

S E R V E D  
March 9, 2011  
FEDERAL MARITIME COMMISSION

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D.C.**

**DOCKET NO. 08-04**

**TIENSHAN, INC.**

**v.**

**TIANJIN HUA FENG TRANSPORT AGENCY CO., LTD.**

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**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE CLAY G. GUTHRIDGE<sup>1</sup>**

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**I. INTRODUCTION.**

**A. Overview and Summary of Decision.**

On August 19, 2008, Tienshan, Inc. (Tienshan) commenced this proceeding by filing a Complaint alleging that Tianjin Hua Feng Transport Agency Co., Ltd. (Tianjin Hua Feng) violated section 10(d)(1) of the Shipping Act of 1984 (Shipping Act or Act), 46 U.S.C. § 41102(c),<sup>2</sup> by refusing to give Tienshan, the consignee of a shipment, the original bill of lading that would permit it to take delivery of the shipment. Tienshan purchased stoneware from Henan Huatai Ceramic

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<sup>1</sup> The 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.

<sup>2</sup> On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill's purpose was to "reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law." H.R. Rep. 109-170, at 2 (2005). Section 10(d)(1) is now codified at 46 U.S.C. § 41102(c). The Commission often refers to provisions of the Act by their section numbers in the Act's original enactment, references that are well-known in the industry. *See, e.g., 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*, FMC No. 09-07 (Oct. 22, 2009) (Order of Investigation and Hearing). I follow that practice in this Initial Decision.

Technology (Henan Huatai), a Chinese company with its principal place of business in Henan, China. Tianjin Hua Feng is registered with the Commission as a foreign non-vessel-operating common carrier (NVOCC), but operated as a freight forwarder in China on the shipment from Henan Huatai in China to consignee Tianshan in the United States. Tianjin Hua Feng refused to release the original bill of lading unless Tianshan paid fees allegedly owed to Tianjin Hua Feng by Henan Huatai. Tianjin Hua Feng claims that it had a maritime lien on the cargo; therefore, it was entitled to retain the bill of lading until Tianshan paid the debts.

This proceeding raises the question of whether a foreign freight forwarder that is also registered with the Commission as a foreign NVOCC, but performs only freight forwarder services at the beginning of a shipment, may by its subsequent actions attain the status of a common carrier on the shipment and thereby be subject to section 10(b)(1). I conclude that by refusing to deliver the original bill of lading to Tianshan, Tianjin Hua Feng, an entity that holds itself out as an NVOCC, assumed responsibility for the transportation of cargo by water from China to the United States; therefore, it is subject to section 10(d)(1) of the Shipping Act. I find that it is not necessary to determine whether Tianjin Hua Feng had a maritime lien on the cargo that it could protect by preventing delivery of the cargo because even if it did, Tianjin demanded payment of fees for earlier unrelated shipments. Demand for payment of charges for unrelated shipments cannot be used by a carrier as justification for refusing to release cargo and violates section 10(d)(1). I conclude that Tianjin Hua Feng violated section 10(d)(1) of the Act when it refused to give the bill of lading to Tianshan. Tianshan suffered actual injury as a result of the violation of section 10(d)(1) and is entitled to reparations in the amount of \$16,944.00.

## **B. Procedural Background.**

Tianshan filed its Complaint on August 19, 2008. In lieu of an answer, on October 15, 2008, Tianjin Hua Feng filed a Motion to Dismiss Pursuant to F.R.C.P. 12(b)(1) and (6) for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief (Motion to Dismiss). On April 23, 2010, I denied the motion. *Tianshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, FMC No. 08-04 (ALJ Apr. 23, 2010) (Memorandum and Order on Respondent Tianjin Hua Feng Transport Agency Co., Ltd.'s Motion to Dismiss Pursuant to F.R.C.P. 12(b)(1) and (6) for Lack of Subject Matter Jurisdiction and for Failure to State a Claim for Relief).

A procedural order issued on June 7, 2010, established a discovery schedule and a briefing schedule. At the request of the parties, the order delayed implementation of the schedule to permit the parties to engage in settlement discussions. The parties did not settle and the schedule went into effect. Pursuant to the procedural order, Tianshan was required to file proposed findings of fact, supporting appendix, and a brief on October 22, 2010, later enlarged to October 26, 2010. *Tianshan v. Tianjin Hua Feng*, FMC No. 08-04 (ALJ June 7, 2010) (June 7, 2010 Procedural Order); *Tianshan v. Tianjin Hua Feng*, FMC No. 08-04 (ALJ Oct. 22, 2010) (Order Enlarging Time to File Tianshan's Proposed Findings of Fact, Appendix, and Brief).

On September 27, 2010, the Commission received Tianjin Hua Feng's Notice of Motion and Emergency Motion to Compel Discovery Responses Pursuant to F.R.C.P.; Memorandum of Law (Motion to Compel) claiming that Tienshan had failed to respond to Tianjin Hua Feng's interrogatories, requests for production of documents, and requests for admission. On September 28, 2010, Tienshan served a Motion for Summary Judgment and Reply to Respondent's Motion to Compel Discovery Responses (Motion for Summary Judgment). On October 15, 2010, Tianjin Hua Feng filed an opposition to the motion for summary judgment.

With regard to Tianjin Hua Feng's motion to compel discovery responses, Tienshan argued that Tianjin Hua Feng had not served its discovery requests as required by the Commission's Rules of Practice and Procedure and the June 7, 2010, Procedural Order; therefore, Tienshan was not obligated to respond to the discovery. Because Tianjin Hua Feng had not been diligent about pursuing discovery, I denied its motion to compel with regard to interrogatories and requests for admission, but granted the motion with regard to the documents it sought. I ordered Tienshan to respond to the requests for production of documents by November 10, 2010. *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04, Memorandum at 3-5 (ALJ Oct. 20, 2010) (Memorandum and Order on Respondent's Motion to Compel Discovery and Complainant's Motion for Summary Judgment), and Tienshan served its responses on that date. I found that it would be an inefficient use of judicial resources to consider and rule on Tienshan's motion for summary judgment when its proposed findings of fact, appendix, and brief were due so soon thereafter and denied the motion. *Id.* at 6-7.

On October 26, 2010, Tienshan filed its brief and other papers addressing the merits. Tianjin Hua Feng filed its responses on November 30, 2010. In its response to Tienshan's brief, Tianjin Hua Feng raised a problem with Tienshan's responses to Tianjin Hua Feng's requests for production of documents. Tianjin Hua Feng stated that Tienshan's responses to the requests indicated that Tienshan had destroyed relevant evidence after it had filed its Complaint. Tianjin Hua Feng claimed that lack of this evidence compromised its ability to defend against Tienshan's Complaint; therefore, it sought sanctions for violation of the discovery order and/or for spoliation. On December 13, 2010, Tienshan filed its reply arguing that it was under no duty to preserve the documents sought by Tianjin Hua Feng's discovery and that sanctions were not warranted.

I invited the parties to file supplemental briefs on the destruction of the evidence. *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04, Memorandum at 3-5 (ALJ Dec. 15, 2010) (Memorandum and Order Requiring Additional Briefing). I also invited the parties to file supplemental briefs with citation to case law and other authorities supporting their positions addressing the issue of whether and how Tianjin Hua Feng's actions violated section 10(d)(1). *Id.* The parties filed their final supplemental briefs on January 21, 2011.

### **C. Evidence.**

As required by the June 7, 2010 Procedural Order, each party included the documentary evidence on which it relied in an Appendix filed with its brief and proposed findings of fact. *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04 (ALJ June 7, 2010) (June 7, 2010 Procedural Order).

The appendices are cited as “Tienshan App.” and “Tianjin Hua Feng App.” All of the documents submitted by the parties are hereby admitted into evidence. The parties also stipulated to some facts. The stipulations may be found in Tienshan’s Appendix at 220-222. This Initial Decision is based on the verified Complaint, the answer, evidence, briefs and replies, proposed findings of fact and conclusions of law, supplemental briefs and replies, and stipulations filed by the parties. All of the documents in evidence were considered, even if they are not cited in this Initial Decision. I find that proposed findings of fact upon which this decision relies are supported by the evidence in the record.

This Initial Decision addresses only material issues of fact and law. Under the Administrative Procedure Act (APA), an administrative law judge may not issue an order “except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 98 (1981). Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the claim or the defenses thereto. Administrative adjudicators are “not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-194 (1959). I find that proposed findings of fact upon which this decision relies are supported by the evidence in the record.

#### **D. Summary of Arguments of the Parties.**

Tienshan contends that when Tianjin Hua Feng refused to give the original bill of lading to Tienshan unless Tienshan paid debts that Henan Huatai allegedly owed to Tianjin Hua Feng, Tianjin Hua Feng violated section 10(d)(1) the Shipping Act by failing to establish, observe, or enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property. Tienshan contends that it is entitled to a reparation payment of \$16,944.00 for demurrage it had to pay before the cargo would be released and \$106,115.00 in penalties paid to the ultimate purchaser of the stoneware and lost profits, plus reasonable attorney’s fees.

Tianjin Hua Feng claims that it only continued handling shipments from Henan Huatai because Tienshan promised to act as guarantor of Henan Huatai’s fees to Tianjin Hua Feng and that Tianjin Hua Feng had a “maritime lien” on the cargo that entitled it to hold the bill of lading until Tienshan paid Henan Huatai’s Rmb243,680<sup>3</sup> debt; therefore, it did not violate the Act. Tianjin Hua Feng contends that Tienshan engaged in spoliation when it lost or destroyed its business records and that the appropriate sanction for spoliation is dismissal of the Complaint.

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<sup>3</sup> The renminbi (“people’s currency” or “people’s money”), abbreviated Rmb, is the sole legal tender in the mainland of the People’s Republic of China. (<http://www.china.org.cn/english/LivinginChina/184832.htm> (last visited Feb. 25, 2011).) The parties apparently do not dispute that Rmb243,680 is approximately \$35,000 and Rmb4690 is approximately \$700.

## II. FINDINGS OF FACT.<sup>4</sup>

Tienshan is a corporation organized and existing pursuant to the laws of the state of Delaware with its principal place of business at 231 Wilson Avenue, South Norwalk, Connecticut (Stipulation (Stip.) ¶ 1), although in its discovery responses, Tienshan states that it halted business operations in the United States in December 2009. (Tianjin Hua Feng App. at 4.) Tianjin Hua Feng is a foreign corporation organized and existing pursuant to the laws of the People's Republic of China with a principal place of business in China. (Stip. ¶ 2.) Tianjin Hua Feng is a bonded and tariffed foreign-based NVOCC registered with the Commission as Organization Number 018117, but is not licensed by the Commission as an NVOCC. (Stip. ¶¶ 3, 4.) Hua Feng (USA) Logistics Inc. (Hua Feng (USA)), Commission Organization Number 019033, is a bonded and tariffed NVOCC licensed by the Commission as NVOCC No. 019033. (Stip. ¶ 5.) Hua Feng (USA) is an affiliate of Tianjin Hua Feng. (Stip. ¶ 6.)

In April 2008, Tienshan signed a sales contract for the purchase of stoneware from Henan Huatai, a Chinese company with its principal place of business in Henan, China. Tienshan and Henan Huatai are not related by common ownership or under common control. Tienshan purchased the stoneware FOB Tianjin Port, China, and paid Henan Huatai the full contract price for the stoneware. (Tienshan App. at 260 (¶ 4-6).)<sup>5</sup>

Henan Huatai contacted Tianjin Hua Feng to arrange for transportation of the stoneware to Tienshan in the United States. Tianjin Hua Feng contacted China Ocean Shipping Agency, an agent for Wan Hai Lines (Singapore) PTE Ltd. (Wan Hai), a vessel-operating common carrier, Commission Organization Number 019942. On June 3, 2008, China Ocean Shipping Agency, acting as agent for Wan Hai, issued Wan Hai bill of lading 0338005421 (the bill of lading also has a second number TJ30170006) for the shipment. (Stip. ¶ 7; Tienshan App. at 12.) The bill of lading describes the shipment as "stoneware dinner set" packed in 3339 cartons in four containers, identifies the shipper as Henan Huatai, the consignee as Tienshan, and the "notify" party as Sonic Logistics (USA) Company Ltd., states that the freight is payable at destination, and states that Long Beach, California, is the port of discharge and the place of delivery. (Tienshan App. at 12.) Neither Tianjin Hua Feng nor Hua Feng (USA) is a party to Wan Hai bill of lading 0338005421. (Stip. ¶¶ 8, 9.)

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<sup>4</sup> To the extent any finding of fact may be deemed a conclusion of law, it should be considered a conclusion of law. Similarly, to the extent any conclusion of law may be deemed a finding of fact, it should be considered a finding of fact.

<sup>5</sup> Tienshan App. at 260-262 is the affidavit of Ms. Du Ping first filed in support of Tienshan's motion for summary judgment. Tianjin Hua Feng responded with a document entitled Evidentiary Objections to Affidavit of Ms. Du Ping Filed in Support of Complainant's Motion for Summary Judgment. I have considered and overrule the objections to ¶¶ 11, 14, 21, and 26 with regard to the facts asserted by Ms. Du Ping on which this decision is based.

The stoneware was loaded into four containers to be delivered to Tienshan in Long Beach, California. In June 2008, the four containers were loaded on the vessel CMA CGM Africa, a vessel operated by Wan Hai. The shipment of stoneware arrived in Long Beach, California, in June 2008. Tienshan paid the full amount of the ocean freight and other charges to Wan Hai. (Tienshan App. at 260 (¶¶ 8, 10, 11).)

Henan Huatai went out of business in the middle of June 2008. Henan Huatai allegedly owed Tianjin Hua Feng Rmb243,680 for services performed for Henan Huatai on several shipments, including Tianjin Hua Feng's fee of Rmb4690 for arranging this shipment to Tienshan. (Tianjin [Hua] Feng Proposed Finding of Fact ¶¶ 24, 25, 26.) Tienshan asked Tianjin Hua Feng to release the original bill of lading and informed Tianjin Hua Feng that Tienshan was subject to liquidated damages payable to its ultimate customers because it had not received the shipment. (Tienshan App. at 262 (¶ 20).) Tianjin Hua Feng insisted that Tienshan pay the Rmb243,680 Henan Huatai allegedly owed to Tianjin Hua Feng and refused to give Tienshan the bill of lading unless Tienshan paid that money. (Tienshan App. at 261 (¶ 14); Tianjin [Hua] Feng Proposed Finding of Fact ¶ 29.)

Meanwhile, Wan Hai told Tienshan that without an original bill of lading, a letter of guarantee by the shipper and consignee would be necessary to secure release of the cargo. (Tienshan App. at 261 (¶ 16).) Apparently at the request of Tienshan, on June 18, 2008, Henan Huatai issued a letter of guarantee to Wan Hai stating:

WE,HENAN HUATAI CERAMIC TECHNOLOGY&TRADING CO.LTD.,SHIPPER OF THE B/L NUMBER TJ3017006<sup>[6]</sup> WITH THE VESSEL/VOY OF CMA CGM AFRICA BH017E,DELARE THAT THE OWNERSHIP OF THE GOODS ARE TRANSFERED TO THE CONSIGNEE ON THIS B/L TIENSHAN INC. . . . WE AGREE TO ALLOW TIENSHAN INC TO PICK UP THE GOODS WITHOUT ORIGINAL B/L.WE AFFORD ANY RELATED RESULTS IT CAUSED.

(Tienshan App. at 17 (spelling, capitalization, and punctuation in original); Tienshan App. at 261 (¶ 17).)

On June 19, 2008, Jenny Zhao, a representative of Hua Feng Transport Agency Co., Ltd., Tianjin Branch, sent an email to Ray Lee and others on the subject "Local charges for c/tienshan Xingang," stating:

First of all, it is high appreciated that you help us push the payment all the time, tks for your kindly assistance. We know TienShan is a respectable company for so many years, and our cooperation is very happy all the time.

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<sup>6</sup> I assume that this is a typographical error and that the writer intended to state "TJ30170006," the second number on Wan Hai bill of lading 0338005421.

But you know, the debts is Rmb243,680.00<sup>7</sup> in total, it is not only this shpt but also many others. When we knew factory's funds was tight primitively, we tried our best to pay carrier first in order to get b/l in time and make cnee can pick up goods smoothly at destination. Day by day, we pay the local charge for one shpt and one again. During this period, we never make trouble for factory. We just pushed them repay the debts again and again, and they also promised to pay us many times, but it is a pity that they haven't paid us till now.

We admit the original b/l is in our hand now. Pls note we hold the original b/l just aim at the factory(shipper) because of the outstanding payment. We book for them, we make docs for them, we pay carrier's local charge for them, but they owe us. How to protect our rights and interests? We sent shipper the formal letter today, which you can find in the attachment, but more regrettable is that shipper told WANHAI they lose the original b/l..... We will send shipper the original b/l when we get the payment.

(Tienshan App. at 15 (spelling and punctuation in original); Tienshan App. at 261 (¶ 14); Tianjin [Hua] Feng Proposed Findings of Fact ¶ 27.)

On June 20, 2008, Tienshan issued a letter of guarantee to Wan Hai referencing Wan Hai bill of lading 0338005421, requesting that the cargo be delivered to Tienshan without production of the original bill of lading, and agreeing to indemnify Wan Hai for any damages or expense it might suffer by reason of delivering the cargo in accordance with its request. (Tienshan App. at 19; Tienshan App. at 261 (¶ 18).) To secure release of the cargo, Tienshan paid 110% of the value of the cargo (\$47,801.42) into Wan Hai's escrow account plus demurrage in the amount of \$16,944.00. (Tienshan App. at 262 (¶ 26); Tienshan App. at 265.) On October 3, 2008, through counsel, Tianjin Hua Feng gave the bill of lading to Tienshan. (Tienshan App. at 262 (¶ 23).) Tienshan delivered the bill of lading to Wan Hai and Wan Hai returned the \$47,801.42 placed in escrow. (Tienshan App. at 262 (¶ 23, 24).) Wan Hai retained \$16,944.00 to cover demurrage that accrued before the cargo was released. (Tienshan App. at 262 (¶ 26).)

### **III. ANALYSIS AND CONCLUSIONS OF LAW.**

#### **A. Burden of Persuasion.**

A complainant alleging a violation of section 10(d)(1) of the Shipping Act "has the initial burden of proof to establish the[] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true." *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at \*3 (ALJ June 13, 2005). See 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the

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<sup>7</sup> The figure "\$35,000" is written by hand above Rmb243,680.00.

burden of proof.”); 46 C.F.R. § 502.155. “[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. at 102. “[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose.” *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (1994).

## **B. Alleged Spoliation.**

### **1. Background Regarding Lost Evidence.**

On October 20, 2010, I granted in part and denied in part Tianjin Hua Feng’s motion to compel discovery and ordered Tienshan to respond to Tianjin Hua Feng’s requests for production of documents. *Tienshan v. Tianjin Hua Feng*, FMC No. 08-04, Memorandum at 5 (ALJ Oct. 20, 2010) (Memorandum and Order on Respondent’s Motion to Compel Discovery and Complainant’s Motion for Summary Judgment). Tienshan served its responses on November 10, 2010. (Tianjin Hua Feng App. at 3-80.)

Tienshan set forth the following statement as all or part of its responses to Requests Number 1 and 3-12:

Given that Tienshan halted business operation in the U.S. in December 2009 during the severe economic downturn in the U.S., as a result most of its historical business records are not currently in Tienshan’s possession and custody. The Tienshan building at 231 Wilson Avenue, South Norwalk, Connecticut 06852, including computer equipment with data, was sold in February 2010. At that time it is likely that certain hard copies of documents were either discarded or shredded. Therefore, Tienshan is not in a position to produce documents in response to Request No. [N]. Notwithstanding this fact, Tienshan will produce documents in response to Respondent’s Request of Production of Documents No. 2. These documents clearly demonstrate that Respondent was never considering Tienshan as a guarantor. This only occurred to Respondent as a possible interpretation after the fact – i.e., when Respondent found the February 2006 e-mails., [sic] they then conveniently alleged this defense on October 14, 2008 by counsel’s letter. The October 14, 2008 Respondent’s counsel letter was the first time that Respondent alleged a “guarantee” even though Tienshan had made several demands that the cargo be released. Respondent never brought up this “guarantor” issue even after the parties participated in several settlement discussions. Respondent even represented in its letter dated July 10, 2008, in response to Tienshan’s demand to release the cargo, that there was

no contract between them. See Attachment A, Affidavit of Ms. Du Ping, and Attachment E, Tianjin Hua Feng's Response Dated July 10, 2008: No Contractual Relationship with Tienshan, with a Verified Translation Pursuant to 46 C.F.R. § 502.7.

(Tianjin Hua Feng App. at 4-5 (Tienshan's Discovery Responses).)

In its brief filed November 30, 2010, Tianjin Hua Feng contended that by this response:

Tienshan admits that during pending litigation, it destroyed evidence highly relevant to this case. On August [19], 2008, Tienshan filed the instant proceeding. Sixteen (16) months later, in December 2009, Tienshan ceased its U.S. operations and discarded most of its historical business records. Therefore, Tienshan engaged in intentional spoliation of evidence, thereby irreparably harming Hua Feng in that it will not have all relevant evidence available to present its case.

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Pursuant to Rule 502.210, the Commission may issue sanctions against Tienshan for its willful spoliation of evidence and failure to comply with the Order of October 20, 2010. The Commission may sanction Tienshan by ordering (1) certain facts as taken established, such as Hua Feng's proposed findings of fact, (2) the refusal of Tienshan to introduce any evidence to support its claims or make adverse inferences against Tienshan, or (3) the striking of Tienshan's Complaint or dismissing the action.

Given the severity of Tienshan's willful spoliation of evidence, the proper sanction would be to either strike Tienshan's Complaint or dismiss the action as Hua Feng has been substantially and irreparably damages [*sic*] by Tienshan's destruction of evidence.

(Tianjin Hua Feng Brief at 20-21.)

Tienshan replied that it was under no duty to preserve the documents sought by Tianjin Hua Feng's discovery; therefore, it should not be sanctioned. (Tienshan Reply Brief at 17-19.)

After reviewing the parties' briefs, I found that:

Although the destruction of some or all of the evidence sought by Tianjin Hua Feng's request for production of documents may warrant a sanction, Tianjin Hua Feng has not established for each item or class of evidence it sought that a sanction is warranted, and, if so, that the sanction it seeks – striking Tienshan's Complaint or dismissing the action – is the appropriate sanction to be entered.

*Tienshan v. Tianjin Hua Feng*, FMC No. 08-04, Memorandum at 3-5 (ALJ Dec. 15, 2010) (Memorandum and Order Requiring Additional Briefing). I issued an order permitting the parties to file additional briefs on spoliation.

On or before January 7, 2011, Tianjin Hua Feng may file a supplemental brief addressing the elements that a party seeking sanctions for the claimed destruction of evidence must establish and setting forth a reasoned argument regarding what sanction, if any, should be imposed. Tienshan's obligation to preserve the evidence, Tienshan's culpability for any destruction, the relevance of the evidence and consequent degree of prejudice to Tianjin Hua Feng, if any, and the specific sanction to be imposed, if any, may vary depending on the evidence claimed to be missing or destroyed. Therefore, Tianjin Hua Feng should address each item of evidence or class of evidence individually. Tienshan may file a response to Tianjin Hua Feng's supplemental brief on or before January 21, 2011.

*Id.* at 5-6. The parties filed the briefs invited by this Order.

## **2. Supplemental briefs.**

Tianjin Hua Feng contends that many of the documents it requested concern its claim that Tienshan guaranteed Henan Huatai's payments and argues that without the documents, "Hua Feng is unable to present a defense and, as a result, Hua Feng has been substantially prejudiced. The only fair sanction is to strike the Complaint or dismiss the proceeding due to Tienshan's intentional spoliation." (Respondent Tianjin Hua Feng Transport Agency Co., Ltd.'s Supplemental Brief Regarding Discovery Sanctions for Complainant Tienshan Inc. (Tianjin Hua Feng Supp. Brief) at 1.)<sup>8</sup> Tianjin Hua Feng argues that once litigation was probable or pending, Tienshan had a duty to preserve all evidence that it knew or reasonably should know could be relevant to the proceeding.<sup>9</sup>

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<sup>8</sup> Tianjin Hua Feng did not number the pages in its brief. I have assigned the number 1 to the page beginning "Introduction" and numbered the following pages sequentially.

<sup>9</sup> Commission Rule 201 establishes the scope of discovery in Commission proceedings:

Persons and parties may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

Tienshan filed its Complaint on August 19, 2008. On October 13, 2008, Tianjin Hua Feng sent Tienshan a letter stating that Tianjin Hua Feng considered Tienshan a guarantor of shipping costs Henan Huatai owed to Tianjin Hua Feng for the shipment at issue and other earlier shipments, a letter that it claims put Tienshan on notice that it had a duty to preserve any evidence that could be relevant to this claim. Despite this notice, in February 2010, eighteen months after filing the Complaint and sixteen months after receiving the letter, Tienshan discarded its computer and its hard copy documents, including evidence related to this pending proceeding. (*Id.* at 3-4.) Tianjin Hua Feng argues that Tienshan's destruction of evidence eighteen months after Tienshan filed its Complaint and sixteen months after it received the letter stating Tianjin Hua Feng's contention that Tienshan served as a guarantor of Henan Huatai's debts is "intentional and inexcusable." (*Id.* at 5.) "The missing evidence would also have supported Hua Feng's affirmative defenses, including waiver, estoppel, and/or excuse, actions outside of control of Respondent, direct and proximate result of the acts or omissions of others, avoidable consequences, failure to mitigate, failure to establish all elements, and no proximate cause." (*Id.* at 11.) In addition to its contention that the "only fair sanction is to strike the Complaint or dismiss the proceeding due to Tienshan's intentional spoliation," (*id.* at 1), Tianjin Hua Feng addresses each of its document requests for which Tienshan had destroyed the evidence and argues how unavailability of the evidence sought by the request prejudices its defense against Tienshan's Complaint. (*Id.* at 5-12.)

Tienshan contends that "there are no bases for . . . sanctions." (Tienshan, Inc.'s Reply to Tianjin Hua Feng Transport Agency Co., Ltd.'s Supplemental Brief (Tienshan Supp. Brief) at 1.) With regard to the alleged Tienshan guarantee to pay Henan Huatai's fees, Tienshan asserts that Tianjin Hua Feng "itself knows that the 'guaranty' did not exist" and Tianjin Hua Feng "represented to Tienshan that there is no contractual relationship between Tienshan and Hua Feng." (*Id.* at 3.) Tienshan argues that the documents requested by Tianjin Hua Feng are not relevant to the proceeding: "When Respondent itself represented that there was no contractual relationship between Respondent and Tienshan and when its own conduct demonstrates that there is no guaranty or reliance on the alleged 'guaranty,' the fact is clear and it is not necessary to make any inference." (*Id.*) Therefore, Tienshan argues since there was no guarantee, it did not have an obligation to preserve documents that concerned the alleged guarantee. (*Id.* at 3-8.) Tienshan also argues that it complied with the discovery order. (*Id.* at 8-9.)

### **3. Controlling law on spoliation.**

Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. It has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by "that favourite maxim of the law, *omnia presumuntur contra spoliatores*."

A federal district court may impose sanctions under Fed. R. Civ. P. 37(b) when a party spoliates evidence in violation of a court order. Even without a

discovery order, a district court may impose sanctions for spoliation, exercising its inherent power to control litigation.

*West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (citations omitted).

[A] a party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed “with a culpable state of mind”; and (3) that the destroyed evidence was “relevant” to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

*Beaven v. U.S. Dept. of Justice*, 622 F.3d 540, 553 (6th Cir. 2010), quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002). The burden is on the party seeking to impose sanctions to prove these elements. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d at 107.

“An obligation to preserve may arise ‘when a party should have known that the evidence may be relevant to future litigation . . . .’” *Beaven v. U.S. Dept. of Justice*, 622 F.3d at 108, quoting *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

“[T]he ‘culpable state of mind’ factor is satisfied by a showing that the evidence was destroyed ‘knowingly, even if without intent to [breach a duty to preserve it], or negligently.’” *Beaven v. U.S. Dept. of Justice*, 622 F.3d at 108, quoting *Byrnie v. Town of Cromwell*, 243 F.3d 93, 109 (2d Cir. 2001) (brackets and emphasis added in *Beaven*). See *Thompson v. U.S. Dept. of Housing and Urban Development*, 219 F.R.D. 93, 101 (D. Md. 2003) (“In *Residential Funding*, *supra*, the court clarified that there were three possible states of mind that would satisfy the culpability requirement: bad faith/knowing destruction; gross negligence, and ordinary negligence.”).

A party seeking a sanction for spoliation must establish that the unavailable evidence is “relevant” to its claims or defenses.

[O]ur cases make clear that “relevant” in this context means something more than sufficiently probative to satisfy Rule 401 of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that “the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.”

*Beaven v. U.S. Dept. of Justice*, 622 F.3d at 108-109 (citations and footnote omitted). See also *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d at 109 (“a showing of gross negligence in the destruction or untimely production of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party.”).

When spoliation is established, “a proper spoliation sanction should serve both fairness and punitive functions.” *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009).

The United States Court of Appeals for the Third Circuit has applied three (3) key considerations to determine whether a sanction for spoliation of evidence is appropriate. The considerations are: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future. When appropriate, a court may impose any potential sanction including: (1) dismissal of a claim or granting judgment in favor of a prejudiced party; (2) suppression of evidence; [and] (3) an adverse inference, referred to as the spoliation inference . . . .

*Ogin v. Ahmed*, 563 F. Supp. 2d 539, 545 (M.D. Pa. 2008).

Although a district court has broad discretion in crafting a proper sanction for spoliation, we have explained that the applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine. The sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore “the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.”

“[O]utright dismissal of a lawsuit . . . is within the court’s discretion.” Dismissal is appropriate if there is a showing of willfulness, bad faith, or fault on the part of the sanctioned party. However, because dismissal is a “drastic remedy,” it “should be imposed only in extreme circumstances, usually after consideration of alternative, less drastic sanctions.”

*West v. Goodyear Tire & Rubber Co.*, 167 F.3d at 779 (citations omitted). See *Adkins v. Wolever*, 554 F.3d at 652-653 (“Because failures to produce relevant evidence fall ‘along a continuum of fault-ranging from innocence through the degrees of negligence to intentionality,’ the severity of a sanction may, depending on the circumstances of the case, correspond to the party’s fault. Thus, a district court could impose many different kinds of sanctions for spoliated evidence, including dismissing a case, granting summary judgment, or instructing a jury that it may infer a fact based on lost or destroyed evidence.”). See also *The Government of the Territory of Guam v. Sea-Land Service, Inc.*, 29 S.R.R. 894, 906 (ALJ 2002) (“[I]t is well settled that, when a party is responsible for the loss or destruction of important evidence, an adverse inference can be drawn against the party on the issues to which the evidence would relate, and that such an adverse inference is generally appropriate when the party can reasonably be faulted for the loss or destruction.”).

#### 4. Analysis regarding spoliation.

The first question to address is whether Tienshan had an obligation to preserve relevant evidence at the time it was destroyed. Tienshan filed its Complaint on August 19, 2008. By that time, if not earlier, Tienshan knew or should have known that discoverable information relating to the claims set forth in its Complaint should be preserved. Tienshan's responses to Tianjin Hua Feng's Requests Number 1 and 3-12 state that:

Tienshan halted business operation in the U.S. in December 2009 . . . [and] as a result most of its historical business records are not currently in Tienshan's possession and custody. The Tienshan building . . . including computer equipment with data, was sold in February 2010. At that time it is likely that certain hard copies of documents were either discarded or shredded.

(Tianjin Hua Feng App. at 4-5.) The obligation to preserve evidence relevant to this proceeding arose at least sixteen months before Tienshan ceased doing business and eighteen months before Tienshan sold its building and computer equipment and either discarded or shredded hard copies of documents. Therefore, I find that Tienshan had an obligation to preserve discoverable information in December 2009 and February 2010 when the information was lost or destroyed.

The second question is whether Tienshan lost or destroyed the discoverable information with a culpable state of mind. Three possible states of mind that satisfy the culpability requirement: bad faith/known destruction; gross negligence, and ordinary negligence. *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d at 107. Tienshan knew the allegations set forth in its own Complaint and had an obligation to preserve evidence relevant to those allegations. On October 13, 2008, Tianjin Hua Feng sent Tienshan a letter stating that Tianjin Hua Feng considered Tienshan a guarantor of shipping costs Henan Huatai owed to Tianjin Hua Feng for the shipment at issue and other earlier shipments. This letter put Tienshan on notice that it had a duty to preserve any evidence that could be relevant to Tianjin Hua Feng's claimed defense. Tienshan knew or should have known that any documents within the scope of discovery should be retained for possible use in this litigation. Despite this knowledge, in February 2010 Tienshan sold its computer equipment with data and discarded or shredded hard copies of its business records without ensuring retention of information "relevant to the subject matter involved in the proceeding." I find that Tienshan was grossly negligent in permitting the loss of this information.

Tianjin Hua Feng has established that eighteen months after filing its Complaint and acting with gross negligence, Tienshan lost or destroyed its electronically stored documents and discarded or shredded the hard copies of its business records. Therefore, Tianjin Hua Feng may be entitled to a sanction for spoliation. In its opening brief (Tianjin Hua Feng Brief at 20-21) and its supplemental brief (Tianjin Hua Feng Supp. Brief at 1 *passim*), Tianjin Hua Feng argues that Tienshan's Complaint should be dismissed as a sanction for its destruction of evidence. The primary documents that relate to the shipment are in the record and there is little if any dispute regarding the events that occurred during the shipment, however. Tianjin Hua Feng has not established the extreme

circumstances that would justify the drastic remedy of dismissal. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d at 779.

Tienshan is not attempting to use evidence that was not produced in discovery. Therefore, suppression of evidence is not an appropriate remedy.

The trier of fact may draw an adverse inference, referred to as the spoliation inference, from the spoliation of relevant evidence. *Ogin v. Ahmed*, 563 F. Supp. 2d at 545. Document Requests Number 1 and 3-12 relate directly or indirectly to Tianjin Hua Feng's contention that Tienshan guaranteed Henan Huatai's payments to Tianjin Hua Feng and that as a result, Tianjin Hua Feng had a maritime lien in the cargo and was entitled to hold the cargo until Tienshan paid the Rmb243,680 owed by Henan Huatai. As explained more fully below, I pretermitted a decision on Tianjin Hua Feng's claim of a guarantee and assume for the purposes of this Initial Decision that Tianjin Hua Feng could prove that it had a maritime lien on the cargo described in the Wan Hai bill of lading. Given this assumption, it is not necessary to determine whether Tienshan destroyed any otherwise unavailable documents responsive to Requests Number 1 and 3-12 and whether an adverse inference should be drawn from that destruction.

Request Number 13 sought evidence regarding Tienshan's claim for lost profits. In its Supplemental Brief, Tianjin Hua Feng argues:

[Request No. 13] is highly relevant to Tienshan's claim for lost profits of \$106,115.00. The only evidence produced was a spreadsheet that is unverified and lacks foundation, and spreadsheet [sic] purports to show lost sales. However, no backup documentation was provided, and it can be reasonably inferred that such backup was discarded by Tienshan in February 2010.

(Tianjin Hua Feng Supp. Brief at 11.) Although Tienshan addresses spoliation with regard to documents Tianjin Hua Feng sought that it alleged would support its claim that Tienshan guaranteed Henan Huatai's payments, Tienshan does not address the question of the loss or destruction of documents related to its claim for \$106,115.00 in lost profits. As explained more fully below, I find that Tienshan has not proven it is entitled to lost profits. Therefore, no adverse inference for loss of any evidence sought by Request Number 13 is necessary.

Although Tianjin Hua Feng has established that Tienshan was grossly negligent when it destroyed documents relevant to this proceeding, under these circumstances, no sanction for spoliation or failure to respond to discovery is warranted.

**C. Tianjin Hua Feng is an Entity Subject to the Provisions of Section 10(d)(1) for this Shipment.**

Tianjin Hua Feng concedes and the evidence establishes that Tianjin Hua Feng refused to give Tienshan the original bill of lading that would permit Tienshan to obtain delivery of the four

containers of stoneware unless Tienshan first paid Rmb243,680 to Tianjin Hua Feng to cover debts allegedly owed by Henan Huatai to Tianjin Hua Feng, including Rmb4690 for the shipment of the four containers transported on this shipment. Tienshan contends that Tianjin Hua Feng's refusal violated section 10(d)(1) of the Shipping Act.

Section 10(d)(1) provides: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). Since section 10(d)(1) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries, to violate section 10(d)(1), an entity must be a common carrier, marine terminal operator, or an ocean transportation intermediary within the meaning of the Act.<sup>10</sup>

The Act defines two types of ocean transportation intermediaries: "Ocean freight forwarders" and "non-vessel-operating common carriers." 46 U.S.C. § 40102(19). "The term 'ocean freight forwarder' means a person that – (A) *in the United States, dispatches shipments from the United States* via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(18) (emphasis added). Henan Huatai, the shipper in China, contacted Tianjin Hua Feng to arrange for shipment of the stoneware to Tienshan in the United States. When it arranged for transportation of the Tienshan shipment from China to Long Beach, Tianjin Hua Feng performed services comparable to freight forwarder services as defined by the Act and the Commission's regulations. *See* 46 C.F.R. § 515.2(i). As a result of Tianjin Hua Feng's efforts, Wan Hai, a common carrier, through its agent China Ocean Shipping Agency, issued a bill of lading for the shipment identifying Henan Huatai as the shipper and Tienshan as the consignee. Wan Hai assumed responsibility for the transportation by water of the goods from Henan Huatai in China to Tienshan in the United States, with Henan Huatai identified as the shipper and Tienshan identified as the consignee. Tianjin Hua Feng dispatched the shipment.

As defined by the Act, an "ocean freight forwarder" operates "*in the United States*" and "dispatches shipments *from the United States*." 46 U.S.C. § 40102(18) (emphasis added). Since Tianjin Hua Feng operated in *China* and dispatched the Tienshan shipment *to the United States*, Tianjin Hua Feng did not operate as an ocean transportation intermediary/ocean freight forwarder as defined by the Act on the Tienshan shipment. Therefore, Tianjin Hua Feng did not violate section 10(d)(1) through its activities as an ocean freight forwarder.

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its

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<sup>10</sup> Tienshan does not contend that Tianjin Hua Feng operated as a marine terminal operator, 46 U.S.C. § 40102(14), or as an ocean common carrier (vessel-operating common carrier). 46 U.S.C. § 40102(17). Therefore, I only discuss whether Tianjin Hua Feng is an ocean transportation intermediary within the meaning of the Act.

relationship with an ocean common carrier.” 46 U.S.C. § 40102(16). Section 10(d)(1) applies to a foreign NVOCC for its actions on a shipment from a foreign country to the United States.

To be an NVOCC on a particular shipment, an entity must meet the Act’s definition of “common carrier.”

The term “common carrier” – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

As discussed above, although it is registered with the Commission as a foreign NVOCC, Tianjin Hua Feng performed services comparable to an ocean freight forwarder, not an NVOCC, at the beginning of this shipment. To be an NVOCC on the Tianshan shipment, Tianjin Hua Feng must have operated as a common carrier on the shipment; that is, it must have: (i) held itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumed responsibility for the transportation of the Tianshan shipment from the port or point of receipt to the port or point of destination; and (iii) used, for all or part of that transportation, a vessel operating on the high seas between a port in the United States and a port in China. 46 U.S.C. § 40102(6). Furthermore, to be an NVOCC on this shipment, it must have engaged in some activity that would permit it to assume the status of an NVOCC after transportation of the shipment had begun.

Since Tianjin Hua Feng is a bonded and tariffed foreign-based NVOCC registered with the Commission, it holds itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. Therefore, Tianjin Hua Feng meets the first prong of the definition of common carrier. The Wan Hai bill of lading (Tianshan App. at 12) proves that the shipment was transported on a vessel operating on the high seas between China and Long Beach. Therefore, this shipment meets the third prong of the definition of common carrier.

In its June 19, 2008, email, Hua Feng, acting as Tianjin Hua Feng’s agent, stated that Henan Huatai owed Tianjin Hua Feng Rmb243,680, that it had possession of the original bill of lading, and that it would keep the original bill of lading until it received the payment. (Tianshan App. at 15, quoted in full *supra* at 13-14.) Tianjin Hua Feng itself proposed a finding of fact stating: “In order to protect its lien rights in the Shipment, Hua Feng held on to the original B/L awaiting payment from Tianshan and assumed the responsibility for transportation of the goods and operated as a NVOCC on the Shipment.” (Tianjin [Hua] Feng Proposed Finding of Fact ¶ 29.) This proposed finding is supported by the evidence to which it cites.

When Tianjin Hua Feng refused to give Tienshan the original bill of lading and prevented delivery of the goods, it assumed responsibility for the transportation of the goods. As a bonded and tariffed foreign-based NVOCC registered with the Commission, Tianjin Hua Feng holds itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation. The Tienshan shipment used, for all or part of its transportation, a vessel operating on the high seas between a port in the United States and a port in a foreign country. By assuming responsibility for transportation of the goods, Tianjin Hua Feng meets the second prong of the Act's definition of common carrier on the Tienshan shipment. 46 U.S.C. § 40102(6). Therefore, Tianjin Hua Feng is an entity subject to the requirements of section 10(d)(1) on the shipment.

**D. Tianjin Hua Feng Failed to Establish, Observe, and Enforce Just and Reasonable Regulations and Practices Relating to or Connected with Receiving, Handling, Storing, or Delivering Property When it Refused to Give the Bill of Lading to Tienshan.**

**1. It is not necessary to decide whether Tienshan guaranteed payments by Henan Huatai resulting in a maritime lien in the stoneware for Tianjin Hua Feng.**

Tianjin Hua Feng argues that it had a right to refuse to give the bill of lading to Tienshan because it had a maritime lien on the cargo. "A maritime lien is 'a privileged claim upon maritime property . . . arising out of services rendered to or injuries caused by that property.'" *Hawkspere Shipping Co., Ltd. v. Intamex, S.A.*, 330 F.3d 225, 230 n.3 (4th Cir. 2003) (quoting 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 9-1 (3d ed. 2001)). "If a shipper refuses to pay the full freight, the carrier may lawfully withhold the cargo." *Id.* "NVOCCs have an *in rem* maritime lien for unpaid freight against the cargo they are responsible for transporting." *Logistics Management, Inc. v. One (1) Pyramid Tent Arena*, 86 F.3d 908, 914 (9th Cir. 1996).

Tianjin Hua Feng asserts that after problems occurred with payments by Henan Huatai in 2006, Tienshan failed to pay Tianjin Hua Feng for its services on a series of shipments. As a result of negotiations between Tianjin Hua Feng and Tienshan, Tianjin Hua Feng contends that Tienshan agreed to guarantee Henan Huatai's future payments to Tianjin Hua Feng. Tianjin Hua Feng argues that because of that guarantee, it had a maritime lien on the cargo and a right to retain the bill of lading until Tienshan paid the money owed by Henan Huatai. Tianjin Hua Feng states that Henan Huatai owed Rmb4690 for the shipment of the four containers and a total of Rmb243,680 for the current shipment and back shipments. Tianjin Hua Feng argues that the maritime lien gave it a right to retain the bill of lading until Tienshan paid Rmb243,680. (Tianjin Hua Feng Brief at 5-15.) In its supplemental brief, Tianjin Hua Feng argues that Tienshan destroyed evidence that would help Tianjin Hua Feng prove its maritime lien when it sold its building in February 2008; therefore, it is entitled to dismissal of the Complaint. (Tianjin Hua Feng Supp. Brief at 12.)

Tienshan argues:

It is an uncontested fact that Respondent acted as a freight forwarder in China not an NVOCC for subject shipment. It is only in relation to delivery in the U.S. that Respondent assumed carrier functions by interfering with the delivery of the cargo to Tienshan by wrongfully holding the bills of lading. Therefore, Respondent is not entitled to a maritime lien.

(Tienshan Reply Brief at 13.) As discussed above, if Tienshan's argument is correct and Tianjin Hua Feng did not operate as an NVOCC on the shipment, it is not an entity subject to the requirements of section 10(d)(1) and Tienshan's Complaint must be dismissed. Moreover, as found above, when Tianjin Hua Feng assumed responsibility for the transportation of the goods, it did operate as an NVOCC on the shipment. Tianjin Hua Feng is entitled to the rights of an NVOCC as well as the responsibilities, including the possibility of a maritime lien in cargo for which it assumed transportation.

Tienshan also argues that Tianjin Hua Feng's statements in the record indicate that Tianjin Hua Feng knows there was no such agreement. In June 2008, Tianjin Hua Feng stated that "there are no contracts between Tianjin Hua Feng and Tienshan" and that Tianjin Hua Feng never claimed there was a guarantee until four months after the dispute arose when it found emails written in 2006 and claimed first claimed that Tienshan guaranteed the payments. (Tienshan Supp. Brief at 4-5.)

I find that it is not necessary to resolve this dispute. Even if it is assumed that Tienshan guaranteed Henan Huatai's payments to Tianjin Hua Feng and that Tianjin Hua Feng had a maritime lien on the cargo in the containers, as set forth below, Tianjin Hua Feng violated section 10(b)(1) of the Act when it demanded a payment of Rmb243,680 before it would give Tienshan the bill of lading. Therefore, I will pretermite a decision on this portion of the controversy.

## **2. Tianjin Hua Feng violated section 10(d)(1).**

As stated above, for the purposes of this decision, I assume that Tianjin Hua Feng had a maritime lien on the cargo in the four containers to secure the payment owed to it and a concomitant right to withhold the bill of lading until that payment had been made. The lien only secured payment for the shipment of the cargo subject to that lien, however. As summarized by Judge Kline:

A carrier can withhold delivery of cargo to compel the shipper to pay freight money that is lawfully owed and has a cargo lien which the carrier can assert if necessary, which lien the carrier loses if it surrenders the cargo. *See Johnson Products Co., Inc. v. M/V Molinera*, 628 F. Supp. 1240, 1248 (S.D. N.Y. 1986); Gilmore and Black, *The Law of Admiralty* (2d ed.) sec. 3-45; 70 Am Jur 2d, Shipping, sec. 793. Conversely, if a shipper or consignee induces the carrier to surrender the cargo and thus lose its lien, and thereafter refuses to pay the lawful freight money owed because the shipper or consignee has outstanding disputes with the carrier on earlier unrelated shipments, and withholds payment of the lawful freight as a means to coerce the carrier to settle the disputes on earlier unrelated shipments, the shipper or consignee has acted

unlawfully, in violation of section 10(a)(1) of the 1984 Act. *See Waterman Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173 (I.D.), affirmed with slight modifications, 26 S.R.R. 1424 (1994). *Thus, disputes over earlier unrelated shipments cannot be used by either a carrier or a shipper as justification for refusing to release the cargo or to pay lawful freight money.*

*Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc.*, 29 S.R.R. 1348, 1356 n.14 (ALJ 2003) (emphasis added), admin. final Feb. 12, 2003. *See also American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 115 F. 669, 672 (1st Cir. 1902) (a lien against cargo “cannot be applied . . . beyond the amount of freight stipulated in the bill of lading”); *Finora Co., Inc. v. Amitie Shipping, Ltd.*, 852 F. Supp. 1298, 1307 (D.S.C. 1994) (“Under U.S. law, a shipowner’s lien on sub-freights is limited to the amounts which may be due under the Voyage Charter.”) (citing *American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*); *The Albert Dumois*, 54 F. 529, 530 (D.C.N.Y. 1893) (“By virtue of this provision the shipowner may enforce a lien upon the cargo for the freight stated in the respective bills of lading, but for no more.”).

A maritime lien secures money lawfully owed for the carriage of that particular shipment. Tianjin Hua Feng states that “[i]n connection with the last shipment with bill of lading No. 0338005421 that is the subject of this proceeding, Henan Huatai owes Hua Feng \$4,690.00 RMB, which is around \$700.00 USD, that Tienshan guaranteed to pay.” (Tianjin Hua Feng App. at 1 (affidavit of the president of Tianjin Hua Feng).) Assuming that Tienshan guaranteed Henan Huatai’s payments, that Tianjin Hua Feng had a maritime lien in the cargo until it received the payment, and that Tianjin Hua Feng had a right to retain possession of the bill of lading until it was paid, if Tianjin Hua Feng had limited its demand to Rmb4690, retention of the bill of lading may not have violated section 10(d)(1). Tianjin Hua Feng demanded Rmb243,680, however, a sum that included fees allegedly owed for prior shipments. An NVOCC that holds cargo hostage to its demands for money allegedly owed for prior shipments violates section 10(d)(1). *Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc.*, 29 S.R.R. at 1354-1356. When it refused to deliver the bill of lading unless Tienshan paid money allegedly owed for prior shipments, Tianjin Hua Feng attempted to use a dispute over earlier unrelated shipments as justification for refusing to release the cargo. Therefore, I conclude that Tianjin Hua Feng failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property in violation of section 10(d)(1) when it refused to give the bill of lading to Tienshan unless Tienshan paid it Rmb243,680.

#### **E. Tienshan is Entitled to Reparations.**

Tienshan claims that it is entitled to reparations in the amount of \$16,944.00 it paid in demurrage resulting from the delay in releasing the containers to Tienshan. (Tienshan App. at 262.) Tienshan also claims that as a result of Tianjin Hua Feng’s actions, Tienshan “breached its contract with Wal-Mart, and other retailers and has thereby been subjected to substantial monetary penalties and suffered loss of profits because of the late or non-delivery of the goods.” (*Id.*) Tienshan contends that it “incurred loss of profits in the amount of \$106,115.00.” (*Id.*)

The Act provides: “If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.” 46 U.S.C. § 41301(a).

(a) **Definition.** – In this section, the term “actual injury” includes the loss of interest at commercial rates compounded from the date of injury.

(b) **Basic amount.** – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305.

As the complainant, Tienshan has the burden of proving entitlement to reparations. *See James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) (“As the Federal Maritime Board explained long ago: ‘(a) damages<sup>[11]</sup> 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.’”).

The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

*Tractors and Farm Equip. Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788, 798-799 (ALJ 1992).

In her affidavit, Ms. Du Ping, Tienshan’s chairman, states that as a precondition to release of the cargo, Tienshan was required to pay demurrage in the amount of \$16,944.00. (Tienshan App. at 262.) I credit this averment. Tienshan has also submitted as evidence a Fairfield County Bank Domestic Outgoing Wire Transfer Request indicating that on August 15, 2008, Tienshan wired

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<sup>11</sup> Reparations under the Shipping Act and damages are synonymous. *See Federal Maritime Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

\$16,944.00 to Norton Lilly International as agents for Wan Hai Line for storage charges. (Tienshan App. at 265.) Accordingly, the evidence submitted supports the amount claimed as actual injury.

I conclude that as a result of Tianjin Hua Feng's violation of section 10(d)(1), Tienshan suffered actual injury in the amount of \$16,944.00 when it was required to pay demurrage to secure delivery of the stoneware and is entitled to reparations in that amount. This injury occurred on August 15, 2008, the date of the wire transfer request. Therefore, in addition to the principal, Tienshan is entitled to interest on the \$16,944.00 from August 15, 2008. The specific amount of interest will be calculated by the Commission when the Commission issues its Final Decision.

Tienshan has not established a right to compensation for a penalty paid to Walmart or other retailers or to lost profits. The sole evidence submitted to prove this claim consists of Du Ping's affidavit and the document Tienshan calls a "Proof of Loss of Sales." (Tienshan Brief at 28.) In her affidavit, Du Ping avers:

Tienshan, as a result of Respondents's action, breached its contract with Wal-Mart, and other retailers and has thereby been subjected to substantial monetary penalties and suffered loss of profits because of the late or non-delivery of the goods caused solely by Tianjin Hua Feng's unlawful withhholding [*sic*] of the original B/L and Hua Feng's conspiracy with Tianjin Hua Feng. Tienshan incurred loss of profits in the amount of \$106,115.00.

(Tienshan App. at 262.) The "Proof of Loss of Sales" consists of twelve pages<sup>12</sup> of columns listing items and prices. (Tienshan App. at 267-278.) Tienshan does not explain who created the "Proof of Loss of Sales," whether it was created in the ordinary course of business, or what the figures in the exhibit mean. Tienshan presents no evidence regarding its contract with Walmart or any other retailer, the amount of monetary penalties or how they were calculated, documents demonstrating that Tienshan paid the monetary penalties or that Walmart or other retailers deducted the penalties from payments made by the Walmart or the retailers, whether Walmart or other retailers eventually purchased the stoneware, the difference in purchase price between what Tienshan would have received had the stoneware been timely delivered and the purchase price actually received by Tienshan. Without this evidence, Tienshan has not met its burden proving that its claim for lost profits in the amount of \$106,115.00 is "something based on a reasonable approximation supported by evidence and by reasonable inferences" that can be drawn from the evidence. Tienshan has not demonstrated by a preponderance of the evidence that it lost profits of \$106,115.00; therefore, its claim for lost profits is denied.

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<sup>12</sup> This appears originally to have been six pages, but one column from each page is printed by itself on an individual page.

**F. Tienshan's Request for Attorney's Fees.**

Tienshan asks for an award of attorney's fees. Since Tienshan has been awarded reparations, it is entitled to reasonable attorney's fees as directed by 46 U.S.C. § 41305(b).

The Commission's regulation (46 C.F.R. 502.254) provides that petitions for attorney's fees shall normally be filed with the presiding judge in cases where there are no exceptions filed by respondents but only after the Commission makes the judge's initial decision final, normally about 30 days after service of that decision. A ruling on the petition is not normally issued by the judge until the 30-day review period has expired. See Docket No. 99-14 – *Global Transporte Oceanico S.A. v. Coler Independent Lines Co.*, 28 S.R.R. 1162 (1999) (petition for attorney's fees in default case filed within one week after service of Initial Decision; judge's ruling on the petition not issued until after the Commission had made the Initial Decision final). Incidentally, the Commission is authorized only to award reasonable attorney's fees, a term that does not include "costs." See *Global Transporte*, 28 S.R.R. at 1163 n.5.

*Safmarine Container Lines N.V. v. Garden State Spices, Inc.*, 28 S.R.R. 1621, 1623 n.5 (ALJ 2000).

The question of attorney's fees for Tienshan will be addressed when and how set forth in 46 C.F.R. § 502.254.

**ORDER**

Upon consideration of the record herein, the arguments of the parties, the conclusion that respondent Tianjin Hua Feng Transport Agency Co., Ltd., violated section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. § 41102(c), and that complainant Tienshan, Inc., suffered actual injury as a result of that violation, and for the reasons set forth above, it is hereby

**ORDERED** that Tianjin Hua Feng Transport Agency Co., Ltd., pay Tienshan, Inc., reparations in the amount of \$16,944.00 plus interest from August 15, 2008.

  
Clay G. Guthridge  
Administrative Law Judge