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FEDERAL MARITIME COMMISSION, OFFICE OF THE SECRETARY, 2023

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June 29, 2023

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Office of Administrative Law Judges

Erin M. Wirth, Chief Administrative Law Judge

Linda S. Harris Crovella, Administrative Law Judge

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 401-413. 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 Administrative Law Judges

FOREIGN TIRE SALES INC., *Complainant*

v.

EVERGREEN SHIPPING AGENCY (AMERICA) CORPORATION, AS AGENT FOR EVERGREEN LINE, EVERGREEN GROUP D/B/A/ EVERGREEN LINE, *Respondent*.

DOCKET NO. 22-05

Served: May 3, 2022

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

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On April 26, 2022, Complainant Foreign Tire Sales Inc., and Respondent Evergreen Shipping Agency (America) Corporation, as agent for Evergreen Line, Evergreen Group d/b/a Evergreen Line Inc. filed a petition ("Motion") seeking approval of a settlement agreement, voluntary dismissal of the complaint with prejudice, confidential treatment of the settlement agreement, and, if denied, to extend the time for Respondent to answer the complaint. A copy of the confidential settlement agreement was attached to the motion. The parties acknowledge that the confidential settlement, if approved, "would fully and finally dispose of all issues and disputes that are the subject of this Action." Motion at 3. Additionally, Complainant acknowledges that "there will be no necessity to file an answer if Complainant's Motion to Dismiss with Prejudice is granted, nor will there be any need for any further proceedings in this matter." Motion at 8.

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).

[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.

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 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 that in reaching the confidential settlement, "the Parties each had the benefit of advice from counsel" and the settlement is the result of "negotiations between the parties that have been ongoing since the complaint was filed." Motion at 5-6. The parties state that the settlement is free of fraud or duress, that each party "is acting in its own self-interest," and "neither party has been subject to pressure or duress from the other Party." Motion at 5.

Furthermore, the Parties have good cause to settle because "the Parties will incur substantial costs and expenses of litigation including attorneys' fees if the case goes forward" because "any Final Decision by the ALJ can be appealed to the Commission," the "losing Party risks being held liable for the opposing Party's attorneys' fees which stand to be substantial," and because the confidential settlement "involves no admissions of liability on behalf of either party." Motion at 6.

Lastly, the settlement does not contravene law or public policy, has no adverse effect on any third parties or the market for transportation services, and does not run afoul of any provision of the Shipping Act. Motion at 7. Rather, "the terms and conditions of the Confidential Settlement are facially reasonable," and it "reflects the fair and considered judgment of the relative strengths of their respective positions, the desire to avoid expensive litigation costs and to avoid the risks inherent in litigation." Motion at 7.

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 arms-length settlement discussions. The proceeding would require potentially expensive 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 Complainant Foreign Tire Sales Inc., and Respondent Evergreen Shipping Agency (America) Corporation, as agent for Evergreen Line, Evergreen Group d/b/a Evergreen Line be **GRANTED**. It is

FURTHER ORDERED that the Motion to Extend Time to Answer be **DENIED AS MOOT**. 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

YSN IMPORTS INC. D/B/A/ FLAME KING,
Complainant

v.

FEIGE "PEGGY" OBERLANDER, U SHIPPERS GROUP INC., U SHIPPERS GROUP MANAGEMENT CO., INC.,
Respondent

DOCKET NO. 21-02

Served: May 12, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's April 11, 2022, Initial Decision Approving Settlement Agreement and Dismissing Proceeding with Prejudice has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

CCMA, LLC, *Complainant*

v.

MAERSK A/S AND PORTS AMERICA CHESAPEAKE, LLC, *Respondent*

DOCKET NO. 22-01

Served: May 16, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's April 13, 2022, Initial Decision Approving Settlement Agreement has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITME COMMISSION

MUHAMMAD RANA, *Complainant,* v. MICHELLE FRANKLIN, D.B.A. "THE RIGHT MOVE," INC., *Respondents.*	Docket No. 19-03

Served: May 25, 2022

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M. VEKICH, *Commissioners*. *Chairman* MAFFEI filed a concurring opinion in which *Commissioners* BENTZEL and VEKICH join.

Order Affirming Initial Decision

Complainant Muhammad Rana is a shipper seeking reparations under 46 U.S.C. § 41102(a) for ocean freight charges and other expenses he incurred to release a hold on his shipment after the non-vessel operating common carrier (NVOCC) he hired to move his household goods failed to pay the ocean freight charges. Complainant hired and prepaid Respondent Michelle Franklin, D.B.A. "The Right Move" Inc. (Right Move) but his shipment was held at the destination port because Right Move failed to pay the

ocean transportation charges. Right Move then made misrepresentations and illusory promises to induce Complainant to pay the charges himself. Right Move ceased operating shortly after accepting Complainant's booking, and the Commission later revoked its NVOCC license for failure to maintain a surety bond.

The Administrative Law Judge (ALJ) determined that Right Move knowingly and willfully obtained ocean transportation at less than applicable rates using unjust or unfair means in violation of § 41102(a) and awarded reparations. The ALJ also imposed discovery sanctions and inferred that the responses Right Move refused to provide would have been averse to its position. Finally, relying on inferences drawn from Respondent's refusal to answer discovery and other evidence, the ALJ found Ms. Franklin personally liable for the reparations awarded.

For the reasons set forth below, the Commission affirms the ALJ's decision in its entirety and awards Complainant reparations of $7,472.40 plus interest of $176.57, totaling $7,648.97.

I. BACKGROUND

A. Factual Background

Complainant hired Respondent in early February 2019 to transport his household goods from Alexandria, Virginia to Port Qasim in Karachi, Pakistan. Initial Decision (I.D.), 5.[1] Right Move was a licensed NVOCC at the time (No. 023229N), and Ms. Franklin was Right Move's sole owner and its only employee. On February 29, 2019, Ms. Franklin decided to close the company because it was insolvent. *Id.* at 5, 15. The Commission revoked Right Move's NVOCC license on July 4, 2019 because its surety bond had lapsed.[2] *Id.*

[1]The Commission adopts the ALJ's findings of fact (I.D., 5-16), which are the basis for the facts recited above.
[2]*See* https://www.fmc.gov/oti/revocations-july-12-2019/.

Right Move agreed to provide door-to-port transportation by ocean carrier from the United States to Pakistan in exchange for which Complainant prepaid a flat fee of $2,595 that covered ocean freight, terminal handling, and port of loading expenses. *Id.* at 5-6. Complainant paid the fee by transferring funds to an account in Ms. Franklin's name in accordance with her instructions. *Id*. at 6. Right Move used another licensed NVOCC, Troy Container Line (Troy), to arrange ocean transportation for Complainant's shipment, and Troy's local agent in Karachi, CP World Ltd. Co., handled the shipment when it arrived at the Karachi port on March 29, 2019. Right Move and Troy both issued bills of lading describing the shipment as used household goods that qualified for "[e]xpress release" on arrival at the port in Karachi, Pakistan. *Id*. at 7.

When Complainant's shipment arrived in Karachi, Troy placed a hold on the container because Right Move had not paid the ocean freight charges. *Id.* at 7-8, 23. Complainant did not learn of the hold until after he traveled from Islamabad to Karachi to retrieve the shipment at the port. Complainant arrived in Karachi on April 2, and quickly sought Respondent's help in getting the container released and asked her to send confirmation that he had prepaid Right Move and that Right Move had in turn paid Troy the ocean freight charges. *Id.* at 8. Respondent never sent the requested confirmation. Shortly after the container arrived in Karachi, Respondent told Complainant that Right Move had been the victim of shipping fraud and was being forced to close but promised to work with Complainant to get his shipment released. *Id.*

Respondent deflected Complainant's requests for proof of payment with a smokescreen of false statements and misrepresentations and concealed the fact that Right Move had not in fact paid the ocean freight charges to Troy. Respondent told Complainant that Right Move had paid an unnamed third party and that she was diligently pursuing that party to find out why it failed to pay Troy and asking them to correct that error. *Id.* at 8-9. Respondent assured Complainant that a solution was at hand, telling

him at one point, that she had "talked to the company and they are sending the payment today, but it may take a few days." *Id.* at 9.

Respondent also urged Complainant to pay the ocean freight himself and promised to "wire the money to [him]." *Id*. Complainant requested that she "wire the total amount that was due for shipping today, so I can pay it here," and warned that if he did not receive the funds he would "be compelled to lodge a complaint" since he was being told by Troy and its agent in Karachi, CP World, that Right Move had engaged in shipping fraud. *Id.* at 10; Complainant's App. (Feb. 25, 2020). Respondent responded by threatening to cut off direct communications with Complainant but also recommended he contact the Commission for assistance. *Id.* at Ex. 26 (Apr. 8, 2019 email: "From now on we either talk through the [Commission] or your lawyer!"); *see also* Respondents' Appeal to the Initial Decision ("Exceptions"), 7, 11, 15 (June 15, 2020).

Complainant ultimately paid the ocean freight and demurrage charges himself on April 9, 2019 to recover possession of his belongings. I.D., 9. Due to further delays associated with transferring funds from the United States and dealing with Pakistani customs, Complainant did not actually take custody of the shipment until April 23. After Complainant paid Troy, Respondent again promised to cover "the ocean cost that we failed to pay in time" and told him that the funds had been sent by wire transfer. *Id.* at 14. Complainant was not reimbursed for the charges he paid to CP World or the other costs he incurred in connection with retrieving his shipment which included expenses for meals, lodging and taxis during his stay in Karachi. *Id*. at 12-14.

B. Procedural History

Complainant filed this action in May 2019 seeking reparations against Ms. Franklin D.B.A. The Right Move., Inc. The complaint initially asserted a claim under 46 U.S.C. § 41102(c) and was later amended to add a § 41102(a) claim. Complainant later withdrew the § 41102(c) claim because Respondent refused to answer discovery about other complaints against the company. I.D., 3. Complainant seeks the ocean freight ($1,107.97) and demurrage charges ($935 from April 7 to 23) that he paid to release the shipment and his expenses while staying in Karachi for lodging ($2,350), meals ($1,476), and taxi fare ($116.40). I.D. at 32.[3]

Respondent refused to answer Complainant's discovery, prompting Complainant to file two motions to compel.[4] The ALJ denied the first motion but ordered Respondent to answer the discovery by a date certain. When Respondent failed to comply with that order, Complainant filed a second motion to compel which the ALJ granted and ruled that Respondent's refusal to answer discovery would be considered evidence that supports Complainant's allegations. *See id*. at 17-18. After the ALJ granted the second motion to compel, Respondent submitted objections and partial discovery responses in an email to the ALJ but did not produce any documents.

The ALJ issued an Initial Decision and found that Respondent violated § 41102(a) and used unfair means to obtain ocean transportation at less than applicable rates by misleading Complainant and inducing him to pay Troy the ocean freight charges. *Id.* at 24-25. The ALJ also held Ms. Franklin personally liable for reparations because she blurred the line between the

[3]Complainant initially also sought punitive damages and reparations for emotional distress which are not recoverable under the Shipping Act. *See* 46 U.S.C. § 41305(b) (authorizing reparations for "actual injury"). Complainant does not challenge the ALJ's decision denying those damages. *See* Complainant's Reply to Respondent's Exceptions (Complainant's Reply), 8 (July 7, 2020).
[4]*See* Complainant's Mots. to Compel filed Oct. 18 and Dec. 19, 2019.

business and her personal affairs. The ALJ inferred that the documents she refused to produce would have been adverse to her position that she observed corporate boundaries. *Id.* at 29-30.

In timely-filed exceptions, Respondent challenges the ALJ's determination that she violated § 41102(a) and the decision to hold her personally liable and also argues that the reparations awarded are excessive. Respondent does not deny making false statements about Right Move having paid the ocean freight and failing to keep a promise to reimburse Complainant if he paid Troy, but she argues that she did not act in bad faith and was simply reacting to the stress of closing Right Move. Respondent also asserts that she should not be sanctioned for not responding to discovery because she did not understand her obligation to respond and, in any event, was entitled to withhold information she considers irrelevant or private.

Complainant asks the Commission to affirm the Initial Decision in its entirety. Complainant's Reply, 8. Complainant asserts that the ALJ's findings on the § 41102(a) claim are supported by the record as is the ALJ's decision to sanction Respondent for failing to provide discovery and comply with the ALJ's orders.

II. DISCUSSION

A. Standard of Review

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 and can make additional findings. *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). 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, at *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 Transport Logistics, Inc*., FMC Docket No. 15-04, 2019 FMC LEXIS 44, at *10-11 (FMC July 16, 2019). The Commission can rely on circumstantial evidence if there is no direct evidence as long as its findings are based on more than speculation. *See Waterman Steamship Corp. v. Gen. Foundries, Inc*., 1993 FMC LEXIS 73, at *40 (ALJ 1993), *adopted in relevant part*, 1994 FMC LEXIS 19 (FMC June 13, 1994).

The Commission's rules do not expressly address the standard of review for decisions sanctioning parties' failure to comply with orders compelling discovery. *See Kawasaki Kisen Kaisha, Ltd. v. Port Auth. of N.Y. & N.J*., FMC Docket No. 11-12, 2014 FMC LEXIS 35, at *18-19 (FMC Nov. 20, 2014). "[F]or situations which are not covered by a specific Commission rule," the Commission follows the Federal Rules of Civil Procedure "to the extent that they are consistent with sound administrative practice." 46 C.F.R. § 502.12. Federal Rule of Civil Procedure 37(b) is the corollary to the Commission's rule on discovery sanctions (46 C.F.R. § 502.150) for violating an order directing discovery responses. In reviewing district courts' orders on discovery, the United States Courts of Appeal apply an abuse of discretion standard because a "'narrowly circumscribed' scope of review is consistent with district courts' "'considerable discretion' in managing discovery" and their "broad discretion to impose sanctions for discovery violations under Rule 37." *Parsi v. Daioleslam*, 778 F.3d 116, 125 (D.C. Cir. 2015); *see also Bonds v. District of Columbia*, 93 F.3d 801, 807 (D.C. Cir. 1996) (reviewing court should reverse discovery sanctions only if they are found to be "clearly unreasonable, arbitrary, or fanciful").

B. Discovery Sanctions

The ALJ imposed discovery sanctions when Respondent did not comply with the ALJ's order directing discovery responses. I.D., 17-18. The ALJ inferred that responses Respondent failed to provide

would have been adverse to her interests. *Id*. Before imposing sanctions, the ALJ gave Respondent several opportunities to comply and repeatedly warned about the consequences of refusing to produce discovery. *Id.* Respondent challenges the sanctions as unjust and defends her refusal to provide discovery by claiming that the information Complainant sought is not relevant because she concedes that Right Move did not pay the ocean freight charges and because Right Move's information was already on file with the Commission. Exceptions, 8, 10.

Parties in adjudications before the Commission are entitled to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things." 46 C.F.R. § 502.141(e)(1). "Relevant information need not be admissible at hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id*. If a party fails or refuses to respond to discovery, the requesting party can move for an order directing responses, and the party resisting disclosure bears the burden of proving that the requests are improper or unduly burdensome. *Id.* § 502.150(a); *Kawasaki*, 2014 FMC LEXIS 36, at *35 (citations omitted). The presiding officer has authority, for good cause, to "order discovery of any matter relevant to the subject matter involved in the action." 46 C.F.R. § 502.141(e).

Refusing to comply with an order directing discovery responses is sanctionable conduct. If a party "fails or refuses to obey an order requiring it to make disclosures or respond to discovery requests, the presiding officer . . . may make such orders in regard to the failure or refusal as are just." *Id.* § 502.150(b). Sanctions authorized by the Commission's regulations include: (1) inferring or adopting certain facts as true for purposes of that proceeding; or (2) barring claims and defenses or restricting evidence. *Id.* Adverse inferences are "particularly appropriate," when the resisting party "fails to produce documents." *Worldwide Relocations, Inc. - Possible Violations of Sections 8, 10 and 19 of the Shipping Act*,

FMC Docket No. 06-01, 2012 FMC LEXIS 23, at *12 (FMC Mar. 15, 2012).

The ALJ's decision to sanction Respondent for refusing to produce discovery was not an abuse of discretion. As an initial matter, Complainant's requests were well within the bounds of permissible discovery under the Commission's rules. *See* 46 C.F.R. § 502.141(e)(1). In fact, some information Complainant requested should have been provided in Respondent's initial disclosures. *See* 46 C.F.R. § 502.141 (explaining parties' obligation to produce initial disclosures "without awaiting a discovery request" containing information about persons "likely to have discoverable information" and "[a] copy, or a description by category and location, of all documents . . . that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses").

Complainant sought information about Respondent's communications with Troy and payments related to his shipment and also requested documents related to Right Move's status as a separate entity, such as business tax returns and related materials. *See* Complainant's Mot. to Compel, Ex. 1 at 3 (Oct. 19, 2019). Complainant also requested information about other complaints lodged against Right Move that could be relevant to showing whether it previously engaged in the conduct alleged. *See id.* Respondent's refusal to provide this information led Complainant to withdraw the § 41102(c) claim because he did not have evidence that the claimed acts or omissions occurred on a "normal, customary and continuous basis." *See* 46 C.F.R. § 545.4.

Respondent repeatedly failed to heed the ALJ's instructions and clear warnings that refusing to answer discovery would lead to sanctions. The ALJ gave Respondent several chances to comply *after* explaining that answers were required and that continued refusals could lead to a default. *See* Order Denying Mots. for Default and Summ. Decision, to Strike, and to Compel; Discharging Show Cause Order and Scheduling Order (ALJ Oct. 30, 2019). The ALJ denied as moot the first of Complainant's two motions to compel

and established a date certain for Respondent's answer while emphasizing the need to comply. *See id*. at 3-4. Respondent did not heed that warning and did not produce any documents, prompting Complainant to file a second motion to compel. The ALJ granted Complainant's second motion to compel but gave Respondent another chance to avoid sanctions by responding to the discovery. Instead of taking advantage of that opportunity, Respondent submitted a letter to the ALJ that listed the discovery requests and stated boilerplate reasons for not providing the information requested.[5] Respondent provided basic information in response to a few interrogatories (*e.g*., the name of the person responding, the surety bond amount, etc.) but by and large did not answer the interrogatories and provided no documents.

Respondent categorically refused to respond to questions she believed would not further resolution of the claims or which she considered irrelevant or related to another company not directly involved in her agreement with Complainant. She asserted that her acknowledgement that Right Move had not paid the ocean freight charges made most of the discovery requests irrelevant *See* Respondent's Answer, 1-2; *see also* Respondent's Mot. for Finding of Facts alleged by Complainant and Default Decision--Response (Respondent's Proposed Findings) (Jan. 23, 2020).

Respondent's excuses for not complying are not persuasive. Respondent claims that she did not understand the process and was entitled to withhold the information she considered irrelevant. Respondent asserts that as a pro se litigant,[6] she did not understand that she had to respond to discovery or that shirking that obligation

[5]Respondent's Answer to Complainant's Discovery Request" (Respondent's Answer) (Jan. 15, 2020).

[6]The ALJ made allowances for Respondent's *pro se* status in dealing with discovery and other issues. *See Anchor Shipping Co. v. Alianca Navegacao E Logistica Ltda*., FMC Docket No. 02-04, 2008 FMC LEXIS 21, at *56 (ALJ Dec. 16, 2008) (stating that *pro se* litigants should be held to less stringent standards). The ALJ held Respondent's filings to less stringent standards and did not penalize her for technical deficiencies.

would lead to a penalty. Respondent claims that if she had understood those things, she would have provided more information. *See* Exceptions, 2-3, 10. Respondent also states that she assumed the case would proceed like a mediation and the ALJ would notify her if more information was needed to resolve the claims. *Id*. at 2. While Respondent may not have initially understood the Commission's rules on discovery, that excuse is not plausible in light of the ALJ's clear instructions and repeated, pointed warnings about parties' obligations to answer discovery and consequences of refusing to answer. The ALJ's recurring admonitions clearly put Respondent on notice that her continuing failure to cooperate could lead to sanctions and possibly a default judgment.

The ALJ narrowly tailored the discovery sanctions imposed to address the resulting prejudice to Complainant's case. *See Rivera v. New York City Hous. Auth*., Civ No. 94-436, 1998 U.S. Dist. LEXIS 2816 (S.D.N.Y. Mar. 11, 1998) (sanctions imposed should be narrowly tailored to address the specific harm). Respondent refused to provide information about Right Move's existence as a corporate entity separate and distinct from Ms. Franklin acting in her personal capacity and also refused to provide information about prior complaints lodged against Right Move.[7] That information was uniquely or largely within Respondent's control and by refusing to disclose it, Respondent unfairly deprived Complainant of information needed to prove a § 41102(c) claim or show that Ms. Franklin did not respect the boundaries between the company's and her personal business.

Sanctioning that conduct was appropriate to prevent Respondent from benefiting from her own intransigence and to minimize unfair prejudice to the Complainant. *See* I.D., 15-16 (relying on Respondent's failure to answer discovery in finding that Respondent failed to treat Right Move as a separate entity); *see also GO/DAN Industries, Inc. v. Eastern Mediterranean Shipping Corp.*,

[7]*See* Order Denying Complainant's Mot. for Finding of Facts and Default Decision, 1 (ALJ Feb. 6, 2020); *see also* I.D., 18.

FMC Docket No. 98-24, 1998 FMC LEXIS 5, at *7 (ALJ Dec. 10, 1998) (sanctioning Respondent's failure to participate in proceedings by entering judgement in Complainant's favor).

The Commission affirms the discovery sanctions against the Respondent and infers that the discovery Respondent withheld would have been adverse to her interests.[8]

C. Section 41102(a) Claim

The ALJ found that Respondent knowingly and willfully obtained ocean transportation at less than otherwise applicable rates through unjust and unfair means in violation of § 41102(a). I.D., 23-25. The ALJ based that determination on Respondent concealing Right Move's failing financial status when Complainant booked the shipment, falsely claiming that Right Move had paid the ocean freight charges and blaming an unnamed third party for the hold Troy placed on the shipment, and making illusory promises to repay Complainant immediately if he paid the ocean freight charges that Right Move owed. *Id.* Respondent now admits that Right Move failed to pay Troy for transporting Complainant's shipment but defends the failure to reveal Right Move's failing financial status to Complainant before booking the shipment. She argues that her misrepresentations about Right Move having paid the charges were caused by the stress of Right Move's financial collapse and were not made in bad faith. *See* Exceptions, 3-4.

[8]Complainant voluntarily dismissed the § 41102(c) claim because the Respondent refused to produce discovery about previous acts or omissions that might have been used to support elements of the claim. Had the Complainant not dismissed the § 41102(c) claim, the ALJ could have similarly imposed sanctions including an inference that the Respondent's actions occurred on a normal, customary, and continuous basis. The ALJ's sanctions in this case illustrate the importance of discovery obligations in all Commission proceedings, and in particular cases involving § 41102(c) claims.

1. Elements of a Section 41102(a) Claim

Section 41102(a) states that a "person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification . . . 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). Proving a § 41102(a) claim requires three elements: (1) knowing and willful conduct; (2) through which, either "directly or indirectly," by means of the actions enumerated in the statute or through "any other unjust or unfair device or means;" (3) respondent obtained or attempted to obtain ocean transportation at lesser rates. *Id.*; *OC Int'l Freight, Inc.*, FMC Docket No. 12-01, 2014 FMC LEXIS 14, at *12 (FMC July 31, 2014).[9]

The first element--knowing and willful conduct--is established if the respondent had "knowledge of the facts of the violation" and acted either intentionally or with "reckless disregard, plain indifference, or purposeful or obstinate behavior akin to gross negligence." *Rose Int'l, Inc. v. Overseas Moving Network, Int'l*, FMC Docket No. 96-05, 2001 FMC LEXIS 39, at *118, *147 (FMC June 1, 2001) (citations omitted). Conduct is knowing and willful if it was carried out "purposely or obstinately" or with "gross recklessness, heedlessness, or a callous disregard" for the

[9]Although the ALJ determined that Respondent acted as a regulated entity in arranging transportation for Complainant's shipment (I.D., 23), regulated status is not an element required to establish a § 41102(a) claim. *OC Int'l Freight*, 2014 FMC LEXIS 14, at *18-19 (§ 41102(a)'s "prohibitions" are not limited to entities like common carriers or NVOCCs). Further, the Respondent does not challenge the ALJ's finding on that question and it is supported by the record. Right Move was a licensed NVOCC and held itself out as a common carrier when it booked the shipment and assumed responsibility for transporting Complainant's household goods from the United States to Pakistan by ocean carrier. *See* 46 U.S.C. § 40102(17) (defining NVOCC); *Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, FMC Docket No. 08-04, 2011 FMC LEXIS 9, *39-42 (ALJ Mar. 9, 2011) (registering with the Commission establishes that an entity holds itself out as a common carrier).

consequences *or* "plain indifference to the law's requirements." *Brokerage on Shipments of Ocean Freight—Max LePack*, (*Max LePack*), 5 F.M.B. 435, 444 (FMB 1958) (equating indifference with an "outright" violation); [10] *see also Portman Square Ltd.--Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, FMC Docket No. 97-17, 1998 FMC LEXIS 27, at *21-22 (ALJ Mar. 16, 198) (Admin. final 1998).

The second element is established if the respondent used false billing or misclassification, or any other "unjust device or means" to obtain ocean transportation at less than otherwise applicable rates. *Rose Int'l*, 2001 FMC LEXIS 39, at *102. Here, there are no allegations that Respondent engaged in false billing, misclassification of cargo, or any other conduct specifically prohibited by § 41102(a) so the question is whether Respondent's actions may be considered any "other unjust or unfair device or means" within the meaning of § 41102(a).

> [F]raud or concealment is a necessary ingredient in the proof of an unjust or unfair device or means . . . It is such fraud or concealment that in fact makes the practice unjust or unfair. Whether an act constitutes an unfair or unjust device . . . depends on its similarity to false billing, false classification or the other prohibited conduct.

Open Bulk Containers, 727 F.2d at 1064 (citations omitted); *see also OC Int'l Freight*, 2014 FMC LEXIS 14, at *14. Knowingly making claims that one knows or should know are false supplies the required element of fraud or concealment. *Open Bulk Containers*, 727 F.2d at 1065.

[10]Decisions interpreting the initial paragraph of § 16 of the 1916 Act, the predecessor to § 41102(a), remain persuasive authority, because the operative language prohibiting the use of "any other unjust or unfair device or means" to obtain lower rates has not changed. *See U.S. v. Open Bulk Carriers*, 727 F.2d 1061 (11th Cir. 1984) (quoting the initial paragraph of § 16, formerly codified at 46 U.S.C. § 815 (initial paragraph)).

By itself, a failure to pay ocean transportation charges does not establish the second element of § 41102(a) claim, because that alone does not establish that fraud or deceit were used to avoid paying the applicable rates. 46 C.F.R. § 545.2; *see also Open Bulk Containers*, 727 F.2d at 1064 (openly combining cargos to obtain lower rates and reduce deadfreight penalties was not an unjust or unfair device). Further, showing that the respondent was deceitful or dishonest in some respect unrelated to obtaining or attempting to obtain lower rates is not sufficient; fraud or concealment must be the *means by which* the respondent obtained or tried to obtain lower rates. *Open Bulk Containers*, 727 F.2d at 1064.

Finally, the third element is established by showing that respondent obtained or tried to obtain ocean transportation for less than the otherwise applicable rates. *OC Int'l Freight*, 2014 FMC LEXIS 14, at *17-18.

2. Respondent's Conduct

a. Knowing and Willful

The ALJ determined that Respondent acted knowingly and willfully when she deflected Complainant's inquiries "with false information," made illusory promises to persuade Complainant to pay Troy, and deposited Complainant's payment into a personal bank account to segregate it from Right Move company funds and protect it from the business's creditors. I.D., 24-26. The ALJ cited Respondent's "ever-changing" excuses in concluding that she had not established a good faith defense to the allegations that she acted knowingly and willfully. Respondent counters by arguing that it was impossible for her to act knowingly and willfully because she was too distressed by Right Move's insolvency and the company's forced closure to formulate a coherent plan and claims that her actions were nothing more than a desperate and scattershot attempt to salvage her pride and professional reputation. *See* Exceptions, 4.

Respondent's emails and her admission that Right Move failed to pay the ocean freight charges establish that she knowingly relayed false information. Respondent deflected Complainant's request for confirmation of payment by insisting that "we have paid the shipping costs to a third party to pay the SSL for this shipment." *Id*., Ex. 23. Respondent now concedes that the information about Right Move having paid the ocean freight charges was false. *See* Respondent's Mot. for Finding of Facts, 3 (Jan. 23, 2020), (conceding that "[R]espondent failed to pay ocean costs").

The story that Respondent manufactured to conceal Right Move's failure to pay the ocean freight charges and the details she invented to keep up that false pretense show that her actions were knowing and willful. Respondent deliberately created and maintained the illusion that she was diligently working with an unnamed third party that Right Move had allegedly paid to have that unnamed party pay Troy and get shipment released. Several times, she reported on communications from this unnamed third party and assured Complainant that a solution was almost at hand. *See* Complainant's App., Exs. 23-32. At various times, she told Complainant that: (1) she was "checking into" the situation and to "give [her] an hour or 2 to see why this was not paid;" (2) she had "talked to the company and they are sending the payment today, but it may take a few days," and added that "I think it will be released by Tuesday or Wednesday [at] the latest;" and (3) the "[t]he third company I booked with . . . waited until the last minute to pay the ocean . . . [and] thought they had a few more days. *Id*. In other communications, Respondent assured Complainant that she had been "asking them to pay it for the last 4 days, they should be able to pay it today or tomorrow. I will send you the proof once it was paid:" and pressed Complainant to tell her whether he had paid the charges himself, telling him that the "[t]he company I paid the money to needs to know. . ." *Id.*

Respondent's unflagging persistence in keeping up this pretense refutes her claim that it was not a purposeful plan but rather an ad hoc reaction to the stress of dealing Right Move's financial

collapse. *See* Exceptions, 4. Respondent was not just flailing aimlessly when she told Complainant that she was working to resolve the situation, as she now contends. *See id.* She persistently defended a story that she fabricated and embellished it with details to make it seem more believable and suggest at times that a solution was imminent.

Respondent does not identify any evidence in the record that Right Move paid a third party or even that such a party existed. Further, Respondent's story is not credible and does not align with established facts. *See* Exceptions, 10-12. If Right Move had actually paid the money to another entity with the understanding that it would pay Troy, that does not explain why the payment was not eventually sent to Troy. Nor does it explain why Respondent has not identified this unnamed party whose lack of diligence caused Troy to hold the shipment. Respondent suggested in one email to Complainant that the third party simply miscalculated the timing and the shipment arrived before it made the payment, which might explain why the payment arrived late but does not explain why it never arrived at all. And Respondent's credibility on this point is further eroded by the refusal to answer Complainant's discovery. Respondent did not identify this unnamed party in discovery or provide any documents proving its existence, so it is reasonable to infer Right Move did not pay a third party who then failed to remit the freight charges to Troy. I.D., 28.

Respondent has also suggested that when Complainant first contacted her, she thought that Troy's charges had been paid (Exceptions, 7), but later learned that Troy had applied the payment to charges owed on a prior shipment. *See* Complainant's App., Ex. 27. Respondent does not point to any evidence in the record showing that Right Move paid or thought it had paid Troy's charges by sending the money to a third party. *See* I.D., 27. Even if Respondent was initially mistaken about the payment having gone out to Troy, Troy's hold on the shipment should have alerted her to the fact that it either had not received the payment, had not applied it to Complainant's shipment, or at least that something had gone awry.

Further, even if Respondent mistakenly believed that Troy had been paid, that would not excuse inventing a story blaming an unnamed third party or make that fabrication any less purposeful.

Respondent's false representations to Complainant that Troy had been paid were not just purpose-driven, they were reckless and grossly negligent. By inducing Complainant to believe that a solution was close at hand and she would shortly furnish him with proof of payment, Respondent led Complainant to depend on her and await a solution that was not going to materialize. Respondent recklessly disregarded the negative impact those false assurances would have on Complainant. Respondent has described herself as a professional experienced in maritime industry practices. *See* I.D., 26; Exceptions, 6 (noting Respondent's 15 years of experience in the shipping industry). As the owner and operator of an NVOCC, Respondent must have known that free time was limited and that any increased delay in releasing the shipment would add to demurrage and possibly other charges due on the shipment. By ignoring the obvious and inevitable consequences of her actions, Respondent demonstrated callous disregard that equates to knowing and willful conduct. *See Rose Int'l*, 2001 FMC LEXIS 39, at *147-48 (knowing and willful conduct shown by callous disregard for the consequences of one's actions); *Max LePack*, 5 F.M.B. at 444.

Respondent also acted recklessly in making illusory promises or guarantees to repay Complainant *if* he paid Troy the ocean freight charges. Several factors made those promises illusory.[11] First, from all indications, Respondent did not have the funds to repay Complainant. Right Move had just closed for lack of funds and apparently did not have the funds to pay a line of credit extended by its bank. Despite this apparent lack of funds, Respondent assured Complainant that she would send the funds to

[11]At other times in later emails, Respondent qualified her promises by stating, *e.g.*, that she attempted to repay Complainant as much as she is responsible for or help him defray the costs. Exceptions, 7; Respondent's App., Ex. 8.-But those qualified assurances do not excuse or reverse the consequences of her unqualified assurances.

him "shortly" or within days if he settled Right Move's debt to release the hold on his shipment. The unpaid freight charges were a business debt, but the business was insolvent and had ceased operating so there was no obvious source of funds from which Respondent could immediately repay Complainant. It is clear from the evidence, including Respondent's own statements, that Respondent knowingly or at least recklessly misled Complainant by making promises she could not reasonably have expected to keep.[12] And she used those promises to inaccurately imply that Complainant would quickly be repaid if he satisfied Right Move's debt to Troy for the ocean freight charges.

Respondent's challenges to the ALJ's determination that she acted knowingly and willfully are not persuasive. First, she points to other actions she took to assist Complainant and other shippers as proof that her communications with Complainant were not made in bad faith. *See* Exceptions, 7. As evidence of that, Respondent points to an email in which she advised Complainant to seek help from the Commission and file a claim against the company's surety bond. *See id.* at 6-8. Offering that assistance hardly refutes the compelling evidence that she knowingly and willfully misled Complainant about having paid the ocean freight and then made misleading promises about immediate repayment. *See generally OC Int'l Freight, Inc*., 2014 FMC LEXIS 14, at *12-13 (certifying information respondent knew was false demonstrated knowing and willful conduct).

[12]Respondent's own statements demonstrate the lack of available funds to honor the promises made to Complainant. Respondent stated that the decision to close Right Move was made in late February 2019, a month before her April 2019 emails to Complainant about Troy's hold on the shipment. *See* Exceptions. 8. Respondent informed Complainant of the decision to close the company in an email dated April 2, 2019 in which she explained that the company had been the target of "shipping fraud" and was forced to close due to the resulting "financial burden." Exceptions, 7, 15; Complainant's App., Ex. 17 (advising Complainant that "[t]he booking was done under another company['s] license, because I knew we may get to the point we have to close").

Respondent also argues that her promises to repay Complainant were made in good faith,[13] she did intend to repay the money and that two attempts to transfer the money failed because there was not enough money in her account. Exceptions, 14 (referencing email dated May 30 stating that funds to cover "the ocean cost that we failed to pay in time" were sent "yesterday" by wire transfer and should reach Complainant's bank account the next day). This argument is not persuasive for several reasons. First, Respondent does not point to any supporting evidence beyond her own assertion that she intended to repay the money and attempted to do so. Second, Respondent's assertion lacks credibility given that Right Move had just ceased operating for lack of funds. Further, if Respondent had business funds available to repay Complainant that begs the question of why she did not pay Troy/CP World directly with those funds.

Respondent's second argument misinterprets § 41102(a) and the conduct it governs. Respondent argues that her conduct subsequent to booking Complainant's shipment on February 6, 2019, and in particular her communications with Complainant about the unpaid freight charges in early April 2019, are not relevant and should not be considered as evidence supporting Complainant's allegations. That argument inaccurately assumes that § 41102(a) governs how Right Move obtained Complainant's shipping business and fails to recognize that the conduct at issue is whether/how Right Move obtained ocean transportation for Complainant's shipment without paying the applicable rates.[14] *See* Exceptions, 2-4, 18.

[13]Complainant signed the shipping agreement with Right Move on February 6, 2019 (Complainant's App., Ex. 1), and Respondent has stated that she made the decision to close Right Move a few weeks later in late February 2019 (Exceptions, 7-8, 13).

[14]Respondent's raises this argument several times in challenging other aspects of the ALJ's analysis and the evidence that the ALJ relied on but it has no legal basis and does not discredit the ALJ's analysis on this or any other issue. *See, e.g*., Exceptions, 6-7 (asserting that the decision to close Right Move was made after booking the shipment).

For all the reasons discussed above, the Commission finds that Respondent acted knowingly and willfully.

b. Unjust and Unfair Means or Device

Proving a respondent used an unjust or unfair means to obtain ocean transportation at lower rates requires evidence of fraud or concealment carried out for that purpose. *Open Bulk Containers*, 727 F.2d at 1064*; OC Int'l Freight, Inc*., 2014 FMC LEXIS 14, at *12-14. Here, the ALJ found "clear evidence" of fraud and concealment based on a series of actions. I.D., 26-27. The ALJ found that in booking and arranging transportation for Complainant's shipment, Respondent acted fraudulently by concealing Right Move's financial instability, failing to pay the ocean freight then falsely claiming the charges had been paid while Complainant's shipment remained "in limbo," and finally by making illusory promises to repay Complainant. *Id.* at 28. Respondent again argues that she was under stress and not acting in bad faith and points to evidence that she tried to help Complainant and other shippers. Exceptions, 3-6, 18.

Respondent engaged in a series of deceptive acts to conceal Right Move's insolvency and failure to pay the ocean freight charges for Complainant's shipment and to avoid paying those charges. Respondent was certainly aware that ocean freight charges were Right Move's responsibility under the shipping agreement that Complainant signed. She had operated Right Move for the past 8 years and was its sole employee. She also knew that Complainant had fulfilled his part of the agreement by paying Right Move's flat fee in advance. But despite all of that, Respondent failed to pay the ocean freight charges--then invented a scapegoat to conceal that failure and used illusory promises to induce Complainant to pay the charges. The Commission's regulations recognize similar conduct as supporting an inference that a respondent used unjust or unfair means to avoid paying the applicable rates. 46 C.F.R. § 545.2 (inducing the carrier in bad faith to relinquish its possessory lien on

the cargo or transport without prepayment sufficient to infer use of an unjust device).

Respondent also engaged in deception when she opened an account in a different bank to avoid Right Move's creditors and used that account for Complainant's payment. Respondent admits opening the account to prevent her original bank from seizing funds in Right Move's account to cover a line of credit and concedes that the new account was in her name and that Right Move's name was not on the account. Exceptions, 14. But she claims that her reasons for switching banks and using an account in her name were legitimate. *See id*. Respondent asserts that she was following the bank representative's advice and only opened the account in her name because the documents needed to open a business account were not immediately available. *Id.* at 14-15. Respondent does not point to any evidence to substantiate these statements.

The totality of Respondent's actions establishes the use of an unjust or unfair device. *See, e.g.*, *Rose Int'l*, 2001 FMC LEXIS 39 at *123-25, *149-50 (creating shell corporation showed purposeful action to evade the Shipping Act and the Commission's regulations or at a minimum, reckless disregard). Respondent's repeated falsehoods and deceptive tactics shows that her actions were a calculated effort to avoid paying for the ocean transportation and to convince Complainant to pay those charges even though he had already paid Right Move for that service. This series of actions shows that Right Move's failure to pay Troy was not grounded in a good faith dispute over the charges or the result of an honest error or oversight on its part or based on any other recognized defense for non-payment. *See* 46 C.F.R. § 545.2.

If the only evidence offered to prove knowing and willful use of unfair means to avoid paying Troy had been Respondent's failure to disclose Right Move's uncertain financial status, that alone would not be sufficient. Respondent has stated that Right Move's financial issues might have been caused by seasonal fluctuations in revenue and the Commission might reasonably infer that

Respondent subjectively believed that Right Move might survive the downturn and recover. *See* I.D., 27-28 (quoting Respondent's statement that she "had been through this same cycle" for the past 8 years and managed successfully). But when Respondent's failure to disclose Right Move's precarious status is considered as part of a series of actions directed at concealing or misleading Complainant with misinformation, collectively the evidence shows that her actions were purposeful and directed at avoiding paying Troy the ocean freight charges owed for Complainant's shipment.

For all the reasons discussed above, the Commission finds that Respondent used an unjust or unfair means or device to avoid paying the ocean freight charges.

c. Attempting to or Obtaining Transportation at Lesser Rates

The ALJ determined that Respondent obtained ocean transportation for Complainant's shipment and avoided paying the charges through unjust means. I.D., 28. The ALJ stated that "Respondent does not contest this element" and conceded that Complainant's shipment was transported by ocean carrier and Right Move failed to pay for that transportation. Respondent challenges the ALJ's determination and defends her conduct by arguing that she intended to pay for the transportation but simply lacked the necessary funds and also claims that she is not culpable because she urged Complainant to file a claim against the surety bond. Exceptions, 15-16.

Respondent's arguments challenging the ALJ's findings are not persuasive. Respondent argues that she originally intended to repay Complainant and made two attempts to wire transfer the funds which the bank rejected for lack of funds. *Id.* at 14-16. As with Respondent's other defenses, the only evidence that Respondent points to is her own statements and assertions. Since she refused to produce documents in discovery, the record does not include documents substantiating her claims about the failed wire transfer

attempts. Further, even if Respondent's statements are true, her subjective intentions and failed attempts to transfer the money to Complainant's account do not refute the evidence that she avoided paying Troy the ocean freight charges for Complainant's shipment.

For all the reasons discussed above, the Commission finds that Respondent obtained ocean transportation for Complainant's shipment without paying the applicable rates using an unfair means or device. Because the Respondent knowingly and willfully obtained ocean transportation at less than otherwise applicable rates through unjust and unfair means, the Commission affirms the ALJ's determination that Respondent violated § 41102(a).

D. **Personal Liability**

The ALJ found Ms. Franklin personally liable for reparations. I.D. at 29-31. Respondent argues that she should not be held personally liable because the ALJ should not have sanctioned her for discovery violations and she also defends the use of her personal account for business funds as an anomaly that came about through innocent action on her part. *See* Exceptions, 14.

As an initial matter, although Respondent states several times in the Exceptions and elsewhere in filings before the ALJ that she accepts personal responsibility for the ocean freight charges, it is clear from the content and context of her statements that she does not concede personal liability for reparations awarded in this case. In conceding responsibility, Respondent conflates personal liability with reimbursement that Complainant might seek under Right Move's surety bond. *See, e.g*., Respondent's Proposed Findings, 3 ("Respondent is personally liable through her bond, that's exactly why there is a BOND")(emphasis in original); Exceptions, 3-4 (referring to Right Move's surety bond as her "personal guarantee" while also noting that as the owner of a "closed failed company" she bears responsibility for its debts); *see also* I.D., 5 (citing Ms. Franklin's admission that as the "sole owner of a failed company," she is responsible for its debts). Also, Respondent contests the

inferences and evidence the ALJ relied on in piercing the corporate veil and finding her personally liable, so it is clear that Respondent does not concede personal liability for reparations.

The ALJ applied the Commission's two-prong test derived from federal common law to determine whether Respondent established and respected corporate boundaries. I.D., 29-30. That test examines whether a respondent: (1) exercised control and domination over a shell corporation; and (2) committed a federal violation. *Rose Int'l*, 2001 FMC LEXIS 39 at *122-23; *YSN Imports Inc. d/b/a Flame King v. Oberlander*, FMC Docket No. 21-02, 2021 FMC LEXIS 104, at *9 (ALJ July 7, 2021).

The Commission has identified multiple factors relevant in deciding the first question:

> (1) the nature of the ownership and control; (2) failure to maintain corporate minutes or adequate corporate records and failure to follow corporate formalities; (3) commingling of funds and other assets; (4) inadequate capitalization; (5) diversion of the corporation's funds or assets to non-corporate uses; (6) use of the same office or business location by the corporation and its shareholders; (7) overlapping ownership, officers, directors and personnel; (8) the amount of business discretion displayed by the allegedly dominated corporation; and (9) whether the corporations are treated as independent profit centers.

Rose Int'l, 2001 FMC LEXIS 39 at *127 (citations omitted). To resolve the second question, the Commission considers whether it is appropriate to pierce the corporate veil to prevent respondent from using the "corporate device" to commit statutory violations and whether refusing to do so would allow respondent to use the corporate structure to circumvent a federal statute. *Id.* at *127-28.

The ALJ relied on Respondent's refusal to respond to Complainant's discovery in entering key findings about her control over Right Move and the absence of corporate boundaries. The ALJ found that: (1) from February 2019 forward, Ms. Franklin was Right Move's "sole spokesperson, representative, owner, advocate, and employee;" (2) Right Move did not "observe corporate formalities" in terms of maintaining proper documentation; (3) Right Move did not operate as a separate entity distinct from Ms. Franklin and is or was taxed through Ms. Franklin's personal tax returns; (4) Ms. Franklin treated Right Move's funds and assets as her own and used Right Move "as a facade for her personal financial dealings" and did not respect its boundaries as a separate corporate entity. I.D., 15-16 (Finding Nos. 78-82).

Respondent's refusal to provide discovery about Right Move and its corporate structure and income reporting led the ALJ to infer that information would have been adverse to her position. The ALJ also relied on Respondent's contemporaneous statements as probative and found they were "the most directly relevant evidence in the record." I.D., 30. The ALJ relied in particular on admissions that Respondent made in an April 9, 2019, email to the effect that she had booked Complainant's February 2019 shipment under another company's license because she knew that Right Move might reach the point where closing was inevitable. Complainant's App., Ex. 27. In the same email, Respondent acknowledges opening an account which she characterized as a "business account" but with "my name on it in order to be not associated with" Right Move's financial burden. *Id*. The ALJ found these admissions "coupled with [Respondent's] failure to produce discovery" established that Ms. Franklin used her personal bank account for Complainant's payment and commingled business and personal funds, and also proved that Right Move had inadequate operating capital. I.D., 30.

The ALJ appropriately relied on Respondent's refusal to provide discovery in inferring that she had not maintained corporate boundaries between Right Move and her personal affairs. *See* I.D., 29-30. Respondent was unrelenting in refusing to provide discovery

and in defending that decision before the ALJ and the Commission. In her exceptions, Respondent acknowledges refusing to share personal/corporate details because she thought they were irrelevant to the case and because she "refused to drag any other company into this claim and refused to share the information considering the outcome is the same, and the ocean [freight] was indeed not paid for." Exceptions, 10. Respondent's assertion that the "separation between" Right Move and Michelle Franklin can easily be confirmed with a letter from an accountant misses the point entirely. Respondent shirked her obligation to provide information about Right Move's corporate status in discovery and to submit relevant information on that point before the record closed. And she cannot undo her failure to meet those obligations now by suggesting that information she never provided to Complainant or submitted to the ALJ *could* readily establish that Right Move functioned as a separate corporate entity.

As for the ALJ's determination that Respondent commingled business and personal funds, Respondent explains that she opened a new account in a different bank in her name only because the documents required to open a business account were boxed up and not readily available to her. Exceptions, 14. Respondent states that she planned to convert the account to a business account once she located the required documents. *Id*. Respondent also asserts that Complainant's payment was the only payment deposited to her personal account. *Id.* Respondent's explanation does not refute the facts the ALJ relied on--even if this was an anomaly caused by switching banks and her inability to supply the documents needed to open a business account--the fact remains that Complainant's payment was deposited into a personal account in her name.

For all the reasons discussed above, the Commission finds Michelle Franklin personally liable for the § 41102(a) violation.

E. Reparations Award

The ALJ awarded Complainant reparations totaling $7,472.40 comprised of: (1) the shipping charges Complainant paid to Right Move ($2,595) (2) demurrage charges ($935); and (3) expenses for meals and lodging incurred while staying in Karachi ($3,942.40). I.D., 33. Respondent challenges the reparations award as excessive and argues that Complainant is only entitled to ocean freight charges and five days of demurrage. Beyond that, Respondent argues, any expenses that Complainant incurred were due to voluntary decisions on his part or his unfamiliarity with maritime industry customs and norms. Exceptions, 3-4, 9-10.

Complainant is entitled to reparations for the "actual injury" caused by Respondent's conduct in violation of § 41102(a). 46 U.S.C. § 41305(b). "If the complaint was filed within the period specified in section 41301(a) . . . [the] Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part." *Id.*

The reparations the ALJ awarded are the direct result of Respondent's failure to pay the ocean freight charges and subsequent actions concealing that information and misstating the facts. Respondent caused Complainant to incur additional charges for demurrage by concealing the fact that Right Move had not paid the ocean freight and did not have the funds to correct that error and creating the false impression that she was in contact with an unnamed third party that would very shortly rectify the oversight and pay Troy. Those misrepresentations led to the shipment being held longer and increased the charges Complainant ultimately had to pay to retrieve his shipment and also lengthened his stay in Karachi and added to his expenses for lodging, meals and transportation to and from the port. *See* I.D., 8-12. Complainant's claimed expenditures to retrieve the shipment and expenses incurred while staying in Karachi are substantiated by receipts included in the record. *See* Complainant's App., Exs. 9-14 (receipts for charges

paid to CP World on. April 10, 2019, charges Complainant's agent paid to Maersk, and receipt for 21 nights lodging from April 2-23).

Respondent's argument that Complainant is not entitled to the additional demurrage charges or other expenses because he is partially or wholly to blame for the container's delayed release is meritless and unsupported. Respondent faults Complainant for not providing her with detailed information needed for a final bill of lading and criticizes him for his unfamiliarity with the port's protocols and Pakistan's customs requirements. *See* Exceptions, 4-9 (criticizing Complainant for failing to understand shipping industry norms). The additional demurrage charges were the result of Respondent's failure to pay Troy for the ocean freight charges, not Complainant's alleged delay in providing details about the shipment. Troy/CP World placed a hold on the container because the ocean freight charges had not been paid, not because of issues with the bill of lading. Respondent also faults Complainant for not fully understanding the customs clearance process in Pakistan and planning accordingly. *See* Exceptions, 9. She argues, for example, that Complainant should have understood that a no objection certificate is a "regular process" and once he became aware of the delay caused by CP World's hold on the container, should then have "plan[ned] 5 steps ahead" and extended the no objection certificate ahead of time, instead of "wait[ing] until the last minute and losing 3 extra days over it." *Id.* Respondent's failure to pay the ocean freight thrust Complainant into the position of dealing with unanticipated challenges and delays in getting the container released and then navigating unfamiliar maritime industry standards and port protocols and Pakistan's customs requirements while demurrage charges continued to accrue. So any additional delays or charges caused by those delays are still attributable to Respondent's conduct in violation of § 41102(a).

In a related argument, Respondent asserts that Complainant should bear responsibility for the demurrage charges because she warned him on April 5 that free time was limited and when it expired, demurrage charges would begin accruing. Exceptions, 5,

11. The demurrage charges resulted directly from Right Move's failure to pay the ocean freight charges and the hold that Troy placed on the container to collect those charges. Respondent cannot shift responsibility for its failure to pay the ocean freight to the Complainant. Having already paid Right Move's entire fee in advance, Complainant had no legal obligation to pay twice for the services Right Move contracted to provide. *See* Complainant's App. Ex. 3 (Respondent paid Right Move in full through a February 14, 2019 wire transfer for $2,595).

Respondent's assertion that Complainant failed to approach her "in real time" for assistance in handling customs clearance procedures is also meritless. Respondent asserts that had Complainant contacted her, she would have been willing to assist him with clearing customs had he agreed to pay her another $300 for Right Move's "custom clearance option." Exceptions, 9. Complainant was still dealing with the fallout from Right Move's failure to provide the services he originally paid for. To suggest that he should have trusted Respondent again and paid Respondent an additional $300 for further services is unreasonable. Further, if Respondent is raising a more general objection and arguing that Complainant did not seek her assistance--that is clearly not the case. Complainant repeatedly and persistently sought Respondent's help to get the container released and urgently requested proof of payment--all to no avail. Complainant did not have a continuing obligation to keep reaching out to Respondent and certainly not to pay her for additional services to speed the container's release after he paid Troy to satisfy Right Move's debt for the ocean freight charges.

Respondent's assertion that Complainant should not recover any expenses he incurred while staying in Karachi and negotiating the release of his shipment and that his presence there was voluntary is not supported by the record. Exceptions, 9-10. Complainant explains that he had to remain in Karachi to oversee the transfer of his household goods to the motor carrier he hired to transport them from the port in Karachi to Islamabad. Complainant's Reply, 8; *see*

also Complainant's App., Ex. 41. Respondent's assertion that the costs Complainant claims for lodging and meals are excessive is also unsupported. Exceptions, 19. Complainant's claimed expenses are in line with the U.S. State Department's foreign per diem for meals and incidental expenses for Karachi, Pakistan in April 2019. *See* I.D., 16 (Finding No. 86).

Respondent also contends that the inland transportation charges of $1,265 that Right Move paid should be deducted from the reparations award. Exceptions, 18. The ALJ justifiably denied that request, because Respondent did not introduce any supporting evidence and refused to provide discovery that might have substantiated her argument and proved the amounts that Right Move spent on inland transportation were excessive. I.D., 32.

Finally, Respondent's argument that Complainant can seek reimbursement under Right Move's surety bond is not grounds for denying or reducing the reparations awarded by the ALJ. Complainant is entitled to reparations for his "actual injury" under 46 U.S.C. § 41305(b) without regard to whether he might have a claim against Right Move's surety bond. Further, it is not clear that relief would be available under the surety bond in any event, since Right Move's license was revoked by the Commission in July 2019 for failing to maintain a bond.

For all the reasons discussed above, the Commission awards Complainant reparations in the amount of $7,472.40 (covering shipping charges paid to Right Move ($2,595), demurrage charges ($935), and meals and lodging during Complainant's stay in Karachi ($3,942.40)) plus interest of $176.57, totaling $7,648.97.

IV. CONCLUSION

The Commission hereby:

(1) affirms the Initial Decision in its entirety;

(2) finds Respondent Michelle Franklin D.B.A. "The Right Move," Inc. and in her personal capacity in violation of § 41102(a); and

(3) awards Complainant reparations in the amount of $7,472.40, plus interest of $176.57 totaling $7,648.97.

By the Commission.

William Cody
Secretary

Chairman Daniel B. MAFFEI, concurring, with whom *Commissioners* BENTZEL and VEKICH join:

I agree with the outcome of this case. I agree with the Administrative Law Judge's use of discovery sanctions, the conclusion that the Respondent violated the elements of § 41102(a), the decision to hold the Respondent personally liable, and the award of reparations to the Complainant. I therefore vote to deny the Respondent's exceptions to the Initial Decision and affirm the Initial Decision in its entirety. I take this opportunity to restate my belief that the Commission should re-examine our interpretation of § 41102(c).[15]

Although the holding of the case does not involve an interpretation of § 41102(c), this case exemplifies the concerns I have with our application of that statute. The Complainant, Mr. Rana, pursued his case pro-se and initially made a § 41102(c) claim. He stated that a cursory search of the internet revealed numerous complaints by consumers against the Respondent alleging fraud or deceit.[16] He sought information about past complaints during discovery, but the Respondent failed to meaningfully participate in discovery and therefore Mr. Rana dropped the § 41102(c) claim due to a perceived inability to show that the claimed acts occurred on a "normal, customary, and continuous" basis as required by Commission's current interpretation at 46 C.F.R. § 545.4(b). Footnote eight of the opinion importantly notes that had Mr. Rana continued with his § 41102(c) claim, it is possible that sanctions against Respondent may have also allowed for an inference to prove the § 41102(c) claim. That would have been an appropriate outcome.

While discovery obligations are a legitimate means for shippers to establish proof of a prohibited act, the Commission's current interpretation of § 41102(c) sets the bar too high. The law says that

[15] *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).

[16] *See* Complainant's Supplement to Mot. for Entry of Default and Summary Decision filed Sep. 10, 2019.

a regulated entity "may not fail to establish, observe, and enforce just and reasonable regulations and practices." From what we know about this case, the Respondent failed to observe and enforce reasonable practices with respect to Mr. Rana's shipment. Yet Mr. Rana was discouraged from pursuing his initial claim because he did not believe he could show multiple violations or continuous behavior by the Respondent. In my view, such an interpretation removes an incentive for regulated entities to observe and enforce reasonable practices and is based not on the meaning of the words written in the statute, but a perceived interpretation of the congressional intent of those words as they were written and enacted 106 years ago.

FEDERAL MARITIME COMMISSION

FACT FINDING INVESTIGATION 29
FINAL REPORT

EFFECTS OF THE COVID-19 PANDEMIC ON THE U.S. INTERNATIONAL OCEAN SUPPLY CHAIN: STAKEHOLDER ENGAGEMENT AND POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(c)

MAY 31, 2022

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I. EXECUTIVE SUMMARY

The Federal Maritime Commission (FMC or Commission) has a clear and compelling responsibility to actively respond to the challenges impacting the global supply chain and the American economy. Accordingly, on March 31, 2020, eighteen days after the President declared a national emergency concerning the coronavirus disease 2019 (COVID-19), the Commission launched Fact Finding 29 (FF29). The Commission's Fact Finding Order appointed Commissioner Rebecca F. Dye as the Fact Finding 29 Officer and directed her to engage supply chain stakeholders in public or non-public discussions to identify commercial solutions to certain unresolved supply chain issues that interfere with the smooth operation of the U.S. international ocean supply chain. In addition, it directed her to form one or more FMC International Ocean Supply Chain Innovation Teams (Innovation Teams), composed of leaders from commercial sectors of the U.S. international ocean supply chain, to develop commercial solutions to port congestion and related supply chain challenges.

Initially, the Fact Finding focused on convening new Innovation Teams to address the challenges facing the supply chain. As the challenges created by the COVID-19 pandemic evolved, Fact Finding 29 evolved, and over the course of the following two years, the Fact Finding 29 Investigation developed three distinct phases:

- Phase 1 – Supply Chain Innovation Teams;
- Phase 2 – Information and Research; and
- Phase 3 – Commission Action.

In the early stages of the COVID-19 pandemic, Fact Finding 29 focused on using Innovation Teams to understand the most pressing supply chain challenges the United States was facing to find commercial solutions and when possible, and to eliminate regulatory requirements that had become burdensome. The goal was to work with stakeholders to identify both commercial and regulatory solutions and to disseminate helpful information to mitigate the challenges faced by all affected parties.

During the first two phases, the Fact Finding Officer spoke to hundreds of U.S. importers, exporters, truckers, and others through virtual speeches, other virtual meetings, phone conversations, and emails. Three areas of most concern brought to the Fact Finding Officer's attention were: 1) the increase in the price of ocean shipping during the COVID-19 pandemic; 2) the ongoing unreasonable detention and demurrage charges and other charges imposed by ocean carriers, seaports, and marine terminals; and 3) the supply chain bottlenecks due to unresolved operational problems, including disruption of information concerning "blank sailings."

When it became clear that these issues were the primary concern of stakeholders, the Fact Finding Officer pivoted to focus on investigating the state of the market for ocean liner services and the assessment and billing of detention and demurrage charges. The Fact Finding Officer also focused on whether regulated entities were complying with their regulatory obligations. Additionally, the Fact Finding Officer began to gather information to assist in developing specific interim and final recommendations to inform further Commission action. During this second phase, the Fact Finding Officer examined market conditions based on industry data and Commission programmatic information. The Fact Finding Officer also issued information demands to carrier and marine terminal operators (MTOs) regarding their demurrage and detention practices and other issues.

In 2021, the Fact Finding Officer determined that, responsive to stakeholder concerns about the price of ocean services and problems with detention and demurrage charges, there were solutions that would address certain problems in the global ocean supply chain. These Interim Recommendations were organized around three principles:

- Minimizing Barriers to Private Party Action;
- Clarifying Commission and Industry Processes; and
- Encouraging Assistance with Commission Investigations.

The Fact Finding Officer recommended a series of guidance documents, advice to the trade, other educational outreach, and a rulemaking to clarify Commission processes and encourage stakeholders to bring claims when warranted.

Fact Finding Conclusions

Based on information and research gathered during this second phase, the Fact Finding Officer has concluded that, using established antitrust analytical tools also used by our sister competition agencies (the Department of Justice and the Federal Trade Commission) - and notwithstanding certain misconceptions - the current market for ocean liner services in the Trans-Pacific trade is *not* concentrated and the Trans-Atlantic trade is only *minimally* concentrated. Competition among ocean common carriers,[1] among the three major alliances and among the members in each of these alliances, is vigorous. The market for ocean services remains highly contestable, particularly in the Trans-Pacific trade. Finally, the Fact Finding Officer concludes that although certain ocean transportation prices, especially spot prices, are disturbingly high by historical measures, those prices are exacerbated by the pandemic, an unexpected and unprecedented surge in consumer spending, particularly in the United States, and supply chain congestion, and are the product of the market forces of supply and demand.

The Fact Finding Officer is concerned that certain ocean carriers, despite the actions of the new FMC Vessel-Operating Common Carrier Audit Program and recent compliance efforts are not in full compliance with the incentive principle of the Commission's Interpretive Rule on Demurrage and Detention. The Fact Finding Officer emphasizes that the Interpretive Rule on Detention and Demurrage promulgated by the Commission pursuant to Fact Finding 28 provides the shipping public with an enforceable principle that the Commission employs to assess the reasonableness of demurrage and detention practices and regulations under the Shipping Act of 1984, as amended.[2] The Interpretive Rule describes a non-exclusive list of factors the Commission may consider in evaluating claims and complaints that come before the agency under 46 U.S.C. § 41102(c) and 46 C.F.R. 545.4(d). The Incentive Principle of the Interpretive Rule developed pursuant to

[1] 46 C.F.R. § 535.104(u) ("Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.").

[2] The Shipping Act, the Foreign Shipping Practices Act, Section of the Merchant Marine Act, 1920, and sections 2 & 3 of P.L. 87-777 were repealed. The text of those Acts was codified in in Subtitle IV of Title 46, becoming positive law and they ceased to exist as freestanding statutes.

"notice and comment," is enforced through the Commission's consideration of complaints and enforcement actions under section 41102(c) of Title 46, United States Code.

The Fact Finding Officer is also concerned that the Commission lacks the regulatory tools to deal with the numerous new charges imposed on U.S. shippers and truckers by ocean carriers and marine terminals through tariffs and with other supply chain dislocations within the Commission's authority. Several final recommendations by the Fact Finding Officer address these concerns.

Finally, based on the information gathered, the Fact Finding Officer further believes that the most productive path forward for shippers and ocean carriers alike would be to enter mutually enforceable and binding service contracts-- true "meeting of the minds"-- that are enforceable commercial documents. For some time, the Fact Finding Officer has been concerned that the contracts negotiated by many U.S. importers and exporters lack this mutuality of understanding and obligation and are not enforceable. Without enforceable contracts, shippers are unable to protect themselves from volatile shipping rates and ocean carriers have few forecasting tools to provide the shipping capacity necessary to serve their customers.

As the Fact Finding Officer concludes Fact Finding 29, the Fact Finding Officer issues a series of Final Recommendations to further alleviate dislocations in the U.S. international ocean supply chain. These are:

1. A new Commission "International Ocean Shipping Supply Chain Program" with dedicated personnel.
2. A rulemaking to provide coherence and clarity on empty container return practices.
3. A rulemaking to provide coherence and clarity on earliest return date practices.
4. Continued Commission support for the new FMC "Vessel-Operating Common Carrier Audit Program" including developing a new requirement for ocean carriers, seaports, and marine terminals to employ an FMC Compliance Officer.

5. An FMC Outreach Initiative to provide more information to the shipping public about FMC competition enforcement, service contracts, shippers associations, and forecasting, among other topics.
6. Enhanced cooperation with the federal agency most experienced in agricultural export promotion, the Department of Agriculture, concerning container availability and other issues.
7. A Commission Investigation into practices relating to charges assessed by ocean common carriers, seaports, and marine terminals through tariffs.
8. A rulemaking to provide coherence and clarity on merchant haulage and carrier haulage.
9. A new "National Seaport, Marine Terminal, and Ocean Carrier Advisory Committee" to work cooperatively with the Commission's National Shipper Advisory Committee.
10. A revival of the Rapid Response Team program as agreed to by all ocean carrier alliance CEOs.
11. FMC International Ocean Supply Chain Innovation Teams engagement to discuss blank sailing coordination and other matters as needed to support recommendations.
12. A reinvigorated focus on the extreme problems at Memphis rail heads and around the country.

The Fact Finding Officer believes that the implementation of the Fact Finding 29 Interim Recommendations and the implementation of the Fact Finding 29 Final Recommendations will alleviate pressing problems experienced by Commission stakeholders and allow the Commission to achieve its objective of eliminating obstacles to a smooth and efficiently operating international ocean supply chain.

II. FACT FINDING 29

A. Background for Fact Finding 29

In December 2019, The People's Republic of China (China) first identified cases of what would later be called "COVID-19" in the central city of Wuhan. The following month, the World Health Organization (WHO) declared the outbreak a

public health emergency of international concern. Since then, the world has grappled with the many effects of the COVID-19 virus.

One early, but dynamic, consequence of the outbreak of COVID-19 was its effect on the global ocean supply chain.[3] Originally, as the presence of the virus was largely limited to China, the global supply chain effects were primarily reactive to the impact in China. In late January 2020, Chinese authorities extended the Lunar New Year holidays nationwide[4] and Chinese businesses told employees not to return to work.[5] The ensuing return to work delay, coupled with lack of personnel mobility and traffic restrictions led to an initial difficulty in recovering production.[6] However, despite the isolated nature of these initial impacts, China's role and importance to global trade and, in particular, Wuhan's global significance, meant that even these relatively isolated restrictions were felt on a global stage.

Responding to the outbreak in China, in the first 24 weeks of 2020, ship calls around the globe diminished by 8.7 percent.[7] As the virus spread, individuals outside of China began voluntarily staying home and governments began imposing lockdowns. As lockdowns were imposed globally and fewer people were engaging in the economy, vessel calls fell even further, so that in the second quarter, the number of calls fell by 17 percent.[8]

In May through August 2020, the three largest container shipping alliances (THE, 2M, and OCEAN) announced cancellation of 126 scheduled sailings

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[3] Julianne Dunn, *COVID-19 and Supply Chains: A Year of Evolving Disruption,* Federal Reserve Bank of Cleveland, Feb. 26, 2021 ("Supply chain disruptions have been ever-present since the onset of the COVID-19 pandemic, but they've been largely idiosyncratic, impacting different firms at different times for different reasons.").

[4] Reuters, *China's cabinet to extend Lunar New Year holidays: state broadcaster*, (Jan. 26, 2020), https://www.reuters.com/article/us-china-health-holidays/chinas-cabinet-to-extend-lunar-new-year-holidays-state-broadcaster-idUSKBN1ZP0PQ, (last visited May. 17, 2021).

[5] BBC Business, *Coronavirus: Companies tell workers 'stay at home'* (Jan. 27, 2020), https://www.bbc.com/news/business-51260149, (last visited May. 17, 2021).

[6] Kilpatrick J., and Barter L., *COVID-19: Managing supply chain risk and disruption*, Deloitte, https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/finance/Supply-Chain_POV_EN_FINAL-AODA.pdf, (last visited May. 17, 2021).

[7] United Nations Conference on Trade and Development, *COVID-19 and maritime transport: Impact and responses*, Mar. 2021, https://unctad.org/webflyer/covid-19-and-maritime-transport-impact-and-responses, (last visited May. 17, 2021).

[8] *Id.*

between Asia and North America, and 94 sailings between Asia and Europe.[9] It is estimated that container lines ultimately canceled more than 1,000 voyages during the first six months of 2020.[10]

Coupled with the initial reduction in consumer demand was a dramatic increase in the demand for medical equipment, both for medical professionals and the general public. In February 2020, the World Health Organization assessed that demand for Personal Protective Equipment (PPE) increased 100 times higher than normal.[11] In early 2020, most of the world's face masks were made in China, but as the virus spread through China, the government forbade their export and China began importing masks.[12]

As the pandemic spread, the demand for PPE increased. Prior to 2020, the United States was importing more than 20% of its PPE.[13] Specialty PPE was even more dependent on imports with an estimated 90% of N95 masks being imported.[14] Thus, while consumer demand decreased for certain consumer goods, the need for PPE dramatically increased. Ports and marine terminals struggled with identifying which imports contained the necessary PPE and which containers contained consumer goods.

During the first half of 2020, there was a tremendous decrease in the demand for most goods, as countries worldwide went into lockdown. However, this decline did not last long. By summer 2020, demand for U.S. imports exploded. This was in

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[9] Greg Knowler, *Alliances outline extensive blank sailings for Q3*, (Jun. 3, 2020), https://www.joc.com/maritime-news/alliances-outline-extensive-blank-sailings-q3_20200603.html, (last visited May. 17, 2021).

[10] U.S. International Trade Commission, *The Impact of the COVID-19 Pandemic on Freight Transportation Services and U.S. Merchandise Imports*, https://www.usitc.gov/research_and_analysis/tradeshifts/2020/special_topic.html#_ftnref10.

[11] Lisa Schnirring, *WHO warns of PPE shortage; COVID pace slows slightly in China,* (Feb. 7, 2020), https://www.cidrap.umn.edu/news-perspective/2020/02/who-warns-ppe-shortage-ncov-pace-slows-slightly-china, (last visited May. 17, 2021).

[12] Liz Alderman, *As Coronavirus Spreads, Face Mask Makers Go Into Overdrive*, New York Times, (Feb. 6, 2020), https://www.nytimes.com/2020/02/06/business/coronavirus-face-masks.html, (last visited May. 17, 2021).

[13] Dai, T., Bai, G. & Anderson, G.F. PPE Supply Chain Needs Data Transparency and Stress Testing. Journal of General Internal Medicine 35, 2748–2749 (Jun. 30, 2020), https://doi.org/10.1007/s11606-020-05987-9.

[14] *Id.*

part because businesses had the opportunity to adjust to new safety protocols, but also because of the rapid growth of e-commerce as consumers turned to online buying in record numbers.

The increased demand shocked the U.S. international ocean freight delivery system. By the fourth quarter of 2020, container lines were operating at nearly full capacity.[15] Blank sailings, which accounted for 21 percent of all voyages in May 2020, declined to 1 percent by October 2020.[16] The number of shipping containers in circulation during the second half of 2020 was insufficient to meet higher than anticipated consumer demand for imports.[17] Exporters, particularly agricultural exporters, suffered from a lack of container availability due to constrained capacity.

Soaring consumer demand for goods in the United States also led to record cargo volumes at major U.S. ports. The Port of Los Angeles, the Nation's largest port, reported the busiest September in its 114-year history.[18] Similarly, the Port of Virginia saw a dramatic increase in volumes with reported September 2020 volumes 4.4 percent higher than September 2019.[19]

Beginning in the fourth quarter of 2020, the United States and the world at-large was faced with increased challenges as the COVID-19 pandemic and its effects disrupted our global ocean supply chain. Increased demand exposed existing problems in the international ocean supply chain, leading to extreme supply chain port and marine terminal congestion.

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[15] Lazaro Gamio and Peter Goodman, *How the Supply Chain Crisis unfolded,* New York Times, (Dec. 5, 2021), https://www.nytimes.com/interactive/2021/12/05/business/economy/supply-chain.html, (last visited May. 17, 2021).

[16] *Id.*

[17] Gregory LaRocca, *Rising Maritime Freight Shipping Costs Impacted by Covid-19*, Office of Industries U.S. International Trade Commission, (Apr. 2021), https://www.usitc.gov/publications/332/executive_briefings/ebot_greg_larocca_freight_costs_weighing_covid_pdf.pdf.

[18] Anshu Siripurapu, *What Happened to Supply Chains in 2021?*, Council on Foreign Relations, (Dec. 13, 2021), https://www.cfr.org/article/what-happened-supply-chains-2021, (last visited May. 17, 2021).

[19] Ari Ashe, *Port of Virginia marks strong recovery with record September*, Journal of Commerce, (Oct. 1, 2020), https://www.joc.com/port-news/us-ports/port-virginia/port-virginia-marks-strong-recovery-record-september-volume_20201001.html, (last visited May. 17, 2021).

B. Initial Order of Investigation

During the first quarter of 2020, as the COVID-19 pandemic escalated in the United States and internationally, the Commission considered ways to respond to urgent cargo delivery dislocations in the U.S. international ocean freight delivery system.

In the earliest days of the pandemic, import cargo volumes dropped precipitously and ocean carriers "blanked" sailings. Imports that were delivered contributed to congestion at U.S. ports, particularly on the West Coast, because the import cargo was not being picked due to business shutdowns. The congestion was further exacerbated by empty containers.

On March 31, 2020, the Commission issued an Order authorizing Commissioner Rebecca F. Dye to identify operational solutions to cargo delivery system challenges related to the COVID-19 pandemic.[20] Among other things, that Order for Fact Finding 29, International Ocean Transportation Supply Chain Engagement, authorized the Fact Finding Officer to form multi-industry Innovation Teams to develop critical supply chain interventions.

C. Phase One – Innovation Teams

In a press release, also issued on March 31, 2020, the Fact Finding Officer announced the intent to engage key executives to participate on new Innovation Teams. The press release also invited individuals wishing to provide information to Commissioner Dye to email ff29@fmc.gov.[21]

The Commission's use of Innovation Teams was not a novel approach. The Fact Finding Officer had used similar authority in Fact Finding 28[22] and in the

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[20] Order: International Ocean Transportation Supply Chain Engagement, 85 Fed. Reg. 19146 (Apr. 6, 2020).

[21] FMC Press Release: *Commissioner Dye Leading FMC Initiative to Address Urgent COVID-19 Supply Chain Impacts,* (Mar. 31, 2020), https://www.fmc.gov/dye-leading-fmc-initiative-address-urgent-covid-19-supply-chain-impacts/.

[22] *See Fact Finding No. 28 Final Recommendation to the Commission*, (Aug. 27, 2019) https://www.fmc.gov/wp-content/uploads/2019/09/FF28FinalReportLetter.pdf.

2015 Supply Chain Innovation Teams Initiative.[23] When refining this approach, the Fact Finding Officer consulted a variety of academic and business resources and experts in supply chain management, process innovation, transportation research, and business teams. The FMC Supply Chain Innovation Teams initiative focuses on three concepts: teamwork, international ocean supply chain operations, and incremental process innovation.

The Innovation Teams consist of 5-12 members representing multiple industries who are committed to a shared goal — developing the best ways to improve international supply chain effectiveness, reliability, and resilience.[24] Effective Team participants are dynamic industry leaders with extensive experience, broad perspective, and collaboration skills that allow them to think beyond their immediate company or industry interests ("step out of their silos") and take an encompassing view of the entire ocean supply chain system.

In Fact Finding 28, after several months of information gathering, the Fact Finding Officer recommended that the Commission organize Innovation Teams composed of industry leaders who ultimately met on a limited, short-term basis to refine commercially viable demurrage and detention approaches. The valuable discussions with stakeholders during this phase of the investigation ensured that recommendations that resulted from Fact Finding 28 would be advantageous and workable.

As in previous Innovation Teams, the teams organized under Fact Finding 29 were composed of business leaders whose senior level positions included responsibility and influence over their companies' operations and who were positioned to implement recommendations developed by the Innovation Teams. As Fact Finding 29 was conducted during a period when travel and in-person group meetings were constrained by pandemic-related concerns, Fact Finding 29 Teams met virtually to focus on the changing dynamics that various ocean carriers, exporters, importers, shipping intermediaries, drayage operators, seaports, longshore labor, and marine terminals were experiencing.

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[23] *See FMC Supply Chain Innovation Team Initiative Final Report,* (Dec. 5, 2017), https://www.fmc.gov/wp-content/uploads/2018/08/SCITFinalReport-reduced.pdf.

[24] *Id.* at 5.

Initially, nine Innovation Team meetings with fifty-one participants were held. However, in the following months, the Fact Finding Officer would ultimately convene two additional groupings of teams. In sum, during this first phase, three types of teams met:

- Original Nine Supply Chain Innovation Teams;
- Ocean Common Carrier Teams; and
- Regional Teams.

1. Original Nine Supply Chain Innovation Teams

When the Fact Finding Officer began the Fact Finding 29 investigation, consumer demand was down, and ocean carriers were cancelling a significant number of sailings. At the same time, there was a dramatic increase of demand for PPE. It was in this context that teams began meeting to identify commercial solutions to problems facing the ocean supply chain.

The first nine multi-industry Innovation Teams met in mid-April 2020 and were presented with three basic questions[25]:

- What can the Federal Maritime Commission do to provide relief or assistance to mitigate negative impacts on the international ocean supply chain related to COVID-19?
- What can companies involved in ocean cargo delivery do to respond to existing supply chain challenges and bottlenecks?
- What can supply chain actors do to strengthen the overall performance of the American international ocean freight delivery system?

The goal of these initial meetings was to identify what actions could provide immediate relief to the most pressing challenges the American freight delivery system faces from COVID-19 related disruptions. The desire was not only to find actions the industry could take on a commercial level to mitigate problems, but also to identify what actions the Commission could take to provide relief. It was

[25] The Fact Finding Officer shared these three initial questions with the public in a press release and encouraged members of the public not participating on a team, but who nonetheless wished to provide advice, to email FF29@FMC.gov. FMC Press Release: *Fact Finding 29 Supply Chain Innovation Teams to Begin Work*, (Apr. 6, 2020), https://www.fmc.gov/Fact Finding-29-teams-to-begin-work/.

through these initial meetings that the Fact Finding Officer was able to identify and recommend Commission action in the form of service contract filing exemptions to alleviate the strain felt by shippers. The Fact Finding Officer was also able to work with carriers and terminals on their efforts to prioritize cargo. Additionally, through these meetings, the Fact Finding Officer was able to identify the four main issues that would become a focal point throughout the investigation.

2. Commission Action - Service Contract Exemptions

At that time, the Fact Finding was focused on identifying things the Commission could do to alleviate the challenges caused by the COVID-19 pandemic. The first Team meetings were focused on what the FMC could do to provide relief and FMC assistance.[26]

One of the early issues raised by shipper Team members was difficulty in filing service contracts. Many service contracts had May 1 or June 1 end dates, and some businesses were struggling to conduct contract negotiations while dealing with issues caused by COVID-19. Several Team members also indicated that stay-at-home orders had resulted in a growing number of businesses working remotely.

At the time, Commission regulations required that ocean common carriers file original service contracts with the Commission "before any cargo moves pursuant to that service contract."[27] In contrast, the Commission's regulations provided more flexibility to service contract amendments, which could be filed within 30 days after the amendment's effective date.[28]

Acting on the recommendation of the Fact Finding Officer, on April 27, 2020, the Commission issued a temporary blanket exemption extending the current filing flexibilities for service contract amendments to original service contracts.[29] This exemption allowed parties time to adapt to the increased pressures that have

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[26] *See* .

[27] 46 C.F.R. §§ 530.8(a)(1), 530.14(a) (2019).

[28] *See id.* §§ 530.3(i), 530.8(a)(2), 530.8(b)(8)(i), 530.14(a).

[29] Order: *Temporary Exemption from Certain Service Contract Requirements*, 2 F.M.C.2d 65 (FMC 2020).

been placed upon them by COVID-19 and minimize disruptions to the contracting process.

The Commission Order granting the exemption issued on April 27, 2020, was set to expire on December 31, 2020. On October 1, 2020, based on additional information from the Fact Finding investigation and stakeholder interest, the Commission issued an Order extending the exemption until June 1, 2021.[30] Following the positive response of Commission stakeholders to the temporary service contract filing relief, the Commission considered permanently establishing this exemption by amending its regulations. The Commission issued a Notice of Proposed Rulemaking (NPRM) on January 19, 2021, to make the exemption permanent.[31] The Commission received eight comments on its proposed rule and on April 23, 2021, issued a final rule making the exemption permanent.[32]

3. Other Identified Challenges

Another challenge Innovation Team members identified was that the freight delivery system was struggling with prioritizing cargo so that urgently needed goods, especially personal protective equipment (PPE) and other medical equipment, would be given delivery priority. As noted previously, while general demand decreased in the first quarter of 2020, the demand for medical equipment dramatically increased. The challenge presented to the Teams was how to prioritize cargo that was urgently needed and what to do with cargo that was not currently in demand.

Marine terminals advised that they would be better able to manage cargo flows if they had specific, timely, and accurate information from shippers about which shipments contained PPE, which containers shippers were prepared to pick-up, and which containers shippers would not be able to pick-up and must be stored

[30] Order: *Temporary Exemption from Certain Service Contract Requirements*, Docket No. 20-06, 2020 FMC LEXIS 206 (FMC Oct. 1, 2020).

[31] NPRM: Service Contracts, Docket 20-22, 86 Fed. Reg. 5106 (Jan. 19, 2021).

[32] Final Rule: Service Contracts, Docket 20-22, 86 Fed. Reg. 21651 (Apr. 23, 2021).

in off-dock storage. Some terminals had already set up hotlines or points of contacts by which shippers could identify containers containing PPE.[33]

To foster the use of these methods of prioritization, on May 14, 2020, the Fact Finding Officer issued a press release that laid out steps shippers could take to mitigate COVID-19 impacts on the supply chain.[34] Specifically, the Fact Finding Officer informed shippers that MTOs could more effectively prioritize the movement of PPE cargo if they are better informed. The Fact Finding Officer encouraged shippers to share the following information with their MTOs:

- Identify shipments that contain Personal Protective Equipment. These commodities must move first and MTOs need to know which containers to prioritize.
- Identify containers that shippers want to accept and can be prepared to be picked-up. This cargo must be moved to make more space for incoming shipments.
- Identify containers that shippers are not able to accept or pick-up. Terminals can more effectively store cargo if they know a shipper is not expecting to pick it up.

Ocean common carriers also stepped up in the early phases of the pandemic with innovative solutions to cargo that was not urgently needed. To avoid nonurgent cargo piling up at ports and slowing down the retrieval of urgently needed medical equipment, carriers offered to detour cargo destined for U.S. ports to other ports with available land for storage. Instead of charging demurrage or detention rates at U.S. ports, a much lower storage charge could be instead issued.[35]

In the May 2020 press release, the Fact Finding Officer noted that there was a similarly short list of key steps ocean carriers could take related to increase the

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[33] *See* Press Release: *COVID-19 Critical Cargo Initiative*, (Apr. 17, 2020), https://www.apmterminals.com/en/los-angeles/practical-information/news-and-alerts/supplier-letter.

[34] FMC Press Release: *Fact Finding 29 Innovation Teams Identify Information Helpful to Mitigating COVID-19 Impacts on Supply Chain*, (May 14, 2020), https://www.fmc.gov/Fact Finding-29-teams-covid-19-impacts-supply-chain/.

[35] Many carriers instituted programs like this under various names including, "Suspension of Transit," "Detention in Transit," or "Delay in Transshipment."

efficiencies of the freight delivery system.[36] These key steps involved four issues identified in the initial Team meetings that offered the best chance to mitigate the challenges faced, including:

- The impact of increased blanked sailings and skipped port calls;
- The impact of terminal closures and reduced hours;
- Confusion around ERDs and exporter cutoffs; and
- Increased difficulty in returning empty containers.

As noted previously, one of the first notable effects of COVID-19 on the supply chain was a dramatic decrease in cargo volume. Carriers responded to the decline in volume by blanking sailings or bypassing ports to keep vessel supply matched to demand. Responding to both the change in vessel calls and the decline in demand, some terminals determined that the reduced cargo volumes did not financially justify maintaining full gate hours. Marine terminals also noted a need to adjust to new safety protocols which also resulted in reduced hours or unexpected closures.

A concern grew among truckers and agricultural exporters that ocean carriers and marine terminals were not conveying vessel and terminal changes effectively. This was especially frustrating for agricultural exporters whose cargo must take several days to reach a port in a timely manner. Agricultural exporters cited examples of their cargo being loaded onto trucks or rail only to be informed that the vessel on which they booked cargo was not arriving at that port. Similarly, drayage operators and shippers were frustrated with receiving last minute notice of terminal closures, which did not allow them to properly adjust their operations.

Fluctuations in volumes impacted every aspect of the supply chain and subsequently nearly every aspect faced some level of disruption. Changes to terminal operating hours, vessel schedules, and reductions in available storage

[36] *Id.* ("Commissioner Dye believes there is a similarly short list of key steps ocean carriers can take related to customer communications, business processes, and equipment logistics that will increase the efficiencies of the freight delivery system").

space inevitably spilled over into conflicts with earliest return dates (ERDs) and exporter cutoffs.[37]

As vessel schedules fluctuated, the dates and times terminals would begin accepting containers for exports fluctuated. Unfortunately, if this information was not communicated clearly or promptly, it could lead to shippers dropping off cargo too early or too late. This was particularly an issue for agricultural shippers, whose cargo may take several days to arrive at a terminal. Some agricultural shippers reported that their cargo was already in transit to the port when they were notified of a delayed ERD. Some truckers had to turn around and return the container to the shipper, while others had no option but to deliver the cargo early. Many inland shippers transport their cargo via rail and there was little that a shipper could do with a container on a rail line to stop the delivery of their container to the terminal.

Furthering this frustration was a lack of clear guidance on where truckers and exporters could locate reliable ERD information. Exporters and truckers reported conflicting ERD information on marine terminal and ocean carrier websites. Without clear and accurate information, some frustrated exporters resorted to checking every available resource on vessel arrivals and were forced to predict cargo availability.

Additionally, exporters and drayage operators routinely expressed frustration with untimely notice when carriers' empty containers were not being accepted at one terminal and drayage operators were directed to an alternative terminal. The complexity of the process is increased because carrier alliance members may call at multiple terminals. Not knowing which terminal may be accepting a particular empty container on a given day led some drayage truckers to book multiple appointments to ensure they had an appointment, further exacerbating process confusion.

[37] The earliest return date is the first day a terminal will accept a container for export and an exporter cutoff is the last day a terminal will accept a container for export. If a container arrives too early, it may be subject to additional storage fees and if a container arrives to late, it may miss the vessel entirely and be rolled onto the next available vessel, incurring fees and penalties.

4. Ocean Common Carrier Innovation Team Meetings

The initial meetings with the nine Teams helped identify key areas that offered the best chance for action to mitigate the challenges faced because of the pandemic. At the end of April 2020, building on the information gathered in the initial Team meetings, the Fact Finding Officer reached out for insight and cooperation of the major ocean carriers. Prior to these meetings, carriers were instructed to consider the four topics identified by the previous Innovation Teams as areas that offer a reasonable prospect for mitigation of the challenges the industry is facing.

Four meetings were held between May 4, 2020, and May 7, 2020, during which all major ocean carriers participated.[38] Like all early Team meetings, these groups met virtually. During these meetings, the Fact Finding Officer discussed the four remaining issues identified by the initial nine teams:

- Confusion around ERDs and exporter cutoffs;
- The impact of terminal closures and reduced hours;
- The impact of increased blanked sailings and skipped port calls; and
- Enhanced difficulty in returning empty containers.

With respect to ERDs, the Teams discussed the need for proactive communication and to ensure shippers have access to correct and current information. It was noted that this will require that carriers work with terminals to ensure the correct information is shared. In the event the dates conflict, one idea proposed by Team members was that carriers could agree to abide by the information published by the terminal. This guarantee would eliminate confusion and give shippers confidence that the information they rely on is correct.

Team members also discussed how important it is that shippers have timely information about reduced terminal hours, terminal closures, blanked sailings, and bypassed ports. Due to the uncertainty present in the early stages of the pandemic, it was important that shippers and truckers were given sufficient notice of reduced terminal hours, terminal closures, blanked sailings, and bypassed ports so that they

[38] See Appendix for a list of team participants.

could prepare. Based on conversations with members of the industry, 7-day notice for blanked sailings or terminal closures and 48-hour notice for bypassed ports could mitigate some of the problems shippers and truckers faced. All agreed that commercial solutions to this issue require carriers to work with marine terminals to ensure that proper notice is given.

Lastly, during the meetings, Team members talked about the difficulties drayage operators and shippers have returning empty containers. Drayage operators expressed frustration about being denied access to terminals and being forced to travel to alternative locations to return empties. The group acknowledged that increased collaboration on this issue could result in improved clarity and efficiency.

Following these meetings, the Fact Finding Officer routinely contacted the carrier participants to encourage progress and remain up to date on steps being taken to mitigate adverse effects on the supply chain.

5. Regional Innovation Teams

As the volume and cargo handled at ports differ, so do terminal operations and local conditions. Conversations with team members during the first nine teams, and in the meetings with carriers, demonstrated a need for a regional approach to the next part of the Fact Finding investigation. The Innovation Teams recommended that the Fact Finding Officer create teams to discuss challenges by specific port range. That recommendation was adopted, and over the following months, the Fact Finding Officer conducted regional team meetings specific to challenges in Southern California, New York/New Jersey, and New Orleans.

a. Southern California Team

The regional team discussions and interviews focused on the same four areas of concern that were identified in the earlier team meetings and included: (1) terminal gate closure notifications, (2) blanked sailings and bypassed port notifications, (3) export cargo receiving timelines (ERD), and (4) empty container returns (dual moves and chassis availability). Teams discussed the intricacies of these supply chain challenges and proposed ways to address them.

Team members stressed that notice of terminal gate closures should be given no fewer than three days, and preferably seven days, before gate closings. At no time should a closure occur mid-shift. Advance notice of blank sailings should be given not only to beneficial cargo owners, but also be posted prominently on a carrier's website, at least seven days in advance. Notice of bypassed ports should be posted at least three days in advance. Finally, carriers and terminals should collaborate more closely regarding export cargo receiving timelines with the goal of eliminating conflicting or confusing information.

With respect to empty container return practices, most Team members agreed that the ideal approach would be to direct drayage operators to return empties to the terminal where they had picked up the loaded container. This would potentially allow the drayage operator to complete a dual move and reduce the number of chassis required. Other suggestions included:

- Terminals refraining from cutoffs of empty returns mid-shift;
- Terminals adopting a goal of 7 days advance notice, but no fewer than 24 hours, for empty cutoffs; and
- Terminals allowing appointment-free returns during low use periods (such as night gates).

The above actions by carriers and terminals could help, but Team members also acknowledged that there are actions shippers and truckers could also take to mitigate supply chain issues. First, shippers or truckers should promptly cancel any unused multiple bookings and terminal appointments to reduce "no show" rates and related inefficiencies.

Blank sailings, port bypasses, and cancelled services increase shipper uncertainty about space availability. Increased uncertainty can lead truckers to make multiple bookings and related terminal appointments that compound existing inefficiencies. Unused bookings and appointments thwart planning and result in under-utilization of scarce assets. As soon as a shipper or trucker is aware that its extra bookings or extra terminal appointments will not be used, they should immediately notify their lines and terminals so that others can take advantage of those opportunities.

The approach and recommendations developed by this Team were published on the Commission's website in the form of a press release.[39] This approach was used in future conversations with regional Teams and throughout the later stages in the Fact Finding. Following the close of these meetings, the Fact Finding Officer and staff assigned to Fact Finding 29, continued to engage key industry leaders in Southern California about the progress they made in implementing four approaches to immediately address these critical operational issues.

b. North Atlantic Team

Following the success of the Team meetings on the West Coast, the Fact Finding shifted to concentrate on issues related to operations at the Port Authority of New York & New Jersey (PANYNJ) and surrounding facilities. For the North Atlantic region, three Teams consisting of drayage operators, terminal operators, shippers, intermediaries, and other parties critical to the movement of intermodal ocean cargoes through the PANYNJ facilities met in July 2020. These Teams discussed what operational adjustments will prepare the bi-state port complex for dealing with increasing cargo volumes.

The Teams began their efforts by assessing which, if any, of the four operational challenges identified during the examination of the San Pedro Bay ports may be applicable in the port of New York and New Jersey. Team members were also tasked with identifying other operational challenges to efficient port and supply chain operations and developing commercial solutions to address them.

Interviews with port users revealed that New York/New Jersey Port Authority leadership had responded effectively to the initial challenges that arose. Port users reported that because of this effort, facilities in the two states were working well. Especially helpful was the early and active intervention of port leadership with local and state governments. Also cited was the effectiveness of stakeholder cooperation under the Council on Port Performance (CPP).

One common challenge identified was the need to make progress in returning containers in a manner that facilitates a "double move." Senior port

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[39] FMC Press Release: *Commissioner Dye Announces Findings of San Pedro Bay Discussions*, (Jun. 17, 2020), https://www.fmc.gov/commissioner-dye-announces-findings-of-san-pedro-bay-discussions/.

executives advised that achieving that goal was a high priority and the CPP was working to improve the process.[40] The Fact Finding 29 team members recommended greater ocean carrier participation in port performance discussions as a step toward achieving better drayage outcomes, especially in returning containers.

In a press release dated August 4, 2020, the Fact Finding Officer revealed these findings and announced intent of shifting focus to the U.S. Gulf Coast.[41] The Fact Finding Officer and staff members supporting the Fact Finding effort continued to stay in touch with supply chain parties in the New York/New Jersey area to monitor and encourage improved efficiency and better communications.

c. Gulf Coast Ports Team

The third region incorporated into Fact Finding 29 was the U.S. Gulf Coast with a particular focus on the Port of New Orleans. Aside from challenges arising from disruptive hurricanes, users of the Gulf Coast ports expressed concerns with port channels, barge traffic, blanked sailings, and bypassed port calls. Stakeholders at Gulf Coast ports also raised issues with demurrage and detention charges and new charges for terminal appointments to return empty containers.

As rising cargo volumes increasingly put pressure on port and terminal performance, demurrage and detention charges increased. Shippers and trucking companies asserted that those increases often had little to do with creating effective incentives. They viewed such non-incentive charges as a forced subsidy for continued inefficiency. Again, as with the previous two regions, following the conclusion of the meetings, the Fact Finding Officer and staff remained in contact with stakeholders in the Gulf Coast region to monitor and encourage progress.

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[40] In May 2021, however, two of the largest trucking organizations in the Northeast suspended their participation in the CPP, citing lack of carrier action taken on CPP recommendations.

[41] FMC Press Release: *Commissioner Dye Completes Work in NY & NJ, Turns Attention to New Orleans,* (Aug. 4, 2020), https://www.fmc.gov/commissioner-dye-completes-work-in-ny-nj-turns-attention-to-new-orleans/.

6. Memphis Innovation Team

The FMC Memphis Supply Chain Innovation Team (Memphis Innovation Team) was first established following the FMC Fact Finding Investigation 28 meeting held in Memphis on May 15, 2018. This Team is comprised of shippers, ocean carriers, railroads, chassis pool contributors, and motor carriers, who volunteered to address the collective challenges in the Mid-South area in search of a better and more efficient supply chain process. Anything that is an unnecessary complicating factor adds confusion, delay, and unnecessary costs into the supply chain. Especially given extreme congestion involving ocean carrier haulage in rail heads during the pandemic, it is imperative that the Federal Maritime Commission and the Surface Transportation Board renew cooperation to alleviate this crisis.

On May 22, 2019, Commissioner Dye appeared before the Surface Transportation Board (STB), to discuss the recommendations of the Memphis Innovation Team. During this meeting, a white paper on the team's efforts to improve supply chain velocity and fluidity at the rail ramps in Memphis and the Mid-South was submitted to the STB.

One of the Fact Finding 28 recommendations, adopted by the Commission on September 6, 2019, was that the Commission continue to support the Memphis Innovation Team in its efforts to improve the performance of the international ocean container freight delivery system.[42] As a result, additional meetings were held in Washington D.C. on December 20, 2019, and January 22, 2020. Another meeting was held virtually on August 11, 2021. A recording of the meeting can be viewed online at: https://www.dropbox.com/s/z7zhgoreh17ya1n/FMC_2021.wmv?dl=0.

The white paper authored by the Memphis Innovation Team articulates the essential qualities of a high performing grey chassis pool that is essential for efficient chassis provisioning in the rail heads in Memphis. The qualities articulated in the white paper not only are essential for chassis provisioning in rail heads in Memphis, but also in other rail facilities and seaports around the country.

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[42] *Fact Finding No. 28 Final Recommendation to the Commission*, (Aug. 27, 2019), https://www.fmc.gov/wp-content/uploads/2019/09/FF28FinalReportLetter.pdf.

A copy of the white paper can be viewed online at: https://www.fmc.gov/wp-content/uploads/2019/05/MemphisSupplyChainWhitepaper.pdf.

The expertise the Commission has developed surrounding the international ocean supply chain gives the Commission a unique perspective on the extreme equipment dislocations that occur in Memphis rail heads, other rail facilities, and seaports around the country. The problems that exist in Memphis are worsening. This is a matter of national significance and must be addressed for the United States to increase the performance of our international ocean supply chain. The Fact Finding Officer strongly recommends a reinvigorated focus on the critical equipment dislocations in Memphis and in other rail facilities and seaports around the country.

7. Other Approaches Considered

The Fact Finding Officer sought out ideas from the public and other organizations that presented ideas for alleviating challenges to the issues facing the international ocean supply chain. One such approach was developed by the Council on Port Performance (CPP). Established in June 2014 and led by the Port Department Director at The Port Authority of New York and New Jersey (PANYNJ) and the President of the New York Shipping Association (NYSA), the CPP provides guidance on programs and initiatives to improve efficiency and reliability at the Port of New York and New Jersey.[43]

At the request of the CPP, a working group of ocean carriers, trucking companies, marine terminal operators, shippers and third-party depot operators was formed to address growing concerns over empty container handling at the Port and to identify potential improvements to the current processes. The Empty Container Working Group's discussions centered on ways to increase efficiencies through enhanced communications and advanced notifications. The group's recommendations were presented to the CPP at their August 27, 2021, meeting and were overwhelmingly approved and endorsed by the Council.

[43] Council on Port Performance, Port of New York and New Jersey, https://www.panynj.gov/port/en/our-port/council-on-port-performance-.html, (last visited May 17, 2022).

The group recommended that dual transactions should be exploited as often as possible, and truckers should be directed to return empties to the terminal where they were picked up. If this is not possible, the Empty Container Working Group identified other steps that marine terminal operators and ocean common carriers can take to improve the empty container return process:

- All terminals, depots, and carriers should publish the next day's empty container return information no later than 1:00 PM daily; and
- If the return location changes overnight, truckers should not be turned away from a terminal or depot with an empty of the type that was identified as allowable on the return information published the day before.

There were additional suggestions that were presented to further achieve efficiency with empty container handling once the initial recommendations were addressed. These included:

- Terminal and carrier computer systems should be synchronized;
- Carrier customer service hours should be aligned to terminal and depot hours of operation;
- Terminals that typically require appointments should allow appointment-free empty returns during low use periods;
- Off terminal depots should limit the number of carriers directing empties to the same location in a single day;
- Off-hire boxes should automatically be given extra time (i.e., 10 days) to allow scheduling for delivery to locations outside of the port district; and
- Ocean carriers should hire a drayage trucker to reposition empties where their business needs direct them to be, rather than imposing this task, that was not contractually negotiated, onto the motor carrier.

This approach was presented to later Fact Finding 29 Team members and used to develop ideas for commercial solutions.

D. Phase Two – Information Gathering

Fact Finding 29 transitioned into its second phase in November 2020. During the first and second phases of Fact Finding 29, the Fact Finding Officer held over

20 team meetings with 80 different participants representing shippers, carriers, ports, terminal operators, ocean transportation intermediaries, drayage providers, and trade associations. The Fact Finding Officer also spoke to hundreds of stakeholders through virtual speeches, meetings, phone conversations, and emails. Throughout the process, both the Fact Finding Officer and Commission staff assigned to the Fact Finding routinely followed-up with Team participants and stakeholders in the areas reviewed above. These frequent check-ins with Team members located in key areas of the United States allowed the Fact Finding Officer to stay abreast of changes in the challenges and, on some occasions, to witness improvements.

While the industry continued to struggle with some issues, during the Fall of 2020, Team members noted improvement with some of the key issues identified early in the Fact Finding and two of the original four issues identified in the initial team meetings had greatly dissipated by the end of 2020.

In the early stages of the pandemic, blanked sailings were a significant issue on the west coast and in some southern Atlantic ports. As the months progressed, check-ins with Innovation Team members revealed improvement on this issue. However, the Fact Finding Officer remains concerned that blank sailings are interfering with customer service and recommends Innovation Team meetings to develop coherent blank sailing processes.

Similarly, in the early stages of the pandemic, there were significant issues with terminal closures and reduced hours. However, over the following months, issues with unexpected terminal closures also diminished, in part because the industry adjusted to new volumes and in part because safety and health procedures were standardized and normalized. In cases where there was still disruption to terminal schedules, shippers and drayage operators noted that timely conveyance of this information had improved.

Other issues, however, remained outstanding and, in some cases, deteriorated. Stakeholders using the Port of New York and New Jersey, the Port of Los Angeles, and the Port of Long Beach expressed growing concern with carrier practices regarding shifting ERDs, the return of empty containers, export cutoffs, and how these issues were leading to increased demurrage and detention invoices.

Some stakeholders also stated that increasingly, demurrage and detention charges were not being administered in a manner consistent with the Incentive Principle as articulated by the FMC's Interpretive Rule under section 41102(c) of Title 46, United States Code.

1. Supplemental Order

Based on information obtained in the Fact Finding and coverage in the trade press, the Commission began growing increasingly concerned that vessel-operating common carriers in alliances who call on the Port of New York and New Jersey, the Port of Long Beach, and the Port of Los Angeles may be employing practices and regulations that violate 46 U.S.C. § 41102(c).

Acting on this concern, on November 20, 2020, the Commission approved a Supplemental Order for Fact Finding 29.[44] The Supplemental Order emphasized the Commission's concern with reports coming out of the Port of Los Angeles, Port of Long Beach, and Port of New York and New Jersey, and endorsed the efforts by the Fact Finding Officer, under the authority existing in the March 31, 2020 Order, to investigate whether alliance carriers who call on those ports were employing practices or regulations in violation of § 41102(c).[45] The Supplemental Order identified three issues in particular that warranted additional scrutiny, especially given the rapid increase of trade volumes. These issues included:

- **Container return practices** – in particular, practices that impact the efficient drayage of empty containers to marine terminals for carrier pickup;
- **Demurrage and detention practices** – specifically whether carriers' policies, practices, and procedures align with the principle, central to the Commission's Interpretive Rule on demurrage and detention, that detention and demurrage charges and policies should serve the primary purpose of incentivizing the movement of cargo and promoting freight fluidity; and

[44] Order: International Ocean Transportation Supply Chain Engagement - Possible Violations of 46 U.S.C. § 41102(c), (Nov. 19, 2020).

[45] *Id.* at 2.

- **Practices related to container availability for U.S. exports** – in particular, reports that carriers were declining to ship U.S. agricultural commodity exports.

The Supplemental Order signaled a transition in the focus of the Fact Finding 29 investigation. The initial focus in Fact Finding 29 was on commercial solutions.[46] This Supplemental Order signaled a shift in focus and an intensified effort to gather information and act on violations of the Shipping Act of 1984, as amended. As noted in the Supplemental Order, "the Fact Finding Officer's authority includes the ability to issue…compulsory information demands under 46 U.S.C. § 40104."[47]

2. Fact Finding 29 Emails

In the first Fact Finding 29 press release, the Fact Finding Officer stated that "individuals wishing to provide information to Commissioner Dye may do so by writing to ff29@fmc.gov."[48] During the first phase of the Fact Finding, most of these emails were either individuals wishing to participate in teams or offering to share general news or information.

When the Commission issued its Supplemental Order announcing a focus on potential violations of the Shipping Act, individuals began using this email address to report potential violations. Commission staff assigned to Fact Finding 29 sorted through and categorized these emails.

The most common concern received in the FF29 email inbox involved demurrage or detention charges resulting from an inability to return containers. Issues involving confusion or problems with earliest return dates or export cutoffs also made up a significant number of emails received. These emails were ultimately forwarded to the FMC's Bureau of Enforcement (BOE) and the

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[46] 85 Fed. Reg. 19146 at 19147 (Apr. 6, 2020).

[47] *Id.*

[48] Press Release: *Commissioner Dye Leading FMC Initiative to Address Urgent COVID-19 Supply Chain Impacts,* (Mar. 31, 2020) https://www.fmc.gov/dye-leading-fmc-initiative-address-urgent-covid-19-supply-chain-impacts/.

Commission's area representatives where they were evaluated for potential enforcement action.

3. Advice to the Trade

In addition to the information demands issued in early 2021, the Fact Finding Officer also solicited information from the public regarding alleged violations. On December 17, 2020, shortly after the issuance of the Supplemental Order, the Fact Finding Officer issued a press release titled, "Fact Finding 29: Advice to the Trade." In this press release, the Fact Finding Officer advised shippers and drayage operators to contact the FMC's Bureau of Enforcement (BOE) with allegations of ocean carriers and marine terminal operators employing practices or regulations in violation of 46 U.S.C. § 41102(c).[49]

The Fact Finding Officer advised that shippers and truckers could contact the BOE with allegations of ocean carriers and marine terminal operators employing practices or regulations in violation of 46 U.S.C. § 41102(c) involving non-compliance with the Final Rule published earlier this year by the agency that addresses detention and demurrage. Reports of allegations should typically be directed to area representatives; however, to facilitate the immediate need and gain understanding of the issues, individuals with specific allegations of behavior that violates 46 U.S.C. § 41102(c) were instructed to submit their complaint and supporting evidence to the BOE by writing boe@fmc.gov.[50]

4. Information Demands

The Supplemental Order reemphasized that "the Fact Finding Officer's authority includes the ability to issue compulsory information demands under 46 U.S.C. § 40104."[51] On February 17, 2021, in an additional effort to gain information on the practices of carriers and terminals and to determine if legal obligations related to detention and demurrage practices were being met, the Fact

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[49] FMC Press Release: *Fact Finding 29: Advice to the Trade,* (Dec. 17. 2020), https://www.fmc.gov/Fact Finding-29-advice-to-the-trade/.

[50] This email address was provided in part to curb the ongoing emails being sent to ff29@fmc.gov. Despite this press release however, the FF29 inbox continued to receive email complaints which were forwarded to BOE.

[51] 85 Fed. Reg. 19146 at 19147.

Finding Officer announced that information demands would be issued to ocean carriers and marine terminal operators (MTOs).[52]

On March 8, 2021, the Fact Finding Officer served 26 Information Demand Orders.[53] The information demands sought additional information on a variety of subjects including empty container return and ERDs, two of the original four issues identified by the early work of the Innovation Teams. These information demands resulted in thousands of pages of answers and documents. Commission staff reviewed and categorized the information received and, on several occasions, sought clarifying information from carriers and MTOs.

The information demands covered a variety of subjects related to demurrage and detention and export procedures. For example, the information demands inquired on system changes in light of the Interpretive Rule on demurrage and detention charges, empty container return practices, earliest return date practices, and ideas for innovation and improvement. The information demands also requested information about export container availability and to ensure that the Fact Finding Officer was fully informed on agricultural export issues, a letter was also sent to the carriers providing them with the opportunity to respond to these complaints and media reports in May 2021.

a. Demurrage and Detention

The information demands asked questions on how carriers and MTOs changed their practices or policies on demurrage and detention since the issuance of 46 C.F.R. § 545.5. Many identified actions included clarifying terminology and procedures on websites, providing more information, simplifying dispute resolution policies, and making practices more consistent with the Interpretive Rule on Demurrage and Detention. Several others noted changes to their calculation metrics, such as, which days count toward free time.

The information demands also asked questions on how demurrage and detention was collected since the issuance of the Interpretive Rule. Unfortunately,

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[52] FMC Press Release: *Information Demand on Detention & Demurrage Practices to Be Issued,* (Feb. 17, 2021), https://www.fmc.gov/information-demand-on-detention-demurrage-practices-to-be-issued/.

[53] In total, 26 orders were served seeking information from 10 ocean common carriers and 16 MTOs.

evaluating the impact of the Interpretive Rule proved difficult in reviewing the information demands. The issuance of the Interpretive Rule on Demurrage and Detention coincided with the COVID-19 pandemic lockdown in the United States. This makes it challenging to disentangle the effects of the Interpretive Rule from the effects of the pandemic. Most carriers and MTOs do not track free time extensions granted, and thus, it was difficult to evaluate how carriers and MTOs mitigated demurrage and detention.

b. Empty Container Return

Commission concerns about empty container returns are not new. In the Commission's 2019 Notice of Proposed Rulemaking on demurrage and detention, the Commission stated that under the "incentive principle," if empty containers cannot be returned due to a lack of appointments, demurrage and detention cannot incentivize equipment return.[54] The Commission went on to propose that "[a]bsent extenuating circumstances, practices and regulations that result in detention being imposed when a container cannot be returned weigh heavily in favor of a finding of unreasonableness."[55] The Commission reiterated these principles in its final rule on demurrage and detention, which 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."[56]

However, trucker complaints about difficulties in timely returning empty containers persisted after the Commission published its Interpretive Rule and increased in light of supply chain disruptions associated with the COVID-19 pandemic. The information demands sought information from carriers and terminals on notification processes for empty container return and impediments to empty container return. Specifically, how much notice is given regarding return policies and what happens when inadequate notice is given. These two areas were

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[54] NPRM: Interpretive Rule on Demurrage and Detention Under the Shipping Act, 84 Fed. Reg. at 48852 (Sept. 17, 2019).

[55] *Id.* at 48853 ("imposing detention in situations of uncommunicated or untimely communicated changes in container return location also weighs on the side of unreasonableness, as might doing so when there have been uncommunicated or untimely communicated notice of terminal closures for empties").

[56] 46 C.F.R. § 545.5(c)(2)(ii).

identified in both the Team meetings in 2020 and through follow up conversations with stakeholders.

i. Empty Container Return Notification

During the Team meetings, drayage operators and shippers raised concerns over the notice provided about where to return an empty container. Reported frustrations included receiving last minute notice of changes to which terminals were receiving empties and difficulty in determining where to return empties. Some even claimed that there were periods where no return location would be available at all.

Through the information demands, the Fact Finding Officer sought to determine whether carriers were operating under standard practices and what was preventing notice from reaching its intended audience. MTOs largely said that they were not in a good position to provide information about the processes of empty container return because containers are carrier equipment, not terminal equipment, and detention charges are imposed by carriers, not MTOs. Furthermore, they stated that carriers determined when to begin and when to stop receiving equipment.

Carriers generally acknowledged their responsibility, but the answers demonstrated regional approaches for dealing with notifying drayage operators and shippers of return locations. Operations on the east coast typically relied on the terminals to notify shippers and drayage operators of changes to return locations. On the west coast, carriers relied on processes like E-Modal or Pier PASS to notify shippers or drayage operators of return locations or changes to return location. In addition, west coast MTOs generally broadcast empty container return information on their website, terminal system, or through blast email notifications.

Every ocean carrier who received an information demand stated that it provides notice to the terminal[57] by at least 4:00 pm the day before and many claimed to provide even more notice, including giving several days' notice of return locations. This 4:00pm deadline is derived from the Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) which requires that carriers

[57] As noted above, the carrier then relies on the terminal to broadcast this information.

post container return locations by 4:00pm the day prior.[58] Additionally, the UIIA states that the default equipment return location is the location at which it was picked up, unless the carrier directs otherwise. If a carrier does not provide notice of return location by 4:00pm, the UIIA provides that a trucker is entitled to one extra business day to return equipment.[59]

ii. Empty Return Impediments

In their responses, carriers acknowledged that there are instances where they are unable to provide notice of empty container return information by 1:00pm or 4:00pm. They also acknowledged that there may be situations where there are no available empty container return locations, but universally stated that multiple days without return locations are rare. As noted above, in these cases, the UIIA would require the extension of free time. When this happens, carriers stated that additional free time is granted on a case-by-case basis.

Every carrier stated if a party wishes to dispute a detention charge incurred because no return locations were available, they do not need to pay that charge first. Every carrier also claimed to grant free time extension when return locations are unavailable on a case-by-case basis. This case-by-case language was common in answers regarding disputes and demonstrated that in terms of resolving issues, there is a wide range of approaches carriers take.

For example, MTOs were asked what would happen if a drayage operator is in line to return a container only to have the return location change. MTOs presented two different solutions. Some said they would issue a trouble ticket and the trucker would need to dispute any charges with the carrier. Others said they would honor the appointment regardless.[60] These responses not only demonstrated

[58] Uniform Intermodal Interchange and Facilities Access Agreement, § E,1, b ("Whenever a return location is changed, Provider must notify the Motor Carrier by e-mail by 16:00 p.m. local time the business day prior to the change becoming effective.").

[59] *Id.* at § E.1.d ("Should the notification required under subsection 1.b. above not be made one (1) business day prior to the effective date of the change, and the late notification delayed the Interchange of Equipment, then the Motor Carrier would be entitled to one (1) additional business day to return the Equipment.").

[60] Still others avoided the question entirely and said such a situation never happens.

the variety of approaches operators take, but also provided insight into the need for greater coherence of operational processes concerning empty container return.

Most MTOs said that they have no control over container detention charges or free time extensions related to empty container returns. However, some of these MTOs indicated that they will accept an empty return if the trucker has a confirmed appointment. Others said they could only issue a trouble ticket so that the drayage operator had proof of the issue when disputing detention charges with a carrier.

The information demands also asked for policies and procedures regarding the use of dual moves. Commission stakeholders from all aspects of the industry have repeatedly spoke of merits of dual moves and they have been widely recognized as a solid method of alleviating congestion. In situations in which a drayage operator does not have a dual move and they are required, dual moves can be an impediment to the return of an empty container. Thus, the Commission has strongly encouraged the use of dual moves, while allowing flexibility for truckers to return an empty if a dual move is not possible.

While most MTOs allowed dual moves, few had programs or policies that actively encouraged or incentivized their use. Of the MTOs that did encourage dual moves, a common method of encouraging or incentivizing dual moves involved easing or removing appointment requirements for dual moves. One MTO said that it would accept empties even if was over a carrier's quota or it was part of a dual move. Nearly all MTOs stated that they recognized the benefits of dual moves.

In sum, the information demands shed some light on the frustration shippers and drayage operators noted regarding notice of where and when empty containers can be returned. It appears that there is a lack of consistency across the United States with respect to the return of empties and it is not always clear who is responsible for communicating return locations. While carriers are taking strides to communicate the information to shippers and drayage operators, there remains a disconnect over who is ultimately responsible for sharing the correct information and how timely the information is shared.

c. Earliest Return Dates

One enduring issue for exporters throughout the Fact Finding was with Earliest Return Dates (ERDs). The information demands asked how carriers provided notice to exporters/drayage truckers of blanked sailings, bypassed ports, or changes to earliest return dates, and how carriers mitigated the effects of those events to exporters and drayage truckers. MTOs were similarly asked whether they post information about earliest return dates and vessel schedules on their website. Though all carriers claimed that they communicated vessel schedule or ERD information to their customers, as with empty container return, responses indicated a large array of methods being employed to communicate information.

A relatively small number of carriers stated that they do not actively notify shippers of changes, instead, these carriers rely on shippers and drayage operators to check the carriers' websites to determine if any changes have taken place. Some carriers distinguished ERD issues from blanked sailing or bypassed port issues and said for ERD concerns, customers need to check with MTOs.

In contrast, other carriers send push notifications or other form of active notice to customers when there are changes to vessel schedules or ERDs. One carrier said, in addition to website updates and push notifications, it also sends emails describing and explaining any changes to ERDs. In addition to enhanced notification systems, two carriers also provide updated bookings in the event there is a blanked sailing or bypassed port. These carriers will automatically update bookings and make alternative plans for shipments already confirmed for the vessels impacted by blanked sailings or bypassed ports. MTOs uniformly stated that they post information about vessel schedules on their websites, but that this information comes from the carrier or is based on information provided by the carrier.

All carriers said that they would mitigate export demurrage or detention charges caused by changes in vessel schedules and ERDs. About half automatically account for vessel schedules or ERD changes in assessing demurrage and detention and will preemptively extend free time or waive demurrage or detention without issuing an invoice and without requiring additional action by the shipper or trucker. Other carriers said that they required the customer to act before

mitigating charges related to schedule changes. Most carriers will extend free time by the same number of days the vessel schedule is delayed.

These findings suggest a variety of methodologies being employed to communicate ERD information to shippers and truckers and supports the need for greater clarity in ERD practices.

d. Innovation Ideas

Finally, carriers were also asked what other solutions (*e.g.*, container depots, collapsible containers, or new carrier offerings) could improve the availability of containers for exports. Many carriers suggested the use of container depots which could mitigate some of the bottlenecks currently experienced. A few others discussed a need for increased supply, including increased container supply or increased rail capacity. Some also noted innovative ideas such as collapsible containers which would allow multiple empty containers to be loaded on a vessel.

Carriers also had suggestions for things that shippers, truckers, and MTOs could do to improve container flow. These included, for example, shippers pooling facilities to facilitate export loading; increasing the size and operating hours for distribution centers and terminals; and improving technology.

e. Container Availability

Questions about the availability of containers for export and, in particular, agricultural exports, were asked through the information demands and additional letters sent to carriers. Carriers emphasized that the driver of cargo from Asia to the U.S. is a demand surge from U.S. consumers. Consequently, carriers stated, they must reposition equipment from the U.S. to Asia to meet their contractual obligations to U.S. importers. Many carriers reported that exports increased from 2019 to 2022. Some carriers further suggested that because of exceptional conditions caused by the COVID pandemic, there were competing demands for the same empty container supply. One carrier noted the historically peak import season (August – October) does not coincide with peak agricultural export season (November – March). But in 2020 and the beginning of 2021, import peak volumes were sustained beyond traditional peak periods, which changed network calculations.

Carriers stated that they do not fill their ships entirely with loaded export containers on the backhaul voyage from the U.S. to Asia. This is in part due to safety considerations, commercial considerations, and congestion considerations. Many carriers noted that because agricultural exports are relatively heavy, they must be balanced with containers loaded with lighter cargo or with empty containers.

5. Supplemental Carrier and Marine Terminal Innovation Teams

There were four primary issues initially identified by the original nine Teams. Of these four, two were resolved in the first phase of the Fact Finding, but two others have persisted throughout, namely issues with the return of empty containers and issues with earliest return dates. Using the information gathered over the last two years, in late 2021 and early 2022, the Fact Finding Officer convened team meetings with carriers on an alliance-by-alliance basis, together with their terminal partners, to explore commercial solutions to these two outstanding issues.

These Teams met between November 2021 and February 2022 and discussed potential commercial solutions to lingering issues with ERDs and empty return. Teams explored some of the previous proposals on these issues identified by the Fact Finding and by the CPP. Ultimately through these meetings, a new framework was developed by the Fact Finding Officer that emphasized coherence at the ports. This framework was presented to the Teams for their thoughts on its feasibility.

With respect to container return, the emphasis was on creating a reliable container return process. Specifically, containers should always be allowed to be returned to the originating terminal, regardless of whether other locations are available, operations should emphasize and encourage the use of dual moves. When, in rare cases it is not possible to return a container to the terminal of original pickup, notice should be received by at least 1:00pm the day before and requirements for appointments at the new terminal should be waived.

With respect to ERDs, the emphasis was on improving certainty for exporters. Specifically, confirming that the carrier is responsible to communicate

the ERD to shippers, but MTOs and carriers will communicate to establish reliable ERD information for exporters. In rare cases in which a terminal cannot honor the original ocean common carrier's ERD or on occasions where a vessel is delayed after an export container is delivered to the terminal in accordance with the carrier's ERD, the carrier and terminal will not invoice or otherwise charge export demurrage to the shipper.

Like previous proposals from the Fact Finding and from outside, team members had mixed reactions to the effectiveness of these proposals. Some questioned the feasibility of incorporating these changes during this time of extreme congestion in seaports and terminals.

III. FACT FINDING OFFICER CONCLUSIONS FROM PHASE I AND PHASE II

A. International Ocean Freight Pricing and Market Analysis

1. Background

Over the course of Fact Finding 29, the focus of the investigation has shifted to meet new demands and respond to the interests and needs of stakeholders. One area of increased concern is the increased price of ocean shipping in the wake of the pandemic. Ocean shipping freight rates have risen dramatically in the last two years. The average spot market price of shipping a 40-foot container hovered around $1,500 in the first week of May 2020, reached a peak of $11,109 in September 2021, and in spring 2022, are near $9,000.[61] This average increase in prices has strained exporters and importers and the Fact Finding Officer is aware and acknowledges concerns that have been both raised by shippers and reported in the trade press.

[61] Figures were taken from the Freightos Baltic Index (FBX): Global Container Freight Index. Available online at: https://fbx.freightos.com/.

Freight rates for ocean shipping are subject to volatility.[62] Supply and demand fluctuates on an annual and seasonal basis, and due to external events. Notwithstanding the nature of freight rates, as discussed throughout this report, the effects of the COVID-19 pandemic were evident in the global supply chain quickly and intensely.

Consumer spending also was dramatically impacted by the change in circumstances.[63] As people stayed home and governments imposed lockdowns and restrictions, consumer spending on goods, particularly through e-commerce, rather than services, surged in the fall of 2020.[64] This increased demand overwhelmed limited supply, which was further affected by other COVID-19 impacts, such as government restrictions and decreased workforces because of illness.[65] Supply chain congestion globally further decreased the available supply of ship capacity and container availability for exporters and importers.

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[62] Fernando Leibovici and Jason Dunn, *The Dynamics of International Shipping Costs, Federal Reserve Bank of St. Louis,* (Jan. 3, 2022), https://www.stlouisfed.org/on-the-economy/2022/january/dynamics-international-shipping-costs#:~:text=A%20salient%20feature%20of%20the,in%20the%20week%20of%20Feb (last visited May. 17, 2021)("Our first observation is that international shipping costs are volatile. Their deviations from trend prior to COVID-19 range from -26.8% to 19.0%, with a standard deviation of 12.8%. Thus, even though recent changes of international shipping costs stand significantly above this range, it is important to note that seaborne shipments typically feature significant price swings even outside crisis episodes.").

[63] *Id.* ("These sharp changes in international shipping costs are partially in response to the COVID-19 economic environment. Unprecedented levels of fiscal stimulus, combined with a sharp reallocation of demand from services into durable goods, have been straining supply chains, leading to the resurgence of inflation across developed economies. Given that durable goods are particularly likely to be traded internationally, these developments have led to the increased demand for international shipping services and, thus, to the rise of international shipping costs.").

[64] *See* United Nations Conference on Trade and Development, *Review of Maritime Transport 2021,* https://unctad.org/system/files/official-document/rmt2021_en_0.pdf.

[65] United Nations Conference on Trade and Development, *High freight rates cast a shadow over economic recovery,* (Nov. 18, 2021), https://unctad.org/news/high-freight-rates-cast-shadow-over-economic-recovery ("This large swing in containerized trade flows was met with supply-side capacity constraints, including container ship carrying capacity, container shortages, labour shortages, continued on and off COVID-19 restrictions across port regions and congestion at ports. This mismatch between surging demand and de facto reduced supply capacity then led to record container freight rates on practically all container trade routes.").

Even as COVID-19 cases dropped, vaccines became available, and the impact of the pandemic was less pronounced at ports and with supply chain actors, the supply remained outmatched by the demand.[66]

2. Commission Competition Enforcement and Shipping Act 6(g) Standard

The number of major carriers in the U.S. transpacific and Atlantic trades has decreased from 20 in 2015 to 11 by 2022, due to ocean carrier mergers and the bankruptcy of one major carrier.[67] The Federal Maritime Commission and the Department of Justice have a statutory division of competition authority over international liner shipping in the U.S. trades. The Department of Justice reviews and approves *mergers* of ocean carriers.[68] The Federal Maritime Commission analyzes the competitive market effects of collaborative agreements among competitors, such as vessel sharing agreements (alliances are vessel sharing agreements that operate globally) or joint ventures. It is noted that market concentration results from mergers, not from the market effects of collaborative agreements among competitors.

While it is characterized as an "exemption," the Shipping Act of 1984 is not an exemption from the antitrust laws, but an *alternative competition regime* put in place by Congress in recognition of the multinational nature of international ocean

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[66] In response, ocean carriers are responding to the imbalance between supply and demand by ordering of new vessels. Through this investment, carriers are responding to the lack of supply. While ultimately these orders will increase supply, it will be sometime before their effects are felt due in part to the time necessary to produce new vessels and the time it will take for the market to feel their effect.

[67] The ocean carrier consolidation and bankruptcy since 2014 include:

CSAV and Hapag-Lloyd merger (2014);
COSCO and China Shipping merger (2016, announced in 2015 but not completed until Feb. 2016);
Hanjin bankruptcy (2016);
CMA CGM purchase of APL through acquisition of NOL (2016);
Maersk purchase of Hamburg Sud (2017);
COSCO purchase of OOCL (completed 2018, announced 2017);
Hapag-Lloyd/UASC merger (2017); and
MOL/K Line/NYK joint venture as ONE (2017/2018).

[68] The Fact Finding Officer believes that the most wholistic approach would be to include ocean carrier merger activity under the FMC, similar to railroad merger activity which is overseen by the Surface Transportation Board.

shipping and importance of working with our international trading partners in this arena. The Federal Maritime Commission, with its specialized knowledge and expertise, is the agency responsible for administering this alternative competition law. The competition standard in the Shipping Act of 1984, as amended, 46 U.S.C. § 41307(b)(1), is modeled on the same laws administered by the Department of Justice.[69] The basic framework for initial analysis aligns with established guidelines used for evaluating collaboration among competitors and is performed by economists and industry analysts who are experts in the ocean transportation system.[70]

Agreements that may pose competitive concerns are subject to continuous monitoring by Commission staff. The Commission validates the data and information collected through our monitoring with external sources of information on ship schedules, capacity, and measures of cargo moved. The FMC also regularly reviews and revises monitoring data to ensure that the data collected aligns with the realities of the industry. During the pandemic, "blank sailings" were a particular concern because of their potential to be used for anti-competitive purposes. Our monitoring, however, indicated that this reduced service by ocean carriers was driven by port congestion rather than a desire to reduce capacity, and delays and skipped ports have been a frequent occurrence. The Commission staff have adjusted the data collected on blank sailings to provide additional detail on the factors driving schedule delays and blanked sailings.

There are three global alliance agreements on file with the Commission: 2M, OCEAN, and THE. These agreements contain authority for the carriers to share vessels, exchange space, and coordinate scheduling and utilization, among other provisions. These are the most heavily monitored carrier agreements, due to the potential anticompetitive impacts from their authority to efficiently use their

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[69] Section 6(g) of the Shipping Act of 1984, 46 U.S.C. § 41307(b)(1), is modeled on the Hart-Scott-Rodino Antitrust Improvements Act of 1976 which amended the Clayton Act to require companies to file premerger notifications with the Federal Trade Commission and the Antitrust Division of the Justice Department for certain mergers and acquisitions.

[70] Federal Trade Commission and Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, (April 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

resources. As of May 5, 2022, the three global ocean carrier alliances and each of their member companies will now be required to provide enhanced pricing and capacity information. Additional agreement changes may be required by the Commission to alleviate competition concerns as warranted.

3. Market Analysis

Though there have been charges of illegal activity or concerns of market concentration driving increased ocean freight costs, the Fact Finding Officer's assessment is that our transpacific market is not concentrated and that the increased rates in that market are a result of an extreme spike of consumer demand in the United States that overwhelmed the supply of ship capacity. Similarly, the U.S. Atlantic market for ocean shipping is barely concentrated, and increased rates in that market are also a result of overwhelming U.S. demand.[71] Furthermore, a reassuring data trend indicates that the individual ocean carriers within each alliance continue to compete on pricing and marketing independently and vigorously. Individual ocean carriers within alliances continue to add and withdraw vessels from trades both inside and outside the alliances in which they participate and, particularly in the transpacific, new entrants have been entering the trade. The transpacific is a highly contestable market.

Using the Herfindahl–Hirschman Index (HHI) the Commission's Bureau of Trade Analysis has found that the transpacific markets are competitive and have been for some time. In fact, moving beyond HHI, the fact that the non-alliance share in the transpacific increased throughout 2021 provides further evidence of competition in that market. The transatlantic numbers are slightly higher in terms of HHI, indicating a moderately concentrated market over the past year, but is at the very bottom of that range.

The Commission has ongoing contact with our international ocean liner competition partners. Competition officials of the European Union, China, and the

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[71] Similar conclusions have been reached by European counterparts. *See* Peter Thomsen, *EU rejects cartel charges against carriers*, ShippingWatch, (Feb. 2, 2022), https://shippingwatch.com/regulation/article13757511.ece#:~:text=The%20European%20Commission%20denies%20allegations.alliances%2C%20states%20spokesperson%20to%20ShippingWatch. (last visited May 17, 2022) ("It was concluded that so far no evidence of anti-competitive behavior from shipping alliances aimed at increasing freight rates has been identified").

Federal Maritime Commission regularly discuss our ocean shipping markets and we have, to date, observed no indication that the current prices for liner shipping are a result of collusive or illegal conduct on the part of the major ocean carriers in our markets.

B. Detention and Demurrage

1. Interpretive Rule

The second category of concern that the Fact Finding Officer heard about from stakeholders during the Fact Finding was detention and demurrage charges and other new charges by carriers and marine terminals. Many have charged that empty container return practices, and other carrier practices, have not only resulted in increased operating costs, but in many cases, resulted in demurrage and detention charges due to terminals unwillingness to accept empty containers.

Issuing the Interpretive Rule on Demurrage and Detention Under the Shipping Act in May 2020, was one of the biggest challenges the Commission has ever undertaken. Demurrage and detention charges are controversial internationally. The United States is the first nation to take steps to confine the charges to the purpose for which they are intended: to incentivize shippers to pick up cargo and return equipment during allotted time periods. Central to the Commission's Interpretive Rule on Demurrage and Detention is the principle that detention and demurrage charges and policies should serve the primary purpose of incentivizing the movement of cargo and promoting freight fluidity.

The Commission employed an Interpretive Rule to provide a standard – the incentive principle – to govern analysis of detention and demurrage charges. This standard is issued under the existing statutory requirements of 46 U.S.C. § 41102(c) that ocean carrier and marine terminal operators "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 Interpretive Rule is based on the incentive principle – that detention and demurrage fees must facilitate freight fluidity. In effect, this principle allocates the risk of congestion to those in the best position to address the issues – ocean common carriers, seaports, marine terminal operators, and in some cases, shippers.

The Commission is enforcing the Interpretive Rule to define and address "unreasonable" detention and demurrage charges. Cases have been filed, giving the Commission the opportunity to clarify unreasonable charges. Based on information developed as part of our "Vessel-Operating Common Carrier Audit Program," the Commission is moving forward to investigate situations that may violate 46 U.S.C. § 41102(c) in the case of demurrage and detention.

2. Information Demands

Due to concerns that carriers were not following the Commission's rule on detention and demurrage practices, the Fact Finding Officer issued information demands to ocean carriers about their detention and demurrage practices. The Fact Finding also solicited information and evidence from shippers, truckers, intermediaries, and their trade associations and required carriers and marine terminal operators to provide information and evidence on demurrage and detention, empty container return, and export container availability.

3. Enforcement of Interpretive Rule

A major misunderstanding surrounds the nature of the Demurrage and Detention Interpretive Rule. The Interpretive Rule is ***not*** merely guidance. We have issued several "guidance statements" as part of Fact Finding 29, and they are useful regulatory tools. But the Interpretive Rule acts as the "interpretation" of demurrage and detention charges as potential "unreasonable practices" under section 41102(c) of Title 46, United States Code.[72] The Interpretive Rule is the basis for Commission investigations of potential violations of section 41102(c) against ocean carriers for unreasonable practices regarding demurrage and detention. This law enforcement aspect of Fact Finding 29 is aimed at potential unreasonable demurrage and detention charges and is currently underway, and it may result in civil penalty proceedings or other formal enforcement actions.

Based on the Interpretive Rule, the Commission has completely reoriented our resources to focus on demurrage and detention, including beginning a new

[72] Without the Interpretive Rule, it would take years of investigations and complaints for the Commission to develop a coherent approach to "unreasonable" demurrage and detention charges case-by-case.

program to reach out to ocean carriers and audit their demurrage and detention compliance.

4. Need for Information on Which to Base Enforcement Actions

One final point regarding a violation of any law or regulation: to enforce the Interpretive Rule, the Commission must be made aware of the facts surrounding a potential violation to pursue an investigation. Whether it is through a complaint or a notice to the Commission's Bureau of Enforcement, the Commission needs facts to pursue demurrage and detention violations.

IV. COMMISSION ACTION: INTERM AND SUPPLEMENTAL RECOMMENDATIONS

A. Interim Recommendations

On July 28, 2021, during the open session of a Federal Maritime Commission meeting, the Fact Finding Officer provided the Commission with Interim Recommendations to address current conditions contributing to inefficiencies and congestion in the freight delivery system exacerbated by impacts associated with the ongoing COVID-19 pandemic.[73] The recommendations aimed at minimizing barriers to private party enforcement of the Shipping Act, clarifying Commission and industry processes, encouraging shippers, drayage operators, and other stakeholders to assist Commission enforcement actions, and support the ability of our Office of Consumer Affairs and Dispute Resolution Services to facilitate prompt and fair dispute resolution and assist shippers in emergency situations.

In sum, eight interim recommendations were submitted to and approved by the Commission to address the three goals:

- Minimizing Barriers to Private Party Action;
- Clarifying Commission and Industry Processes; and

[73] FMC Press Release: *Remarks of Commissioner Rebecca Dye on Fact Finding 29 Interim Recommendations*, (Jul. 28, 2021), https://www.fmc.gov/remarks-of-commissioner-rebecca-dye-on-Fact Finding-29-interim-recommendations/.

- Encouraging Assistance with Commission Investigation.

The Commission voted to implement the four recommendations that do not require legislative action in September 2021. As of the writing of this report, all these recommendations have either been accomplished or are underway at the Commission.

1. Minimizing Barriers to Private Party Action

Despite persistent criticism of carrier and terminal practices since the very beginning of Fact Finding 29, few private parties have filed complaints seeking reparations. This apparent disconnect fueled discussions with stakeholders and an internal review of Commission policies. It appears that shipper and trucker concerns about retaliation, litigation costs, and attorney fees are important disincentives to private party enforcement of 46 U.S.C. § 41102(c). The Fact Finding Officer recommended three actions to address these concerns:

- Amend section 41104(a)(3) of title 46, United States Code, to broaden the anti-retaliation provision in the Shipping Act to respond the concerns raised by shippers, especially exporters;
- Amend section 41305(c) of title 46 to authorize the Commission to order double reparations for violations of section 41102(c), with Commission guidance focusing this provision on demurrage and detention violations and other types of cases or behavior; and
- Issue a Commission policy statement regarding three areas related to private party complaints: retaliation, attorney fees, and representational complaints, including trade associations.

The first recommendation is a request from the Fact Finding Officer to Congress to amend the statute to remove a potential barrier to private party action. This recommendation was based on perceived fears from the industry that they will face retaliation when filing a complaint. The Shipping Act does prohibit retaliation,[74] but it only applies to retaliation by carriers against "shippers," it does not apply to retaliation by other regulated entities or to retaliation against non-shippers, such as drayage operators or others working on behalf of shippers. Thus,

[74] 46 U.S.C. § 41104(a)(3).

the Fact Finding Officer recommended amending the statue to reflect the different types of entities who could be subject to retaliation and to make clear that 46 U.S.C. § 41104(a)(3) is not limited to protecting competition among carriers, but also protects the ability to complain to the Commission about potentially unlawful conduct free from retaliatory fears.

The second recommendation is also for a statutory change and again asks Congress to remove a potential barrier to private party action. One potential disincentive to private party complaints is the cost of litigating against carriers or marine terminal operators, especially when the amount in dispute may be comparatively small. The Fact Finding Officer recommended that Congress change these incentives, and deter unlawful demurrage and detention practices, by amending 46 U.S.C. § 41305(c) to add 46 U.S.C. § 41102(c) to the list of prohibitions for which double reparations are available.

The third recommendation was to create Commission guidance or "policy statements" on three areas related to private party complaints: (1) the current anti-retaliation prohibition, (2) attorney fees, and (3) who may file a complaint. All three policy statements were issued on December 28, 2021 and were announced via press release[75] and through the Federal Register.[76]

In the first policy statement (Docket No. 21-13), the Commission reiterated that shippers' associations and trade associations may file a complaint alleging a prohibited act violation under 46 U.S.C. Chapter 411. This allows these organizations to protect the interests of their members while also providing shippers with a degree of separation and insulation from potential retaliation.[77] The second statement (Docket No. 21-14) explained the Commission's approach on attorney fees and reiterates that a party who brings an unsuccessful complaint is not automatically required to pay the other party's attorney fees.[78] The

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[75] *See* Press Release: FMC Policy Statements Provide Guidance on Complaints Process, (Dec. 18, 2021), https://www.fmc.gov/fmc-policy-statements-provide-guidance-on-complaints-process/.

[76] 87 Fed. Reg. 13292.

[77] Docket No. 21-13: *Statement on Representative Complaints,* (Dec. 28, 2021), https://www2.fmc.gov/readingroom/docs/21-13/21-13_Representative_Complaints.pdf/.

[78] Docket No. 21-14: *Statement on Attorney Fees,* (Dec. 28, 2021), https://www2.fmc.gov/ReadingRoom/docs/21-14/21-14_Policy_Atty_Fees.pdf/.

Commission will look favorably upon complainants who raise non-frivolous claims in good faith, who litigate zealously but within the rules and for proper purposes, and who comply with Commission Orders. Finally, in the third statement on retaliation (Docket No. 21-15), the Commission emphasized that it broadly defined both who can bring a retaliation complaint, as well as the types of shipper activity that is protected under the existing retaliation prohibitions. This policy statement also addresses the proof necessary for certain retaliation complaints.[79]

2. Clarifying Commission and Industry Processes

Throughout the Fact Finding, stakeholders repeatedly demonstrated confusion with the processes currently available at the Commission. There was misunderstanding, for example, about the differences between small claims and formal private party complaints, and between private party complaints and "complaints" to the Commission alleging potential violations of the Shipping Act for investigation or "complaints" to the Office of Consumer Affairs and Dispute Resolution Services (CADRS) for requests for dispute resolution services. To remedy this confusion and to generate more interest in using the preexisting Commission processes, the Fact Finding Officer recommended:

- Revising the Commission's website to provide clarity regarding the Commission's existing processes to bring factual allegations to the Commission for resolution; and
- Holding a webinar to explain Commission processes.

The first two recommendations were aimed at accomplishing the same objective, clarifying Commission processes. The Fact Finding Officer recommended that the Commission's website should more clearly explain the differences between private party complaints, the Bureau of Enforcement's investigation and enforcement process, and dispute resolution services provided by CADRS. While all this information is currently on the Commission's website, housing it on the same page will allow stakeholders to discern the differences more clearly. Similarly, holding a webinar that discusses all three options and compares them could help dispel confusion and may aid the public as they choose a process.

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[79] Docket No. 21-15: *Statement on Retaliation*, (Dec. 28, 2021), https://www2.fmc.gov/ReadingRoom/docs/21-15/21-15_Policy_Retaliation.pdf/.

This webinar was released on April 25, 2022.[80] To further aid the public on February 15, 2022, the Fact Finding Officer issued a press release explaining options for filing complaints at the FMC.[81]

In addition to clarifying Commission practices, the Fact Finding Officer also recommended action to clarify industry practices, specifically with respect to billing. Throughout the Fact Finding, industry members reported confusion about the information contained in invoices. Although the Commission declined to prescribe specific billing practices in the Interpretive Rule on Demurrage and Detention,[82] it nonetheless referred to the content and clarity of practices and regulations regarding demurrage and detention billing in the final rule, 46 C.F.R. § 545.5(d). To evaluate whether further action should be taken to clarify billing practices, the Fact Finding Officer recommended:

- Issuing a rulemaking concerning information on demurrage and detention billings.

Since the close of Fact Finding 28 and the issuance of the Interpretive Rule, the Surface Transportation Board adopted a rule requiring certain rail carriers to include "certain minimum information on or with demurrage invoices and provide machine-readable access to the minimum information."[83] The Fact Finding Officer recommended that the Commission issue an Advanced Notice of Proposed Rulemaking (ANPRM) to assess whether a similar rule is appropriate in the ocean shipping context.

The Commission recently moved forward on this Interim Recommendation. On February 4, 2022, the Commission voted unanimously to issue an ANPRM seeking information from the public on whether a new rule governing demurrage and detention billing practices would benefit the trade.

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[80] FMC Press Release: *FMC Launches Instructional Video on How to File Complaints,* (Apr.25, 2022), https://www.fmc.gov/fmc-launches-instructional-video-on-how-to-file-complaints/.

[81] FMC Press Release: *Commissioner Dye Explains Options for Filing Complaints at FMC*, (Feb. 15, 2022), https://www.fmc.gov/commissioner-dye-explains-options-for-filing-complaints-at-fmc/.

[82] 85 Fed. Reg. at 29661.

[83] Final Rule: Demurrage Billing Requirements, 86 Fed. Reg. 17735 (Apr. 6, 2021).

The ANPRM requested comments on five areas related to demurrage and detention billing and whether they should be subject to future regulation. These include what data should be included on bills, reasonable timeframes for billing and response, and whether other charges should be included in billing regulation. The ANPRM noted the Commission is considering the merits of establishing regulations mandating certain minimum information be included in bills issued for demurrage and detention. Through the ANPRM, the Commission is also considering prescribing a maximum period in which an invoice can be sent. The ANPRM also inquired whether this rule should apply to marine terminal operators and non-vessel-operating common carriers in addition to vessel-operating common carriers. The ANRPM was published in the Federal Register on February 25, 2022, with comments due on March 17, 2022.[84] This comment period was later extended to April 16, 2022[85] and the Commission received eighty-one comments.

3. Encouraging Assistance with Commission Investigation

Though the Commission brings enforcement actions under 46 U.S.C. § 41302(a), the Commission needs stakeholders to participate in all stages of the enforcement process. Not only does the Commission use information provided by stakeholders to inform the Commission of violations, but as noted above, the Commission also needs stakeholders who are willing to support enforcement actions. To encourage members of the shipping community to aid the Commission in its enforcement actions, the Fact Finding Officer recommended:

- Amending 46 U.S.C. §§ 41109 and 41309 to authorize the Commission to order refund relief in addition to civil penalties in enforcement proceedings.

Under the current statutory framework, in an enforcement proceeding, the Commission can assess a civil penalty for a violation of a prohibited act,[86] but that penalty goes to the United States Government, not injured parties.[87] The Fact Finding Officer believes that granting the Commission the discretionary authority

[84] ANPRM: Demurrage and Detention Billing Requirements, 87 Fed. Reg 8506, (Feb 25, 2022).

[85] Extension of Comment Period, 87 Fed. Reg. 15179, (Mar. 11, 2022).

[86] 46 U.S.C. §§ 41107(a), 41109.

[87] *Id.* at § 41107(a).

to order refunds in enforcement proceedings in addition to civil penalties, or in lieu of civil penalties, would incentivize parties to work with Commission investigatory staff.

4. Bolstering CADRS

Throughout the Fact Finding, stakeholders repeatedly mentioned the benefits of the Office of Consumer Affairs and Dispute Resolution Services (CADRS) and the vital role it plays in assisting stakeholders resolve disputes without litigation. In doing so, CADRS serves as a liaison between different groups and educates them about their responsibilities. Export-related issues are similar but not identical to import-related issues. Due to the rise in export-related issues, the Fact Finding Officer recommended:

- Designating an Export Expert in CADRS.

On December 18, 2021, a Commission staff member was detailed to this position to begin assisting stakeholders encountering export issues. The experienced staff member has been permanently reassigned to assist CADRS as the export advocate to promptly address export matters. In addition, the Commission is actively recruiting and hiring positions to provide further resources for CADRS.

Through later work with carriers, the Fact Finding Officer also worked to revitalize the "Rapid Response" program housed in CADRS. The Commission established Rapid Response Teams in 2010 to provide prompt solutions for commercial disputes between shippers and carriers. The Fact Finding Officer was able to secure a recommitment from carriers to commit Chief Operating Officers to this program for resolving the most urgent emergencies.

B. Final Recommendations

The last two years have demonstrated that the Commission is uniquely positioned to handle the challenges facing our global supply chain. While the primary focus of this investigation has been seeking commercial solutions, there have been moments where direct Commission action was warranted. In the Supplemental Order issued in November 2020, the Commission endorsed the Fact Finding Officer to investigate: (1) practices and regulations related to demurrage

and detention, (2) empty container return in light of 46 C.F.R. § 545.5, and (3) practices related to the carriage of U.S. exports.

Much time has been spent in this report documenting efforts and actions taken by the Fact Finding Officer to investigate and provide relief to demurrage and detention issues, including initiating a rulemaking earlier this year to bring clarity to demurrage and detention billing practices. With respect to the issues of empty container return and U.S. exports, the Fact Finding Officer also believes the industry could benefit through additional recommendations, collaboration, and new rulemakings to similarly bring coherence and clarity to these sectors of the industry. The Fact Finding Officer, therefore, recommends the following additional recommendations:

- A new Commission "International Ocean Shipping Supply Chain Program" with dedicated personnel;
- A rulemaking to provide coherence and clarity on empty container return practices;
- A rulemaking to provide coherence and clarity on earliest return date practices;
- Continued Commission support for the new FMC "Vessel-Operating Common Carrier Audit Program" including developing a new requirement for ocean common carriers, seaports, and marine terminals to employ an FMC Compliance Officer;
- An FMC outreach initiative to provide more information to the shipping public about FMC competition enforcement, service contracts, forecasting, and shippers associations, among other topics;
- An enhanced cooperation with the federal agency most experienced in agricultural export promotion, the Department of Agriculture, concerning container availability and other issues;
- A Commission Investigation into practices relating to charges assessed by ocean common carriers and seaports and marine terminals through tariffs;
- A rulemaking to provide coherence and clarity on merchant haulage and carrier haulage;
- A new "National Seaport, Marine Terminal, and Ocean Carrier Advisory Committee" to work cooperatively with the Commission's National Shipper Advisory Committee;

- A revival of the Rapid Response Team program as agreed by all ocean carrier alliance CEOs;
- A FMC Supply Chain Innovation Teams engagement to discuss blank sailing coordination and information availability; and
- A reinvigorated focus on the extreme supply chain equipment dislocations in Memphis railheads, other rail facilities and other facilities around the country.

These recommendations are discussed more fully below.

1. New FMC Supply Chain Program

Over the last five years, the Commission has supported three investigations to explore and remedy challenges in our international ocean supply chain. In the Supply Chain Innovation Initiative, the focus was on enhancing supply chain reliability and resilience. In Fact Finding 28, the focus was on the effects of demurrage and detention charges. In Fact Finding 29, the emphasis has been on ocean supply chain issues exacerbated by the COVID-19 pandemic.

Throughout each of these investigations, the Fact Finding Officer has dealt with international ocean supply chain disruptions. The reasons that these problems persist despite great strides made by the industry and the Commission, resides in the nature of the supply chain. The United States international ocean supply chain is a complex system, and the operational interdependence of the actors within it make it difficult to develop solutions to individual supply chain challenges.

Fortunately, the Commission stands in a unique place to understand and address the issues facing the U.S. international ocean freight delivery system. Therefore, the Fact Finding Officer strongly supports a dedicated program office for studying and addressing the growing needs in our Nation's supply chain. This dedicated program office should study the issues facing our supply chain and propose solutions to challenges.

2. Rulemaking on Empty Container Return

In the November 2020 Supplemental Order, the Commission endorsed the Fact Finding Officer's efforts to investigate, among other things, empty container

return in light of 46 C.F.R. § 545.5 in our major gateways. Over the last two years, teams have explored three approaches to dealing with these issues and dozens of meetings were conducted exploring potential solutions. The Fact Finding Officer also obtained information on the practices of carriers and terminals on these issues through the use of information demands. The data collected emphasized the need for the Commission to regulate the communication of vital information to shippers.

Again, issues with empty container return are not new. In its Final Rule on demurrage and detention the Commission stated 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."[88] However, trucker complaints about difficulties in timely returning empty containers persisted after the Commission published its interpretive rule and increased in light of supply chain disruptions associated with the COVID-19 pandemic. The information demands served in the Fact Finding sought information from carriers and terminals on notification processes for empty container return and impediments to empty container return. Specifically, how much notice is given regarding return policies and what happens when inadequate notice is given. These two areas were identified as problematic issues in both the team meetings in 2020 and through follow up conversations with stakeholders.

As noted in the earlier discussion, the information demands shed some light on the frustration shippers and drayage operators noted regarding notice of where and when empty containers can be returned. It appears that there is a lack of consistency across the United States with respect to the return of empties and it is not always clear who is responsible for communicating return locations. While carriers are taking strides to communicate the information to shippers and drayage operators, there remains a disconnect over who is ultimately responsible for sharing the correct information and how timely the information is shared.

The Fact Finding Officer therefore recommends that the Commission begin a rulemaking to bring coherence and consistency to practices surrounding the return of empty containers. Relying on the approaches examined in the

[88] 46 C.F.R. § 545.5(c)(2)(ii).

investigation, the rulemaking should focus on ensuring information is communicated timely and that shippers can rely on the information provided to them.

3. Rulemaking on Earliest Return Dates

The Fact Finding Officer is pleased that American agricultural exporters enjoyed record breaking trade levels in 2021.[89] However, American exporters have still endured hardships over the last two years. One enduring issue for stakeholders throughout the Fact Finding was with earliest return dates (ERDs) for containers. As discussed earlier, the information demands asked how carriers provided notice to beneficial cargo owners/drayage operators of blanked sailings, bypassed ports, or changes to ERDs, and how carriers mitigated the effects of those events to drayage operators and shippers. MTOs were similarly asked whether they post information about ERDs and vessel schedules on their website. Though all carriers stated that they communicated vessel-schedule and/or ERD information to their customers, as with empty container return, responses indicated a large array of methods being employed to communicate information.

Confusion over where to locate reliable information on ERDs and who is ultimately responsible for determining ERDs has frustrated the shipping public. Stakeholders have continued to express frustration regarding poor notice of where and when empty containers can be returned. Others mentioned instances of terminals refusing to receive empty containers, requiring dual transactions, or not having appointments for the return of empty containers. Many further charged that empty container return practices, ERD issues, and other carrier practices, have not only resulted in increased operating costs, but in demurrage and detention charges.

Again, in sum, the information demands and conversations with stakeholders suggest there is a variety of methodologies being employed to communicate ERD information to shippers. The Fact Finding Officer recommends launching an additional rulemaking to bring coherence and consistency to practices surrounding the issuance of ERDs. As with the rulemaking on empty container return, this

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[89] USDA Press Release: *American Agricultural Exports Shattered Records in 2021*, (Feb. 8, 2022), https://www.usda.gov/media/press-releases/2022/02/08/american-agricultural-exports-shattered-records-2021 ("the American agricultural industry posted its highest annual export levels ever recorded in 2021").

rulemaking should rely on the approaches discussed and generated during the Fact Finding and should primarily focus on removing confusion about responsibility and notification procedures.

4. Ocean Carrier and Marine Terminal Compliance Officers

The Supplemental Order directed the Fact Finding Officer to investigate whether carriers' policies, practices and procedures align with the principle, central to the Commission's Interpretive Rule, that detention and demurrage charges and policies should serve the primary purpose of incentivizing the movement of cargo and promoting freight fluidity.

The Commission currently focuses resources on industry-wide compliance with the demurrage and detention Interpretive Rule and underlying statutory authorization. This includes actions taken by the new Commission audit teams, and the Commission's compliance program to ensure conformity with the Commission's regulations.

To aid in compliance operations, the Fact Finding Officer further recommends a new regulatory requirement that all ocean carriers and MTOs designate a Commission compliance officer who reports directly to the Chief Executive Officer (USA). Having designated officials responsible for FMC compliance will aid in ensuring industry-wide observance of the law and Commission regulations.

5. Outreach Initiatives to Stakeholders

One of the first findings of Fact Finding 29 was a lack of awareness in the industry of how the Commission can serve stakeholders. Over the last two years, the Fact Finding Officer has shared information and advice to the shipping public. In the Interim Recommendations, the Fact Finding Officer provided information to the public on filing complaints through the issuance of three policy statements and the publication of an instructional video. The Fact Finding Officer recommends the Commission continue to focus and support outreach initiatives to continue engaging the shipping public on ways the Commission can assist them.

6. Enhanced Interagency Cooperation for Agricultural Exporters

The Fact Finding Officer encourages increased Commission engagement with the U.S. Department of Agriculture, whose experience and expertise in handling the needs of exporters could be of great value to the Commission. One of the most important issues to be addressed for agricultural exporters involves access to ocean shipping containers. Container availability is a chronic challenge for agricultural exporters and the Commission should engage with the U.S. Department of Agriculture to assist U.S. exporters in this and other vital matters.

7. Commission Investigation into Tariff Surcharges and Other Charges

There are currently only limited Commission regulations to evaluate charges by ocean common carriers, MTOs, and seaports, contained in tariffs. Specifically, with any tariff change or rate increase, ocean common carriers are required to provide a 30-day notice to shippers and ensure that published tariffs are clear and definite. Recently, stakeholders have raised concerns about new charges appearing in their invoices. The Fact Finding Officer recommends the Commission launch an investigation into practices by carriers, MTOs, and seaports relating to charges assessed through tariffs.

8. Rulemaking to Define Merchant Haulage and Carrier Haulage

Throughout the course of the Fact Finding, a number of stakeholders have expressed a lack of clarity among the parties regarding the differences between merchant haulage and carrier haulage. Having a clear definition of these terms will provide coherence and definition for the responsibilities of parties. The Fact Finding Officer recommends a rulemaking that defines these terms for the shipping public.

9. New National Seaport, Marine Terminal, and Ocean Carrier Advisory Committee

One of the recommendations of the Fact Finding 28 investigation was the development of a Commission shipper advisory committee. The charter for the National Shipper Advisory Committee (NSAC) was issued on June 7, 2021, and

the committee has been meeting regularly since then. The Committee provides information, insight, and expertise pertaining to conditions in the ocean freight delivery system to the Commission. The Fact Finding Officer believes the Commission and the National Shipper Advisory Committee would equally benefit with the creation of an ocean carrier, seaport, and marine terminal advisory committee. This was identified early in the Fact Finding 29 investigation[90] and could serve the Commission as it continues to deal with issues pertaining to the industry.

10. Rapid Response Team in Office of Consumer Affairs and Dispute Resolution Services

The Commission has successfully used Rapid Response Teams (RRTs) in CADRS to provide a prompt solution for emergency commercial disputes between exporters and ocean carriers. In the past, the success of this program depended on carrier CEO level participation in this process. The involvement of high-level company leadership ensured that concerns were addressed and resolved quickly. Unfortunately, over the years, carrier CEO level participation with the Commission RRTs has diminished.

The Commission should reestablish a RRT process that involves ocean carrier CEOs. Through meetings with the CEOs of the U.S.-based subsidiaries of all major ocean carriers, the Fact Finding Officer has obtained their commitment to the program. This program will ensure that the most serious and time-sensitive issues are addressed and resolved promptly.

11. FMC Supply Chain Innovation Teams on Blank Sailings

Early in the pandemic, shippers struggled with remaining informed on blanked sailings and bypassed ports. Recently, stakeholders have raised concerns about information availability and coordination with respect to blanked sailings. The Fact Finding Officer recommends engaging Innovation Teams to identify commercial solutions to lingering issues with blanked sailings and other issues.

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[90] *See* FMC Press Release: *Commissioner Dye Announces Findings of San Pedro Bay Discussions*, (Jun. 17, 2020), https://www.fmc.gov/commissioner-dye-announces-findings-of-san-pedro-bay-discussions/.

12. Memphis Supply Innovation Team

The Fact Finding Officer strongly recommends a reinvigorated focus with the Surface Transportation Board on the critical equipment dislocations in Memphis and in other rail facilities around the country. Unfortunately, the situation in Memphis and in railheads around the country has deteriorated. The Fact Finding Officer strongly encourages a renewed effort to resolve the challenges faced by stakeholders in Memphis.

V. PATH FORWARD – MUTUALLY ENFORCEABLE CONTRACTS

For the last two years, the international ocean supply chain has weathered effects of the COVID-19 pandemic, exacerbated by an unprecedented surge in consumer demand created in part by COVID-19 lockdowns and facilitated by e-commerce. Whether high consumer demand and the resulting congestion is the "new normal," time will tell. The Fact Finding Officer believes that the actions taken pursuant to the Interim Recommendations, and the approval and implementation of the Final Recommendations, will address a number of the challenges experienced in the international ocean supply chain as a result of COVID-19.

The Fact Finding Officer also believes that to address bottlenecks in the supply chain and make the ocean supply chain more efficient, it is crucial that shippers and ocean carriers move beyond vague and unenforceable rate agreements. One important thing for shippers and carriers alike would be for service contracts to entail a "meeting of the minds" with mutual obligations and commitments that are part of enforceable commercial documents. This is what was anticipated in the Ocean Shipping Reform Act of 1998. Mutual commercial commitments and understanding will provide protection for exporters and importers from volatile shipping rates and the forecasting that ocean carriers need to provide capacity to serve the needs of their customers.

ACKNOWLEDGEMENTS

This has been the fourth Fact Finding Investigation for which I have served as Fact Finding Officer during my tenure at the Commission. Of the three, I have found this one, launched to respond to a global pandemic, to be the most challenging – and the most rewarding. First, I wish to thank my fellow Commissioners for placing their confidence and trust in me to examine these issues and make recommendations to eliminate bottlenecks in the U.S. international ocean supply chain caused or exacerbated by the COVID-19 pandemic. I wish to thank former Chairman Michael A. Khouri, and current Chairman Daniel B. Maffei, for their unfailing support for this effort.

Second, I wish to thank all the stakeholders that met and communicated with me over the last two years and actively participated in the Innovation Teams that contributed to the work of this Fact Finding. The recommendations flowing from this Fact Finding would not have been nearly as well thought out and beneficial without the participation of those who contributed to this effort. I also wish to acknowledge several on whose work I relied: Bjorn Jensen of Sea Intelligence, Drewry Maritime Research, and the Federal Reserve Banks of St. Louis and Cleveland.

Finally, I wish to thank those here at the Federal Maritime Commission who helped me with this work. I could not have done it without the experienced staff at the Federal Maritime Commission.

Thank you all!

Rebecca F. Dye

APPENDIX

Team Participants

Original Team Members
April 2020

Amazon Global Logistics
Maersk
American Coffee Corporation
Mohawk Global Logistics
APM Terminals
MOL America
ASF Global
MSC
Atlantic Container Line
North American Chassis Pool Cooperative
BassTech International
Northwest Seaport Alliance
Best Transportation
Oliver Wyman
Cal Cartage Transportation
OOCL
Cargill Inc.
Port Authority of New York and New Jersey
CMA CGM America
Port of Long Beach
ContainerPort Group
Port of New Orleans
Fenix Marine Services
Port of Olympia
Flexport
Ports America
Gap, Inc.
Scoular
Gemini Shippers Association
Seaboard Marine
Georgia Ports
SeaCube Container Leasing
Global Container Terminals
South Carolina Ports Authority
Hapag-Lloyd
T.G.S. Transportation
IMC Companies
Target
International Longshore and Warehouse Union
Total Terminals International
ITS Terminals
Walmart
Louis Dreyfus Company
Yusen Terminals
Amazon Global Logistics
ZIM

Carrier Team Participants
May 2020

CMA CGM	Ocean Network Express
Maersk	Hapag Lloyd
COSCO	OOCL
MSC	HMM
Evergreen Line	Yang Ming

Southern California Team
June 2020

Fenix Marine Terminals	Ports America
Total Terminals International	Yusen Terminals

North Atlantic Teams
July 2020

American Coffee Corporation	NJ Motor Truck Association
Gemini Shippers	Best Transit
Association of Bi-State Motor Carriers	Port of New York and New Jersey
IMC Companies	Consolidated Chassis Management
Atlantic Container Line	Seaboard Marine
	Container Port Group

Gulf Coast Teams
September and October 2020

American Coffee Corporation	IPaper.com
Pacorini Group	Rooms To Go
Ceres Global Ag	J.W. Allen
Ports America	The Dupuy Group
DOW Corporation	New Orleans Terminal
ResinTech	Triple G Express

Memphis Team
August 2021

Ashley Furniture Industries
Louis Dreyfus Company Cotton
AutoZone, Inc.
IMC Companies
BNSF Railway
International Paper
CMA CGM
Maersk
CN Railroad
Mallory Alexander International Logistics
COFCO International
Mohawk Global Logistics
Cornerstone Systems
Nike
Delta Strategy Group
Olam International
Dunavant Logistics Group
Port of Memphis
ECOM USA
Protective Industrial Products
FedEx Logistics
Pyramex Safety Products
Greater Memphis Chamber
TCW
IMC Companies
The Mitchell Group
International Paper
Wayfair

Additional Terminal and Carrier Meetings
November 2021 - February 2022

APL
Long Beach Container Terminal
APM Terminals
Maersk
CMA-CGM
Maher Terminals
COSCO
MSC
Evergreen Line
ONE
Everport Terminals
OOCL
Fenix Marine Services
SSA Marine Terminals
Global Container Terminals
Total Terminals International
Hapag Lloyd
Yang Ming
HMM
Yusen Terminals
ITS Terminals

FEDERAL MARITIME COMMISSION

FOREIGN TIRE SALES, INC., *Complainant*

v.

EVERGREEN SHIPPING AGENCY (AMERICA) CORPORATION, AS AGENT FOR EVERGREEN LINE, EVERGREEN GROUP D/B/A/ EVERGREEN LINE, *Respondent.*

DOCKET NO. 22-05

Served: June 6, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's May 3, 2022, Initial Decision Approving Settlement Agreement has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITME COMMISSION

INTERNATIONAL OCEAN TRANSPORTATION SUPPLY CHAIN ENGAGEMENT

Fact Finding No. 29

Served: June 9, 2022

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M. VEKICH, *Commissioners*.

Order Discontinuing Proceeding

On March 31, 2020, the Federal Maritime Commission (Commission) issued an order establishing Fact Finding 29.[1] The primary purpose of the Fact Finding was to identify operational solutions to cargo delivery system challenges related to recent global events and Commissioner Rebecca F. Dye was appointed the Fact Finding Officer.

On November 19, 2020, the Commission issued a supplemental order expanding the scope of the investigation.[2] The

[1] Order: *International Ocean Transportation Supply Chain Engagement*, 85 Fed. Reg. 19146 (April 6, 2020).
[2] Supplemental Order: *International Ocean Transportation Supply Chain Engagement* (FMC November 19, 2020).

expanded scope included investigating whether alliance carriers calling on the Port of New York and New Jersey or the Port of Long Beach and the Port of Los Angeles were employing practices or regulations in violation of 46 U.S.C. § 41102(c).

On May 18, 2022, Commissioner Dye reported her findings to the Commission in the open session of the Commission's Public Meeting, and on May 31, 2022, Commissioner Dye issued her Final Report and accompanying recommendations to the Commission and made the report available to the public via the Commission's website, www.fmc.gov.

THEREFORE IT IS ORDERED, That, this Proceeding is hereby discontinued; and

IT IS FURTHER ORDERED, That, notice of this Order be published in the Federal Register.

By the Commission.

William Cody
Secretary

FEDERAL MARITME COMMISSION

MAVL CAPITAL INC. ET AL.,

Complainants,

v.

MARINE TRANSPORT LOGISTICS, INC. ET AL.,

Respondents.

Docket No. 16-16

Served: June 10, 2022

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M. VEKICH, *Commissioners*.

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 Complainants' claim that Respondent Marine Transport Logistics, Inc. (Marine Transport) violated 46 U.S.C. § 41102(c) by selling two vehicles stored as export/import cargo to cover unpaid fees without prior notice or due process. Marine Transport justified the sale as authorized by its house bill of lading. On remand, the ALJ found Marine Transport acted unreasonably and consistent with its normal, customary, and continuous practice in selling the two

vehicles and that its actions violated § 41102(c). However, the ALJ denied Complainants' claim for reparations because they failed to prove "actual injury" as required by 46 U.S.C. § 41305 and did not produce sufficient reliable evidence substantiating the amounts they seek for the loss of the two vehicles and related expenses. The ALJ also denied Complainants' request to hold Marine Transport's employee, Respondent Dmitry Alper, personally liable for the § 41102(c) violation.

In timely-filed exceptions, Complainants argue that the ALJ misapplied the burden of proof and erred in finding their reparations evidence insufficient. Complainants seek $48,500 for the loss of a 2006 Mercedes SL 26 and $67,000 for the loss of a 2011 Porsche Panamera and $10,000 for ocean freight charges related to the Porsche and also ask to be declared the prevailing parties. Complainants argue that a declaration of value for customs purposes for the Mercedes and a contract from an overseas buyer for the Porsche prove their claim. Marine Transport argues the ALJ's decision is soundly based on the record and legally correct and further asserts that the reparations Complainants seek for the two used vehicles are clearly excessive.

For the reasons set forth below, the Commission affirms the ALJ's decision in its entirety, denies Complainants' claim for reparations for lack of evidence, and denies as premature Complainants' request to be declared the prevailing parties.

I. BACKGROUND

A. Factual Background

Complainants MAVL Capital Inc. (MAVL) and IAM & AL Group, Inc. (IAM) are in the business of importing and exporting vehicles for the overseas market. Initial Decision on Remand (I.D.R.), 6. Maxim Ostrovskiy is a principal in both companies. Marine Transport is a licensed non-vessel operating common carrier (NVOCC), and Dmitry Alper acted as its General Counsel and later

as Director of Operations. *Id.* Complainants stored the Mercedes and the Porsche in Marine Transport's New Jersey warehouse as import/export cargo. *Id.* at 7-9, 23. At some point, the parties had a disagreement over Mr. Ostrovskiy gaining access to the Mercedes, and he allegedly issued verbal instructions to ship the Mercedes to Germany. *Id.* at 9.

The Mercedes was not shipped to Germany but was instead sold, along with the Porsche, to cover Complainants' unpaid storage charges. Marine Transport sold the vehicles pursuant to its bill of lading which provides 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." *Id.* at 11-12. Both vehicles were shipped to Dubai, United Arab Emirates where the Mercedes was sold for under $4,000. *Id.* at 9.

B. Procedural History

Complainants alleged that Respondents violated 46 U.S.C. §§ 41102(c) and 41104(a)(3) and (10) and 46 C.F.R. Part 515 in selling the Mercedes and the Porsche and by Respondents unlawfully interfering with Complainants' attempt to export three motorcycles stored by a competitor NVOCC. Complainants originally sought "[d]irect damages in excess of $180,000 constituting the amounts paid for the purchase of the vehicles plus additional consequential damage for sums arising out of lost contracts, plus interest." Complaint, 9.

In January 2017, the ALJ dismissed all Complainants' claims except the § 41102(c) claim for the sale of the Porsche. The Commission reversed the ALJ's dismissal of the § 41102(c) claim for the sale of the Mercedes and remanded that claim to the ALJ to be decided along with the § 41102(c) claim for the sale of the

Porsche.[1] On remand, the ALJ determined that Marine Transport violated § 41102(c) by selling the Mercedes and Porsche without prior notice or due process but denied Complainants' reparations claim for lack of sufficient evidence. I.D.R., 20-32.[2]

In timely-filed exceptions, Complainants argue that the ALJ erred in finding their reparations evidence insufficient and ask the Commission to declare them the prevailing party since the ALJ found liability under § 41102(c). Complainants' Br. in Support of Exceptions (Exceptions) (Nov. 12, 2021). Marine Transport urges the Commission to affirm the ALJ's decision in its entirety and deny the request for prevailing party status.

II. DISCUSSION

A. Standard of Review

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. *DSW Int'l, Inc. v. Commonwealth Shipping, Inc.*, FMC Docket No. 1898(F), 2012 FMC LEXIS 32, at*2 (FMC July 23, 2012).

[1]The Commission's decision is published at *MAVL Capital Inc. v. Marine Transp. Logistics, Inc.*, FMC Docket No. 16-16, 2020 FMC LEXIS 216 (FMC Oct. 29, 2020).

[2]The ALJ's Initial Decision on Remand is published at *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, No. 16-16, 2021 FMC LEXIS 161 (ALJ Sept. 29, 2021).

B. Reparations Claim

The ALJ determined that Complainants failed to meet their burden of proving an actual injury commensurate with the reparations they seek for the loss of the Mercedes and Porsche. I.D.R., 32. The ALJ found that Complainants' evidence was insufficient and inconclusive. *Id.* With respect to the Mercedes, the ALJ found that while it "is possible that Complainants paid for the Mercedes in Germany and paid the shipping costs from Germany," it was "also possible that someone else paid the purchase price and shipping fees." *Id.* The ALJ reached a similar conclusion with respect to the Porsche and determined that while it was possible Complainants had paid various sums referenced in Complainants' documents, it was equally possible that they had not. *See id.*

1. Legal Standard

Section 41305(b) provides that the Commission "shall direct the payment of reparations to the complainant for actual injury caused" by a Shipping Act violation if the claims were brought within the three-year time period for filing a complaint.[3] 46 U.S.C. § 41305(b); § 41301(a). Complainants bear the burden of proving that they are entitled to reparations. *Yakov Kobel v. Hapag-Lloyd A.G.*, FMC No. 10-06, 2014 WL 25316331, at *13 (FMC July 30, 2014). As the Commission has explained:

> (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.

James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist., FMC Docket No. 94-32, 2003 WL 22067203, at *7-

[3]This action was filed within three years of the sale of Complainants' vehicles, so timeliness is not an issue.

8 (FMC Aug. 26, 2003) (quoting *Waterman v. Stockholms Rederiaktiebolag Svea* , 3 F.M.B. 248, 249 (1950)). Establishing a Shipping Act violation alone does not justify reparations—complainants must also show that they sustained a pecuniary loss as a result of the unlawful act. *Yakov Kobel*, 2014 WL 5316331, at *13.

"Reparations will only be awarded based on actual damages." *Yakov Kobel*, 2014 WL 5316331, at *14 (citing *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co*., Inc., FMC No. 81-57, 1992 FMC LEXIS 86, at *59-60 (ALJ Nov. 23, 1992) (admin. final Dec. 31, 1992)). Actual damages means "compensation for the actual loss or injuries sustained by reason of the wrongdoing" which complainants must show to a reasonable degree of certainty. *Cal. Shipping Line, Inc. v. Yangming Marine Transport Corp*., FMC No. 88-15, 1990 WL 427466, at *23 (FMC Oct. 19, 1990); *Rose Int'l Inc. v. Overseas Moving Network*, FMC No. 96-05, 2001 WL865708, at *76 (FMC June 7, 2001). That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained. *See Yakov Kobel*, 2014 WL 5316331, at *14. Reparations claims that come before the Commission generally involve lost or damaged cargo, and the Commission bases reparations either on the cargo market price or the invoice price paid by the complainant. The method chosen depends on the evidence available and which calculation more accurately measures the actual loss. *See id.*

2. Complainants' Evidence of Market Value

Complainants seek reparations based on the vehicles' "market value at the port of destination." Exceptions, 7. Complainants do not point to direct evidence of market value and instead rely on a customs broker's valuation estimate for the Mercedes and a contract to purchase the Porsche as proof of their loss. *See id.* at 8-13. Complainants also refer to other miscellaneous documents relating to wire transfers and payments as supporting their claim. *See id.*

a. Mercedes' Alleged Market Value

Complainants' sole basis for claiming the Mercedes had a market value of $48,500 is the value declared for customs purposes when it arrived from Germany in November 2012. *Id.* at 8-9.[4] Complainants do not point to any evidence indicating that this estimate was based on the car's actual condition or to show that it is a reasonable, accurate, or reliable approximation of the car's actual value. *See id.* Instead, they focus on evidence that has no apparent bearing on those critical factors. *See id.* For example, Complainants state that the customs declaration was signed by customs broker John F. Kilroy Co. Inc. as "attorney in fact" and that Kilroy received a "Customs Clearance Pass Through" fee of $1,106.81 from Atlantic Cargo Logistics. *Id.* at 9. They also rely on language on the United States Customs and Border Patrol form indicating that the signer declares the information and prices on the form are true. *Id.*

Complainants argue that this evidence regarding the customs broker and the fees paid somehow cures the defects the ALJ found and refutes the ALJ's determination that their evidence was too speculative and unreliable to prove the Mercedes had a market value of $48,500. Even if the invoice and related documents show what Complainants contend--which is not at all clear since the documents do not show payments coming directly from MAVL (the Mercedes' alleged owner)--all that would establish is that Kilroy was the customs broker and was paid a fee. *See id.* The evidence Complainants discuss in their exceptions does not cure the critical deficiencies in the customs declaration. *See id.* Namely, the evidence does not address the broker's basis for assigning $48,500 as the declared value, indicate what knowledge (if any) he had about the car's actual condition, or what factors he considered in assigning

[4]Complainants ask the Commission to note that Complainant (presumably referring to Mr. Ostrovskiy) purchased the Mercedes "three years prior to its import into the United States" for his personal use. Exceptions, 8. Complainants have not produced the invoice for the Mercedes' purchase and do not cite any support in the record for this assertion or explain how (if at all) it supports the amount they seek for the loss of the Mercedes. *See id.*

that value. Those ambiguities are not cured by language on the form indicating that signer represents the information provided is true. Even if the broker believed that the information he provided was accurate, that does not prove his belief was reasonable or accurate, since there is nothing to suggest he had a factual basis for that opinion. *See generally Flanagan*, 2003 WL 22067203, at *7-8 ("conclusory statements" that do not demonstrate lost business with "any particularity" insufficient to prove reparations).

Apart from the reliability issues with the customs declaration, Complainants' own statements indicate that the Mercedes was not in good condition which suggests that $48,500 is unrealistically high. Mr. Ostrovskiy had the Mercedes shipped back to the United States from Germany so he could inspect it for needed repairs and order custom parts. *See* I.D.R., 7-8 (Finding Nos. 21-23). That plan clearly suggests that Mr. Ostrovskiy believed the Mercedes needed repair work. *See id*. Otherwise he would not have gone to the trouble and expense of having the car shipped back to the United States in the fall of 2012. The ALJ's finding that the Mercedes was "sold for under $4,000 in Dubai" sometime in 2013 also suggests that the brokers' estimated value was unrealistic. *See* I.D.R., 9 (Finding No. 42).

The record also includes a June 2013 invoice naming Copart/Car Express as the seller that describes the Mercedes as having sustained "severe water damage" and lists $3,600 as the total purchase price. *See* I.D.R. at 9 (Finding No. 39). Complainants submitted this invoice in support of their remand brief. *See* Complainants' App., Vol. 1, App. H (Bates Nos. DEF 4, DEF 15). The ALJ entered several findings related to this invoice which collectively suggest that the information it contains is not accurate. *See* I.D.R., 9 (Finding Nos. 39-41). Specifically, the ALJ found that: (1) the June 7, 2013 invoice "was not created and/or generated by Copart and 'Car Express did not purchase the VIN that is Lot 26998321," (2) the June 7, 2013 invoice "was provided to Alexander Safonov after the Mercedes arrived in Dubai;" and (3) "Aleksandr Solovyev, sole principal and officer of Car Express and [Royal

Finance Group]" stated that those companies "were not involved with the 2006 Mercedes." *Id.* These findings suggest that the June 2013 invoice in and of itself does not have evidentiary value, and the Commission did not consider it as evidence that the Mercedes had actually sustained water damage, but this invoice does raise further doubts about the accuracy of the customs brokers' $48,500 estimate.

Complainants assert that the ALJ erred in finding that the evidence was equally balanced because Marine Transport made contradictory statements about selling the Mercedes to Middle East Asia Alfa for $3,500. *See* Exceptions, 10-11. That argument misstates the ALJ's reasoning and misapplies the law. As the party seeking reparations, Complainants had the burden of proving their actual injury, and the ALJ correctly found that Complainants' evidence was not sufficiently reliable to reasonably infer that the Mercedes had a market value of $48,500. *See* I.D.R. 9 and 32. Marine Transport's statements about the amount the Mercedes later sold for in Dubai was not a factor in finding that Complainants' evidence insufficient. Whether Complainants have met their burden of persuasion does not turn on which side's evidence is more credible--it is a matter of determining whether the Complainants' evidence is reliable and trustworthy and supports a reasonable inference that they are entitled to the reparations that they seek. *See id.* at 32; *see also Yakov Kobel*, 2014 WL 5316331, at *13.

Complainants have not met their burden of proving that the Mercedes actually had a market value of $48,500 as of November 2012 or in the June to August 2013 timeframe when Marine Transport seized the car and had it sold to cover its outstanding charges. Further, Complainants do not point to evidence that supports awarding a different amount for the loss of the Mercedes.

For all the reasons discussed above, the Commission affirms the ALJ's decision denying reparations for the loss of the Mercedes.

b. Porsche's Alleged Market Value or Invoice Price

Complainants' sole basis for asserting that the Porsche had a market value of $67,000 is a sales contract with a Russian buyer who agreed to purchase the car in April 2013 for that price. *See* Exceptions, 12-14. The contract provides that IAM agrees to sell the 2011 Porsche Panamera to Sokolov Oleg Yuryevich of Moscow, Russia for $67,000 with delivery to Kotka, Finland to take place within 30 days.

The ALJ did not adopt Complainants' proposed findings regarding the sale contract. *See* I.D.R., 9-11. Complainants proposed that the ALJ find that:

> 114. On April 25, 2013, IAM had sold the Porsche to "Sokolov Oleg Yuryevich" for $67,000.00 and received payment from him . . .
>
> 115. After complainants failed to deliver the Porsche to Sokolov Oleg Yuryevich, and pursuant to complainants' contract with Mr. Sokolov, complainants were forced to refund the $67,000.00 to him, plus an additional penalty for failure to deliver, resulting in a total loss of $98,088.00 for this car . . .

Complainants' Remand Br. 32-33 (Mar. 17, 2021). Complainants did not object to the ALJ's failure to adopt these proposed findings. *See* Exceptions, 12-14.

Complainants' arguments challenging that the ALJ's finding that they failed to meet their burden of proof on reparations for the loss of the Porsche and related expenses ($10,000 in ocean freight) are not persuasive. First, Complainants challenge the ALJ's determination that a $10,000 wire transfer to Royal Finance Group on April 22, 2013 may or may not have been a payment related to the Porsche Panamera and could have been payment for a different vehicle altogether. *See* Exceptions, 13. Complainants cite to a

declaration from Aleksandr Solovyev of Royal Finance Group submitted in a related federal court action "wherein he explains that [Royal Finance] never tried to collect on invoices . . . related to the subject Mercedes" as support for their contention that the $10,000 wire transfer "could only have been applied to the subject Porsche." *Id.* (emphasis original).

From this assertion, Complainants argue that the ALJ erred in finding the evidence "evenly balanced" since "there is no evidence on the record contradicting complainants' argument that the $10,000 was payment for anything other than the subject Porsche." *Id.* Complainants summarize their argument for overturning the ALJ's denial of reparations for the loss of the Porsche as follows:

> At the end of the day, MTL has not provided any evidence to contradict complainants' evidence that the Porsche was in fact sold to a customer overseas for the sum of $67,000 pursuant to a contract of sale, nor that the value of the car at the port of destination was anything other than $67,000 pursuant to the case law set forth above. Above that amount, and pursuant to the contract of sale, complainants were also obligated to pay a penalty to their customer for failure to deliver the car pursuant to paragraph 12.1 of the contract.

Exceptions, 13.

Complainants' argument misapplies the law and turns their burden of proof on its head. *See id.* at 13-14. As the party seeking reparations, Complainants bear the burden of producing reliable evidence supporting a reasonable inference that $67,000 equals or is at least a reasonable approximation of their actual injury for the loss of the Porsche and showing that they actually paid the $10,000 for ocean freight or other charges they now seek to recover. *See Yakov Kobel*, 2014 WL 5316331, at *13. Complainants' evidence rises or falls on its own merit. *See id.* It is not a question of whether Marine

Transport produced evidence refuting Complainants' documents or whether its evidence or arguments are less credible. Respondents do not have the burden of proof. If the Complainants' evidence is inherently too weak or unreliable to reasonably infer that the amount they seek reasonably approximates their actual injury--they have not met their burden of persuasion and their claim fails and reparations are not awarded. *See id.* That is exactly how the ALJ applied the law.

Further, multiple findings--which Complainants do not challenge--cast doubt on the reliability of $67,000 as a reliable reflection of the Porsche's actual market value. For example, the ALJ found that Aleksandr Solovyev, sole principal and officer of [Royal Finance] 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.'" I.D.R., 9-10 (Finding No. 44). Likewise, the ALJ found that an invoice from Royal Finance referencing the 2011 Porsche Panamera indicated the car cost $35,379 plus shipping and other charges which brought the total cost to $40,429. *Id.* at 10 (Finding No. 46). According to the ALJ's findings, another document dated April 23, 2013 from Insurance Auto Auctions (IAA) listed a price of $40,500 for the Porsche and a $46,440 total with various fees included. Id. (Finding No. 48).[5]

The invoices on which the ALJ's findings are based involve other entities and there is no mention of IAM--the Porsche's alleged owner. *See, e.g.*, I.D.R., 10-11 (Finding Nos. 49-54). As such, they clearly support the ALJ's determination that while the evidence does not clearly show that Complainants actually purchased or paid for the Porsche. I.D.R., 32. As the ALJ stated, while it was "possible" that Complainants wired $5,500 to IAA on April 18, 2013 and

[5]The Commission did not take into account evidence suggesting that the Porsche was purchased as a salvage vehicle since the ALJ concluded that it "is not clear if these [documents] are reliable. I.D.R., 9 (Finding No. 43). If the Porsche was in fact sold as a salvage vehicle, that would further undermine Complainants' $67,000 reparations claim.

$10,000 to Royal Finance on April 22, 2013 for the Porsche Panamera, it is also possible that "those payments were made by someone else or were for a different shipment." *See id.* The ALJ also noted that the lack of clear evidence is consistent with and perhaps attributable to Complainant's practice of "conduct[ing] their business with limited written documentation, including making verbal requests and agreements," which makes it more difficult for them to "provid[e] evidence to establish actual injury." *Id.*

Complainants appear to argue that it is simply a matter of connecting the dots between a series of documents (including invoices, checks, and wire transfers) that collectively support their reparations claim and show that IAM actually paid for the Porsche. *See* Exceptions, 13-14. The record does not support that argument. Complainants do not point to a clear traceable line between these various documents which leads one to reasonably conclude that IAM paid $67,000 for the Porsche or incurred the other losses (ocean freight) it now seeks to recover from Marine Transport. *See id.* The ALJ's determination that the evidence is too speculative and inconclusive to support Complainants' reparations claim is supported by the record and sound legal reasoning. Further, Complainants do not point to evidence that supports awarding a different amount for the loss of the Porsche or related expenses.

For all the reasons discussed above, the Commission affirms the ALJ's decision denying reparations for the loss of the Porsche.

D. Request to be Declared the Prevailing Party

Complainants ask the Commission to declare them the prevailing party based on the ALJ's determination that Marine Transport violated § 41102(c). Exceptions, 6-7. Complainants assert that they qualify as prevailing even though no reparations were awarded because the ALJ's determination that Marine Transport violated § 41102(c) altered the parties' legal relationship. *Id.*

Section 41305(e) provides that a prevailing party "may be awarded reasonable attorney fees" in any private party action brought under § 41301. 46 U.S.C. § 41305(e). This provision was enacted as part of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281, § 402, 128 Stat. 3022 (Dec. 18, 2014). The Commission adopted implementing regulations and provided further guidance on qualifying to recover fees and the discretionary factors the Commission will consider in deciding whether the petitioning party should recover its attorney fees. *See* 46 C.F.R. § 502.254; Final Rule: Organization and Functions; Rules of Practice and Procedure; Attorney Fees (Final Rule), 81 Fed. Reg. 10508 (Mar. 1, 2016).

Prevailing party status is the first step of the two-party inquiry the Commission engages in to decide whether to grant a petition for attorneys' fees under 46 C.F.R. § 502.254(c). The Commission's regulations provide that "the Commission may, upon petition, award the prevailing party reasonable attorney fees" in a private complaint proceeding brought under 46 U.S.C. § 41301.

Complainants' request to be declared the prevailing party is premature because there is not yet a final decision in this matter. Petitions for attorney fees are due "within 30 days after a decision becomes final." 46 C.F.R. § 502.254(c). The ALJ's Initial Decision on Remand is not a final order since Complainants filed exceptions. The Commission's decision on Complainants' exceptions will not become final until the period for appealing that decision to the United States Court of Appeals has expired. Under 28 U.S.C. § 2344, "[a]ny party aggrieved by the final order" issued by the Commission has 60 days following entry of the order to petition for its review. Therefore the Commission's order in this case will not become final until the 60 days allotted for appeal has expired.

For all the reasons discussed above, the Commission denies as premature Complainants' request to be declared the prevailing party.

IV. CONCLUSION

The Commission hereby:

(1) denies Complainants' exceptions; and

(2) affirms the ALJ's Initial Decision in its entirety.

By the Commission.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

OCEAN NETWORK EXPRESS (NORTH AMERICA), INC. AND OCEAN NETWORK EXPRESS, PTE., LTD. - POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(C)	**DOCKET NO. 21-17**

Served: June 28, 2022

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

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

I. Background and History

On June 23, 2022, Respondent Ocean Network Express, Pte., Ltd. ("ONE") and the Bureau of Enforcement ("BOE"), filed a joint motion for approval of a proposed settlement agreement by the parties and a joint memorandum for, and memorandum in support of, a proposed settlement ("Motion"), together with a copy of the settlement agreement. Respondent Ocean Network Express (North America), Inc. was dismissed from this proceeding on May 4, 2022, and is no longer a party. The parties seek approval of the settlement agreement, confidential treatment of the settlement agreement, and, upon approval of the settlement agreement, dismissal of this proceeding with prejudice. Motion at 1, 6.

The Federal Maritime Commission ("Commission") initiated this proceeding on December 30, 2021, by issuing an Order of Investigation and Hearing ("OIH") to determine whether Respondents violated section 41102(c) of the Shipping Act by overbroadly defining and applying the definition of merchant in ONE's bill of lading in such a manner as to unilaterally impose joint and several liability for freight and/or charges on a party with whom ONE was not in contractual privity and who had not consented to be bound by the terms of the bill of lading. OIH at 2. In addition, the Commission ordered the proceeding to be expedited, with an initial decision issued by an Administrative Law Judge within six months of the date of the OIH and the final decision of the Commission issued within ninety days of service of the Initial Decision. OIH at 7-8.

The proceeding was temporarily stayed while the Commission considered a petition seeking reconsideration and rescission, which was denied on January 28, 2022. A motion to dismiss was denied on February 23, 2022. The parties engaged in discovery, with an order granting a motion to individually identify respondents issued on March 28, 2022, and an order on motions to compel and to dismiss issued on May 4, 2022. Briefing deadlines were set but the parties requested multiple extensions while they negotiated the settlement agreement.

[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.

II. Settlement Agreement

The parties describe the settlement agreement, stating:

> The Settlement Agreement addresses the conduct alleged in the [OIH] to constitute potential violations of the Shipping Act. It resolves the proceeding in the best interests of the Parties and the shipping public, without the need for further litigation, and it requires ONE to take certain measures intended to address the conduct alleged in the [OIH], without any admission of violations by the Respondent.

Motion at 2.

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 long history of approving settlement agreements that meet the required criteria, including in enforcement proceedings.

> The Commission's decisions and regulations have long indicated a broad policy favoring settlement. In reviewing a proposed settlement, the Commission evaluates whether it would contravene any law or public policy, and whether it is "fair, reasonable, and adequate." As the parties note, the Commission weighs enforcement policy in terms of deterrence and compliance, likely costs and delay, and "pragmatic litigative possibilities" regarding the proceeding's potential outcomes.

Possible Unfiled Agreement Between Hyundai Merchant Marine Company, Ltd. and Mediterranean Shipping Co., S.A., Docket No. 97-07, 2000 FMC LEXIS 2 at *4 (FMC May 2, 2000) (citing *Old Ben Coal Co. v. Sea-Land Serv.*, 21 F.M.C. 506, 512-513; 18 S.R.R. 1085, 1091 (ALJ Nov. 29, 1978); *Far Eastern Shipping Co. – Possible Violations of Sections 16, Second Paragraph 18(b)(3) and 18(c), Shipping Act, 1916*, 21 S.R.R. 743, 1014 (ALJ Mar. 25, 1982)).

> The Commission has routinely held that negotiated settlement agreements should be approved unless the agreements present one of a few defects requiring disapproval. The Commission has consistently adhered to a policy of encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid. Despite the general preference for approval of settlement agreements, the Commission does not merely rubber stamp any proffered settlement. Instead, the Commission typically reviews a settlement

> agreement to ensure that it does not contravene law or public policy. Such review typically includes evaluating factors to determine that the settlement agreement was not a product of fraud, duress, undue influence, or mistake. The Commission also reviews the terms of settlement agreements to ensure that the terms are fair, reasonable, and adequate. The review process frequently involves a balancing of the likelihood of success on the merits against the cost and complexity of proceeding to final judgment.

World Chance Logistics (Hong Kong), Ltd. and Yu, Chi Shing, a.k.a. Johnny Yu – Possible Violations of Section 10 of the Shipping Act of 1984, Docket No. 09-07, 2010 FMC LEXIS 27 at *5, 31 S.R.R. 1346, 1350 (FMC May 20, 2010) (internal citations omitted).

Here, the parties assert that the settlement agreement "negotiated by BOE and ONE, with the advice and assistance of their respective counsel, is reasonable and not inconsistent with any law or policy;" that the parties "have carefully considered the costs, benefits, and risks of further litigation, and determined that settlement is in their mutual interests, as well as that of the shipping public;" and that the settlement "was reached without fraud, duress, undue influence, or any other defect that would bar its approval." Motion at 3. The parties further assert that "proposed settlements are to be evaluated on the basis of balancing agency enforcement policy, deterrence by respondents, the industry, and the shipping public with the litigative probabilities, litigative and administrative costs, and such other matters as justice may require" and that the "balance favors approval of this proposed settlement." Motion at 5.

A review of the settlement agreement indicates that it satisfies the criteria for approval. The terms of the settlement agreement appear to be fair, reasonable, and adequate; the agreement does not appear to contravene law or public policy; and the agreement serves the interests of both BOE and Respondent by preventing the need for them to engage in costly, uncertain, and protracted litigation of the issues in contention. "The policy of encouraging and approving settlements is firmly embedded in precedent and is especially welcome as a means for the Commission and respondents to conserve their resources." *Direct Container Line Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984; Direct Container Line Inc. and Owen Glenn Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, Docket Nos. 99-01 and 99-06, 1999 FMC LEXIS 7 at *6 (ALJ June 29, 1999). Therefore, the settlement agreement is reasonable and will be approved.

III. Confidential Treatment Request

The parties further request that the settlement agreement be held confidential by the Commission, stating that the Commission routinely honors such requests and citing Commission Rule 5 and private party decisions. Motion at 4. In addition, the terms of the settlement agreement require the parties to keep the terms of the settlement agreement confidential. Motion at 4. The parties state that this "confidentiality requirement is an important and necessary element of the Settlement Agreement; it could be compromised by a breach of such confidentiality. The Parties therefore respectfully request that the Commission keep the unredacted copy of the Settlement Agreement confidential." Motion at 4. Because the entire settlement agreement is confidential, no public version is provided. Motion at 4.

Commission Rule 603(a), governing the assessment of civil penalties in Commission-instituted proceedings, states that the "full text of any settlement must be included in the final order of the Commission." 46 C.F.R. § 502.603(a). The parties do not address this requirement.

This is an expedited proceeding which has been heavily litigated. The confidentiality provision is central to the agreement to settle this proceeding. Given both of these factors, the confidentiality provision will be permitted due to the unique circumstances of this particular proceeding. However, in future enforcement proceedings, the parties must address the requirements of Commission Rule 603(a) when submitting settlements and should not assume that confidentiality provisions will be approved.

If enforcement proceedings are meant to deter violations of the Shipping Act and Commission regulations as well as to inform the shipping public of regulatory requirements, reliance on confidential material impedes those goals. The requirement that the full text of settlements be included in the Commission's order benefits the public. This is especially true where an agreement requires a respondent "to take certain measures intended to address the conduct alleged" and where a respondent has "agreed to adjust their conduct to address the Commission's concerns." Motion at 2, 5. Even where it may be appropriate to redact particular words in a settlement agreement, confidential treatment should not be requested or expected for the entire agreement.

For the reasons outlined above, under the unique circumstances of this settlement and this expedited proceeding, the confidentiality provision will be permitted. The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission to review while maintaining the required confidentiality.

IV. Order

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

ORDERED that the motion to approve the settlement agreement between the Bureau of Enforcement and Ocean Network Express, Pte., Ltd. be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED** and the settlement agreement be maintained in the Secretary's confidential files. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

FULTER LOGISTICS LLC, *REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE NO. 027912NF*

DOCKET NO. 22-09

Served: July 26, 2022

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

INITIAL DECISION REVOKING OCEAN TRANSPORTATION LICENSE[1]

I. INTRODUCTION

A. Summary

Respondent Fulter Logistics LLC ("Fulter Logistics") is licensed as an ocean transportation intermediary ("OTI") by the Federal Maritime Commission ("FMC" or "Commission"). On March 11, 2022, the Commission's Bureau of Certification and Licensing ("BCL") notified Fulter Logistics that the Commission intended to revoke its OTI license on the basis that Fulter Logistics had failed to respond to a lawful inquiry by the Commission and lacks the necessary character to render ocean transportation intermediary services under the Commission's regulations at 46 C.F.R. § 515.11(a)(2). Fulter Logistic then requested a hearing on the proposed revocation pursuant to the Commission's regulations at 46 C.F.R. § 515.17 and 46 C.F.R. Part 502, Subpart X. In accordance with the provisions of 46 C.F.R. § 502.702(a), the Secretary of the Commission assigned this proceeding to the Office of Administrative Law Judges ("OALJ") for adjudication.

As required under the Commission's Rules at Subpart X, BCL and the Commission's Bureau of Enforcement ("BOE") were notified that Fulter Logistics had requested a hearing and BOE was ordered to serve a copy of the revocation notice and materials supporting the revocation notice. In addition, Fulter Logistics was informed that it had a right to file a response within thirty days of BOE's submission. On the day of the established deadline for Fulter Logistics to file its response, Fulter Logistics sent an email to the Secretary indicating that it intended to file a motion requesting an extension of the deadline to submit its response, but then failed to file the motion or to participate any further in the proceeding despite a reminder from OALJ. BOE subsequently submitted a

[1] This initial decision will become final within 22 days of service in the absence of exceptions filed by either party or review by the Commission. 46 C.F.R. § 502.708(c).

reply brief in support of its argument that Fulter Logistics' license should be revoked. As a result of Fulter Logistics' failure to submit any evidence to support its request for a hearing, the evidence of record consists solely of the materials submitted by BOE.

As discussed below in greater detail, the evidence provided by BOE supports a finding that Fulter Logistics' OTI license should be revoked and no evidence in the record contradicts or disproves that evidence. Fulter Logistics' OTI license is therefore revoked.

II. BACKGROUND

A. Factual Allegations

Respondent Fulter Logistics is a limited liability Delaware entity with its principal place of business in the State of Florida, operating under the name Fulter Logistics USA LLC. BOE 2.[2] It has been licensed with the Commission as an OTI since December 31, 2019. BOE 2. Nicolas Soria is Fulter Logistics' qualifying individual ("QI"). BOE 6.

On July 28, 2021, Fulter Logistics submitted a Form FMC-18 Application to BCL to add a trade name to Fulter Logistics' OTI license. During processing of the application, BCL discovered that there was an undisclosed judgment against Fulter Logistics dated July 11, 2021, in the amount of $12,832.37, in favor of Platinum Cargo Logistics Inc. ("Platinum Logistics"). BOE 39. Part B, item 7 of Form FMC-18 requires an applicant to disclose a legal judgment for debt against it and the Commission's Rules at 46 C.F.R § 515.20(e) require licensees to report changes of material fact to the Commission within thirty days. Fulter failed to report the debt judgment against it during its application to add a trade name and within the thirty-day period required by Rule 515.20(e). When questioned about the judgment on October 27, 2021, Fulter Logistics stated that it would pay the debt judgment but did not explain why it failed to disclose the debt to the Commission. Further, upon follow-up, BCL staff was advised by Platinum Logistics on November 17, 2021, that Fulter Logistics still had not paid the debt judgment. To date, Fulter Logistics has neither submitted proof to BCL that it has paid the debt judgment nor provided an explanation why it failed to disclose the debt judgment to the Commission. BOE 2.

In addition, BCL discovered that there had been two recent complaints against Fulter Logistics - one by GLT Transportation Group filed in the Miami-Dade County Court, Florida on September 29, 2021, for failure to pay freight charges totaling $17,778.50, and the second by Paycargo LLC, dated February 3, 2021, which was voluntarily dismissed on May 21, 2021. BOE 3.

Thirdly, BCL learned of past debt owed by Fulter Logistics' QI, Nicolas Soria, incurred when Mr. Soria was the QI and twenty percent owner of Talwin Transport Service LLC ("Talwin"), a Commission-licensed OTI. The debt by Nicolas Soria resulted in a transportation related claim against Talwin's bond, which Mr. Soria entered into an agreement with Roanoke Trade Services to pay but subsequently defaulted on the payment.

[2] Citations to BOE # are to the bates page numbers in BOE's Submission of Materials Supporting Notice of Revocation Appendix.

Mr. Soria paid the debt only after BCL learned about the debt and inquired about it in connection with BCL's processing of Fulter Logistics' application to add a trade name to its OTI license. BOE 3.

As a result of these events and Fulter Logistics' failure to respond to multiple FMC requests for information, BCL decided to revoke Fulter Logistics' OTI license.

B. Procedural History

On March 31, 2022, the Secretary of the Commission issued a Notice of Hearing Request and Assignment, noting that on March 11, 2022, BCL had notified Fulter Logistics by letter that the Commission intended to revoke Fulter Logistics' OTl license. The Secretary also noted that on March 29, 2022, Fulter Logistics had requested a hearing on the proposed revocation pursuant to the Commission's Rules at 46 C.F.R. § 515.17 and 46 C.F.R. Part 502, Subpart X. Pursuant to Rule 702(a), the Secretary assigned this proceeding to OALJ for adjudication. 46 C.F.R. § 502.702(a).

On April 7, 2022, as required under Rule 702(b), a Notice and Initial Order ("Initial Order") was issued, notifying BCL and BOE that Fulter Logistics had requested a hearing and directing BOE to file by May 9, 2022, a copy of the notice given to Fulter Logistics and BCL's materials supporting the notice. 46 C.F.R. § 502.702(b). The initial order also stated that "BOE may file a brief with legal arguments, proposed findings of fact, or additional information, and any requests for confidential treatment as well as an appendix with supporting documents." Initial Order at 1.

On May 9, 2022, BOE filed a Notice of Appearance, Submission of Materials Supporting Notice of Revocation, and an Appendix containing twenty exhibits. On May 11, 2022, pursuant to Rule 703 (46 C.F.R. § 502.703), a Notice of Right to Respond was issued, stating in pertinent part:

> Pursuant to Rule 703, Fulter Logistic is hereby notified of its right to file a response to the May 9, 2022, filing. 46 C.F.R. § 502.703. Fulter Logistics may file a brief with legal arguments, proposed findings of fact, additional information, and any requests for confidential treatment as well as an appendix with supporting documents. Fulter Logistics' response is due on June 10, 2022. 46 C.F.R. § 502.703(a).
>
> Pursuant to Rule 704, BOE may file a reply brief within twenty days of Fulter Logistics' filing. 46 C.F.R. 502.704. This notice serves as BOE's notification of its right to file a reply.

Notice of Right to Respond at 1.

On June 10, 2020, an email was received from Fulter Logistics stating:

> Good morning Mr. Secretary,
> Per 46 C.F.R. 502.702 I am requesting [an] extension date for the Submission of Materials Supporting Notice of Revocation. Finishing las[t] 4 Appendix.
> Waiting your confirmation,
> All[] my Best.

Email dated Friday, June 10, 2022 9:16 AM, From: Nicolas Soria, QI of Fulter Logistics; To: Serena Tang (BOE), Office of the Secretary; CC: ALJ (and other BOE and BCL staff).

On June 10, 2022, the Secretary responded to Mr. Nicolas Soria in pertinent part as follows:

> Good morning Mr. Soria,
>
> The Commission's Rules on Practice and Procedure and the ALJ's Initial Order provide instruction on requesting extension of deadlines. Please refer to § 502.102 which includes the requirements for motions for enlargement of time to file documents, and § 502.71 which indicates you must confer with the opposing party (which is reiterated in the ALJ's Initial Order). I have copied the regulations below.

Email dated Friday, June 10, 2022 11:48 AM, From: Secretary (of the FMC); To: Nicolas Soria; CC: Judges Mailbox (and the BOE and BCL offices and staff included in the email from Mr. Soria).

On June 10, 2022, another email was received from Mr. Soria, stating:

> Mr. Secretary good afternoon!
> I really appreciated your email and legal information about the regulation (My apologies)[.] Following now procedures and reg.
>
> Best Regards,

Email dated Friday, Friday June 10, 2022 12:50 PM, From: Nicolas Soria; To: the Secretary; CC: Judges Mailbox (and the BOE and BCL staff included in the previous email exchanges).

No materials nor any further communication was received from Fulter Logistics. Therefore, on June 22, 2022, OALJ sent an email to Fulter Logistics, copying BOE and stating: "The Judge expected to receive a filing from Fulter Logistics on June 10, 2022. If additional time is needed, a motion requesting an extension must be filed. Any filings should be copied to this email address." Fulter Logistics did not respond to the email from OALJ and no submissions or communications have been received from Fulter Logistics to date.

On June 30, 2022, BOE filed a reply brief, arguing that a revocation of Fulter Logistics' OTI license is warranted by the Shipping Act of 1984, Commission regulations, and established legal precedent. As previously noted, due to Fulter Logistics' failure to submit any arguments or evidence in the proceeding, the evidence of record consists solely of the materials submitted by BOE.

III. DISCUSSION

A. BOE's Arguments

BOE submitted twenty exhibits and a verified statement by Luther Johnson, an industry analyst at BCL, in support of its contention that revocation of Fulter Logistics' OTI license is warranted. BOE argues that revocation of Fulter Logistics' OTI license should be upheld because: Fulter Logistics and its QI, Soria, failed to notify the Commission of three changes in material facts, contrary to 46 C.F.R. §§ 515.12(e) and 515.20(e) of the Commission's regulations; failed three times to respond to BCL's lawful inquiries, contrary to the Commission's regulations at 46 C.F.R. § 515.16(a)(2); made material false and misleading statements to BCL, contrary to the Commission's regulations at 46 C.F.R. § 515.16(a)(3); and lacks the necessary character to render OTI services as set forth in the Commission's regulations at 46 C.F.R. §§ 515.11 and 515.16(a)(4). BOE Reply at 8-12. BOE asks that an order be issued directing Fulter Logistics to cease and desist all OTI activities. BOE Reply Brief at 12.

B. Controlling Authority

An applicant seeking an OTI license must demonstrate through its qualifying individual that it has the necessary experience by showing that "its qualifying individual has a minimum of three years' experience in ocean transportation intermediary activities in the United States, and the necessary character to render ocean transportation intermediary services." 46 C.F.R. § 515.11(a)(1). The Commission shall conduct an investigation of the applicant's qualifications for a license. Such investigations may address:

(a) The accuracy of the information submitted in the application;

(b) The integrity and financial responsibility of the applicant;

(c) The character of the applicant and its qualifying individual; and

(d) The length and nature of the qualifying individual's experience in handling ocean transportation intermediary duties.

46 C.F.R. § 515.13.

The Shipping Act grants authority to revoke an OTI's license under certain conditions.

> The Federal Maritime Commission, after notice and opportunity for a hearing, shall suspend or revoke an ocean transportation intermediary's license if the Commission finds that the ocean transportation intermediary –
>
> (1) is not qualified to provide intermediary services; or
>
> (2) willfully failed to comply with a provision of this part or with an order or regulation of the Commission.

46 U.S.C. § 40903(a).

Further, under the Commission's regulations a license may be revoked or suspended for any of the following reasons:

> (1) Violation of any provision of the Act, or any other statute or Commission order or regulation related to carrying on the business of an ocean transportation intermediary;
>
> (2) Failure to respond to any lawful order or inquiry by the Commission;
>
> (3) Making a materially false or misleading statement to the Commission in connection with an application for a license or an amendment to an existing license;
>
> (4) A Commission determination that the licensee is not qualified to render intermediary services; or
>
> (5) Failure to honor the licensee's financial obligations to the Commission.

46 C.F.R. § 515.16(a).

C. BOE Demonstrates that Revocation of Fulter Logistics' OTI License is Warranted

The materials and brief submitted by BOE support a finding that Fulter Logistics' OTI license should be revoked, and no evidence of record contradicts BOE's arguments or the materials BOE submitted in support of its arguments. Thus, the record supports a finding that Fulter Logistics and its QI, Mr. Soria, failed to notify the Commission of changes in material facts, contrary to 46 C.F.R. §§ 515.12(e) and 515.20(e) of the Commission's regulations; failed to respond to BCL's lawful inquiries, contrary to the Commission's regulations at 46 C.F.R. § 515.16(a)(2); made material false and misleading statements to BCL, contrary to the Commission's regulations at 46 C.F.R. § 515.16(a)(3); and lacks the necessary character to render OTI services as set forth in the Commission's regulations at 46 C.F.R. §§ 515.11 and 515.16(a)(4).

Based on the foregoing, it is found that the evidence supports a finding that Fulter Logistics and its qualifying individual, Nicolas Soria, violated the Commission's regulations at 46 C.F.R. §§ 515.12(e) and 515.20(e) and that Fulter Logistics and its qualifying individual, Nicolas Soria, lack the necessary character to render OTI services as set forth in the Commission's regulations at 46 C.F.R. § 515.11(a). Accordingly, Fulter Logistics' OTI license is revoked.

IV. ORDER

Upon consideration of the evidence and arguments submitted by BOE, and for the reasons stated above, it is hereby

ORDERED that Fulter Logistics' ocean transportation license number 027912NF be **REVOKED** pursuant to 46 C.F.R. § 515.16(a) and 46 U.S.C. § 40903(a). It is

FURTHER ORDERED that Fulter Logistics LLC cease and desist all ocean transportation intermediary activities.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

C.V. INT'L SERVICES LLC, *INTENT TO DENY AN OCEAN TRANSPORTATION INTERMEDIARY APPLICATION*	**DOCKET NO. 22-10**

Served: July 26, 2022

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

INITIAL DECISION DENYING OCEAN TRANSPORTATION INTERMEDIARY LICENSE[1]

I. INTRODUCTION

A. Summary

On July 14, 2021, C.V. Int'l Services LLC ("C.V. Int'l") applied for an ocean transportation intermediary ("OTI") license with the Federal Maritime Commission ("FMC" or "Commission"). On March 11, 2022, the Commission's Bureau of Certification and Licensing ("BCL") notified C.V. Int'l that the Commission intended to deny its OTI license on the basis that C.V. Int'l lacks the necessary character to render ocean transportation intermediary services under the Commission's regulations at 46 C.F.R. § 515.11. On March 28, 2022, C.V. Int'l requested a hearing on the proposed revocation pursuant to the Commission's regulations at 46 C.F.R. § 515.17 and 46 C.F.R. Part 502, Subpart X. In accordance with the provisions of 46 C.F.R. § 502.702(a), the Secretary of the Commission assigned this proceeding to the Office of Administrative Law Judges ("OALJ") for adjudication.

As required under the Commission's Rules at Subpart X, BCL and the Commission's Bureau of Enforcement ("BOE") were notified that C.V. Int'l had requested a hearing, and BOE was ordered to serve a copy of the denial notice and materials supporting the denial notice. BOE filed the required documents on May 12, 2022. C.V. Int'l was then informed that it had a right to file a response within thirty days of BOE's submission. C.V. Int'l failed to file a response or to participate any further in the proceeding, despite a reminder from OALJ. BOE subsequently submitted a reply brief in support of its argument that C.V. Int'l's license application should be denied for lack of the necessary character to hold a license under section 40903 of the Shipping Act of 1984. 46 U.S.C. § 40903. As a result of C.V. Int'l's failure to submit any evidence to support its request for a hearing, the evidence of record consists solely of the materials submitted by BOE.

[1] This initial decision will become final within 22 days of service in the absence of exceptions filed by either party or review by the Commission. 46 C.F.R. § 502.708(c).

As discussed below in greater detail, the evidence provided by BOE supports a finding that C.V. Int'l's application for an OTI license should be denied, and no evidence in the record contradicts or disproves that evidence. C.V. Int'l's application for an OTI license is therefore denied.

II. BACKGROUND

A. Factual Allegations

Applicant is a Florida limited liability company with its principal place of business in the State of Florida, operating under the name C.V. Int'l Services LLC doing business as C.V. Int'l Ocean Services. BOE 7[2], BOE 135. On July 14, 2021, BCL received an FMC Form-18 application on behalf of C.V. Int'l. Verified Statement of Michael Sumrall ("Sumrall Verified Statement") at 1. Mr. Christian Velazquez is C.V. Int'l's proposed qualifying individual ("QI"); BOE 7. The deficiencies in C.V. Int'l's application for an OTI license, as described by BCL, are summarized as follows:

> On or about July 15, 2021, a standard background check, "Accurint," was conducted. The Accurint report revealed Velazquez, CV Int'l's proposed QI, has a felony conviction for trafficking in cocaine and has other unrelated, but relevant, criminal acts/arrests. None of this information was disclosed in the applicant's FMC-18. BOE Exhibit 5, FMC-18 at BOE 0007-0018; BOE Exhibit 12, Federal Criminal Court Records Search at BOE 0145-0172.
>
> On or about July 15, 2021, an Acknowledgement Letter was sent to Velazquez via the FMC18 Message Center requesting, among other things, the declaration of all prior criminal convictions and a request for documentation demonstrating the resolution of all prior criminal convictions. BOE Exhibit 6, FMC-18 Correspondence Log at BOE 0100-0101. *See also* Attachment A, BCL Applicant Acknowledgement Letter.
>
> On or about July 15, 2021, Velazquez submitted a revised FMC-18 for C.V. Int'l. In the revised application no prior criminal conviction or activity was disclosed. BOE Exhibit 5, FMC-18 at BOE 0019-0031; BOE Exhibit 6, FMC-18 Correspondence Log at BOE 0101.
>
> On or about July 23, 2021, [BCL] requested Velazquez to update information. Among other things, [BCL] asked that he indicate all prior criminal convictions. BOE Exhibit 6, FMC-18 Correspondence Log at BOE 0102.
>
> On or about July 29, 2021, Velazquez submitted a revised FMC-18 for C.V. Int'l. In the updated application no prior criminal convictions were disclosed. BOE Exhibit 5, FMC-18 at BOE 0032-0044; BOE Exhibit 6, FMC-18 Correspondence Log at BOE 0103.

[2] Citations to BOE # are to the bates page numbers in BOE's Submission of Materials Supporting Notice of Denial.

> On or about August 4, 2021, Velazquez updated CV Int'l's application via the message center. He specifically addressed prior criminal activity, stating, *"I have never been convicted of anything. I have just have been arrested for some things in the past, and dismissed in court."* Additionally, he provided court documents relating to criminal activity in Miami-Dade County, FL. BOE Exhibit 6, FMC-18 Correspondence Log (BOE 0104). Exhibit 14: Criminal Charges 11th Judicial Circuit Miami-Dade County, FL – Applicant (BOE 191-194).

Sumrall Verified Statement at 2, ¶¶ 7-13 (paragraph numbering omitted).

Subsequent efforts by BCL to obtain from C.V. Int'l an updated application correcting the deficiencies in C.V. Int'l's FMC-18 Application and disclosing all crimes for which Mr. Velazquez has been charged or convicted were unsuccessful. Sumrall Verified Statement at 2-3, ¶¶ 14-24. As a result of these events, as well as C.V. Int'l's failure to respond to multiple FMC requests for information, BCL notified Mr. Velazquez that it intended to deny C.V. Int'l's OTI application.

B. Procedural History

On March 31, 2022, the Secretary of the Commission issued a Notice of Hearing Request and Assignment, noting that on March 11, 2022, BCL had notified C.V. Int'l by letter that the Commission intended to deny C.V. Int'l's OTl license. The Secretary also noted that on March 28, 2022, C.V. Int'l had requested a hearing on the proposed denial pursuant to the Commission's Rules at 46 C.F.R. § 515.17 and 46 C.F.R. Part 502, Subpart X. Pursuant to Rule 702(a), the Secretary assigned this proceeding to OALJ for adjudication. 46 C.F.R. § 502.702(a).

On April 12, 2022, as required under Rule 702(b), a Notice and Initial Order ("Initial Order") was issued, notifying BCL and BOE that C.V. Int'l had requested a hearing and directing BOE to file by May 12, 2022, a copy of the notice given to C.V. Int'l and BCL's materials supporting the notice. 46 C.F.R. § 502.702(b). The Initial Order also stated that "BOE may file a brief with legal arguments, proposed findings of fact, or additional information, including requests for confidential treatment." Initial Order at 1.

On May 12, 2022, BOE filed a Notice of Appearance, Submission of Materials Supporting Notice of Revocation, and an Appendix containing 24 exhibits. On May 18, 2022, pursuant to Rule 703 (46 C.F.R. § 502.703), a Notice of Right to Respond was issued, stating in pertinent part:

> Pursuant to Rule 703, C.V. Int'l Services LLC ("C.V. Int'l") is hereby notified of its right to file a response to the May 12, 2022, filing. 46 C.F.R. § 502.703. C.V. Int'l may file a brief with legal arguments, proposed findings of fact, additional information, and any requests for confidential treatment as well as an appendix with supporting documents. C.V. Int'l's response is due on June 17, 2022. 46 C.F.R. § 502.703(a).
>
> Pursuant to Rule 704, BOE may file a reply brief within twenty days of C.V. Int'l's filing. 46 C.F.R. 502.704. This notice serves as BOE's notification of its right to file a reply.

Notice of Right to Respond at 1.

No materials or any further communication was received from C.V. Int'l. Therefore, on June 22, 2022, OALJ sent an email to C.V. Int'l, copying BOE and stating: "The Judge expected to receive a filing from C.V. Int'l Services on June 17, 2022. If additional time is needed, a motion requesting an extension must be filed. Any filings should be copied to this email address." C.V. Int'l did not respond to the email from OALJ and no submissions or communications have been received from C.V. Int'l to date.

On July 7, 2022, BOE filed a reply brief and the Sumrall Verified Statement with attachments. BOE argues that a denial of C.V. Int'l's OTI license based on C.V. Int'l's character is warranted by the Shipping Act of 1984, Commission regulations, and established legal precedent. As previously noted, due to C.V. Int'l's failure to submit any arguments or evidence in the proceeding, the evidence of record consists solely of the materials submitted by BOE.

III. DISCUSSION

A. BOE's Arguments

BOE submitted 24 exhibits and a verified statement by Michael P. Sumrall, an industry analyst at BCL, in support of its contention that denial of C.V. Int'l's OTI license is warranted. BOE argues that denial of C.V. Int'l's OTI license should be upheld because C.V. Int'l lacks the necessary character to provide OTI services in the United States as the evidence demonstrates that C.V. Int'l's principal and proposed QI, Mr. Velazquez, lacks the necessary character to hold a license under section 40903 of the Shipping Act due to his failures to disclose his "no contest" plea to trafficking of cocaine and "other" criminal activity in C.V. Int'l's OTI license application and for repeatedly making misleading statements to BCL, as well as his failure to correct C.V. Int'l's Form FMC-18 and to provide accurate and truthful information despite several opportunities that he was provided to do so. BOE Reply at 8. In addition, BOE asks that C.V. Int'l be directed to cease and desist any and all OTI activities. BOE Reply at 9.

B. Controlling Authority

An applicant seeking an OTI license must demonstrate that:

> (a)(1) It possesses the necessary experience, that is, its qualifying individual has a minimum of three (3) years' experience in ocean transportation intermediary activities in the United States, and the necessary character to render ocean transportation intermediary services…
>
> (a)(2) In addition to information provided by the applicant and its references, the Commission may consider all information relevant to determining whether an applicant has the necessary character to render ocean transportation intermediary services, including but not limited to, information regarding: Violations of any shipping laws, or statutes relating to the import, export, or transport of merchandise in international trade; operating as an OTI without a license or registration; state and federal felonies and misdemeanors…

46 C.F.R. § 515.11. The Commission shall conduct an investigation of the applicant's qualifications for a license. Such investigations may address:

(a) The accuracy of the information submitted in the application;

(b) The integrity and financial responsibility of the applicant;

(c) The character of the applicant and its qualifying individual; and

(d) The length and nature of the qualifying individual's experience in handling ocean transportation intermediary duties.

46 C.F.R. § 515.13.

The Shipping Act grants authority to deny an OTI's license application under certain conditions.

If the Commission determines, as a result of its investigation, that the applicant:

(a) Does not possess the necessary experience or character to render intermediary services;

(b) Has failed to respond to any lawful inquiry of the Commission; or

(c) Has made any materially false or misleading statement to the Commission in connection with its application; then, a notice of intent to deny the application shall be sent to the applicant stating the reason(s) why the Commission intends to deny the application. The notice of intent to deny the application will provide, in detail, a statement of the facts supporting denial. An applicant may request a hearing on the proposed denial by submitting to the Secretary, Federal Maritime Commission, Washington, DC 20573, within twenty (20) days of the date of the notice, a statement of reasons why the application should not be denied. Such hearing shall be provided pursuant to the procedures contained in § 515.17. Otherwise, the denial of the application will become effective and the applicant shall be so notified.

46 U.S.C. § 515.15.

C. BOE Demonstrates that Denial of C.V. Int'l OTI License is Warranted

The materials and brief submitted by BOE support a finding that C.V. Int'l's application for an OTI license should be denied, and no evidence of record contradicts BOE's arguments or the materials BOE submitted in support of those arguments. The record shows that as part of a plea bargain, Mr. Velazquez pled no contest and was adjudicated and convicted of a felony on April 30, 2009. BOE 157, BOE 182. This felony conviction was not disclosed on C.V. Int'l's OTI license application even after BCL's request for additional information. BOE 0102-0104.

Therefore, the record supports denying C.V. Int'l's OTI license application because its QI, Mr. Velazquez, lacks the necessary character to provide OTI services in the United States due to his failure to disclose a felony conviction and failure to provide accurate and truthful information in the OTI license application. Therefore, C.V. Int'l does not meet the requirements of 46 C.F.R. § 515.11. Accordingly, C.V. Int'l's application for an OTI license is denied pursuant to 46 C.F.R. § 515.15.

IV. ORDER

Upon consideration of the evidence and arguments submitted by BOE, and for the reasons stated above, it is hereby

ORDERED that C.V. Int'l's application for an ocean transportation license be **DENIED**. It is

FURTHER ORDERED that C.V. Int'l cease and desist any and all ocean transportation intermediary activities.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

ACHIM IMPORTING COMPANY INC., *Complainant*

v.

YANG MING MARINE TRANSPORT CORP., *Respondent*.

DOCKET NO. 22-08

Served: August 22, 2022

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

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On August 4, 2022, Complainant Achim Importing Company Inc. ("Achim") and Respondent Yang Ming Marine Transport Corporation ("Yang Ming") filed a joint motion ("Motion") seeking approval of a settlement agreement, dismissal of the claims with prejudice, confidential treatment of the settlement agreement, and, an extension of the deadlines in the proceeding until a ruling on the motion. 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. Any party may file exceptions to this decision within twenty-two days of the date of service. 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, Achim and Yang Ming, both sophisticated corporate entities, arrived at the Settlement Agreement through extensive, arm's length negotiations that involved businesspeople and counsel on both sides, and make this motion to approve the Settlement Agreement jointly. 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 non-parties or the shipping public. Instead, the Settlement Agreement is intended to restore and reinforce the long-standing business relationship between the Parties. As such, 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 arms-length settlement discussions. The proceeding would require potentially expensive 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 Complainant Achim Importing Company Inc. and Respondent Yang Ming Marine Transport Corporation be **GRANTED**. It is

FURTHER ORDERED that the request to extend deadlines be **DENIED AS MOOT**. It

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

Office of Administrative Law Judges

PRO TRANSPORT CHARLESTON, INC., *Complainant*

v.

ALLROUND MIDWEST FORWARDING, INC., *Respondent*.

DOCKET NO. 22-15

Served: August 22, 2022

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

INITIAL DECISION APPROVING DISMISSAL AGREEMENT[1]

This complaint was initiated on June 13, 2022, when Complainant Pro Transport Charleston, Inc. ("Pro Transport") filed a complaint alleging that Respondent Allround Midwest Forwarding, Inc. ("Allround") violated the Shipping Act. On June 27, 2022, Pro Transport filed a Notice of Dismissal, requesting that the proceeding be dismissed pursuant to an agreement between the parties. Pro Transport was advised that a copy of the parties' agreement must be filed. On August 8, 2022, the parties filed an Agreement in Support of Dismissal of Petitioner's Complaint.

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. Any party may file exceptions to this decision within twenty-two days of the date of service. 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)).

This proceeding was filed based upon the alleged failure of Allround to maintain a surety bond. The existence of the bond has been established to Complainant's satisfaction. The parties have agreed to dismiss the proceeding with each party bearing their own fees and costs. Based on the documents filed in this matter, the parties have established that the agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are both represented by counsel and have engaged in arms-length negotiations. The proceeding would require potentially expensive discovery and briefing. The parties have determined that the agreement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the agreement requesting dismissal is approved.

Upon consideration of the notice of dismissal, the agreement in support of dismissal, and the record, and good cause having been stated, it is hereby:

ORDERED that the request to approve the agreement between Pro Transport and Allround and dismiss the proceeding be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

FULTER LOGISTICS LLC, *REVOCATION OF OCEAN TRANSPORTATION INTERMEDIARY LICENSE NO. 027912NF*

DOCKET NO. 22-09

Served: August 26, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's July 26, 2022, Initial Decision Revoking Ocean Transportation License, has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

C.V. INT'L SERVICES LLC, *INTENT TO DENY AN OCEAN AN TRANSPORTATION INTERMEDIARY Application*

DOCKET NO. 22-10

Served: August 26, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's July 26, 2022, Initial Decision Denying Ocean Transportation Intermediary License, has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

NNABUGWU CHINEDU ANDREW, AVERS LOGISTICS LTD., AND CJ DELUZ NIGERIA LTD. *Complainants,* v. MARINE TRANSPORT LOGISTICS, INC., ALLA SOLOVYEVA, AND RAYA BAKHIREV *Respondents.*	Docket No. 20-12

Served: September 22, 2022

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Max M. VEKICH, *Commissioners*; Louis E. SOLA, Carl W. BENTZEL, *Commissioners*, concurring in the result.

Order Affirming Initial Decision

On January 24, 2022, the Administrative Law Judge ("ALJ") issued an Initial Decision ("I.D.") finding that none of the allegedly-unlawful actions by Respondent Marine Transport Logistics ("MTL") were unjust or unreasonable under 46 U.S.C. § 41102(c), and that Complainants had failed to pierce MTL's corporate veil

such that either Respondents Alla Solovyeva or Raya Bakhirev, MTL employees, were properly named. Doc. 37. Thus, the ALJ dismissed the action. *Id.*

On February 15, 2022, Complainants Nnabugwu Chinedu Andrew, Avers Logistics Ltd., and CJ Deluz Nigeria Ltd., filed a "Brief in Support of Their Exceptions to the Initial Decision." Doc. 38. Despite the document's title, Complainants' filing does not constitute "exceptions" because it fails to comply with the Commission's particularity requirements set forth in 46 C.F.R. § 502.227(a). Under § 502.227(a), "any party may file a memorandum excepting to any conclusions, findings, or statements contained in [an initial] decision." 46 C.F.R. § 502.227(a)(1). Such exceptions "shall indicate with particularity alleged errors, [and] shall indicate transcript page and exhibit number when referring to the record[.]" *Id.* Complainants' filing does no such thing. *See generally* Doc. 38 (failing to identify any findings of fact or issues of law with which Complainants disagree). Indeed, Complainants' *only* specific citation to the I.D. concerns an obvious typographical error by the ALJ. *See id.* at 5 (citing Doc. 37 at 15 and spuriously maintaining that because the ALJ wrote "Respondents" where she obviously meant "Complainants," the ALJ is "confused" as to "who are the complainants and who are the respondents in this matter"). To the extent that Complainants state anything specific at all, they primarily (and improperly) rehash discovery disputes that have been thrice raised before—and ruled on by—the ALJ. *Compare* Doc. 38 at 2-8 *with* Complainants' Motions to Compel and Reconsider, Docs., 18, 24, 28 and Orders on Complainants' Motions, Docs. 21, 26, 29.

Indeed, Complainants acknowledge that their filing is deficient. *See* Doc. 38 at 9 ("The purpose of these Exceptions are [sic] to make a record of key issues raised by the [I.D.] and to request that the Commission now review the decision."). Complainants do not, however, ask that the Commission waive the particularity requirements in § 502.227(a). Instead, without citing any authority,

Complainants maintain that "[i]t is fundamentally unfair for complainants, who are of limited means and resources (as well as the undersigned [Complainants' counsel], a solo practitioner whose resources and time are also limited) to be expected to now sift through all reversible errors in the Initial Decision[.]" *Id.* Complainants are incorrect. It is well-established that counsel's busy schedule and being a solo practitioner are not good grounds for failing to comply with rules and regulations.[1] *See, e.g.*, *Chebro v. Great Dane, LLC*, 2020 WL 4499970, at *3 (D. Conn. Aug. 5, 2020) (citing cases); *see also Tremper v. Air-Shields Inc.*, 2001 WL 1000686, at *2 (S.D. Ind. Aug. 27, 2001) (noting that the Seventh Circuit has characterized as the "opposite of good cause" for having violated relevant rules and orders, "excuses" such as "[p]oor time management and attorney neglect-even excusable neglect") (internal citation omitted).

Though not required to engage in the type of review that Complainants themselves are required—but chose not—to do, the Commission has considered the arguments made in the Complainant's filing. *See* 46 C.F.R. § 502.227(a); Complainants' Exceptions at 9 (inappropriately requesting that the Commission "take into consideration *all arguments and evidence* previously set forth in Complainants' [Summary Decision] Brief and Proposed Findings of Fact and Appendix," which were, of course, before the ALJ). The Commission finds these arguments lacking.

Specifically, Complainants' discovery-related assertions appear to be directly refuted by Complainants' own Proposed Findings of Fact and the record that Complainants themselves produced. *Compare* Complainants' Exceptions, Doc. 38 at 7

[1] Further, Complainants did not request an extension of time in which to file their exceptions—a request that the Commission often grants.

(maintaining that Complainants "still have not received" invoices, bills of lading, dock receipts, and other paperwork for four vehicles at issue: those with Vehicle Identification Numbers ("VINs") ending in 6693, 5968, 0283, and 2288) *with* Complainants' Proposed Findings of Fact, Doc. 31 at PDF 414, 501, 517, 528 (reflecting various invoices for the vehicle with the VIN ending in 6693); *id.* ¶ 140 (referencing the "MTL Invoice" for the vehicle with the VIN ending in 5968); *id.* ¶¶ 136-137 (referencing the "MTL Invoice" and the "MTL Dock Receipt" for the vehicle with the VIN ending in 0283); *id.* ¶¶ 141-44 (referencing the "MTL Invoice" and the "MTL Dock Receipt" for the vehicle with the VIN ending in 2288). Complainants do not explain or even state how the ALJ reached an incorrect conclusion as to any of the I.D.'s relevant, corresponding findings of fact; instead, Complainants maintain that the ALJ reached a decision "prior to the development of a full and complete record[.]" Doc. 38 at 4. Here, too, Complainants fail to explain to themselves, choosing instead to "refer[]" the Commission to their "various motions" before the ALJ "which, for the purposes of brevity will not be regurgitated" in their Exceptions. *Id.* at 4. Thus, the Commission agrees with the ALJ that "the extensive record was sufficient to rule on the material issues in this proceeding." I.D. at 18.[2]

Furthermore, the Commission reiterates the Administrative Law Judge's caution to Counsel for Complainants regarding the naming of individuals instead of, or in addition to corporations, without sufficient basis to do so. As the Judge indicated in the I.D.,

[2] Although the I.D. includes analysis of all the elements in the Commission's interpretive rule on § 41102(c), initial decisions "should address only those issues necessary to a resolution of the material issues presented on the record." 46 C.F.R. § 502.223. Accordingly, once the ALJ determined that Respondents' conduct was not unreasonable, further analysis was not necessary and the Commission did not review and does not adopt the ALJ's other findings. *See* I.D. at 12-18.

future instances of this conduct may result in a finding that the claim against the named individual was frivolous and may warrant sanctions. *Id.* at 13. Moreover, Counsel is cautioned about the tone and allegations made in the brief supporting exceptions. The Commission reminds Counsel that it expects practitioners to treat the ALJ (and the Commission) with respect and to otherwise act in accordance with the applicable rules of professional conduct. *See* 46 C.F.R. § 502.26.

For the reasons set forth above, the Commission **AFFIRMS** the Initial Decision. **THEREFORE IT IS ORDERED** that Complainant'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**.

By the Commission.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

ACHIM IMPORTING COMPANY INC., *Complainant*

v.

YANG MING MARINE TRANSPORT CORPORATION, *Respondents*.

DOCKET NO. 22-08

Served: September 23, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's August 22, 2022, Initial Decision has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

PRO TRANSPORT CHARLESON, INC., *Complainant*

v.

ALLROUND MIDWEST FORWARDING, INC., *Respondents*.

DOCKET NO. 22-15

Served: September 23, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's June 16, 2022, Initial Decision has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

ORANGE AVENUE EXPRESS, INC., *Complainant*

v.

HAPAG LLOYD AG, *Respondent*.

DOCKET NO. 21-10

Served: October 3, 2022

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

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On September 15, 2022, Complainant Orange Avenue Express, Inc. and Respondent Hapag Lloyd AG ("Hapag Lloyd") filed a joint motion for approval of confidential settlement agreement ("Motion") and a copy of the confidential settlement agreement. The motion seeks approval of the settlement agreement, voluntary dismissal of the complaint with prejudice, and confidential treatment of the settlement agreement. Motion at 4.

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

[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.

> 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 that they "established a procedural schedule and engaged in discovery" and have "engaged in settlement discussions at various points in time throughout the course of the proceeding, ultimately concluding the Confidential Settlement Agreement accompanying this memorandum." Motion at 3. The parties further state:

> In this action, the parties, both sophisticated corporate entities, arrived at the Confidential Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks. The Confidential 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 Confidential 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 Confidential Settlement

> Agreement be approved and, on that basis, the complaint in this matter be dismissed with prejudice.

Motion at 6.

Based on the representations in the joint 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 arms-length settlement discussions. The proceeding would require potentially expensive 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 parties properly redacted confidential bank account information from the confidential settlement agreement. The confidential 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 Complainant Orange Avenue Express, Inc. and Respondent Hapag Lloyd AG 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

OJ COMMERCE, LLC, *Complainant*

v.

HAMBURG SÜDAMERIKANISCHE DAMPFSCHIFFFAHRTS-GESELLSCHAFT A/S & CO KG AND HAMBURG SUD NORTH AMERICA, INC., *Respondents*.

DOCKET NO. 21-11

Served: October 6, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's August 31, 2022 decision to grant Respondents' motion to dismiss Complainant's 46 U.S.C. §§ 41102(b)(2), 41104(a)(5), and 41104(a)(9) claims has expired. Accordingly, the corresponding portion of the "Order on Respondents' Motion to Partially Dismiss and for a Protective Order and Complainant's Motion for Expedited Relief" has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

INTERNATIONAL EXPRESS TRUCKING, INC., *Complainant*

v.

ZIM INTEGRATED SHIPPING SERVICES LTD., *Respondent*.

DOCKET NO. 22-13

Served: October 20, 2022

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

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On October 5, 2022, Complainant International Express Trucking, Inc. ("IXT") and Respondent Zim Integrated Shipping Services Ltd. ("Zim") filed a joint motion seeking approval of a settlement, confidential treatment of the settlement agreement, and voluntary dismissal of the complaint ("Motion") and a copy of the confidential settlement agreement.

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

[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.

> 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 that the "claims at issue relate to allegations that the Respondent engaged in unjust and unreasonable practices in violation of the Shipping Act. The Respondent has denied all such allegations." Motion at 2. The parties further state:

> Here, the Parties' settlement reflects a fair and considered judgment of the relative strengths of their respective positions, the desire to avoid continuing litigation costs and to avoid the risks inherent in litigation. The settlement is the product of arms-length negotiations, in which counsel for both parties participated, and is free of fraud, duress, or undue influence. The Parties also submit that the settlement is free of mistake or other defects which might make it unapprovable.
>
> Further, the settlement does not contravene law or public policy. It is not an unjust or discriminatory device, has no adverse effect on any third parties or the market for transportation services, and does not run afoul of any provision of the Shipping

> Act. Rather, it constitutes a prudent decision to settle costly litigation in which the ultimate outcome was uncertain. In sum, because the settlement is fair, reasonable and adequate, and is the product of prudent and considered judgment on the part of the Parties, it should be approved.

Motion at 2-3.

Based on the representations in the joint 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 arms-length settlement discussions. The proceeding would require potentially expensive 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 confidential 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 Complainant IXT and Respondent Zim 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

ONE NETWORK EXPRESS PTE. LTD. – POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(c)

Docket No. 21-17

Served: October 27, 2022

BY THE COMMISSION: Daniel B. MAFFEI, Chairman, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M. VEKICH, Commissioners.

Order Reversing the Initial Decision and Remanding

On June 28, 2022, the Administrative Law Judge ("ALJ") in Docket No. 21-17, *One Network Express Pte. Ltd.*[1] *– Possible Violations of 46 U.S.C. § 41102(c)*, issued an Initial Decision ("I.D.") approving a confidential settlement between Respondent and the Bureau of Enforcement ("BOE"), and dismissing the proceeding with prejudice. I.D., Doc. 42. On July 15, 2022, the Commission requested review of the I.D. The Secretary's corresponding Notice of Commission Determination to Review rendered the I.D. inoperative and settlement agreement

[1] At the Bureau of Enforcement's request, former Respondent Ocean Network Express (North America) was dismissed from this action in May 2022. *See* Order on Mots. to Compel and Dismiss, Doc. 36.

unenforceable. Notice, Doc. 43; *see* 46 C.F.R. § 502.227.

Having reviewed the I.D., the settlement agreement, and all other relevant materials, the Commission now reverses the I.D. and remands the action to the ALJ for further proceedings consistent with this Order.

I. BACKGROUND

On December 30, 2021, the Commission instituted this adjudicatory proceeding to determine whether the apparent practice of ocean common carrier Ocean Network Express Pte. Ltd. ("ONE") of attempting to collect charges from persons who did not agree to be bound under the relevant bills of lading, is unreasonable under 46 U.S.C. § 41102(c). Order of Investigation and Hearing, Doc. 1.

A. Private Party Litigation Involving ONE

In May 2020, ONE filed suit against Greatway Logistics Group, LLC ("Greatway"), a licensed non-vessel operating common carrier ("NVOCC"), in federal district court, demanding payment for charges accrued on the shipments covered under two bills of lading relating to shipments of cargo from Brazil to the Port of Houston. *Id.* ¶¶ 11-12. [2] One of the bills of lading listed Greatway as (only) the Notify Party. *Id.* ¶ 14. The other did not identify Greatway at all. *Id.* ¶ 15.

According to ONE, the bills of lading "govern the relations between [] Carrier[s] and [] Merchant[s]." *Ocean Network Express (North America) Inc. v. Pacific Lumber Resources, Inc.*, Compl. ¶¶ 18-19, No. 4:20-cv-01734 (filed May 18, 2020). Also according to ONE, per the bills of lading, "Merchants" are "liable to the Carrier for the payment of all Freight and/or expenses[;]" and "Merchant," as defined on the standard contract itself, "includes the Shipper,

[2] The case named five other entities also alleged to be "merchants" responsible for the charges who were all eventually voluntarily dismissed from the case.

Consignee, owner, Person owning or entitled to the Person owning or entitled to possession of the Goods or of this Bill, Receiver, Holder, and anyone acting on behalf of any such person, including but not limited to agents, servants, independent contractors, [] NVOCCs[], and freight forwarders." *Id.* (quoting ONE's bills of lading). Greatway, in response, asserted that it had acted only to arrange for customs clearance; it did not agree to be bound by the bills of lading, have any interest in the cargo, or act as an agent for any relevant party. *See* Doc. 1 ¶¶ 16-19. In short, Greatway maintained that it was not liable for the charges. *See id.*

On May 25, 2021, ONE sought to dismiss its claims against Greatway voluntarily stating that it had "settled with other defendants regarding the underlying occurrence and no longer desire[d] to pursue further litigation related to these bills of lading," and moved to dismiss a counterclaim filed by Greatway. *Ocean Network Express*, No. 4:20-cv-01734, ECF No. 66 ¶ 10. The district court granted ONE's motion, thereby terminating the action.

Also on May 25, 2021, Greatway filed a complaint with the Commission alleging that ONE Pte.'s attempt to collect demurrage, storage, and freight charges violated 46 U.S.C. § 41102(c). FMC Dkt. No. 21-04. BOE subsequently intervened in the Commission case. In November 2021, ONE Pte. and Greatway moved for approval of a settlement agreement and dismissal of Greatway's complaint. Although BOE took no position on the commercial terms of the settlement agreement, BOE made clear that the commercial resolution of ONE Pte.'s and Greatway's dispute did not address BOE's concerns about application of the "Merchant" clause. BOE Resp. to Jt. Mot. at 3, Dkt. No. 21-04 (Nov. 12, 2021). The ALJ approved the settlement agreement and dismissed the complaint on November 30, 2021, and the Commission issued a notice not to review the ALJ decision on January 5, 2022.

B. FMC Notice of Inquiry

In October 2020, the Commission issued a Notice of Inquiry ("NOI") regarding vessel-operating common carriers ("VOCCs") defining "Merchant" in their bills of lading to apply to persons and entities with whom the carriers did not contract. *See* FMC Dkt. No. 20-16. This included those who might not be in privity of contract, or should otherwise be deemed to have consented to be bound by the contract of carriage. The Order of Investigation in this case referenced the Notice of Inquiry as part of the determination to initiate this enforcement action.

C. Procedural History of Docket No. 21-17

On December 30, 2021, the Commission ordered the initiation of this action. Order of Investigation and Hearing, Doc. 1.

The parties here proceeded to discovery, and, after several discovery disputes, jointly moved for approval—and confidential treatment—of their settlement agreement, and for the action to be dismissed with prejudice. *See* Docs. 21-35; Joint Mot., Doc. 41.

On June 28, 2022, the ALJ approved the confidential settlement in her I.D., which the Commission now reverses for the following reasons.

II. DISCUSSION

A. Standard of Review

The Commission reviews an ALJ's decision *de novo*. 46 F.R. § 502.227(a)(6) (when the Commission reviews an initial decision, it "will have all the powers which it would have in making the initial decision").

The Commission has a longstanding policy of encouraging settlements and applies presumptions favoring a finding that the

terms are fair, correct and valid. *World Chance Logistics (Hong Kong), Ltd. and Yu, Chi Shing, a.k.a. Johnny Yu –Possible Violations of Section 10 of the Shipping Act of 1984*, Dkt. No. 09-07, 2010 FMC LEXIS 27, at *5 (FMC 2010). However, that does not mean that the Commission reflexively approves any settlement proposed by the parties. *See, e.g.*, *Foreign Tire Sales Inc. v. Evergreen Shipping Agency (America) Corp.*, Dkt. No. 22-05, 2022 WL 1485894 (ALJ May 3, 2022) (admin. final. June 2, 2022). Before granting its approval, the Commission reviews the terms to ensure they are consistent with § 502.72(a)(3) and that the terms are fair, reasonable, and adequate. *World Chance*, 2010 FMC LEXIS 27, at *5.

There are additional procedural requirements, described in Subpart W of the Commission's Rules of Practice and Procedure, for settlement agreements in formal, docketed proceedings instituted by order of the Commission. *See* 46 C.F.R. §§ 502.601-502.605.

B. The Settlement Agreement

There are several issues with the settlement agreement and the parties' arguments in support thereof.

First, although the parties state that they are moving under Rule 72, 46 C.F.R. § 502.72, which is in Subpart E of the Commission's Rules of Practice and Procedure and governs dismissals in formal actions, their motion is void of *any* reference to the rules in Subpart W, which govern, among other things, the assessment of civil penalties and settlements in enforcement actions seeking civil penalties, *id.* §§ 502.601-502.605. *See* Doc. 41. Under § 502.603(b), "[i]n determining the amount of any penalties assessed," the Commission is required to: "take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other

matters as justice requires."[3]

The joint motion of the parties does not address these factors which renders the Commission unable to definitively determine whether the settlement agreement conforms with the requirements in Subpart W. Based on the information the Commission does have about these factors from the record, it does not appear that the civil penalty and other terms proposed in the settlement agreement are sufficient to resolve the serious allegations in this case.

Moreover, enforcement action settlements are not to be kept confidential. 46 C.F.R. § 502.603(a) ("The full text of any settlement [assessing a civil penalty] must be included in the final order of the Commission."). In the I.D., the ALJ acknowledges that the parties did not "address this requirement." Doc. 42 at 4. The ALJ nevertheless granted the parties' request for confidentiality because this "expedited proceeding [] has been heavily litigated" and the "confidentiality provision is central to the agreement to settle this proceeding." *Id.*

The Commission does not agree that these are sufficient reasons to waive the no-confidentiality requirement, especially in the absence of any request to do so. To be sure, the Commission regularly agrees to keep confidential various settlements in private party actions. As § 502.603(b) makes clear, however, in an enforcement action, the Commission is interested in deterring unlawful conduct and otherwise encouraging compliance with the statutes and regulations that it administers. Confidential settlements do not further these important goals.

Because the Commission finds that the terms of the agreement violate the Commission's Rules of Practice and Procedure and are objectionable from a policy perspective, it hereby reverses the I.D.'s approval of the agreement. *See id.* § 502.72(a)(3)

[3] These factors have since been codified in 46 U.S.C. § 41109 by the passage of the Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272.

(settlements that appear to violate any law or policy will not be approved).

III. CONCLUSION

For the reasons set forth above, the Initial Decision Approving Settlement Agreement is **REVERSED**.

THEREFORE, IT IS ORDERED that this action be **REMANDED** to the ALJ for further proceedings.

It is further **ORDERED** that the ALJ promptly issue a scheduling order setting dates for the parties to submit briefs, findings of fact, and appendices.

It is further **ORDERED** that the ALJ issue an Initial Decision on the merits of the case by January 26, 2023.

It is further **ORDERED** that the Commission's deadline for a final decision in this case is extended to April 26, 2023.

By the Commission.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

ORANGE AVENUE EXPRESS, INC., *Complainant*

v.

Hapag Lloyd AG, *Respondent*.

DOCKET NO. 21-10

Served: November 3, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's October 3, 2022, Initial Decision Approving Settlement Agreement has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

ACME FREIGHT SERVICES CORP., *Complainant*

v.

TOTAL TERMINALS INTERNATIONAL, *Respondent*.

DOCKET NO. 22-07

Served: November 9, 2022

ORDER OF: Linda S. Harris CROVELLA, *Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On October 21, 2022, Complainant Acme Freight Services Corp. ("Acme"), and Respondent Total Terminals International ("Total Terminals"), filed a joint motion seeking approval of a confidential settlement agreement and dismissal with prejudice of the complaint ("Motion"), with a copy of the confidential settlement agreement.

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

[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.

> 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 settlement agreement includes a non-party, Mediterranean Shipping Company ("MSC"), to whom Respondent states that Acme paid the disputed demurrage. The parties state that "the settlement is the product of arms-length negotiations between sophisticated entities," and "reflects a fair and considered judgment of the relative strengths of their respective positions, the desire to avoid continuing litigation costs and to avoid risks inherent in litigation." Motion at 2-3. The parties state:

> Further, the settlement does not contravene law of public policy. It is not an unjust or discriminatory device, has no adverse impact on any third parties or the market for transportation services, and does not run afoul of any provision of the Shipping Act. Rather, it constitutes a prudent decision by the Parties and MSC. In sum, the settlement should be approved because it is fair, reasonable and

adequate, and is the product of prudent and considered judgment on the part of the Parties and MSC.

Motion at 3.

Based on the representations in the joint 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 arms-length settlement discussions. The proceeding would require potentially expensive 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 confidential 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 Complainant Acme and Respondent Total Terminals 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**.

Linda S. Harris Crovella
Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

ONE BANANA NORTH AMERICA CORP., *Complainant*

v.

HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA) LLC, *Respondents*.

DOCKET NO. 22-03

Served: November 16, 2022

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

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On October 31, 2022, Complainant One Banana North America Corp., ("One Banana") and Respondent Hapag-Lloyd AG and Hapag-Lloyd (America) LLC (collectively "Hapag-Lloyd") filed a joint motion seeking approval of a confidential settlement agreement ("Motion") and a copy of the confidential settlement agreement.

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

[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.

> 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 that they "have engaged in settlement discussions at various points in time throughout the course of the proceeding, ultimately concluding the Confidential Settlement Agreement accompanying this memorandum." Motion at 1-2. The parties further state:

> In this action, the parties, both sophisticated corporate entities, arrived at the Confidential Settlement Agreement through arm's length negotiations and support this motion and the relief that it seeks. The Confidential 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 Confidential Settlement Agreement is a fair and reasonable resolution of the disputes 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 Confidential Settlement

> Agreement be approved and, on that basis, the complaint in this matter be dismissed with prejudice.

Motion at 3.

Based on the representations in the joint 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 arms-length settlement discussions after conducting extensive discovery. 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 confidential 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 Complainant One Banana and Respondents Hapag-Lloyd 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

Office of Administrative Law Judges

AENEAS EXPORTING LLC, *Complainant*

v.

HONEYBEE INTERNATIONAL INC., AND ALL AMERICA SHIPPING, *Respondent*.

DOCKET NO. 22-11

Served: November 16, 2022

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

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On October 31, 2022, Complainant Aeneas Exporting LLC ("Aeneas"), in pro per, and Respondents, Honeybee International Forwarding, dba Honeybee International, Inc. ("Honeybee") and All California Auto Parts Inc., erroneously sued herein as All America Shipping ("All America"), filed a joint motion seeking approval of a settlement agreement and dismissal with prejudice of the complaint ("Motion") with a copy of the settlement agreement.

Complainant is unrepresented, however, he has actively engaged in this proceeding, including requesting a number of subpoenas. Initial requests for subpoenas and appointment of an expert were denied, but a subsequent subpoena request with a more detailed justification was granted. In addition, the parties agreed in email correspondence with the Commission's Office of Administrative Law Judges that the Complainant's motion to compel documents from Respondents, labeled as a motion to subpoena non-party, has been resolved between the parties.

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).

[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.

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 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 reached their settlement with the assistance of an FMC mediator. Motion at 2. The parties further state:

> In the FMC Proceeding, Aeneas believes that it would prevail on the allegations set forth in its Complaint. Honeybee and All America believe that they would defeat the allegations set forth in the Complaint.
>
> Notwithstanding these beliefs, the Parties recognize that when the claimed damages are compared with the expected remaining costs of this litigation and the inherent uncertainties of litigation, with the assistance of the FMC mediator, the Parties agreed to conduct settlement discussion to see whether the matter could be resolved. The Settlement Agreement that accompanies this Motion is the result of the mediator directed discussions among the Parties and is submitted to the Presiding Officer for approval.

Motion at 2.

The parties further assert that "the proposed settlement here is to be evaluated against litigative probabilities, litigative and administrative costs, and such other matters as justice may require," arguing:

> As discussed above, there are bona fide disagreements between Claimant and the Respondents as to certain facts and legal issues. Although each side is confident it would prevail, the outcome of any litigation is uncertain. In view of the litigative probabilities and the probability that this proceeding will continue to be time consuming, and costly, the proposed Settlement Agreement, which dismisses all FMC claims with prejudice, would save all Parties time and expense.

Motion at 3-4.

Based on the representations in the joint 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 agreement was negotiated with the assistance of an FMC mediator and the parties have engaged in arms-length settlement discussions. The proceeding would require potentially expensive 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.

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 Complainant Aeneas and Respondents Honeybee and All America be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

INTERNATIONAL EXPRESS TRUCKING, INC., *Complainant*

v.

ZIM INTEGRATED SHIPPING LTD., *Respondent*.

DOCKET NO. 22-13

Served: November 22, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's October 20, 2022, Initial Decision has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

ACME FREIGHT SERVICES CORP., *Complainant*

v.

TOTAL TERMINALS INTERNATIONAL, *Respondent*

DOCKET NO. 22-07

Served: December 12, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's October 21, 2022, Initial Decision has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

OCEAN NETWORK EXPRESS (NORTH AMERICA), INC. AND OCEAN NETWORK EXPRESS, PTE., LTD. - POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(C)	**DOCKET NO. 21-17**

Served: December 13, 2022

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

INITIAL DECISION APPROVING REMAND SETTLEMENT AGREEMENT[1]

I. Background and History

On December 2, 2022, the Bureau of Enforcement, Investigations, and Compliance ("BEIC") and Respondent Ocean Network Express, Pte., Ltd. ("ONE") filed a joint memorandum in support of a proposed revised settlement ("Motion"), together with a copy of the proposed settlement agreement. Respondent Ocean Network Express (North America), Inc. was dismissed from this proceeding on May 4, 2022, and is no longer a party. The parties seek approval of the settlement agreement, a cease and desist order entered against ONE, and dismissal of this proceeding with prejudice. Motion at 12.

The Federal Maritime Commission ("Commission") initiated this proceeding on December 30, 2021, by issuing an Order of Investigation and Hearing ("OIH") to determine whether Respondents violated section 41102(c) of the Shipping Act by overbroadly defining and applying the definition of merchant in ONE's bill of lading in such a manner as to unilaterally impose joint and several liability for freight and/or charges on a party with whom ONE was not in contractual privity and who had not consented to be bound by the terms of the bill of lading. OIH at 2. In addition, the Commission ordered the proceeding to be expedited. OIH at 7-8.

The proceeding was temporarily stayed while the Commission considered a petition seeking reconsideration and rescission, which was denied on January 28, 2022. A motion to dismiss was denied on February 23, 2022. The parties engaged in discovery, with an order granting a motion to individually identify respondents issued on March 28, 2022, and an order on motions to compel and to dismiss issued on May 4, 2022. Briefing deadlines were set but the parties requested multiple extensions while they negotiated the original settlement agreement. On June 28, 2022, the original confidential original settlement requested by the parties was approved. On July 15, 2022, the Commission issued a Notice of Determination to Review.

[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.

On October 27, 2022, the Commission issued an Order Reversing the Initial Decision and Remanding ("Remand Order"). The Remand Order stated that the joint motion of the parties did not address the Subpart W factors which govern the assessment of civil penalties and settlements in enforcement actions, which rendered the Commission "unable to definitively determine whether the settlement agreement conforms with the requirements in Subpart W" and that it did not appear that "the civil penalty and other terms proposed in the settlement agreement are sufficient to resolve the serious allegations in the case." Remand Order at 5-6. In addition, the Commission stated that "enforcement action settlements are not to be kept confidential." Remand Order at 6. "Because the Commission finds that the terms of the agreement violate the Commission's Rules of Practice and Procedure and are objectionable from a policy perspective, it hereby reverses the I.D.'s approval of the agreement." Remand Order at 6. The Commission required that the ALJ promptly issue a scheduling order and that an initial decision on the merits be issued within three months.

On October 28, 2022, a remand scheduling order was issued. On November 17, 2022, counsel for the parties met with the undersigned in a virtual conference to discuss the status of settlement discussions. On November 18, 2022, a joint status report was filed by the parties summarizing the previous day's conference and anticipation that a settlement would be reached.

II. Legal Standard

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 long history of approving settlement agreements that meet the required criteria, including in enforcement proceedings.

> The Commission's decisions and regulations have long indicated a broad policy favoring settlement. In reviewing a proposed settlement, the Commission evaluates whether it would contravene any law or public policy, and whether it is "fair, reasonable, and adequate." As the parties note, the Commission weighs enforcement policy in terms of deterrence and compliance, likely costs and delay, and "pragmatic litigative possibilities" regarding the proceeding's potential outcomes.

Possible Unfiled Agreement Between Hyundai Merchant Marine Company, Ltd. and Mediterranean Shipping Co., S.A., Docket No. 97-07, 2000 FMC LEXIS 2 at *4 (FMC May 2, 2000) (citing *Old Ben Coal Co. v. Sea-Land Serv.*, 21 F.M.C. 506, 512-513; 18 S.R.R. 1085, 1091 (ALJ Nov. 29, 1978); *Far Eastern Shipping Co. – Possible Violations of Sections 16,*

Second Paragraph 18(b)(3) and 18(c), Shipping Act, 1916, 21 S.R.R. 743, 1014 (ALJ Mar. 25, 1982)).

> The Commission has routinely held that negotiated settlement agreements should be approved unless the agreements present one of a few defects requiring disapproval. The Commission has consistently adhered to a policy of encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid. Despite the general preference for approval of settlement agreements, the Commission does not merely rubber stamp any proffered settlement. Instead, the Commission typically reviews a settlement agreement to ensure that it does not contravene law or public policy. Such review typically includes evaluating factors to determine that the settlement agreement was not a product of fraud, duress, undue influence, or mistake. The Commission also reviews the terms of settlement agreements to ensure that the terms are fair, reasonable, and adequate. The review process frequently involves a balancing of the likelihood of success on the merits against the cost and complexity of proceeding to final judgment.

World Chance Logistics (Hong Kong), Ltd. and Yu, Chi Shing, a.k.a. Johnny Yu – Possible Violations of Section 10 of the Shipping Act of 1984, Docket No. 09-07, 2010 FMC LEXIS 27 at *5, 31 S.R.R. 1346, 1350 (FMC May 20, 2010) (internal citations omitted).

This is an enforcement proceeding and the Commission has instructed that the Subpart W factors be considered. Under Subpart W, Commission Rule 603(b), in "determining the amount of any penalties assessed," the Commission is required to "take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires." 46 C.F.R. § 502.603(b). These factors have since been codified in 46 U.S.C. § 41109 by the passage of the Ocean Shipping Reform Act of 2022, Pub. L. No. 117-146, 136 Stat. 1272. Remand Order at 6 n.3.

In addition, Commission Rule 603(a), governing the assessment of civil penalties in Commission-instituted proceedings, states that the "full text of any settlement must be included in the final order of the Commission." 46 C.F.R. § 502.603(a); *see also* Remand Order at 6.

III. Settlement Agreement Analysis

A. Settlement Terms

The parties state that the "revised Settlement Agreement addresses the purpose the Commission articulated in its OIH and Order Reversing the Initial Decision and Remand; specifically, the rules in Subpart W, which govern, among other things, the assessment of civil penalties 46 C.F.R. §§ 502.601-502.605." Motion at 2 (footnote omitted). In addition, the parties state:

> The Parties agree to resolve their legal dispute in the Settlement Agreement and agree that settlement is in the interest of both parties, as it conserves litigative and administrative resources. Furthermore, the Settlement Agreement addresses the Commission's enforcement interests of deterrence and compliance, while providing clarity and benefits to the shipping public, such as, immediate relief to third parties performing vital supply chain activities. A summary of terms of the Settlement Agreement are as follows:
>
> 1. ONE will pay a civil penalty of $131,332.00;
>
> 2. ONE will immediately limit the use of its Bill of Lading "Merchant" definition in the U.S. foreign trade to shippers, consignees, and persons with a beneficial interest in the cargo (46 C.F.R. § 515.2(b));
>
> 3. ONE will add an explanatory note to its U.S. tariff explaining its "Merchant" limitation;
>
> 4. ONE agrees to the issuance of a cease-and-desist order prohibiting ONE from collecting monies owed ONE under its bill of lading from non-Merchants or entities with whom ONE has no direct contractual relationship; and
>
> 5. ONE will immediately stop invoicing non-Merchants or entities with whom ONE has no direct contractual relationship.
>
> The Parties note that, in part, the subject matter of the OIH and this settlement agreement is currently being addressed by the Commission in rulemaking and that the settlement agreement provides relief to the shipping public now, rather than when a final rule is issued.

Motion at 2-3.

Consistent with Commission Rule 603(a), the full text of the settlement agreement is attached to this order. 46 C.F.R. § 502.603(a). In addition, the settlement agreement should be posted on the docket on the Commission website.

B. Criteria

1. Rule 72 Factors

Commission Rule 72 requires consideration of "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).

The parties assert that the agreement is public and therefore it "will inform other carriers and the shipping public so they may take note of its terms and conform their conduct thereto." Motion at 6. The parties further contend that the settlement agreement "is free of fraud, duress, undue influence, mistake, or other defects which would otherwise result in its disapproval. The

settlement is the result of arms-length, good-faith negotiations conducted with the advice of counsel. Approval of the Settlement Agreement is proper inasmuch as it does not violate any law or policy." Motion at 6.

Both parties are represented by counsel who have engaged in arm's length negotiation and there is no indication of fraud, duress, undue influence, mistake, or other defects. The settlement promptly resolves an issue important to the shipping industry and avoids the potential costs and uncertain outcome inherent in litigation. Moreover, the agreement does not appear to violate any law or policy and is consistent with Commission requirements as outlined below.

2. Rule 603 Factors

Commission Rule 603(b) requires consideration of "the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires." 46 C.F.R. § 502.603(b). The parties have different positions regarding a number of these factors.

Regarding the nature, circumstances, extent and gravity of the violation, BEIC contends that these are aggravating factors, and the penalty amount "is based on the two bills of lading identified in the OIH and calculated using the maximum amount for a knowing and willful violation." Motion at 7. BEIC further asserts that:

> Beyond the dollar amount of the civil penalty, the true value of the Settlement Agreement lies in ONE's agreeing to immediately alter its practices in the U.S.-foreign trades. The Settlement Agreement coupled with the issuance of a cease-and-desist order will deter future similar violative acts by ONE. Moreover, it will serve as notice to other VOCCs that a merchant clause inclusive of third parties who are not in contractual privity with the carrier, who have no beneficial interest in the cargo, and who have not consented to the carrier's bill of lading terms and conditions, may run afoul of the Shipping Act.

Motion at 7.

ONE does not admit any violations and contends that "any violative act(s) found could number no more than the two bills of lading originally identified in the OIH. ONE also asserts that multiple mitigating factors exist that weigh in its favor. ONE believes the Settlement amount is significant because it exceeds the maximum allowed by law." Motion at 6-7.

The OIH identified two bills of lading at issue and the settlement amount meets or exceeds the maximum amount for a knowing and willful violation. Therefore, the amount of the civil penalty is consistent with the number of violations alleged and the nature, circumstances, extent and gravity of the violations alleged. Moreover, there is significant benefit to the shipping public in having an expeditious resolution which clarifies the Shipping Act requirements and imposes a clear cease and desist order.

Regarding the degree of culpability, BEIC argues that "ONE knowingly and willfully established a practice of unreasonably holding third parties liable through its bill of lading (merchant clause) in violation of the Shipping Act." Motion at 8. ONE asserts that it named Greatway as a defendant in the underlying lawsuit "in good faith and based on federal maritime law," and that "even if it violated the Shipping Act, its violation was not knowing and willful." Motion at 9. "ONE and BEIC agree that culpability is capped in this Settlement Agreement for two knowing and willful Shipping Act violations." Motion at 9. It is difficult to determine the degree of culpability at this stage of the proceeding, however, the civil penalty is consistent with the maximum penalty for the two violations alleged, and the cease and desist order ensures that further violations do not occur. Therefore, the proposed settlement is reasonable with regard to the degree of culpability.

Regarding history of prior offenses and ability to pay, the parties agree that "ONE has no history of prior offenses and that ONE has the ability to pay the agreed upon civil penalty." Motion at 9. These factors are consistent with the proposed penalty.

Regarding other factors as justice requires, the parties state:

> The Settlement Agreement significantly benefits the shipping public by requiring ONE to change its activities promptly, not at some future undetermined date. Pursuant to the settlement, ONE agrees to immediately modify the interpretation of its Merchant clause with respect to the U.S.-foreign trades, limiting the term to shippers, consignees, and entities with beneficial interest in the cargo, and to explain the revised definition in its tariff. ONE also agrees to immediately cease and desist invoicing non-Merchants (as re-defined) or entities with whom ONE has no direct contractual relationship under its bill of lading and to formalization of that obligation in a cease and-and desist order. Thus, the Settlement Agreement fully resolves the behaviors raised in the OIH, addresses the concerns expressed by the Commission in Docket No. 20-16, and brings instant relief for the industry from such practices. The cease-and desist order ensures that such relief will persist until modified or superseded by subsequent Commission guidance, such as issuance of a final rule regarding the matters addressed in the settlement agreement.

Motion at 9-10. These factors significantly weigh in favor of approving the proposed settlement agreement.

3. Other Considerations

The parties raise two other considerations in reaching the settlement: the enforcement policy of deterrence and compliance and, litigative realities. Both are appropriate for consideration.

Regarding the enforcement policy of deterrence and compliance, the parties assert:

> With respect to the policy of enforcement, BEIC stresses the importance of ensuring compliance with the Shipping Act of 1984. ONE supports the Commission's objectives and has, in addition to payment of a civil penalty,

> agreed to significantly alter its tariff terms, as well as its behavior thereunder, for all shipments within the jurisdiction of the Commission.
>
> The relief agreed to by ONE provides assurances of deterrence and future compliance. The Settlement Agreement requires ONE to change how it defines Merchant in the U.S. trades and who it invoices and imposes liability under its bill of lading. ONE's commitment to these changes is reflected in its agreement to a cease-and-desist order. The agreed civil penalty adds further weight to the deterrent effect. ONE also recognizes that its failure to comply with the cease-and-desist order may result in much higher penalties being demanded by the Commission in any enforcement action resulting from such failure. Additionally, approval of the Settlement Agreement would put other ocean common carriers on notice and is likely to deter them from engaging in similar practices.

Motion at 10. These factors also significantly weigh in favor of approving the proposed settlement agreement.

Regarding litigative realities, the parties assert that the "litigative realities and cost of continued litigation weigh in favor of approving the Settlement Agreement" and that the "decision to settle reflects the consideration that, if the matter were not settled, both parties would be expected to vigorously defend their respective positions." Motion at 11. The parties outline the arguments that they would make. The parties conclude:

> Acknowledging the Parties remain divergent on the merits of the case, they have carefully considered the costs, benefits, and risks of further litigation, and determined that settlement is in their mutual interests, as well as that of the shipping public. Both sides recognize the litigation reality that resolution of the proceeding by trial would be an expensive undertaking that would divert resources from each of the Parties. Moreover, it is likely that, even with the expedited schedule required by the Reversal and Remand Order, as implemented by the Presiding Officer's Revised Schedule issued on October 28, 2022, the likelihood of appeal to the Commission and the courts, the matter would take significant time to reach a final resolution. The settlement agreement by contrast, would resolve the matter without extended litigation bringing substantial valuable (and immediate) relief to the shipping public. Accordingly, consideration of the risks, costs, and uncertainties of continued litigation weighs in favor of approval of the Settlement Agreement.

Motion at 12. The prompt resolution of this proceeding by the parties benefits the parties as well as the shipping public and therefore is a reasonable balance of the relevant factors.

A review of the settlement agreement and the relevant factors indicates that it satisfies the criteria for approval. Therefore, the settlement agreement is reasonable and will be approved, including imposition of civil penalties and a cease and desist order.

IV. Order

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

ORDERED that the motion to approve the settlement agreement between the Bureau of Enforcement, Investigations, and Compliance and Ocean Network Express, Pte., Ltd. be **GRANTED**. It is

FURTHER ORDERED that the request for a cease and desist order be **GRANTED**. ONE is hereby **ORDERED** to cease and desist (1) invoicing or making any other form of written or oral demand for monies owed under the Bill of Lading or tariff for freight and/or charges to any parties other than shippers, consignees, and persons with a beneficial interest in the cargo or with whom ONE has a direct contractual relationship; and (2) all efforts at collecting monies owed to ONE from any parties other than shippers, consignees, and persons with a beneficial interest in the cargo or with whom ONE has a direct contractual relationship. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

ONE BANANA NORTH AMERICA CORP., *Complainant*

v.

HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA) LLC, *Respondents*.

DOCKET NO. 22-03

Served: December 20, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's November 16, 2022, Initial Decision has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

AENEAS EXPORTING LLC., *Complainant*

v.

HONEYBEE INTERNATIONAL INC., AND ALL AMERICA SHIPPING, *Respondents*.

DOCKET NO. 22-11

Served: December 20, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's November 16, 2022, Initial Decision has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

TCW, Inc.,

Claimant ,

v.

EVERGREEN SHIPPING AGENCY (AM.) CORP. & EVERGREEN LINE JOINT SERVICE AGREEMENT

Respondents.

Docket No. 1966(I)

Served: December 29, 2022

BY THE COMMISSION: Daniel B. MAFFEI, Chairman, Rebecca F. DYE, Louis E. SOLA, Max M. VEKICH, Commissioners. Carl W. BENTZEL, *Commissioner*, dissenting.

Order Affirming the Initial Decision

On February 19, 2021, the Small Claims Officer ("SCO") issued an Initial Decision ("I.D.") finding that Respondents Evergreen Shipping Agency Corp.'s and Evergreen Line Joint Service Agreement's (collectively, "Respondent") charges were unjust and unreasonable, but that Respondent's invoicing practices were not. Doc. 1. The SCO ordered Respondent to pay TCW ("Claimant") the requested reparations ($510) and to cease-and-

desist from imposing per diem charges when such changes do not serve their incentivizing purposes, such as when empty equipment cannot be returned on weekends, holidays, and port closures. Five days later, the Commission determined to review the SCO decision, and subsequently requested additional briefing on certain issues. The Commission received briefings from both Claimant and Respondent, as well as four amicus briefs.

Having reviewed the supplemental briefings and amicus filings, the Commission now affirms and herein adopts the initial decision of the SCO in its entirety.

I. BACKGROUND

A. Factual Background

On March 14, 2020, Evergreen Line Joint Service Agreement, an ocean common carrier, issued Yamaha Motor Company, Ltd. ("Yamaha"), an importer and BCO, a non-negotiable sea waybill to deliver a shipment from the Port of Shimizu, Japan to Yamaha's facility in Newnan, Georgia. Resp. Ex. 10. As part of the transportation arrangement for the shipment, Yamaha designated Claimant as its "preferred trucker" and thereby authorized Claimant to transport the shipment from the Port of Savannah to Yamaha's facility. *Id.*

Yamaha, Claimant, and Evergreen Shipping Agency, a New Jersey corporation that acts as a North American agent for Evergreen Line Joint Service Agreement, signed a Preferred Trucker Agreement ("PTA") in which Respondent agreed to the designation of Claimant as the preferred trucker for Yamaha's import and export cargoes. Resp. Ex. 9. Per the PTA, Claimant (as the motor carrier) is required to be a signatory to the Uniform Interchange and Facilities Access Agreement ("UIIA") and Evergreen Shipping Agency's individual addendum to the UIIA ("Evergreen Addendum"). *Id.* The UIIA is a contract between motor carriers and equipment providers and regulates the motor carrier's access and use of the containers and chassis. Resp. Ex. 1. The

Evergreen Addendum supplements the general provisions of the UIIA and includes details specific to Respondent regarding free time, per diem, and dispute resolution procedures. Resp. Ex. No. 4. According to the contract, the PTA's terms and conditions control in the event of a conflict. Resp. Ex. 9.

Per the shipping agreement, Yamaha, and, therefore, Claimant, were entitled to receive twenty-one days of free time for the container and four days of free time for use of the chassis. Cl. Ex. F. The free time calculation did not include weekends or holidays. Resp. Ex. 4. Respondent would also provide Claimant a free chassis for use in transporting the Yamaha shipment. *Id.* Additionally, Claimant was required to pay per diem charges for any unreturned equipment after the expiration of the free time, including on weekends and holidays. *Id.*

On April 28, 2020, the cargo arrived at the Port of Savannah and was reterieved by Claimant. Cl. Ex. F. Per the terms of the agreements, the free time expired for the chassis on May 4, 2020, and on May 19, 2020 for the container. *Id.* Claimant returned both on May 26, 2020. *Id.* Per the terms of the Evergreen Addendum, Respondent invoiced Claimant for per diem charges for the equipment in the amount of $1,050 for 7 days of per diem for the container (May 19-25, 2020), and $440.00 for 22 days of per diem for the chassis (May 4-25, 2020) for a total of $1,490. *Id.*

Claimant, in turn, disputed three days of charges corresponding to when the port was closed. Respondent declined to waive the charges. Cl. Ex. G. Claimant then paid in full and later invoiced Yamaha $1788.00 for the per diem charges, which Yamaha subsequently paid.[1] Cl. Resp. to Aug. 2020 Order for Suppl. Info.

On June 18, 2020, Claimant filed this small claims action against Respondent alleging that Respondent violated 46 U.S.C. §

[1] Claimant up charged Yamaha $298 for the per diem charges, and invoiced Yamaha $1,260.00 for 7 days of per diem for the container and $528.00 for 22 days of per diem for the chassis. *Id.* On August 21, 2020, Yamaha paid claimant $1,788.00 for the per diem charges. *Id.* There is no dispute before the Commission between Claimant and Yamaha.

41102 by: (1) invoicing per diem on weekends, holidays and during temporary port closures, when Claimant had no ability to return empty containers; (2) invoicing Claimant (the motor carrier) for per diem, instead of the BCO, even though the charges and free time were negotiated with the BCO; and (3) invoicing Claimant for chassis fees at a fixed rate, which is also negotiated directly with the BCO. Am. Cl. at 2. As relief, Claimant requested an order: (1) directing Respondent to reimburse it $510.00 in per diem charges; (2) forbidding Respondent from imposing per diem charges on days when a motor carrier has no ability to return equipment due to a port closure; and (3) directing Respondent and all marine lines to bill per diem charges directly to the BCO instead of the motor carrier. *Id.* at 3-4.

B. Procedural History

On February 19, 2021, the SCO issued an I.D. finding that it was unjust and unreasonable under § 41102(c) for Respondent to have charged Claimant per diem when the Port of Savannah was closed. *Id.* at 32. The SCO, therefore, ordered Respondent to pay Claimant reparations, and to cease and desist from imposing per diem when equipment cannot be returned on weekends, holidays, and port closures. *Id.* at 33. The SCO denied, however, Claimant's request to order Respondent to invoice per diem to BCOs rather than Claimant. *Id.*

On February 24, 2021, a Commissioner requested review and the Secretary issued the corresponding Notice, rendering the I.D. inoperative. To aid in its review of the I.D., the Commission subsequently afforded the parties the opportunity to provide additional briefing. The Commission received briefs from both Claimant and Respondent. The Commission additionally received amicus briefs from the National Association of Waterfront Employers ("NAWE"), a trade association representing marine terminal operators ("MTOs"), the World Shipping Council, a trade organization representing ocean carriers, Ports America, Inc. and SSA Marine Terminals, LLC, major U.S. MTOs, and the American

Pyrotechnics Association, a safety and trade association for the fireworks industry.

II. DISCUSSION

A. **Standard of Review**

When the Commission reviews an SCO's Initial Decision pursuant to 46 C.F.R. § 502.304(g), 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 SCO'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).

B. **The Commission has jurisdiction**

Respondent raised as an affirmative defense the Commission's lack of jurisdiction. Resp. to Am. Cl. at 6. Specifically, Respondent argues that Evergreen Shipping Agency is merely an agent for Evergreen Line Joint Service Agreement and is not itself a regulated entity subject to the provisions of 46 C.F.R. § 545.5(b).

As explained in the I.D., the claim against Evergreen Shipping Agency arises "out of a common nucleus of operative facts" with the claim against Evergreen Line Joint Service Agreement, over which the Commission has jurisdiction as a VOCC. Doc. 1 at 15. Here, the principle was the VOCC for the transportation at issue and the 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.

Respondent further alleges that the Commission does not have the authority to adjudicate this action because the UIIA, the Evergreen Addendum, and the PTA are private contracts, and the "just and reasonable" requirement of § 41102(c) applies only to

"regulations and practices" not to private contracts. Evergreen Br. at 3-4. The per diem charges at issue, Respondent maintains, are not regulations or practices but merely "contractual provisions in the [PTA] that Claimant freely signed." Resp. Reply Brief at 8; *see also* Resp. Suppl. Brief at 10.

The SCO correctly concluded that the Commission can adjudicate this action. I.D. at 14-18. The Commission can adjudicate allegations that contract terms are violative of the Shipping Act. *See* Final Rule: Interpretive Rule on Demurrage and Detention, Docket No. 19-05, 85 Fed. Reg. 29638 at 29648 (May 18, 2020) ("Ocean carriers and marine terminal operators (and ocean transportation intermediaries) do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c)."); *see also Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, 28 S.R.R. 1635, 1645; 2000 FMC LEXIS 14, *32 (FMC 2000) (the test for the Commission's jurisdiction is whether a Claimant's allegations "also involve elements peculiar to the Shipping Act").

C. Respondent Charging Per Diem on Weekends, Holidays, and Temporary Closures Was Unjust and Unreasonable Under § 41102(c)

A successful claim for reparations under §41102(c), must demonstrate five necessary elements. 46 C.F.R. § 545.4.

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

For the reasons set forth by the SCO, and reiterated below, the Commission finds that Respondent's charging of per diem over a Saturday to Monday period from May 23-25, 2020, during which the Port of Savannah was closed, was unjust and unreasonable in violation of § 41102(c) and runs contrary to the Commission's rule in 46 C.F.R. § 545.5(d).

1. Respondent is a regulated entity

As explained by the SCO, and *supra*, Respondent, Evergreen Joint Service Agreement is an ocean common carrier and thus undeniably subject to the requirements of section 41102(c). Evergreen Shipping Agency imposed the per diem charges at issue on the ocean common carrier's behalf, thereby acting as its agent. The SCO ruled that because the practice at issue occurred during the through transportation of international oceanborne shipping provided by a VOCC, the Commission has jurisdiction to adjudicate whether the charges imposed by the agent during the inland portion of the through transportation, which it then passed on to the VOCC, violate the Shipping Act. Doc. 1 at 15. Further, the SCO reasoned that "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." *Id*.; *see also, Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F. 3d 1174, 1180 (9th Cir. 2004) ("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"). The Commission concurs with the SCO's reasoning. Claimant thus demonstrates the first element to prove its section 41102(c) claim for reparations.

2. The act occurred on a normal, customary, and continuous basis

46 C.F.R. § 545.4(b) requires that the acts or omissions occur on a normal, customary, and continuous basis. The SCO concluded that the claimed acts occurred on a normal, customary, and continuous basis because of their inclusion in the Evergreen UIIA Addendum and because Respondent specifically states in its brief, "Respondent's only intent is to bill per diem allowed by the PTA that Claimant agreed to, which includes the PTA's requirement to be a signatory to the UIIA addendum which mandates the alleged unreasonable conduct." Resp. Reply Brief at 2. The SCO concluded that 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. Doc. 1 at 22.

In their supplemental briefing, Respondent argues Claimant has only one factual showing of the alleged act and instead relies on the UIIA addendum and Respondent's admission to establish this element. Respondent argues that the requirement in section 545.4 is that the act or omissions "are occurring" on a normal customary and continuous basis not merely "possible" or "contemplated." Doc. 3 at 4. NAWE presents a similar argument in its amicus brief, stating, "the fact that ports are normally closed on weekends, and that the UIIA Addendum permits charging demurrage after free time, does not constitute evidence that Respondents' charge demurrage on a normal, customary, and continuous basis in all situations when a port is closed." Doc. 5 at 5.

First, NAWE's argument is not based in the language of the UIIA addendum. The addendum does not "permit charging." The addendum states, "[t]he Motor Carrier shall pay…". Resp. Ex. 4 at 4. This is not a situation where carriers have the option to charge if they choose, instead the language of the addendum mandates when the trucker must pay per diem. Further the addendum does not only discuss charging demurrage after free time, it also specifically says it will be charged on days when the port is closed. Thus, a more accurate representation of the content of the UIIA addendum is that

it mandates the payment of per diem on days when the port is closed and in doing so establishes that this practice is occurring a normal, customary, and continuous basis.

Thus, the SCO properly found that the evidence establishes that imposition of the disputed per diem charged by Respondents is occurring on a normal, customary, and continuous basis. Accordingly, this element has also been demonstrated.

Although not determinative in this analysis, the Commission notes that in this case, the Respondent, in its brief, admits that this is the policy to which it will adhere, further supporting the SCO decision. Resp. Reply Brief at 2.

3. Respondent Charging Per Diem on Weekends, Holidays, and Temporary Closures Was Unreasonable

To find a violation, 46 C.F.R. § 545.4(d) requires that the practice be unjust and unreasonable. In § 545.5 the Commission further explains how it will assess the reasonableness of demurrage and detention charges and states that in general the Commission will consider the extent to which they are serving their intended primary incentivizing purpose. 46 C.F.R. § 545.5(c)(1). Additionally, the interpretive rule provides specific clarity with respect to the return of empty containers: "[a]bsent 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." *Id*. § 545.5(c)(2)(ii).

As explained in the I.D., during the rulemaking the Commission was clear that no amount of detention can incentivize the return of a container when the terminal cannot accept the container. Doc. 1 at 25; *see also* 85 Fed. Reg. 29638, 29655. In this case there was nothing Claimant could have done to return the container between May 23-25, 2020 because the port was not receiving empty containers. The SCO correctly found that the per diem charges 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." Doc. 1 at 26.

The Commission also rejects the argument raised in amicus filings that not charging during the May 23-25, 2020 closure would have disincentivized the return of the container before the closure. *See* Doc 7 at 15, Doc. 9 at 3. These arguments were previously raised and similarly dismissed during the rulemaking process. 85 Fed. Reg. at 29652. First this disincentivizing argument neglects the commercial incentives to returning empty containers and one could easily argue the contrary position, namely that the ability to collect per diem, even if it is impossible for a truck to return equipment might disincentivize ocean carriers and marine terminal operators from acting efficiently. *Id*. at 29653.

Respondent, NAWE, and WSC also claim that the SCO failed to consider 46 C.F.R. § 545.5(f). Section 545.5(f) states that nothing precludes the Commission "from considering factors, arguments, and evidence in addition to those specifically listed in this rule." 46 C.F.R. § 545.5(f). The "other factor" most frequently cited by the amicus briefs and Respondent is the fact that Claimant could have returned the container prior to the May 23-25, 2020 closure and that the container was already in per diem when the closures took place. Doc. 4 at 5-7, Doc. 6 at 9-11, Doc. 7 at 10 ("[i]f the party responsible for returning the equipment on time (i.e., either the shipper or trucker) can avoid the charge by taking some action prior to the expiration of allotted free time, the charge will be considered reasonable.").

This notion was discussed at length during the rulemaking process and is frequently referred to as "once-in-demurrage, always-in-demurrage." Under this principle, the shipper bears the risk of anything after free time has ended. As discussed in the rule, "once free time ends, it would not be unreasonable to impose demurrage on a shipper even if the shipper is unable to retrieve the container due to circumstances outside the shippers, or anyone's, control." 85 Fed. Reg. at 29652.

The SCO correctly addressed and dismissed these arguments during in the I.D. Doc. 1 at 27. During the rulemaking process the Commission received comments from ocean carriers and marine

terminal operators urging the Commission to reaffirm the principle of "once-in-demurrage, always-in-demurrage." 85 Fed. Reg. at 29652. Conversely other commenters requested that the Commission expressly overrule the "once-in-demurrage, always-in-demurrage" principle. The Commission did neither, stating that it "does not agree with some commenters' 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." *Id*. at 29653.

Just because a container is in a state of per diem, it does not automatically mean that charges can continue to accrue regardless of circumstance. Rather, the interpretive rule continues to apply, and the practice must be evaluated under that lens. In this case, for the reasons discussed in the I.D., such an evaluation leads the Commission to conclude that the charging of per diem on this container during the May 23-25, 2020 closure when it was not possible to return the container was unjust and unreasonable under § 41102(c).

> 4. The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

46 C.F.R. § 545.4(c) requires that the practice relates to or is connected with receiving, handling, storing, or delivering property. As discussed in the I.D., the parties do not dispute that the per diem charges at issue relate to or are connected with receiving, handling, storing, or delivering property. Doc. 1 at 22. Respondent, nevertheless, raised an argument, that because the Claimant is a motor carrier the claim was outside Commission jurisdiction. *Id*. The SCO dismissed this argument, stating that during the rulemaking process the Commission made clear that truckers were one of the entities meant to be protected under § 41102(c). *Id*. The SCO ultimately concluded that the requirements of § 545.4(c) were established. *Id*. The Commission concurs with the SCO's conclusion.

5. Respondent's Practice is the Proximate Cause Of The Claimed Loss

46 C.F.R. § 545.4(e) requires that the practice be the proximate cause of the loss. Respondent argues that Claimant was not injured, or that the per diem did not proximately cause any injury, because Claimant passed on the per diem with markup to Yamaha. Doc. 4 at 13-14, Doc. 5 at 11-12 (similar arguments were raised by NAWE). The SCO rejected that argument as a defense to liability under § 41102(c), but nevertheless ordered Claimant to return the per diem with markup to Yamaha so that Claimant did not receive a double recovery – i.e., reparations plus retention of the per diem/markup it received from the BCO. Doc. 1 at 29.

In re Vehicle Carrier Services, 1 F.M.C.2d 440, 446 (FMC 2019) the Commission stated that a respondent cannot rely on a claimant pass-on theory to avoid liability for reparations. This is a corollary to the direct purchaser rule in overcharge cases. Under the direct purchaser rule, only the party who actually paid the carrier can sue for reparations for an overcharge, not indirect purchasers further down the chain. *Id*. By the same token, a respondent cannot rely on the fact that a claimant passed on charges as a defense to an overcharge claim. *Id*.

Under the direct purchaser rule, "parties suing for alleged overcharges can only recover reparations if they actually paid the carrier or received an assignment from the direct purchaser." *Gov't. of Guam v. Sea-Land Serv., Inc.*, 29 S.R.R. 894, 902, 2002 FMC LEXIS 16, *4 (ALJ 2002), *admin. final*, 2002 FMC LEXIS 25 (FMC 2002). As explained in the recent Commission case, *In Re Vehicle Carrier Services*, "[t]he basis for this rule first arose in 1934, when the Commission's predecessor, the United States Shipping Board Bureau, held that the entity that paid the illegal overcharges was the person 'directly damaged' by the illegal rates and '[h]is claim accrued at once' and the law 'does not inquire into later events.'" *See In Re Vehicle Carrier Services*, 1 F.M.C.2d 440, 445 (2019) (citations omitted). The Commission continued, "In the 80 years since the Shipping Board held that a respondent could not rely on a pass-on theory to avoid liability to a Claimant for reparations,

the Commission has repeatedly found that a Claimant cannot rely on a pass-on theory to recover reparations for overcharges. In numerous decisions, the Commission has ruled that only the party who actually paid the carrier (or the valid assignee of the payor) can sue for reparations." *Id*. at 446.

The Commission's rule is consistent with the Supreme Court's direct purchaser rule developed in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977). There, the Supreme Court explained that this rule was necessary to avoid the complex task of accurately apportioning damages among various parties along the distribution chain. *Id*. at 730-37. The Court recognized that "these difficulties and uncertainties will be less substantial in some contexts than in others," but chose not to carve out exceptions. *Id*. at 743-44.

In the instant matter there is no question that Respondent was paid by the Claimant. Thus, under the Commission's Direct Purchaser Rule, the Claimant has the ability to collect damages and Respondent cannot avoid responsibility by claiming Claimant was later reimbursed.

D. **Claimant's Requested Relief**

In addition to finding that Respondent's actions in this case were unreasonable and ordering reparations, the SCO also ordered Respondent 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." Doc. 1 at 33. This injunctive language mirrors 46 C.F.R. § 545.5(c)(2)(ii): "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 SCO correctly determined that it was appropriate to issue a cease-and-desist order. Doc. 1 at 29-30. Respondents were found to have violated section 41102(c). *Id*. at 20. Under Commission precedent, a cease-and-desist order may be issued where there is a violation of the Shipping Act. *See, e.*g., *Bimsha Int'l*

v. Chief Cargo Svcs. Inc., 32 S.R.R. 1861, 1864, 2013 FMC LEXIS 32 at *22-*23 (FMC 2013).

The order followed Commission precedent regarding the language used in cease-and-desist orders. *See Universal Logistic Forwarding Co. Ltd.,-- Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 SRR 474, 476 (FMC 2002)(The Commission advised "the language used in cease-and-desist orders generally mirrors the violations committed coupled with the statutory language").

The Commission has issued a variety of cease-and-desist orders, some warranting broader language, some more specific language. *See, e.g., United Logistics (lax) Inc. - Possible Violations of Sections 10(a)(1) and 10(b)(2)(a) of the Shipping Act of 1984*, 2014 WL 5316339 (FMC 2014) (Respondent ordered to cease and desist from operating as an OTI without a license); *Saeid B. Maralan, et. al. - Possible Violations of Sections 8(a)(1), 10(b)(1), 19(a) and 23(a) of the Shipping Act of 1984*, 1999 WL 1294893 (FMC 1999) (Respondent ordered to cease and desist from charging rates other than those filed in tariffs); *but see, Commonwealth Shipping Ltd., Cargo Carriers Ltd., Martyn C. Merritt And Mary Anne Merritt - Submission Of Materially False Or Misleading Statements to the Federal Maritime Commission and false representation of Common Carrier Vessel Operations* 2003 WL 21371703 (FMC 2003) (Respondent ordered to "cease and desist from committing any further violations of the Shipping Act.").

The Commission has also issued cease-and-desist orders to advance compliance more broadly. In *Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342, 1997 FMC LEXIS 46, *26 (ALJ 1997), the Respondent was not currently engaged in transportation activities, nevertheless, a cease-and-desist order was still deemed appropriate to "alert the shipping industry, serve to forestall future violations, and facilitate injunctions against possible future unlawful activity." *See also Geo Machinery FZE v. Watercraft Mix, Inc*, 32 S.R.R. 1673, 1677 (SCO May 21, 2013), *aff'd*, 33 S.R.R. 329 (FMC 2014) (Order Affirming Settlement Officer's Decision) (the small claims officer issued a cease-and-desist order to "alert the shipping industry, serve to forestall future

violations, and facilitate injunctions against possible future unlawful activity."); *Stallion Cargo, Inc. Possible violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 205, 218 (ALJ 2001) (despite no evidence that Respondent had continued to violate the Shipping Act, cessation of unlawful practices, and argument that it had taken measures to prevent future violations, a cease and desist order was still appropriate because the Respondent intended to stay in business, and had previously persisted in committing numerous violations.).

The Commission has previously expressed that "cease-and-desist orders are usually issued when there is a reasonable expectation that respondents will continue or resume illegal activities." *See Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335 at 1342-1343. Evergreen acknowledged in its filings that it intended to continue charging while the port was closed. Resp. Reply Brief at 2.

Finally, for the reasons discussed in the I.D., the Commission also denies Claimants request that Respondents and "all marine lines" be directed to bill per diem charges directly to their customers. Amended Cl. Pg. 2. First, as noted by the SCO, judgments issued in this decision can only apply to Respondent because Claimant did not include any other marine line as a respondent in this proceeding. Doc. 1 at 31. Further, the fact that Claimant agreed to be billed for the per diem charges and appears to have profited from the billing arrangement, does not support its argument that the billing arrangement poses a hardship and a burden to it. *Id*. at 32.

III. CONCLUSION

For the reasons explained in the I.D. and reiterated above, the Commission finds that Claimant has met its burden of proof in demonstrating that Respondent's actions were unjust and unreasonable under § 41102(c), as interpreted following 46 C.F.R. § 545.5.

Accordingly, the Commission **AFFIRMS** the Initial Decision. It is hereby **ORDERED** that Respondent shall pay reparations to Claimant by January 13, 2023, in the amount of $510.00 with interest ($11.62) running on the reparation award from June 6, 2020, totaling $521.62.

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 is **DENIED**.

By the Commission.

William Cody
Secretary

Commissioner Bentzel, dissenting:

I disagree with the SCO's finding that Evergreen's conduct was unjust or unreasonable under § 41102(c). Accordingly, I disagree with the above Order and recommend that the Commission affirm the SCO's decision with respect to the issues of invoicing TCW instead of the BCO and reverse the SCO's decision with respect to the per diem charges.

I. LEGAL STANDARDS

The Commission reviews an I.D. de novo. 46 C.F.R. § 502.227(a)(6) (when the Commission reviews an I.D., it has "all the powers which it would have in making the initial decision"). 46 U.S.C. § 41102(c) prohibits common carriers, marine terminal operators, and ocean transportation intermediaries from failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property. 46 C.F.R. § 545.4 further requires § 41102(c) claimants seeking reparations to prove that the claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis, and that the complained-of practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.5 informs § 41102(c) claimants (and others) that in assessing the reasonableness of any charges, including "per diem," assessed by regulated entities on containerized cargo, the Commission "will consider the extent to which demurrage and detention are serving their intended primary purpose as financial incentives to promote freight fluidity" (the "incentive principle"). 46 C.F.R. § 545.5(c)(1).

It is my view that terms such as "incentive principle" do not replace "reasonableness" which is the underpinning of the Shipping Act. In this case, my concern is that we are at risk of overstating the manufactured principle at the peril of usurping reasonableness. Further, it is my view that the Respondents, Evergreen Shipping, charged detention consistent with the "incentive principle" and the need to promote fluidity of movement.

Specifically, in this case, the container and chassis were already exceeding limits of free time before implementation of the per diem penalties and the claimants well apprised of and cognizant of the standards for implementation of per diem detention penalties. In this case it is clear to me that the claimants knew when the Port of Savannah was open to business, and when they were supposed to re-deliver cargo equipment; there were no issues that were beyond

or outside of the control of the shipper justifying the denial of detention penalties. In essence, the shipper knew when the facility was closed and failed to timely re-deliver it before the stipulated time.

II. INTERPRETIVE RULE

Unfortunately, the industry has been forced to rely on a series of *ad hoc* determinations and general guidance that neither affirms proper context for enforcing an adequate process in which detention and demurrage charges can be assessed nor outlines the improper implementation of penalties aimed at increasing cargo fluidity in movement. Compounding the challenge of establishing the reasonableness of shipping practices, is the challenge of defining "reasonableness."

While I generally agree with the proposition that detention and demurrage for circumstances outside of the shipper's control, in instances where a shipper/trucker is unaware of unscheduled or unannounced policy changes that are made to provide access for the pick-up or return of containers or intermodal equipment, I do not believe that the incentive principle should be construed to provide an interpretation that prohibits the assessment of penalties for days that a terminal is closed for business, or on holiday.

Penalty charges for detention and demurrage are intended to facilitate the movement of cargo from the port complex and the re-delivery of intermodal cargo equipment back to the port complex. As such there should be a balance of expectation in performance. The carrier/terminal operator should provide a reasonable amount of free time before imposition of the demurrage penalty, and a reasonable period for the re-delivery of intermodal cargo equipment. The primary mechanism driving the incentive principle is not that we intend to immunize shippers for charges when terminal factifies are closed, but rather that we have clear communications on the expectation of pick-up of cargo and re-delivery of intermodal cargo equipment. The incentive is the notification of operating

requirements governing access into and out of the complex, and deadlines for performance on both ends. The shipper must be aware of and prepared to pick up cargo and return equipment within the required free time or pay penalties for the delay.

The majority opinion in my view is overly concerned with the methodology of assessing detention and demurrage, rather than focusing on whether in this instance it reasonably achieved the objective of providing fluidity of movement of cargo. The terms of detention and demurrage are set by the ocean carriers by contract, or in some instances by their tariff, and marine terminals set detention and demurrage requirements by the terms of publicly available schedules. They make their own decisions on what is necessary and appropriate in the implementation of potential penalties. As such, they could choose to define detention and demurrage differently: either to define operations days to include days off and holidays or to shorten or expand the duration of detention and demurrage to reflect the time frame they seek to have covered. Effectively, this decision will have no value governing whether carriers or terminals alter policies on billing detention and demurrage because they are authorized to define the terms for the imposition of the penalty.

Reviewing the facts in this particular case, and not focusing on whether their assessment methodology included assessments for a day off each week and a holiday, claimant had 21 days of total free time. An amount of time that, even excluding the days off, seems to be a more than a reasonable amount of time to make a port run, and return intermodal cargo equipment to the terminal. Instead of returning the equipment three weeks, two weeks or even one week ahead of time, before falling into demurrage, the equipment was held on to and effectively taken out of the supply chain. When the claimant did decide to return the equipment, it was on a holiday weekend. The Port of Savannah was closed the Monday of Memorial Day and it was also closed on Saturdays during the COVID crisis. The Port of Savanah confirmed that the port was in fact closed on Saturdays from mid-March 2020 to mid-June 2020, but these closures were communicated widely, and in my view the

claimants were well positioned to know when they could pick-up cargo and return intermodal cargo equipment.

For example, a month before a Saturday closure, the Port's email system routinely notifies 1,400 trucking companies and the Port's Everbridge text system reaches over 8,000 truck drivers who are alerted of operational closures or changes in schedule. In practice, the shipper would have received communication on the port's operation schedule throughout the 21 days of free time.

What makes the legal claim contesting assessment of detention about the port being closed on the weekend and holidays even more concerning is that it was a time when port and supply chain operations were widely acknowledged as suffering as a result well known operational disruptions throughout the supply chain. Throughout the system there were carriers waiting outside ports to berth, congestion at terminals, equipment dislocation for chassis and empty containers. Anyone moving cargo should and would have been on high alert.

In the absence, of information on *ad hoc* closures restricting access to the Port of Savannah, I believe the provision of 21 days of total free time for pick-up of cargo and re-delivery of intermodal cargo equipment was a reasonable time allotment even with reductions due to Saturday closures and the Memorial Day holiday, and I believe that the claimants were provided more than adequate notification of the operational policies restricting access to the terminal. Accordingly, I disagree with the SCO's finding that Evergreen's conduct was unjust or unreasonable under § 41102(c). Also, I disagree with the above Order and recommend that the Commission affirm the SCO's decision with respect to the issues of invoicing TCW instead of the BCO and reverse the SCO's decision with respect to the per diem charges.