charged as per the tariff. As noted even by Complainants access by limousines is extremely small in number compared to other users (297 in 2014 when compared to the unlimited trips made by Complainants). Given past history, the loss of revenue was extremely small. However, as part of this 2013-2014 staff study, the Wharves resolved to enforce access rates on limousines after replacing the person at the entrance gate in August of 2014. Unfortunately, efforts to collect against these companies persist, with a number refusing to service the terminal if they must pay a fee. Affidavit of Mark Murchison at § 25 (Resp. App. Tab 77 at p. 2086). The matter is still under review.

Respondents' Corrected Br. at 23 n.6 (emphasis added). Mr. Murchison stated in his affidavit that limousines access the cruise terminal irregularly and much less often than local users. Respondents' App. at 2086 (Murchison Aff. ¶ 24). Historically, he stated, "it has been difficult to get limousines to pay these fees. Attempting collection efforts for such small fees has not been economically feasible." *Id.* (Murchison Aff. ¶ 25); *id.* at 2087 (Murchison Aff. ¶ 27) (describing collection difficulties in 2014). As to why Respondents stopped collecting per-trip fees, Mr. Murchison explained that "[t]he employee at the gate stopped keeping track of limousines and the billing stopped." *Id.* at 2087 (Murchison Aff. ¶ 26).

Complainants have also met their burden of persuasion on the third § 41106(2) element because Respondents have not given a legitimate reason for treating limousines differently than Complainants from 2008 to August 2014. Respondents failed to enforce the Tariffs against limousines for six years due to employee error – the employee stopped keeping track of limousines. Respondents' App. at 2087 (Murchison Aff. ¶ 26). This is not a reasonable basis for a marine terminal operator to apply its terminal schedule unevenly under the factors typically considered by the Commission. 2016 FMC LEXIS 61 at *9-*11. Nor is this oversight the type of decision the Commission can defer to. To adopt Respondents' view would effectively allow a marine terminal operator to enforce its schedule against one person but not another so long as the marine terminal operator could show that recouping the uncollected fees would be expensive or difficult. When coupled with the duration of the disparate treatment, Complainants have demonstrated that Respondents' conduct was not reasonable.

Finally, Complainants have proved injury. While their subsidization argument does not have merit, Complainants paid more ($8.00 monthly per-space fees) than did limousines against whom the Tariffs were not enforced ($0). The D.C. Circuit has made clear that this suffices to meet the injury element of § 41106(2). D.C. Circuit Opinion, 889 F.3d at 797. Consequently, Complainants have proved that Respondent The Board of Trustees of the Galveston Wharves violated the Shipping Act. As explained below, this violation largely overlaps with the other violation involving limousines, the only practical effect being one month's worth of reparations (July 2014) about which the evidence is unclear.

F. Claims Implicating Waiver and Related Issues

1. Claims Regarding Per-Trip Fees

In the 2015 Initial Decision, the ALJ found that Complainants had not proved a § 41106(2) violation because, among other reasons, they had not met their burden of demonstrating that they were injured by being charged a monthly $8.00 per-space fee instead of being charged $10.00 per trip like hotel shuttle buses. I.D., 2015 FMC LEXIS 44 at *79, *82-*121.[18] The Commission affirmed the ALJ's finding, concluding that "Complainants failed to

[18] The 2007 Tariff and subsequent Tariffs contain per-trip fees higher than $10 per-trip. It does not appear, however, that Complainants ever argued that they were unreasonably prejudiced by not being charged these higher per-trip fees. Moreover, given the finding that Complainants were not injured by paying $8.00 per-space compared to $10 per-trip, which Complainants declined to challenge, it follows that they were not injured when they avoided paying greater-than-$10 per-trip fees.

demonstrate that they suffered any injury resulting from paying the $8.00 per space per month fee as opposed to per trip fees." FMC Order, 2017 FMC LEXIS 1 at *31-*37.

Complainants did not appeal that aspect of the FMC Order and did not challenge the Commission's analysis of the $10 per-trip access fee vis-à-vis the monthly $8.00 per space access fee. Instead, they argued on appeal that the Commission should have also compared the per-space fee to the Tariffs' treatment of taxis and limousines, which were exempt from per-space or per-trip fees. Br. of Pet'rs at 12, 13, 21, 25, *Santa Fe Discount Cruise Parking v. Fed. Mar. Comm'n*, No. 17-1089 (D.C. Cir. July 31, 2017). Further, Complainants stated at oral argument that they were not appealing the Commission's dismissal of their § 41106(2) claims with respect to the per-trip access fees. Audio Tr. of Oral Arg. at 10:20-10:51, 25:52-26:21, *Santa Fe Discount Cruise Parking v. Fed. Mar. Comm'n*, No. 17-1089 (D.C. Cir. Mar. 12, 2018).

On remand, the ALJ nonetheless addressed Complainants' claims that the per-space fee was unreasonably prejudicial as compared to the per-trip fees in the Tariffs. The ALJ not only reiterated the prior finding that Complainants were not injured by the difference, but the ALJ also found that Complainants had not shown the treatment of hotel shuttles versus Complainants was unjustified. I.D.R. at 40-43, 47, 49-63. Complainants argue that the ALJ erred in both respects.

The Commission declines to consider these arguments, however, because Complainants forfeited the right to challenge the Commission's injury determination regarding per-trip fees compared to per-space fees by not raising the challenge in their appeal to the D.C. Circuit. *See Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) (holding that a party forfeits an argument not raised in its briefs). Complainants also waived the issue by representing to the court that they were not appealing that aspect of the FMC Order. *See generally Wood v. Milyard*, 566 U.S. 463, 470 n. 4 (2012) ("A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve."); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, (D.C. Cir. 1987). And Complainants acknowledged that the only issues before the Commission on remand involved taxis, limousines, and selective enforcement in their post-remand filings. Statement of Complainants at 4-10 (Sept. 5, 2018); *see also* Complainants' Exc. to I.D.R. at 2 (stating that "all that remains to be determined is whether Respondents, in the record, had justified the differential treatment of Complainants as opposed to taxicabs and as opposed to limousines, by legitimate transportation factors"). Consequently, the Commission affirms the dismissal of Complainants' claim that being charged a monthly per-space fee as opposed to a per-trip fee violates § 41106(2) for the reasons set forth in the FMC Order, 2017 FMC LEXIS 1 at *31-*37.

For similar reasons, the Commission rejects Complainants' argument that Respondents unreasonably preferred hotels, or unreasonably prejudiced Complainants, because the access fees were structured so that hotels could avoid paying per-trip fees on their shuttle bus trips by using taxis and limousines, whereas Complainants were charged a per-space fee regardless of whether

they used taxis and limousines instead of their shuttle buses.[19] Specifically, Complainants argue that they "were and remain unable to arrange for their customers to be transported to or from the Cruise Terminal by taxicabs or limousines without Complainants themselves being charged Access Fees." Complainants' Exc. to I.D.R. at 29. In contrast, "[h]otels, by not being designated or treated as 'Off-Port Parking Users' (despite meeting the definition), are allowed to arrange for their customers who park their cars at the hotels' parking lots for the duration of a cruise, for such transportation without the hotels being charged Access Fees by Respondents." *Id.* at 29-30.

This is not, however, a separate § 41106(2) claim. It is instead a different way of complaining about the differences between the monthly per-space access fees and the per-trip access fees. The Commission previously found that the monthly per-space access fee regime "allowed Complainants unlimited access to the cruise terminal" and "might have benefitted the Complainants by maximizing customer satisfaction through prompt service while minimizing customer complainants of delayed service." FMC Order, 2017 FMC LEXIS 1 at *36; I.D.R. at 3, 11; FF 37. Complainants now identify a downside of being charged a flat fee instead of a variable one: they were unable avoid the per-space fee in the same manner that hotels could avoid the per-trip fee by using other forms of transportation. In other words, Complainants argue in their exceptions that the injury analysis accounted for the upside of a flat terminal access fee but not the downside.

But, as noted above, Complainants expressly declined to appeal the Commission's injury analysis with respect to per-space and per-trip fees. If Complainants felt that the Commission erred in this regard, it was incumbent on them to raise the issue with the D.C. Circuit. Because they did not do so, the Commission will not revisit the issue.

The Commission also finds unpersuasive Complainants' suggestion that Respondents should have treated hotels as "Off-Port Parking Users" and charged hotels per-space fees instead of per-trip fees. *See, e.g.*, Complainants' Exc. to I.D.R. at 29 (noting that hotels were not designated or treated as Off-Port Parking Users "despite meeting the definition"). In the 2015 Initial Decision, the ALJ found that hotels "are off-port parking users within the meaning of the tariff." 2015 I.D., 2015 FMC LEXIS 44 at *73. The Commission disagreed and determined that hotels are not Off-Port Parking Users under the Tariffs. FMC Order, 2017 FMC LEXIS 1 at *28-*30. Complainants did not dispute the Commission's determination on appeal. Consequently, they forfeited any arguments based on hotels falling within the Tariffs' definition of Off-Port Parking Users.

2. Lighthouse Parking, Inc.'s Claims

There are three Complainants in this case, and the Commission dismissed all their claims

[19] Some of Complainants' statements suggest that the Tariffs prohibited them from using taxis and limousines to transport their customers. *See, e.g.*, Complainants' Exc. to I.D.R. at 25 ("Similarly, the ALJ fails to consider the Section 4106(2) violation arising from Respondents not allowing Complainants to arrange taxicabs and limousines for the transport of their customers."). But the Tariffs did not bar Complainants from using taxis and limousines. Rather, the "flat" nature of the monthly per-space fee meant that Complainants were charged access fees even if they used taxis or limousines instead of their own shuttle buses.

in its 2017 Order. Complainants EZ Cruise and 81st Dolphin petitioned for review of the FMC Order, but Lighthouse Parking did not. *See* Pet. for Review, *Santa Fe Discount Cruise Parking v. Fed. Mar. Comm'n*, No. 17-1089 (D.C. Cir. Mar. 14, 2017); Br. of Pet'rs at 2 n.3, *Santa Fe Discount Cruise Parking v. Fed. Mar. Comm'n*, No. 17-1089 (D.C. Cir. July 31, 2017) (noting that Lighthouse Parking "did not join in this appeal"). Consequently, the FMC Order became final as to Lighthouse when it declined to appeal. *Nat'l Ass'n of Broadcasters v. FCC*, 554 F.2d 1118, 1124 (D.C. Cir. 1976) ("It is the generally accepted rule in civil cases that where less than all of the several co-parties appeal from an adverse judgment, a reversal as to the parties appealing does not necessitate or justify a reversal as to the parties not appealing."); *Spradlin v. Williams*, 521 B.R. 1, 19 (Bankr. E.D. Ky. 2014) ("A reversal or vacatur of a judgment in an appeal brought by one party does not upset that judgment or like judgments' preclusive effect as to the non-appealing parties."). The Commission therefore affirms the dismissal of Lighthouse's claims against Respondents based on the FMC Order and the reasoning therein.[20]

G. Reparations

The Commission finds that Respondent The Board of Trustees of the Galveston Wharves violated § 41106(2) in two ways. First, it engaged in an unreasonable prejudice or preference by charging Complainants monthly $8.00 per-space access fees while exempting certain limousines from per-space or per-trip access fees. This violation began in August 2006 on the effective date of the 2006 Tariff and ended when the July 2014 Tariff removed the preferential treatment of limousines. The reparations period is therefore August 15, 2006 to June 30, 2014. Second, the Board engaged in an unreasonable preference or prejudice by consistently charging Complainants access fees while failing to enforce per-trip access against certain other limousines as set forth in the Tariffs. This violation began in 2008 when Respondents stopped enforcing per-trip fees against limousines and ended when Respondents began enforcing access fees against limousines in August 2014. This reparations period is 2008 to July 31, 2014.

The ALJ found that the statute of limitations barred reparations for access fees paid before June 16, 2011. I.D.R. at 66. Complainants did not except to the ALJ's findings regarding the statute of limitations, and the Commission affirms it. Considering the statute of limitations, the period of reparations for the first violation is June 16, 2011 to June 30, 2014. The period of reparations for the second violation is June 16, 2011 to July 31, 2014. These periods overlap with only one month's difference. Because the measure of reparations is the same for both violations, the combined reparations period is June 16, 2011, to July 31, 2014.

As for how to calculate reparations, the ALJ found that "because the taxicabs and limousines were not charged for access, that injury would be measured by the difference between the amount charged Complainants and the amount charged taxicabs and limousines – zero." I.D.R. at 66. "Therefore, Complainants' damages would be all of the access fees that they paid to the Port." *Id.* Neither party objects to this conclusion.

[20] Complainants also alleged that Respondents unreasonably exempted from access fees two private parking lots whose customers walk to the cruise terminal and unreasonably prohibited Complainants from entering the terminal through the "back" gate. Am. Compl. ¶¶ EE-GG, V.G.5. The ALJ dismissed these claims as abandoned because Complainants did not address them in their briefs. I.D.R. at 18-19. Neither party excepts to this finding, and the Commission affirms the dismissal of these claims.

The Commission therefore remands this case to the ALJ to consider an appropriate reparations award for the period of June 16, 2011, to July 31, 2014 for EZ Cruise and 81st Dolphin. The record has data on EZ Cruise and 81st Dolphin access fee payments for all months except July 2014. *See* Complainants' App. at 45-56 (Galveston Wharves Historical Detailed Trial Balance, Access Fees); *id.* at 110-140, 234-271. On remand, EZ Cruise and 81st Dolphin would have the opportunity to prove the amount of access fees they paid that month. The ALJ may also consider whether and how to pro-rate June 2011 and the extent to which decal fees affect the reparations calculation – while taxis and limousines did not pay per-trip or per-space access fees under the tariffs, they did pay decal fees.

H. Attorney Fees

The ALJ determined that Respondents were prevailing parties. I.D.R. at 68. Because the Commission is reversing the ALJ's liability determination, the Commission vacates the ALJ's prevailing party finding. It would be premature to make any additional findings on attorney fees. The appropriate time to address attorney fees is when addressing a timely petition under 46 C.F.R. § 502.254(c). That said, the Commission notes that it has previously spoken to the applicability of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022, 3056 (Dec. 18, 2014) (Coble Act), in situations where a case was pending as of enactment, but reparations were awarded after enactment. In its final rule on attorney fees, the Commission indicated that the Coble Act would likely apply in that scenario. Final Rule: Organization and Functions; Rules of Practice and Procedure; Attorney Fees, 81 Fed. Reg. 10508, 10516-17 (Mar. 1, 2016).

III. CONCLUSION

The Commission:

(1) reverses the Initial Decision on Remand in part and finds that Respondent The Board of Trustees of the Galveston Wharves violated 46 U.S.C. § 41106(2) with respect to Complainants EZ Cruise and 81st Dolphin;

(2) remands this case for further proceedings on reparations for the § 41106(2) violations;

(3) vacates the Initial Decision on Remand with respect to the prevailing party determination and attorney fees; and

(4) affirms the Initial Decision on Remand in all other respects.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

CMI DISTRIBUTION, INC., *Complainant*,

v.

SERVICE BY AIR, INC., RADIANT CUSTOMS SERVICES INC. (FORMERLY KNOWN AS SBA CONSOLIDATORS, INC.), AND LAS FREIGHT SYSTEMS LTD., *Respondents*.

DOCKET NO. 17-05

Served: July 26, 2021

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Michael A. KHOURI, Louis E. SOLA, Carl W. BENTZEL, *Commissioners*. Chairman MAFFEI filed a concurring opinion.

ORDER AFFIRMING-IN-PART AND REVERSING-IN-PART INITIAL DECISION

This case is before the Commission on the parties' exceptions to the Administrative Law Judge's (ALJ) Initial Decision finding that Respondent Service by Air, Inc. (SBA), violated 46 U.S.C. §§ 40501(a), 40901(a), 41102(c), and 41104(a)(2)(A). The ALJ awarded Complainant reparations of $126,185 for the § 41104(a)(2)(A) violation and directed SBA to cease and desist acting as an unlicensed NVOCC without a published tariff. The ALJ dismissed the claims against Respondents Radiant Customs Services, Inc. (Radiant), and LAS Freight Systems Ltd. (LAS Freight).

For the reasons set forth below, the Commission affirms-in-part and reverses-in-part the Initial Decision. The Commission affirms the findings that SBA violated 46 U.S.C. §§ 40501(a), 40901(a), and 41104(a)(2)(A) and affirms the dismissal of the claims against Radiant and LAS Freight. The Commission declines to adopt, however, the Initial Decision with respect to 46 U.S.C. § 41102(c) because the evidentiary record is unclear on that issue and it has no bearing on Complainant's relief. Regarding that relief, the Commission reverses the Initial Decision as to reparations and instead awards Complainant reparations of $112,902, plus interest of $7181.59, totaling $120,083.59. Finally, the Commission reverses the ALJ's issuance of a cease-and-desist order.

I. BACKGROUND

A. Factual Background

Complainant CMI Distribution, Inc. (CMI) imports plastic packaging materials from China and sells them on the United States wholesale market and has its principal place of

business in Wheeling, Illinois. Initial Decision (I.D.) at 29-30.[1] Respondent SBA is certified by the Transportation Security Administration to operate as an indirect air carrier but is not licensed by the Commission as a non-vessel operating common carrier (NVOCC) and does not have a published tariff for ocean freight rates. *Id.* at 30. During the time period relevant to CMI's claims, SBA had a wholly owned subsidiary called SBA Consolidators that was a licensed NVOCC. *Id.* In 2017, SBA Consolidators' NVOCC license was transferred to Respondent Radiant. *Id.* Radiant is owned by the same parent company as SBA but operates as a separate entity. *Id.* Respondent LAS Freight is a Taiwanese company and is registered with the Commission as a foreign NVOCC. *Id.* at 30-31.

In 2013 and 2014, CMI used UTi, United States, Inc. (UTi), a licensed NVOCC, to transport goods from China to the United States. *Id.* at 31; CMI's Opening Br. in Supp. of Claims against SBA (CMI Br.) at Ex. A ¶ 6 (Decl. of Maria T. Vega) (Apr. 6, 2018). UTi shipped the goods under a negotiated rate arrangement (NRA) with CMI that specified rates for transporting by water plastic deli bags, paper towels, and rubber gloves from China to U.S. destinations. I.D. at 31; CMI's Notice of Filing (CMI Notice) at Ex. 2 (June 5, 2018).

Beginning in 2014, CMI and SBA engaged in discussions about having SBA transport goods from China to the United States for CMI. I.D. at 30. According to CMI's Financial Controller Maria T. Vega, "SBA represented that it could provide the same type of services that UTi had been providing to CMI." CMI Br. at Ex. A ¶ 9; *see also id.* at Ex. B at 67-68 (Bryan Tincher Dep.);[2] I.D. at 20. Emails between CMI and SBA reflect discussions about ocean freight rates taking place in August 2014. CMI Br. at Ex. A-1.[3] Subsequently, CMI provided SBA with UTi's rates and said that SBA needed to "match or beat" them. *Id.* After reviewing UTi's rates, SBA International Manager Bryan Tincher stated that, accounting for a recent GRI (general rate increase), he thought SBA would be competitive. *Id.*; *see also id.* at Ex. B (Tincher Dep. 15:5-19) During these discussions, Mr. Tincher described UTi's NRA as an "ocean tariff." *Id.* at Ex. A-1.

Mr. Tincher also provided CMI with what he described as SBA's "tariff." This document mirrored UTi's rate spreadsheet. CMI Notice at Ex. 2. SBA appears to have copied its rates into the UTi spreadsheet and imposed the SBA letterhead. CMI Br. at Ex. A-2. The document retained references to an "NRA" number, and the bottom of the document refers to UTi and the "Carrier's Rules Tariff" available on UTi's website. *Id.* It purported to be effective from August 27 to September 27, 2014, and the rates quoted in the document are for "Ocean Freight." *Id.*

[1] The facts recited are based on the ALJ's findings, which the Commission adopts excepted as otherwise noted regarding reparations.

[2] The testimony of Mr. Tincher, SBA's International Manager, is equivocal on this point: "Q: Essentially, though, you were saying 'Listen, we provide the same type of service as UTI, right,' right? A: Yes. Q. But that's not accurate is it? A. I wouldn't say that. Q. You provide the same service as UTI? A. I don't know what UTI did. So I can't answer that question. I don't know what exact services they were doing. I mean, there are similarities." CMI Br. at Ex. B at 67-68. Mr. Tincher testified, however, that he did not think it was necessary to make a distinction between SBA's services and UTI's services. *Id.*

[3] The Vega deposition can be found at RX 4-71 and the Jalowiecki declaration can be found at RX 113-15 as exhibits to the Decl. of Steven Block (Block Decl.) (May 2, 2018).

Based in part on this information, CMI shipped with SBA through June 2015. I.D. at 33, 44-73; CMI Br. at Ex. A (Vega Decl. at ¶ 19). In October 2014, SBA sent CMI a document titled "CMI Packaging and Distribution FOB Tariff." I.D. at 33. This document contains a list of ports of origin, ports of discharge, and destinations, each with a freight rate based on different sizes of containers. *See id.*; CMI Br. at Ex. A-3. The "tariff" states that it does not include demurrage and detention, and that "all rates are subject to SBA Global Terms and Conditions." CMI Br. at Ex. A-3. SBA sent CMI a similar "FOB Tariff" in February 2015. *Id.*

For the shipments at issue, SBA engaged Respondent LAS Freight, a foreign registered NVOCC, to transport them from China to the United States. I.D. at 34. LAS Freight often issued bills of lading naming the Chinese supplier as the shipper and CMI as the consignee. *See, e.g.*, *id.* at 41, 47, 51.[4] LAS Freight would usually then engage with other NVOCCs. *Id.* at 34. These entities also issued bills of lading, with the same port of loading as the LAS Freight bills of lading, and naming LAS-SWEG Logistics as the shipper and SBA as the consignee and notify party. *See, e.g.*, *id.* at 41, 43, 46, 48; Joint App. at JA 191, 200. For inland segments of the route and drayage services, SBA contracted with Freight Tech Cartage, Inc. (Freight Tech) and other companies. I.D. at 34.

Once a vessel with a relevant shipment arrived, the NVOCC who issued the bill of lading naming SBA as the consignee would send SBA an "arrival notice/freight invoice." *E.g.*, I.D. at 17 (citing Joint App. at JA00146); *id.* at 40-41. The arrival notices/invoices, like the bills of lading, listed LAS-SWEG Logistics as the shipper and SBA as the consignee and notify party. *E.g.*, *id.* at 28, 40, 67. SBA would pay the NVOCC and then invoice CMI for ocean freight, usually for a higher amount than the NVOCC listed on its arrival notice/freight invoice. *See generally id.* at 40-73. Freight Tech and other drayage providers invoiced SBA directly for storage and other charges. *Id.* at 71. SBA would then collect these charges from CMI with a markup. *Id.* at 40-73.

For cargo to be released to CMI, CMI had to first pay its Chinese suppliers. These suppliers instructed LAS Freight, who in turn instructed SBA, not to release a shipment to CMI until payment was confirmed by telex release. *Id.* at 3-6, 34-35. Problems arose under this arrangement when CMI began experiencing cash-flow problems that delayed payments to its suppliers, which led to demurrage charges accruing when SBA withheld containers pending receipt of the supplier's telex release. *Id.* at 36. Later in its dealings with CMI, SBA withheld CMI's shipments until it received money it was allegedly owed for demurrage and related charges on past shipments. *Id.* at 26, 36.

B. Procedural History

CMI filed this action in May 2017 seeking reparations for Respondents' alleged Shipping Act violations in arranging transportation for its shipments from China to the United States. Compl. ¶¶ 32-38. CMI alleged that Respondents violated 46 U.S.C. § 40901 by acting as OTIs without a license, § 40501 by failing to maintain tariffs showing their rates, and §

[4] In other instances, LAS Freight's bills of lading named CMI as the shipper and a third party as the consignee. *See, e.g., id.* at 43, 44, 45, 46.

41104(a)(2)(A) by charging rates that were not contained in a published tariff. CMI also alleged that Respondents violated 46 U.S.C. § 41102(c) by charging for storage and demurrage without notice or published tariffs, adding markups to demurrage assessed by third parties while representing that the amounts were purely pass-through charges, charging demurrage in situations where no demurrage was properly owed to the underlying third party, and failing to provide CMI with a variety of documents. *Id.* at ¶¶ 32-42.

Following motion practice in which the ALJ dismissed claims involving shipments outside the Commission's purview, the ALJ issued an Initial Decision on May 24, 2019, finding in CMI's favor with respect to 28 shipments. The ALJ ordered SBA to pay CMI reparations of $126,185 based on the § 41104(a)(2)(A) claim and "demurrage" imposed on a subset of the shipments and further ordered SBA to cease and desist acting as an NVOCC without a license or published tariff. The ALJ dismissed with prejudice the claims against Radiant and LAS Freight.[5]

Both SBA and CMI filed timely exceptions challenging the ALJ's Initial Decision. SBA argues that it is not an NVOCC subject to the Shipping Act, and that the ALJ's findings regarding reparations and cease and desist relief were erroneous. CMI asserts that it is entitled to an additional $121,815 in reparations but does not otherwise challenge the ALJ's findings.

II. DISCUSSION

A. Legal Standards

When the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore reviews the ALJ's findings de novo. *Id.*; *see also Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 12-02, 2015 FMC LEXIS 43, *110-*11 (FMC Dec. 18, 2015). Complainants bear the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 FMC LEXIS 35, *41 (FMC Dec. 17, 2014). Under the preponderance standard, Complainants must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transp. Logistics, Inc.*, FMC Docket No. 15-04, 2019 FMC LEXIS 44, at *10 (FMC July 16, 2019).

B. SBA Status as Common Carrier and NVOCC

SBA's liability depends on whether it is a regulated entity, in this case, a common carrier or NVOCC, the latter being a type of common carrier. *See* 46 U.S.C. §§ 40501, 40901, 41102(c), 41104. The analysis focuses on SBA's status with respect to the 28 shipments at issue. *See generally MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, FMC Docket No. 16-16, 2020 FMC LEXIS 216, *6 (FMC 2020) (whether § 41102(c) applies depends on whether the respondent was acting as a common carrier for particular cargo); *Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, FMC Docket No. 08-04, 2011 FMC LEXIS 9, *39-*40 (ALJ

[5] In a separate order issued the same day, the ALJ struck CMI's freight overpayment claim and certain documents as untimely.

Mar. 9, 2011) (common carrier status depends on handling of particular shipments at issue).

1. SBA as Common Carrier

Common carriers are defined by three traits. They: (1) hold themselves out to the general public as providing transportation by water for passengers or cargo between the United States and a foreign country; (2) assume responsibility for transporting the passengers or cargo from the port or point of receipt to the port or point of destination; and (3) use, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a United States port and a foreign port. 46 U.S.C. § 40102(7); 46 C.F.R. § 515.2(e); *see also Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 497 (D.C. Cir. 2009) ("[A] person or entity that provides NVOCC services falls within the ambit of [46 U.S.C. § 40901] only when it 'holds itself out to the general public to provide transportation' and 'assumes responsibility for the transportation'"). An NVOCC is a common carrier that "does not operate the vessels by which the ocean transportation is provided" and "is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17).

The Commission's methodology for deciding common carrier status, given these criteria, considers the totality of circumstances and "their combined effect." *Worldwide Relocations — Possible Violations of the Shipping Act*, FMC Docket No. 06-01, 2012 FMC LEXIS 23, *14 (FMC Mar. 15, 2012) (quoting *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 65 (FMC 1965) (*Containerships*); *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, FMC Docket No. 96-05, 2001 FMC LEXIS 39, *134 (FMC June 1, 2001) (no single factor determines common carrier status). This fact-intensive inquiry looks "beyond documentary labels" and delves into respondent's conduct regarding shipments at issue, while considering that the respondent may have acted as a common carrier in handling some shipments, but not others. *Worldwide Relocations*, 2012 FMC LEXIS 23, *13 (citing *Containerships*, 9 F.M.C. at 66).

While the Commission's inquiry is fact-driven, it nevertheless relies on "reasonable evidentiary inferences" consistent with the "strong public policy interest in protecting consumers and the shipping public" and ensuring that shippers only entrust their cargo to registered NVOCCs. *Id.* at *2, *14, *23; *Anderson Int'l Transport and Owen Anderson—Possible Violations of Sections 8(A) and 19 of the Shipping Act of 1984*, FMC Docket No. 07-02, 2013 FMC LEXIS 19, *23-*24 (FMC June 25, 2013). In drawing inferences regarding common carrier status, the Commission has relied on Federal Rule of Evidence 406 which provides that "[e]vidence of a person's habit or an organization's routine practice" is admissible "to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice." Fed. R. Evid. 406. Respondents can rebut these inferences with evidence of their actual conduct or status or other compelling facts. *Id.*

Here, the ALJ found that SBA operated as an NVOCC on the shipments at issue. I.D. at 13. On appeal, SBA argues that it was not a common carrier or NVOCC but rather an "ocean freight forwarder for inbound cargo," a type of entity that would be outside the scope of the prohibitions at issue. SBA asserts that it did not hold itself out as an NVOCC and did not assume

responsibility for transportation in the manner of an NVOCC.[6] The record, however, supports the ALJ's determination that SBA was a common carrier within the meaning of 46 U.S.C. § 40102(7).

a. Holding Out

The first question in the common carrier analysis is whether SBA held "itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation." In finding that SBA did, the ALJ relied on evidence that: (i) SBA charged CMI ocean freight rates rather than fees that an agent or forwarder would use; and (ii) SBA established its freight rates in documents described as "tariffs." I.D. at 14-16. SBA argues that "its pricing was set, per CMI's direction, based on pricing UTi had earlier charged." SBA Exceptions to Initial Decision (SBA Exceptions) at 2, 18, 27 (July 9, 2019). SBA further asserts that neither CMI nor SBA understood that SBA was acting as an NVOCC. *Id.* at 1, 4, 10, 16, 17. SBA also argues that there is no evidence that SBA held itself out to anyone other than CMI to provide transportation and therefore it did not hold itself out to the general public. *Id.* at 4, 15, 20, 27.

SBA's arguments are unpersuasive. The record demonstrates that SBA held itself out to CMI to provide transportation by water of cargo between the United States and a foreign country for compensation. On three separate occasions, SBA provided CMI with its ocean freight rates in documents described as "tariffs." CMI Br. at Ex. A ¶¶ 11-19; *id.* at Exs. A1, A2, A3. In August and October 2014 and February 2015, SBA International Manager Bryan Tincher sent CMI SBA's ocean freight rates from departure points in China to U.S. destinations for containerized cargo of various sizes via emails with the subject line "FCL TARIFF" or "CMI Packaging and Distribution FOB Tariff." *Id.* Emails accompanying the tariffs that SBA sent in October 2014 and February 2015 include the disclaimer that the quoted rates do not include "demurrage and/or detention." Moreover, once shipments arrived in the United States, SBA invoiced CMI for "ocean freight" as well as charges such as import duties and detention. *See e.g.*, Joint App. at JA25. SBA's ocean freight rates were higher than the ocean freight rates that other NVOCCs charged SBA. I.D. at 15-16. Charging ocean freight is indicative of carrier status rather than forwarder or agent status. *Worldwide Relocations*, 2012 FMC LEXIS 23, at *25, *25 n.3 (holding that charging ocean freight is indicative of a carrier rather than an agent or ocean freight forwarder). CMI Br. at Ex. A ¶¶ 11-19 and Ex's A1, A-2, A-3. In other words, by providing CMI with freight rates, and charging CMI for ocean freight, SBA held itself out to CMI as *providing* international ocean transportation rather than acting as CMI's forwarder or agent to obtain such transportation.

SBA argues that it did not "establish" ocean freight rates because it was responding to a request from CMI to match or beat UTi's rates and "priced its services based on UTi's pricing." SBA Exceptions at 18. According to SBA, its "'markups' of NVOCC freight rates are not NVOCC activity. SBA's rates were set at pricing CMI itself directed." *Id.* Regardless of how SBA arrived at its rates, however, the rates were freight rates set by SBA. That SBA was trying

[6] It is undisputed that the relevant shipments were transported by a vessel operating on the high seas between a port in China and a port in the United States, satisfying the third element of the common-carrier definition. I.D. at 13.

to match or beat the ocean freight rates of a licensed NVOCC further supports that it was holding itself out to provide international ocean transport as a carrier as opposed to an unregulated entity.

SBA also contends that the documents containing rates it sent to CMI in August 2014, October 2014, and February 2015 were not really "tariffs" in the sense meant in the Shipping Act. It further contends that neither CMI nor SBA understood that SBA was representing itself as an NVOCC. As evidence, SBA relies on the testimony of CMI's Financial Controller (Maria Vega) stating that she was unaware of the distinction between an NVOCC and an ocean freight forwarder, did not "get that detailed," and did not know whether CMI agreed to provide NVOCC services. SBA Exceptions at 10 and n. 21 (citing Vega Dep. at RX 11 and RX 27). SBA also relies on the declaration of CMI's former warehouse manager, Justin M. Jalowiecki, who also managed CMI's relationship with SBA. *See id.* at 4, 17. Mr. Jalowiecki averred that "CMI did not understand SBA to be [an NVOCC] and that he knew of "no instance in which SBA held itself out to CMI as an NVOCC." *Id.* at 17 (citing Jalowiecki Decl. ¶ 9). He also stated that he and Mr. Tincher at SBA used the phrase "tariff" to simply mean a price list of SBA services, not a formal NVOCC tariff. *Id.* at 4-5, 17-18 (citing Jalowiecki Decl. ¶ 11). In August 2014, Mr. Jalowiecki also asked SBA to provide SBA's proposed pricing on a table identical to that used by UTi. *Id.* (citing Jalowiecki Decl. at ¶ 12).

CMI's and SBA's beliefs about the legal ramifications of SBA's conduct are of limited relevance. The Commission determines whether a carrier was "holding out" its services based on the carrier's words and actions – not on the shippers' response or interpretation of those actions. *See In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries-Pet. for Declaratory Order* (Pet. for Declaratory Order), FMC Docket No. 06-08, 2008 FMC LEXIS 9, *40 (FMC Feb. 15, 2008); *Containerships*, 9 F.M.C. at 64. Ms. Vega's lack of understanding of what an NVOCC is says nothing about whether SBA held itself out to provide international ocean transportation. And even if CMI's warehouse manager (Jalowiecki) and SBA's representative (Tincher) did not believe they were using "tariff" in a legal sense or trying to create an NRA by using UTi's rate schedule, SBA nonetheless quoted CMI ocean freight rates – SBA offered to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation.

SBA further maintains that CMI has not shown that SBA held itself out to the *general public* as providing ocean transportation services. SBA Exceptions at 20, 26-27. According to SBA, there is no evidence that it offered the services at issue here to anyone other than CMI. *Id.* at 26-27. There is no evidence, SBA argues, that "SBA's website, advertising materials, letterhead, standard forms, etc., suggest SBA offers or provides NVOCC or other ocean carrier services." *Id.* at 20.

Although it is true that there is no evidence that SBA marketed itself on its website, letterhead, etc. as an NVOCC, SBA's argument places undue emphasis on how broadly SBA marketed its ocean freight services, which is not the sole, or even primary criterion. *Containerships*, 9 F.M.C. at 63 ("But common carrier status is not lost by the carrier's failure to publish sailing schedules or advertise."). The Commission defines "holding out" as a willingness to accept cargo from whoever offers it subject to carrying capacity but does not require the carrier to broadcast that it will accept any commodity from all shippers. *Rose Int'l*, 2001 FMC

LEXIS 39, *133-34 (FMC 2001); *Pet. for Declaratory Order*, 2008 FMC LEXIS 9, *32; *EuroUSA Shipping, Inc.--Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations*, FMC Docket No. 06-06, 2013 FMC LEXIS 44, *20 (FMC Sept. 10, 2013).

CMI is a member of the general public, so in that sense, SBA held itself out to the general public to provide international ocean transportation of cargo. *Containerships*, 9 F.M.C. at 65 ("The public does not mean everybody all the time.") (quoting *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252 (1916)). Additionally, SBA's marketing of its services as a logistics provider and indirect air carrier demonstrates its willingness to accept cargo from the public at large in providing those services.[7] Moreover, SBA's Terms and Conditions, which were effective January 1, 2012, have a liability section for "ocean shipments." CMI's Reply Br. (CMI Reply Br.) at Ex. 1 Bates No. CM100151 (June 15, 2018). The Terms and Conditions state that "[i]f all or any part of the shipment tendered to [SBA] is carried by water over any part of said route," SBA's liability will be governed by the Carriage of Goods by Sea Act "and any other pertinent laws applicable to water carriers." *Id.* SBA's Terms and Conditions make clear to the public, then, that it might transport cargo by water, and when it does, it does so as a *carrier*.[8]

Further, it is undisputed that SBA successfully competed for CMI's business against UTi, a licensed non-vessel operating *common carrier*. At CMI's request, SBA listed its ocean freight rates on a UTi document for side-by-side comparison purposes. SBA Exceptions at 4, 17. CMI's Financial Controller believed that SBA essentially stepped into the shoes of UTi and was providing the same services. CMI Br. at Ex. A ¶¶ 9, 15-23; Block Decl. at RX 12 (Vega Dep. 30:2-4) ("Q: Okay, What services did UTi provide CMI? A: The same services we've gotten from, you know, SBA, where they would bring our product . . ."). In her mind, there was no material distinction between the two which is in fact exactly how SBA represented itself in making its sales pitch to CMI. CMI Br. at Ex. A ¶¶ 8-9, Exs. A1, A2. SBA Regional Manager Edward Zasada confirmed that SBA offered CMI "the same type of services that UTi had been providing" and superimposed its proposed ocean freight rates directly onto UTi's tariff displaying its China/U.S. routes so that CMI could easily compare both sets of rates. *Id.* at Ex. C (Zasada Dep.11:17-21). In sum, SBA affirmatively positioned itself as offering similar services as a licensed NVOCC and offered competitive ocean freight rates. Those actions signaled its willingness to arrange ocean transportation and demonstrate that it held itself out to the public as a common carrier. *See Worldwide Relocations*, 2012 FMC LEXIS 23, at *25.

Finally, SBA's argument, if accepted, would allow unlicensed NVOCCs to skirt statutory licensing requirements and Commission oversight so long as they do not advertise their activity widely. Similarly, 46 U.S.C. § 40501's requirement that common carriers publish tariffs would be ineffectual if the failure to publish a tariff is sufficient to take an entity outside the definition of common carrier. As a general matter, the Commission avoids interpretations of the Shipping

[7] *See* https://comm.sbaglobal.com/Default.aspx. The Commission may take official notice of information SBA publicizes on its corporate website under 46 C.F.R. § 502.226(a) which authorizes taking official notice for "such matters as might be judicially noticed by the courts."

[8] This is not to say that the reference to ocean shipments in SBA's Terms and Conditions would be sufficient on its own to prove that SBA held itself out within the meaning of § 40102(7). Rather, it tips the scales in that direction when considered with the evidence of SBA's conduct.

Act that would hamper the Commission's ability to fulfill its statutory functions. *See Containerships*, 9 F.M.C. at 69 ("In order to effectuate the remedies intended by the enactment of a regulatory statute such as these [the Shipping Act and Intercoastal Act], it is necessary to allow flexible and liberal interpretation of the statute."); *id.* ("To decide that Containerships is not a common carrier would result in giving it an advantage enjoyed by none of its competitors"); *cf. Worldwide Relocations*, 2012 FMC LEXIS 23 at *23 ("When unlicensed entities enter into the transportation transaction, the consumer public is more justly served where a lawful permissive presumption is used to properly bring the more complete array of Commission remedies into play.").

b. Assumption of Responsibility

The second element of the common-carrier definition asks whether SBA "assume[d] responsibility for the transportation from the port or point of receipt to the port or point of destination." 46 U.S.C. § 40102(7). The ALJ started with the shipping documents in the record, though noting that the Commission "looks beyond documentary labels." I.D. at 16 (quoting *Anderson Int'l*, 2013 FMC LEXIS at *45 n.7). The ALJ found that although the "documents showed ambiguity in the identification of the actual shippers," they nonetheless showed that SBA "was listed either as a shipper, consignee, notify party, the entity to be billed for the charges, or the entity to contact for their delivery. *Id.* at 16-17. The ALJ concluded that "ambiguous identification of party shippers in [the shipping] documents may lead to a finding of NVOCC status." *Id.* at 17 (quoting *Anderson Int'l*, 2013 FMC LEXIS at *28). The ALJ further relied on evidence that: (1) that SBA employees believed SBA assumed responsibility for delivery of CMI's cargo; (2) after engaging SBA, CMI ceased having control over the goods or their transportation; (3) CMI did not choose which steamship line would transport CMI's goods, had no contact with steamship lines, LAS Freight, or other downstream carriers, and looked solely to SBA for services; (4) SBA issued its own bills of lading to CMI along with separate invoices; and (5) SBA assumed responsibility for holding shipments until CMI paid for them. *Id.* at 17-19. The ALJ concluded that this "evidence thus amply demonstrates that [SBA] assumed responsibility for the transportation of the CMI shipments. *Id.* at 18.

SBA's primary argument on appeal is that it did not issue bills of lading to CMI; rather, the documents labeled "air waybill" that SBA supplied to CMI were not "functional" bills of lading but rather backup documentation it provided at CMI's request. SBA Exceptions at 1, 3, 10-15. SBA also contends that it did not assume responsibility "for transportation of cargo" in the manner of an NVOCC, but rather as part of an "agreement to coordinate transportation services." *Id.* at 2, 32-33. Further, SBA asserts that it never agreed to pay CMI's potential cargo claims and never paid any such claims, and that it "did not conceal the identify of actual carriers" or select the steamship line. *Id.* at 2, 5, 19, 20, 31-32.

Contrary to SBA's contentions, the ALJ did not err in finding that SBA assumed responsibility for transportation of CMI's cargo. As the ALJ found, Bryan Tincher, SBA's International Manager, testified that SBA assumed responsibility of the delivery of CMI's goods. CMI Br. at Ex. B (Tincher Dep. at 31, 33); *see also id.* at 33 ("[W]e would take responsibility then from the terminal to their door."). That SBA asserts that it never agreed to pay CMI cargo

claims and did not pay any claims is relevant but does not change that the SBA employee who worked with CMI believed SBA took responsibility for transporting the cargo.

Moreover, as the ALJ pointed out, CMI did not have direct contact with NVOCCs, drayage companies, or other companies that transported or handled its cargo. I.D. at 35. SBA was CMI's sole conduit for information about its shipments and the release of its cargo. SBA did not share with CMI the details on the arrangements it made and CMI was not even aware of the fact that SBA did not engage the steamship lines directly but made those transportation arrangements through a foreign NVOCC (usually LAS Freight). CMI Br. at Ex. A (Vega Decl. ¶¶ 29-36). SBA also represented to CMI that it was dealing with or negotiating directly with steamship lines on matters like demurrage and returning containers. CMI Br. at Ex. A-6. Even when confronted with repeated requests from CMI for details on charges and information on the companies "actually providing the underlying services," SBA "consistently refused to provide accurate information and supporting documentation," and what documentation was provided was "varying and often incorrect," according to CMI's Financial Controller. CMI Br. at Ex. A (Vega Decl. ¶¶ 42-44).

SBA does not dispute that CMI dealt with SBA exclusively regarding transportation of the cargo. Rather, SBA asserts that it had no relationship with any VOCC or contact with any VOCC. SBA Exceptions at 2, 31-32. According to SBA's 30(b)(6) deponent, although SBA did not have direct contact with steamship lines,

> Many shippers, including CMI, specifically Maria, do not understand the transportation process and don't understand the terms that we use on that. So if we were talking to her about demurrage charges or something and I were to say "Well, the co-loader has sent an email to Brian saying we need to get that box back," or something like that, she would say "What? What's a co-loader?" She didn't understand all the different parties. So for simplicity she would say "You mean the steamship line?" And I went "Yeah, okay, the steamship line. People with the boats, they want their box back."

CMI Br. at Ex. C (Zasada Dep. at 25-26); *see also id.* at Ex. B (Tincher Dep. at 148-49) (testifying that he referred to communicating with steamship lines for simplicity rather than explaining the various agents and co-loaders in the transportation chain). And SBA further argues it did not conceal the identity of actual carriers, given that CMI has house bills of lading issued by Chinese NVOCCs.

That SBA itself might not have selected or communicated with VOCCs and that CMI might have at some point learned the identity of some NVOCCs in the chain is not particularly relevant. What is important is that CMI did not select any VOCCs, NVOCCs, or any other entity in the process. Rather CMI engaged SBA, who took care of everything. SBA's activities (such as quoting ocean freight rates to CMI, invoicing CMI ocean freight, and paying ocean freight to downstream carriers) weigh in favor of finding that SBA assumed responsibility for the cargo. *EuroUSA,* 2013 FMC LEXIS 44 at *33-*34.

Further, there is no dispute that SBA was responsible for releasing shipments to CMI, and that SBA refused to release certain shipments unless CMI paid SBA for other shipments. SBA enforced the supplier's requirement that cargo only be released after the supplier issued a telex release signifying that it had received payment for that shipment. *See, e.g.*, I.D. at 44 (FF 13/5). SBA also exercised its authority over the release of the cargo on its own behalf as leverage to collect its fees for services related to that shipment or on occasion to past shipments. I.D. at 35-36 (FF 51-60). Drayage companies holding the shipments (generally Freight Tech) followed SBA's directions on whether the cargo could be released and what terms or preconditions had to be met first. *See, e.g.*, CMI Br. at Ex. A6 (email correspondence negotiating for release of CMI shipments). SBA claims that it did not assert a carrier lien against CMI cargo. Whether or not it exercised a carrier lien, SBA's undisputed ability to control cargo release vis-à-vis CMI is further evidence of its responsibility for the cargo.

The ALJ also did not err in relying on SBA bills of lading as additional evidence that SBA assumed responsibility for the cargo. The ALJ considered and relied in part on evidence that "Service by Air issued its own bills of lading to CMI for the shipments, along with separate invoices." I.D. at 17. SBA argues that it did not issue bills of lading, and that this fact is determinative on assumption of responsibility. According to SBA, the Commission should ignore the bills of lading it generated because they were not true bills of lading. Rather, long after the transportation of a shipment was completed, and in response to CMI's request for documentation supporting SBA's invoices, SBA supplied CMI with documents labeled "air waybills." SBA Exceptions at 1. According to SBA, because it is primarily an air carrier, its software generated the backup documentation in the form of air waybills. *Id.* at 3-4. SBA asserts that neither it nor CMI understood the bills of lading to be "functional" bills of lading. The air waybills were not used in customs documentation; they were not signed; they were marked "SBA's use only;" and they were not issued to Chinese suppliers as "functional" bills of lading would have been. *Id.* at 3-4, 10-10.

The problem for SBA is that while issuing bills of lading is strong evidence that an entity assumed responsibility for transporting cargo, the absence of bills of lading is not determinative of the issue. And the labels that SBA gave its documents do not override its actions. *See Anderson Int'l*, 2013 FMC LEXIS at *21-22; *Worldwide Relocations*, 2012 FMC LEXIS 23, at *20-21 (an entity's conduct, not the labels it applied, determine NVOCC status). Further, even if the Commission were to accept SBA's argument that the air waybills it generated were not "real" bills of lading and not treated as such by CMI, and instead reflected information supporting SBA's invoices, the documents nonetheless are evidence that SBA assumed responsibility for CMI's cargo. Even if the air waybills were not "functional," they indicate that SBA considered itself a carrier vis-à-vis CMI. Among other things, the documents list SBA as the "issuing carrier's agent," list the Chinese supplier as the shipper, and CMI as the consignee. CMI Br. at Ex. A-4. Moreover, notwithstanding the air waybills, SBA's freight invoices are themselves evidence of assumption of responsibility. *EuroUSA*, 2013 FMC LEXIS *34 (invoicing entities for ocean freight charges and marking up charges incurred constitutes evidence of assuming responsibility for cargo).

Finally, SBA asserts that "[a]ssumption of liability has different meanings and nuances in difference circumstances" and that ocean freight forwarders "'assume responsibility' to certain

extents for transportation services as well." SBA Exceptions at 32. According to SBA, "[w]hile circumstances in the parties' dialogue reflect an understanding that SBA would 'assume responsibility' for transportation services related to CMI's cargo, such 'responsibility' without specification that it extended to NVOCC liability does not create an NVOCC out of what the parties understood to be a mere freight agency relationship." *Id.* at 33.

But, as noted above, the SBA's conduct belies the notion that it was acting as CMI's agent. And as the ALJ correctly pointed out, "[a]mbiguous identification of party shippers in [the shipping] documents may lead to a finding of NVOCC status." I.D. at 17 (quoting *Anderson Int'l*, 2013 FMC LEXIS at *28). That is, ambiguity about what type of responsibility SBA was assuming makes it more likely, not less, that the Commission would consider it a common carrier. Although SBA complains that the shipping documents in this case were issued by other entities and "[a]ny ambiguity in that documentation as to shippers and consignees is not SBA's responsibility," CMI dealt solely with SBA and had even less control over the documentation. Moreover, as a sophisticated logistics provider that wholly owned a licensed NVOCC when it provided services to CMI, SBA's complaint about not being responsible for ambiguous or confusing documentation is unpersuasive.

2. SBA as NVOCC

In addition to arguing that it is not a common carrier, SBA also asserts that it does not fall within the definition of NVOCC. The Shipping Act contemplates two types of common carriers: (1) "ocean common carriers," which are vessel-operating common carriers; and (2) "non-vessel operating common carriers," which are common carriers that do not operate the vessels by which the ocean transportation is provided and are shippers in their relationships with ocean common carriers. 46 U.S.C. § 40102(17), (18). SBA argues that it cannot be an NVOCC because it is not a shipper with respect to the ocean carriers that transported CMI's cargo. According to SBA, there is "[n]o bill of lading or other documentation [that] identifies SBA as a shipper of record." SBA Exceptions at 2, 3. SBA contends that "CMI easily could look to the VOCC bills of lading and/or bills of lading issued by NVOCC LAS Freight or the other Chinese NVOCCs to confirm this." *Id.* at 3. 11, 15-16.

The ALJ did not address this argument, but it misses the mark in any event. First, SBA is a common carrier that does not operate vessels. The only type of common carrier it could be under the Shipping is an NVOCC – nothing in the Act suggests the existence of a third type of common carrier that may operate free from the licensing requirements.

Second, SBA meets the "shipper" element of the NVOCC definition. The definition of "shipper" is broad, and includes not only the cargo owner, but also "the person to whom delivery is to be made" and "a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract." 46 U.S.C. § 40102(23). Here, the shipping documents listed SBA "either as shipper, consignee, notify party, the entity to be billed for the charges, or the entity to contact for their delivery," roles that fall within the statutory definition of "shipper." I.D. at 16; *see also* Joint App. at JA1128, JA00200, JA00224 (NVOCC bills of lading naming SBA as consignee). Moreover, SBA employee Bryan Tincher testified that SBA "ultimately" paid charges assessed by steamship lines that were passed along

to SBA. CMI Br. at Ex. B (Tincher Dep. at 45-46). And there is evidence in the record that SBA dealt directly with ocean common carriers in a shipper capacity. SBA received and paid invoices from "MSC/Mediterranean Shipping Co. (USA) for rework, drayage, storage, and logistics and management fees. Joint App. at JA210, JA381-82.

Further, SBA provides no support for the proposition that an entity must be in contractual privity with an ocean common carrier, or be named a shipper on an ocean common carrier master bill of lading, to be "a shipper in its relationship with an ocean common carrier" under § 40102(17). The Commission permits NVOCCs to act as shippers in relationship to other NVOCCs, who act as carriers, and the Commission has not suggested that the former (the NVOCC-shipper) is not an NVOCC because it does not have a direct contractual relationship with the ocean common carrier. *See, e.g.*, Final Rule: Non-Vessel Operating Common Carrier Service Arrangements, 70 Fed. Reg. 56577, 56579 (Sept. 28, 2005) ("[T]he Commission's regulations have recognized and provided for the sale of ocean transportation services by one NVOCC acting as carrier to another acting as shipper under tariff regulations.").

The Commission also prohibits an NVOCC from entering a negotiated service arrangement (NSA) with an NVOCC that has not met the Commission's bonding and tariff requirements. 46 C.F.R. § 531.6(c)(4). This regulation would not make sense if only entities in contractual privity with ocean common carriers (or appearing in ocean common carrier bills of lading) qualify as NVOCCs. *See also* 46 C.F.R. § 520.11(c) (regulations addressing co-loading situations where NVOCCs establish shipper-carrier or carrier-carrier relationships with each other). In other words, being an NVOCC does not require that an entity be in privity of contract with an ocean common carrier. Rather, the statute requires that it be in a "shipper relationship" with one. And there is evidence that SBA's relationship with ocean common carriers was as a shipper, not as a carrier.

3. Carrier or Forwarder

In addition to finding that SBA was a common carrier, the ALJ found that SBA performed many of the NVOCC services listed in the Commission's regulations. *See* 46 C.F.R. § 515.2(k). The ALJ found that SBA purchased transportation services from common carriers and resold them to CMI, paid port-to-port multimodal transportation charges, entered affreightment agreements with underlying shippers, issued bills of lading and invoices, arranged for inland transportation and paid inland freight charges on through movements, and entered arrangements with the origin and destination agents regarding delivery of CMI shipments. I.D. at 18-19. SBA asserts that it performed none of these NVOCC services. SBA primarily argues that it did not purchase transportation services or pay multimodal or inland freight charges on its own account but did so as "CMI's disclosed agent." SBA Exceptions at 28-29. It also argues that it did not issue bills of lading or other shipping documents, did not enter affreightment agreements with underlying shippers, and did not enter arrangements with origin or destination agents. *Id.*

The ALJ's determination that SBA performed NVOCC services is supported by findings based on invoices, shipping documents, and emails that trace the transportation services SBA performed, purchased, or charged to CMI. I.D. at 40-73 (FF 3/1-FF 62/11). And the documents show that SBA provided NVOCC services for the shipments at issue. 46 C.F.R. § 515.2(k).

Among other things, SBA arranged and paid for inland transportation services from Freight Tech and other motor carriers, issued shipping documents (in the form of its air waybills and invoices), and collected ocean freight charges from CMI. The regulations do not say that an NVOCC must have done these activities "on its own account." SBA also does not cite evidence that it was acting as CMI's "disclosed agent." Additionally, SBA did enter an affreightment agreement with an underlying shipper – CMI.

Other specific activities and supporting documents are listed throughout the ALJ's findings and incorporated into the discussion on each of the NVOCC services that SBA performed in handling the shipments at issue. *See, e.g.*, I.D. at 41-48 (FF 3/3-3/4 (SBA paid Pan Star Express Corp. then billed CMI for the charges); FF 9/5-9/6 (SBA paid Weida Freight System then billed CMI); FF 9/9-9/10 (Freight Tech billed SBA for delivery, demurrage and other charges, and SBA then billed CMI); FF10/7-10/8 (Intermodal Cartage Co. billed SBA for round trip service, then SBA billed CMI for ocean freight, storage and import duty/tax); FF 13/4 (SBA paid Acme Freight Services Corp.); FF 16/4-16/7 (Acme Freight Services Corp. billed SBA (as consignee) for ocean freight which SBA then paid and subsequently billed CMI for ocean freight, import duty/tax and container demurrage); and FF 19/7-19-9 (Freight Tec billed SBA for demurrage, yard storage, and other charges and SBA then billed CMI for ocean freight and container demurrage).

Throughout its brief, SBA emphasizes that it did not appear as a shipper on an NVOCC or vessel-operating common carrier (VOCC) bill of lading. According to SBA, "[t]he clearest indication of whether SBA operated as an NVOCC would have been house bills of lading SBA would have issued to CMI's Chinese suppliers which would be the shippers of record in such shipments. SBA issued no such house bills of lading; CMI produced none; and none are in the record." SBA Exceptions at 2, *see also id.* at 7-8, 11, 15. SBA suggests that LAS Freight was "the documented NVOCC of the transportation at issue." *Id.* at 16.

SBA is partially correct. If it had issued house bills of lading to the Chinese suppliers, this would not be a close case. But the absence of such bills of lading does not mean it was not acting as an NVOCC. SBA assumes that one can *only* act as an NVOCC if it issues a house bill of lading to a shipper and appears as a shipper on bills of lading issued by another NVOCC or a VOCC.[9] That is, SBA suggests that it could only be an NVOCC if it is part of a clear chain of shipper-carrier relationships between the beneficial cargo owner (shipper) and NVOCCs and VOCCs, all evidenced by bills of lading.

That is certainly one way a shipment can move from China to the United States. But it is not the only way. NVOCCs can engaging in co-loading. This co-loading can take the form of a shipper-to-carrier relationship, in which case a house bill of lading would be generated, or it could take the form of a carrier-to-carrier relationship, in which case there would not necessarily be a neat chain of bills of lading. 46 C.F.R. § 520.11(c). And there is evidence that the

[9] The parties did not identify any VOCC bills of lading in the record. Such master bills of lading would not, however, be particularly useful given that there were several intermediaries in the transportation chain between CMI and SBA and any ocean common carrier, including LAS Freight and intermediaries it engaged with. Moreover, an unlicensed NVOCC would be unlikely to appear on a VOCC bill of lading in any event; the Shipping Act prohibits common carriers from accepting cargo from NVOCCs who lack a tariff. 46 U.S.C. § 41104(a)(11).

transportation of CMI's containers involved co-loading. *See* CMI Br. at Ex. B (Tincher Dep. at 51 ("Well, we acted as CMI's agent. The co-loaders."); *id.* at 54 ("LAS Freight worked with the suppliers in China, and they arranged through co-loaders space with the lines."). The point is that the absence of a chain of bills of lading involving SBA might suggest that SBA was not an NVOCC, as SBA insists. But the absence of a chain of bills of lading is also consistent with unlicensed NVOCCs who engage in co-loading and other practices that do not involve an obvious shipper-carrier chain of relationships.

The record indicates that SBA was presented with an opportunity to obtain CMI's business. Although it is primarily an indirect air carrier, it took that opportunity and engaged a foreign registered NVOCC (LAS Freight) to get CMI's goods into the United States. SBA either assumed it did not have to comply with Commission regulations applicable to NVOCCs or ignored them. Had SBA wanted to make clear its relationship with CMI it could have done so. *Cf. Worldwide Relocations*, 2012 FMC LEXIS 23 at *23 ("The dual NVOCC-OFF licensed entity has within its own power the ability to insulate itself from this concern by being clear in its shipping documents as to the status and relationship of all parties to the transportation transaction."). Instead, SBA employees compared SBA's ocean freight rates to that of a licensed NVOCC, referred to documents as "tariffs," informed CMI it was communicating with "steamship lines," and generated documents that had the appearance of bills of lading. This evidence establishes that SBA acted as an NVOCC.

C. Liability

After finding that SBA was an NVOCC, the ALJ determined that SBA violated 46 U.S.C. §§ 40501(a)(1), 40901(a), 41102(c), and 41104(a)(2)(A). The ALJ also dismissed the claims against Radiant and LAS Freight. I.D. at 28, 74. Except for the § 41102(c) claim, the Commission affirms the ALJ's liability and dismissal determinations. SBA raises little defense to the ALJ's liability findings, relying almost entirely on its argument that it is not an NVOCC and thus not subject to the statutory prohibitions. Neither party challenges the dismissal of CMI's claims against Radiant and LAS Freight, which are supported by the record.

1. Section 40901(a) Claim

Section § 40901(a) of Title 46 requires any person in the United States who advertises, holds itself out, as or acts as an NVOCC to obtain a license from the Commission. 46 U.S.C. § 40901(a); 46 C.F.R. § 515.3(a). The ALJ found that SBA violated § 40901(a) by operating as an NVOCC without a license. I.D. at 19. The ALJ did not, however, award any reparations based on this violation. *Id.* Although SBA disputes that it is an NVOCC or that it provided the NVOCC services described in 46 C.F.R. § 515.2(k), as noted above, the ALJ correctly rejected those arguments. Moreover, it is undisputed that SBA lacks an OTI license. I.D. at 30. And SBA does not argue, and there is no evidence, that it is exempt from the licensing requirements because it was acting as the disclosed agent of an OTI. 46 U.S.C. § 40901(c); 46 C.F.R. § 515.4(b)(1). The Commission therefore affirms the ALJ's finding that SBA violated 46 U.S.C. § 40901(a) in handling the 28 shipments at issue.

2. Section 40501(a) Claim

Under 46 U.S.C. § 40501(a), a common carrier must "keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established." *See also* 46 C.F.R. pt. 520. The ALJ found that in handling CMI's shipments at issue, SBA operated as a common carrier without a published tariff in violation of § 40501(a). I.D. at 19-20. As with § 40901, the ALJ did not award reparations based on the § 40501(a) violation.

It is undisputed that SBA did not publish a tariff. At most, SBA claims that CMI agreed to pay demurrage and other charges imposed under the parties' oral contract and that CMI's concurrence absolves SBA of liability. But even if true, which CMI denies, an oral agreement would not exempt SBA from the § 40501(a) publication requirement.[10] Consequently, the Commission affirms the ALJ's finding that SBA violated 46 U.S.C. § 40501(a).

3. Section 41104(a) Claim

Section 41104(a)(2)(A) of Title 46 prohibits common carriers from "provid[ing] service in the liner trade that is not in accordance with the rates, charges . . . and practices contained in a tariff published or a service contract, . . . unless excepted or exempted." The ALJ explained that while SBA could have legally passed demurrage and detention charges imposed by downstream carriers along to CMI with no markup, it could not lawfully add its own charges for detention and demurrage because they were not set forth in a published tariff. I.D. at 20. SBA does not challenge the ALJ's determination that it violated § 41104(a)(2)(A), other than arguing that it was not an NVOCC.

The ALJ correctly found SBA liable under § 41104(a)(2)(A). None of the charges SBA imposed on CMI appeared in a published tariff. Also, SBA does not contend that it qualifies for an exception carved out by § 40501(a)(2) or the Commission's regulations under authority granted in 46 U.S.C. § 40103. And SBA is not eligible to use NSAs and NRAs. Moreover, the "tariffs" that SBA sent to CMI did not specify rates for detention or demurrage, and those "tariffs" were not published in any event. The Commission thus affirms the ALJ's finding that SBA provided service to CMI that was not in accordance with a published tariff in violation of § 41104(a)(2)(A).

The ALJ erred, however, by suggesting that only markups to pass-through charges need to appear in a published tariff. Section 40501(a) requires common carriers to publish all their rates and charges in a tariff, unless subject to an exception or exemption. Although changes in pass-through charges may take effect upon publication under the Commission's tariff regulations, the pass-through charges must still appear in a tariff. *See* 46 C.F.R. § 520.8(b)(4) (making effective upon publication "[c]hanges in charges for terminal services, canal tolls, additional charges, or other provisions not under the control of the common carriers or

[10] SBA does not qualify for the NSA and NRA exemptions to the tariff publication requirement because it is not a licensed or registered NVOCC. *See* 46 C.F.R. § § 531.1, 532.3, 531.4, 532.1, 532.2(g), 532.4.

conferences, which merely acts as a collection agent for such charges and the agency making such changes does so without notifying the tariff owner"). Similarly, NRAs must provide information about pass-through charges to shippers. 46 C.F.R. § 532.5(d)(2).

4. Section 41102(c) Claim

Under 46 U.S.C. § 41102(c), a common carrier "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." The ALJ found that SBA violated this provision by engaging in a "normal, customary, and continuous practice of refusing to deliver cargo on which all transportation charges had been paid [i]n order to coerce payment of charges due on cargo that had been delivered." I.D. at 26.[11] The ALJ did not, however, award reparations for this violation because CMI did not "clearly articulate any actual injury it suffered from section 41102(c) violations in addition to the overpayments of detention and demurrage resulting from the violations of" § 41104(a)(2)(A). I.D. at 26.[12]

The Commission declines to adopt the ALJ's § 41102(c) analysis because it is not clear whether the conduct at issue occurred on a normal, customary, and continuous basis as required by 46 C.F.R. § 545.4(b) and because this alleged violation has no bearing on Complainant's reparation award given the ALJ's unchallenged finding that CMI did not articulate injury for a § 41102(c) violation. Although the evidence suggests that SBA withheld and delayed some shipments to collect charges based on unrelated cargo, the record is unclear about how long each container was held, when each container was released, and what charges demanded by SBA were related to the withheld container and what charges were related to earlier shipments, all of which are relevant to whether SBA engaged in a regulation or practice of holding cargo hostage.

D. Reparations

1. Basis for Reparations

The ALJ awarded CMI $126,185 in reparations due to SBA's § 41104(a) violation based on the difference between the demurrage charges SBA paid to third parties and the amounts SBA billed to CMI.[13] I.D. at 20. In other words, the reparations represented SBA's markup on the charges that carriers and other third parties charged SBA that it passed on to CMI. The reparations award is based on 17 of the 28 shipments at issue. The ALJ did not award reparations for charges associated with 11 shipments because the documents in the record did not provide sufficient information to calculate actual injury. *See id.*

On appeal, CMI asks the Commission to increase the reparations awarded by $121,815

[11] The ALJ correctly rejected other § 41102(c) claims insofar as they related to conduct prohibited by other Shipping Act provisions, recognizing that § 41102(c) is not meant to be duplicative of other prohibitions. I.D. at 25.

[12] The ALJ appears to have erroneously cited § 40501(a) in this sentence. The only reparations the ALJ awarded were for SBA's violation of § 41104(a)(2)(A). I.D. at 20, 75.

[13] The ALJ did not award reparations based on the violations of §§ 40901(a), 40501(a), or 41102(c), I.D. at 19, 26, 74, and neither party challenges this result.

(for a total award of $248,000) and argues that SBA should not be allowed to retain any of the charges it collected while acting as an unlicensed NVOCC without a published tariff. CMI Exceptions at 1-3. That is, CMI asserts that its reparations should include not just the markup it paid SBA, but also the third-party charges that SBA passed through. CMI argues that the Commission does not have discretionary authority to allow SBA to retain the out-of-pocket expenses it incurred in arranging transportation of CMI's shipments from China, and even if the Commission had such discretion, it should not allow SBA to retain any of charges it collected from CMI as an unlicensed NVOCC that lacked a tariff. CMI Exceptions at 1-2. According to CMI, SBA flagrantly violated licensing and tariff requirements and compounded its actions by falsely claiming in this case that it "has never participated in ocean transportation" despite ample evidence to the contrary and by submitting a declaration from Mr. Zasada denying that SBA ever told CMI that it was collecting demurrage charges imposed by a steamship line. *Id.* at 5 (quoting SBA's Mot. to Dismiss).

SBA counters that if it had been operating as an unlicensed NVOCC under an NRA, it would have been entitled to collect pass-through charges under 46 C.F.R. § 532.5(d)(2)(iv). It also cites *Graniteville Co. v. Scarade, Lines*, FMC Informal Dkt. No. 19647(I), 1991 FMC LEXIS 64 (FMC Jan. 24, 1991), for the proposition that reparations should be limited to the markup.

The Commission agrees with the ALJ's decision to limit the reparations to the markups SBA imposed on CMI. Commission caselaw allows shippers to recover reparations for charges paid to NVOCCs operating without a published tariff in violation of § 41104(a) because the NVOCC has collected charges beyond its "actual disbursements." *Graniteville*, 1991 FMC LEXIS 63, at *6. Nonetheless, a shipper in that situation has received something it wanted – "the transportation of its cargo from A to B." *Id.* The shipper's "actual injury" is thus "whatever it paid the NVOCC, less whatever payments were made by the NVOCC that the shipper would otherwise have had to pay." *Id.* at *6. This calculation method is consistent with 46 U.S.C. § 41305(b), which provides that the Commission "shall direct the payment of reparations to the complainant for actual injury caused by violation of this part." Subtracting from the reparations the pass-through charges the NVOCC paid on the shipper's behalf also prevents the shipper from unfairly receiving a windfall. *Graniteville*, 1991 FMC LEXIS 63, *6. This approach is also consistent with the Commission's approach under the Shipping Act of 1916. *See First Int'l Dev. Corp. v. Ship's Overseas Services, Inc.*, FMC Docket No. 77-13, 23 F.M.C. 47, 53 (FMC 1980), *rev'd on other grounds, Ships' Overseas Services, Inc. v. Fed. Mar. Comm'n*, 670 F.2d 304 (D.C. Cir. 1981) (awarding complainant in un-tariffed charges case the "difference between the amount collected by the [NVOCC] and the cost of the transportation service which [complainant] received").

CMI's arguments fail in light of this precedent. CMI cites several cases for the proposition that "the tariff adherence requirements of the common carrier statutes are so strict that when properly filed, tariffs have the force of law and strict liability is imposed upon carriers thereunder." CMI Exceptions at 6-7. But the issue here is not liability. It is what constitutes "actual injury." And Commission caselaw defines actual injury in the unlicensed NVOCC context as the difference between the charges paid by the shipper to the NVOCC and the transportation benefit they received. *See Graniteville*, 1991 FMC LEXIS 63, *5-*6. And in this

case, the ALJ properly excluded the transportation charges SBA incurred from the reparations award because CMI received the benefit of those services—its goods were shipped from China to the United States through arrangements made by SBA.

CMI also argues that the Commission should penalize SBA for alleged misconduct in litigating this case by refusing to allow SBA to retain the fees it collected from CMI. SBA Exceptions at 5-6. CMI contends that SBA purposely misled the Commission through repeated misrepresentations about its activities and status in handling CMI's shipments. *See id.* The Commission rejects this invitation because reparations for "actual injury" do not include what amount to punitive damages. *Cal. Shipping Line, Inc. v. Yangming Marine Transp. Corp.*, FMC Docket No. 88-15, 1990 FMC LEXIS 25, *65 (FMC Oct. 19, 1990) (noting that term "actual damages" does not include punitive damages).

2. Amount of Reparations

As for the amount of reparations, SBA argues that the ALJ miscalculated by $27,346.75 and that the reparation award should be reduced to $98,838.25. SBA asserts that the ALJ failed to deduct service charges that SBA paid to various companies for miscellaneous services, e.g., storage, stripping and cross dock, skids in and skids out, wait time, logistic and management fees, and per diem fees. SBA Exceptions at 2, 6, 24-25. CMI counters that SBA is not entitled to the reduction it seeks because the ALJ "closely scrutinized" the invoices and concluded, for sound reasons, that SBA is not entitled to retain demurrage charges collected illegally solely because it may have paid third parties for those services. CMI's Reply to SBA Exceptions at 17 (July 31, 2019). CMI also cites SBA's nonspecific billing practices and argues that it "should not be permitted to retain funds collected for nonexistent demurrage charges, simply because unrelated funds were paid to a third party." *Id.*

SBA's argument is based on five containers, which the Initial Decision referred to by the manner in which the documents were organized as Folder 29, Folder 44, Folder 49, and Folder 60-61. In each instance, the ALJ found that SBA charged CMI for demurrage but that there was no evidence that a third-party charged SBA for this amount. The ALJ consequently awarded the entire demurrage amount as reparations. I.D. at 21-23. SBA asserts that the ALJ failed to recognize that the "demurrage" it charged CMI included amounts for which there is evidence. SBA Exceptions at 24-25.

The record shows that the parties understood "demurrage" to represent storage charges. SBA Exceptions at 20-23 (citing Vega Dep. at 92-93 (RX27)). Consequently, evidence that third parties charged SBA storage is evidence that SBA paid "demurrage," and the storage charges should have been deducted from the ALJ's reparations calculations. There is no evidence, however, that the parties understood demurrage to include other types of fees. Consequently, those would not be deducted from the demurrage SBA charged CMI. Applying this understanding to the containers at issue:

Folder 29. SBA charged CMI $6,650 for demurrage. SBA claims this should be reduced by $200 for a charge it paid to Mediterranean Shipping Co. (MSC). The pay stub SBA cites does

not identify what the charge is for, however, and the other documents suggest it was for a "dry run," not storage. It will therefore not be deducted. Joint App. at JA210, JA212.

Folder 44. SBA charged CMI $6,650 for demurrage. SBA claims this should be reduced by $5,501.75 based on several charges imposed on it by Jewels Transportation, Inc. Only three of the charges are clearly identified as storage charges. A June 2015 charge for $852, a May 2015 charge for $852, and an April 2015 charge for $504. Joint App. at JA 336, 340, 341.[14] The other documents do not appear to reflect container storage charges. *Id.* at JA337-339. Consequently, the Commission will deduct $2,208 from the reparations calculated by the ALJ.

Folder 49. SBA charged CMI $2,700 for demurrage. SBA claims this should be reduced by $2,300 based on charges imposed on it by MSC. The record establishes that MSC invoiced SBA $400 for storage, which the Commission will deduct from the reparations calculated by the ALJ. *Id.* at JA381. The remaining $1,900 at issue does not appear to be for storage. The charges are described as "logistics and management fee." *Id.* at JA382.

Folder 60-61. SBA charged CMI $24,800 for demurrage on two containers. SBA claims this should be reduced by $19,345 based on charges imposed on it by Anchor Logistics. The documentary evidence shows storage charges of $5075 and $5600, for a total of $10,675. *Id.* at JA559. The balance claimed by SBA represents "per diem" fees that overlap the period for which storage was assessed. *Id*. at JA560. That SBA incurred storage and per diem for the same time periods indicates that they are different charges. In the absence of any evidence that the "per diem" fees are for container storage, the Commission will deduct $10,675 of storage charges from the reparations calculated by the ALJ but not the per diem fees.

In total, the ALJ's reparations award was too high by $2,208 + $400 + $10,675 = $13,283. The Commission therefore reduces the reparations award from $126,185 to $112,902.

E. Cease-and-Desist Order

The ALJ ordered SBA to cease and desist from operating as an NVOCC without a license and from operating without a published tariff. I.D. at 75. The ALJ reasoned that "without a cease and desist order, it is likely that [SBA] will continue to operate as an NVOCC without a Commission license and as a common carrier without a published tariff." *Id.* at 20. SBA argues that the ALJ's determination that it will continue operating in violation of these provisions is unsupported and argues that "no evidence in the record suggests SBA would ever in the future operate improperly as an NVOCC in a transaction with any other entity." SBA Exceptions at 34.

A cease-and-desist order is appropriate if a respondent's unlawful conduct is likely to continue or resume. *In re Vehicle Carrier Servs.*, 1 F.M.C.2d 440, 466 (FMC 2019). The ALJ's finding that SBA is likely to continue operating as an unlicensed NVOCC or without a published tariff is not supported by the record. There is no evidence that SBA acted as an unlicensed NVOCC before 2014, and there is no evidence that SBA continued acting as an unlicensed NVOCC after mid-2015 when it apparently ceased handling CMI's shipments. Given the absence of any indication that SBA has continued or will continue acting as an unlicensed

[14] JA335 appears duplicative of the amount in JA340.

NVOCC without a tariff, there is no basis for ordering it to cease and desist engaging in that activity. The Commission therefore reverses the Initial Decision with respect to the cease-and-desist order.[15]

III. CONCLUSION

The Commission:

(1) Affirms the ALJ's determination that SBA violated 46 U.S.C. §§ 40501(a), 40901(a), and 41104(a)(2)(A);
(2) Reverses the ALJ's calculation of reparations and orders SBA to pay CMI reparations of $112,902, plus interest of 7,181.59, totaling $120,083.59, for the violation of § 41104(a)(2)(A), which SBA must pay by August 10, 2021.
(3) Reverses the ALJ's issuance of a cease-and-desist order; and
(4) Affirms the ALJ's dismissal of the claims against Radiant and LAS Freight.

By the Commission.

Rachel E. Dickon
Secretary

Chairman MAFFEI, concurring:

I concur in the outcome of the majority, but I must note one area where I think my colleagues have erred in their conclusion.

In the § 41102(c) analysis, the majority indicates there is insufficient clarity to determine whether the alleged conduct by SBA meets the standard for an unreasonable practice. Specifically, they note that while there were "some" shipments withheld and delayed to collect charges based on unrelated cargo,[16] there is not enough information to determine how many were involved and to what extent.[17]

[15] The Commission denies SBA's request for a hearing because oral argument would not materially aid the Commission's analysis of the parties' exceptions.
[16] Majority opinion at 28-29.
[17] In my opinion, one that I have expressed repeatedly, if a company can act unreasonably with intention and then hide behind the idea that they only did so "occasionally," that's a problem. *See, e.g.*, *Gruenberg-Reisner v. Overseas Moving Specialists*, 34 S.R.R. 613, 626-32 (FMC 2016), c*ontra* Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367, 45369 (Sept. 7, 2018) [*hereinafter* NPRM] (citing *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 187, 200-01 (Examiner 1964)). However, I understand the Commission's current interpretation of § 41102(c) is that repeated behavior or other evidence of a normal, customary, and continuous practice or regulation is a required element, and I do not intend to dispute that interpretation in this opinion.

In the Initial Decision, the ALJ did not rely on the number of instances of the conduct in making the determination that it was sufficiently normal, customary, and continuous to meet the standard for a violation of § 41102(c). He relied on the statements made by a senior management official to a representative of the company: when the representative asked the COO whether it was permissible to hold containers that were otherwise available for release in order to demand payment for unrelated shipments, he was told it was and directed to do so.[18]

A statement by a senior management official such as a Chief Operating Officer is highly persuasive evidence that a practice is normal, customary, and continuous. It indicates that there is willingness, at the highest levels of a company, to conduct business in an unjust and unreasonable manner that should be a violation of the Shipping Act. In this case, there is no equivocation, no indication it's an isolated act or error.[19] It's not an understandable misfortune.[20] Moreover, the COO gave this instruction to a representative for the company, increasing the likelihood of it happening in more cases in the future.

This evidence would be highly relevant to the normal, customary, and continuous prong of the § 41102(c) analysis, and might even be sufficient to meet that standard, as the ALJ decided;[21] however, because the § 41102(c) claim has no bearing on the outcome of this case[22] and the majority doesn't reach a conclusion on that violation, there is no reason to disrupt the ultimate outcome of the majority opinion.

[18] I.D. at 26.
[19] NPRM, 83 Fed. Reg. at 45369.
[20] *Id.*
[21] *See Chief Cargo Servs. v. Fed. Mar. Comm'n*, No. 13-4256-ag, 2014 U.S. App. LEXIS 18831, at *4 (2d Cir. Oct. 2, 2014). If this is not sufficient evidence to prove conduct is normal, customary, and continuous, it adds further support to my conclusion (and the Second Circuit's) that the language of § 41102(c) is ambiguous as written and should be clarified by Congress.
[22] Majority opinion at 28.

FEDERAL MARITIME COMMISSION

TOYOTA DE PUERTO RICO CORP., *Complainant*,

v.

PUERTO RICO PORTS AUTHORITY, CROWLEY PUERTO RICO SERVICES, INC., AND OCEANIC GENERAL AGENCY, INC., *Respondents*.

DOCKET NO. 19-02

Served: July 30, 2021

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Michael A. KHOURI, Louis E. SOLA, Carl W. BENTZEL, *Commissioners*.

ORDER AFFIRMING INITIAL DECISION

This case is before the Commission on a narrow issue raised by Respondent Puerto Rico Ports Authority (PRPA) in exceptions to the Initial Decision (I.D.) dismissing the complaint with prejudice. Complainant Toyota de Puerto Rico, Corp. (Toyota) alleged that PRPA, which operates the Port of San Juan (Port), violated 46 U.S.C. §§ 41102(c), 41104 and 41106 by collecting an enhanced security fee from Toyota to fund PRPA's scanning program for containerized cargo. Toyota's objection was that PRPA assessed the fee on non-containerized vehicles Toyota unloaded at the Port that were not subject to the scanning program. The Administrative Law Judge (ALJ) upheld PRPA's assertion that it operates the scanning program as an arm of the Commonwealth of Puerto Rico which entitles it to sovereign immunity and dismissed the complaint for lack of jurisdiction. Neither party challenges the basis for the ALJ's ruling or the dismissal.

PRPA filed exceptions solely to correct what it asserts is a misstatement in the Initial Decision that characterizes as dicta the First Circuit Court of Appeals' ruling on PRPA's sovereign immunity defense in *Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc*., 958 F.3d 38 (1st. Cir. 2020). PRPA asks the Commission to amend the Initial Decision to clarify that *Dantzler* upheld PRPA's sovereign immunity defense and relied on it as alternative grounds for dismissal so that ruling's preclusive effect is not jeopardized. Puerto Rico Ports Authority's Brief Exception (PRPA Exceptions) (Apr. 21, 2021).

For the reasons set forth below, the ALJ did not err in referring to *Dantzler's* sovereign immunity discussion as dicta, and the Initial Decision acknowledges *Dantzler's* reliance on sovereign immunity as alternative grounds for dismissal, so no correction is necessary. The Commission affirms the Initial Decision.

I. BACKGROUND

A. Factual Background

In the wake of the terrorist attacks on September 11, 2001, Congress enacted legislation[1] to bolster port security. Puerto Rico followed suit by enacting Law 12-2008, 23 L.P.R.A. §§ 3221 *et seq.*, which called for improved safety protocols at Puerto Rico ports. Compl. ¶¶ 14-15. PRPA is a public corporation responsible for managing port facilities at San Juan, including terminals that receive containerized cargo. *Id.* ¶ 8. Under authority granted by Law 12-2008, PRPA adopted Resolution 8067[2] which required all inbound cargo containers unloaded at the Port to undergo scanning and imaging. *Id.* ¶¶ 16-17. Scanning served two purposes--it detected unreported taxable goods and improved port security and safety. *Id.* ¶ 17. Scanning inspection lanes were only installed at terminal facilities serviced by three shipping lines, Crowley Puerto Rico Services, Inc. (Crowley), Horizon Lines, and Sea Star Lines. *Id.* ¶ 18.

PRPA funded the scanning program through an enhanced security fee based on cargo type and weight that was imposed on all inbound cargo unloaded at the Port. *Id.* ¶¶ 19-23. Although vehicles and other non-containerized (bulk) cargo were not scanned, they were still subject to the enhanced security fee used to fund the scanning program. *Id.* ¶¶ 24-25.[3] Toyota alleges that it paid Crowley and Oceanic General Agency Inc. (Oceanic) $1.16 million in enhanced security fees from 2012 to 2017 on unscanned vehicles arriving at the Port. *Id.* ¶¶ 28-29.

B. Procedural History

Toyota filed this action in February 2019 seeking $1.16 million in reparations for Respondents' alleged Shipping Act violations in collecting enhanced security fees on unscanned vehicles. Early in the proceedings, the claims against Crowley and Oceanic were dismissed by stipulation. The ALJ denied PRPA's motion to dismiss the complaint based on standing, sovereign immunity, and other defenses. In addressing PRPA's sovereign immunity defense, the ALJ stated that a ruling would be premature since that issue was then before the First Circuit in

[1]*See* Maritime Transportation Security Act, 46 U.S.C. §§ 70101 *et seq.*; Security and Accountability for Every Port Act, 6 U.S.C. §§ 901 *et seq.*

[2]Regulation No. 8067 had a sunset clause which provided that authorization for the scanning program would expire on June 30, 2014, unless the original term was extended, modified, or amended before that date. *Dantzler*, 958 F.3d at 44. Although authorization for the program was not extended, PRPA continued operating it beyond the expiration date and was subsequently ordered to cease and desist by the Puerto Rico Court of Appeals. *Id.* (citing *Camara de Mercadeo, Industria y Distribucion de Alimentos v. Autoridad de los Puertos, Civ. No. 2015-002,* 2016 PR App. LEXIS 4771 (P.R. Ct. App. Oct. 28, 2016)).

[3]In October 2013, the U.S. District Court for the District of Puerto Rico enjoined PRPA from collecting "enhanced security fees from shipping operators that are not being scanned pursuant to Regulation No. 8067." *De Mercadeo v.Vazquez,* Civ. No. 11-1978, 2013 U.S. Dist. LEXIS 150275, *44 (D.P.R. Oct. 16, 2013). The First Circuit affirmed that decision and also upheld the constitutionality of PRPA's scanning program as applied to shipping operators who can access the scanning equipment. *Industria Y Distribuction de Alimentos v. Suarez & Co.*, 797 F.3d 141, 143-45 (1st Cir. 2015).

Dantzler and the circuits were split on the issue.[4] I.D. at 9. After discovery, the ALJ stayed the case pending a ruling in *Dantzler*, and lifted the stay when the First Circuit issued its decision in May 2020.

Following supplemental briefing, the ALJ issued an Initial Decision on March 30, 2021, and determined that PRPA functions as an arm of the Commonwealth of Puerto Rico in managing and funding the scanning program and dismissed the claims as barred by sovereign immunity. Toyota filed a notice declaring it did not intend to file exceptions. PRPA timely filed exceptions asking the Commission to clarify that *Dantzler's* sovereign immunity discussion is not dicta, and Toyota has not opposed that request.

II. DISCUSSION

A. Legal Standards

When the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore reviews the ALJ's findings de novo. *Id.; see also Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 12-02, 2015 FMC LEXIS 43, at *110-*11 (FMC Dec. 18, 2015). Respondents claim that they are entitled to sovereign immunity and therefore bear the burden of proving that they qualify as an arm of the state. *Ceres Marine Terminals, Inc. v. Maryland Port Admin.*, Docket No. 94-01, 2004 FMC LEXIS 1, *31 (FMC Aug. 16, 2004).

B. Initial Decision's Characterization of *Dantzler*

PRPA filed exceptions solely because it objected to the ALJ describing the *Dantzler* discussion of sovereign immunity in a footnote as "dicta." *See* I.D. at 8 ("Although this is dicta in a footnote ruling on a motion to dismiss, it is nonetheless relevant and persuasive authority."). PRPA argues that the *Dantzler* footnote is not dicta but an "alternative ruling by the First Circuit Court of Appeals and a second grounds for dismissal." PRPA Exceptions at 1. According to PRPA, an alternative ruling has "preclusive effect" on the *Dantzler* parties and the ALJ characterizing it as dicta could have unintended consequences for the parties in *Dantzler*.

The ALJ did not commit reversible error by characterizing the *Dantzler* sovereign immunity discussion at one point as dicta – that is, reading the Initial Decision as a whole, the ALJ accurately described *Dantzler's* treatment of the issue. Statements that are not necessary to the disposition of the case are dicta. *Lupien v. City of Marlborough*, 387 F.3d 83, 89 (1st Cir. 2004); *Urban Health Care Coal. v. Sebelius*, 853 F. Supp. 2d 101, 112 n. 10 (D.D.C. 2012). *Dantzler* did not address sovereign immunity until *after* the court had determined that the claims challenging PRPA's enhanced security fees had to be dismissed for lack of jurisdiction. *Dantzler*, 958 F.3d at 50. Plaintiffs in *Dantzler* were shippers who were indirectly affected when carriers and agents passed the enhanced security fees along to them. *Id*. at 47-48. PRPA argued

[4] *Compare Puerto Rico Ports Auth. v. Fed. Mar. Comm'n* (*Ports Auth.*), 531 F.3d 868 (D.C. Cir. 2008) (PRPA qualified for sovereign immunity in leasing marine terminal facilities), *with Grajales v. Puerto Rico Ports Auth*., 831 F.3d 11, 30 (1st Cir. 2016) (PRPA not entitled to sovereign immunity in employment discrimination suit).

that plaintiffs failed to establish Article III standing and the court agreed.[5] *Id.* at 47-49. The court then stated the following in a footnote:

> While our conclusion makes it unnecessary to reach PRPA's argument that it is entitled to sovereign immunity, we note that given the analytical framework set forth in *Grajales* . . . combined with the fact that the cargo scanning program was implemented to further the governmental purposes of improving national security and ensuring proper tax collection, we find it difficult to see how PRPA cannot be cloaked with sovereign immunity here in its performance of an inspection function that is governmental in nature . . . We view this, thus, as an alternative ground supporting our ultimate conclusion vacating and remanding the district court's order and partial judgment.

Id. at 50 n. 6 (citations omitted). By acknowledging that it could dispose of the case without deciding sovereign immunity, the court signaled that its statements on that subject were dicta. So, the ALJ has accurately described *Dantzler's* treatment of the issue.

PRPA's stated concern that the reference to dicta could have unintended consequences for the parties in *Dantzler* is not well-founded. *See* PRPA Exceptions at 2. *Dantzler's* statements on sovereign immunity are plainly worded. Another tribunal assessing the preclusive or persuasive effect of the *Dantzler* sovereign immunity discussion is likely to look at what the First Circuit said rather than how the ALJ or Commission characterized what the court said. Further, the clarification that PRPA seeks is already in the Initial Decision which quotes *Dantzler* verbatim including the reference to sovereign immunity as alternative grounds for dismissal. I.D. at 5, 8; *see also id*. at 11 (stating that "[a]lthough the First Circuit found PRPA to be cloaked with sovereign immunity in *Dantzler*, because this was an alternative ground, there is limited analysis of the relevant factors"). Also, while noting that *Dantzler's* treatment of the issue is "dicta in a footnote ruling on a motion to dismiss," the ALJ nonetheless relied on it as "relevant and persuasive authority." *Id.* at 8.

Because the Initial Decision accurately addressed *Dantzler's* treatment of PRPA's sovereign immunity defense, PRPA's exceptions are denied.

III. CONCLUSION

The Commission affirms the Initial Decision, dismisses the complaint and discontinues the proceeding.

[5]Article III is derived from the constitutional restriction limiting federal courts to "actual cases or controversies" and requires plaintiffs to establish three elements: (1) "an injury in fact which is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical'"; (2) "'fairly traceable to the challenged action,'"; and (3) likely to be "'redressed by a favorable decision.'" *Dantzler*, 958 F.3d at 46-47 (citing *Massachusetts v. U.S. Dep't of Health & Human Serv*s., 923 F.3d 209, 221-22 (1st Cir. 2019).

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

CROCUS INVESTMENTS, LLC & CROCUS, FZE,
Complainant,

v.

MARINE TRANSPORT LOGISTICS, INC., *Respondents*.

DOCKET NO. 15-04

Served: August 18, 2021

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Michael A. KHOURI, Louis E. SOLA, Carl W. BENTZEL, *Commissioners. Chairman* MAFFEI filed a concurring opinion.

ORDER AFFIRMING INITIAL DECISION ON REMAND

This case is before the Commission following a remand to the Administrative Law Judge (ALJ) to address the merits of the sole remaining claim against Respondent Marine Transport Logistics (Marine Transport) under 46 U.S.C. § 41102(c). Complainants Crocus Investments, LLC and Crocus, FZE (collectively Crocus) alleged, among other things, that Marine Transport, a licensed non-vessel operating common carrier (NVOCC), charged excessive fees to store their cargo (a Formula boat) prior to export and negligently failed to provide promised services. The ALJ dismissed all of Crocus's claims, and Crocus filed exceptions. The Commission affirmed the dismissal except for the claim regarding the storing or handling of the Formula boat from August 2013 through February 2014, which the Commission remanded. *Crocus Investments, LLC v. Marine Transp. Logistics, Inc.*, FMC Docket No. 15-04, 2019 FMC LEXIS 44 (FMC July 16, 2019) (FMC Order). On remand, the ALJ determined that Marine Transport acted unreasonably by charging more than its tariff rate to store the Formula boat from August 2013 to February 2014 without advance notice to Crocus. The ALJ dismissed the § 41102(c) claim, however, because Crocus failed to prove that Marine Transport normally, customarily, or continuously overcharged to store cargo earmarked for export.

Crocus filed exceptions and argues that: (1) it is not required to prove that Marine Transport's allegedly unreasonable conduct was normal, customary, and continuous because the Commission's 2018 Interpretative Rule, codified at 46 C.F.R. § 545.4, does not apply to claims that were pending prior to the rule's effective date; and (2) even if § 545.4 applies, the evidence shows that Marine Transport was generally dishonest in its dealings with Crocus related to the Formula boat and two other boats, was found by the Commission to have violated § 41102(c) in handling a 2007 shipment of three vehicles, and stands accused of violating § 41102(c) in two other cases pending before the Commission.

These arguments are unpersuasive. Crocus cites no legal support for its argument that §

545.4 does not apply, and the Commission has previously applied the rule in circumstances such as this. Additionally, Crocus has not proved that Marine Transport's conduct occurred on a normal, customary, and continuous basis as required by § 545.4. Crocus points to only one prior occasion when Marine Transport was found in violation of § 41102(c) for conduct related to storage fees on export cargo, and that occurred in December 2007 and involved a single shipment of three vehicles. The other conduct Crocus relies on comprises unproven allegations that are unrelated to storage fees.

For the reasons set forth below, the Commission affirms the ALJ's dismissal of the § 41102(c) claim and dismisses the complaint with prejudice.

I. BACKGROUND

A. Factual Background

Crocus[1] is in the business of purchasing used boats and vehicles to repair and resell overseas with help from its former affiliate in Dubai, United Arab Emirates. Initial Decision on Remand (I.D.R.) at 7. Crocus's owner, Alexander Safonov, worked with Respondent Aleksandr Solovyev to select and purchase boats and vehicles at auction. Acting as Marine Transport's agent, Mr. Solovyev would then arrange for Crocus's purchases to be delivered to a shipping/loading or storage facility prior to being exported overseas. FMC Order, 2019 FMC LEXIS 44, at *16-*19.[2]

Crocus purchased the Formula boat involved in this case in August 2013, and Mr. Solovyev arranged for storage in New Jersey at a facility operated by World Express & Connection, Inc. (World Express), a company that he owns. I.D.R. at 9. Mr. Solovyev billed Crocus for services related to the purchase and storage of the Formula through another of his companies, Royal Finance Group, Inc. *Id*. at 8. Before the Formula could be shipped overseas, it required a boat trailer. *Id.* After Mr. Safonov rejected the first trailer offered to him, Mr. Solovyev located a second one that was acceptable. *Id*. By December 2013, Mr. Solovyev had purchased a trailer for the Formula and billed Crocus for that purchase. *Id.* at. 10.

Despite the trailer purchase, the Formula was not shipped to Dubai, and as of February 2014, remained at the World Express warehouse. By that time, Mr. Safonov had begun to mistrust his business associate in Dubai and decided that he would not ship the Formula boat to Dubai. He expressed this change of plans in an email dated February 14, 2014 addressed to Mr. Solovyev and noted his relief that there had not been time to ship the Formula boat overseas and asked about documents required to ship it to Florida instead. *Id*.

As of July 2014, the Formula was still stored at the World Express warehouse in New Jersey. Mr. Safonov inquired about its status and renewed his inquiry about shipping it to

[1]The ALJ restated the original findings relevant to the issues on remand (which the Commission previously adopted) and entered additional findings which the Commission now adopts. The facts recited in Section I are based on the original and new findings in the I.D.R. at 7-11.

[2]The Commission previously affirmed the ALJ's dismissal of Crocus's 46 U.S.C. § 40901(a) claim against Solovyev. FMC Order, 2019 FMC LEXIS 44, at *16-*19.

Florida. *Id.* at 10. In reply, Mr. Solovyev quoted a price to transport the Formula and two other boats belonging to Crocus (a Monterey and Chaparral) to Miami and demanded $38,859.39 in accrued storage charges for the Formula boat. *Id*. at 10-11. The dispute over the accrued storage charges and other matters led to this action against Marine Transport and Mr. Solovyev.

B. Procedural History

Crocus filed this action in May 2015 seeking $416,739 in reparations for Respondents' alleged violations of §§ 40901(a) and 41102(c) in handling the Formula and two other boats. Compl. ¶¶ 28-31. After discovery, the ALJ issued an Initial Decision on June 17, 2016, dismissing the complaint with prejudice. Initial Decision (I.D.) at 19-27. The ALJ dismissed all claims related to the Formula on jurisdictional grounds because the parties never entered into a contract to ship that particular boat overseas. *Id*. at 26. The ALJ also dismissed the § 41102(c) claims related to inquiries about shipping all three boats from New Jersey to Florida as outside the Shipping Act's jurisdiction. *Id*. at 24-26. All remaining claims were dismissed with prejudice on the merits. *Id*. at 27. Complainants filed timely exceptions challenging the ALJ's dismissal.

In 2019, the Commission affirmed the ALJ's dismissal of the claims involving the Monterey and Chaparral boats and the claims against Mr. Solovyev. FMC Order, 2019 FMC LEXIS 44 at *10. The Commission vacated, however, the Initial Decision with respect to the § 41102(c) claim related to Marine Transport storing or making other arrangements for the Formula from August 2013 to February 14, 2014, and the Commission remanded that claim to the ALJ. On remand, the parties filed additional briefs and exhibits but did not engage in additional discovery. I.D.R. at 6. The ALJ issued the remand decision on December 9, 2020 and found that while Crocus had established that Marine Transport acted as an ocean transportation intermediary (OTI), imposed unreasonable fees for storing the Formula from August 2013 to February 2014, and caused Crocus to suffer damages, Crocus failed to prove that the unreasonable conduct (i.e., excessive storage fees for export cargo without notice) was Marine Transport's normal and customary practice. The ALJ consequently dismissed Crocus's remaining § 41102(c) claim.

Crocus filed exceptions arguing that it was not required to prove that Marine Transport's conduct was normal and customary because the Commission cannot retroactively apply §545.4. Crocus further argues that even if § 545.4 applies, the evidence shows that Marine Transport has engaged in dishonest conduct generally, is the subject of pending § 41102(c) claims, and was found in violation of § 41102(c) in handling a 2007 shipment. Crocus's Br. in Support of Exceptions (Crocus Exceptions) (Dec. 31, 2019). Marine Transport filed a reply and asks the Commission to affirm the ALJ's ruling and dismiss the complaint with prejudice.

II. DISCUSSION

A. Legal Standards

When the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore reviews the ALJ's findings de novo. *Id*.; *see also Maher Terminals, LLC*

v. Port Auth. of N.Y. & N.J., FMC Docket No. 12-02, 2015 FMC LEXIS 43, *110-*11 (FMC Dec. 18, 2015). Complainants bear the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 FMC LEXIS 35, *41 (FMC Dec. 17, 2014). Under the preponderance standard, Complainants must show that their allegations are more probable than not. FMC Order, 2019 FMC LEXIS 44, at *10.

B. Section 41102(c) Claim

The ALJ determined that Crocus established all but one of the elements required to prove its § 41102(c) claim based on fees charged to store the Formula boat. I.D.R. at 22. The ALJ found that Crocus failed, however, to prove that Marine Transport normally, customarily, and continuously overcharged shippers to store export cargo, without notice, for over a year. *Id.* at 21. Whether Crocus met its burden of proof on that element is the only liability issue before the Commission.

Crocus's exceptions raise the following issues: (1) whether the ALJ properly required Crocus to establish that the conduct was normal, customary, and continuous per § 545.4; and (2) whether Marine Transport's alleged misconduct in handling other aspects of the Formula's purchase and storage (e.g. falsifying documents, etc.), the pending claims against it in other Commission cases, and the Commission's finding that Marine Transport overcharged for storage on a 2007 shipment satisfy the normal, customary, and continuous element of § 41102(c).

1. Elements Required to Prove a § 41102(c) Claim

Section 41102(c) of Title 46 provides that common carriers and other regulated entities "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). The Commission clarified the elements required to prove a § 41102(c) claim in rulemaking proceedings (Docket No. 18-06) finalized in December 2018. Final Rule: Interpretive Rule, Shipping Act of 1984 (Final Rule), 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018); Notice of Proposed Rulemaking, Interpretive Rule, Shipping Act of 1984 (NPRM), 83 Fed. Reg. 45367, 45367-45372 (Sept. 7, 2018). The Final Rule, codified at 46 C.F.R. § 545.4, clarifies that § 41102(c) is not violated by a single act or omission (even if unjust or unreasonable), but rather applies to conduct that is normal, customary, and continuous.

Under § 545.4, a complainant must prove five elements to establish a successful § 41102(c) claim for reparations:

- The respondent must be an ocean common carrier, marine terminal operator, or ocean transportation intermediary;

- The "claimed acts or omissions" must occur on a "normal, customary, and continuous basis;"

- The practice or regulation relates to or is connected with "receiving, handling,

storing or delivering property;"

•The practice is unjust or unreasonable; and

•The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4; *see also* Final Rule and NPRM.

2. Applying Section 545.4 to Pending Claims

Before addressing whether Crocus met its burden of proof on the "normal, customary, and continuous" element of its claim, the Commission considers Crocus's argument that it is not required to prove that element. Crocus suggests that applying § 545.4 to its § 41102(c) claim exceeds the Commission's rulemaking authority under the Administrative Procedure Act (APA) because Marine Transport's conduct occurred in 2013/2014, before the rule's effective date. Crocus Exceptions at 27. Crocus does not reference any particular section of the APA or cite supporting caselaw but rests its argument on the conclusory assertion that applying § 545.4 retroactively unfairly rewards Marine Transport. *Id.*

Crocus correctly points out that the conduct at issue occurred, and Crocus filed suit, prior to the promulgation of 46 C.F.R. § 545.4. But the Commission has consistently applied § 545.4 to cases that were pending when the rule went into effect. *See, e.g.*, *Hangzhou Qianwang Dress Co., Ltd. v. RDD Freight Int'l Inc*., FMC Docket No. 17-02, 2020 FMC LEXIS 192 (FMC Sept 1, 2020) (applying § 545.4 to 2016 shipments); *Ngobros and Co. Nigeria v. Ocean Cargo Link, LLC*, FMC Docket No. 14-15, 2019 FMC LEXIS 85, at *4-5 (FMC Dec. 17, 2019) (§ 41102(c) claims regarding 2012 shipments and 2013 payments remanded for consideration under the Interpretative Rule). The Commission pointed out in *Ngobros* that:

> Although the Commission revised its interpretation of § 41102(c) after the ALJ issued its Initial Decision, any retroactive effect of the Commission's interpretive rule is subsumed in the permissible retroactivity of agency adjudication. *See, e.g.*, *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 424 (D.C. Cir. 1994); *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 907 (D.C. Cir. 2010); *Providence Health Sys. – Washington v. Thompson*, 353 F.3d 661, 667 (9th Cir. 2003). Nor would applying the normal, customary, and continuous standard in this case work a manifest injustice. *Clark-Cowlitz Joint Operating Agency v. Fed. Energy Regulatory Comm'n*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc). While this is not the first case in which the revised interpretation of § 41102(c) was announced, and the revised interpretation departs from a line of Commission caselaw, there is no indication that the parties conformed their conduct in reliance on the prior interpretation of § 41102(c), the revised standard is not imposing new liability on anyone, and applying the standard is consistent with the Commission's approach in other cases. *E.g.*, *Hangzhou*, 1 F.M.C.2d at 262.

Ngobros, 2019 FMC LEXIS 85, at *4 n. 2.

Crocus's argument provides no reason for the Commission to alter its analysis. The restriction against retroactivity does not apply to interpretative rules if the agency could have achieved the same result through its internal adjudicative process. *Health Ins. Ass'n*, 23 F.3d at 424. Subject to some limitations, agency decisions issued in internal adjudications typically apply retroactively, and that same permissive retroactivity extends to rules the agency issues interpreting a federal statute. *See id.*; *Clark-Cowlit*, 826 F.2d at 1081. As the D.C. Circuit explained in *Health Ins. Ass'n*, restricting agencies from adopting a new interpretation of a preexisting statute and applying it retroactively "only if" the agency does not memorialize its interpretation in an interpretative rule would create "a perverse disincentive to issue such rules" leaving entities affected "more in the dark than before, for clues to the agency's reading of the relevant texts would emerge only on an ad hoc basis." *Health Ins. Ass'n*, 23 F.3d at 424-25. Instead of a clear and comprehensive explanation interpreting relevant statutes, complainants would be confronted with a series of ad hoc decisions addressing statutory coverage and requirements in a piecemeal fashion.

Here, the Commission did not need to issue § 545.4 to clarify the elements of a § 41102(c) claim. It could have laid out the required elements for a § 41102(c) claim in this case (or any pending case) and disavowed past decisions without issuing an interpretative rule or raising concerns about impermissible retroactivity. *See id.* at 424. Establishing the same result through rulemaking does not preclude the Commission from applying the rule to pending cases involving conduct that occurred before § 545.4 took effect in December 2018. *See id.*; *see also St. Luke's Hosp.*, 611 F.3d at 907; *Providence Health Sys.*, 353 F.3d at 667.

There is, however, an exception to this general rule – retroactivity is not appropriate if it would "work a 'manifest injustice.'" *Clark-Cowlitz*, 826 F.2d at 1081. Courts consider five factors in determining whether this exception precludes retroactive application:

> (1) whether the particular case is of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Id. (quoting *Retail, Wholesale & Department Store Union v. Nat'l Labor Relations Bd*., 466 F.2d 380, 390 (D.C. Cir. 1972)).

Applying these factors here does not justify departing from the normal rule allowing retroactive application even though the first two factors, by themselves, weigh in favor of the manifest injustice exception. The first factor "recognizes that a number of reasons call for the application of a new rule to the parties to the adjudicatory proceeding in which it is first announced." *Id*. at 1081-82 (internal quotation marks and citations omitted). This is not the first case in which the "normal, customary, and continuous" interpretation is being announced. The Commission described its revised interpretation in the Final Rule in 2018 and reiterated it in vacating and remanding in Docket Nos. 17-02 (*Hangzhou*) and 1960(I) (*M/S Parsons Overseas v. Seven Seas Shipping USA, Inc.*). Also, the Commission issued the rule sua sponte; it was not

brought about by Marine Transport. *See id*. at 1082 ("For one thing, by granting the benefit of a change in the law to those whose efforts may have helped bring about the change, retroactive application of a new principle encourages parties to advance new theories or . . . challenge outworn doctrines.") (internal quotation marks and citations omitted).

While the second factor weighs against applying § 545.4 to Crocus's claims, it does not weigh heavily. The second factor "requires the court to gauge the unexpectedness of a rule and the extent to which the new principle serves the important but workaday function of filling in the interstices of the law." *Id.* at 1082. It "recognizes that the longer and more consistently an agency has followed one view of the law, the more likely it is that private parties have reasonably relied to their detriment on that view." *Id.* at 1083.

Here, § 545.4 is a purposeful departure from recent Commission caselaw interpreting § 41102(c). *See* NPRM, 83 Fed. Reg. 45367, 45367-68. It was adopted to signify the Commission's revised interpretation based on a studied application of the rules of statutory construction, not to fill interstices in § 41102(c). *See Clark-Cowlitz*, 826 F.2d at 1083. This factor does not weigh that heavily against the general rule, however, because the Commission's prior interpretation of § 41102(c) was not that old or that well-established. It began with a decision issued in 2010 but was not squarely discussed by the Commission until 2013. *See* 83 Fed. Reg. at 45367. Further, it was never confirmed by a published Court of Appeals decision. And Commissioners consistently dissented to the post-2010 interpretation as departing from long-established Commission precedent and straying from the rules of statutory construction and Congress's plain intent. *E.g.*, *Kobel v. Hapag-Lloyd A.G.*, FMC Docket No. 10-06, 2013 FMC LEXIS 47, at *82 (FMC 2013) (Khouri, Commissioner, dissenting).

As for the third factor, Crocus does not assert, and there is no evidence, that it relied on the Commission's prior interpretation of § 41102(c). *See* Crocus Exceptions. Although Crocus litigated its case through the first ALJ Initial Decision under that prior interpretation, there is no evidence that Crocus changed or conformed its conduct based on that prior interpretation and is now being unfairly penalized for doing so. There is no evidence, for example, that in storing the Formula or its other boats, Crocus relied on the fact that it might later seek reparations for unannounced overcharges under § 41102(c) without proving that Marine Transport normally and customarily engaged in that practice. Nor is there any indication that Crocus relied on the prior interpretation in deciding to pursue a § 41102(c) claim against Marine Transport. The absence of any reliance on Crocus's part contrasts markedly with the litigant's conduct in *Retail, Wholesale*, for example, where the company against whom the agency was applying its new rule had previously conformed its conduct to a well-established and long-accepted standard, and was confronted with the agency's attempt to punish conduct that complied with its former rule, but not with its newly-adopted policy. 466 F.2d at 391.

The lack of "punishment" inflicted on Crocus is also key to the fourth factor—assessing the degree to which Crocus is burdened by the application of § 545.4. This is not a situation in which the Commission is penalizing or imposing liability on a regulated entity that relied in "good-faith" on the Commission's prior interpretation of statutory intent. *See Clark-Cowlitz*, 826 F.2d at 1085-86. Rather, Crocus is being held to the standard of proof that Congress intended to apply to § 41102(c) claims against OTIs and carriers. And it is also relevant that Crocus was

given an opportunity to meet this burden of proof, and the evidence it presented was fully evaluated and found lacking. Further, as the Commission noted in its Notice of Proposed Rulemaking, complainants seeking reparations for "discrete instances of unreasonable or unjust conduct" are not necessarily without a remedy and might seek relief under common law or other federal statutes. 83 Fed. Reg. at *45368.

The fifth factor – the statutory interest in applying § 545.4 – does not clearly favor either result. Among the purposes of the Shipping Act is to establish a nondiscriminatory regulatory process for ocean common carriage, 46 U.S.C. § 40101(1), and the "primary objective of the shipping laws administered by the [Commission] is to protect the shipping industry's customers, not members of the industry," *N.Y. Shipping Ass'n v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1374 (D.C. Cir. 1988) (quoting *Boston Shipping Ass'n v. Fed. Mar. Comm'n*, 706 F.2d 1231, 1238 (1st Cir. 1983)). But there is also an interest in minimizing government intervention in the industry, 46 U.S.C. § 40101(1), and in the Commission focusing on activities (*i.e.*, practices) that "negatively affect the broader shipping public," 83 Fed. Reg. at 45367, which both counsel against applying an "old" statutory interpretation that is more expansive that the Commission deemed appropriate.

For all these reasons, the Commission finds that § 545.4 is not impermissibly retroactive as applied to Crocus's § 41102(c) claim for reparations.

3. Proving Normal, Customary, and Continuous Conduct

The ALJ determined that Crocus failed to show that Marine Transport's unreasonable acts or omissions occurred on a normal, customary, or continuous basis—the fifth and final element it needs to prevail on its § 41102(c) claim. 46 C.F.R. § 545.4.[3] The Commission has described conduct indicative of a regulation or practice as actions that are "often repeated, systematic, uniform, habitual, and continuous," basically, the manner in which a respondent carries out its business dealings. Final Rule, 83 Fed. Reg. at 64479. "The essence of a practice is uniformity. It is something habitually performed and implies continuity . . . the usual course of conduct. It is not an occasional transaction . . ." *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 178, 201 (FMC 1964); *see also Muzorori v. Canada State Africa Lines, Inc.*, FMC Docket No. 1949(F), 2016 FMC LEXIS 45, at *71 (FMC 2016) (Khouri, Commissioner dissenting).

Commission precedent has made clear that a single shipment or isolated act or omission does not show a pattern or practice. *Hangzhou*, 2020 FMC LEXIS 192. An "occasional transaction" or isolated act is not a "practice." *Stockton Elevators*, 8 F.M.C. at 201. Two or three incidents over a short time period are not enough to show that the conduct in question is an entity's normal and customary practice. *Hangzhou*, 2020 FMC LEXIS 192, at *7 (releasing 3 shipments to the same consignee without an original bill of lading over a 2-month period insufficient to show that was respondent's normal practice or that it was customary or continuous). Even six instances of "unreasonable conduct" carried out over a period of several months involving the same entities have been ruled insufficient to prove that conduct was

[3] The parties did not dispute the ALJ's findings on the other § 545.4 elements. I.D.R. at 19-22.

"uniform or continuous" under § 41102 (or its predecessor, section 17 of the Shipping Act). *Stockton Elevator*, 8 F.M.C. at 200-201 (charges to the same customer inconsistent with tariff rates on six occasions amounted to a "single transaction").

The question before the Commission, then, is whether Crocus has proved that Marine Transport assessed excessive storage fees on export cargo without notice or explanation on a normal, customary, and continuous basis.

Much of the evidence that Crocus relies on in trying to show "normal, customary, and continuous" unreasonable conduct relates to other aspects of Marine Transport's purchase and handling of the Formula boat, and to a lesser extent, the Monterey and Chaparral boats, as opposed to the storage-charge-conduct the ALJ determined was unreasonable.[4] Crocus Exceptions at 10-14, 17-22. Crocus lists multiple transgressions allegedly committed by Marine Transport ranging from charging for services it failed to provide, falsifying documents, unreasonably withholding cargo, committing conversion, mishandling and failing to account for funds held in escrow, and not following Crocus's instructions, among other things. *See id.* at 10-14 and 21-24. Crocus claims these acts show that it is Marine Transport's "regular custom and practice to steal, lie, and defraud its clients at each and every step of the shipping process." *Id.* at 22.

None of the incidents that Crocus alleges as demonstrating Marine Transport's alleged propensity to cheat or defraud shippers is relevant.[5] First, the ALJ did not sustain Crocus's claims based on these alleged actions. I.D.R. at 21 (citing Compl. at 5).[6] Crocus did not appeal the ALJ's decision to reject claims unrelated to the storage charges, so evidence related to those allegations is not relevant in determining whether Crocus met its burden of proving a normal, customary, and continuous practice.

Without delving into whether each of these allegations is substantiated by the record, even if true, they do not constitute evidence that Marine Transport routinely overcharged for storage fees – which is the conduct the ALJ found unreasonable. Crocus relies on these alleged other incidents as purportedly showing that Marine Transport is a "bad actor" generally and

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[4]Regarding the Monterey and Chaparral boats, the ALJ found " no evidence of unjust or unreasonable acts prior to shipping the boats overseas," and noted that the "appropriate charges for storage of these boats" was also the subject of a related district court action, *World Express & Connection, Inc. v. Crocus Investments, LLC*, No. 2:15-CV-08126-KM (D.N.J.). Further, prior to the remand, the Commission dismissed "Crocus's § 41102(c) claim related to the receipt and storage of the Monterey and Chaparral." FMC Order, 2019 FMC LEXIS 44, at *31.

[5]It is also noteworthy that a number of acts or omissions Crocus relies on are not services that an NVOCC would provide in its regulated capacity. *See* 46 C.F.R. § 515.2(k) (listing NVOCC services); *cf.* Crocus Exceptions at 10-12, 22-24 (describing Marine Transport activities related to the "business of selling automobiles and pleasure boats"). For example, assisting shippers with purchasing and financing the inventory they sell is a service that an NVOCC would not provide in its regulated capacity. It is also conceivable (if not probable) that when Mr. Solovyev was carrying out these activities, he was not acting as Marine Transport's agent, but was acting in an individual capacity or on behalf of another company he owns. Additionally, it is not clear that all these activities are related to or connected with receiving, handling, storing, or delivering property, which is the only type of practice or regulation covered by § 41102(c).

[6]The ALJ explained that "the record does not support a finding that [Marine Transport] unlawfully withheld property, committed conversion, charged unreasonable storage rates, or otherwise committed unjust reasonable acts on a normal, customary, and continuous basis." I.D.R. at 20.

altogether untrustworthy, but that does not constitute the type of proof required to show that Marine Transport had a policy of overcharging shippers for storing cargo prior to export. *See generally Hangzhou*, 2020 FMC LEXIS 192, at *8 (noting the significance of the lack of evidence that respondent engaged in the same conduct with other shippers).

Section 545.4 requires proof that "claimed acts or omissions" occurred on a normal, customary, continuous basis, i.e., that the alleged conduct amounts to a practice or regulation. A complainant must also prove that this specific practice or regulation is unjust or unreasonable. § 545.4(d). In other words, § 41102(c), as interpreted by the Commission, requires proof that a regulated entity engaged in a practice related to receiving, handling, storing, or delivering property that was unreasonable. Crocus's approach would result in liability if a regulated entity's "practice" was behaving unreasonably. That is not how § 545.4 is structured, and Crocus cannot combine disparate types of allegedly unreasonable behavior into a practice for purposes of § 41102(c).

Crocus also relies on the district court's dismissal of a breach of contract claim in *World Express* as an "[a]dditional example" of Marine Transport's alleged practice of collecting money for goods or services it did not provide. Crocus Exceptions at 19-20. Crocus does not explain how the dismissal of World Express's contract claim against Crocus in that litigation shows a pattern of misconduct by Marine Transport. The New Jersey district court was addressing World Express's claim for charges it was allegedly due, not Marine Transport's entitlement to storage fees. *World Express & Connection, Inc. v. Crocus Invs., LLC*, No. 2:15-CV-08126-KM, 2020 U.S. Dist. LEXIS 156525, at *37-*40 (D.N.J. Aug. 28, 2020). Although Mr. Solovyev has a connection with both companies, World Express's actions are not attributable to Marine Transport, which is owned by Mr. Solovyev's estranged wife.

Crocus also relies on the Commission's findings in two prior cases, *Best Way USA, Inc. v. Marine Transport Logistics* (*Best Way*), FMC Docket No. 1901(I), and *Samir Abusetta d/b/a Sammy's Auto Sales v. JAX Auto Shipping and Marine Transport Logistics* (*Sammy's Auto Sales*), FMC Docket No. 1932(I) to establish that Marine Transport engages in unreasonable conduct on a normal, customary, and continuous basis.

Best Way involved a shipment of three vehicles in 2007 from the United States to Russia with intermediate calls at ports in Germany and Latvia. *Best Way*, Order Affirming S.O. Decision at 2-3. (Nov. 8, 2013). Best Way brought a § 41102(c) claim against Marine Transport seeking reparations for demurrage charges imposed at the destination port and business losses caused by the shipment's delayed arrival. *Id.* at 2-3. The Settlement Officer found that Marine Transport "assessed unlawful storage charges at origin and held the cargo . . . which resulted in demurrage . . . incurred in Riga," and "wrongfully charged [the shipper] $420 for storage in New York, $1,880 for demurrage in Riga, and $625 for an increased cost of rail services from Riga" to the final destination. *Id*. at 5. The Commission affirmed those findings in part and found that Marine Transport violated § 41102(c) "by failing to observe just and reasonable practices with the handling, storing and delivering of Complainant's property." *Id*. at 6.

It is not obvious from the Commission's decision what aspects of Marine Transport's conduct violated § 41102(c). The Commission did not expressly affirm or reverse the finding

regarding the storage charges that Marine Transport imposed at the port of origin in the United States. *See id.* The Commission's statement that Marine Transport "had plenty of time to notify Complainant of the additional storage charges prior to loading," however, suggests that it found Marine Transport at fault in that regard. *See id*. at 5. The Commission's decision could thus reasonably be construed as finding Marine Transport in violation of § 41102(c) for imposing unreasonable storage fees on a single shipment of three vehicles in or about December 2007.

At most, the evidence that Crocus relies upon demonstrates the Commission found Marine Transport in violation of § 41102(c) on one prior occasion based on the storage fees it assessed against a single shipment of vehicles in or about December 2007. This falls short of the requirement that Marine Transport's conduct regarding storage charges in 2013 and 2014 is normal, customary, and continuous. *Hangzhou*, 2020 FMC LEXIS 192; *Stockton Elevator*, 8 F.M.C. at 200-201.

Sammy's Auto Sales involved a shipment of eight vehicles that were to be transported from the United States to Jordan in two containers. Sammy's hired JAX which in turn engaged Marine Transport to arrange transportation overseas. S.O. Decision at 1-3. Acting on JAX's instructions, Sammy's delivered the vehicles to a New Jersey warehouse for future loading. *Id.* at 2. Shipment of one container was delayed due to a missing vehicle title. *Id.* A duplicate title was eventually obtained and provided to Marine Transport. By that time, Marine Transport was owed $10,000 in accrued storage fees. Its offer to discount the accrued fees to $4,000 did not settle the matter, and the vehicles were eventually auctioned off. Sammy's sued for reparations claiming that JAX and Marine Transport had violated § 41102(c*). Id*. at 3. Sammy's alleged that Marine Transport lost its car title and failed to provide timely notice of the accruing warehouse charges. *Id.* at 12.

The Settlement Officer found that Marine Transport had not violated § 41102(c) but JAX had. *Id.* at 10-13 (stating that "it was incumbent upon JAX (and not [Marine Transport]) to provide notice of the storage charges"). Sammy's hired JAX, not Marine Transport, to transport its vehicles and Marine Transport "does not own, operate or control" the company that stored the vehicles. *Id*. at 7. The case came before the Commission on sua sponte review and the Commission concurred with the Settlement Officer's "finding that [Marine Transport] did not violate § 41102(c)." Order Reversing in Part Decisions of the Settlement Officer, at 7 (FMC Oct. 18, 2016).

Crocus acknowledges the Commission's finding that Marine Transport was not liable but argues that JAX's conduct (which was found to be in violation of § 41102) demonstrates that Marine Transport acted unreasonably in allowing storage charges to accrue without notifying Crocus. Crocus Exceptions at 26. But Crocus cannot rely on a case where the Commission expressly found that Marine Transport did *not* act unreasonably as evidence that Marine Transport's conduct here is part of a practice.

Finally, Crocus relies on allegations in two cases brought against Marine Transport that are currently before the Commission: *MAVL Capital Inc. v. Marine Transport Logistics, Inc.* (*MAVL*), FMC Docket No. 16-16 and *Nnabugwu Chinedu Andrew v. Marine Transport Logistics, Inc*. (*Andrew*), FMC Docket No. 20-12. *See* Crocus's Exceptions at 14 and 21. But the

allegations in those cases are different from the conduct the ALJ found unreasonable here. In *MAVL*, the complainants alleged that Marine Transport failed to provide them with certain documents (ownership documents, shipping invoices, bills of lading, transport terms and conditions), failed to deal in good faith, misdelivered cargo, detained cargo, converted cargo, and exercised a maritime lien for monies owed to third parties. Compl. ¶¶ V.A, C, FMC Docket No. 16-16 (July 31, 2016). The complainants did not allege that Marine Transport overcharged them for storage without notice. Likewise, the complainants in *Andrew* did not allege that Marine Transport overcharged them. Rather, they alleged that Marine Transport violated § 41102(c) by failing to provide certain documents, failing to deal in good faith, misapplying complainants' monies resulting in delayed shipments and additional storage charges, causing unnecessary storage charges, misdelivering cargo, and dismantling automobiles. Compl. ¶¶ 55-172. These allegations are related to storage charges, but they are a different type of conduct than what the ALJ found unreasonable here.

Additionally, the allegations in *MAVL* and *Andrew* are just that – allegations. The Commission order in MAVL was decided using a motion to dismiss standard under which the Commission accepted the allegations as true. But neither the Commission nor the ALJ has made factual findings on those allegations. And *Andrew* is pending before the ALJ. Consequently, these cases are of limited relevance about whether Marine Transport's unreasonable conduct occurred on a normal, customary, and continuous basis. While the Commission could consider allegations as substantiating evidence, here the allegations brought by other complainants that Crocus relies on are not enough to carry the day. *See generally Hangzhou*, 2020 FMC LEXIS 192, at *6 (speculation that respondent may have engaged in similar conduct in handling other shipments insufficient to prove a pattern or practice).

In sum, the ALJ correctly applied 46 C.F.R. § 545.4 in deciding Crocus's § 41102(c) claim. In challenging the ALJ's determination that Crocus failed to prove Marine Transport normally, customarily, and continuously overcharged shippers to store cargo, Crocus points to only one relevant instance of overcharging another shipper. That conduct involved a single shipment of three vehicles and occurred in or around December 2007. Two instances of overcharging on storage fees over a seven-year period are not sufficient to show a regulation or practice of engaging in that conduct. Crocus has not met its burden of proving that Marine Transport had a regulation or practice of engaging in unreasonable or unjust conduct in handling or storing shippers' cargo, and the Commission therefore affirms the ALJ's dismissal of this claim.[7]

III. CONCLUSION

The Commission hereby:

> (1) affirms the ALJ's dismissal of the § 41102(c) claim regarding the Formula boat; and

[7]Crocus's challenge to the ALJ's calculation of reparations is denied as moot. *See* I.D.R. at 22; Crocus Exceptions at 28.

(2) dismisses the complaint and discontinues this proceeding.

By the Commission.

Rachel E. Dickon
Secretary

Chairman MAFFEI, concurring:

I agree in the outcome of the majority opinion, but I disagree with one part of the analysis involving the Commission's 2018 interpretive rule on § 41102(c), codified at 46 C.F.R. § 545.4, in this case.

As I have stated in previous opinions,[8] I accept that the interpretive rule is the current policy of the Federal Maritime Commission, and I have voted with the majority when the interpretive rule is applied properly in order to ensure consistency while the interpretive rule remains in effect. However, I have not changed my view that the interpretive rule misinterprets the intent of Congress in § 41102(c).

Therefore, I do not agree where the majority opinion directly references a view of Congressional intent and therefore *reinforces*, rather than merely *follows*, the interpretive rule. Specifically, I disagree with the majority's opinion where it states, "[r]ather, Crocus is being held to the standard of proof that Congress intended to apply to § 41102(c) claims against OTIs and carriers."[9]

Because the majority makes a convincing argument that the 2018 interpretive rule does properly apply to this case without this discussion, I concur with the rest of the analysis and the outcome.

I would note, in case this statement comes across as pedantic, that the interpretive rule that the majority opinion reinforces is currently contributing to a substantial deterrent for parties to bring private claims in cases involving alleged unreasonable detention and demurrage charges. As we consider ways to encourage private parties to bring complaints to the Commission for adjudication in this challenging time for the ocean cargo transportation system, I hope to draw attention to this issue in the hopes that Congress will clarify the awkward phrasing of § 41102(c) and make it clear how the Commission should adjudicate such claims.

[8]*See, e.g.*, *Hangzhou Qianwang Dress Co., Ltd. v. RDD Freight Int'l Inc*., 2 F.M.C. 2d 168, 175-78 (FMC Sept 1, 2020); *Gruenberg-Reisner v. Overseas Moving Specialists*, 34 S.R.R. 613 (FMC 2016).
[9]Majority opinion, at 12.

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MOSES DAMISA, *Complainant*

v.

TRANS ATLANTIC SHIPPING LLC, *Respondent*.

DOCKET NO. 1967(F)

Served: August 27, 2021

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION GRANTING MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE[1]

I. Introduction

Complainant Moses Damisa initiated this proceeding by filing a small claims complaint against Respondent Trans-Atlantic Shipping LLC ("TAS") with the Federal Maritime Commission ("Commission") alleging that TAS violated section 41102(c) of the Shipping Act of 1984, 46 U.S.C. § 41102(c), in connection with an arrangement between the parties to ship Complainant's property from the United States to Nigeria. Respondent denied the allegations.

Complainant moved to dismiss the complaint without prejudice so as to refile his complaint against Respondent in Georgia state court. Respondent opposes dismissal of this action without prejudice and seeks an award of attorney's fees and costs incurred in this proceeding. Complainant opposes Respondent's request for attorney fees and costs. For the reasons discussed below, this proceeding is dismissed without prejudice and Respondent's request for attorney fees and costs is denied.

II. Procedural History

On December 22, 2020, the Commission issued a Notice of Filing of Small Claims Complaint and Assignment, assigning this proceeding to the Office of Administrative Law Judges. On January 15, 2021, Respondent filed its answer to the complaint and declined to use the Commission's small claims procedures. On January 21, 2021, an order was issued assigning this claim to the undersigned for adjudication under the Subpart T procedures at 46 C.F.R. § 502.311-502.321 and requiring the parties to submit a joint status report identifying discovery requests.

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

On February 22, 2021, the parties submitted a joint status report indicating that they had requested mediation through the Commission's Office of Consumer Affairs and Dispute Resolution Services ("CADRS"). On February 25, 2021, another order was issued, granting the parties one month to engage in mediation through CADRS and requiring a second joint status report by March 24, 2021. The parties were also instructed to voluntarily produce discovery to each other before the due date for the second joint status report.

On March 24, 2021, the parties filed their second joint status report and a third order was issued on April 1, 2021, granting them time until April 30, 2021, to voluntarily exchange discovery, engage in mediation, and to file a third joint status report. On April 30, 2021, the parties submitted their third joint status report and a fourth order was issued on May 3, 2021, granting them time until May 28, 2021, to finalize discovery, to schedule mediation, and to file a fourth joint status report setting a specific deadline to complete discovery and mediation. On May 28, 2021, a fourth joint status report was received from the parties and a fifth order was issued instructing the parties to conclude discovery and mediation and file a fifth joint status report with a proposed briefing schedule on June 30, 2021. On June 30, 2021, the parties submitted their fifth joint status report with proposed briefing schedule and on July 2, 2021, a scheduling order was issued requiring the completion of discovery in this proceeding by July 15, 2021, and the completion of briefing by September 15, 2021.

On July 26, 2021, Complainant filed a motion to dismiss the complaint without prejudice ("Motion"). On August 3, 2021, Respondent submitted a response opposing the motion ("Opposition"). On August 11, 2021, Complainant filed a reply to the opposition ("Reply").

On August 18, 2021, Respondent submitted a motion for leave to file a sur-reply ("Sur-reply Motion") together with the sur-reply ("Sur-reply"). Respondent asserts that it will suffer prejudice if not allowed to respond to Complainant's reply because of "erroneous assertion of facts and law and new arguments raised by Complainant for the first time in his Reply" and "the ongoing global Covid-19 pandemic and related elevated shipping costs [that] represent extraordinary circumstances for which the Commission should permit this sur-reply to allow TAS to defend its interest." Sur-reply Motion at 1.

On August 25, 2021, Complainant filed a response to Respondent's sur-reply ("Sur-reply Opposition"). Complainant argues that the sur-reply was improper but that alternatively, if the sur-reply is allowed, Complainant should be afforded the opportunity to reply and Complainant includes the arguments. Sur-reply Opposition at 1-3.

Typically, sur-replies are not permitted, however, decisions should be based on a full and complete record. Given the somewhat unusual posture of this case, where a motion for voluntary dismissal and request for attorney fees are filed prior to any dispositive rulings, both sur-replies provide additional relevant information and arguments. Accordingly, Respondent's sur-reply is accepted and its arguments in the sur-reply are incorporated as part of the record. In addition, Complainant's sur-reply opposition is accepted and arguments in the sur-reply opposition are incorporated as part of the record. The record is now complete and ready for decision.

III. Discussion

A. Relevant Law

Commission Rule 72(a)(3), which governs voluntary dismissal of complaints after the respondent has filed an answer, provides:

> [A]n action may be dismissed at the complainant's request only by order of the presiding officer, on terms the presiding officer considers proper. If the motion is based on a settlement by the parties, the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable. Unless the order states otherwise, a dismissal under this paragraph is without prejudice.

46 C.F.R. § 502.72(a)(3).

The Shipping Act addresses when attorney fees are appropriate. "In any action brought under section 41301, the prevailing party may be awarded reasonable attorney fees." 46 U.S.C. § 41305(e). Additionally, Commission Rule 254, governing the award of attorney fees in private party complaint proceedings, provides in pertinent part:

> (a) In any complaint proceeding brought under 46 U.S.C. 41301 . . . the Commission may, upon petition, award the prevailing party reasonable attorney fees . . . .
>
> (b) *Attorney fees* means the market value of the services of any person permitted to appear and practice before the Commission in accordance with subpart B of this part.
>
> * * *
>
> (c) (1) In order to recover attorney fees, the prevailing party must file a petition within 30 days after a decision becomes final.
>
> * * *
>
> (d) (1) The petition must:
>
> (i) Explain why attorney fees should be awarded in the proceeding;
>
> (ii) Specify the number of hours claimed by each person representing the prevailing party at each identifiable stage of the proceeding; and
>
> (iii) Include supporting evidence of the reasonableness of the hours claimed and the customary rates charged by attorneys and

> associated legal representatives in the community where the person practices.
>
> (2) The petition may request additional compensation, but any such request must be supported by evidence that the customary rates for the hours reasonably expended on the case would result in an unreasonably low fee award.

46 C.F.R. § 502.254; *see also* Docket No. 15-06, *Final Rule, Organization and Functions; Rules of Practice and Procedure; Attorney Fees*, 81 Fed. Reg. 10508 (March 1, 2016) ("Final Rule").

B. Argument of the Parties

Complainant asserts that the dismissal of this proceeding and refiling of his action in state court will not cause undue prejudice to Respondent, and that "there [are] no defenses available to Respondent in this Court that will be barred in Georgia state court." Motion at 2.

However, Respondent opposes a dismissal without prejudice, urging that:

> Complainant's motion to dismiss be granted in part to dismiss the complaint and denied in part so that the claims therein are dismissed with prejudice and that TAS be awarded with attorney's fees, costs, and expenses incurred in this case, or, in the alternative, TAS respectfully requests that Complainant's motion be granted in its entirely but the dismissal be stayed until Complainant compensates TAS for its costs, expenses, and attorney's fees incurred defending itself in this proceeding, or in the alternative, TAS respectfully requests that Complainant's motion be denied in its entirety and this case proceeds to trial.

Opposition at 1.

Respondent argues that dismissal of Complainant's complaint without prejudice will cause plain legal prejudice to it for the following reasons: Complainant's explanation of its desire to dismiss shows that filing a new case in state court "would be a waste of judicial resources given the state court's clear lack of jurisdiction to adjudicate [Complainant's Shipping Act claims]" and the fact that "TAS will have to prepare for yet another trial under different circumstances;" Respondent has expended effort and expense preparing for trial in this proceeding; excessive delay and lack of diligence by Complainant in moving to dismiss given that "Complainant waited until the entire discovery was completed and until the week that his brief with proposed findings of fact and appendix was due to move to dismiss;" and Complainant's dismissal is sought merely to escape an adverse decision or to seek a more favorable forum because the complaint fails to state a claim upon which relief can be granted. Opposition at 6-17.

In the reply, Complainant contends that a dismissal will not cause legal prejudice to Respondent and "it is ordinarily proper to grant a motion to dismiss unless the defendant will suffer some plain legal prejudice beyond the mere prospect of a second lawsuit." Reply at 1-4 (quoting *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967)). Complainant asserts that it properly stated a claim for which relief could be granted and that because his

"claims have not been argued, briefed or decided by this Court, Respondent's argument that [Complainant] failed to properly state a claim for which relief could be granted is without merit." Reply at 2-4. Complainant contends that an award of attorney's fees is not appropriate because TAS has not shown any evidence that the claims filed by Complainant amount to frivolous litigation. Reply at 6. Complainant states:

> [Complainant] further shows the Court that he filed this Motion to Dismiss only after extensive discovery had been conducted and mediation had been attempted and failed. [Complainant] did not take earlier action to dismiss this case and file in state court because [he] wanted to take advantage of the mediation services available through the FMC. Respondent insisted that the parties engage in discovery prior to mediation and [Complainant] agreed. All discovery in this matter will benefit Respondent in the state court action. Likewise, mediation attended in this matter will also benefit the parties in the state court action.

Reply at 7. Complainant urges that if determined that his complainant should be dismissed with prejudice, attorney fees nevertheless be denied to Respondent. Reply at 8.

In its sur-reply, Respondent argues that the cases cited by Complainant in his reply are distinguishable from this case because they involve dismissal of a lawsuit in federal court to bring a lawsuit with the same claims in state court, while here, Complainant seeks dismissal of his complaint in order to bring different claims in state court. Sur-reply at 1. Respondent states that Complainant's statement that mediation was completed in June 2021 and that his motion was filed after the conclusion of mediation was misleading because mediation was still ongoing as of July 14, 2021, and Complainant never stated to TAS or the mediator that the mediation had failed. Sur-reply at 3. Respondent avers that it would be a manifest injustice resulting in undue prejudice for TAS should Complainant's claim be dismissed without prejudice and the dismissal is not conditioned upon the payment of costs and fees incurred by TAS in defending this suit. Sur-reply at 3.

Complainant alleges that while "Respondent contends that Complainant did not fully respond to discovery requests, Complainant likewise contends that Respondent has failed to respond to Complainant's discovery requests;" the parties had "no way to move forward with mediation;" and the "timing of the decision was such that no prejudice would be suffered by Respondent and that all work product developed would be beneficial to Respondent in the State Court case." Sur-reply Opposition at 2-3.

C. Analysis

1. Dismissal of the Complaint Without Prejudice is Appropriate

Pursuant to Commission Rule 72(a)(3), which governs dismissals in instances where the respondent has filed an answer to the complaint, "an action may be dismissed at the complainant's request only by order of the presiding officer, on terms the presiding officer considers proper. Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The parties agree that a voluntary dismissal may be with prejudice if there would be legal prejudice to a respondent. Opposition at 5-6; Reply at 4. The parties disagree, however, on what factors demonstrate legal prejudice. In this case, even under the factors identified by Respondent, legal prejudice is not established because (1) Complainant has provided a proper explanation for the motion to dismiss: that it seeks to file a related proceeding in state court; (2) Respondent was not required to file a brief, rather the expenses incurred were for hiring counsel, discovery, and mediation; (3) there was not excessive delay or lack of diligence from the parties; and (4) there was no pending motion or briefing on the merits when the voluntary withdrawal request was filed.

Although the parties have engaged in discovery and mediation, resulting in costs to both sides, this proceeding has not progressed so far that withdrawal of the complaint would be unduly prejudicial. Additionally, the parties have not yet briefed the merits of the allegations raised in the complaint nor has a decision been issued on the merits. Accordingly, Complainant's motion to dismiss his complaint without prejudice is granted.

2. Respondent is Not Eligible or Entitled to Recover Attorney Fees

In any private party complaint proceeding, the Commission is empowered "upon petition, [to] award the prevailing party reasonable attorney fees." 46 C.F.R. § 502.254(a). The party petitioning for attorney fees has the burden to show why it should be awarded the fees. *See* 46 C.F.R. § 502.254(d)(1) (stating in pertinent part that the petition must "[e]xplain why attorney fees should be awarded in the proceeding"); s*ee also Adenariwo v. BDP Int'l, Zim Integrated Shipping Ltd. and Its Agent (Lansal)*, 34 S.R.R. 771, 772 (FMC 2017) ("[t]he party seeking attorney fees bears the burden of establishing eligibility and entitlement to an award, providing evidence of the appropriate hours, and justifying the reasonableness of the rates" (citing *Edaf Antillas, Inc. v. Crowley Caribbean Logistics*, LLC, 34 S.R.R. 439, 444-45 (FMC 2016)).

A complainant "would generally qualify as the 'prevailing party' in a Commission proceeding when the presiding officer awards reparations or issues a cease and desist order." Final Rule, 81 Fed. Reg. at 10509. Similarly, a respondent would qualify as a prevailing party where the presiding officer issues a decision on the merits of the complaint and dismisses the complainant's claims with prejudice. *See, e.g.*, *Edaf*, 34 S.R.R. at 445 (where the Commission held that the administrative law judge's dismissal of all the complainant's claims with prejudice represented "a success on the merits" for the respondents and because they "prevailed on all of Complainants' claims against them," the respondents were "eligible for an award of fees as prevailing parties"). Here, Complainant has been granted permission to withdraw his complaint and no decision has been reached on the merits of his claims that would warrant a dismissal with prejudice of those claims. *See Guttenberg v. Emery*, 68 F. Supp. 3d 184, 191 (D.D.C. 2014) ("'[A]s numerous federal courts have made clear, a voluntary dismissal without prejudice under Rule 41(a) leaves the situation as if the action never had been filed.'" (quoting 9 Charles Alan Wright, Federal Practice and Procedure § 2367 (3d. ed. 2014)). Thus, Respondent is not a prevailing party under the Commission's rules.

Moreover, even if Respondent prevailed on the merits, it would not *ipso facto* be entitled to an award of attorney fees. In *Baltic Auto*, the Commission denied attorney fees in a case that was dismissed for statute of limitations grounds. The Commission found that the Complainant

in *Baltic Auto* "had a colorable argument that its claim arose within the statute of limitations and that the claim was not objectively unreasonable." *Baltic Auto Shipping Inc. v. Hitrinov*, 34 S.R.R. 944, 955 (FMC 2017).

"The primary consideration in determining entitlement to attorney fees is whether such an award is consistent with the purposes of the Shipping Act, and any factors the Commission relies upon in individual cases should be consistent with these purposes." Final Rule, 81 Fed. Reg. at 10515. The Commission elaborated:

> The Shipping Act is intended not only to ensure a non-discriminatory process for the common carriage of goods, but also to provide and promote an efficient, competitive, and economic ocean transportation system. These later goals are furthered by encouraging the industry to continue to develop new ways of improving ocean transportation. In order to promote such improvements and assist the industry in evaluating potential option, it is important the boundary between legal and illegal conduct be demarcated as clearly as possible.

Final Rule, 81 Fed. Reg. at 10514. To that end, a relevant factor when deciding whether to award attorney fees is that "parties should be encouraged to litigate meritorious claims and defenses." *Id.* at 91. So, even if this case was fully briefed and Respondents were successful on the merits, without more, they would not be entitled to attorney fees.

Awarding attorney fees against a complainant for withdrawing a complaint which was not determined to have been meritless would not comport with the Commission's goal that "parties should be encouraged to litigate meritorious claims and defenses." *See* Final Rule, 81 Fed. Reg. at 10515. Therefore, Respondent would not be entitled to recover attorney fees even it were a prevailing party, which it is not. Accordingly, Respondent's request for award of attorney fees and costs is denied.

IV. Order

Upon consideration of the motion and the record herein, the arguments of the parties, and the conclusions set forth above, it is hereby

ORDERED that Complainant Moses Damisa's motion for voluntary dismissal of his complaint be **GRANTED**. It is

FURTHER ORDERED that Respondent Trans-Atlantic Shipping LLC's request for attorney fees be **DENIED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITHOUT PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

SANTA FE DISCOUNT CRUISE PARKING, INC., D/B/A EZ CRUISE PARKING; LIGHTHOUSE PARKING INC.; AND SYLVIA ROBLEDO D/B/A 81ST DOLPHIN PARKING,
Complainants,

V.

THE BOARD OF TRUSTEES OF THE GALVESTON WHARVES; AND THE GALVESTON PORT FACILITIES CORPORATION,
Respondents.

DOCKET NO. 14-06

Served: September 10, 2021

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Michael A. KHOURI, Louis E. SOLA, Carl W. BENTZEL, *Commissioners*.

ORDER GRANTING PARTIAL SETTLEMENT PETITION

On July 26, 2021, Respondents The Board of Trustees of the Galveston Wharves (The Board) and The Galveston Port Facilities Corporation and Complainants Santa Fe Discount Cruise Parking, Inc. d/b/a EZ Cruise Parking (EZ Cruise) and Lighthouse Parking (Lighthouse) (collectively, the Settling Parties) filed a joint petition for approval of a partial settlement. For the reasons set forth below, the Commission grants the Settling Parties' petition.

I. BACKGROUND

In 2014, Complainants filed a complaint with the Commission alleging that Respondents violated 46 U.S.C. §§ 41102(c), 41106(2), and 41106(3). The ALJ dismissed the § 41102(c) and § 41106(3) claims relatively early in the proceedings, but the remaining § 41106(2) claims have been the subject of multiple Commission decisions and a D.C. Circuit appeal. *See Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, FMC No. 14-06, 2021 FMC LEXIS 56 (FMC Apr. 16, 2021). In April 2021, the Commission: (i) found that The Board violated § 41106(2) and remanded for the ALJ to determine an appropriate reparations award; and (ii) affirmed the ALJ's dismissal of all other claims. Respondents filed a petition for reconsideration of the Commission's April Order.

On July 26, 2021, Complainants EZ Cruise and Lighthouse and both Respondents filed a joint petition for approval of a partial settlement. Complainant Sylvia Robledo d/b/a 81st Dolphin Parking did not join the petition but has not opposed it.

II. DISCUSSION

The Commission's regulations allow parties to settle their disputes. 46 C.F.R. § 502.75(a), (b). When parties seek dismissal of a case pursuant to a settlement agreement, the Commission reviews the settlement to determine whether it "appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). As part of this analysis, "the Commission looks to see if the settlement has a reasonable basis and reflects the careful consideration by the parties of such factors as the relative strengths of their positions weighted against the risks and costs of continued litigation." *APM Terminals N. Am., Inc. v. Port Auth. of N.Y. & N.J.*, 31 S.R.R. 623, 626 (FMC 2009) (quoting *Delhi Petroleum Pty. Ltd. v. U.S. Atl. & Gulf/Australia – New Zealand Conference & Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988)).

Here, the Partial Settlement Agreements attached to the petition reflect considered decisions of sophisticated parties, represented by counsel, to settle their claims and related disputes. The Agreements do not appear to violate any law or policy and there is no evidence of fraud, duress, undue influence, mistake, or other defects that might make the settlement unapprovable.

III. CONCLUSION

The Commission therefore **GRANTS** the Joint Petition for Approval of Partial Settlement, **APPROVES** the Partial Settlement Agreements, and **DISMISSES** the Settling Parties' claims against each other in Docket No. 14-06 with prejudice, with the Settling Parties to bear their own costs and attorney fees with respect to each other.

By the Commission.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MCS INDUSTRIES, INC., *Complainant*

v.

COSCO SHIPPING LINES CO., LTD. AND MSC MEDITERRANEAN SHIPPING COMPANY SA, *Respondents*.

DOCKET NO. 21-05

Served: September 23, 2021

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT[1]

On September 10, 2021, Complainant MCS Industries ("MCS") filed a motion seeking approval of a settlement agreement with COSCO SHIPPING Lines ("CSL") and to preserve confidentiality of the settlement agreement and attached a copy of the confidential settlement agreement. The motion requests permission to file the settlement agreement under seal, approval of the settlement agreement, dismissal with prejudice of MCS's claims against CSL, and confidentiality for the settlement agreement.

Using language borrowed in part from the Administrative Procedure Act,[2] Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

[2] "The agency shall give all interested parties opportunity for – (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit." 5 U.S.C. § 554(c).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A American Jurisprudence, 2d Ed., 777-778 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp*., 30 S.R.R. 310, 311 (ALJ 2004)).

The motion states that "MCS and CSL, both sophisticated corporate entities, arrived at the Settlement Agreement through extensive, arm's length negotiations that involved businesspeople and counsel on both sides;" that the settlement agreement "does not contemplate any adverse effects on any non-parties, Respondent MSC, or the shipping public;" and that "the Settlement Agreement is fair and reasonable, and reflects the Parties' desire to resolve their issues without the need for costly and uncertain litigation." Motion at 3.

Based on the representations in the motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in settlement discussions. The proceeding was filed recently and

would require potentially expensive additional discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. There is no evidence of fraud, duress, undue influence, mistake, or harm to the public. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the petition to approve the settlement agreement between MCS Industries, Inc. and COSCO SHIPPING Lines Co., Ltd. be **GRANTED**. It is

FURTHER ORDERED that the claims against Respondent COSCO SHIPPING Lines Co., Ltd. be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that the requests to file under seal and for confidential treatment of the settlement agreement be **GRANTED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MAVL CAPITAL INC., IAM & AL GROUP INC., AND MAXIM OSTROVSKIY, *Complainants*

v.

MARINE TRANSPORT LOGISTICS, INC. AND DMITRY ALPER, *Respondents*.

DOCKET NO. 16-16

Served: September 29, 2021

BEFORE: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION ON REMAND[1]

I. INTRODUCTION

A. Overview and Summary of Decision

Complainants MAVL Capital Inc. ("MAVL"), IAM & AL Group Inc. ("IAM"), and Maxim Ostrovskiy commenced this proceeding by filing a complaint alleging that Respondents Marine Transport Logistics, Inc. ("MTL") and Dmitry Alper,[2] violated the Shipping Act of 1984 ("Shipping Act") with regard to two vehicles and three motorcycles. As discussed below, Complainants allege that Respondents violated section 41102(c) "by exercising a purported maritime lien for monies allegedly owed to third parties, and by detaining, misdelivering, and converting Complainants' automobiles in order to sell them overseas for a profit." Complaint at 8-9.

Respondents filed answers denying the allegations and raising defenses. Respondent Alper asserts that he was an employee who acted within the scope of his employment. Alper Answer at 6. Respondent MTL argues, in relevant part, that Complainants abandoned the vehicles so "MTL had no choice but to find a dealer who would cover outstanding storage," and that "MTL was entitled to exercise a lien over the subject vehicles as MTL is not a storage company, and vehicles generally are stored short term in contemplation of export." Remand Opposition at 2-4; MTL Response to CPFF at 3 ¶ 24.

[1] This initial decision on remand will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

[2] Mr. Alpers's name is Vadim Alper but he is also known as Dimitry Alper. CApp., Vol. 1, Appendix M at 6-7.

On January 17, 2017, a partial initial decision dismissed the claims for all but the Porsche Panamera. Initial Decision at 28, 2017 FMC LEXIS 4 (ALJ Jan. 17, 2017) ("I.D."). On January 27, 2017, an order was issued staying the proceeding on the Porsche claim until the Commission ruled on exceptions to the partial initial decision. On October 29, 2020, the Commission issued a memorandum opinion and order remanding the section 41102(c) claim regarding the Mercedes SL65 for further proceedings. Memorandum Opinion and Order at 18, 2020 FMC LEXIS 216 (FMC Oct. 29, 2020) ("Commission Order"). This triggered the end of the stay of the Porsche claim. The parties were provided time to complete discovery and brief the remaining issues.

As discussed more fully below, MTL asserted a lien and liquidated the vehicles based upon the terms of its standard house bill of lading which documents its normal business practice that "the Carrier shall have the right in its absolute discretion to dispose of the Goods and/or to sell the Goods by public auction or private sale without notice to the Merchant." CApp., Vol. 1, Appendix F, Ex. E at DEF 286.[3] Complainants have established that the regulations and practices identified in MTL's house bill of lading, which form the justification for the liquidation of the Mercedes and Porsche vehicles without sufficient notice or legal process, are unreasonable. Accordingly, Complainants have established by a preponderance of the evidence that MTL violated the Shipping Act. However, although the evidence supports a finding that the Commission has jurisdiction over MTL, Complainants do not argue or present evidence that would support piercing the corporate veil to find that Respondent Alper violated the Shipping Act. In addition, the evidence does not support awarding reparations.

B. Procedural History

1. Initial Decision

Complainants filed their complaint on August 5, 2016, and Respondents filed their answer on August 31, 2016. Prior to discovery, the parties were instructed to show cause why the complaint should not be partially dismissed.

On January 17, 2017, an initial decision was issued partially dismissing the complaint.

The ALJ addressed the Mercedes and motorcycle claims in an Initial Decision Partially Dismissing the Complaint (Initial Decision or I.D.). The ALJ dismissed

[3] The following documents are cited in this decision:

CApp.:	Complainants' Remand Brief Appendix, Volumes 1-4, filed March 17, 2021.
CApp./Sanct.:	Complainants' Motion for Discovery Sanctions Appendix, filed January 27, 2021.
CPFF:	Complainants' Remand Brief (Proposed Findings of Fact), filed March 17, 2021.
CR/OTSC:	Complainants' Response to Order to Show Cause, filed October 3, 2016.
CR/RPFF:	Complainants' Response to RPFF, filed May 5, 2021.
MTL App.:	Respondent MTL's Appendix, filed April 20, 2021.
R/CPFF:	Respondent MTL's Responses to CPFF, filed April 20, 2021.
RO/Sanct.:	MTL's Opposition to Motion Seeking Sanctions Exhibits, filed February 2, 2021.
RPFF:	Respondent MTL's Statement of Proposed Facts, filed April 20, 2021.

> the § 41102(c) claim regarding the Mercedes for lack of jurisdiction and failure to state a claim. The ALJ dismissed the § 41104(a)(3) claim regarding the motorcycles for failure to state a claim. The ALJ dismissed all remaining claims regarding the Mercedes and motorcycles as abandoned because Complainants did not address those claims in responding to the ALJ's show cause order. Complainants filed exceptions to some, but not all, of the ALJ's findings.

Commission Order at 2. On January 27, 2017, the remaining claims were stayed pending the Commission's decision on exceptions to the initial decision.

2. Commission Order

On October 29, 2020, the Commission Order remanded the section 41102(c) claim regarding the Mercedes for further proceedings. The Commission, in relevant part, (1) reversed "the dismissal of the § 41102(c) claim regarding the Mercedes and remand[ed] that claim for further proceedings" (2) affirmed "the dismissal with prejudice of the § 41104(a)(3) claim regarding the motorcycles;" and (3) affirmed "the dismissal with prejudice of the § 41104(a)(10) claim regarding the Mercedes." Commission Order at 18.

Based on the allegations in the complaint, the Commission discussed the Mercedes, stating:

> In December 2012, MAVL imported a 2006 Mercedes SL65 from Germany, retained MTL as the "receiving agent," and had the vehicle delivered to MTL's New Jersey warehouse. *Id.* ¶¶ 27-29.2. Complainants imported the Mercedes "so that maintenance could be performed on the vehicle after which it would subsequently be shipped overseas." *Id.* ¶ 27. Mr. Ostrovskiy informed MTL of this plan when MAVL stored the Mercedes in December 2012, but he did not specify a timeline or proposed shipping date at that time. *Id.* ¶ 29; Ostrovskiy Certif. ¶¶ 7-10. Mr. Ostrovskiy provided MTL with the certificate of title which is required for export. Ostrovskiy Certif. ¶ 9.
>
> MTL charged MAVL for storage of the Mercedes pursuant to MTL's NVOCC tariff. *Id.* ¶ 4. The storage charges that MTL imposed were consistent with MTL's tariff charges for cargo earmarked for export. *Id.* ¶¶ 4, 11. For example, MAVL received 30 days free storage allowed under the MTL tariff for vehicles "received for US export shipment." *Id*; Complainants' Show Cause Resp. App. A (MTL Tariff, Rule 2-140). "Beyond 30 days," MTL's tariff establishes rates of $10.00 per day for vehicles stored at its Bayonne, New Jersey facility. *Id.* The MTL tariff also links 30 days free storage to the need to provide the carrier with the vehicle title without which the "vehicle will not be loaded into a container." *Id.* Following the initial 30-day period, MTL discounted the storage rates for the Mercedes by fifty percent, which Mr. Ostrovskiy attributed to the "parties' ongoing business relationship." Ostrovskiy Certif. ¶ 12.
>
> Six months after the Mercedes arrived in MTL's New Jersey facility, Mr. Ostrovskiy asked MTL to produce the Mercedes for his inspection, but MTL

> failed to do so. *Id.* ¶ 13. Whereupon Mr. Ostrovskiy directed MTL to release the Mercedes and ship it to Dusseldorf, Germany. *Id.* ¶¶ 14-15. Several months later, Mr. Ostrovskiy learned that MTL had not followed these instructions, but had in fact shipped the Mercedes to Dubai without his knowledge or consent for the purpose of selling it and keeping the proceeds. *Id.* ¶¶ 16-17. According to Complainants, MTL has refused to provide them with documents verifying the sale of the Mercedes or confirming the details of the alleged sales transaction. Compl. ¶¶ 31-35. MTL claimed that the Mercedes was seized and sold consistent with its house bill of lading under a maritime lien for outstanding charges. Ostrovskiy Certif. ¶¶ 5-6.

Commission Order at 3-4 (footnote omitted).

The Commission stated that "[p]roperly framed, the question is whether Respondent MTL was a common carrier with respect to the allegations regarding the Mercedes." The Commission concluded:

> In sum, at this stage of the proceedings, Complainants have adequately alleged that MTL was acting as an NVOCC with respect to the Mercedes. The Commission therefore reverses the ALJ's dismissal of the § 41102(c) claim regarding the Mercedes and remands it for further proceedings, during which Complainants would need to prove all the elements of their § 41102(c) claim under the Commission's interpretative regulations at 46 C.F.R. § 545.4.

Commission Order at 13 (footnote omitted).

On October 30, 2020, the parties were ordered to file a joint status report with proposed schedule. On December 10, 2020, a remand scheduling order was issued permitting limited discovery. On February 5, 2021, Complainants' motion for discovery related sanctions was denied and the schedule was revised. On March 1, 2021, Complainants' motion to enlarge the time to file their remand brief was granted with the deadline extended to March 9, 2021.

On March 17, 2021, Complainants filed their remand brief with appendix. On March 19, 2021, Complainant filed a motion to accept late filing of Complainants' brief, proposed findings of fact, and appendix. On March 29, 2021, the scheduling order was amended to account for the late filing of Complainants' brief. On April 20, 2021, MTL filed its opposition brief, opposition to Complainants' proposed findings of fact, and proposed findings of fact with appendix. On May 5, 2021, Complainants timely filed their reply brief and response to MTL's proposed findings of fact.

C. Preliminary Issues

Complainants' March 19, 2021, motion to accept late filing of Complainants' brief, proposed findings of fact, and appendix is pending. Respondents have not objected to the late filings and an order dated March 29, 2021, provided Respondents with additional time for their responsive filings. Counsel for Complainants indicates that a medical condition prevented him from timely filing the brief, proposed findings of fact, and appendix. As there has been no objection to the delayed filing and no other delays, good cause is stated. Accordingly,

Complainants' motion to accept late filing of Complainants' brief, proposed findings of fact, and appendix is hereby **GRANTED**.

D. Arguments of the Parties

Complainants argue that Respondents acted as an ocean transportation intermediary ("OTI") with regard to the Mercedes and Porsche vehicles and that their actions and omissions that violated the Shipping Act are occurring on a normal, customary, and continuous basis; are directly related to and connected with the receiving, handling, storing, and/or delivering of property; are unjust and unreasonable; and are the proximate cause of Complainants' claimed loss. Brief at 33-63.

MTL asserts that it is not a regulated entity with respect to the vehicles; Complainants abandoned the vehicles; MTL did not act unreasonably with respect to Complainants and the subject vehicles; and there is no evidence that the conduct complained of amounts to a practice by MTL. MTL Opposition at 1-7. Respondent Alper has not filed anything since the remand.

In their reply, Complainants assert that MTL was a regulated entity with respect to the subject vehicles; Complainants did not abandon the subject vehicles which were, at the very least, misdelivered by MTL to Dubai; MTL acted unreasonably with regard to Complainants and the subject vehicles; and the conduct by MTL was part of a common custom, practice, and regular manner of MTL doing business. Reply at 5-11.

E. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision on remand is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision on remand addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or the defenses thereto. Administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Specific findings of fact on remand are in section two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. REMAND FINDINGS OF FACT

The findings of fact in the initial decision and the Commission decision were based upon the allegations in the complaint. At this stage, there must be evidence to support findings of fact. Many facts in this proceeding are disputed and it is not necessary to resolve disputes regarding facts that are not determinative. The record includes voluminous, sometimes contradictory, exhibits which were poorly organized and contain unnecessary duplicates. Only findings of fact relevant to the issues on remand are included.

A. Relevant Entities

1. Complainant MAVL was a New York corporation from 2008 to 2016. RO/Sanct., Ex. 1 at 1.

2. Complainant IAM was an Indiana corporation from 2012 to 2015. RO/Sanct., Ex.1 at 2.

3. Complainant Maxim Ostrovskiy was a principal of MAVL and IAM, which were automobile importers/exporters. CApp., Vol. 3, Appendix II at 1 ¶ 1.

4. According to Mr. Ostrovskiy, MAVL had an on-going business relationship with MTL. CR/OTSC, Ostrovskiy Certif. ¶ 12.

5. Respondent MTL is a New York Corporation licensed as a non-vessel-operating common carrier ("NVOCC"), FMC License No. 018709. www2.fmc.gov/oti/NVOCC.aspx (last visited August 26, 2021).

6. Alla Solovyeva is the sole owner of MTL. CPFF ¶10; R/CPFF ¶¶ 10, 86.

7. Respondent Alper was MTL's General Counsel and then Director of Operations from 2009 to 2015. CApp., Vol. 1, Appendix C, Ex. 1 at DEF 149; CApp., Vol. 1, Appendix M at 13.

8. Respondent Alper resigned from MTL effective May 1, 2015. CApp., Vol. 1, Appendix C, Ex. 1 at DEF 149.

9. Respondent Alper is the qualifying individual for an ocean transportation intermediary not involved in this proceeding. CApp., Vol. 1, Appendix M at 9-10; *see also* CApp., Vol. 2, Appendix Z (MTL lawsuit against Alper).

10. World Express & Connection, Inc. ("World Express") is a warehouse company providing loading and storage services for vehicles, boats, and other cargo, including for ocean transportation from the United States to foreign ports. CPFF ¶ 14; R/CPFF ¶ 14.

11. MTL uses World Express as its container freight station/container yard ("CFS/CY"). CPFF ¶ 88; R/CPFF ¶ 88.

12. Car Express & Import, Inc. ("Car Express") is a New York corporation and is licensed as a car purchaser/dealer. CApp., Vol. 3, Appendix HH at 2.

13. Aleksandr Solovyev is the sole owner, officer, and director of World Express, Car Express, and Royal Finance Group ("RFG"). R/CPFF ¶¶ 11, 12, 13; CApp., Vol. 3, Appendix HH at 1.

14. Aleksandr Solovyev, was married to Alla Solovyeva. *Crocus Investments, LLC v. Marine Transport Logistics*, Docket No. 15-04, Initial Decision on Remand at 8, 2020 FMC LEXIS 238 (ALJ Dec. 9, 2020) ("Crocus Remand ID") *aff'd* 2021 FMC LEXIS 125 (FMC Aug. 18, 2021) ("Crocus Remand FMC").

15. At times, Aleksandr Solovyev or one of his companies acted as agent for MTL. CPFF ¶ 18; R/CPFF ¶ 18.

16. MTL accepts automobiles into its possession, custody, and control solely for purposes of export, and never for storage only. CPFF ¶ 68; R/CPFF ¶ 68.

17. MTL moves thousands of containers per year. CApp., Vol. 1, Exhibit F at 2 (DEF 262).

18. MTL Tariff, Rule 2-140, states that a "shipper will be entitled to 30 days free storage starting from the date of arrival of the vehicle at the carrier warehouse in order to allow time to provide the carrier with the vehicle title, absent which the vehicle will not be loaded into a container." CPFF ¶ 38; R/CPFF ¶ 38; CR/OTSC, Ex. D, App. A at CX 178.

B. Findings Related to the Mercedes SL65

19. Maxim Ostrovskiy states that the Mercedes SL65 was imported to the United States from Germany so that maintenance could be performed and then it would be shipped back to Germany. CR/OTSC, Ostrovskiy Cert ¶ 2.

20. A series of import documents discuss the shipment from the Hanjin Phoenix of an automobile, with the VIN number matching the Mercedes SL65, that arrived on November 13, 2013 (USCBP Entry Summary), an automobile from Germany described as "CAXU6911501" (Kilroy customs broker), where MTL billed Atlantic Cargo Logistics for the same container number "CAXU6911501" (MTL Invoice), and on November 28, 2012, Atlantic Cargo Logistics billed MAVL/Maxim Ostrovski for the same BL No "CAXU6911501." CApp., Vol. 3, Appendix FF, Ex. A at P0020-P0023.

21. A November 29, 2012, email regarding the Mercedes states that the car was offloaded on November 27th and is on a credit hold until released by Atlantic Cargo Logistics; that a customer showed up without an appointment and was not authorized to take possession; and that there is free storage at MTL until December. MTL App., Ex. 3.

22. In December 2012, Complainants engaged MTL to act as their receiving agent and to store the Mercedes so that maintenance could be performed on it before shipping it back to Germany. CR/OTSC, Ostrovskiy Cert. ¶ 7; CApp., Vol. 1, Exhibit F at 2 (DEF 262).

23. Complainants explained that the Mercedes was to be shipped back to Germany by MTL on a date to be determined by Complainants after Complainants could inspect said vehicle and order custom made repair parts. CR/OTSC, Ostrovskiy Cert. ¶ 10.

24. An email dated January 11, 2013, from MTL to IAM & IL Group, Inc., with a subject line of "CAXU6911501 storage fee invoice" which states that "Invoice for storage fee is attached. Next invoice for $150 will be generated on 2/03." MTL App., Ex. 1 at 5.

25. Complainant Ostrovskiy gave MTL the original Certificate of Title for the Mercedes for presentation to U.S. Customs in order to facilitate export of the Mercedes to Germany. CR/OTSC, Ostrovskiy Cert. ¶ 9.

26. Complainants received thirty days of free storage at MTL's warehouse. CR/OTSC, Ostrovskiy Cert. ¶ 11.

27. After expiration of the thirty days of free storage, MTL charged Complainants a monthly storage charge of $150 for the Mercedes. CR/OTSC, Ostrovskiy Cert. ¶ 12; CApp., Vol. 1, Exhibit F at 2 (DEF 262).

28. At some point in 2012 or 2013, Ostrovskiy visited MTL's warehouse to inspect the Mercedes prior to exporting it to Germany through MTL but the evidence is conflicting regarding the date and whether he saw the vehicle. CR/OTSC, Ostrovskiy Cert. ¶ 13 (June 2013) *but see* R/CPFF ¶ 41 (November 2012), MTL App., Ex. 3.

29. Ostrovskiy claims that he verbally requested that Respondents release the Mercedes from the MTL storage facility and export it to Germany to an address previously provided to MTL for export of his other cargo, although there is no contemporaneous evidence of this request. CR/OTSC, Ostrovskiy Cert. ¶¶ 14, 15.

30. MTL customers were allowed to verbally provide shipping instructions for export of vehicles. CPFF ¶ 42; R/CPFF ¶ 42; CApp., Vol. 1, Appendix M at 19.

31. On May 9, 2013, MTL sent a message to Ostrovskiy regarding the Mercedes storage fee stating: "Your vehicle is stored in our facility for more than half a year. Invoice for storage for period from 05/04-06/05 alone[sic] with the total outstanding balance are attached. Please advise when you are planning to arrange payment for total storage outstanding and pick up your vehicle." CPFF ¶ 20; R/CPFF ¶ 20; CApp., Vol. 1, Appendix F, Ex. A at DEF 268-DEF 271; MTL App., Ex. 1 at 3.

32. The May 9, 2013, email attached MTL "Open Invoices January 11 through May 9, 2013" for IAM & AL Group, Inc. with a total of $900.00, for six months at $150.00 a month and identified the container as "CAXU6911501," the Mercedes. CPFF ¶ 20; R/CPFF ¶ 20; CApp., Vol. 1, Appendix F, Ex. A at 270.

33. It appears that the May 9, 2013, email was not received, as MTL's evidence shows that "[d]elivery to the following recipient failed permanently." MTL App., Ex. 1 at 1-2. In

addition, an email to "Alla" and "Dimitry" states: "This email bounced. I do not have any other email. I tried to call the client. He didn't pick up." MTL App., Ex. 1 at 4.

34. The May 9, 2013, email was forwarded on May 10, 2013, and that email was received by Ostrovskiy. CApp., Vol. 1, Appendix F, Ex. A; CR/RPFF ¶ 4.

35. Complainants did not pay the storage charges due for the Mercedes. RO/Sanct., Solovyeva Cert. at 1-2.

36. Alla Solovyeva, on behalf of MTL, stated that "after my company could not locate Mr. Ostrovskiy, Car Express found the customer (Middle East Asia Alfa) who paid for outstanding storage charges and the vehicle was transferred to Car Express as it is an authorized dealer so the vehicle could lawfully be exported out of the United States." RO/Sanct., Solovyeva Cert. at 2.

37. Alla Solovyeva, on behalf of MTL, stated that "[w]hen a lien was asserted, I offered this vehicle to all my customers and dealers, and Car Express's client, Middle East Asia Alfa, paid for the storage." RO/Sanct., Solovyeva Cert. at 2.

38. Alla Solovyeva explained how the lien arose when she stated that the "2006 Mercedes SL65 VIN#3072 was sold pursuant to Clause 15 of the MTL House Bill of Lading . . . for unpaid freight and other charges owed by plaintiffs." CPFF ¶ 36; RPFF ¶ 36.

39. A Copart invoice dated June 7, 2013, showing that Car Express purchased the Mercedes from Travelers Indemnity for a total of $3,600.00, which includes a severe water damage disclosure, was not created and/or generated by Copart and "Car Express did not purchase the VIN that is Lot 26998321." CApp., Vol. 1, Appendix H at DEF 4, DEF 15; *see also* CApp., Vol. 3, Appendix DD, Ex. B at DEF 355.

40. This June 7, 2013, Copart invoice was provided to Alexander Safonov after the Mercedes arrived in Dubai. CApp., Vol. 3, Appendix DD, Ex. B at DEF 350.

41. Aleksandr Solovyev, sole principal and officer of Car Express and RFG, stated that "Car Express and Royal finance Group were not involved with the 2006 Mercedes SL65." CApp., Vol. 3, Appendix HH at 3.

42. The Mercedes was sold for under $4000 in Dubai. CApp., Vol. 2, Appendix V at 10 (DEF 0061) ($3500) *but see* CPFF ¶ 35; R/CPFF ¶ 35 ($3,800).

C. Findings Related to the Porsche Panamera

43. There are documents that suggest that the Porsche Panamera was purchased as a salvage vehicle, although it is not clear if these are reliable. Compare CApp., Vol. 2, Appendix V at 3-4 (DEF 54-DEF 55) with CApp., Vol. 3, Appendix FF, Ex. A at P0008-P0011.

44. Aleksandr Solovyev, sole principal and officer of RFG and Car Express, stated that "Car Express purchased the Porsche Panamera for $41,940 on or about April 18, 2013, at

Plaintiff's request with financing provided by Royal Finance Group." CApp., Vol. 3, Appendix HH at 4.

45. An April 18, 2013, document shows a withdrawal of $5,500 for a wire to IAA Buyer Wires for "STOCK #11030324" and a handwritten note that says "Ostrovsviy paid to the auction. AS." CApp., Vol. 4, Appendix JJ, Ex. G at 1 (also MTL App., Ex. 7). MTL claims that this is MTL's payment although the handwritten note suggests it was Complainants' payment. MTL App., table of contents; MTL App., Ex. 7.

46. Royal Finance Group Invoice no. 1172MO, April 20, 2013, to MAVL for the 2011 Porsche Panamera lists the description of services as follows: Car Cost: $35,379; Delivery: $950; Shipping to Kotka: $700; Commission: $3,300; Total Cost: $40,429. CApp., Vol. 1, Appendix G, Ex. B at DEF 761.

47. An April 22, 2013, wire transfer of $10,000, to RFG states "Pamamera ML 350," which may have been payment for the Porsche Panamera but might also have been a payment for a different vehicle as the Porsche is not otherwise described as "ML 350." CApp., Vol. 4, Appendix JJ, Ex. G at 2.

48. A document dated April 23, 2013, bearing an "Insurance Auto Auctions" ("IAA") logo titled "Buyer Receipt" lists: Buyer Name and Invoice To: IAM & Al Group; Item: 2011 Porsche Panamera; *Stock No.: 11030324*; Bid Amount: $40,500.00; Buyer Fee: $365.00; Service Fee: $55.00; Late Fee: $810.00; Storage: $100.00; Internet Fee: $59.00; Check #/Reference No. AB 10,000.00; Total: $41,889.00; Total Payment Amount: $46,440.00. CApp., Vol. 3, Appendix FF, Ex. A at P0006.

49. A document with a date stamp of April 23, 2013, shows a processed wire transfer from an account number that matches the account number for RFG listed in CApp., Vol. 4, Appendix JJ ($10,000 wire transfer to RFG dated 4/22/2013). This wire transfer is for $36,440 to IAA Buyer Wires and references "Stock # 11030324" which matches the stock number on the IAA buyer receipt and a handwritten note says "my payment to IAAI for Porsche Panamera." CApp., Vol. 4, Appendix KK, Ex. 2 at 2. It is not clear who wrote the note but this appears to be a payment from RFG to IAA for the Porsche.

50. Both the $5,500 withdrawal and the $36,440 wire transfer from RFG list the same stock number that is on the IAA Buyer Receipt (11030324) and both are sent to "IAA Buyer Wires" at the same account number. It appears that this total payment of $41,940 was paid to IAA for the Porsche Panamera. CApp., Vol. 4, Appendix JJ, Ex. G at 1; CApp., Vol. 4, Appendix KK, Ex. 2 at 2.

51. A Copart invoice dated May 28, 2013, showing that Car Express purchased the Porsche from Progressive for a total of $21,000, which includes a severe water damage disclosure, was not created and/or generated by Copart. CApp., Vol. 1, Appendix H at DEF 4, DEF 18.

52. A Sunrise Automotive Center invoice, dated August 2, 2013, and addressed to Royal Finance Group, bills $9,200 for repairs to the 2011 Porsche Panamera. The invoice

reflects that $260.00 of the amount billed was paid in cash. CApp., Vol. 4, Appendix KK, Ex. 2 at 3.

53. On August 5, 2013, Royal Finance Group issued a check for $7,936 signed by Alex Solovyev to Sunrise Automotive Center for repair of the Porshe Panamera. CPFF ¶ 35; CApp., Vol. 4, Appendix KK, Ex. 2 at 4.

54. On September 17, 2013, Royal Finance Group issued another check for $1,000 signed by Alex Solovyev to Sunrise Automotive Center. CPFF ¶ 35; CApp., Vol. 4, Appendix KK, Ex. 2 at 6.

55. The record contains an email dated August 14, 2015, two years after the Porsche was shipped to Dubai and sold, from an employee of MTL, addressed to MAVL Capital, Inc., which attached invoice 24141 and stated:

> Dear customer, your invoice is over 6 months past due, please remit payment. Please be advised that administrative and legal fees will apply. If this matter will not be settled within 7 business days, cargo shall be auctioned as abandoned to cover above mentioned fees as well as storage and handling. Your prompt response is highly requested. Management.
>
> Enclosed is the invoice for inland Charges facilitated by MTL via 3rd party carriers. Please proceed with immediate payment in order to avoid shipment delays and late fees. We look forward to serving you in the future.

CApp., Vol. 3, Appendix GG at DEF 756-DEF 757 (emphasis omitted).

56. Attached to the 2015 invoice was an MTL invoice labeled 24141, addressed to MAVL, dated May 8, 2013, with a due date of May 15, 2013, listing a total of $1,000 based on inland freight of $850 and storage fee of $150. CApp., Vol. 3, Appendix GG at DEF 758.

57. The record also includes an invoice from MTL to Middle East Asia Alfa FZC dated April 27, 2013, for storage fees for the Porsche Panamera from May 8, 2013, to August 21, 2013, in the amount of $1,060, and an MTL receipt for $1060 dated June 11, 2013. CApp./Sanct., Appendix Y at 1-2.

D. General Findings of Fact

58. Alla Solovyeva, on behalf of MTL, stated that "Cargo Express, as a lawful dealer, found the buyer for the Mercedes and Porsche, and acted as a third party between MTL and the [new] consignee." RO/Sanct., Solovyeva Cert. at 2.

59. Clause 15 of MTL's standard house bill of lading provides:

> LIEN The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier: (a) Under the Bill of Lading, (b) Under any other contracts with the

> Merchant, including without limitation, any and all unpaid ocean freight or other charges due from or on account of any previous carriage or other services performed by the Carrier for the Merchant; (c) For expenses incurred by the Carrier for the account of the Merchant, and for General Average and salvage contributions to whomsoever due, and (d) For the costs and attorneys' fees incurred in recovering any or all of the foregoing, and for all such purposes the Carrier shall have the right in its absolute discretion to dispose of the Goods and/or to sell the Goods by public auction or private sale without notice to the Merchant.

CApp., Vol. 1, Appendix F, Ex. E at DEF 286.

60. Respondent Alper was asked in his deposition whether it is possible to "change ownership" of vehicles before shipping and he answered: "Unless you went through court and got a lien or you paid them or, no, I don't believe so." CApp., Vol. 1, Appendix M at 71.

61. On August 24, 2013, the Mercedes and Porsche Panamera were shipped from the United States and sold in the United Arab Emirates pursuant to Clause 15 of the MTL House Bill of Lading's lien clause for unpaid freight. CApp., Vol. 2, Appendix P at DEF 245; *see also* CApp., Vol. 2, Appendix S, T.

62. The house bill of lading, issued by MTL for shipping of the Mercedes SL65 and the Porsche Panamera to the UAE, lists Tretiykov Andrey as the exporter; Middle East Asia Alfa, FZE ("MEAA") as the consignee; and MTL as the forwarding agent for the Porsche Panamera and the Mercedes. CApp., Vol. 2, Appendix S at DEF 259.

63. The non-negotiable waybill issued by Maersk, for shipping of the Mercedes and the Porsche Panamera to the UAE lists MTL as the shipper and MEAA as the consignee for the Porsche Panamera and the Mercedes. CApp., Vol. 2, Appendix T at DEF 58; CPFF ¶ 52; R/CPFF ¶ 52.

64. The Automated Export System ("AES") filing for shipment of the Mercedes and the Porsche Panamera from the United States to Dubai filed by MTL lists MTL as the freight forwarder for the shipment and Alla Solovyeva as the contact for MTL. CApp., Vol. 2, Appendix O at 6 (DEF 232); CPFF ¶ 34; R/CPFF ¶ 34.

65. Car Express was listed as the shipper and United States Principal Party in Interest ("USPPI") on the AES filing for the export of the Mercedes and the Porshe Panamera. CApp., Vol. 2, Appendix O at 6 (DEF 232).

66. MTL was in contact with Complainants regarding other shipments, including of bobcats, in 2013. CApp., Vol. 1, Appendix F at DEF 263-DEF 265.

67. Complainant Ostrovskiy admits that various automobiles were purchased by his companies through Car Express, with the agreement that Car Express would fund a portion of the purchase price, and that the automobiles would be shipped exclusively using MTL's services. CApp., Vol. 3, Appendix II at 2.

68. Complainants admit that various automobiles shipped by their companies through MTL were also financed, in part, by MTL and Car Express, both of which directed Complainants to make payment to RFG for MTL's services. CApp., Vol. 3, Appendix II at 2.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 2006 FMC LEXIS 19, at *33, 30 S.R.R. 991, 997-99 (FMC May 10, 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co.*, Docket No. 99-24, 2000 FMC LEXIS 14, at *38-42, 28 S.R.R. 1635, 1645 (FMC Oct. 31, 2000). Complainants allege a violation of the Shipping Act within the Commission's jurisdiction.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 FMC LEXIS 35, at *41 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Remand FMC,* 2021 FMC LEXIS 125, at *4. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180, 1993 FMC LEXIS 73, at *40 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 FMC LEXIS 19 (FMC June 13, 1994).

B. Relevant Law

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). "The term 'ocean freight forwarder' means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(19).

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17). To be an NVOCC, the entity must meet the Shipping Act's definition of common carrier.

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(7).

The statutory definitions are echoed in the Commission's regulations:

> *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term
>
> (1) *Ocean freight forwarder (OFF)* means a person that – (i) In the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (ii) Processes the documentation or performs related activities incident to those shipments; and
>
> (2) *Non-vessel-operating common carrier (NVOCC)* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(m).

> *Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:
>
> (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
>
> (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 C.F.R. § 515.2(e).

The Commission promulgated regulations providing examples of NVOCC services performed by OTIs.

> *Non-vessel-operating common carrier services* refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:
>
> (1) Purchasing transportation services from a common carrier and offering such services for resale to other persons;
>
> (2) Payment of port-to-port or multimodal transportation charges;
>
> (3) Entering into affreightment agreements with underlying shippers;
>
> (4) Issuing bills of lading or other shipping documents;
>
> (5) Assisting with clearing shipments in accordance with U.S. government regulations;
>
> (6) Arranging for inland transportation and paying for inland freight charges on through transportation movements;
>
> (7) Paying lawful compensation to ocean freight forwarders;
>
> (8) Coordinating the movement of shipments between origin or destination and vessel;
>
> (9) Leasing containers;
>
> (10) Entering into arrangements with origin or destination agents;
>
> (11) Collecting freight monies from shippers and paying common carriers as a shipper on NVOCC's own behalf.

46 C.F.R. § 515.2(k).

The complaint alleges that Respondents violated section 41102(c) of the Shipping Act, which states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

On September 7, 2018, the Commission issued a notice of proposed rulemaking "to obtain public comments on clarification and guidance regarding the Commission's interpretation of the scope of 46 U.S.C. 41102(c)." Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367 (Sept. 7, 2018) ("NPRM"). In the notice of proposed rulemaking, the Commission stated *inter alia*:

> Specifically, the Commission is considering an interpretive rule consistent with Commission precedent . . . that would restore the scope of § 41102(c) to prohibiting unjust and unreasonable *practices* and *regulations*. These decisions require that a regulated entity engage in a practice or regulation on a *normal, customary,* and *continuous* basis and a finding that such practice or regulation is unjust or unreasonable to violate that section of the Shipping Act.

NPRM, 83 Fed. Reg. at 45368 (emphasis in original, internal citations omitted).

On December 17, 2018, the Commission issued a final rule adopting the September 7, 2018, notice of proposed rulemaking without change. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018) ("Final Rule"). Rule 545.4, states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

C. Discussion

At this point, the only remaining claims are the alleged violations of section 41102(c) for the Mercedes and Porsche vehicles. The Commission found that the "ALJ correctly dismissed as abandoned any 46 U.S.C. §§ 41104(a)(10) and § 41102(c) claims regarding the motorcycles because Complainants did not allege violations of those statutory prohibitions vis-à-vis the motorcycles." Commission Order at 15. In addition, "the Commission affirm[ed] the ALJ's dismissal with prejudice of the § 41104(a)(10) claim regarding the Mercedes for failure to state a claim." Commission Order at 17. In their brief, Complainants only argued section 41102(c) claims. Complainants did not argue that any other claims remain and any such claims are deemed abandoned. Thus, the only remaining issue is whether Respondents violated section 41102(c).

The first question is whether Respondents were regulated entities with respect to the vehicles. If so, then the next question is whether the elements required to establish a violation of section 41102(c) have been met. Each question will be addressed in turn.

1. Whether Respondents Acted as Regulated Entities

a. MTL

The Commission found that the complaint adequately alleged that Respondent MTL was acting as a regulated entity with regard to the Mercedes. The Commission decision did not address the claims regarding the Porsche as they were not before it. To be a regulated entity under section 41102(c), MTL must have been acting as a common carrier, marine terminal operator, or ocean transportation intermediary. There is no allegation that MTL was an ocean common carrier or a marine terminal operator. Ocean transportation intermediaries may be ocean freight forwarders or NVOCCs.

The Commission discussed the relevant legal standard.

> Properly framed, the question is whether Respondent MTL was a common carrier with respect to the allegations regarding the Mercedes. *See Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, FMC No. 08-04, 2011 FMC LEXIS 9, *39 (ALJ Mar. 9, 2011). Common carriers are defined by three traits; they: (1) hold themselves out to the general public as providing transportation by water for passengers or cargo between the United States and a foreign country; (2) assume responsibility for transporting the passengers or cargo from the port or point of receipt to the port or point of destination; and (3) use, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a United States port and a foreign port. 46 U.S.C. § 40102(7) and (17); 46 C.F.R. § 515.2(e) and (k).
>
> When dealing with alleged common carriers or NVOCCs under § 41102(c), the Shipping Act's common carrier definition forms the basis for a "fact-intensive analysis" that considers the parties' conduct and actual arrangements during the relevant time frame. *Crocus*, 1 F.M.C. 2d. [403, 415 (FMC July 16, 2019)] (citing *Worldwide Relocations—Possible Violations of the Shipping Act*, 32 S.R.R. 495, 503, 2012 FMC LEXIS 23, *13-*14 (FMC 2012). The Commission's well-defined methodology for deciding common carrier status considers the totality of circumstances and their combined effect. *Worldwide*, 32 S.R.R. at 503, 2012 FMC LEXIS 23, *13-*14.
>
> Here, MTL's alleged actions regarding the Mercedes meet all criteria that define a common carrier. MTL unquestionably held itself out as a common carrier; it is registered with the Commission as a licensed NVOCC and publishes an NVOCC tariff. I.D. at 3-5; MTL Tariff at 1; *see also Crocus*, 1 F.M.C. 2d at 410; *Tienshan*, 2011 FMC LEXIS 9, at *39-*42.
>
> Taking Complainants' allegations as true, MTL also assumed responsibility for the Mercedes when it agreed to store it and tacitly understood that MAVL would eventually have the Mercedes shipped abroad. Compl. ¶¶ 27-29. When MTL accepted delivery of the Mercedes in early December 2012, Mr. Ostrovskiy told MTL that MAVL would eventually have the car shipped back to Germany after

> inspecting it and ordering repair parts. *Id.* MTL acknowledged that the Mercedes was earmarked for export by granting MAVL the same 30 days free storage it allows cargo destined for export under its NVOCC tariff. MTL's tariff allows "30 days free storage starting from the date of arrival of the vehicle at the warehouse, in order to allow time to provide the Carrier with the vehicle title, absent which the vehicle will not be loaded into a container." MTL Tariff, Rule 2-140. According to Mr. Ostrovskiy, MAVL had an on-going business relationship with MTL Ostrovskiy Certif. ¶ 12, so MTL presumably knew that MAVL is in the vehicle export/import business and likely to ship the Mercedes abroad at some point.
>
> Further support for MTL having assumed responsibility for transportation comes from the undisputed allegations and evidence that MTL actually shipped the Mercedes overseas as an NVOCC. Complainants allege that MTL shipped the Mercedes to Dubai. *See* Compl. ¶¶ 27-31. A bill of lading issued by Maersk for the Mercedes' shipment shows MTL listed as the shipper, which would be consistent with it acting as an NVOCC. *See* 46 U.S.C. § 40102(7) and (17).
>
> As for the third element of the common carrier definition, Complainants allege that the Mercedes was transported between a United States port and a foreign port. Compl. ¶ 31; Ostrovskiy Certif. ¶¶ 16-17. This is further demonstrated by the Maersk bill of lading for the Mercedes.
>
> In sum, at this stage of the proceedings, Complainants have adequately alleged that MTL was acting as an NVOCC with respect to the Mercedes.

Commission Order at 11-13 (footnotes omitted).

The Commission reviewed this proceeding prior to briefing on the merits and therefore relied on the allegations in the complaint. The proceeding has now been fully briefed and Complainants have established by a preponderance of the evidence that MTL was acting as an NVOCC with respect to both the Mercedes and the Porsche.

MTL asserts that Complainants abandoned the vehicles prior to any shipping of the vehicles and that a maritime lien applies. MTL argues that Mr. Ostrovskiy did not make efforts to repair the vehicles, that Mr. Ostrovskiy sold the Porsche so did not have title to it, that "if somebody leaves property on the yard without compensation for storage, then MTL should not be a regulated entity with respect to such property indefinitely," and that "disposing of the property as junk" does not involve shipping. Opposition at 2-4.

Complainants contend that they did not abandon the vehicles, that the repairs are not relevant to whether the vehicles were abandoned, that title did not change until the vehicles were in Dubai, and that Solovyev and Solovyeva already admitted that the vehicles were "misdelivered." Reply at 8-10.

MTL is registered with the Commission as a licensed NVOCC and publishes an NVOCC tariff, so for the reasons outlined by the Commission, MTL meets the holding out element. MTL accepts automobiles into its possession, custody, and control solely for purposes of export, and

never for storage only, CPFF ¶ 68; R/CPFF ¶ 68, so the evidence shows that MTL assumed responsibility for the vehicles when it agreed to store them pending shipment abroad. According to Mr. Ostrovskiy, MAVL had an on-going business relationship with MTL, CR/OTSC, Ostrovskiy Cert. ¶ 12, so MTL presumably knew that MAVL is in the vehicle export/import business and likely to ship the vehicles abroad. Further support for MTL having assumed responsibility for transportation comes from the admission that MTL actually shipped the vehicles overseas as an NVOCC. Commission Order at 12. The bill of lading issued by Maersk for the shipment of the Mercedes and Porsche from New York to the United Arab Emirates lists MTL as the shipper, which is consistent with it acting as an NVOCC. CApp., Vol. 2, Exhibit N; *see also* Commission Order at 12-13; 46 U.S.C. § 40102(7) and (17).

Complainants have established the final element requiring that the cargo at issue be shipped by international ocean borne transportation because MTL assumed responsibility for the vehicles with the expectation that they would be shipped overseas and because MTL did, in fact, ship the vehicles overseas, albeit not on behalf of Complainanats. CApp., Vol. 2, Appendix T at DEF 58. Moreover, the invoice issued by Car Express lists the delivery destination for the Porsche as Kotka (Finland) (CApp., Vol. 1, Appendix G, Ex. B at DEF 761) and Complainant Ostrovskiy admits that various automobiles were purchased by his companies through Car Express, with the agreement that the automobiles would be shipped exclusively using MTL's services. CApp., Vol. 3, Appendix II at 2. Similarly, Complainants explained that the Mercedes was to be shipped back to Germany by MTL on a date to be determined by Complainants after Complainants could inspect said vehicle and order custom made repair parts. CR/OTSC, Ostrovskiy Cert. ¶ 10. MTL accepts automobiles into its possession, custody, and control solely for purposes of export, and never for storage only. CPFF ¶ 68; R/CPFF ¶ 68.

Accordingly, the evidence supports a finding that MTL was a regulated entity with regard to both the Porsche and the Mercedes.

b. Mr. Alper

Complainants alleged in their complaint: that "the closeness of [the] relationships [between Alper and MTL] indicates that individual respondent Alper is the alter ego of the corporate entity [MTL] and piercing the corporate veil is necessary to avoid injustice and fundamental unfairness;" that "at all times relevant to the instant lawsuit, respondents MTL and Alper were united in interest such that they are one and the same;" that Mr. Alper performed the functions of an NVOCC; and that "Alper knowingly and intentionally used the corporate form of respondent MTL to perpetrate tortious and other wrongful conduct against the Complainants." Complaint at 2-3.

The Commission Order states:

> On remand, the ALJ may also need to address whether and on what basis the Complainants can pursue a § 41102(c) claim against Mr. Alper. Section 41102(c) governs the conduct of regulated entities, not individuals. Complainants allege that Mr. Alper acted as MTL's alter ego, that their actions are one and the same, and that it would be unjust not to pierce the corporate veil and hold him accountable for alleged Shipping Act violations. Compl. ¶¶ 12-16.

Commission Order at 13 n.10.

No party addressed the allegations against Mr. Alper in their remand filings. Although Complainants incorporated portions of the Commission Order, including the Commission's statement in the above footnote, in their remand brief, they failed to brief any of their allegations or alter ego claims against Respondent Alper or to present any evidence supporting those claims. Mr. Alper has not submitted any recent filings in this proceeding.

"[F]ailure to brief and argue [an] issue during the proceedings is grounds for finding that the issue has been abandoned." *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 130l, 1326 (11th Cir. 2000) (internal citations omitted). Accordingly, Complainants are deemed to have abandoned their claims against Respondent Alper. In addition, Mr. Alper could not be liable for a violation of section 41104 as the evidence does not support a finding that he was acting as a regulated entity, but rather as an employee of MTL. The claims against Respondent Alper are therefore dismissed with prejudice. The analysis of the section 41102(c) elements will focus only on Respondent MTL.

2. Section 41102(c) Elements

To establish a violation of section 41102(c), a complainant must demonstrate that the respondent is a regulated entity; the claimed acts or omissions occurred on a normal, customary, and continuous basis; the practice or regulation is connected with receiving, handling, storing, or delivering property; the practice or regulation is unjust or unreasonable; and the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4. Each element is discussed below.

a. MTL Acted as an OTI

Because section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries, to violate it an entity must be a common carrier, marine terminal operator, or an ocean transportation intermediary within the meaning of the Shipping Act. As discussed above, the evidence establishes that MTL acted as an NVOCC and a regulated entity with regard to both the Mercedes and the Porsche. An NVOCC is a type of OTI. 46 U.S.C. § 40102(20). Accordingly, the evidence establishes that MTL acted as an OTI as required for the first element.

b. Normal, Customary, and Continuous Basis

Complainants allege that "Respondents' acts and omissions with regard to the Mercedes and Porsche that violated the Shipping Act are occurring on a normal, customary, and continuous basis" and that "it has been and continues to be the business model of MTL" to fail to observe just and reasonable practices. Brief at 1, 55. Complainants assert that MTL's violations were not limited to a single incident but rather part of the routine practice, pointing to two prior Commission cases. Brief at 55-57. Complainants argue that MTL failed to provide an accounting of charges for either vehicle and that MTL lacked "any legal basis for exporting the Mercedes and Porsche to Dubai." Brief at 59-61.

MTL contends that there is no evidence that the conduct complained of amounts to a practice by MTL done in a customary and continuous manner. Opposition at 5. Rather, MTL asserts that "Mr. Ostrovskiy abandoned his property all over Europe, causing MTL to sustain money damages — he then sells the property that he does not have in his inventory to third parties, disappears, closes his companies, and then seeks reparations for allegedly converting his property that he abandoned." Opposition at 7.

Complainants have the burden to establish that the unjust and unreasonable acts in question occurred on a normal, customary, and continuous basis and thus were a regulation or practice by Respondent. As explained below, the record supports a finding that MTL failed to provide sufficient notice or legal process and unreasonably liquidated the Porsche and Mercedes and that such acts were part of MTL's business model and normal business practices.

The evidence shows that Complainants provided the Mercedes and Porsche to MTL with the expectation that the vehicles would be exported. The vehicles were, in fact, exported, however, they were not exported on behalf of Complainants. Rather, the vehicles were sold overseas to cover storage fees without sufficient notice to Complainants that the vehicles were considered junk or abandoned, that they would be subject to a lien, or that the vehicles would be disposed of and liquidated.

MTL asserts that it liquidated the vehicles because they were abandoned and based upon the terms of its house bill of lading which provided, in part, that "the Carrier shall have the right in its absolute discretion to dispose of the Goods and/or to sell the Goods by public auction or private sale without notice to the Merchant." CApp., Vol. 1, Appendix F, Ex. E at DEF 286. Indeed, the evidence shows that the vehicles were sold by private sale without legal process or sufficient notice to the shipper (Complainants) which is consistent with this language in the house bill of lading. Moreover, MTL does not assert that this was a mistake or an isolated incident, rather, MTL contends that it was entitled to sell the vehicles to cover storage fees. Opposition at 7.

MTL did not issue a bill of lading to the Complainants for these shipments because MTL did not ship the vehicles for Complainants, but rather as part of the liquidation process. Therefore, the record does not contain the lien provision applicable to this shipment for Complainants. However, MTL relied on its bill of lading provision which is printed on other bills of lading. *See* CApp., Vol. 1, Appendix F, Ex. E at DEF 286. MTL's bill of lading provisions identify MTL's normal business practices and this provision may limit alternative avenues of redress for this claim. *See, e.g., Poppy Tex & Designs, Inc. v. Cont'l Logistic Serv.*, 2020 U.S. Dist. LEXIS 235045, at *14-15 (C.D. Cal. Oct. 20, 2020) ("Pursuant to the parties' contract, CLS had the option to enforce liens 'by public or private sale and without notice.'"). Moreover, such provisions may discourage shippers from filing valid claims.

These types of normal business practices are appropriately adjudicated under section 41102(c) as practices that "negatively affect the broader shipping public." Final Rule, 83 Fed. Reg. at 45368. Indeed, it appears that MTL is not alone in including language in its bills of lading permitting the sale of cargo without notice. *See Petra Pet, Inc. v. Panda Logistics Ltd.*, Docket No. 11-14, 2012 FMC LEXIS 33, at *30 (ALJ Aug. 14, 2012), *aff'd* 2013 FMC LEXIS 37 (FMC Oct. 31, 2013) ("The Carrier shall have a lien on the Goods . . . and for that purpose

shall have the right to sell the Goods by public auction or private treaty without notice to the Merchant."); *Waterman Steamship Corp. v. General Foundries Inc.*, 1993 FMC LEXIS 73, at *45-46 ("The carrier shall have a lien on the goods, which shall survive delivery, for all freight, charges, and sums referred to herein, and may enforce this lien by public or private sale and without notice" but noting that "[w]hether all of the above provisions would be enforceable in a court of law may be argued.").

Complainants also contend that "rules created by administrative agencies should only possess a prospective effect. Accordingly, if the interpretive rule were to be applied retroactively to MTL's activity complained herein, MTL would effectively be rewarded for its behavior." Brief at 56-57. The Commission, in *Crocus Remand FMC*, thoroughly discussed the retroactivity of this Final Rule, finding that "§ 545.4 is not impermissibly retroactive as applied to Crocus's § 41102(c) claim for reparations." *Crocus Remand FMC*, 2021 FMC LEXIS 125, at *6-14. The same logic would apply to this proceeding and it is therefore appropriate to apply Commission Rule 545.4 to this proceeding.

MTL asserts that collateral estoppel applies because the "concept of 'continuity' was already litigated in Federal Court . . . when the Complainants here made allegations under the 'RICO' statute as to the same property" and that issue was resolved in MTL's favor. Opposition at 5. Complainants do not directly respond to this argument.

> Under the doctrine of collateral estoppel, also known as issue preclusion, "if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Hecht v. Puerto Rico Mar. Shipping Auth.*, 26 S.R.R. 1327, 1332 (ALJ 1994). Although different courts define the elements of issue preclusion differently, the Eighth Circuit provides a useful framework:
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> > [I]issue preclusion has five elements: (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment.
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> *Ginters v. Frazier*, 614 F.3d 822, 826 (8th Cir. 2010). Regardless of how the elements are delineated, collateral estoppel only bars relitigation of issues that were actually decided in a previous action. *See Martin v. Dep't of Justice*, 488 F.3d 445, 454 (D.C. Cir. 2007). The party asserting issue preclusion bears the burden of establishing its elements. *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008).

Maher Terminals, LLC v. The Port Authority of New York and New Jersey, Docket No. 12-02, 2015 FMC LEXIS 43, at *102-103 (FMC Dec. 18, 2015).

In the related case before the Eastern District of New York, the court dismissed Shipping Act claims as more appropriately raised before the Commission and dismissed Racketeer Influenced and Corrupt Organizations Act ("RICO") claims for failure to allege a pattern of racketeering. *MAVL Capital Inc. v. Marine Transport Logistics Inc.*, 130 F. Supp. 3d 726, 731-33 (E.D.N.Y 2015). To prove "continuity" in RICO cases, "it must be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity. Continuity is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Adler v. Loyd*, 496 F. Supp. 3d 269, 279 (D.D.C. 2020) (citing *H.J. Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229, 240-41 (1989)) (emphasis in original, internal quotations omitted). This federal RICO continuity requirement is not the same as the interpretive rules' requirement that the claimed acts or omissions of the regulated entity are a regulation or practice occurring on a normal, customary, and continuous basis in section 41102(c) Shipping Act claims. Because the issue sought to be precluded here is not the same as the issue involved in the federal court proceeding, collateral estoppel does not apply.

The evidence thus establishes that MTL's conduct is occurring on a normal, customary, and continuous basis and is a part of MTL's normal business practices or business model. Accordingly, this element required to demonstrate a section 41102(c) violation is also demonstrated.

c. Connected with Receiving, Handling, Storing, or Delivering Property

Complainants assert that the alleged violations are directly related to and connected with the receiving, handling, storing, and/or delivering of property as the Mercedes was stored in anticipation of shipment by MTL back to Germany and the Porsche was purchased to be shipped to Kotka. Brief at 57-61. MTL asserts that the vehicles were abandoned but does not contest that the alleged violation is connected with receiving, handling, storing, or delivering property. Opposition at 5-6.

This dispute centers on the receiving, handling, storing, or delivering of the vehicles. The evidence shows that in December 2012, Complainants engaged MTL to act as their receiving agent after importing the Mercedes from Germany and to store the Mercedes so that maintenance could be performed on it before shipping it back to Germany. CR/OTSC, Ostrovskiy Cert. ¶ 7. The evidence further shows that on April 20, 2013, Royal Finance Group issued an invoice to MAVL for the 2011 Porsche, which included shipping to Kotka, Finland in the description of services, indicating that the vehicle was being held for export. CApp., Vol. 1, Appendix G, Ex. B at DEF 761. On or about August 24, 2013, the Porsche was shipped from the United States and sold in the United Arab Emirates. CApp., Vol. 2, Appendix P at DEF 245. Accordingly, the evidence shows that the alleged violation involved receiving and storing the vehicles in anticipation of export and was connected to receiving, handling, storing, or delivering both the Mercedes and the Porsche.

d. Unjust and Unreasonable

The complaint alleges that MTL "failed to follow all legal prerequisites to selling this vehicle, such as notifying the Complainants prior to the sale, and the requirement that respondents obtain valid title [to] this vehicle. Respondents have further failed to provide documentation establishing that a sale took place, nor have they come forward with the specific sum realized from the sale of the vehicle." Complaint ¶¶ 33, 43; *see also* CR/OTSC, Ostrovskiy Cert. ¶¶ 5-6.

Complainants assert that MTL's conduct was unjust and unreasonable, arguing that there was a lack of a legal basis for exporting the vehicles to Dubai, a failure to provide invoices and statements of account, failure to provide the status of the Porsche for over two years, failure to provide notices regarding storage charges, failure to provide information about the Mercedes when Mr. Ostrovskiy visited MTL's facility, and a failure to provide a statement of account as to how the monies realized from the alleged sale were applied to Complainants' account. Brief at 61-62.

MTL contends that Mr. Ostrovskiy abandoned the vehicles, noting that there are no emails regarding storing, repairing, or shipping the Mercedes, and arguing that MTL cannot store vehicles for free and had no choice but to find a dealer who would cover outstanding storage. Opposition at 2-4.

A recent appellate case described the historical basis for maritime liens on cargo.

> A maritime lien is "a privileged claim upon maritime property . . . arising out of services rendered to or injuries caused by that property." 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 9-1 (3d ed. 2001). It "attaches simultaneously with the cause of action," and it is a right against the property in rem. *Id.*
>
> If a shipper refuses to pay the full freight, the carrier may lawfully withhold the cargo. *See The Bird of Paradise*, 72 U.S. (5 Wall.) 545, 554, 18 L. Ed. 662 (1866) ("Ship-owners, unquestionably, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made."); *see also Gilbert Imported Hardwoods, Inc. v. 245 Packages of Guatambu Squares*, 508 F.2d 1116, 1122 (5th Cir. 1975). And in fact, if it is to preserve its lien, the carrier *must* withhold the cargo: unlike an ordinary maritime lien, a vessel owner's lien on cargo for unpaid freight is "possessory," i.e., it "continues only so long as the cargo remains in the owner's actual or constructive possession." *Beverly Hills Nat'l Bank & Trust Co. v. Compania De Navegacione Almirante S.A.*, 437 F.2d 301, 304 (9th Cir. 1971).

Hawkspere Shipping Co. v. Intamex, S.A, 330 F.3d 225, 230 n.3 (4th Cir. 2003); *see also World Imports, Ltd. v. OEC Group New York*, 820 F.3d 576, 583 (3d Cir. 2016).

As the Supreme Court stated in *The Bird of Paradise*, liens on cargo may arise out of contracts to pay freight. *The Bird of Paradise*, 72 U.S. at 554; *see also* 2 Thomas A. Russell,

Benedict on Admiralty § 44, at 3-50 n.2 (7th ed. rev. 2010). "Legal effect of such a lien is, that the ship-owner, as carrier by water, *may retain the goods until the freight is paid, or he may enforce the same by a proceeding in rem in the District Court*." *The Bird of Paradise*, 72 U.S. at 555 (emphasis added); *see also Eddy*, 72 U.S. (5 Wall.) 481, 494 (1867) (either party "may enforce his lien by a proceeding in rem in the District Court" although "the shipowner usually finds an adequate remedy by retaining the goods until the freight and charges are paid.").

> Where the contract is to carry by water from port to port an actual delivery of the goods into the possession of the owner or consignee, or at his warehouse, is not required in order to discharge the carrier from his liability. He may deliver them on the wharf; but *to constitute a valid delivery there the master should give due and reasonable notice to the consignee*, so as to afford him a fair opportunity to remove the goods, or put them under proper care and custody. When the goods, after being so discharged and the different consignments properly separated, are not accepted by the consignee or owner of the cargo, the carrier should not leave them exposed on the wharf, but should store them in a place of safety, *notifying the consignee or owner that they are so stored, subject to the lien of the ship for the freight and charges*, and when he has done so he is no longer liable on his contract of affreightment.

Eddy, 72 U.S. at 495 (emphasis added).

The Federal Bills of Lading Act (FBLA or Pomerene Act), 49 U.S.C. § 80109, governs bills of lading issued in the United States. It provides that a common carrier that issues a bill of lading has the right to assert a lien for the goods listed in that specific bill of lading.

> A common carrier issuing a negotiable bill of lading has a lien on the goods covered by the bill for — (1) charges for storage, transportation, and delivery (including demurrage and terminal charges), and expenses necessary to preserve the goods or incidental to transporting the goods after the date of the bill; and (2) other charges for which the bill expressly specifies a lien is claimed to the extent the charges are allowed by law and the agreement between the consignor and carrier.

49 U.S.C.S. § 80109. This Act is not enforced by the Commission. *Bimsha Int'l v. Chief Cargo Services, Inc.*, Docket No. 10-08, 2013 FMC LEXIS 32, at *14 (FMC Sept. 4, 2013).

> Maritime liens on cargo have been recognized by the Commission.
>
> A carrier can withhold delivery of cargo to compel the shipper to pay freight money that is lawfully owed and has a cargo lien which the carrier can assert if necessary, which lien the carrier loses if it surrenders the cargo. *See Johnson Products Co., Inc. v. M/V Molinera*, 628 F.Supp. 1240, 1248 (S.D.N.Y. 1986); Gilmore and Black, The Law of Admiralty (2d ed.) sec. 3-45; 70 Am Jur 2d, Shipping, sec. 793. Conversely, if a shipper or consignee induces the carrier to surrender the cargo and thus lose its lien, and thereafter refuses to pay the lawful freight money owed because the shipper or consignee has outstanding disputes

> with the carrier on earlier unrelated shipments, and withholds payment of the lawful freight as a means to coerce the carrier to settle the disputes on earlier unrelated shipments, the shipper or consignee has acted unlawfully, in violation of section 10(a)(1) of the 1984 Act. *See Waterman Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173 (I.D.), affirmed with slight modifications, 26 S.R.R. 1424 (1994). Thus, disputes over earlier unrelated shipments cannot be used by either a carrier or a shipper as justification for refusing to release the cargo or to pay lawful freight money.

Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc., Docket No. 02-12, 29 S.R.R. 1338, 1356 n.14, 2003 FMC LEXIS 12, at *29 (ALJ Jan. 8, 2003), admin. final Feb. 12, 2003. The Commission has stated that each bill of lading is a separate transaction under the Shipping Act "and the merits of each claim must be considered in toto and independent of claims under any other bill of lading." *Colgate Palmolive Co. v. The Grace Line*, 14 S.R.R. 600, 602 (FMC 1974).

MTL's house bill of lading, which identifies MTL's normal and customary practices and regulations, provides:

> LIEN The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier: (a) Under the Bill of Lading, (b) Under any other contracts with the Merchant, including without limitation, any and all unpaid ocean freight or other charges due from or on account of any previous carriage or other services performed by the Carrier for the Merchant; (c) For expenses incurred by the Carrier for the account of the Merchant, and for General Average and salvage contributions to whomsoever due, and (d) For the costs and attorneys' fees incurred in recovering any or all of the foregoing, and *for all such purposes the Carrier shall have the right in its absolute discretion to dispose of the Goods and/or to sell the Goods by public auction or private sale without notice to the Merchant*.

CApp., Vol. 1, Appendix F, Ex. E at DEF 286 (emphasis added).

MTL may have been entitled to assert a lien for unpaid storage charges and liquidate the vehicles. Assuming MTL was entitled to assert a lien, the lien was not exercised in a commercially reasonable manner. A prior case discussed the issue of whether ITLC, an ocean freight forwarder, asserted a lien and liquidated cargo in a reasonable manner.

> The evidence establishes that even if ITLC could have legally placed a lien on the containers, that the liquidation did not occur in a commercially reasonable manner. ITLC placed one advertisement in their own office, but did not obtain an inventory of goods, conduct a public auction, or attempt to obtain fair market value for the shipments. ITLC failed to notify Complainants regarding the date, location, or other details of the liquidation. There is no evidence in the record that the Complainants were specifically notified that the partial payment received was insufficient, although there is evidence that Complainants had promised to submit

> the full amount. In addition, Complainants were not notified of the liquidation, even as they continued making payments in late March and early April. Complainants did not find out about the liquidation until after they traveled to Poland to pick up the containers. The manner in which the liquidation of all three containers was conducted was not reasonable.
>
> Moreover, the evidence shows that ITLC failed to provide full and accurate information to Complainants, including failing to provide details of the liquidation and failing to advise of the sale or provide copies of the revised bills of lading, in violation of Commission regulations. 46 C.F.R. § 515.32(c) (requiring freight forwarders to not withhold "any information concerning a forwarding transaction from its principal" and to "exercise due diligence to assure that all information provided to its principal or provided in any export declaration, bill of lading, affidavit, or other document which the licensed freight forwarder executes in connection with a shipment is accurate"); *see also* Remand, 32 S.R.R. at 1742. The failure to fully advise the Complainants of the liquidation and status of their containers was not reasonable.
>
> There is no evidence that ITLC established just and reasonable regulations and practices for handling shipments for which they did not receive payment or that were not picked up timely. ITLC did not identify the legal basis for its liquidation of the three containers. ITLC did not establish that it paid any storage charges or possessed the containers, or that a warehouseman lien would apply. ITLC has not argued that it could take advantage of the liquidation provision in the Limco bills of lading, and even if it could, the liquidation was not conducted at public auction, as required by the Limco bills of lading. As the Commission indicated, destination agent Baltic Sea Logistics' "pressure for storage charges cannot justify the liquidation of Complainants' three containers by ITLC, a freight forwarder, without any legal rights, court's order, or Complainants' authorization." Remand, 32 S.R.R. at 1742.

Kobel v. Hapag-Lloyd, Docket No. 10-06, Remand Initial Decision at 8-9, 33 S.R.R. 594 (ALJ July 30, 2014) *aff'd* 2015 FMC LEXIS 6, at *6-7 (FMC May 26, 2015) (finding that "ITLC has failed to show credible evidence that it had any legal basis to liquidate Complainants' three containers and the cargoes therein without Complainants' consent or authorization.")

In this case, MTL was not a freight forwarder but an NVOCC. As such, it assumed responsibility for the cargo and may have been entitled to exert a lien. *Logistics Mgmt. v. One Pyramid Tent Arena*, 86 F.3d 908, 914 (9th Cir. 1996) ("NVOCCs have an *in rem* maritime lien for unpaid freight against the cargo they are responsible for transporting"). In addition, the MTL house bill of lading expressly provides for liens on cargo. However, there is no contemporaneous evidence that such a lien was properly executed, no notice to Complainants regarding MTL's exertion of the lien or intent to liquidate the cargo, no good faith, commercially reasonable procedures followed, and no legal process.

The Uniform Commercial Code provides guidance on commercially reasonable practices when exercising a lien. "A carrier has a lien on the goods covered by a bill of lading for charges

subsequent to the date of its receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to their transportation or reasonably incurred in their sale pursuant to law." U.C.C. § 7-307(1) (1977).

> A carrier's lien on goods may be enforced by public or private sale of the goods, in bulk or in packages, at any time or place and on *any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale*. The fact that a better price could have been obtained by a sale at a different time or in a method different from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. The carrier sells goods in a commercially reasonable manner if the carrier sells the goods in the usual manner in any recognized market therefor, sells at the price current in that market at the time of the sale, or otherwise sells in conformity with commercially reasonable practices among dealers in the type of goods sold. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable, except in cases covered by the preceding sentence.

U.C.C. § 7-308 (emphasis added). Moreover, "[b]efore any sale pursuant to this section, any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred in complying with this section. In that event, the goods may not be sold but must be retained by the carrier, subject to the terms of the bill of lading and this article." U.C.C. § 7-308(b). "A carrier may satisfy its lien from the proceeds of any sale pursuant to this section but shall hold the balance, if any, for delivery on demand to any person to which the carrier would have been bound to deliver the goods." U.C.C. § 7-308(e).

Regarding the Mercedes SL65, the evidence shows that Complainants stored the Mercedes at MTL's warehouse in expectation of shipping it to Germany. The evidence includes an email dated January 11, 2013, from MTL to IAM & IL Group, Inc., with a subject line of "CAXU6911501 storage fee invoice," presumably for the Mercedes, which states that "Invoice for storage fee is attached. Next invoice for $150 will be generated on 2/03." MTL App., Ex. 1 at 5.

The evidence includes a second email dated May 9, 2013, from Natalia at MTL to IAM & AL Group, Inc. with a subject referring to storage fee for "06 mb", presumably the Mercedes, which stated that "Your vehicle is stored in our facility for more than half a year. Invoice for storage for period from 05/04-06/05 alone[sic] with the total outstanding balance are attached. Please advise when you are planning to arrange payment for total storage outstanding and pick up your vehicle." MTL App., Ex. 1 at 3. It appears that this email was received by Complainants when forwarded on May 10, 2013. The email attached MTL "Open Invoices January 11 through May 9, 2013" for IAM & AL Group, Inc. with a total of $900.00, for six months at $150.00 a month. CApp., Vol. 1, Appendix F, Ex. A at 270.

MTL submitted an appendix, with exhibit 1 labeled as "MTL's documented efforts to contact the Complainants." This exhibit includes the two emails regarding the Mercedes, dated January 11, 2013, and May 10, 2013. MTL App., Ex. 1. No additional attempts to contact Complainants regarding the Mercedes are part of the record, although MTL was in contact with Complainants regarding other shipments, including of bobcats, in 2013. CApp., Vol. 1, Appendix F at DEF 263-DEF 265.

The only email in the record regarding the Porsche was dated two years after the Porsche was shipped to Dubai. The August 14, 2015, email from MTL to MAVL Capital stated:

> If this matter will not be settled within 7 business days, cargo shall be auctioned as abandoned to cover above mentioned fees as well as storage and handling. Your prompt response is highly requested. Management.
>
> Enclosed is the invoice for inland Charge facilitated by MTL via 3rd party carriers. Please proceed with immediate payment in order to avoid shipment delays and late fees. We look forward to serving you in the future.

CApp., Vol. 3, Appendix GG at DEF 756-DEF 757 (emphasis omitted).

This 2015 email demonstrates that MTL knew it had an obligation to notify Complainants prior to auctioning or abandoning cargo. However, this attempt to provide notice two years after the vehicle was sent overseas to another buyer is not sufficient. Moreover, the evidence does not establish that invoice 24141 for the Porsche was provided to Complainants in a timely fashion. CApp., Vol. 3, Appendix GG at DEF 758.

The evidence does not show any other demands from MTL to Complainants for payment of the storage fees. To the extent other documents would have been helpful, they should have been disclosed in discovery, included in the appendix, and discussed in MTL's opposition brief. Even if the emails in January and May of 2013 regarding the Mercedes or similar emails for the Porsche reached Complainants, that would not be sufficient notice. The evidence does not show any attempts to notify Complainants of the imposition of a lien, nor that the vehicles would be considered abandoned or junk and liquidated prior to disposing of the vehicles.

The Demurrage and Detention Final Rule applies to "the use of marine terminal space (e.g., land) or shipping containers" for "containerized cargo" and would not apply to the off-port storage of these vehicles prior to export. 46 C.F.R. § 545.5(b). However, the principles identified in the Demurrage and Detention Final Rule are instructive and persuasive. Among the principles identified are that "the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity" and "the Commission may consider whether and how regulated entities provide notice to cargo interests that cargo is available for retrieval. The Commission may consider the type of notice, to whom notice is provided, the format of notice, method of distribution of notice, the timing of notice, and the effect of the notice." 46 C.F.R. § 545.5(c). The Demurrage and Detention Final Rule notes that on December 3, 2018, the Fact Finding Officer found that: "[d]emurrage and detention are valuable charges when applied in ways that incentivize cargo interests to move cargo promptly from ports and marine terminals" and "[f]ocusing port and marine terminal

operations on notice of actual cargo availability would achieve the goals of demurrage and detention practices and improve the performance of the international commercial supply chain." Demurrage and Detention Final Rule at 7 (citing Final Report at 32).

Providing reasonable notice to cargo owners that their cargo may be considered abandoned, subject to a lien, and liquidated would promote freight fluidity, encourage the retrieval of cargo, incentivize cargo interests to move cargo promptly, and improve the performance of the international commercial supply chain. Indeed, the evidence shows that Maxim Ostrovskiy visited MTL's headquarters in 2012 or 2013 in part because he was concerned about the status of the Mercedes. The Commission has previously found that failure to show credible evidence of a legal basis to liquidate containers without the shipper's consent or authorization establishes a violation of section 41102(c). *Kobel,* 2015 FMC LEXIS 6, at *6-7. Failure to provide sufficient notice of abandonment, lien, or liquidation is not a reasonable business practice. The record demonstrates a failure to utilize appropriate legal process or to notify Complainants with a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. Moreover, MTL does not provide any cases supporting the sale of cargo without notice and legal process.

MTL did not enforce a lien by a proceeding in rem in the District Court or take other legal action to enforce a lien. When Respondent Alper was asked whether it is possible to "change ownership" of vehicles before shipping and he answered: "Unless you went through court and got a lien or you paid them or, no, I don't believe so." CApp., Vol. 1, Appendix M at 71. The record does not show that MTL utilized appropriate legal process to enforce the lien on the vehicles. Quite the contrary, the evidence shows the existence of Copart invoices that were "not created and/or generated by Copart" but which facilitated the shipment and overseas sale of the vehicles. CApp., Vol. 1, Appendix H at DEF 4, DEF 15, DEF 18; *see also* CApp., Vol. 3, Appendix DD, Ex. B at DEF 355, DEF 350.

The Commission has not issued specific guidance regarding what is required to properly exercise a maritime lien or to consider cargo as junk or abandoned. Indeed, the question of appropriate notice prior to considering cargo abandoned has occurred in other cases as well. *See Kobel*, 2015 FMC LEXIS 6, at *6-7. Clearly, however, the shipping public is entitled to at least some notice before cargo is considered abandoned or a lien is imposed. In this case, MTL provides two emails regarding storage charges for the Mercedes and no notice prior to exporting and selling the Porsche. There is no evidence that MTL made any timely attempt to warn Complainants that the cargo would be considered abandoned, a lien imposed, or the cargo liquidated. Failure to warn of potential abandonment, lien, or liquidation of cargo is clearly not sufficient notice.

Moreover, MTL contends that is had "no choice but to find a dealer who would cover outstanding storage." Remand Opposition at 4. However, the vehicles could have been held for longer than six months as was done in the related case in Docket No.15-04, where MTL stored boats for a whole year – double the amount of time that the Mercedes was stored. In addition, around this time, MTL transported bobcats to Kotka, Finland, the anticipated destination for the Porsche on behalf of Complainants. CApp., Vol. 1, Appendix F at DEF 263-DEF 265. So, it appears that the parties were in contact during this time and that additional efforts could have been made to notify Complainants before liquidating the vehicles.

MTL also impugns Complainants, alleging a variety of problems with their business practices. However, Complainants' relationships with their customers and their business practices are not a defense that would absolve MTL of its responsibility to handle shipments entrusted to it within the requirements of the Shipping Act.

The vehicles were received for export shipment. While MTL is not expected to store the vehicles for free, the record supports a finding that liquidating the vehicles without sufficient notice and legal process is unreasonable. Complainants have established that liquidating the vehicles without sufficient notice or legal process was unjust and unreasonable and have met the section 41102(c) requirement to establish that MTL's action were unreasonable.

e. Proximate Cause of Loss

Complainants allege that after the Mercedes and Porsche were placed into MTL's possession, custody, and control, they were exported to Dubai and sold by MTL. Brief at 63. MTL does not deny that the vehicles were sold but rather argues that the vehicles were abandoned so that "MTL had no choice but to find a dealer who would cover outstanding storage." Opposition at 4. Complainants have established this element as the failure to deliver the vehicles, liquidation without sufficient notice or legal process, and sale to an unrelated party were the proximate cause of the loss. Accordingly, Complainants have established by a preponderance of the evidence that MTL violated the Shipping Act.

3. Reparations

The Commission has jurisdiction over this claim because MTL was acting as a regulated entity when it assumed responsibility for the vehicles. Moreover, Complainants established all elements of a 41102(c) claim, including that the conduct was unreasonable and that the unreasonable conduct was a normal business practice. Therefore, Complainants demonstrated all of the interpretive rules' required elements for successfully establishing a section 41102(c) claim for reparations. The remaining issue is whether reparations should be ordered and, if so, the amount.

Pursuant to section 11(g) of the Shipping Act, if the complaint was filed within three years after the claim accrues, "the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part." 46 U.S.C. § 41305(b).

Commission case law states that: "(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation." *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (FMB 1950); *see also James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, Docket No. 94-2, 30 S.R.R. 8, 13, 2003 FMC LEXIS 30, at *16 (FMC Aug. 26, 2003).

> The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (FMC 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with

> reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc., Docket No. 81-57, 26 S.R.R. 788, 798-799, 1992 FMC LEXIS 86, at *52-53 (ALJ Nov. 23, 1992) (Admin. final 1992).

The complaint requests "[d]irect damages in excess of $180,000.00 constituting the amounts paid for the purchase of the vehicles plus additional consequential damages for sums arising out of lost contracts, plus interest." Complaint at 9. In their brief, Complainants seek $48,500, based on the US Customs decelerated value of the Mercedes plus $67,000, based on a contract for sale of the Porsche, plus $10,000 paid to RFG for ocean freight and other charges. Brief at 63. MTL suggests that Complainants should not be awarded reparations. Opposition at 2-3.

The evidence shows that the Mercedes SL65 was purchased in Germany and imported in November of 2012. CR/OTSC, Ostrovskiy Cert ¶ 2; CApp., Vol. 3, Appendix FF, Ex. A at P0020-P0023. It is possible that Complainants paid for the Mercedes in Germany and paid the shipping costs from Germany. However, it is also possible that someone else paid the purchase price and shipping fees. It is possible that Complainants wired $5,500 to IAA on April 18, 2013, and $10,000 to RFG on April 22, 2013, for the Porsche Panamera as they claim. CApp., Vol. 4, Appendix JJ, Ex. G at 1; CApp., Vol. 4, Appendix JJ, Ex. G at 2. However, it is also possible that those payments were made by someone else or were for a different shipment. For example, it is possible that RFG paid IAA for the Porsche and that RFG financed part, if not all, of the purchase and repairs of the Porsche. CApp., Vol. 4, Appendix KK, Ex. 2 at 2; CApp., Vol. 3, Appendix II at 2. Complainants conducted their business with limited written documentation, including making verbal requests and agreements. As a consequence, Complainants have a harder time providing evidence to establish actual injury.

The evidence supports Complainants' argument that the loss of the Mercedes and Porsche vehicles were caused by MTL's violation of the Shipping Act. However, Complainants have the burden to establish actual injury caused and the evidence is not sufficient to impose reparations. If the evidence produced by both parties is evenly balanced, the party with the burden of persuasion will not prevail. *Director v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). Because there is not sufficient evidence or documentation to support the reparations requested, no reparations can be awarded.

Complainants point to other ways to value the vehicles, such as the customs declaration and contract for sale. However, reparations are only available for actual injury, so estimates of value such as on a customs declaration would not be a basis for reparations. In addition, contracts for sale for a vehicle that was damaged and which a buyer had never seen are too speculative to

support a reparations award. Accordingly, Complainants have not established that they are entitled to reparations.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that MTL violated the Shipping Act, 46 U.S.C § 41102(c), it is hereby

ORDERED that the complaint filed by MAVL Capital Inc., IAM & AL Group Inc., and Maxim Ostrovskiy be **GRANTED IN PART AND DENIED IN PART**. It is

FURTHER ORDERED that the claims against Respondent Alper be **DISMISSED**. It is

FURTHER ORDERED that the claims against Respondent MTL be **GRANTED** but that no reparations be awarded to Complainants. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

MOSES DAMISA, *Complainant*

v.

TRANS ATLANTIC SHIPPING LLC, *Respondent*.

DOCKET NO. 1967(F)

Served: October 6, 2021

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's August 27, 2021 Initial Decision Granting Motion for Voluntary Dismissal Without Prejudice has expired. Accordingly, the decision became administratively final on September 27, 2021.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

MCS INDUSTRIES, INC., *Complainant*

v.

COSCO SHIPPING LINES CO., LTD. AND MSC MEDITERRANEAN SHIPPING COMPANY S.A., *Respondents*.

DOCKET NO. 21-05

Served: October 26, 2021

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's September 23, 2021 Initial Decision Approving Confidential Settlement Agreement has expired. Accordingly, the decision has become administratively final.

Rachel E. Dickon
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MARIE CAREW D/B/A/ HOLIDAY SHIPPING, *Complainant*

v.

MAERSK LINE A/S & JOHN DOES, *Respondents*.

DOCKET NO. 20-17

Served: November 2, 2021

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION[1]

I. INTRODUCTION

A. Procedural History and Summary of Decision

On October 21, 2020, Complainant Marie Carew d/b/a Holiday Shipping ("Holiday") filed a complaint against Respondent Maersk Line A/S ("Maersk") and John Does alleging violations of section 41102(c) of the Shipping Act and Commission Rule 545.4(d) for four containers shipped to Nigeria. Maersk moved for a judgement on the pleadings, which was denied. On April 28, 2021, Maersk filed its answer to the complaint which denied the allegations, raised affirmative defenses, and asserted a counter claim that Holiday obtained transportation at less than applicable rates in violation of section 41102(a) of the Shipping Act.

On August 23, 2021, Holiday filed its proposed findings of facts with exhibits. On September 13, 2021, Maersk filed its brief with appendix. On September 29, 2021, Holiday filed its reply brief with response to Maersk's proposed findings of fact and appendix.

The parties agree that the four containers are currently in Nigeria in the custody of the Nigeria Ports Authority ("NPA") but disagree as to the reason they are being held. RX 5 at 32. An order required the parties to submit affidavits about the status of the containers, stating: "It appears that the parties have received conflicting information from their contacts in Nigeria regarding the process for obtaining shipments to Nigeria. . . . Clearing any misunderstanding as to what is required to release the shipments in question may help the parties resolve their dispute." Order on Complainant's Request for Discovery at 3.

Initially, Holiday alleged that this proceeding was about demurrage and detention fees, which were the subject of a related case in federal court. Complaint at 2-4. However, Maersk waived all detention and demurrage charges. RX 5 at 34. Holiday then asserted that Maersk had refused to release paperwork required for the consignees to retrieve their cargo, asserting first

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

that a debit note was required, then that delivery orders were needed, and finally that the original bills of lading were required. Joint Status Report ("JSR") at 2 (March 3, 2021); Letter Motion at 1 (June 3, 2021); Brief at 2. Holiday's shifting theories of why the containers continue to be held undermines Holiday's argument that Maersk is responsible. Moreover, although filing the complaint against Maersk and John Does, Holiday has not identified any John Does who may be responsible, instead, focusing only on Maersk. In its counter claim, Maersk points to Holiday's description of itself as a freight forwarder to argue that it misrepresented itself to be an NVOCC to access lower rates in the parties' service contract.

As discussed more fully below, Holiday has failed to establish that Maersk violated the Shipping Act. In addition, Maersk has failed to establish that Holiday violated the Shipping Act.

B. Arguments of the Parties

Holiday asserts that Maersk refuses to release the bills of lading for these four containers; that the containers cannot be procured because Maersk refuses to release the bills of lading; and that the shippers have suffered significant losses. Brief at 2. Holiday requests a hearing to determine the remaining merits of the parties' claims and defenses. Brief at 2.

Maersk argues that delivery was accomplished upon discharge to the NPA facility, original copies of the non-negotiable bills of lading were not needed, the bills of lading were properly issued to Holiday, and the containers are being held pursuant to a Nigerian customs hold so that the claimed acts or omissions are not occurring on a normal, customary, and continuous basis, the practice was not unreasonable, and the practice was not the proximate cause of the claimed loss. Opposition at 9-16. Maersk further asserts that Maersk's counter claim against Holiday should be granted either on default or on the merits. Opposition at 17-20.

In its reply, Holiday asserts that Maersk issued non-negotiable bills of lading, designating Holiday as the shipper, and that Holiday does not need to issue an in-house bill of lading. Reply at 3. Holiday asserts that even if it issued an in-house bill of lading, such a bill of lading would be ineffective when Maersk refused, as in the herein case, to release its bill of lading to Holiday. Reply at 3. In addition, Holiday asserts that an NVOCC does not operate vessels that transport cargo and is a shipper in its relationship with an ocean common carrier and that Maersk designated Holiday as the shipper on its bills of lading. Reply at 3.

C. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations in the complaint or the defenses thereto. Administrative adjudicators are "not required to make

subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Specific findings of fact are in section two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT

1. Marie Carew is a natural person who operates a limited liability company under the trade name of Holiday Shipping based in Georgia. Complaint at 1; RX 2 at 9-10.

2. Marie Carew, operating as Holiday Shipping, is licensed by the FMC as a non-vessel-operating common carrier. RX 15.

3. Neither Marie Carew nor Holiday Shipping are licensed as freight forwarders by the FMC. RX 16.

4. Holiday would initiate direct contact with shippers seeking to ship container goods to different parts of the world; arrange transportation services with a common carrier; and collect freight monies from shippers to pay common carriers. RX 2 at 10.

5. Maersk is an ocean common carrier. Answer at 8-9.

6. Holiday, as Shipper, and Maersk, as Carrier, entered into Service Contract number 4227744. RX 2 at 9-10; RX 13 at 2.

7. Holiday and Maersk entered into an agreement, as a result of which Maersk issued four port-to-port non-negotiable sea way bills numbered 965477262, 965544009, 965751148, and 965885829 for the ocean carriage of containers numbered SUDU6808042, MSKU8180603, MSKU8445214, and MRKU6064475. RX 14.

8. The four bills of lading list Holiday Shipping as the shipper and state "freight prepaid." RX 14.

9. For three containers, per diem charges were incurred because adequate documents of title to allow the export were not received from the shipper, so the container needed to be rolled to the next available vessel after proper paperwork was received. RX 5 at 33-34.

10. The fourth container, MSKU6064475, did not incur and was not invoiced for any demurrage, detention, or per diem charges. RX 5 at 34.

11. Maersk withdrew any and all claims for detention and demurrage with regard to these four shipments. RX 5 at 34.

12. The parties agree that the four containers are currently in Nigeria in the custody of the NPA but disagree as to the reason they are being held. RX 5 at 32.

13. Between October 24, 2018, and November 25, 2018, the four containers were all discharged at the Tin Can Island Container Terminal, which is regulated by the NPA. RX 5 at 34-35.

14. "Many of Holiday Shipping's customers reside outside the United States, and obtaining information from these customers is filled with communication and logistical challenges." Brief, Carew Affidavit at 2.

15. One customer, Joseph Famoye, an auto broker, states that he contacted Holiday to transport various items including three cars to Nigeria and that Ms. Carew advised him that he needed to obtain a 40-foot container. Brief, Famoye Affidavit at 1. After the container shipped, Ms. Carew provided a letter of indemnity which indicated the bill of lading number. *Id.* Mr. Famoye paid to clear the container in Nigeria but has been unable to retrieve it. *Id.* at 2.

16. In a related federal case, Ms. Carew stated that Maersk issued each of the bills of lading after it collected freight charges and that it released the consignments to the consignees, limiting her ability to collect money due from the consignees. RX 2 at 12-14.

17. Maersk's investigation suggests that the four containers remain under an NPA hold, possibly because duties must be paid. RX 5 at 35; RX 10 at 114-115; RX 13 at 2.

18. The containers have not been released by the NPA despite Complainant's efforts to obtain them. Brief, Carew Affidavit at 2.

19. The containers' bill of lading terms and conditions state that "If the Carrier is obligated to discharge the Goods into the hands of any customs, port or other authority, such discharge shall constitute due delivery of the Goods to the Merchant under this bill of lading." RX 14 at Terms for Carriage, Section 22.3.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 30 S.R.R. 991, 997-99, 2006 FMC LEXIS 19, at *33 (FMC May 10, 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co.*, Docket No. 99-24, 28 S.R.R. 1635, 1645, 2000 FMC LEXIS 14, at *38-42 (FMC Oct. 31, 2000). Holiday alleges a violation of the Shipping Act within the Commission's jurisdiction.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 FMC LEXIS 35, at *41 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics*, Docket No. 15-04, 2021 FMC LEXIS 125, at *4 (FMC Aug. 18, 2021). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180, 1993 FMC LEXIS 73, at *40 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 FMC LEXIS 19 (FMC June 13, 1994).

B. Relevant Law

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). "The term 'ocean freight forwarder' means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(19).

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(17). To be an NVOCC, the entity must meet the Shipping Act's definition of common carrier.

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(7).

The statutory definitions are echoed in the Commission's regulations:

> *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term
>
> (1) *Ocean freight forwarder (OFF)* means a person that – (i) In the United States, dispatches shipments from the United States via a common carrier

> and books or otherwise arranges space for those shipments on behalf of shippers; and (ii) Processes the documentation or performs related activities incident to those shipments; and
>
> (2) *Non-vessel-operating common carrier (NVOCC)* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(m).

> *Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:
>
> (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
>
> (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 C.F.R. § 515.2(e).

The Commission promulgated regulations providing examples of freight forwarder services.

> *Freight forwarding services* refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:
>
> (1) Ordering cargo to port;
>
> (2) Preparing and/or processing export documents, including the required 'electronic export information';
>
> (3) Booking, arranging for or confirming cargo space;
>
> (4) Preparing or processing delivery orders or dock receipts;
>
> (5) Preparing and/or processing common carrier bills of lading or other shipping documents;
>
> (6) Preparing or processing consular documents or arranging for their certification;
>
> (7) Arranging for warehouse storage;
>
> (8) Arranging for cargo insurance;

(9) Assisting with clearing shipments in accordance with United States Government export regulations;

(10) Preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;

(11) Handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;

(12) Coordinating the movement of shipments from origin to vessel; and

(13) Giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

46 C.F.R. § 515.2(h).

The Commission promulgated regulations providing examples of NVOCC services.

Non-vessel-operating common carrier services refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

(1) Purchasing transportation services from a common carrier and offering such services for resale to other persons;

(2) Payment of port-to-port or multimodal transportation charges;

(3) Entering into affreightment agreements with underlying shippers;

(4) Issuing bills of lading or other shipping documents;

(5) Assisting with clearing shipments in accordance with U.S. government regulations;

(6) Arranging for inland transportation and paying for inland freight charges on through transportation movements;

(7) Paying lawful compensation to ocean freight forwarders;

(8) Coordinating the movement of shipments between origin or destination and vessel;

(9) Leasing containers;

(10) Entering into arrangements with origin or destination agents;

> (11) Collecting freight monies from shippers and paying common carriers as a shipper on NVOCC's own behalf.

46 C.F.R. § 515.2(k).

The complaint alleges that Maersk violated section 41102(c) of the Shipping Act, which states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

On September 7, 2018, the Commission issued a notice of proposed rulemaking "to obtain public comments on clarification and guidance regarding the Commission's interpretation of the scope of 46 U.S.C. 41102(c)." Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367 (Sept. 7, 2018) ("NPRM"). In the notice of proposed rulemaking, the Commission stated *inter alia*:

> Specifically, the Commission is considering an interpretive rule consistent with Commission precedent . . . that would restore the scope of § 41102(c) to prohibiting unjust and unreasonable *practices* and *regulations*. These decisions require that a regulated entity engage in a practice or regulation on a *normal, customary,* and *continuous* basis and a finding that such practice or regulation is unjust or unreasonable to violate that section of the Shipping Act.

NPRM, 83 Fed. Reg. at 45368 (emphasis in original, internal citations omitted).

On December 17, 2018, the Commission issued a final rule adopting the September 7, 2018, notice of proposed rulemaking without change. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018) ("Final Rule"). Rule 545.4, states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

C. Section 41102(c) Elements

To establish a violation of section 41102(c), a complainant must demonstrate that the respondent is a regulated entity; the claimed acts or omissions occurred on a normal, customary, and continuous basis; the practice or regulation is connected with receiving, handling, storing, or delivering property; the practice or regulation is unjust or unreasonable; and the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4. Each element is discussed below.

1. Regulated Entity

Because section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries, to violate it, an entity must be a common carrier, marine terminal operator, or ocean transportation intermediary. The evidence establishes that Maersk is an ocean common carrier and a regulated entity within the meaning of the Shipping Act. Answer at 8-9. Accordingly, Holiday has established this first element.

2. Unjust and Unreasonable

Holiday currently asserts that Maersk failed to release the bills of lading, sea waybill, or telex release for these four shipments. Brief at 2. Maersk contends that delivery was accomplished upon discharge to the NPA facility; original bills of lading were not needed; and Maersk did not act unreasonably. Opposition at 10-14.

Holiday's arguments about what Maersk practices are at issue has continually shifted. Initially, Holiday asserted that Maersk failed to release the containers and charged demurrage and detention fees while the containers were with Customs and Border Patrol, but did not specifically allege a failure to release the bills of lading. Complaint at 2-4. However, in a previous related federal case, Ms. Carew stated that Maersk generally issued bills of lading after it collected freight charges and that it released consignments to the consignees, limiting Holiday's ability to collect money due from the consignees. RX 2 at 12-14. In response to Maersk's motion to dismiss, Holiday asserted that Maersk retained custody of the four containers and refused to release them to the appropriate consignees. Response to Motion to Dismiss at 2. In a joint status report, Holiday next asserted that Maersk "refused to issue a necessary Debit note for the NPA to release the containers to the Consignees." JSR at 2. Then, in a letter motion requesting limited discovery, Holiday asserted that "Complainant has found out that there are differences in business protocols and legal environments between Nigeria and the United States" and that Maersk refuses to issue invoices and release the "delivery order." Letter Motion at 1. Holiday now argues that Maersk refuses to release the bills of lading for the four containers. Brief at 2.

The parties agree that the NPA is holding the containers but disagree as to the reason. Holiday has suggested a variety of theories about why the consignees have been unable to retrieve their cargo. The information that Holiday is receiving regarding why the NPA has not released the containers is inconsistent, second hand, and hearsay. "Many of Holiday Shipping's customers reside outside the United States, and obtaining information from these customers is filled with communication and logistical challenges." Brief, Carew Affidavit at 2. Although

relevant and admissible, this evidence is not persuasive. Holiday appears to have limited knowledge of the import regulations and practices in Nigeria, asserting that "there are differences in business protocols and legal environments between Nigeria and the United States." RX 6 at 96. Moreover, Holiday's statements regarding requirements to release shipments in Nigeria are not consistent and it is not clear what Maersk practices, if any, caused the continued detention of the containers.

In contrast, Maersk has consistently reported that the NPA refuses to release the containers, stating:

> Your Declarant asked MAERSK's agent at Lagos to inquire into the status [of] the four containers which are the subject of the complaint. It was then determined that the containers were still at Lagos awaiting pick-up by the consignees. *Id.* I was also advised that the cargos were under a Nigerian Customs hold, but further details were unavailable.

RX 10 at 114-115; *see also* RX 5 at 35, RX 13 at 2. The NPA is not a party to this proceeding and the undersigned has no authority over its determinations.

As the party who initiated the proceeding, Holiday has the burden of proof. The evidence establishes that Maersk released the containers to the NPA and that the NPA continues to hold the containers. Holiday has not established by a preponderance of the evidence that Maersk's conduct caused the NPA to delay delivery of the containers or to continue to hold the containers. Indeed, it is not entirely clear why the NPA continues to hold the containers, although Maersk's suggestion that significant fees have accrued is conceivable. If, indeed, the containers are being held by the NPA because fees are owed on them, Holiday has not proven any conduct by Maersk that caused the fees to accrue. Holiday has not established by a preponderance of the evidence that Maersk's conduct was unjust or unreasonable and has not met this element.

3. Connected with Receiving, Handling, Storing, or Delivering Property

Holiday alleges violations regarding the handling, storing, and delivering of the four containers. Complaint at 1. Specifically, Holiday alleges that the containers have not been delivered. Brief at 1. The evidence shows that the alleged violation involved receiving, handling, storing, or delivering containers. This element is not contested and is established by Holiday.

4. Normal, Customary, and Continuous Basis

Holiday has the burden to establish that the unjust and unreasonable acts in question occurred on a normal, customary, and continuous basis and thus were a regulation or practice by Respondent. Holiday alleges that: "Ordinarily, Respondent issues its bill of lading or the sea waybill or telex release when the consignment leaves the originating port and is en route to the destination port. The Respondent has refused to release the bills of lading, sea waybill, or telex release for any of these consignments." Brief at 2. Maersk contends that only four containers involving the same shipper are implicated; that the statement of Joseph Famoye is hearsay from someone not named as a consignee; and that the claimed acts or omissions are not occurring on a normal, customary, and continuous basis.

Holiday has not established that Maersk's alleged conduct has occurred on a normal, customary, and continuous basis and is a part of Maersk's normal business practices or business model. To the contrary, the related litigation identified 79 containers shipped by Holiday with Maersk and Holiday does not suggest that these issues occurred with the other containers. *See* Complainant's Response to Maersk's Motion at 1 (Jan. 12, 2021). Rather, Holiday argues that ordinarily, Maersk issues its bill of lading when the consignment leaves the originating port. Brief at 2. For these four containers, Holiday asserts that Maersk treated these four shipments differently from its normal business practices. Accordingly, Holiday has not established this element.

5. Proximate Cause of Loss

Holiday alleges that Maersk refused to release the bills of lading, so that the containers could not be picked up, causing significant loss to the shippers. Brief at 2. Maersk asserts that it was not the proximate cause of the claimed loss. Opposition at 14-16.

The evidence establishes that the containers could not be picked up because they have been detained by the NPA. Holiday has not established that Maersk's action were the proximate cause of the continued detention of the containers and has not established why the containers continue to be held by the NPA. Accordingly, Holiday has not established this element.

6. Conclusion

Holiday has not established by a preponderance of the evidence that Maersk violated section 41102(c) of the Shipping Act and Commission Rule 545.4(d) as alleged, because Holiday has not established that Maersk's conduct was unjust or unreasonable; normal, customary, and continuous; or the proximate cause of loss.

Additional information is not necessary to resolve this claim. Accordingly, Holiday's request for a hearing to determine the remaining merits of the parties' claims and defenses is hereby **DENIED**.

D. Section 41102(a) Counter Claim

Maersk alleges in its counter claim that Holiday violated section 41102(a), formerly section 10(a)(1), of the Shipping Act.

> Claimant knowingly and willfully obtained transportation at less than applicable rates by false, unjust, and unfair means including, *inter alia*, fraudulently misrepresenting NVOCC status. By signing the Service Contract as an NVOCC and then acting as an unlicensed ocean freight forwarder in tendering cargo under that contract, Claimant knowingly and willingly failed to pay for the transportation of Claimant's cargoes by false, unjust, and unfair means including, *inter alia*, fraudulent misrepresentation and abuse of corporate form and style of CAREW and HOLIDAY in licensing and contracting. As a result of the foregoing and Claimant's violations of the Shipping Act, Respondent has been cast in damages equal to the difference between the Service Contract rate and otherwise

> applicable tariff rate for each shipment improperly tendered under the Service Contract.

Answer at 11 (paragraph numbers omitted).

> Section 41102(a) states:
>
> Obtaining Transportation at Less Than Applicable Rates.—A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

46 U.S.C. § 41102(a).

1. Default

Maersk asserts that the counter claim should be granted on default as no answer to Maersk's counter claim has been served. Opposition at 17. Holiday asserts that it acted in its established course of business, that it was licensed as an NVOCC, and that Maersk designated Holiday as the shipper on bills of lading. Reply at 3.

Commission Rule 65 states that a "party to a proceeding may be deemed to be in default if that party fails . . . [t]o answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding." 46 C.F.R. § 502.65(a).

Unlike typical defaults where a party fails to participate in the proceeding, here, Holiday has actively pursued its claims and insisted its actions were proper. Holiday has frequently failed to comply with legal formalities, for example by filing letters instead of motions or briefs and failing to file a formal answer. However, Holiday has continued to participate and to defend its actions. No motion for default decision was filed and no order to show cause was issued. Maersk was on notice that Holiday contested Maersk's arguments. "The reluctance to decide by default judgments is consistent with the underlying philosophy regarding proceedings before administrative agencies like the Commission. Under this philosophy agencies prefer to decide cases based on evidence rather than on defaults and technicalities." *Tak Consulting Eng'rs v. Bustani*, Docket No. 98-13, 28 S.R.R. 581, 583 (ALJ 1998). Accordingly, the counter claim will not be granted as a default but will be evaluated on the merits.

2. Elements

Pursuant to the Shipping Act, a shipper may not knowingly and willfully obtain transportation for less than applicable charges by unjust or unfair means. A person is considered to have "knowingly and willfully" violated the Shipping Act if the person had knowledge of the facts of the violation and intentionally violated or acted with reckless disregard, plain indifference, or purposeful, obstinate behavior akin to gross negligence. *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd*., Docket No. 96-05, 29 S.R.R. 119, 164-165, 2001 FMC LEXIS 39, at *143 (FMC June 1, 2001); *Portman Square Ltd.*, Docket No. 97-17, 28 S.R.R. 80,

84-85, 1998 FMC LEXIS 27 (ALJ Mar. 16, 1998). To establish a violation of section 41102(a), "fraud or concealment is a necessary ingredient in the proof of an unjust or unfair device or means." *United States v. Open Bulk Containers*, 727 F.2d 1061, 1064 (11th Cir. 1984); *see also Rose Int'l,* Docket No. 96-05, 29 S.R.R. 119, 163, 2001 FMC LEXIS 39, at *139; *Waterman S.S. Corp. v. General Foundries, Inc.*, Docket No. 93-15, 26 S.R.R. 1424, 1429, 1994 FMC LEXIS 19 (FMC June 13, 1994). "It is such fraud or concealment that in fact makes the practice unjust or unfair." *Open Bulk Containers*, 727 F.2d at 1064; *see also* 46 C.F.R. § 545.2.

Maersk asserts that Holiday acted as an unlicensed freight forwarder for these four shipments, freight forwarders cannot enter into service contracts, and therefore, Holiday accessed the lower rates available in the service contract by means of a "calculated misrepresentation." Opposition at 18-19. The first question is whether Holiday acted as a freight forwarder or NVOCC for these shipments.

To conclude that an entity operated as an NVOCC, the entity must meet the Shipping Act's definition of a common carrier; that is, it must hold itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation, assume responsibility for the transportation from the port or point of receipt to the port or point of destination, and use for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country. 46 U.S.C. § 40102(7); *see also MAVL Capital Inc. v. Marine Transport Logistics and Dmitry Alper*, FMC Docket No. 16-16, 2020 FMC LEXIS 216, at *8 (FMC Oct. 29, 2020).

The Commission has long relied on these three factors – holding itself out, assuming responsibility, and transportation by water – to identify a common carrier:

> As a "common carrier" is defined in the Shipping Act, an NVOCC "holds out" to the "general public to provide transportation by water" and "assumes responsibility for the transportation from the port or point of receipt to the port or point of destination." 46 U.S.C. §1702(6). The Commission has found that no single factor of an entity's operation is determinative of its status as a common carrier. [*River Parishes Co., Inc. v. Ormet Primary Aluminum Corp.*, 28 S.R.R. 751, 763 (FMC Feb. 3, 1999); *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 62-65 (FMC Sept. 28, 1965) ("*Containerships*")[2]]. Rather, the Commission must evaluate the indicia of common carriage on a case-by-case basis. *Id.*

Rose Int'l, 29 S.R.R. at 162, 2001 FMC LEXIS 39, at *134; *see also Worldwide Relocations*, Docket No. 06-01, 32 S.R.R. at 503, 2012 FMC LEXIS 23, at *14 (FMC Mar. 15, 2012).

A carrier's status is determined by the nature of its service offered to the public and not upon its own declarations. *Bernhard Uhlmann Co., Inc. v. Porto Rican Express Co.*, 3 F.M.B. 771, 775 (FMC Feb. 11, 1952). To determine if an entity is a common carrier, it "is important to

[2] Many F.M.C. cases are available on the Commission's website at https://www.fmc.gov/fmc-reports/.

consider all the factors present in each case and to determine their combined effect." *Containerships*, 9 F.M.C. at 65. The Commission has indicated that it will "look beyond documentary labels." *Containerships,* 9 F.M.C. at 66. For example, "it is the status of the carrier, common or otherwise, that dictates the ingredients of shipping documents; it is not the documentation that determines carrier status." *Containerships,* 9 F.M.C. at 66. To determine whether an entity meets this standard, "an intermediary's conduct, and not what it labels itself, will be determinative of its status." *Bonding of Non-Vessel-Operating Common Carriers,* 56 Fed. Reg. 51,987 at 51,991 (Oct. 17, 1991). This is a fact intensive inquiry.

Ms. Carew referred to Holiday as a freight forwarder for these shipments. RX 3 at 24 ("I operated as an ocean freight forwarder—ocean transportation intermediary (OTI) and appropriately licensed by the Federal Maritime Commission."). However, her description is not determinative. It is not clear whether Ms. Carew fully understands the difference between freight forwarders and NVOCCs. For example, in the related case, Ms. Carew's affidavit states that "I served solely as the ocean freight forwarder or an OTI for each of the consignments" and that "I operated as an ocean transportation intermediary (OTI), and licensed by the Federal Maritime Commission (FMC) to operate in the United States as an ocean freight forwarder (OFF) and non-vessel operating common carrier (NVOCC)." RX 2 at 10-11. Her statements do not determine whether she was acting as an NVOCC or a freight forwarder.

"All cargo carried for compensation moves on some form of transportation agreement, express or implied." *Investigation of Tariff Filing Practices,* 7 F.M.C. 305, 321 (FMC Aug. 2, 1962). "Nor does a common carrier lose that status if he uses shipping contracts other than bills of lading or even if he attempts to disclaim liability for the cargo by express exemptions in the bills of lading or other contracts of affreightment." *Containerships,* 9 F.M.C. at 64.

The affidavit from Joseph Famoye, an auto broker, indicates that he contacted Holiday to transport various items including three cars to Nigeria and that Ms. Carew advised him that he needed to obtain a 40-foot container. Brief, Famoye Affidavit at 1. After the container shipped, Ms. Carew provided a letter of indemnity which indicated the bill of lading number. Brief, Famoye Affidavit at 1. Mr. Famoye paid to clear the container in Nigeria but has been unable to retrieve it. Brief, Famoye Affidavit at 2. Holiday's issuance of a letter of indemnity and not a house bill of lading does not establish that Holiday was not an NVOCC. Moreover, it appears that at least for these shipments, Holiday held itself out to the general public to transport cargo, assumed responsibility for the transportation, and shipped the cargo overseas by water.

The evidence does not establish that Holiday was an unlicensed freight forwarder. Indeed, Maersk admits that Holiday held itself out as an NVOCC when it signed the service contract in that capacity and Maersk listed Holiday Shipping as the shipper on its bills of lading. Opposition at 19. It appears that Holiday held itself out as an NVOCC, assumed responsibility for the shipments, and shipped cargo overseas. Moreover, Holiday was a shipper in relationship to the ocean common carrier. Accordingly, Maersk has not established by a preponderance of the evidence that Holiday was an unlicensed freight forwarder which used fraud or concealment to obtain ocean transportation for property at less than the rates that otherwise would apply.

3. Conclusion

Maersk has not established by a preponderance of the evidence that Holiday defaulted or violated section 41102(a) of the Shipping Act because Maersk has not established that Holiday was acting as an ocean freight forwarder for these shipments.

Maersk requests attorney fees and costs in its opposition brief. Opposition at 20. Commission Rule 254 states that "the Commission may, upon petition, award the prevailing party reasonable attorney fees." 46 C.F.R. § 502.254(a). Maersk's request may be preliminary as petitions requesting attorney fees are generally filed after decisions become final. 46 C.F.R. § 502.254(c). Although Maersk is not the prevailing party in its counter claim, it is the prevailing party with regard to Holiday's complaint against it. "The primary consideration in determining entitlement to attorney fees is whether such an award is consistent with the purposes of the Shipping Act" and "parties should be encouraged to litigate meritorious claims and defences." Final Rule, 81 Fed. Reg. 10,508 at 10,509; *Baltic Auto Shipping Inc. v. Hitrinov*, Docket No. 14-16, 34 S.R.R. 944, 2017 FMC LEXIS 16, at * 26 (FMC Oct. 25, 2017). At this point, the evidence does not establish that Maersk is entitled to attorney's fees under the Commission's case law.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, and the conclusions and findings set forth above, it is hereby

ORDERED that Holiday's complaint be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that Maersk's counter claim be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this proceeding be **DISCONTINUED**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

GREATWAY LOGISTICS GROUP, LLC, *Complainant*

v.

OCEAN NETWORK EXPRESS PTE. LTD., *Respondent*.

DOCKET NO. 21-04

Served: November 30, 2021

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On November 10, 2021, Complainant Greatway Logistics Group, LLC ("Greatway") and Respondent Ocean Network Express Pte. Ltd. ("ONE") filed a joint motion ("Motion") seeking approval of a settlement agreement, dismissal of the complaint with prejudice, and treatment of the settlement agreement as confidential. A copy of the confidential settlement agreement was attached to the motion. On November 12, 2021, the Commission's Bureau of Enforcement ("BOE"), which had intervened in the proceeding, filed a response to the motion.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

> their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state:

> The Settlement Agreement negotiated by Greatway and ONE, with the advice and assistance of their respective counsel, is reasonable and not inconsistent with any law or policy. The Parties carefully considered the costs, benefits, and risks of further litigation, and determined that settlement is in their mutual interests. Similarly, the Settlement Agreement—an agreement between and negotiated by sophisticated business entities—was reached without fraud, duress, undue influence, or any other defect that would bar its approval. Moreover, BOE does not object to the settlement as a commercial resolution of this dispute. Accordingly, the Parties respectfully request that the Settlement Agreement be approved and that all of Greatway's claims against ONE in the above-captioned proceeding be dismissed *with prejudice*.

Motion at 3.

BOE filed a response to the motion which states:

> BOE is not a signatory to the settlement agreement between Greatway and ONE that has been submitted for the ALJ's approval. Although BOE initially participated in the settlement discussions, those discussions resulted in a commercial resolution which does not address BOE's concerns. BOE does not seek to interfere with the commercial resolution that the primary parties reached with assistance of counsel.

BOE Response at 3.

Based on the representations in the motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in settlement discussions. The proceeding would require potentially expensive additional discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Although BOE "continues to have concerns regarding whether ONE's application of its merchant clause may be a violation of the Shipping Act," BOE Response at 3, BOE does not oppose the settlement agreement and has not asserted any evidence of fraud, duress, undue influence, mistake, or harm to the public. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of the motion, the settlement agreement, BOE's response, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the settlement agreement between Greatway Logistics Group, LLC and Ocean Network Express Pte. Ltd. be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

MARIE CAREW D/B/A HOLIDAY SHIPPING., *Complainant*

v.

MAERSK LINE A/S & JOHN DOES, *Respondents*.

DOCKET NO. 20-17

Served: December 3, 2021

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's November 2, 2021 Initial Decision has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

MOHAWK GLOBAL LOGISTICS CORP. DBA MOHAWK GLOBAL LOGISTICS, *Complainant*

v.

MSC MEDITERRANEAN SHIPPING COMPANY (USA) INC. AS AGENT FOR MEDITERRANEAN SHIPPING COMPANY, S.A. GENEVA, *Respondent*.

DOCKET NO. 1971(F)

Served: December 9, 2021

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING CONFIDENTIAL SETTLEMENT AGREEMENT[1]

On November 24, 2021, Complainant Mohawk Global Logistics Corp. and Respondent MSC Mediterranean Shipping Co. (USA) Inc. as agent for Mediterranean Shipping Co., S.A. filed a joint motion ("Motion") seeking approval of a settlement agreement, dismissal of the complaint with prejudice, and treatment of the settlement agreement as confidential. A copy of the confidential settlement agreement was attached to the motion.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

[1] This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state:

> In this action, the parties, both sophisticated corporate entities, arrived at the Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks. The Settlement Agreement does not contravene any law or public policy, and is neither unjust nor discriminatory. It does not contemplate any adverse effects on any third parties or the shipping public. Instead, the Settlement Agreement is a fair and reasonable resolution of the dispute between the parties and reflects their desire to resolve their issues without the need for costly and uncertain litigation. For these reasons, the parties

> respectfully request that the Settlement Agreement be approved and, on that basis, Mohawk's claims against Respondent in this action be dismissed with prejudice.

Motion at 3.

Based on the representations in the motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in arm's length settlement discussions. The proceeding would require potentially expensive additional discovery and briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the settlement agreement between Mohawk Global Logistics Corp. and Respondent MSC Mediterranean Shipping Co. (USA) Inc. as agent for Mediterranean Shipping Co., S.A. be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Statement of the Commission

On Representative Complaints

Docket No. 21-13

Issued December 28, 2021

The Commission has traditionally enforced the prohibitions in Chapter 411 of Title 46 of the United States Code by bringing enforcement actions and issuing civil penalties[1] and by adjudicating private party complaints and awarding reparations.[2] The latter – private party action – is important to alerting the Commission to potential violations of statutes and Commission regulations, clarifying the lines between lawful and unlawful conduct, facilitating the development of Commission precedent, and deterring unfair and unreasonable conduct by carriers, marine terminal operators, and intermediaries.[3]

The Commission recognizes, however, that litigation has costs in terms of time, attention, money, and relationships. And there may be instances where an individual's or single company's cost-benefit analysis weighs against bringing an otherwise valid, or potentially valid, claim. This may especially be true if the amount of potential recovery is small compared to the cost of litigation or if the potential complainant has fewer resources, experience, or other leverage as compared to the entity against whom the claim would be brought.

Because an individual or company may face challenges to bringing a private party complaint unrelated to the complaint's merits, the Commission emphasizes that individuals and companies are not the only persons who may file complaints alleging violations of Title 46, Chapter 411. Rather, *any* person may file a complaint alleging a violation, including shippers' associations and trade groups or trade associations.

Under 46 U.S.C. § 41301(a), "[a] person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part . . . ." Although neither this section, the definitions in § 40102, nor the Commission's Rules of Practice and Procedure define "person,"[4]

[1] *See* 46 U.S.C. §§ 41302, 41107; 46 C.F.R. §§ 502.63, 502.603.

[2] *See* 46 U.S.C. §§ 41301, 41305; 46 C.F.R. § 502.62.

[3] This Policy Statement focuses on claims by a person that another has violated Title 46, Chapter 411. If a person instead wants guidance on its own conduct or proposed conduct, the person may file a petition for a declaratory order under 46 C.F.R. § 502.93.

[4] The Shipping Act of 1916, however, defined "person" to include "corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country." Shipping Act, 1916, Pub. L. No. 64-260. The Shipping Act of 1984 included a similar definition. Pub. L. No. 98-237, § 3(20), 98 Stat. 67, 69.

the Commission has consistently interpreted the term broadly to include not only natural persons but also corporations, partnerships, associations, and public or private organizations.[5]

Additionally, the Commission has long interpreted § 41301(a) to allow any person to file a complaint,[6] even if that person does not allege that it was injured by the alleged violation.[7] Section 41301(a) allows a person to file a complaint alleging a violation, and, if the claim is timely, a complainant may seek reparations for an injury.[8] An association could thus file a complaint to protect the interests of its members even if the association itself did not suffer actual injury.[9]

This does not mean, however, that the nature or status of the person filing a complaint is inconsequential. Reparations, for instance, are only available to a person who suffers "actual injury" caused by a prohibited act.[10] Further, a person filing a complaint, whether an individual or a trade association, becomes a party to an adversary proceeding and is subject to the Commission's procedural rules.[11]

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[5] *E.g.*, 46 C.F.R. § 502.41 ("The term 'party,' whenever used in this part, includes any natural person, corporation, association, firm, partnership, trustee, receiver, agency, public or private organization, government agency, or unit thereof representing said agency. A party who files a complaint under § 502.62 shall be designated as 'complainant.'"); 46 C.F.R. § 540.21 (defining person broadly). These definitions are consistent with 1 U.S.C. § 1, which provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] 'person' . . . includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

[6] 46 C.F.R. § 502.61(a) ("Any person may commence a proceeding by filing a complaint (Rule 62) for a formal adjudication or by filing a claim for the informal adjudication of small claims (subpart S)."); *In re Vehicle Carrier Services*, 1 F.M.C.2d 440, 451 n. 10 (FMC 2019). Both the Shipping Act of 1916 and the Shipping Act of 1984 expressly stated that "any person" could file a complaint. Pub. L. No. 64-260 § 22; Pub. L. No. 98-237, § 11(a), 98 Stat. 67, 80. This was changed to "a person" when the Shipping Act was recodified as positive law, Pub. L. No. 109-304, 120 Stat. 1485 (2006), but there is no indication that Congress intended to change the scope of who could file a complaint.

[7] *Cargill, Inc. v. Waterman Steamship Corp.*, 1981 FMC LEXIS 34, *39 (FMC Nov. 30, 1981) ("Cargill clearly has standing to prosecute a complaint under section 22 of the Shipping Act [of 1916] even if it were not alleging injuries to itself."); *Fed. Mar. Comm'n v. Zim Israel Navigation*, 263 F. Supp. 618, 621 (SDNY 1967) ("Whether or not the insurers are entitled to reparations in the proceedings before the Commission – a question which need not be decided here – they have standing to file the complaint and the Commission has jurisdiction to entertain it.").

[8] *Cf. Isthmian S.S. Co. v. United States*, 53 F.2d 251, 253 (SDNY 1931) ("While it is evident [in the 1916 Act] that in order to obtain 'reparation' for injury 'a person must be directly affected by the violation, the words 'injury if any' indicate that the remedy does not necessarily include 'reparation,' but may relate only to the prevention of unfair or discriminatory rates in the interest of the public.").

[9] The standing requirements of Article III of the Constitution are not directly applicably to agency proceedings. *See, e.g.*, *Pfizer Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999); *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1164 (10th Cir. 2012).

[10] 46 U.S.C. §§ 41301(a), 41305(b).

[11] *See generally* 46 C.F.R. Part 502; *e.g.*, 46 C.F.R. § 502.6(a) (requiring that pleadings be well grounded in fact and not filed for improper purposes). Also, if a trade association or shippers' association were to file a complaint, the association's member could still be subject to relevant third-party discovery. *See* 46 C.F.R. § 502.131.

To conclude, private party complaint proceedings significantly influence the development of shipping law, and neither the text of Title 46 nor the Commission's interpretation of the statute preclude a person from filing a complaint to protect others from potentially unlawful conduct.

By the Commission.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Statement of the Commission

On Attorney Fees

Docket No. 21-14

Issued December 28, 2021

Section 41301(a) of Title 46 of the United States Code allows a person to file with the Commission a complaint alleging violations of certain parts of Title 46, Subtitle IV (often referred to as "the Shipping Act"). Prior to 2014, if the person filing a complaint ("complainant") proved an alleged violation, and the Commission awarded reparations, the Commission would also award the complainant "reasonable attorney fees."[1] The applicable statute did not, however, authorize awarding attorney fees to the person alleged to have violated Title 46 ("the respondent") if the complainant failed to prove a violation.[2] In other words, a successful complainant that obtained reparations was automatically entitled to reasonable attorney fees, whereas a successful respondent was ineligible for attorney fees.

In 2014, Congress changed the attorney fee statute so that "the prevailing party may be awarded reasonable attorney fees."[3] This affected attorney fee awards in three significant ways. First, both prevailing complainants *and* prevailing respondents were now eligible to recover reasonable attorney fees. Second, an award of attorney fees was no longer conditioned on an award of reparations. Third, the Commission now had the discretion to award fees rather than being required to do so.[4] The Commission subsequently issued a Final Rule amending its attorney fee regulations to implement the statutory changes.[5]

Since that time, the Commission has ruled on several fee petitions and further refined its approach to attorney fees. Additionally, shippers have suggested that lack of clarity about a complainant's liability for a respondent's attorney fees might deter shippers from filing

[1] Shipping Act of 1984, Pub. L. No. 98-237, § 11(g), 98 Stat. 67, 80-81("For any complaint filed within 3 years after the cause of action accrued, the Commission shall, upon petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury . . . caused by a violation of this Act plus reasonable attorney's fees."); *see also* Final Rule: Organization and Functions; Rules of Practice and Procedure; Attorney Fees, 81 Fed. Reg. 10508,10509 (Mar. 1, 2016).

[2] 81 Fed. Reg. at 10509 (noting that Commission interpreted pre-2014 attorney fee provision as providing for attorney fees only to prevailing complainants).

[3] Howard Coble Coast Guard and Marine Transportation Act of 2014, Pub. L. No. 113-281, §402, 128 Stat. 3022, 3056; 46 U.S.C. § 41305(e).

[4] *See* 81 Fed. Reg. at 10509.

[5] 81 Fed. Reg. at 10508; *see also* 46 C.F.R. § 502.254.

complaints. The Commission thus finds it appropriate to issue this Policy Statement summarizing its approach to attorney fee timing, procedures, eligibility, and entitlement.

A. Timing

If a prevailing party wants to receive attorney fees, the party must file a petition within 30 days after a decision is "final."[6] A decision is final for attorney fee purposes when the time for seeking judicial review of the decision has expired or when a court appeal has terminated.[7] A petition for attorney fees that is filed before the decision is final under that definition is premature, and the Commission may defer ruling on a premature petition or deny it without prejudice to refiling when ripe. Similarly, absent unusual circumstances, the Commission will not make findings on eligibility or entitlement to attorney fees before a petition is filed.[8]

B. Procedures

The procedures for filing attorney fee petitions are set forth in 46 C.F.R. § 502.254. The party seeking a fee award is responsible for filing a petition. The burden is on the petitioner to, in the petition, establish that it is eligible for and entitled to fees, document the appropriate hours, and justify the reasonableness of the rates.[9] The standard of proof is preponderance of the evidence.[10]

C. Eligibility

The Commission may only award attorney fees under § 41305(e) to a prevailing party in a private party complaint proceeding.[11] In determining whether a party has prevailed, and thus eligible for attorney fees, the Commission looks for a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute."[12] Generally, a complainant is a prevailing party if the presiding officer (Administrative Law Judge

[6] 46 C.F.R. § 502.254(c)(1).

[7] 46 C.F.R. § 502.254(c)(1). In most instances, an aggrieved party has sixty days to seek judicial review of a Commission decision. 28 U.S.C. §§ 2342(3)(B), 2344.

[8] *Santa Fe Discount Cruise Parking, Inc. v. The Board of Trustees of the Galveston Wharves*, 3 F.M.C.2d 59, 82 (FMC 2021) (holding it would be "premature to make any additional findings on attorney fees" in decision on the merits because the "appropriate time to address attorney fees is when addressing a timely petition under 46 C.F.R. § 502.254(c)").

[9] *See* 46 C.F.R. § 502.254(d); *Logfret, Inc. v. Kirsha, B.V.*, 2 F.M.C.2d 110, 113 (FMC 2020).

[10] *Logfret*, 2 F.M.C.2d at 113.

[11] 81 Fed. Reg. at 10511.

[12] 81 Fed. Reg. at 10512 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

or Commission) awards the complainant reparations or issues a cease-and-desist order.[13] A respondent is generally a prevailing party when the presiding officer rebuffs a complainant's claims.[14] For instance, a respondent prevails if the presiding officer grants the respondent's motion to dismiss with prejudice[15] or grants the complainant's request for voluntary dismissal with prejudice.[16]

D. Entitlement

In considering whether to award attorney fees to an eligible party, that is, whether the party is entitled to fees, the Commission's discretion is guided by one overarching consideration, three general principles, and several factors. "The primary consideration in determining entitlement to attorney fees is whether such an award is consistent with the purposes of the Shipping Act . . . ."[17] Further, there is no presumption for or against awarding attorney fees.[18] The Commission also treats prevailing complainants and prevailing respondents the same with respect to the attorney fee analysis.[19] And, when determining whether to award attorney fees, the Commission is informed by the principle that "parties should be encouraged to litigate meritorious claims and defenses,"[20] and attorney fee liability should not be imposed in a way that would chill the filing of credible claims and defenses.[21]

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[13] *81 Fed. Reg. at 10512; CMI Distrib., Inc. v. Service by Air, Inc.*, Docket No. 17-05, Order Denying Petition for Attorney Fees at 6-7 (FMC Nov. 24, 2021); *Adenariwo v. BDP Int'l*, Docket No. 1921(I), 2017 FMC LEXIS 27, *5 (FMC June 28, 2017).

[14] *Baltic Auto Shipping, Inc. v. Hitrinov*, Docket No. 14-16, 2017 FMC LEXIS 16, *23-24 (FMC Oct. 25, 2017).

[15] *Logfret*, 2 F.M.C.2d at 113; *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, Inc.*, Docket No. 14-04, 2016 FMC LEXIS 58, *13 (FMC Sept. 14, 2016).

[16] *Baltic*, 2017 FMC LEXIS 16 at *24.

[17] 81 Fed. Reg. at 10515.

[18] 81 Fed. Reg. at 10515; *id.* at 10513 ("In addition, Congress's decision to amend § 41305 so that the award of fees is now discretionary rather than mandatory indicates an intent to eliminate the automatic award of attorney fees, and the Commission believes that any presumption in favor of fee awards would frustrate that intent.") (internal citations omitted). Nevertheless, awarding fees is also not "the exception," because there is no presumption against fee awards. *Id.*

[19] 81 Fed. Reg. at 10513-14, 10515.

[20] 81 Fed. Reg. at 10515.

[21] *Edaf Antillas*, 2016 FMC LEXIS 58 at *28-29 (Doyle, Commissioner, concurring).

The Commission also weighs several factors when addressing attorney fees: frivolousness, objective unreasonableness (in the factual and legal components of a case), motivation, litigation misconduct, deterrence, and compensation.[22]

> *Objective unreasonableness/Frivolousness*.[23] Objectively unreasonable claims or defenses are those that are clearly without merit or "patently devoid" of a legal or factual basis.[24] Failing to prosecute a claim, for instance, may be considered an objectively unreasonable failure to substantiate the legal and factual components of a case.[25] That a claim or defense was not successful does not necessarily mean it was objectively unreasonable or frivolous.[26] If a non-prevailing party's claims or defenses are based on plausible interpretations of the law or colorable arguments, this factor will weigh against awarding fees to the prevailing party.[27]
>
> *Motivation*. This factor weighs toward awarding fees if the non-prevailing party is improperly motivated, i.e., it asserted claims or defenses not because of their merit but because it sought "to knowingly gamble on an unreasonable legal theory in order to achieve a secondary gain" such as settlement or harassment or financial damage to a competitor.[28]
>
> *Litigation misconduct*. Commission rules prohibit parties from filing pleadings, discovery requests, motions, or other documents for improper purposes, such as harassing others or causing unnecessary delay.[29] Not only might the Commission sanction a party for such conduct, but the misconduct could also weigh in favor of awarding attorney fees to a prevailing adversary. Knowing and repeated disregard of ALJ or Commission orders by a non-prevailing party, for instance, may give rise to attorney fee liability.[30]

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[22] *Edaf Antillas*, 2016 FMC LEXIS 58 at *14. This list of factors is nonexclusive, however, and the Commission may consider additional factors in a particular case.

[23] The "frivolousness" and "objective unreasonableness" factors overlap significantly. *See Logfret*, 2 F.M.C.2d at 114 n.6.

[24] *Logfret*, 2 F.M.C.2d at 114.

[25] *Edaf Antillas*, 2016 FMC LEXIS 58 at *14-15.

[26] *Logfret*, 2 F.M.C.2d at 114; *id.* at 115 (distinguishing insufficient allegations under pleading standards from objectively unreasonable allegations); *Baltic*, 2017 FMC LEXIS 16 at *29.

[27] *See Baltic*, 2017 FMC LEXIS 16 at *30.

[28] *Logfret*, 2 F.M.C.2d at 116 (quoting *Creazioni Artistiche Musicali, S.R.L. v. Carlin Am., Inc.*, Case No. 14-cv-9270, 2017 U.S. Dist. LEXIS 124082, at *10 (SDNY Aug. 4, 2017)); *Logfret, Inc. v. Kirsha, B.V.*, 2 F.M.C.2d 35, 40 (ALJ 2020).

[29] 46 C.F.R. § 502.6(a).

[30] *Edaf Antillas*, 2016 FMC LEXIS 58 at *15.

Deterrence. The Commission may also award attorney fees to deter conduct, such as failing to respond in Commission proceedings[31] or repeatedly engaging in prohibited acts.[32] Considerations of deterrence may also, however, weigh against awarding fees. The "purposes of the Shipping Act are met when complainants are able to raise potential violations, even under unusual or unique circumstances, without the chilling impact of having to pay [r]espondents' attorney fees."[33]

Compensation. Compensation is a factor in certain cases. Because every prevailing party could argue it would not be made whole without an award of attorney fees, placing too much emphasis on compensation would violate the principle that there is no presumption in favor of awarding fees.[34] In some circumstances, however, the need to compensate a prevailing party may weigh in favor of awarding attorney fees. For example, this might be a factor where a prevailing complainant is an individual shipping household goods.[35]

Since the 2014 changes to the attorney fee statute, only once has the Commission required an unsuccessful shipper-complainant to pay an eligible respondent's attorney fees.[36] There, the Commission awarded fees because the complainant "failed to substantiate the legal and factual components of its case, knowingly disregarded the ALJ's orders on numerous occasions, abandoned its claim, forced multiple [r]espondents to expend significant resources of both time and money in their defense and, perhaps most egregiously, failed to terminate the claim when it could have limited the expense of the Respondents," despite "[a]mple opportunity to withdraw its claim."[37] In contrast, complainants who raise non-frivolous claims in good faith, who litigate zealously but within the rules and for proper purposes, and who comply with

[31] *Edaf Antillas*, 2016 FMC LEXIS 58 at *15-16 ("We believe that deterring complainants from failing to prosecute their claims by awarding respondents attorney fees furthers the purposes of the Shipping Act. Proceedings that continue on because of non-responding parties like this one, waste the time and resources of both respondents and the Commission and potentially delay the resolution of other complaint proceedings.").

[32] *See CMI Distrib., Inc.*, Order Denying Petition for Attorney Fees at 11-12; *id.* at 12 ("Were there any indication that [non-prevailing respondent] had engaged in similar violative conduct regarding other shippers, or that it might do so in the future, this factor would weigh in favor of a fee award."). A finding that a respondent has violated Title 46 or Commission regulations is not itself sufficient for the Commission to award fees to the complainant. If so, a prevailing complainant would always be entitled to attorney fees, which would be contrary to the principles that there is no presumption in favor of fees and that prevailing complainants and respondents should be treated similarly. *See* 81 Fed. Reg. at 10514 n.12, 10515. Rather, there must be a particular reason or need to deter the unlawful conduct at issue. *See, e.g.*, *CMI*, Order Denying Petition for Attorney Fees at 12.

[33] *Logfret*, 2 F.M.C.2d at 117 (quoting *Logfret*, 2 F.M.C.2d at 40).

[34] *CMI Distrib., Inc.*, Order Denying Petition for Attorney Fees at 14.

[35] *See CMI Distrib., Inc.*, Order Denying Petition for Attorney Fees at 14.

[36] *Edaf Antillas*, 2016 FMC LEXIS 58. The Commission has also awarded attorney fees *to* a shipper-complainant once since 2014 – the household good shippers in *Gruenberg-Reisner v. Overseas Moving Specialists*, Order Granting Petition for Attorney Fees at 23, Docket No. 1947(I) (SCO Nov. 3, 2017).

[37] *Edaf Antillas*, 2016 FMC LEXIS 58 at *14-15.

Commission orders are at little risk of attorney fee liability if they are unsuccessful, absent unusual circumstances.

By the Commission.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Statement of the Commission
On Retaliation

Docket No. 21-15

Issued December 28, 2021

To enforce the prohibitions in Title 46, Subtitle IV, of the United States Code, the Commission relies on shippers and others to inform the Commission about potential unlawful conduct and provide evidence in the form of documents and testimony (both written and oral). Shippers play a similar role when filing complaints and commenting on rulemakings. By filing private party actions, shippers not only serve their own interest by seeking reparations (damages), but they also alert the Commission to potential violations, help the Commission clarify the line between lawful and unlawful conduct, facilitate the development of Commission precedent, and deter unfair and unreasonable conduct. Shippers and other industry participants may also bring disputes to the Commission's Office of Consumer Affairs and Dispute Resolution Services (CADRS) to take advantage of the Commission's alternative dispute resolution procedures.[1]

For this system to function effectively, shippers and other industry participants must be able to raise claims with and provide information to the Commission without fear of retaliation for having done so. The Commission has, and will continue, to take seriously and investigate thoroughly allegations of carrier retaliation. Additionally, the Commission issues this Policy Statement to clarify that it will interpret 46 U.S.C. § 41104(a)(3) – the anti-retaliation provision – broadly to effectuate Congress's intent that shippers feel free to air their grievances to the Commission, and to address new shipping practices and new forms of retaliation.[2]

To that end, the Commission confirms that: (1) although § 41104(a)(3) protects "shippers," that term includes more than just cargo owners; (2) protected activity includes not only filing a complaint with the Commission but also participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS' dispute resolution procedures; and (3) to establish a violation of § 41104(a)(3), a complainant alleging retaliation or other unfair or unjustly discriminatory conduct based on the above grievance-related activity (filing complaints, etc.) does not need to prove that the carrier's conduct was designed to stifle competition of other carriers or that the shipper at issue sought the services of a carrier other than the respondent – cases suggesting otherwise are inapplicable.

[1] *See* https://www.fmc.gov/databases-services/consumer-affairs-dispute-resolution-services/.

[2] 46 U.S.C. § 41104(a)(3) provides that "[a] common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason."

I. History of Prohibition on Retaliation and Related Conduct

Congressional concern with carrier retaliation predates the Shipping Acts. In 1914, Representative Joshua W. Alexander, the Chairman of the House Committee on the Merchant Marine and Fisheries, presented a report on the Committee's investigation of foreign and domestic shipping lines.[3] The preface to the Alexander Report noted that "[w]hile numerous individual shippers voluntarily presented their grievances to the Committee, under promise of confidential treatment, very few were willing (fearing retaliation) to testify openly against the steamship line or lines upon which they were dependent for the movement of their freight."[4] The report later noted the relationship between carrier market power and shipper fears of retaliation: "Conference lines, through their monopolistic powers, so completely dominate the shippers with whom they deal that these shippers can not afford, for fear of retaliation, to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances."[5] Committee witnesses and commenters advocated the creation of an authority to review conference and rate agreements, in part to give shippers a venue for filing complaints.[6] They also proposed that Congress prohibit carriers from "refusing accommodations to any shipper by way of retaliation because he may have shipped by an independent line, or may have filed a complaint charging unfair treatment, or for other unjust reasons."[7]

The Committee accepted those proposals, and recommended, among other things, that Congress: (1) empower the Interstate Commerce Commission to "[a]dopt whatever measures it may deem necessary to protect the complainant against retaliation," and (2) prohibit carriers from "retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, *or has filed a complaint charging unfair treatment*, or for any other reason."[8]

The Shipping Act of 1916[9] drew heavily on the recommendations of the Alexander Report.[10] Section 14 of the 1916 Act prohibited deferred rebates, fighting ships, making

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[3] Report of the Committee on the Merchant Marine and Fisheries on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade Under H. Res. 587 (1914) (Alexander Report).

[4] Alexander Report at 5.

[5] Alexander Report at 306; *see also id.* ("The various lines, constituting a conference, have the same interests and their organization is effective. Shippers, on the contrary, live far apart, and because of their different and frequently antagonistic interest can only combine for mutual protection with the greatest difficulty.").

[6] Alexander Report at 307 ("Conference and rate agreements, and pooling arrangements, should be made with the full knowledge of some legally constituted authority in order (1) to safeguard the interests of shippers and (2) to make it possible for shippers to file complaints without fear of retaliation.").

[7] Alexander Report at 313.

[8] Alexander Report at 421 (emphasis added).

[9] Shipping Act, 1916, Pub. L. No. 64-260.

[10] *See Fed. Mar. Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 490 (1958) ("In passing the Shipping Act of 1916 . . . Congress followed the basic recommendations of the Alexander Committee."); H.R. Rep. No. 65-659 at 27 (1916).

discriminatory shipping contracts and "retaliat[ing] against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason."[11] This language was carried forward with little change as section 10(b)(5) in the Shipping Act of 1984 and its codification as 46 U.S.C. § 41104(a)(3).[12]

The Commission has infrequently discussed retaliation aimed at shipper complaints but has condemned the practice. In *Pacific American Fisheries Inc. v. American-Hawaiian Steamship Co.*, carriers eliminated a pier used by a shipper from the carrier's terminal rate.[13] The United States Maritime Commission, a predecessor of the Federal Maritime Commission, found that the carrier's conduct was unjust and unreasonable under section 18 of the 1916 Act and unduly prejudicial under section 16 of the Act.[14] The Commission also noted, however, that there was evidence that the chairman of the carriers' conference had previously threatened to eliminate the pier from the terminal rate application unless the shipper withdrew a complaint in a related matter. The Commission stressed that "[a]part from the force of such evidence as possible added proof of unreasonableness and undue prejudice, it shows an attitude toward and treatment of shippers by these respondents which is to be condemned, in view of the provision of section 14 (Third) of the Shipping Act, 1916, prohibiting resort by a subject carrier to a discriminating or unfair method because a shipper has filed a complaint."[15]

Most of the caselaw on § 41104(a)(3) and its predecessors, however, is unrelated to shipper grievances and instead concerns conduct such as dual-rate contract systems that impact competition between carriers.[16] The leading case about this type of conduct is *Federal Maritime*

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[11] Shipping Act, 1916, Pub. L. No. 64-260, § 14.

[12] Shipping Act of 1984, Pub. L. No. 98-237, § 10(b)(5), 98 Stat. 67, 78 ("No common carrier, either alone or in conjunction with any other person, directly or indirectly, may . . . retaliate against any shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason."). Although the 1984 Act lacks a comma after "methods" that was present in the 1916 Act, it does not appear that the change was meaningful. Section 14 Third of the 1916 Act was copied "virtually verbatim into the 1984 Act as section 10(b)(5)," *Int'l Ass'n of NVOCCs v. Atl. Container Line*, Docket No. 81-5, 1990 FMC LEXIS 5, at *88 (ALJ Jan. 25, 1990), and the legislative history of the 1984 Act indicates only that section 10(b)(5) was derived from section 14 Third, *Cal. Shipping Line, Inc. v. Yangming Marine Transp. Corp.*, Docket No. 88-15, 1990 FMC LEXIS 25, at *41 (FMC Oct. 19, 1990). The codification of section 10(b)(5) did not result in meaningful changes.

[13] 2 U.S.M.C. 270, 275-279 (U.S.M.C. 1940).

[14] *Pac. Am. Fisheries*, 2 U.S.M.C. at 279.

[15] *Pac. Am. Fisheries*, 2 U.S.M.C. at 277.

[16] See *Isbrandtsen*., 356 U.S. at 482-83 (finding unlawful under section 14 Third of 1916 Act dual rate contract system); *Pac. Coast/Hawaii & Atlantic-Gulf/Hawaii General Increase in Rates*, 7 F.M.C. 260, 280 (finding sugar freighting agreement requiring party to offer cargo to carrier before using party's own vessel or chartering a vessel did not violate section 14 Third of the 1916 Act because agreement left shipper free to use any other common carrier in the trade); *Isbrandtsen Co. v. States Marine Corp. of Del.*, 6 F.M.B. 422 (Fed. Mar. Bd. 1961) (finding dual rate contract system did not violate section 14 Third of the 1916 Act).

Board v. Isbrandtsen Co.[17] There, a non-conference (or "independent") carrier undercut the relevant conference[18] rates. In response, the conference proposed, and filed with the Federal Maritime Board, a dual rate contract system where a shipper who signed an exclusive patronage contract with the conference would receive a lower freight rate than the conference's noncontract rates.[19] The Board approved the system, but the United States Court of Appeals for the D.C. Circuit set aside the order, finding the dual rate system violated section 14 Third of the Shipping Act of 1916.[20]

The Supreme Court affirmed. In interpreting section 14 Third, the Court noted that section 14 of the 1916 Act specifically prohibited three types of conduct that stifles competition between conference and independent carriers: deferred rebates (section 14 First), fighting ships (section 14 Second), and retaliating against shippers by refusing space accommodations because the shipper patronized another carrier, filed a complaint, or for any other reason.[21] The Court pointed out, however, that section 14 included a fourth category of prohibited conduct: "resort to other discriminating or unfair methods."[22] The Court ruled that the practices "outlawed by the 'resort to' clause of § 14 Third take their gloss from the abuses specifically proscribed by the section" and thus "other discriminating or unfair methods" are "confined to practices designed to stifle outside competition."[23]

The Court reasoned that this was consistent with the "revealed congressional purpose in § 14 Third" – "to outlaw practices in addition to those specifically prohibited elsewhere in the section when such practices are used to stifle outside competition of independent carriers."[24] Applying this approach, the Court held that the dual rate contract system at issue was unlawful because the conference implemented it to offset competition from independent carriers.[25]

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[17] *Isbrandtsen*, 356 U.S. at 482.

[18] A conference is an association of ocean common carriers who engage in concerted activity and use a common tariff. 46 U.S.C. § 40102(8).

[19] *Isbrandtsen*, 356 U.S. at 483; *see also States Marine*, 6 F.M.B. at 439-40 (noting that under a dual rate contract system, "shippers are required to sign a contract in advance and to confine all their shipments to conference lines," and in return, shippers "either receive a discount on freight rates or else lower rates of freight than non-contractors").

[20] *Isbrandtsen*, 356 U.S. at 483.

[21] *Isbrandtsen*, 356 U.S. at 491.

[22] *Isbrandtsen*, 356 U.S. at 492.

[23] *Isbrandtsen*, 356 U.S. at 495; *see also id.* at 493 ("Ties to shippers not designed to have the effect of stifling outside competition are not made unlawful. Whether a particular tie is designed to have the effect of stifling outside competition is a question for the Board in the first instance to determine."); *id* at 499 (holding that "§ 14 Third strikes down dual-rate systems only where they are employed as predatory devices").

[24] *Isbrandtsen*, 356 U.S. at 495.

[25] *Isbrandtsen*, 356 U.S. at 493. Following *Isbrandtsen*, Congress enacted legislation to suspend the case's holding regarding dual rate contract systems until Congress could investigate its ramifications. *See* Pub. L. No. 85-626, 72 Stat. 574, 574 (1958); Pub. L. No. 86-542, 74 Stat. 253, 253 (1960); Pub. L. No. 87-75, 75 Stat. 195, 195 (1961). In

The Commission relied on *Isbrandtsen* to further interpret § 41104(a)(3) through the lens of competition among carriers. In *International Association of NVOCCs v. Atlantic Container Line*, although the Commission's Administrative Law Judge (ALJ) denied a motion to dismiss a claim based on section 10(b)(5) of the Shipping Act of 1984 (the predecessor of § 41104(a)(3)), the ALJ agreed with the respondent ocean carriers that: (1) the law was intended to prohibit predatory practices designed to stifle "outside competition"; and (2) a finding of unlawful discrimination under another section of the law is not sufficient to establish a violation of § 41104(a)(3); rather, a complainant must show that the carrier-respondent had a secondary objective, namely, to stifle outside competition. Otherwise, the ALJ noted, the other prohibitions in the act become surplusage.[26]

Similarly, the Commission in *California Shipping Line, Inc. v. Yangming Marine Transport Corp.* held that section 10(b)(5) "applies solely to retaliatory acts of a carrier against a shipper who has sought the services of another carrier, including retaliatory practices designed to stifle outside competition."[27] There, the complainant, a non-vessel-operating common carrier (NVOCC), alleged that an ocean carrier failed on three occasions to make available to it the essential terms of three service contracts the carrier had with nonparty shippers. The complainant alleged that not only did the carrier violate then-existing law requiring carriers to provide essential terms of service contracts to similarly situated shippers, but that the carrier also violated section 10(b)(5). The ALJ found that the carrier violated the latter prohibition because of the carrier's "discriminatory" denial of access to the service contracts.[28]

The Commission reversed. The Commission cited *Isbrandtsen* and reasoned that if section 10(b)(5) applied to *any* act of discriminatory conduct, it would render other prohibitions superfluous.[29] Consequently, the Commission held that a violation requires retaliatory conduct and evidence that the shipper sought the services of another carrier. Additionally, the Commission rejected a complainant-related retaliation theory, which was premised on complainant having filed a complaint against a different carrier. According to the Commission,

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1961, Congress amended section 14 the Shipping Act of 1916 to authorize ocean common carriers and conferences to enter into "effective and fair dual rate contracts with shippers and consignees." Pub. L. No. 87-346, 75 Stat. 762, 762 (1961).

[26] *Int'l Ass'n of NVOCCs v. Atl. Container Line*, Docket No. 81-5, 1990 FMC LEXIS 5, at *8-9, *87-97 (ALJ Jan. 25, 1990). There, non-vessel-operating common carriers sued ocean carriers alleging that the ocean carriers refused to make containers, chassis, and other equipment for consolidation and loading of cargo available to NVOCCs at the NVOCCs own premises while at the same time supplying such equipment to other shippers. According to the complainants, the refusal to provide equipment prevented NVOCCs from competing with the ocean carriers for less-than-container-load shippers. *Ariel Mar. Grp. v. N.Y. Shipping Ass'n*, Complaint ¶¶ 1-10 (Dec. 23, 1988). Among other things, the complainants alleged that this amounted to refusing cargo space accommodations when available in violation of section 10(b)(5) of the 1984 Act. *Id.* The ocean carriers moved for dismissal of the claim, arguing that their conduct did not result in the type of predatory conduct covered by the anti-retaliation provision. *Int'l Ass'n of NVOCCs*, 1990 FMC LEXIS 5 at *87-93. The ALJ denied the motion because dismissal at a relatively early stage of the proceedings was inappropriate. *Id.* at *97.

[27] Docket No. 88-15, 1990 FMC LEXIS 25, at *44-45 (FMC Oct. 19, 1990).

[28] 1990 FMC LEXIS 25 at *3-9.

[29] 1990 FMC LEXIS 25 at *44.

"[a]lthough section 10(b)(5) does prohibit retaliation against a shipper because the shipper has filed a complaint, we believe that this provision is limited to situations where the shipper has filed a complaint against the carrier who is allegedly retaliating against it."[30] Subsequent cases cited *International Association of NVOCCs* and *California Shipping Line* as limiting the scope of § 41104(a)(3).[31]

II. Commission Current Interpretation

Section 41104(a)(3) provides that "[a] common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason."

Put differently, the provision prohibits a common carrier from:

1. Retaliating against a shipper by refusing, or threatening to refuse, cargo space accommodations when available *because*

    a. the shipper has patronized another carrier,
    b. the shipper has filed a complaint, or
    c. for any other reason; [32]

    or

2. Resorting to other unfair or unjustly discriminatory methods *because*

    a. the shipper has patronized another carrier,
    b. the shipper has filed a complaint, or
    c. for any other reason.

[30] 1990 FMC LEXIS 25 at *45-46.

[31] In *MAVL Capital, Inc. v. Marine Transport Logistics*, Docket No. 16-16, 2017 FMC LEXIS 4, at *61 (ALJ Jan. 17, 2017), the ALJ relied on *Int'l Ass'n of NVOCCs* in holding that the complainants' § 41104(a)(3) claims failed because the complainants had not explained how the respondents' conduct was designed to stifle outside competition. The Commission affirmed the ALJ's dismissal of these claims because the complainants did not challenge the dismissal in their exceptions. MAVL, 2 F.M.C.2d 198, 207 (FMC 2020). *See also Edaf Antillas, Inc. v. Crowley Caribbean Logistics*, LLC, Docket No. 14-04, 2014 FMC LEXIS 29, at *29 (ALJ Nov. 6, 2014),(dismissing § 41104(a)(3) claim because the complainant did not show that retaliation due to patronizing another carrier, citing *California Shipping Lines*); *W. Overseas Trade & Dev. Corp. v. Asia N. Am. Eastbound Rate Agreement*, Docket No. 92-06, 1993 FMC LEXIS 61, at *57 (ALJ Aug. 16, 1993) (noting that the Commission in *California Shipping Lines* "established strict standards" for § 41104(a)(3) claims and stating that a shipper using another carrier was a necessary element of the claim).

[32] Although the comma usage in § 41104(a)(3) could be read otherwise, there is reason to believe that the list of protected activity in the provision (i.e., patronizing another carrier, filing a complaint) modifies both the "retaliation" clause and the "resort to" clause. The Court in *Isbrandtsen* indicated that the list of protected activity in the 1916 Act modifies the "retaliation" clause. 356 U.S. at 491. As noted above, it does not appear that subsequent minor amendments to section 14 Third of the 1916 Act, such as deleting the comma after "methods" were intended to change the meaning of the provision.

Although the Alexander Report in 1914 made clear that the Shipping Acts were intended to encourage shippers to bring their grievances against carriers to the government's attention without fear of retaliation, this purpose has largely been ignored in the caselaw, which has focused almost entirely on predatory practices that inhibit competition among carriers. The language used in this precedent, appropriate in the context in which it developed, runs the risk of unduly narrowing the scope of § 41104(a)(3).

The Commission therefore emphasizes the following.

A. "Shipper" Defined Broadly

Unless amended by Congress, § 41104(a)(3) applies only to prohibited conduct directed at a "shipper." But this term protects entities other than just the cargo owner. The term "shipper" means a cargo owner, the person for whose account the ocean transportation of cargo is provided, the person to whom delivery is to be made, a shippers' association,[33] or a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.[34] In contrast, passengers on a vessel, unless they otherwise fall within the definition of shipper, are not protected entities under § 41104(a)(3).[35]

B. Protected Activity Extends Beyond Filing a Complaint

Section 41104(a)(3) contains two types of shipper activity that are specifically protected: patronizing another carrier and filing a complaint. Filing a complaint refers to filing a sworn complaint alleging a violation under 46 U.S.C. § 41301(a). The statute also, however, protects shippers from being retaliated against "for any other reason." The Commission interprets "any other reason" to mean that protected activity under § 41104(a)(3) includes other ways that shippers may bring allegations of unlawful activity to the Commission, such as participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS' dispute resolution procedures. This interpretation is consistent with congressional intent as set forth in the Alexander Report and with the important role shippers serve in assisting the Commission with its mission. Further, providing information to Commission investigators and enforcement attorneys, seeking assistance from CADRS, and commenting on Commission rules and notices fall within same class of conduct as filing a complaint.[36]

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[33] A "shippers' association" is "a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group to obtain carload, truckload, or other volume rates or service contracts." 46 U.S.C. § 40102(24).

[34] 46 U.S.C. § 40102(23). Although the protected entities under § 41104(a)(3) are shippers, this does not mean one must necessarily be a shipper to file a complaint alleging a violation. Any person may file a complaint alleging a violation of Title 46, Subtitle IV, Part A. *See* 46 U.S.C. § 41301(a); Federal Maritime Commission Statement on Representative Complaints, Docket No. 21-13 (FMC Dec. 28, 2021).

[35] *Hepner v. The Peninsular & Oriental Steam Navigation Co.*, 27 F.M.C. 563, 565 (FMC 1984) (finding that applying section 14 Third to shippers but not passengers was consistent with the language of the statute and finding that the terms of a negotiated settlement was not prohibited retaliatory conduct).

[36] Under the *ejusdem generis* canon of statutory construction, general words following a list of particular classes of things are construed as applying only to things of the same class as those listed. *Cal. Shipping Line*, 1990 FMC LEXIS 25 at *40 n.19.

C. Section 41104(a)(3) Claims Alleging Complaint-Related Retaliation Do Not Require Proof About Carrier Competition

In addition to setting forth a protected entity and protected activities, § 41104(a)(3) lists two types of prohibited carrier conduct. First, a carrier cannot retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations because the shipper has engaged in protected activity. Second, a carrier cannot resort to other unfair or unjustly discriminatory methods because a shipper has engaged in protected activity.

The "other unfair or unjustly discriminatory" language is a "catchall clause by which Congress meant to prohibit other devices not specifically enumerated but similar in purpose and effect to those barred by § 14 First, Second, and the 'retaliate' clause of § 14 Third."[37] The Court in *Isbrandtsen* held that only conduct "designed to stifle outside competition" fell within this catchall.[38] But it is not hard to envision situations where a carrier might engage in retaliatory conduct that has nothing to do with competition with other carriers. A carrier might engage in conduct detrimental to a shipper (e.g., refusing to enter into, renew, or amend a service contract) to "get even" with or deter that shipper and other shippers from complaining to the Commission. Under a broad reading of *Isbrandtsen*, this type of carrier conduct would not violate § 41104(a)(3) because it would not involve conduct designed to stifle outside competition.

While the Commission is bound by *Isbrandtsen*, the Commission does not believe it requires such a result and interprets it as not applying where a retaliation claim is based on complaint-related activity (filing a complaint, participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or bringing a dispute to CADRS). *Isbrandtsen* did not involve allegations that a carrier retaliated against a shipper because it "filed a complaint charging unfair treatment."[39] Rather, at issue was a dual rate contract system designed to protect a conference from an independent carrier.[40] Consequently, the Court had no reason to address, and did not purport to address, the language in the statute that protects shippers who file a complaint. Further, the Court deemed the purpose of section 14 Third was to outlaw practices used to stifle the competition of independent carriers but did not discuss the portions of the Alexander Report that referred to protecting complaining shippers.

Similarly, the Commission finds *International Association of NVOCCs* and *California Shipping Line* inapplicable to claims of complaint-related retaliation. In other words, the Commission will not apply their competition-focused language to future complaint-related claims. [41] The former did not involve allegations of complaint-related retaliation and the ALJ did

[37] *Isbrandtsen*, 356 U.S. at 492.

[38] *Isbrandtsen*, 356 U.S. at 495.

[39] Shipping Act, 1916, Pub. L. No. 64-260, § 14.

[40] Although conferences were once a significant force in ocean transportation, there is only one active conference on file with the Commission, and it is only for the carriage of U.S. government cargoes in the Trans-Pacific trade.

[41] The Commission will also not apply similar limiting language in cases relying on *International Association of NVOCCs* and *California Shipping Lines*, such as that in *MAVL Capital, Inc.*, 2017 FMC LEXIS 4 at *61; *Edaf Antillas*, 2014 FMC LEXIS 29 at *29; *W. Overseas Trade & Dev. Corp.*, 1993 FMC LEXIS 61 at *57.

not address that aspect of § 41104(a)(3)'s language. Nor did the ALJ explain why a complainant who alleged carrier retaliation based on filing a complaint would also need to show that the carrier had a "secondary objective" to stifle outside competition. It is enough that a complainant can show that a carrier engaged in unfair or unjustly discriminatory conduct *because* a shipper filed a complaint-related activity.

California Shipping Line was primarily a me-too service contract access case. Requiring a complainant alleging complaint-related retaliation to prove that the shipper "sought the services of another carrier" is inconsistent with the plain language of § 41104(a)(3), which contains no such element, and is inconsistent with Congress's purpose to combat shipper reticence about bringing complaints to the government. Moreover, this extra step simply does not make sense when the allegation is that a carrier engaged in unfair conduct because a shipper filed a complaint.[42]

That said, the Commission's interpretation in this section of the Policy Statement is only that the statements in the above cases – which limit "unfair or unjustly discriminatory conduct" to conduct implicating carrier competition – do not apply to claims alleging prohibited conduct based on complaint-related activity by shippers. In contrast, the holdings are applicable in the factual contexts in which they arose, e.g., where the alleged unlawful conduct involves "ties" between shippers and carriers.[43]

The Commission also acknowledges that § 41104(a)(3) should not be read so expansively that it renders other prohibitions in Chapter 411 of Title 46 superfluous. Section 41104 of Title 46, for instance, only prohibits specific types of unfair or unjustly discriminatory conduct.[44] Section 41104(a)(3) prohibits a common carrier from "resort[ing] to other unfair or unjustly discriminatory methods . . . for any other reason." The latter does not swallow the other prohibitions, however, because it is not a flat prohibition on all unfair or unjustly discriminatory conduct. A complainant must show that a carrier engaged in prohibited conduct (refusing cargo space accommodations or other unfair or unjustly discriminatory methods), with respect to a protected entity (shipper), because the protected entity engaged in protected activity (patronizing other carriers, filing a complaint, or other activities of the same class).

By the Commission.

William Cody
Secretary

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[42] As noted above, the Commission in *California Shipping Line* dismissed a complaint-related retaliation claim because the carrier accused of retaliation was not the carrier against whom the complainant had previously filed a complaint. While the Commission takes no position on that aspect of *California Shipping Line* here, there could be circumstances where a carrier might be motivated to retaliate against a shipper who filed a complaint against another carrier.

[43] *Isbrandtsen*, 356 U.S. at 493 ("Ties to shippers not designed to have the effect of stifling outside competition are not made unlawful.").

[44] *See* 46 U.S.C. § 41104(a)(4), (5),