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January 31, 2013

VIA COURIER

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Ms. Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Room 1046
Washington, D.C. 20573

Re: Yakov Kobel and Victor Berkovich v. Hapag-Lloyd (America), Inc.; Hapag-Lloyd AG; Limco Logistics, Inc. and International TLC, Inc., FMC Docket No. 10-06

Dear Ms. Gregory:

Enclosed herewith are an original and five (5) copies of the Supplemental Brief of Hapag-Lloyd AG and Hapag-Lloyd (America), Inc. in the above-captioned docket. A copy of the brief in pdf format has also been sent to secretary@fmc.gov.

A copy of this letter and its enclosure has been provided for your acknowledgement of receipt.

Sincerely,

COZEN O'CONNOR

By: Wayne Rohde

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BEFORE THE
FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

YAKOV KOBEL AND VICTOR BERKOVICH)
)
 v.)
)
 HAPAG-LLOYD (AMERICA), INC.;)
 HAPAG-LLOYD AG; LIMCO LOGISTICS, INC.)
 AND INTERNATIONAL TLC, INC.)
)

Docket No.
10-06

 ORIGINAL

**SUPPLEMENTAL BRIEF OF RESPONDENTS
HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA) INC.**

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January 31, 2012

TABLE OF CONTENTS

| | Page |
|---|------|
| I. INTRODUCTION AND BACKGROUND | 1 |
| II. THE COMMISSION’S DECISIONS IN <i>CARGO ONE</i> AND <i>ANCHOR SHIPPING</i> REQUIRE DISMISSAL OF THIS CASE FOR LACK OF JURISDICTION | 3 |
| A. <i>Cargo One</i> and <i>Anchor Shipping</i> Require Dismissal | 3 |
| B. The Issues In This Case Are Not Shipping Act Issues And Ruling In This Case Would Exceed The Limits of Commission Jurisdiction | 4 |
| C. At Least One Of The Purposes Of The Shipping Act Requires Dismissal | 7 |
| D. The Shipping Act’s Treatment Of Attorneys’ Fees Encourages Frivolous Actions Such As This One, Which The Commission Must Guard Against | 9 |
| III. THE CONDUCT HEREIN AT ISSUE DOES NOT CONSTITUTE REGULATIONS AND PRACTICES | 10 |
| A. Single Failure Not A Violation | 10 |
| B. A Sequence Of Failures With Respect To A Single Shipment Is Not A Violation Of Law | 15 |
| C. There Is No Violation Based On The Language Of The Shipping Act | 17 |
| D. An Alternative Approach To Identifying A Practice Or Regulation | 19 |
| IV. CONCLUSION | 20 |



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 AND INTERNATIONAL TLC, INC.)

Docket No.
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 ORIGINAL

**SUPPLEMENTAL BRIEF OF RESPONDENTS
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January 31, 2012

TABLE OF CONTENTS

| | Page |
|---|------|
| I. INTRODUCTION AND BACKGROUND | 1 |
| II. THE COMMISSION’S DECISIONS IN <i>CARGO ONE</i> AND <i>ANCHOR SHIPPING</i> REQUIRE DISMISSAL OF THIS CASE FOR LACK OF JURISDICTION | 3 |
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| C. There Is No Violation Based On The Language Of The Shipping Act | 17 |
| D. An Alternative Approach To Identifying A Practice Or Regulation | 19 |
| IV. CONCLUSION | 20 |

TABLE OF AUTHORITIES

Page

Cases

A.N. Deringer, Inc. v. Marlin Marine Services, Inc., 25 S.R.R. 1273 (Settlement Officer 1990) 5, 11, 12

Anchor Shipping Co. v. Aliança Navegação E Logistica LTDA., 30 S.R.R. 991 (FMC 2008)..... *passim*

Anchor Shipping Co. v. Aliança Navegação E Logistica LTDA., 31 S.R.R. 567 (FMC 2009).....21

Ashcroft v. Iqbal, 556 U.S. 662 (2009).....4

Attorneys' Fees in Reparation Proceedings, 23 S.R.R. 1698 (FMC 1987)..... 9

B.F. McKernin & Co., Inc. v. United States Lines, Inc., 416 F. Supp. 1068 (S.D.N.Y. 1976) 6

Barretto Peat, Inc. v. Luis Ayala Colon Sucrs., Inc., 896 F.2d 656 (1st Cir. 1990) 6

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)4

Bonafide, Inc. v. O.E.C. Shipping Los Angeles, Inc., 31 S.R.R. 1356 (Settlement Officer 2010) 5

California v. United States, 320 U.S. 577 (1944)..... 19

Capitol Packing Company v. U.S., 350 F.2d 67 (10th Cir. 1965)..... 15,16

Cargo One, Inc. v. COSCO Container Lines Co., Ltd., 28 S.R.R. 1635 (FMC 2000)..... 3, 4, 7, 8, 21

Clutch Auto, Ltd. v. International Touch Consolidator, Inc., et al., 31 S.R.R. 535 (ALJ (2008)..... 6

Definition of "Package" under the Carriage of Goods by Sea Act, 23 S.R.R. 111 (FMC 1985)..... 5, 19

Exportorient Ansari v. American President Lines, Ltd., 26 S.R.R. 1414 (Settlement Officer 1994) 5

Hernandez v. Espinosa, et al., Docket 08-22768 (S.D. Fla. 2008).....21

Hutto Stockyard, Inc. v. U.S. Dept. of Agriculture, 903 F.2d 299 (4th Cir. 1990).....13

Investigation of Practices of Stockton Elevators, 8 F.M.C. 181 (FMC 1964) 10,11

J. M. Altieri v. The Puerto Rico Ports Authority, 7 F.M.C. 416 (ALJ 1962)..... 5, 11, 12

Johnson Products Co., Inc. v. M/V LA MOLINERA, 619 F. Supp. 764 (S.D.N.Y. 1985) 7

Jones v. Compagnie Generale Maritime, 882 F. Supp. 1079 (S.D. Ga. 1995)..... 6

Kamara v. Honesty Shipping Service and Atlantic Ocean Line, 29 S.R.R. 321
(Settlement Officer 2001)..... 11, 12

Lane v. Sohler, 40 Agric. Dec. 363 (USDA 1981).....14, 18

Lyng v. Payne, 476 U.S. 926 (1986).....5

Meyan SA v. International Freight Forwarders, 30 S.R.R. 1397 (FMC 2007)..... 5, 16

Mid-South Order Buyers, Inc. v. Platte Valley Livestock, 210 Neb. 382; 315 N.W.2d 229 (1982)..... 14

National Automotive Publications, Inc. v. United States Lines, Inc., 486 F. Supp 1094 (S.D.N.Y. 1980)..... 6

Pan American World Airways, Inc. v. California Stevedore and Ballast Company, 559 F.2d 1173
(9th Cir. 1977) 16

Patricia Eyes v. Wallenius Wilhelmsen Lines, 30 S.R.R. 1064 (ALJ 2006)..... 5, 16

Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Company, 2 U.S.M.C. 517
(USMC 1941) 5

Polo Ralph Lauren, L.P. et al. v. Tropical Shipping & Construction Co., Ltd., 215 F.3d 1217
(11th Cir. 2000) 6

Progressive Auto, Inc. v. Marine Transport Logistics, Inc., 31 S.R.R. 1354 (Settlement Officer 2010) 5

Puerto Rico Ports Authority v. F.M.C., 919 F.2d 799 (1st Cir. 1990)..... 10

Reisman v. Medafrica Lines, U.S.A., 592 F. Supp. 50 (S.D.N.Y. 1984)..... 6

Rice v. Wilcox, 630 F.2d 586 (8th Cir. 1980)..... 13

Seacon Terminals, Inc. v. Port of Seattle, 26 S.R.R. 886 (FMC 1993)..... 15

Senator Line GmbH & Co. KG v. Sunway Line, Inc., 291 F.3d 145 (2nd Cir. 2002) 6

Sony Magnetic Products Inc. of America v. Meriventi O/Y, 863 F.2d 1537 (11th Cir. 1989) 16

Vinmar v. China Ocean Shipping Co., 26 S.R.R. 420 (FMC 1992) 3, 8

Wallace v. Mathias, 2012 U.S. DIST LEXIS 94955 (D. Neb. 2012)..... 13

Statutes

7 U.S.C. 208(a) 13
46 U.S.C. § 41102(c) *passim*
46 U.S.C. §41104(5).....8
46 U.S.C. §41104(9).....8
46 U.S.C. § 41305(b) 9
Section 10(d)(1) *passim*

Other Authorities

Admiralty and Maritime Law, Thomas Schoenbaum, 4th Ed., 2004.....7,8
Awards of Attorneys' Fees By Federal Courts and Federal Agencies, Congressional Research Service, June 20, 2008.....9
James W. Ely, Jr., *The Troubled Beginning of the Interstate Commerce Act*, *Marquette Law Review*, v. 95, No. 4 (Summer 2012).....17

BEFORE THE
FEDERAL MARITIME COMMISSION

YAKOV KOBEL AND VICTOR BERKOVICH)
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 v.)
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 HAPAG-LLOYD (AMERICA), INC.;)
 HAPAG-LLOYD AG; LIMCO LOGISTICS, INC.)
 AND INTERNATIONAL TLC, INC.)
)

Docket No.
10-06

SUPPLEMENTAL BRIEF OF RESPONDENTS
HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA) INC.

Pursuant to the Commission's December 4, 2012 order ("Order"), respondents Hapag-Lloyd AG and Hapag-Lloyd (America) Inc. (hereinafter referred to collectively "Hapag-Lloyd") hereby submit their supplemental brief in this case, addressing the specific questions set forth in the Order and in so doing addressing the considerations identified in the Order.

I. INTRODUCTION AND BACKGROUND

This case is before the Commission on complainants' exceptions to the initial decision of the administrative law judge finding that none of the respondents violated any provision of the Shipping Act. While the questions posed and considerations identified in the Order are, to varying degrees, important in providing guidance with respect to the scope and future application of 46 U.S.C. §41102(c)(formerly Section 10(d)(1) of the Shipping Act), they are not critical to affirming the decision of the administrative law judge on the narrow, limited exceptions before the Commission.

Insofar as Hapag-Lloyd is concerned, complainants alleged that damage to a container during the loading process, the accidental loading of that container on to a

subsequent vessel, and delay of the container at a transshipment port en route to its final destination constituted a failure to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

There are no disputes with respect to any material facts. The record unequivocally demonstrates that the damage to the container and the loading of same were accidental. The record also demonstrates that the delay of the container at the transshipment port was not the fault of Hapag-Lloyd and that, in any event, any act or omission of Hapag-Lloyd was not the proximate cause of any loss suffered by complainants. Based on this record, the administrative law judge held that there was no violation of law with respect to the conduct of Hapag-Lloyd. At the October 18, 2012, oral argument before the Commission, it was undisputed that Hapag-Lloyd had established just and reasonable practices.

In light of the foregoing, as well as Hapag-Lloyd's previous briefs in this case and the analysis that follows, the Commission should at a minimum affirm the decision of the administrative law judge that Hapag-Lloyd did not violate the Shipping Act. It would be more appropriate for the Commission to dismiss this case for lack of jurisdiction.

With this background in mind, Hapag-Lloyd addresses below the questions raised by the Commission and the considerations identified in the Order. Hapag-Lloyd addresses the second question first, as that question presents jurisdictional issues which are appropriately addressed prior to reaching the issues presented by the first question.

II. THE COMMISSION'S DECISIONS IN *CARGO ONE* AND *ANCHOR SHIPPING* REQUIRE DISMISSAL OF THIS CASE FOR LACK OF JURISDICTION

The Commission's Order asks the parties to address the application of the Commission's decisions in *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. 1635 (2000) ("*Cargo One*") and *Anchor Shipping Co. v. Aliança Navegação E Logística LTDA*, 30 S.R.R. 991 (2006) ("*Anchor Shipping*") to this case. As explained below, the principle established in those decisions requires that this case be dismissed for lack of jurisdiction.

A. *Cargo One and Anchor Shipping Require Dismissal*

In *Cargo One*, the Commission addressed alleged violations of the Shipping Act arising out of conduct under a service contract. The Commission reexamined its earlier holding in *Vinmar, Inc. v. China Ocean Shipping Co.*, 26 S.R.R. 420 (1992), in which it had held that Section 8(c) of the Shipping Act deprived it of jurisdiction over claims based on a breach of a service contract. The *Cargo One* decision effectively reversed *Vinmar*, at least in part, and held that the Commission has jurisdiction over claims based on a service contract which involve "elements peculiar to the Shipping Act" or which raise "issues beyond contractual obligations." *Cargo One* at 1645. The Commission also found that:

allegations essentially comprising contract law claims should be dismissed unless the party alleging the violations successfully rebuts the presumption that the claim is no more than a simple breach of contract claim.

Id.

In *Anchor Shipping*, the Commission declined to dismiss a case brought by a NVOCC against a carrier, alleging violations of the Shipping Act in connection with the carrier's conduct under a service contract. The Commission found that *Cargo One*

governed the issue before it and held that on the basis of the allegations contained in the complaint (30 S.R.R. at 999), that Anchor alleged certain violations particular to the Shipping Act. *Id.*

Cargo One and *Anchor Shipping* both stand for the proposition that the FMC is not authorized to decide non-Shipping Act issues. Thus, the presumption established in *Cargo One* applies not only to allegations essentially comprising contract law claims, but to allegations comprising claims under other bodies of law. In other words, contract or tort claims, or claims arising under other statutes, should be dismissed unless the party alleging the violations rebuts the presumption that the claim does not raise legitimate substantive issues which are peculiar to the Shipping Act.¹

B. *The Issues In This Case Are Not Shipping Act Issues And Ruling In This Case Would Exceed The Limits of Commission Jurisdiction*

The conclusion that the Commission lacks jurisdiction over non-Shipping Act cases is compelled by the well-established principle that the jurisdiction of an

¹ In the *Cargo One* decision, the Commission criticized *Vinmar* on the grounds that it placed the Commission in the position of conjecturing, on the basis of complaint language, whether the claim was a breach of contract violation or a Shipping Act claim (with the focus being on the appropriate remedy). 26 S.R.R. at 1644. However, the *Cargo One* decision did nothing to remedy this situation, as the Commission is still required to conjecture, on the basis of complaint language, whether the allegation is a garden variety breach of contract claim or is “peculiar” to the Shipping Act. The practical result of this flawed approach (which is seen quite clearly in this case), is that the Commission tends to disregard the presumption it established in *Cargo One* and assert jurisdiction over every complaint that invokes the “magical” Shipping Act language of undue, unjust, unreasonable, prejudice, preference, disadvantage or discrimination, regardless of whether the claim actually raises legitimate Shipping Act issues. The Commission should, at a minimum, address this problem by following the Supreme Court’s decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and require that in order to survive a motion to dismiss, a complaint must set forth sufficient facts to state a claim for relief that is plausible on its face. See, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This would at least require persons filing complaints before the Commission to do more than use labels and a formulaic recitation of the elements of a cause of action in their complaints (*Id.* at 555), and assist the Commission in separating the wheat of legitimate complaints from the chaff of complaints that do not raise legitimate Shipping Act issues.

administrative agency is limited to that authority granted to it by Congress. *Lyng v. Payne*, 476 U.S. 926 (1986). Thus, for example, the Commission has long held that it has no authority to decide matters arising under COGSA. *Definition of "Package" under the Carriage of Goods by Sea Act*, 23 S.R.R. 111, 113 (FMC 1985).² There is no doubt that the Commission would also dismiss for lack of jurisdiction a claim arising under other federal statutes that Congress has not authorized it to enforce (e.g., a claim that a carrier violated the law by discharging oil in U.S. waters).³

If ever a case involved non-Shipping Act issues cloaked in Shipping Act verbiage, this case is it. This case is about cargo damage, accidental loading of damaged cargo, cargo delay and the propriety of the sale of complainants' cargo by a respondent other than Hapag-Lloyd. None of these issues is a Shipping Act issue. Indeed, in each case, the conduct is either governed by another statute or has been previously held by the Commission not to constitute a violation of the Shipping Act. See, COGSA cases at note 2, *supra.*; *Patricia Eyes v. Wallenius Wilhelmsen Lines*, 30 S.R.R. 1064 (ALJ 2006 (loading of damaged cargo not a Shipping Act violation)); *Meyan SA v. International Freight Forwarders*, 30 S.R.R. 1397, 1400, n. 2 (FMC 2007)(delay of two months in

² See also, *J. M. Altieri v. The Puerto Rico Ports Authority*, 7 F.M.C. 416, 419 (ALJ 1962); *Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Company*, 2 U.S.M.C. 517, 518 (USMC 1941); *Progressive Auto, Inc. v. Marine Transport Logistics, Inc.*, 31 S.R.R. 1354 (Settlement Officer 2010); *Bonafide, Inc. v. O.E.C. Shipping Los Angeles, Inc.*, 31 S.R.R. 1356 (Settlement Officer 2010); *Exportorient Ansari v. American President Lines, Ltd.*, 26 S.R.R. 1414, 1416 (Settlement Officer 1994), administratively final July 28, 1994; *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.*, 25 S.R.R. 1273, 1277 (Settlement Officer 1990).

³ The concurring opinion in *Anchor Shipping* suggests that the Commission is legally obligated to adjudicate all filed complaints. However, since the Commission has long since incorporated motions to dismiss and for summary judgment into its procedural rules, this legal obligation to adjudicate must be understood to apply to those cases in which the Commission has personal and subject matter jurisdiction. For example, the Commission would not be required to adjudicate a claim by a shipper that an entity other than an ocean common carrier, marine terminal operator or ocean transportation intermediary violated 46 U.S.C. §41102(c), as that section applies only to those three types of entities.

delivering cargo not a violation of Section 10(d)(i) absent a pattern of deception); *Clutch Auto, Ltd. v. International Touch Consolidator, Inc., et al.*, 31 S.R.R. 535 (ALJ 2008)(Commission not empowered to authorize or prohibit sale of cargo by carrier). A complainant cannot and should not be permitted to create a Shipping Act claim based on conduct that when, stripped of its Shipping Act verbiage, is clearly not subject to the Shipping Act.

Just as plaintiffs in federal court may not avoid COGSA by cloaking their claims in terms of negligence, fraud, conversion, and breach of contract theories, the complainants in this case may not invoke the limited jurisdiction of the Commission by cloaking their cargo-related claims as Shipping Act issues.⁴

That the claims being made in this case are not within the scope of the Shipping Act is demonstrated not only by the Commission precedent cited above, but also by complainants' own statements. Complainant Kobel referred repeatedly to a "fraud" perpetrated upon him by respondents. See, e.g., Transcript p. 194, Lines 11-16; p. 195, Lines 10-17. Complainants' counsel characterized the conduct of Hapag-Lloyd as "negligence" and the Complainants' claim as one for "conversion." See Int'l TLC Exhibit 58, p. 4. Complainants' Post-Trial Brief and Closing Statement ("Complainants'

⁴ See, e.g., *Senator Line GmbH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145, 168 (2nd Cir. 2002); *Polo Ralph Lauren, L.P. et al. v. Tropical Shipping & Construction Co., Ltd.*, 215 F.3d 1217, 1221 (11th Cir. 2000)(COGSA pre-empts claims in bailment and negligence); *Barretto Peat, Inc. v. Luis Ayala Colon Sucrs., Inc.*, 896 F.2d 656, 661 (1st Cir. 1990)(plaintiff could not circumvent COGSA by couching complain in terms of conversion or breach of contract); *Jones v. Compagnie Generale Maritime*, 882 F. Supp. 1079, 1082-83 (S.D. Ga. 1995)(COGSA provides exclusive remedy for loss of cargo, pre-empts common law in this area, and regulates claims in both tort and contract); *Reisman v. Medafrica Lines, U.S.A.*, 592 F. Supp. 50, 52 (S.D.N.Y. 1984) ("breach of contract, negligence and conversion claims are the common law equivalents of the actions for which COGSA was meant to be an exclusive definition of liability in the shipper-carrier context"); *National Automotive Publications, Inc. v. United States Lines, Inc.*, 486 F. Supp 1094, 1099 (S.D.N.Y. 1980)(plaintiff unable to avoid COGSA by couching claims in terms of negligence, breach of contract and wrongful detention of goods); *B.F. McKernin & Co., Inc. v. United States Lines, Inc.*, 416 F. Supp. 1068, 1070-1071 (S.D.N.Y. 1976)(claims for conversion and breach of contract precluded by COGSA).

Brief”) also characterizes their claim as “tantamount to conversion at common law.” Complainants’ Brief, p. 13. If this case is about fraud, negligence and conversion, it should not be before the Federal Maritime Commission; instead, such claims should be resolved in courts in accordance with COGSA or other bodies of law.

The Commission’s Order, in acknowledging that the claims at issue are based on COGSA, the Uniform Commercial Code, breach of contract and/or tort, rather than the Shipping Act, has acknowledged that none of the claims in this case is subject to the Shipping Act.⁵ It should now follow this reasoning to its logical conclusion and dismiss this case in accordance with the principle of *Cargo One* and *Anchor Shipping*.

C. *At Least One Of The Purposes Of The Shipping Act Requires Dismissal*

The Commission’s lack of jurisdiction and the appropriateness of dismissal are strongly supported by Congressional purpose as expressed in 46 U.S.C. §40101(2) of the Shipping Act, which reads:

provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices.

COGSA is the U.S. statutory enactment of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (also known as the Hague Rules). 1 Schoenbaum, *Admiralty and Maritime Law*, §10-15 (4th Ed. 2004). Jurisdiction over claims arising out of COGSA lies in U.S. federal courts. As noted above, COGSA pre-empts state law claims based on contract and tort theories. The pre-emption of state law by COGSA and the placement of jurisdiction over COGSA in federal courts is intended to ensure consistency in the interpretation of this body of law

⁵ Federal courts have also held that torts such as fraud and negligence are not actionable under the Shipping Act. See, *Johnson Products Co., Inc. v. M/V LA MOLINERA*, 619 F. Supp. 764, 766 (S.D.N.Y. 1985).

within the U.S. and to maintain comity with U.S. trading partners applying the same or similar bodies of law. Indeed, in virtually all significant trading jurisdictions there are limitations on carrier liability for cargo loss and damage. 1 Schoenbaum, *Admiralty and Maritime Law*, §§10-13 and 10-14 (4th Ed. 2004).

If the Federal Maritime Commission were now to hold, for the first time, that damage to or delay of cargo constitutes a Shipping Act violation, then COGSA pre-emption and the preservation of international comity would be meaningless. Shippers and carriers operating in the U.S. trades would be subject to two completely different legal regimes and sets of consequences for the same conduct, depending on whether the claim was made under COGSA or under the Shipping Act. If conduct heretofore governed by COGSA is to be subject to the Shipping Act, then it will be the rare plaintiff indeed who files a COGSA claim in federal court. Instead, plaintiffs will simply file a complaint at the Commission, alleging that any cargo damage was the result of unjust or unreasonable practices or regulations.

Filing claims under the Shipping Act would enable plaintiffs to avoid the COGSA 1-year statute of limitations, the \$500 per package limitation on carrier liability, and recover attorneys' fees. As a result, COGSA would be a nullity. The Commission would have single-handedly abrogated the treaty obligations of the United States under the Hague Rules and, without Congressional approval, established an entirely new body of law with respect to cargo claims. This is hardly in harmony with or responsive to international shipping practices, which as noted above are governed by international treaties and/or domestic laws which provide limitations on carrier liability for cargo loss or damage.

The Commission should not expand its jurisdiction in a way that would allow complainants to circumvent COGSA, and should dismiss this case.

D. The Shipping Act's Treatment Of Attorneys' Fees Encourages Frivolous Actions Such As This One, Which The Commission Must Guard Against

The importance of the judicious exercise of the Commission's authority in order to avoid abuse is particularly important in light of the ability of a successful complainant to recover attorneys' fees under 46 U.S.C. §41305(b).

When a federal statute such as the Shipping Act provides for the recovery of attorneys' fees, it normally does so to encourage private litigation in order to implement public policy. *Awards of Attorneys' Fees By Federal Courts and Federal Agencies*, Congressional Research Service, June 20, 2008, page i ("CRS"). This is often referred to as a "remedial purpose." *Attorneys' Fees In Reparation Proceedings*, 23 S.R.R. 1698, 1699 (FMC 1987). In other words, attorneys' fees are awarded to encourage potential complainants to file actions which enforce the prohibitions contained in the Shipping Act, thereby furthering the purposes for which Congress enacted the statute.⁶

One of the side effects of a statutory provision entitling a successful complaint to attorneys' fees is that complainants with non-Shipping Act claims, particularly individuals and smaller entities that may not have the financial resources to bring a court action, will be tempted to try and cast claims arising under other laws (e.g., COGSA and state tort law), as Shipping Act claims. Such an effort, if successful, carries with it the benefit of not only avoiding COGSA's statute of limitations and limitation on liability, but also of having the respondent ultimately finance the action against it. The Commission has an obligation to guard against being misused as a forum to decide cases

⁶ Given this "remedial" purpose, courts have held it is permissible to have a double standard under which successful defendants are not awarded reparations. See, CRS at pp. 12-14.

that are properly decided by state or federal courts. As the U.S. Court of Appeals for the First Circuit has made clear, the Commission does not have a roving license to correct any inequity related to ocean transportation. *Puerto Rico Port Authority v. FMC*, 919 F.2d 799, 805 (1st Cir. 1990).

For all of the foregoing reasons, the Commission should make clear that it lacks jurisdiction over the claims in this case.

III. THE CONDUCT HEREIN AT ISSUE DOES NOT CONSTITUTE REGULATIONS AND PRACTICES

The first question posed by the Commission's Order is as follows:

If a regulated party has established, observed and enforced just and reasonable regulations and practices; then:

(a) may a single failure by the party to either observe or enforce a regulation and practice be deemed a violation of Section 10(d)(1), or

(b) may a sequence of failures by the party to either observe or enforce regulations and practices within a contemporaneous shipment/transaction be deemed a violation of Section 10(d)(1)?

Hapag-Lloyd's answers to these questions are that: (a) a single failure by a party to observe or enforce a regulation and practice is not a violation of Section 10(d)(1); and (b) a sequence of failures with respect to a single shipment does not constitute a practice and hence would not be a violation of section 10(d)(1).

A. Single Failure Not A Violation

The Commission's own precedent makes clear that a single failure to observe or enforce a regulation or practice is not a violation of section 10(d)(1).

The Commission has long held that a single act or incident does not and cannot constitute "regulations and practices" for purposes of section 41102(c)(formerly section 10(d)(1)). *Investigation of Practices of Stockton Elevators*, 8 F.M.C. 181 (FMC 1964);

J. M. Altieri v. The Puerto Rico Ports Authority, 7 F.M.C. 416 (ALJ 1962); *Kamara v. Honesty Shipping Service and Atlantic Ocean Line*, 29 S.R.R. 321 (Settlement Officer 2001); and *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.*, 25 S.R.R. 1273, 1276 (Settlement Officer 1990).

In *Stockton*, the FMC investigated a marine terminal operator for allegedly providing discounted wharfage to one customer but not to others. The ALJ found no violation of law and, upon review of exceptions, the FMC affirmed his finding and made the initial decision part of its own ruling. 8 F.M.C. at 182. In the initial decision adopted by the FMC, the ALJ stated:

It cannot be found that the Elevator engaged in a 'practice' within the meaning of section 17. The essence of a practice is uniformity. It is something habitually performed and it implies continuity...the usual course of conduct. It is not an occasional transaction such as here shown.

8 F.M.C. at 2011-201. In this case, there is absolutely nothing in the record that suggests, much less proves, that the conduct of Hapag-Lloyd constituted a "practice" as that term has been defined by the Commission.

In *Altieri*, a terminal operator refused to refund an overpayment of demurrage on one shipment, and applied the overpayment to monies owed on a subsequent shipment. The shipper filed an action at the FMC, seeking to recover the overpayment. The ALJ, in denying the shipper's claim, stated:

If the action of respondent were one of a series of such occurrences, a practice might be spelled out that would invoke the coverage of section 17. However, the action of respondent is an isolated or 'one shot' occurrence. Complainant has alleged and proved only the one instance of such conduct. It cannot be found to be a 'practice', within the meaning of the last paragraph of section 17.

7 F.M.C. at 420 (emphasis in original, citations omitted). The conduct of Hapag-Lloyd in this case is without question an isolated or ‘one shot’ occurrence and hence is not a practice as that term has been defined by the Commission.

In *Kamara*, the settlement officer summarized the Commission’s Section 10(d)(1) jurisprudence by saying:

A series of cases alleging Section 10(d)(1) violations has established that a complainant must demonstrate regulations and practices, as opposed to identifying what might be an isolated error or understandable misfortune.

29 S.R.R. at 322, n. 8. The conduct of Hapag-Lloyd in this case, if it is anything, is an isolated error or understandable misfortune rather than a regulation or practice.

In *Deringer*, the complainant sought to recover \$6,000 for the loss of twelve cartons of cargo alleging, among other things, a violation of section 10(d)(1) of the Shipping Act. Resolution of the dispute turned in part on the fact that the bill of lading issued by respondent listed only the number of skids shipped, not the number of cartons shipped. In considering the section 10(d)(1) issue, the settlement officer wrote:

In any case, the sustaining of an alleged violation of Section 10(d)(1) requires more than the showing of unjust or unreasonable activity. It requires that the complainant prove failure: ‘...to establish, observe, and enforce just and reasonable regulations and practices...’ Marlin’s failure to specify on the bill of lading the number of boxes hardly demonstrates any shortcomings in this area. If Marlin did act improperly, only the existence of an isolated error has been demonstrated. Nothing in the records casts light upon its regulations or practices, and this constitutes a fatal flaw in *Deringer*’s case.

25 S.R.R. at 1276 (footnote omitted).

In the foregoing cases, the Commission has interpreted Section 10(d)(1) to mean that: (i) conduct (even if unjust and/or unreasonable) does not violate section 10(d)(1) unless it constitutes a failure to establish, observe, and enforce just and reasonable regulations and practices; and (ii) a single incident or occurrence does not constitute a

regulation or practice. The Commission should reaffirm this precedent and make clear that this represents the proper interpretation of 46 U.S.C. §41102(c) (formerly Section 10(d)(1)).

Moreover, in applying this standard to the instant case, the Commission should find that the problems which arose with respect to the single damaged container herein at issue did not and do not constitute a practice or regulation within the meaning of the statute as interpreted by the Commission, that Hapag-Lloyd's conduct was just and reasonable, and on that basis affirm the decision of the administrative law judge.

Additional support for the foregoing interpretation of the Shipping Act and resultant conclusions can be found in court and agency decisions interpreting similar language in other statutes.

The Packers and Stockyards Act of 1921 requires every stockyard owner and market agency to:

...establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services...

7 U.S.C. §208(a). In interpreting the foregoing statute, the U.S. Courts of Appeals for two circuits have stated that an isolated instance does not constitute a practice. *Hutto Stockyard, Inc. v. U.S. Department of Agriculture*, 903 F.2d 299, 306 (4th Cir. 1990); *Rice v. Wilcox*, 630 F.2d 586, 591 (8th Cir. 1980). See also, *Wallace v. Mathias*, 2012 U.S. Dist. LEXIS 94955 (D. Neb. 2012).

Some subsequent decisions of lower courts and/or administrative law judges have attempted to evade or clarify the reasoning of the 8th Circuit's decision in *Rice*. In *Rowse v. Platte Valley Livestock, Inc.*, 597 F. Supp. 1055 (D. Neb. 1984), the court interpreted the *Rice* decision to mean that one or two transactions can become a practice when they

derive their unfairness from the defendant's abrupt change of a previous course of conduct on which the plaintiff has relied to his detriment. *Id.* at 1058.⁷ However, such an analysis is inapplicable to this case or any other case involving a single shipment and/or first-time customer, since there is no previous course of conduct on which the complainant has relied.

In *Lane v. Sohler*, 40 Agric. Dec. 363 (U.S.D.A. 1981), an administrative law judge⁸ argued that the term "practice" refers not to a course of conduct of a particular respondent, but to a course of conduct of the industry as a whole.⁹ However, it is not clear what relevance such reasoning has for this case specifically (since there has been no allegation made or evidence introduced with respect to industry-wide practices) or the Shipping Act generally (since practices are likely to vary more widely among shipping lines operating in international trades where local laws and customs vary than among stockyards operating only in the U.S.).

Thus, the two U.S. Courts of Appeals that have addressed the issue of what constitutes a regulation or practice under the Packers and Stockyards Act held that an isolated instance does not constitute a practice. This is consistent with the Commission's past interpretation of the Shipping Act, discussed above, and supports reaffirmation of the Commission's existing decisions on the issue.

⁷ Similar reasoning was adopted by the Nebraska State Supreme Court in *Mid-South Order Buyers, Inc. v. Platte Valley Livestock*, 210 Neb. 382; 315 N.W.2d 229 (1982).

⁸ The judge in *Lane v. Sohler* relied in part on an amendment to the Packers and Stockyards Act in which Congress defined a specific type of single act as an unfair practice. However, the fact that Congress considered it necessary to define a specific, single act as an unfair practice actually supports the conclusion that under the statute as drafted, a single act does not constitute a practice.

⁹ The idea that the statutory reference to a regulation or practice refers to the industry as a whole rather than to a particular respondent appears elsewhere in the Packers and Stockyards Act jurisprudence. See, e.g., *Rowse, supra.*, at 1057.

B. *A Sequence Of Failures With Respect To A Single Shipment Is Not A Violation Of Law*

The Commission should make clear that a sequence of failures to observe or enforce regulations and practices within a contemporaneous shipment/transaction is not a violation of the Shipping Act.

In order to constitute a violation of former section 10(d)(1), conduct must constitute a regulation or practice. Under the Commission's own decision in *Stockton*, a practice requires uniformity and continuity. Even assuming that the theoretical acts or omissions posited by the Commission's Order were unjust or unreasonable, such acts or omissions with respect to a single shipment or transaction lack the uniformity and continuity necessary to constitute a practice, and hence would not be a violation of section 10(d)(1).

Even assuming *arguendo* that the theoretical acts/omissions could be found to constitute a practice, there would be no violation of law unless that practice was found to be unjust or unreasonable. It is well established that whether conduct is just and reasonable as compared to unjust and unreasonable is a factual determination to be made on a case by case basis. See, *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886, 899, n. 29 (FMC 1993); *Capitol Packing, infra.*, at 76.

Here, Hapag-Lloyd's conduct is not sufficiently uniform, continuous and usual to constitute a practice. Moreover, even if it such conduct were found to be a practice, based on the facts in the record, there is insufficient evidence to support a finding that the conduct, based on the circumstances at the time, was unjust and unreasonable. The record overwhelmingly demonstrates that Hapag-Lloyd followed normal procedures, kept its customer informed, provided no false information, and demanded no additional

payment. In short, it acted justly and reasonably at all times. Even if one were to argue that the violation here was a failure by Hapag-Lloyd to adhere to its just and reasonable practice of delivering undamaged cargo in a timely manner, the facts still do not support a finding that such failure was unjust or unreasonable. In short, while the events that give rise to this case are unfortunate, they are not unjust or unreasonable.

In addition, when interpreting similar statutes, courts have held that multiple acts, each of which is not a violation of law, cannot be aggregated to create such a violation. Under the Packers and Stockyards Act, “specified methods of dealing which are not themselves violations of that Act cannot, when added together, become a violation.” *Capitol Packing Company v. United States*, 350 F.2d 67 (10th Cir. 1965)(judicial office erred in holding that several near violations constituted an undue or unreasonable preference). Hence, a sequence of acts or omissions which do not individually constitute a failure to observe just and reasonable regulations and practices would not, when added together, constitute such a failure.

Applying this standard to the present case, there has been no unjust or unreasonable practice. None of the individual elements of Hapag-Lloyd’s conduct constitutes a violation of the Shipping Act. The accidental damage to the container is not a violation of the Shipping Act.¹⁰ The accidental loading of damaged cargo is not a violation of the Shipping Act.¹¹ The delay of the cargo at the transshipment port in Germany is not a violation of the Shipping Act,¹² particularly in the absence of any

¹⁰ Cargo damage is governed by the Carriage of Goods by Sea Act (“COGSA”), which applies from the time the ship’s tackle is hooked onto the cargo at the port of loading until the time when cargo is released from the tackle at the port of discharge. See, e.g., *Sony Magnetic Products Inc. of America v. Meriventi O/Y*, 863 F.2d 1537 (11th Cir. 1989); *Pan American World Airways, Inc. v. California Stevedore and Ballast Company*, 559 F.2d 1173 (9th Cir. 1977).

¹¹ *Patricia Eyes v. Wallenius Wilhelmsen Lines*, *supra*.

¹² *Meyan SA v. International Frontier Forwarders*, *supra*.

pattern of deception on the part of Hapag-Lloyd and problems with the documentation that were the responsibility of complainants and/or their agents/contractors. Accordingly, one cannot add all of these non-violations together to create a violation.

C. *There Is No Violation Based On The Language Of The Shipping Act*

The other considerations identified by the Commission in its Order place great emphasis on the language of the statute. While the statutory language is of course the starting point for any legal analysis, Hapag-Lloyd believes that the language on which the Commission has focused may not be the most useful in defining the scope of Section 10(d)(1).

In this regard, the Commission asks the parties to consider use of the conjunctive “and” in section 10(d)(1) rather than the disjunctive “or,” as well as the use of the broad terms “regulations and practices” throughout the Shipping Act.

Insofar as the term “regulations and practices” is concerned, this term appears to have originated in the Interstate Commerce Act, a statute that has been described as “an amalgam of diverse and vague provisions.”¹³ This language has been carried forward into the Shipping Act and the Packers and Stockyards Act, neither of which define what is meant by “regulations and practices.” Available precedent suggests that Congress was aware of the futility of specifying every act that should be prohibited in dynamic and changing industries, and used broad terms such as “regulations and practices” in regulatory statutes in order to delegate discretion to executive and independent regulatory agencies to address in a “practical and sound manner” the particular types of conduct

¹³ James W. Ely, Jr., *The Troubled Beginning of the Interstate Commerce Act*, Marquette Law Review, v. 95, No. 4, 1130 (Summer 2012).

which should be prohibited, based on the experience and expertise of those agencies.

See, *Lane v. Sohler, supra*, at 372-373.

Thus, the logical conclusion is that when Congress used the phrase “regulations and practices” in the Shipping Act it intended the Commission, based on the latter’s experience and expertise with the industry it regulates, to define in a practical and sound manner what conduct is to be prohibited.

With respect to the use of the conjunctive “and” rather than the disjunctive “or” in Section 10(d)(1), the language is again copied from the Interstate Commerce Act. Under a literal reading of the language, there would be no violation of the statute unless the respondent had failed to establish, to observe and to enforce a practice or regulation (i.e., had failed with respect to all three elements of the statute). However, this makes little sense, as it would be impossible to observe or to fail to observe a practice or regulation unless one has first established it. Moreover, under this reading of the statute, no violation would occur if one establishes a just and reasonable practice or regulation but fails to observe or enforce it. This is not a sensible result.

The fact of the matter is that Section 10(d)(1) is an oddly and poorly worded provision. Trying to define the scope of this provision by focusing on the “establish, observe and enforce” language is like trying to fly higher by lowering the ground. Whatever it may mean to “establish, observe and enforce,” the real moving parts of this provision, and the area the Commission can most easily define the scope of the

prohibition, is the “just and reasonable regulations and practices.”¹⁴ This is where the Commission should focus its efforts to provide guidance to the industry.

D. An Alternative Approach To Identifying A Practice Or Regulation

Much of the jurisprudence under the Shipping Act and Packers and Stockyards Act focuses on the issue of what constitutes a practice or regulation. Hapag-Lloyd believes there is an approach to identifying conduct as a practice or regulation that would be clearer and more effective than those taken to date.

Section 17 of the Shipping Act, 1916, provided that:

Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe and order enforced a just and reasonable regulation.

For example, the U.S. Supreme Court upheld a Commission order issued under the foregoing authority that prescribed maximum free time and minimum demurrage and storage rates at the port of San Francisco, finding that prescription of free time and storage rates were an appropriate means for the Commission to remedy conduct it had determined to be an unjust or unreasonable practice. *California v. United States*, 320 U.S. 577 (1944).

The foregoing statutory language assumes that any conduct which constitutes an unjust or unreasonable regulation or practice is susceptible to correction by an order prescribing a just and reasonable regulation. The corollary to this assumption is that if an order could not be constructed to alter conduct, or if a party would not be capable of obeying such an order despite its best efforts to do so, then the conduct at issue would not constitute a practice. In other words, one could determine if conduct constitutes a

¹⁴ The Commission could also focus on the “receiving, handling, storing or delivering” of property language and reaffirm its precedent that Section 10(d)(1) does not apply to the transportation of property. *Definition of “Package,”* at 114.

practice by determining whether the conduct could necessarily be altered by a Commission order.

If a party could alter conduct deemed to be unjust or unreasonable to comply with an order to alter that conduct (e.g., assessing or not assessing a charge), then the conduct is a practice. However, if it is possible for a party to fail to comply with the order despite its best efforts to do so, then the conduct in question is not a practice.

Applying the foregoing test to this case, it is clear that the conduct of Hapag-Lloyd is not a practice. Even if the Commission were to issue an order not to damage containers during loading and not to load any containers so damaged, containers could still be damaged during the loading process and could still be loaded accidentally, despite all of a carrier's best efforts to the contrary. Similarly, even if the Commission were to order that cargo not be delayed in transit, a carrier could not necessarily comply with such an order despite its best efforts to do so. Hence, such delay does not constitute a practice.

Hapag-Lloyd urges the Commission to adopt the foregoing test of whether or not conduct constitutes a practice, and to confirm that the conduct of Hapag-Lloyd in this case was not a regulation or practice and was in any event just and reasonable.

IV. CONCLUSION

This proceeding is fast approaching the three-year mark. The parties have been through a three and a half-day trial and three rounds of briefing, not including pre-trial motions. This most recent round of briefing, following the oral hearing, appears focused largely on issues that need not be resolved to decide this case.

The Commission should now make clear what has been apparent from the outset: that the claims in this case are not peculiar to the Shipping Act and hence fall outside of

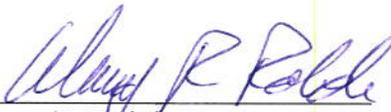
the Commission's jurisdiction. The Commission should adopt the current standard of pleading established by the Supreme Court, and put future complainants on notice that the presumption supposedly created by *Cargo One* and *Anchor Shipping* is in fact the law. This means that complainants cannot invoke the Commission's limited jurisdiction by use of labels and a formulaic recitation of the elements of a cause of action. They would be required to allege sufficient facts for the Commission to conclude that the claim is a legitimate Shipping Act claim, raising issues peculiar to that statute.¹⁵

The Commission should also reaffirm its own precedent that a single act or omission does not constitute a regulation or practice for purposes of Section 10(d)(1).

¹⁵ If the Commission had held the complainant in *Anchor Shipping* to a higher standard of pleading (see note 1, supra.) and not been so quick to assume that any claim couched in Shipping Act language is legitimate, it could have saved itself and the respondents the two or three additional years of litigation that ensued before the claims were dismissed due to lack of cooperation and/or merit. See, *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, et al., 31 S.R.R. 567 (2009). A more prompt and forceful treatment of what were obviously claims duplicative of those already arbitrated may have also avoided the federal action in which several Commission employees were named as respondents. *Hernandez v. Espinosa, et al.*, Docket 08-22768 (S.D. Fla. 2008).

Above all, the Commission should deny the exceptions to the ALJ's initial decision in this proceeding.

Respectfully submitted,



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January 31, 2013

Certificate of Service

I hereby certify that I have this 31st day of January, 2013, served a copy of the foregoing Supplemental Brief of Respondents Hapag-Lloyd AG and Hapag-Lloyd (America), Inc. on all parties of record in this proceeding as follows:

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