

BEFORE THE
FEDERAL MARITIME COMMISSION

YAKOV KOBEL AND VICTOR BERKOVICH) Docket No. 10-06
v.)
HAPAG-LLOYD (AMERICA), INC.; HAPAG-)
LLOYD AG; LIMCO LOGISTICS, INC.; AND)
INTERNATIONAL TLC, INC.)

**BRIEF OF LIMCO LOGISTICS, INC. IN RESPONSE TO
DECEMBER 4, 2012 ORDER BY THE COMMISSION**

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I. PRELIMINARY STATEMENT

The Commission has directed that all parties submit supplemental briefs to analyze two specific questions and in so doing to address numerous considerations. In response to the request for an evaluation of the statutory interpretation of Section 10(d)(1), or 46 U.S.C.A. § 41102(c), it is clear that Limco Logistics, Inc. did not violate the statute. Further, any and all allegations against Limco Logistics, Inc. fail to allege conduct peculiar to the Shipping Act.

Therefore, for the reasons set forth below, the Commission should reaffirm the Administrative Law Judge's February 14, 2012 Decision.

II. FACTUAL BACKGROUND

A. Summary of Action

This action involves the shipment of five containers, Nos. MOGU2002520, MOGU2112451, MOGU2003255, MOGU2101987 and MOGU2051660, from Portland, Oregon to Gdynia, Poland in May and July of 2008.

The shippers of the cargo, Yakov Kobel and Victor Berkovich (hereinafter "Complainants") engaged International TLC, Inc. (hereinafter "Int'l TLC") to assist in this transport. Int'l TLC named Baltic Sea Logistics (hereinafter "Baltic") as its agent at the port of Gdynia, Poland. Int'l TLC thereafter engaged Limco Logistics, Inc. (hereinafter "Limco") to provide NVOCC transportation services. Limco thereafter employed Hapag-Lloyd AG (hereinafter "Hapag-Lloyd") as the ocean common carrier to physically transport the cargo to Poland.

One of the five containers, No. MOGU2002520, was damaged during loading in Portland. The Complainants directed that the container be returned to its facility for inspection, transloading and/or repair. The cargo was flagged for a future shipment so that it would be guaranteed space. However, prior to returning the container to Complainants, it was accidentally loaded and carried to Hamburg, Germany. Upon arrival the intermediate carrier would not on forward the container.

Numerous alternate means of transporting the container were considered. However, it would take several months before the proper customs documents could be obtained from the Complainants. Ultimately the cargo was loaded in an undamaged container, transported to Gdynia and then reloaded into its original damaged container.

Of the remaining four containers, two, Nos. MOGU2112451 and MOGU2003255, were retrieved by the Complainants. Freight on the remaining two was not paid and the containers were left to accrue demurrage. During this time Limco, as well as others, sent numerous notices and emails to Int'l TLC regarding the increasing demurrage. Ultimately, notwithstanding such notification and the accrual of demurrage and freight charges, Int'l TLC liquidated the two containers, together with the damaged container, on February 23, 2009. As stated in the Administrative Law Judge's decision, "[t]he issue in this case is whether the damage and delay to one container or liquidation of three containers violated the Shipping Act." See February 14, 2012 Decision of the ALJ ("Decision"), Pg. 2.

B. Procedural History

Complainants filed a complaint with the Federal Maritime Commission on July 6, 2010, alleging numerous violations of the Shipping Act against Hapag-Lloyd, Limco and Int'l TLC ("Respondents"). In early August, Hapag-Lloyd filed its answer and Motion to Dismiss. Limco filed its Answer on August 6, 2010. A Verified Amended Complaint was filed in October 2010, followed by Complainant's initial discovery.

In March 2011, Hapag-Lloyd and Limco each filed a Motion for Summary Judgment. Complainants filed a Motion for Partial Summary Judgment against Int'l TLC and Limco. The motions were decided in late May 2011. Hapag-Lloyd was granted partial relief dismissing Complainants' claim for double damages.

The parties filed motions in limine in July and August and a hearing was conducted from August 8 to 11, 2011. Post-Trial submissions were provided through November 2011.

Administrative Law Judge Erin Masson Wirth (“ALJ”) issued an Initial Decision on February 14, 2012.

1. Administrative Law Judge’s February 14, 2012 Decision

Focusing on the analysis of Section 10(d)(1), or 46 U.S.C.A. § 41102(c), for which the Commission now seeks additional submissions, Judge Wirth reached a number of well-founded determinations.

Hapag-Lloyd argued the Commission lacked subject-matter jurisdiction over the claims as Complainants’ grievances rested in tort or cargo loss/damage. Specifically, Complainants refer to the fraud perpetrated by Respondents alleging that the conduct of Hapag-Lloyd was negligent and the claim was for conversion. Citing Anchor Shipping Cp. V. Alianca Navegacao E Logistics Ltda., 30 S.R.R. 991, 999 (FMC 2006) and Cargo One, Inc. v. Cosco Container Lines Co., Ltd., 28 S.R.R. 1635, 1645 (FMC 2000), the ALJ found that the “Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act.” The ALJ reasoned that the alleged violation was for conduct both before loading and after discharge at the port and that the damage involved the shipment of all five containers, and the liquidation of three, rather than just the delay of one container.

The ALJ next found that the complainant has the burden of proving by a preponderance of the evidence that the Respondents’ violated the Shipping Act.

Complainants accused Limco of violating Section 10(d)(1) by failing to observe just and reasonable regulations and practices in receiving, handling and storing property. Complainants alleged Limco changed the shipper and consignee name on the bill of lading for the three liquidated containers, issued false bills of lading, provided misleading information about status of the damaged container, wrongfully put a hold on Complainant’s containers and unlawfully delivered the container.

Limco countered it did not violate the Shipping Act. Rather, the damage occurred during loading and the subsequent delay, sale and liquidation of the cargo, due to outstanding ocean freight,

storage and other charges, which were not the consequence of any act or omission of Limco. Consequently, there could be no violation.

The ALJ agreed with Limco finding it was not directly involved with receiving, handling or storing property and not responsible for accidental damage or inadvertent loading. The ALF found Limco promptly and reasonably responded to the situation, conveyed information about the damage, inadvertent loading and delay of the container and promptly conveyed Complainants' demands. While Limco placed a hold on two containers, it was only after they arrived at their final destination and their freight was not paid. Limco also changed the shipper on the bills of lading at the direction of Int'l TLC. There is no evidence Limco knew those containers had been liquidated by Int'l TLC or that Limco acted unreasonably. As such, the ALJ found the Complainants had not met their burden in demonstrating an unreasonable practice or procedure.

The ALJ's decision makes clear Limco did not violate Section 10(d)(1) of the Shipping Act.

2. October 18, 2012 Oral Argument

Following this decision, Complainants sent a Memorandum of Exceptions to Conclusions, Statement and Findings of Fact which was opposed by the Respondents separately. Oral argument was heard on October 18, 2012 ("OA").

During oral argument, Complainants argued it was an unreasonable practice and procedure for Limco to change the bills of lading "as it affects the handling and, particularly, the delivery of property. Because without changing the bill of lading, this person who apparently, allegedly, bought it could never have received it." OA, 12:15-22. However, when asked if there was a pattern of practice regarding Limco, Complainants admitted "we just have the three items in this one case. That's the only pattern that we have that I can point to with respect to Limco Logistics." Moreover, addressing the issue of delay, Complainants admitted they did not pick up the goods for three (3) months because Complainants wanted all three containers to ship together. Id. at 14:3-8.

Importantly, Commissioner Khouri asked whether Complainants could have filed under COGSA. Complainants admitted “yes,” but stated that “once it was taken off the dock, and they agreed to return it, that’s not transportation, that’s pre-transportation.” Id. at 18:9-22.

The Commission also asked whether a single incident is something that Section 10(d)(1) intended to address. Complainants responded by referring to Paul Houben v. World Moving Services, Inc. and Cross-County Van Lines, LLC, 31 S.R.R.1402 (FMC 2010) and other cases. Id. at 19:12-14. Complainants argued the Commission’s interpretation of the statute would preclude first time shippers from filing complaints. However, Complainants presented no statute or other authority in support of this proposition. Rather, Complainants argued “it [Section 10(d)(1)] doesn’t limit it to multiple times. It just says, ‘unreasonable to’ – ‘failure to observe practices.’” Id. at 20:18-21.

Responding to that comment, Commissioner Khouri added: “that’s the purpose of discovery for a single shipper, to find if this is a practice. ‘Practice’ has been defined in many, many cases. The wording here has been used in transportation statutes beginning in the Interstate Commerce Act back in the late 1800’s. So it’s – this wording, this formulation, has been around a long time, and there’s been a rather long interpretation of needs some level of numerosity, or continuity, or habitual.” Id. at 25:20-26:8.

The ALJ and the Complainants raised the concern that “[t]o limit the application of section 10(d)(1) to a minimum number of offenses would have the effect of prohibiting small shippers, including individual consumers, from the benefits of the Shipping Act.” Decision Pg. 24. The ALJ noted, “[p]resumably, upon having a dispute with a shipper, the customer will select a different shipper for their next shipment. Violators would continue their practices unabated.”

Addressing the language of the statute, Commission Khouri noted the distinction between “and” and “or” stating:

I think what my colleague is trying to get to is, to reach the result that you would like us to reach requires a Catch-22 situation, and inserts the word “or.” And as I understand the facts of this case,

there was a reasonable general practice that we – Hapag, I’m going from their point of view here, for the sake of the question, have a reasonable practice that “we don’t do that.” And I thought that was established, and agreed to. And “we dropped the ball this time, but that wasn’t our practice.” You said, “Okay. Fine. But then you – so you failed to observe. So got you there.”

And that’s a reading, if you have words in the statute that say “fail to establish, observe, or enforce.” But that’s not the wording that Congress gave us to work with.

OA, 24:5-22.

Commissioner Khouri then questioned counsel for Hapag-Lloyd stating “it’s been established you had a reasonable practice. Hapag-Lloyd’s been in business for quite a while. They don’t normally do this. That’s not their practice. So there was a reasonable practice, but there was a bad – no question, bad result. Where would the defense be if there as one –.” OA, 36:5-11. Counsel for Hapag-Lloyd responded that “if one adopts the Complainant’s interpretation of the statute, there would be no defense. It would be strict liability.” Id. at 36:18-21.

In addressing jurisdiction, counsel for Hapag-Lloyd pointed out:

This Commission, in 1985, said that Section 10(d)(1) does not empower the Commission to address unjust or unreasonable carrier activity that relates to the transportation of property which is the subject of COGSA. COGSA, as has already been discussed, applies from time of loading on the vessel at the port of origin, to the time of discharge of the cargo at the port of destination.

All of the activities of Hapag-Lloyd in this case occurred during the timeframe covered by COGSA. A container was damaged during loading, set aside, mistakenly loaded on a subsequent vessel, delayed in transit while in Germany, and then subsequently delivered to the port of destination, Poland.

All of the activity occurs within the time period covered by COGSA. Therefore, this case falls outside of the Shipping Act, and outside the scope of the Commission’s jurisdiction.

Id. at 29:5-30:3.

There are some cases, primarily from settlement officers[sic], although, more recently, from the Commission, that have found a violation of Section 10(d)(1) in a case involving a single shipment. But in all of those cases, there was an additional aggravating factor. There was a demand for additional payment. There was a refusal to provide information about the shipment. Or there as misinformation provided about the shipment. There was some aggravating conduct on the part of the carrier involved.

Id. at 31:22-32:10.

In addition to these general propositions, Limco noted “Limco was not really in a position to control the outcome. All they were trying to do, from the very outset, was to try and resolve this thing in a way that, you know, there wouldn’t be any bad consequences.” Id. at 41:10-14. Rather, “other interests that were at stake here. There were demands being made by the other carrier, Baltic, I believe it was. And if International TLC had not taken steps to try and recover the freight, the carriers would have sold the goods anyway. That’s customary practice. It’s on the back of their bills of lading, their contracts of carriage, and it’s in their tariffs.” Id. at 42:5-12. Finally, Limco stated it did not need Complainants consent “because in the face of their failure to respond to demands that they cure the abandonment by paying for the freight and taking custody for it, you know, that’s considered normally sufficient to allow us to go ahead and sell the goods – if it was us, I mean, but any carrier that might be in the process of doing that. And that’s the practice.” Id. at 48:19-49:5.

The Commission concluded by again questioning counsel for Complainants as follows:

Commissioner: Does it need to be a practice of conversion? Does it need to be something that is commonly, repeatedly done in these types of situations, to implicating[sic] 10(d)(1).

The complainant still gets a relief for the one-off situation, but at one[sic] point do we have to incorporate the words of 10(d)(1) to say was this meant to just perfectly mimic conversion, UCC, et cetera? Or is the “practices and regulations” part of 10(d)(1), does that have to be brought in to bear, as well.”

Roach: “I look at the statute, which says you must ‘establish, observe, and enforce.’

And it says they have to do all three. It’s unreasonable - - and to say that if they have reasonable practices but they don’t observe them and they don’t enforce them, does that mean there’s no remedy - -”

Commissioner: Then you don’t have a practice in the first place. Simplest example - - the words are important - - “Do not drink and drive.” It doesn’t say, “Do not drink or drive.” The words are important.

Id. at 65:5-66:11.

On December 4, 2012, the Commission served an Order to Submit Brief requesting that all parties address two issues: first, whether a single failure by the party to either observe or enforce a

regulation and practice may be deemed a violation of 10(d)(1); and second, to address the Commission's decisions in Anchor Shipping Co. V. Alianca Navegacao E Logistics Ltda., 30 S.R.R. 991, 999 (FMC 2006) and Cargo One, Inc. v. Cosco Container Lines Co., Ltd. 28 S.R.R. 1635, 1645 (FMC 2000) in the context of the instant case. In addressing these two issues, counsel was to consider seven (7) additional issues:

- Congress used the conjunctive "and" in the sequence "establish, observe, and enforce . . ." not the disjunctive "or." Further, Congress did use the disjunctive "or" in other parts of Section 10, Prohibited Acts.
- Prior FMC cases addressing Section 10(d)(1) issues, including all prior agency cases addressing Section 17, second sentence of the Shipping Act of 1916.
- Court interpretation of statutory language that is same or near similar to Section 10(d)(1) that Congress used in other late 19th and early 20th century statutes; for example, the Interstate Commerce Act of 1887 (39 Stat. L. 728) and the Packers and Stockyard Act of 1921 (7 U.S.C.A. §§ 181-229b).
- The purpose of the Shipping Act of 1984 as set forth in 46 U.S.C.A. § 40101 .
- Congress's use in the Shipping Act of 1916 and 1984 of the broad and plural terms "regulations and practices," especially in the context of common carrier conferences, discussion agreements and standard tariff provisions.
- Congress's liability scheme in COGSA that provides for dollar limitation on carrier liability in exchange for limited common carrier defenses.
- Implications and reasons for the Shipping Act's provisions of awarding reparations and attorney fees to successful complainants [but not successful respondents] in various Section 10 actions, 46 U.S.C.A. § 41305 .

The following analysis is in response to this request.

III. ARGUMENT

- A. The plain language of Section 10(d)(1) does not apply to a single failure by a party to either observe or enforce a regulation and practice. Rather, a violation requires a greater frequency or regularity of failures to observe and enforce just and reasonable regulations and practices.

When interpreting a statute, word choice, order and punctuation effect the meaning. 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 regulation and practices relating to or connected with receiving, handling, storing, or delivering property.”

In its analysis of whether a single failure, or multiple failures, is required to constitute a violation, the Commission focused on the section of the Act which states a carrier “may not fail to establish, observe, and enforce.” However, to accept Complainants’ interpretation of this section would render a single act a violation, and would make the statute indefensible, thereby operating as strict liability. 36:18-21. This was not Congress’ intent when it enacted the Shipping Act.

“‘The starting point for [the] interpretation of a statute is always its language,’ Cnty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989), and ‘courts must presume that a legislature says in a statute what it means and means in a statute what it says there,’ Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992).” Sompo Japan Ins. Co. of Am. v. Union Pac. R. Co., 456 F.3d 54, 64 (2d Cir. 2006) abrogated by Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp., 130 S. Ct. 2433, 177 L. Ed. 2d 424 (U.S. 2010)).

“It is well settled that, in a statutory construction case, analysis must begin with the language of the statute itself; when the statute is clear, ‘judicial inquiry into [its] meaning, in all but the most extraordinary circumstance, is finished.’ Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475, 112 S. Ct. 2589, 120 L. Ed. 2d 379 (1992). Another ‘fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.’ Perrin v. U. S., 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979).” United States v. Carter, 421 F.3d 909, 911 (9th Cir. 2005); F.D.I.C. v. Meyer, 510 U.S. 471, 476, 114 S. Ct.

996, 127 L. Ed. 2d 308 (1994) (in the absence of a statutory definition, “we construe a statutory term in accordance with its ordinary or natural meaning.”).

1. “And” should be interpreted as inclusive, requiring a carrier to disregard its duty to establish, observe and enforce in order to constitute a violation.

In interpreting the statute at issue, one of the Commission’s first considerations is whether a violation occurs when an entity fails to follow a single action, or whether all three, to establish, observe and enforce, must be disregarded. OA, 24:5-22. Key to this determination was Congress’ intent when it used the word “and.” By way of example, the Commission noted the importance of selecting “and” or “or” in the command “Do not drink and drive.” Id. at 66:7-11. Neither drinking nor driving, separately, are prohibited or a violation. Id. One must engage in both to be subject to the law. Id.

Ordinarily, in everyday English, use of the conjunctive “and” in a list means that all of the listed requirements must be satisfied; while use of the disjunctive “or” means that only one of the listed requirements need be satisfied. See, e.g., Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284, 1292 (D.N.M. 1996) aff’d, 104 F.3d 1546 (10th Cir. 1997); See, e.g., Zorich v. Long Beach Fire Dept. & Ambulance Serv., Inc., 118 F.3d 682, 684 (9th Cir. 1997); United States v. O’Driscoll, 761 F.2d 589, 597-98 (10th Cir. 1985). However, both “and” and “or” are context-dependent, and each word “is itself semantically ambiguous, and can be used in two quite different senses.” Lawrence E. Filson, The Legislative Drafter’s Desk Reference, § 21.10 (1992).

In Zorich, 118 F.3d, 684-85, the Court discussed the use of “or” referencing 1A Norman J. Singer, Sutherland Statutory Construction § 21.14 (5th ed. Supp.1996), for the proposition that “[t]he literal meaning of these terms [‘and’ and ‘or’] should be followed unless it renders the statute inoperable or the meaning becomes questionable.”

The Court in O’Driscoll, 761 F.2d, 597-98 assessed statutory construction and legislative intent where a statute uses “or” stating:

In attempting to give full force and effect to a statute, the court must read it in the light of its purpose; when Congress uses words in a statute without defining them and those words have a judicially settled meaning, it is presumed that Congress intended that meaning.

When the term “or” is used, it is presumed to be used in the *disjunctive* sense unless the legislative intent is clearly contrary. And in penal statutes the word “or” is seldom used other than as a disjunctive and can never be interpreted as meaning the conjunctive “and” if the effect would be to increase the punishment; the word “or” indicates permissible alternative sentences.

(internal citations omitted).

Reviewing § 41102 of the Shipping Act, “General prohibitions,” Congress generously uses both “or” and “and.” For example:

- Section (a): “A person may not knowingly **and** willfully, directly **or** indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, **or** any other unjust **or** unfair device **or** means, obtain **or** attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.
- Section (b):
 - (1) the agreement has not become effective under section 40304 of this title **or** has been rejected, disapproved, **or** canceled; **or**
 - (2) the operation is not in accordance with the terms of the agreement **or** any modifications to the agreement made by the Federal Maritime Commission.
- **Section (c):** 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.

Examining Section (a), Congress makes clear that one must not knowingly and willfully, directly/indirectly (either one), obtain/attempt to obtain property for less than certain rates or charges. In so doing, it lists numerous activities one cannot engage in. This section presents a perfect example of the importance in selecting “and” or “or.” While knowledge and willingness are required, there is an election for the remaining requirements.

Likewise, in interpreting 10(d)(1), “and” and “or” must be given their literal meaning. As drafted, there is no indication the statute is inoperable or the meaning questionable. Rather, the meaning is quite clear when the vocabulary is given their correct meaning. Thus, where “or” is used,

only one of the listed requirements is needed. Where “and” is used, all listed requirements must be satisfied. This was Congress’ intent, and this intent must be upheld by the Commission.

Placing this in context, Complainants must establish that a party failed to establish and observe and enforce regulations and practices. It is not enough to show a party failed to establish regulations, or failed to observe them. This finding was supported by the ALJ and should be upheld by the Commission.

2. Use of “regulations” and “practices” suggests Congress intended numerous actions, not a single incident, to constitute a violation of Section 10(d)(1).

During oral argument, the Commission noted that the term “practice” has been defined in numerous cases and has been used in transportation statutes beginning with the Interstate Commerce Act in the 1800’s. OA, 26:1-8. Many of these statutes, such as the Packers and Stockyards Act, not only use the word “practice” but have provisions of law which closely mirror that of 10(d)(1). Furthermore, the Courts have already analyzed Congress’ intent in using “practice,” in particular whether a single act may constitute a “practice.” Therefore, these statutes and cases provide a basis for evaluating 10(d)(1).

The language of 7 U.S.C.A. § 208(a) of the Packers and Stockyards Act is strikingly similar to that of Section 10(d)(1). It provides:

It shall be the duty of 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, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

A line of three (3) cases examined the statutory language of 7 U.S.C.A. § 208(a) developing a definition for “practices” and thereby interpreting the statute. In so doing, the Courts first looked to the intent of the statute. Using this understanding of the intent of the Act, the Courts then defined terms in the provision such as “practice.” Finally, this definition was applied to the facts of each case to determine whether the alleged conduct was a violation of the Act.

The first of these cases is Rice v. Wilcox, 630 F.2d 586, 589 (8th Cir. 1980), where Court recognized there are two ways to interpret this provision. In Rice, 630 F.2d 586, in order to determine which reading was correct, the Court looked to the purpose of the act, and case law, and found the Act was to be interpreted broadly. Id.

Next, in Guenther v. Morehead, 272 F. Supp. 721, 725 (S.D. Iowa 1967), which was cited in Rice, 630 F.2d 586, the Court spoke to the specific intent of the Packers and Stockyard Act finding “the very thrust of the Act was in the direction of stemming evils which were generated by monopolistic tendencies in the business.” (internal citation omitted); see also, In re Frosty Morn Meats, Inc., 7 B.R. 988 (M.D. Tenn. 1980) (stating that the dominant purpose of the Act was aimed at monopoly practices, to secure patrons of stockyards those services at just and reasonable rates.).

Finally, in McClure v. E. A. Blackshere Co., 231 F. Supp. 678, 682 (D. Md. 1964), Judge Watkins stated:

The duty imposed by 7 U.S.C.A. § 208 is 'to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services.' It would take the most violent stretching of an elastic imagination to class the nonpayment of a bill as involving a regulation or practice in respect to the furnishing of stockyard services; a stockyard 'consisting of pens, or other enclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce.' (section 202). It is clearly only such unjust, unreasonable, or discriminatory regulation or practice 'in respect to the furnishing of stockyard services' which is prohibited and declared to be unlawful.

See also, Guenther, 272 F. Supp., 726.

Upon establishing the statute’s intent or purpose, the courts in all three cases, Rice, Guenther, and McClure, then defined relevant words used in the Act, such as “practice.” The courts uniformly found “[p]ractice’ ordinarily implies uniformity and continuity, and does not denote a few isolated acts, and uniformity and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated.’ (Citations omitted.)” Guenther, 272 F. Supp., 726 (citing

McClure, 231 F. Supp., 682). In Rice, 630 F.2d 586, the court stated, “[t]he case law demonstrates and the parties concede that an isolated instance does not constitute a practice.” Rice, 630 F.2d at 589 (citing, Hays Livestock Comm'n Co., Inc. v. Maly Livestock Comm'n Co., Inc., 498 F.2d 925, 930-31 (10th Cir. 1974); Guenther, 272 F. Supp. at 726; McClure, 231 F. Supp. at 680-82.).

This definition of “practice” was then applied to the relevant facts in each case. In Guenther, 272 F. Supp. 721 the alleged violation was the nonpayment of bills. The Court explained that “[w]hile conceivably a consistent course of conduct, even with respect to nonpayment payment of bills, might in time become a ‘practice’, it is difficult to see how a single instance of the nonpayment of a bill could be so denominated.” Likewise in McClure, 231 F. Supp. 678 the court was asked to determine whether nonpayment of bills constitute a violation of the shipping act. The Court responded, “[w]hile conceivably a consistent course of conduct, even with respect to nonpayment of bills, might in time become a ‘practice’, . . . it is difficult to see how a single instance of the nonpayment of a bill could be so denominated.” McClure, 231 F. Supp. at 682.

Similarly, in Rice, 630 F.2d 586, the Court recounted,

In Hays Livestock Comm'n Co., Inc., 498 F.2d at 930-32, the Tenth Circuit was satisfied that after establishing a practice of honoring drafts, the dishonoring of three drafts constituted an unjust and unreasonable practice in violation of the Act, 7 U.S.C.A. § 208. In the instant case, after honoring seventeen drafts, two drafts were dishonored. As in Hays Livestock Comm'n Co., Inc., 498 F.2d 925, there was sufficient recurrence to establish a “practice.” In so holding we emphasize that isolated transactions do not constitute a practice.

Perhaps more important to this issue is the fact that in both Hays and the present case there was a history of covering the drafts, thus luring an innocent party relying on the representations into accepting the drafts. This is what distinguishes this case from an isolated act of dishonoring the draft as was the case in Guenther. *Thus, the present case involves the purposeful extension of credit, the encouragement of reliance on the drafts through the party covering them at least seventeen times within a six month period, then, dishonoring two of them without warning and with knowledge that the seller had not been and would not be paid.*

Rice, 630 F.2d, 591 (emphasis added).

The purpose and intent in enacting the Shipping Act of 1916 was similar, to some degree, to that of the Packers and Stockyard Act. The Shipping Act created a United States Shipping Board, which later became the Federal Maritime Commission, which was responsible for both the antitrust regulation of ocean commerce, much like the Packers and Stockyard Act, and promotion of the U.S. merchant marine. Malgorzata Anna Nesterowicz, Malgorzata Anna Nesterowicz, The Mid-Atlantic View of the Antitrust Regulations of Ocean Shipping, 17 U.S.F. Mar. L.J. 45, 47 (2005) (citing Shipping Act of 1916, ch. 451, 39 Stat. 728 (1916)). The Shipping Act “was to build up the United States Merchant Marine, and alternatively, to permit a controlled system of agreements designed to limit competition and to procure uniformity in the treatment of ocean carriers and shippers.” Id. at 47-49. “According to the United States Congress, the restriction of free competition in the area of shipping was a tradeoff for the ‘regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, and maintenance of parity . . .’ in American and European rates to foreign markets. H.R. Rep. No. 63-805, at 416 (1914); see also, Esra Bennathan & A. A. Walters, Shipping Conferences: An Economic Analysis, 4 J. Mar. L. & Com. 93 (1972).” Id. at 47.

The Shipping Act of 1984 heavily revised the Act of 1916 to account for changes in the shipping industry fearing “that free competition in the shipping market would lead to rate wars and cut-throat competition due to the carriers' excess capacity, high fixed costs, and low operating costs.” Ibid. (citing, George J. Weiner, Liner Shipping in the 1980's: Competitive Patterns and Legislative Initiatives in the 96th Congress, 12 J. Mar. L. & Com. 25, 35 (1980); see also, Esra Bennathan & A. A. Walters, Shipping Conferences: An Economic Analysis, 4 J. Mar. L. & Com. 93, 96-97 (1972)).

The primary change included “reducing government involvement in maritime commercial practices by eliminating a requirement of advance approval of agreements filed with F.M.C. and the enforcement role of the carriers' tariffs, and introducing service contracts.” Id. at 56.

Currently, the Shipping Act is designed to accomplish four goals:

- 1) establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;
- 2) 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;
- 3) encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and
- 4) promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing greater reliance on the marketplace. 46 U.S.C.A. § 40101.

Christopher T. Cook, Christopher T. Cook, Funding Port-Related Infrastructure and Development: The Current Debate and Proposed Reform, 38 Fordham Urb. L.J. 1523, 1537-41 (2011).

In fact, the Conference report, filed in the House of Representative on February 23, 1984 regarding the statute, provided the following summary of the Act:

Shipping Act of 1984 - Makes this Act applicable to agreements by or among ocean common carriers to: (1) discuss, fix, or regulate transportation rates, accommodations, and other conditions of service; (2) pool or apportion traffic, revenues, net losses, or net profits; (3) allot ports or regulate the number and character of sailings between ports; (4) limit or regulate the volume or character of cargo or passenger traffic; (5) engage in exclusive, preferential, or cooperative working arrangements among themselves or marine terminal operators or non-vessel-operating common carriers; (6) control, regulate, or prevent competition in international ocean transportation; and (7) regulate or prohibit the use of service contracts.

Conference report in H. Rept. 98-600. The summary demonstrates the specific areas the Act was intended to regulate.

In addition to the case law's suggested interpretation of the statute, the language itself provides essential context. For example, the prohibited acts listed in the Shipping Act are all similar to one another or follow a pattern of conduct. There is a strong emphasis on the creation of fair and just, nondiscriminatory behavior towards shippers. "The 1984 Act, like its predecessor, sanctioned such practices, but imposed the limits and discouraged joint action abuses. Most of the listed

provisions concerned obligations to charge either the rates that were filed with the F.M.C. or those agreed upon in service contracts, and prohibitions of discrimination and of dominant position abuse. The prohibitions also applied to joint ventures or consortia ‘of two or more common carriers . . . operated as a single entity.’ 46 U.S.C. § 1709(e) (1984).” Nesterowicz, 17 U.S.F. Mar. L.J. at 599.

The prohibited acts include:

- No person is permitted to obtain transportation for lesser rates than those set forth in a carrier’s application, or operate under a cancelled or rejected agreement;
- Common carriers must fully follow their tariff meaning they cannot charge more or less, rebate or refund in a contradictory manner, deny service, retaliate against a shipper or refuse to provide space for patronizing another carrier or filing a complaint, unjustly discriminate based on rates, cargo classification, cargo space, or loading, employ a fighting ship, offer rebates or a loyalty contract or other preference, accept cargo from an NVOCC operating without a bond and tariff, refuse to negotiate with a shippers’ association, or share information as to the cargo without the shippers’ consent; and two or more carriers may not form a conference and boycott or refuse to deal with certain parties or otherwise collectively act to negotiate rates with nonocean carriers or to allocate shippers among themselves.
- Common carriers, ocean freight forwards and marine termination operators must not fail to establish, observe and enforce just and reasonable regulations and practices relating to receiving, handling, storing or delivering property.

When reading Section 10(d)(1) in context of the other prohibited acts, it is clear that this section of the Shipping Act is intended to regulate a pattern of anticompetitive behavior. It is intended to preserve fair and equitable treatment and practices and to eliminate discrimination.

As stated by Judge Watkins in McClure, it would take a “stretching of the imagination” to find that Limco’s issuance of new bills of lading as a result of Complainants’ failure to respond to demands that they cure abandonment and pay freight and take custody of cargo, constituted an anticompetitive, unjust and/or discriminatory practice. The ALJ agreed that the present facts demonstrate Limco was not directly involved with receiving, handling or storing property and not responsible for accidental damage or inadvertent loading. Limco promptly and reasonably responded

to the situation, conveyed information about damage, inadvertent loading and delay of the container and promptly conveyed Complainants' demands.

Furthermore, as noted in Rice, Guenther, and McClure, having determined the intent of the statute, the court will then develop the correct reading of a word used in the statute.

The Packers and Stockyard Act provides a useful parallel. Both the Packers and Stockyard Act and the Shipping Act were intended to limit anti-competitive measures and were to be read broadly. As these statutes have a similar intent, and this intent dictates the meaning of words used in the statute, the meaning of terms in one statute may parallel that of the other Act.

For example, the Packers and Stockyard Act has provided that "practices" "implies uniformity and continuity, and does not denote a few isolated acts." As there is no suggestion in the legislative history of the Shipping Act or case law that "practice" was to have a narrower reading, it can be concluded that "practice" would have a similar meaning in the Shipping Act as it does in the Packers and Stockyard Act.

By way of comparison, the Commission found there were violations of Section 10(d)(1) in the following two cases.

In William R. Adair v. Penn-Nordic Lines, Inc., 20 S.R.R. 11 (FMC 1991), the Commission outlined the following facts: Penn-Nordic had no tariff on file, accepted booking from Corporate World, entered into a contract with them and later aborted the shipment by abruptly moving the motorcycle from the container and placing it in a warehouse because Corporate World had not paid freight promptly on this and other shipments. Penn-Nordic entered the contract knowing Corporate World's history of non-payment and nonetheless issued an on-board bill of lading, which was false, since the cargo was not loaded, misleading persons coming into possession of the bill. Instead of aborting the shipment, Penn-Nordic could have shipped the motorcycle to its destination in New Zealand and retained possession pending payment from the consignee/shipper. However, despite inquiries, Penn-Nordic failed to notify the consignee as to where the motorcycle was located. When

Penn-Nordic was finally paid, it still refused to perform. Later, Penn-Nordic agreed to send the motorcycle and absorb the accrued storage costs. However, this was later reneged.

Based on the foregoing, the Commission found “Penn-Nordic behaved unreasonably and in violation of Section 10(D)(1) and should be held fully accountable for the damage it caused to fall on the innocent cargo owner.” Id. at 22. Likewise, the Commission found that Corporate World was also in violation of 10(d)(1) as it was supposed to act as Mr. Adair’s fiduciary, a trusted and skilled agent protecting his interests but instead selected an unreliable NVOCC, failed to promptly pay freight, and failed to advise and assist Mr. Adair to arrange the release of the motorcycle. Id. at 25.

In Paul Houben v. World Moving Services, Inc. and Cross-County Van Lines, LLC, 31 S.R.R. 1402 (FMC 2010), the Commission found that “failing to fulfill NVOCC obligations, . . . [and] failing to pay the destination agent monies which have been received by the NVOCC for such services, [is] an unjust and unreasonable practice in violation of Section 10(d)(1).” The Commission recounted that the following had occurred.

Complainant made an agreement with WMS to ship his cargo to Belgium and had made a partial payment to WMS. Complainant then paid the remaining balance as well as overweight charges directly to CCVL. It appears that CCVL, acting as the NVOCC, consolidated three shipments into a single cargo container and contracted with IM as its designation agent. Thereafter, CCVL failed to pay IM for its services in relation to all three shipments. In the absence of payment from CCVL, IM elected to retain the cargo notwithstanding Complainant’s payment to WMS and CCVL. CCVL then failed to timely resolve its commercial dispute with IM, resulting in substantial delay and financial harm to the Complainant. The Complainant incurred additional expenses in the amount of \$11,311.13.

This situation presents not just failure to pay the destination agent. The NVOCC collected funds, failed to timely pay, emailed with numerous parties, acknowledged the debt was owed, established a payment plan, and still failed to make payment. This pattern shows intentional egregious behavior, or “aggravating behavior.”

Neither of these cases demonstrates facts which are comparable to the actions of Limco. Furthermore, Complainants have not satisfied their burden to establish facts similar to Houben or Adair nor can Complainants demonstrate any “practice” as the word has been defined.

Rather, all that has been demonstrated is Complainants have equal, if not greater, responsibility for the liquidation of the containers. Complainants owed freight charges and storage fees for the two containers it left in Poland. Complainants also refused to respond to demands that they cure the abandonment by paying freight and taking possession of the cargo. The reverse of the bill of lading permitted sale of the containers, which occurred consistent with Complainants’ agreement. OA, 48:19-49:5.

Limco acted fully within the realm of law to resolve the situation and limit the increasing expenses which were being incurred as a result of Complainants’ delay. It did not act intentionally or egregiously. It did not mislead or otherwise actively delay resolution. Furthermore, it did not withhold any payments improperly in its possession.

Limco did not engage in unjust or unreasonable practices, or “practices” at all. It did not fail to establish, observe or enforce a just and reasonable regulation and practice. Rather, Limco engaged in a single act of reissuing bills of lading, which complied with the just and reasonable practices of the shipping industry. As stated by the ALJ,

The evidence demonstrates that Limco promptly conveyed information regarding the damage, inadvertent loading, and delay of container MOGU2002520 and that Limco promptly conveyed Complainants’ demands regarding handling of this container. F. 55-67, 83-95. Limco placed a hold on the two undamaged liquidated containers based upon the Complainants’ nonpayment of freight, after those containers were transported without incident to their final destination. F. 43. Limco changed the shipper in the bills of lading at the direction of Int’l TLC after the containers were sold to a third party. F. 118-119. There is no evidence that Limco knew that the containers had been liquidated by Int’l TLC or that Limco acted unreasonably in handling any of these containers. Under these facts, Complainants have not demonstrated an unreasonable practice or procedure.

Finally, the argument Section 10(d)(1) does not require a minimum number of offenses, as such a reading would have a chilling effect on small and/or individual shippers as they would not return to a shipper with whom they had a dispute, must fail in the context of this case. During oral argument, Int'l TLC recounted that the Complainant Victor Berkovich “continued to do business with International TLC. Not once, but four times, even after the liquidation sale of the company’s containers – in October 2008, a trailer in January 2009, and a Dodge Ram in July of 2009. And that was after the liquidation sale.” OA, 56:7-15.

This case provides a valid example that even a novice customer may and will continue to employ a service it had a dispute with over prior shipments. Therefore, the argument that the statute should apply to a single act, to protect one-time customers, does not follow.

B. Complainants’ claims should have been brought under COGSA as the allegations do not present elements peculiar to the Shipping Act. In permitting this action under the Act, Complainants will be abusing the benefits permitted under the Act.

The Commission has requested that counsel discuss Anchor Shipping Co. V. Alianca Navegacao E Logistics Ltda., 30 S.R.R. 991, 999 (FMC 2006) and Cargo One, Inc. v. Cosco Container Lines Co., Ltd. 28 S.R.R. 1635, 1645 (FMC 2000); 2000 WL 1648961, at *1, to evaluate whether the claims should be asserted under the Carriage of Goods by Sea Act (“COGSA”) (note following 26 U.S.C. §30701), the Uniform Commercial Code, or common law breach of contract or conversion.

In its decision, the ALJ referenced these two cases stating the “Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act.” The ALJ reasoned that the violation was for conduct both before loading and after discharge at the port and that the damage involved the shipment of five containers, and liquidation of three, rather than just the delay of one.

However, these cases, as well as subsequent case law, make clear that the allegations against Limco do not constitute violations of the Shipping Act.

At the outset, “[a] complainant alleging that a respondent violated section 10(d)(1) of the 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.’” Bimsha International v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc., 2011 WL 7144011, at *6 (FMC 2011) (internal citations omitted).

In Cargo One, Cargo One alleged that “COSCO violated section . . . 10(d)(1), by failing to receive containers tendered by Complainant at service contract rates, denying container space aboard eastbound vessels in the Far East trade lanes contrary to what was agreed under the service contract, and failing to respond to and rectify complaints from Cargo One regarding the problems with the use of the service contract.” To determine whether these claims were precluded from the Commission’s jurisdiction, both parties discussed the test established in Vinmar, Inc. v. China Ocean Shipping Co., 26 S.R.R. 420 (FMC 1992).

COSCO argued “the Commission examined the legislative history and statutory construction of the Shipping Act and concluded that ‘Congress placed the limitation in section 8(c) in order to limit the Commission's jurisdiction to award remedies that would otherwise be available in a breach of contract action if the matter were brought before a court.’” Id. at 3. Cargo One distinguishes the instant Complaint from Vinmar stating “‘the salient differences [sic] between the case at hand and Vinmar and its progeny is that the activities which form the basis of the allegations in this case drip with facts which constitute violations of the Act, and only incidentally are couched in the context of a service contract,’ while Vinmar, et al. ‘are clearly garden variety breaches of service contracts.’” Id. at 5.

The Commission found “under the Shipping Act that strict deference to some of the language in Vinmar may have eviscerated other statutory rights and remedies envisioned by that legislation” and therefore found that Vinmar should be reconsidered. Id. at 11. The Commission stated it was not

overruling Vinmar but providing a more precise, less expansive, view of which causes of action are precluded. Id. at 14. “The practical effect of this application of the sweeping dicta in Vinmar conflicts with Congress' intention that the Commission is the appropriate forum for resolving allegations of violations of certain section 10 Prohibited Acts, even if they arise from transportation governed by a service contract.” Ibid. The Commission concluded, “[w]e believe the more appropriate test is whether a complainant's allegations **are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act.**” Ibid. (emphasis added).

In Anchor Shipping, the Court looked to Cargo One as clear precedent on the issue. Quoting the revised test established in Cargo One, the Commission found that the matter had to be remanded back to the ALJ to determine whether the allegations involve elements peculiar to the Shipping Act. Id. at 18 (finding that the ALJ should have examined “some 16 sections of the 1984 Act invoked by complainant Anchor to determine which of them are inherently breach of contract claims as opposed to inherently Shipping Act claims.”).

The issue in this case is whether Complainants' allegations of fraud, conversion and breach should have been brought under COGSA or other state law causes of action and whether the Commission lacks jurisdiction over these issues.

The Complainants have pursued their claims under the Shipping Act, presumably because COGSA provides certain protections to a carrier not otherwise permitted under the Shipping Act.

COGSA has a one-year statute of limitation. 46 U.S.C. app. § 1303(6). Second, “[u]nder COGSA, a carrier has limited liability provided that the carrier gives the shipper adequate notice of the \$500 limitation by including a clause paramount in the bill of lading and the carrier gives the shipper a fair opportunity to avoid COGSA's limitation by declaring excess value. Ins. Co. of N. Am. v. M/V Ocean Lynx, 901 F.2d 934, 939 (11th Cir. 1990).” Unimac Co., Inc. v. C.F. Ocean Serv., Inc., 43 F.3d 1434, 1438-39 (11th Cir. 1995); Gen. Elec. Co. v. MV Nedlloyd, 817 F.2d 1022, 1028 (2d Cir. 1987) (“Only by granting shippers a fair opportunity to choose between paying a greater or

lesser charge to obtain corresponding more or less protection for its goods may a carrier limit its liability to an amount less than the loss actually sustained.”); Royal Ins. Co. v. Sea-Land Serv. Inc., 50 F.3d 723 (9th Cir. 1995). Third, unlike the Shipping Act, COGSA does not have a fee shifting arrangement.

Section 41301 and Section 41305 of the Shipping Act provide that a complainant may seek reparations and reasonable attorney fees. Furthermore, pursuant to § 41306, “[a]fter filing a complaint with the Federal Maritime Commission under section 41301 of this title, the complainant may bring a civil action in a district court of the United States to enjoin conduct in violation of this part.” Subsection (d) provides that “[a] defendant prevailing in a civil action under this section shall be allowed reasonable attorney fees to be assessed and collected as part of the costs of the action.”

Considering the costs and time of litigation, there is little incentive for a one-time shipper, or an infrequent shipper, to litigate an alleged violation of the Shipping Act or other maritime claim in Federal Court. This is likely why Congress enacted the above provisions of the Shipping Act.

Unlike other legislation, however, the Shipping Act provides attorney fees only for the prosecuting party. For example, the Civil Rights Act of 1988, 42 U.S.C.A. § 1988(b) , and the Sherman Act, 15 U.S.C.A. §§ 15, 26 (2007), provide that the prevailing party may recoup attorneys fees and costs. Here, while both the Sherman Act and the Shipping Act serve to limit restraints on trade and anticompetitive behavior, the Shipping Act provides fees to the complainant alone. The implication of such legislation is that it incentivizes parties to seek relief where the costs do not justify the results. In so doing, Congress has established a dangerous path.

Additionally, in order to survive a motion to dismiss, a complaint before the FMC is not required to meet the same level of proof as in Federal Court. For example, a complaint attacked by a Rule 12(b) motion to dismiss may not need detailed factual allegations, however, the plaintiff must provide the grounds of his entitlement to relief which “requires more than labels and conclusions.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In

deciding a Rule 12(b) motion to dismiss, a court is “not bound to accept as true a legal conclusion couched as a factual allegation.” Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986).

While COGSA permits a carrier the protection of a statute of limitation and ability to limit its liability, the Shipping Act provides, one might suggest unfairly so, for a complainant to seek attorney fees even where the allegations are not necessarily credible.

Therefore, whether to pursue an action before the Commission or in Federal Court involves numerous considerations. In this case, the claims raised by Complainants do not involve elements peculiar to the Shipping Act. Unlike the case law examined above, Limco’s actions are unrelated to any of the above mentioned prohibited acts. The allegations have no relation to rates, abiding by a tariff, treatment of the shipper or refusal to provide space or services.

Most importantly, Limco did not fail to establish a practice, or thereafter fail to observe or enforce it. The ALJ found that “[t]o prove knowing and willful action, it must be shown that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act, or purposeful of obstinate behavior akin to gross negligence. *Portman Square Ltd.*, 28 S.R.R. 80, 84-85 (ALJ 1998); *see also Rose Int’l, Inc. v. Overseas Moving Network Intl, Ltd.*, 29 S.R.R. 119, 187 (FMC 2001).” Decision, Pg. 31. The ALJ concluded that “Limco was not directly involved with receiving, handling, or storing property and was not responsible for the accidental damage and inadvertent loading of the damaged container. Limco promptly and reasonably responded to the situation, including coordinating negotiations between Hapag-Lloyd and Int’l TLC.” Decision, Pg. 31.

The allegations against Limco do not meet the substantive requirements of a violation of the Shipping Act. Moreover, any claim against Limco also falls outside the jurisdiction of the Shipping Act and should have been brought pursuant COGSA in the Federal Courts. When asked by Commissioner Khouri whether Complainants could have filed under COGSA, counsel responded

“yes” but that “once it was taken off the dock, and they agreed to return it, that’s not transportation, that’s pre-transportation.” 18:9-22.

This argument focused on the conduct of Hapag-Lloyd. Complainants failed to make a similar argument regarding to Limco. Rather, all allegations of misconduct by Limco involve actions allegedly taken during the transportation. Complainants allege that Limco violated Section 10(d)(1) by changing the shipper/consignee on the bills of lading, wrongly putting a hold on the containers, unlawfully delivering containers and providing misleading information. All of these allegations necessarily took place while the cargo was in transport, prior to its being liquidated. These are allegations which could and should have been prosecuted under COGSA. However, as COGSA provides for a one year statute of limitations, limitation of liability, and does not award attorneys fees, it is obvious that Complainants intentions are to manipulate the language of the Act to enable them to revitalize claims they failed to timely pursue. The Commission should not allow the Complainants to do so.

IV. CONCLUSION

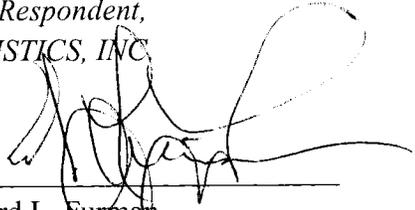
Complainants have failed to present allegations which fall within the Shipping Act. As Limco acted reasonably and responsibly to settle the issues between all parties engaged in this matter. None of its actions were willfully negligent or harmful. None of its actions constitute practices, but rather single acts. In sum, Limco acted within the confines of the law.

The Complainants have failed to establish that Limco failed to observe and enforce just and reasonable regulations and practices. Rather, it has made assertions which are basic maritime claims which should be pursued under COGSA. There are no allegations which are peculiar to the Shipping Act.

For the foregoing reasons, the Commission should reaffirm the ALJ’s February 14, 2012 Decision.

Dated: New York, New York
January 29, 2013

Respectfully submitted,
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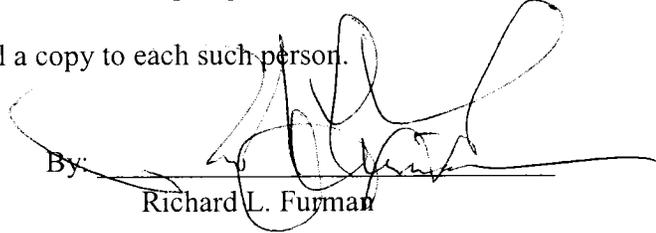
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record by e-mailing, and mailing via first-class mail a copy to each such person.

Dated: New York, New York
January 29, 2013

By: 
Richard L. Furman