

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

**REPLY OF RESPONDENTS
HAPAG-LLOYD AG AND HAPAG-LLOYD (AMERICA) INC.
TO COMPLAINANTS' EXCEPTIONS**

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Pursuant to Rule 227 of the Commission's rules of practice and procedure, respondents Hapag-Lloyd AG and Hapag-Lloyd (America) Inc. (hereinafter referred to collectively "Hapag-Lloyd") hereby reply to the exceptions ("Exceptions") filed by Complainants Yakov Kobel and Victor Berkovich ("Complainants") to the February 14, 2012 initial decision of the Presiding Officer ("Initial Decision").

I. BACKGROUND OF THE CASE

This proceeding was initiated by a complaint filed with the Federal Maritime Commission ("FMC" or "Commission") on July 2, 2010, in which Complainants alleged that Hapag-Lloyd violated Sections 41102(c), 41104(4)(D), 41104(4)(E), 41104(10), 41104(11) and 41104(12) of the Shipping Act of 1984, as amended, in connection with the transportation of five containers of cargo from Portland, OR to Gdynia, Poland in 2008. Similar and/or additional allegations were made against respondents Limco Logistics, Inc. ("Limco") and International TLC, Inc. ("Int'l TLC").

Four of the containers, MOGU2112451, MOGU2003255, MOGU2101987 and MOGU2051660 were delivered to the destination port without incident. Initial Decision

Findings of Fact (“Finding”) #26 and #41. A fifth container, MOGU2002520, was damaged during loading, accidentally loaded on the next Hapag-Lloyd sailing, subsequently delayed at the transshipment port, and delivered later than the other containers. Containers MOGU2112451 and MOGU2003255 were picked up by Complainants. The three other containers (MOGU2002520, MOGU2101987 and MOGU2051660) were sold by Int’l TLC, without the involvement of Hapag-Lloyd. Findings #117 and #124.

Respondents initially sought reparations of \$500,000, plus double damages under 46 U.S.C. § 41305(c). The claim for double damages was dismissed by the Presiding Officer in an Order dated May 24, 2011.

Complainants’ post-hearing brief did not pursue the alleged violations of Sections 41104(11), 41104(12) and 41104(4)(D) by Hapag-Lloyd asserted in the Complaint. In her Initial Decision, the Presiding Officer found that Hapag-Lloyd did not violate these three statutory provisions, and also found that Hapag-Lloyd did not violate Sections 41102(c), 41104(4)(E) or 41104(10). Complainants have excepted to certain Findings and to the conclusion that Hapag-Lloyd did not violate Section 41102(c). Thus, only issues relating to Section 41102(c) are before the Commission on Exceptions.

II. SUMMARY OF HAPAG-LLOYD’S POSITION

As an initial matter, the Exceptions should be dismissed for lack of subject matter jurisdiction. See Section IV.A. *infra*.

To the extent the Commission reviews the Exceptions on their merits, the Commission should affirm the four Findings to which the Complainants’ except, i.e., Findings 69, 71, 90 and 119. The objections to the aforementioned Findings cite nothing in the record that would support a conclusion that any of the Findings are in error.

Indeed, the Findings to which Complainants object are entirely consistent with and are supported by Findings to which Complainants have not filed exceptions. See Section IV.B, *infra*.

The Commission should also affirm the conclusions of law reached in the Initial Decision. These conclusions are well-grounded in the undisputed Findings and Commission precedent. See Section IV.C, *infra*. In contrast, the interpretation of Section 41102(c) that Complainants' urge the Commission to adopt is novel, unsupported by and contrary to precedent, and ill-conceived as a matter of both law and policy. See Section IV.D, *infra*.

III. STANDARD OF REVIEW

In reviewing the Initial Decision, the Commission may exercise "all powers which it would have in making the initial decision." 46 C.F.R. §502.227(6). However, the Initial Decision is "entitled to weight." *Application for Freight Forwarding License, Dixie Forwarding Co., Inc.*, 8 F.M.C. 109, 112 (FMC 1964). The greatest weight is to be afforded the credibility determinations of the Presiding Officer. See, e.g., *J.C. Penney Company, Inc. v. N.L.R.B.*, 123 F.3d 988 (7th Cir. 1997)(ALJ's credibility determination entitled to "great deference"); *Chen v. General Accounting Office*, 821 F.2d 732 (D.C. Cir. 1987)(credibility determination of individual board member entitled to "great deference" upon reconsideration by entire board).

In reviewing the decision of the Presiding Officer, the Commission should bear in mind the standards set forth above and the fact that, unlike many cases that are decided based on written submissions, the Initial Decision presently before it on Exceptions was issued after a 3½-day trial during which the Presiding Officer heard testimony and had ample opportunity to observe the demeanor of the witnesses and assess their credibility.

IV. ARGUMENT

A. THE COMMISSION LACKS SUBJECT MATTER JURISDICTION

Because the Complainants' true grievances are based in tort or cargo loss/damage, the Commission lacks subject matter jurisdiction over their claims. Accordingly, this entire proceeding should be dismissed.

In ruling on pre-hearing motions by Hapag-Lloyd to dismiss for lack of subject matter jurisdiction, the Presiding Officer found that subject matter jurisdiction could exist, but never affirmatively held that subject matter jurisdiction does in fact exist. See, September 28, 2010 Order at p. 3; May 24, 2011 Order at p. 4. In the Initial Decision, the Presiding Officer held that there was no "reason to alter the analysis in those Orders" (Initial Decision, p. 18), overlooking the fact that those Orders did not actually analyze the merits of the subject matter jurisdiction question. Accordingly, the Commission should now review whether it has subject matter jurisdiction over this claim.

In this regard, the Carriage of Goods by Sea Act ("COGSA"), now codified as a note to 46 U.S.C. §30701, establishes the rights and obligations of ocean carriers and shippers with respect to the transportation of goods by water between ports in the United States and ports in a foreign country. *Kawasaki Kisen Kaisha, Ltd. et al. v. Regal-Beloit Corp. et al.*, 130 S.Ct. 2433 (2010). COGSA can be extended beyond port-port transportation by contract (see Section 7 thereof), and in this case was so extended by paragraph 7(2) of the terms and conditions of HLAG's bills of lading and sea waybills

(Exhibits HL-010 and HL-011), such that COGSA applied to the handling of these containers both prior to loading and after discharge.¹

Federal courts have held that claims for cargo loss or damage cloaked in negligence, fraud, conversion and breach of contract theories are pre-empted by COGSA. 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 complaint 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).

¹ Complainants, as customers of a NVOCC, are bound by the extension of COGSA beyond ship’s tackle even though they are not named on HLAG’s bill of lading. See, *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 32-35 (2004).

In this case, 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’ Brief”) also characterizes their claim as “tantamount to conversion at common law.” Complainants’ Brief, p. 13. Complainants’ Exceptions characterize Hapag-Lloyd as a “bailee” subject to a “duty of reasonable care.” Exceptions at p. 6. Thus, it is apparent from Complainants’ own language that they are asserting the types of claims that the courts have consistently held are to be determined in accordance with COGSA.

The Commission, like all administration agencies, is an agency of limited jurisdiction, and COGSA is not a statute which has been delegated to the Commission for its administration. *Definition of “Package” under the Carriage of Goods by Sea Act*, 23 S.R.R. 111, 113 (FMC 1985). Rather, COGSA establishes the courts as the forum for the resolution of claims for cargo loss and damage. *Id.* Consistent with the foregoing, the Commission has repeatedly held that it has no jurisdiction over claims for cargo loss or damage. See, e.g., *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); *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).

Moreover, the Commission has made it clear that shippers may not avoid COGSA by invoking the Shipping Act. This is well-summarized in the *A.N. Deringer* decision:

It is clear that COGSA was enacted to clarify the responsibilities as well as the rights and immunities of carrier and ship with respect to loss and damage claims. Consequently, the use of the Shipping Act of 1984 to circumvent COGSA provisions would constitute a wholly unwarranted frustration of Congressional intent. Furthermore, some of the logical conclusions of such a step would be absurd. For example, COGSA provides a one-year period for the filing of suit; after that period, a claim is time-barred. To accept Deringer's premise, one would have to conclude that a one-year period exists during which a claimant may file suit, but two additional years exist in which to file with the FMC. Inasmuch as COGSA stipulates that the carrier and ship, in the absence of a suit, are discharged from liability after one year, such a conclusion is unacceptable.

A.N. Deringer at 1277 (footnotes omitted).²

Consistent with the approach the Commission has taken to date in keeping COGSA and Shipping Act claims separate, federal courts have 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). Just as federal courts do not allow plaintiffs to avoid COGSA by invoking state law, Complainants should not be allowed to avoid COGSA by invoking the Shipping Act.³ Hapag-Lloyd urges the Commission to see through the transparent attempt of Complainants to avoid

² In recent years, the Supreme Court has affirmed that COGSA is the governing law with respect to ocean carrier liability in international ocean transport. See, *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 12, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004) and *Kawasaki Kisen Kaisha, Ltd. et al. v. Regal-Beloit Corp. et al.*, *supra*. Permitting shippers to circumvent COGSA by bringing Shipping Act claims would be in direct conflict with these recent Supreme Court decisions.

³ This entire proceeding appears to be an attempt by Complainants to avoid the one-year statute of limitations in COGSA by couching their claim in Shipping Act terms. This one-year statute of limitations is, in and of itself, a sufficient basis to dismiss this proceeding in its entirety.

COGSA's one-year statute of limitations (Section 3(6) of COGSA) and \$500 per package limitation (Section 4(5)) by recasting their tort claims as Shipping Act claims. See also Section IV.D, *infra*. Accordingly, all of Complainants' Exceptions should be dismissed for lack of subject matter jurisdiction.

B. THE FINDINGS OF FACT TO WHICH COMPLAINANTS EXCEPT ARE WELL-GROUNDED IN THE RECORD AND CONSISTENT WITH OTHER FINDINGS OF FACT TO WHICH COMPLAINANTS DO NOT OBJECT

The four Findings to which Complainants object are well-grounded in the record and consistent with other Findings to which Complainants do not object. Accordingly, Complainants' exceptions as to each of these Findings must be denied.⁴

1. *Finding #69*

The first Finding to which Complainants except is #69, which states:

Because resolution of a dispute such as this is normally routine, Hapag-Lloyd's personnel expected the dispute to be resolved prior to the arrival of the next Hapag-Lloyd vessel in Portland.

The dispute to which the Finding refers is the responsibility for damage to container MOGU2002520 during the original loading process. Complainants' sole basis for excepting to this Finding is set forth on page 7 of their Exceptions, where they state:

There is no evidence that this dispute was normal and routine, or would be expected to be resolved before the arrival of the next Hapag-Lloyd vessel in Portland, as stated in Finding of Fact F69, especially since Complainants wanted the container returned to their yard.

Complainants' Exceptions to both parts of the Finding are unfounded.

⁴ Even if the Commission upholds the Exceptions with respect to all four of the Findings to which Complainants except, these Findings are not sufficiently material to the Presiding Officer's conclusions of law that a ruling in favor of Complainants on the Exceptions to the Findings would warrant a ruling in favor of Complainants with respect to the legal issue before the Commission.

As to the true substance of the finding, that Hapag-Lloyd's personnel expected the dispute to be resolved prior to the arrival of the next vessel, Ms. Ward's testimony at page 577 of the Transcript states:

Well, during this time, our vessels were very booked up, and I talked to Nadejda [*Li, of Limco*] on the telephone about this and I told her, you know, I rolled the booking, I assigned the vessel. So if the container was repaired or transloaded, it would have guaranteed space.

From the foregoing testimony, it was more than reasonable for the Presiding Officer to conclude that both Ms. Ward of Hapag-Lloyd and Limco expected the matter of the damaged container to be resolved prior to the arrival of the next vessel.

Given the foregoing, whether resolution of matters such as this were "normally routine" is of minimal consequence. However, the "normally routine" portion of the Finding is correct and consistent with other Findings to which Complainants do not except, and with other testimony in the record.

More specifically, in Finding #57 the Presiding Officer found that Hapag-Lloyd offered to transfer the contents of the damaged container to another container. With respect to transloading, William Furer testified that:

We transload containers frequently. They're asking for four days to discharge a 40-foot container that is normally done in one day.

Transcript, p. 545, Lines 4-6. Mr. Furer's testimony also include the following exchange:

Q: Let me ask you this. Mr. Furer. Was this container handled any differently because it was a shipper-owned container?

A: No.

Q: So this was handled the same way that you would have handled an incident with a container that had been handled by Hapag-Lloyd?

A: With the exception that we would have transloaded it normally -- we would normally have been able to transload it. Allowed to transload it. Let's put it that way.

Transcript, p. 547, Lines 15-25. In other words, Hapag-Lloyd treated damaged MOGU2002520 as it would have treated any other container damaged during loading except that, in this case, it was not permitted to transload the cargo.

The foregoing testimony demonstrates that Hapag-Lloyd transloads containers frequently, could have discharged the damaged container in one day, and did not treat this container any differently than it would have treated any other damaged container. This not only supports the Finding that resolution of disputes of this type are routine, but further supports the reasonableness of the conclusion that the matter could have easily been resolved before the arrival of the next vessel.

Complainants rejected Hapag-Lloyd's offer to transload the cargo, which Hapag-Lloyd could have done more quickly and less expensively than Complainants. Findings #58 and #63. Complainants also sought reimbursement in excess of their actual costs. Finding #62. Complainants do not except to any of these other Findings, and offer no evidence whatsoever to support their allegation that resolution of this matter was or should have been anything other than routine.

Thus, the undisputed record shows that this matter could and would have been resolved quickly and efficiently, but for Complainants' insistence on handling the transloading themselves and their submission of inflated costs. Moreover, these other Findings demonstrate that to the extent that the resolution of this matter was anything other than routine, it was due to the actions of Complainants. Accordingly, Finding #69 is supported by the weight of the evidence and must be affirmed.

2. *Finding #71*

Complainants except to Finding #71, which states:

When the next Hapag-Lloyd vessel called in Portland, Oregon, the damaged container was inadvertently loaded on that vessel, on or before June 2, 2008.

Complainants' objection to this Finding is based on the premise that the container could only be loaded and shipped through the direct and intentional act of various Hapag-Lloyd employees. Exceptions at p. 6. Complainants cite testimony regarding the normal documentation process as "evidence" that the loading and shipping of this container was not accidental. *Id.*

Complainants' Exception suffers from the fatal flaw of assuming that "intentional" and "accidental" are mutually exclusive. This is not the case. Consider a situation in which the owner of a building hires a contractor to demolish the building. After hiring the contractor, the owner tells him "check with me before you do the work." A few weeks later the contractor tears down the building without checking with the owner, who it turns out did not yet want the building demolished. There is no doubt the contractor acted intentionally in demolishing the building in the sense that his crew went to the building and took the action to demolish it. However, it is equally clear that it was a mistake for him to do so, since this was inconsistent with the owner's wishes. Thus, the assumption that underlies Complainants' exception, i.e., that an intentional act can never be a mistake, is simply not correct. Here, the damaged container MOGU2002520 was loaded "intentionally" in the sense that the actions necessary to place it on the vessel were taken. However, the loading of the container nevertheless was a mistake.

All of the evidence in the record, both testimonial and documentary, indicates that the loading of the container was a mistake. William Furer of Hapag-Lloyd testified that

container MOGU2002520 “was accidentally loaded to the vessel.” Transcript, p. 547, Line 9. Catherine Ward of Hapag-Lloyd, testifying to what happened with respect to this container, testified: “So that’s where the mistake happened.” Transcript, p. 577, Line 11. The July 1, 2008 e-mail from Catherine Ward (Hapag-Lloyd Exhibit HL-066) indicates that the container “was mistakenly loaded to the vessel.” Complainants’ Exhibit 94 contains an August 22, 2008 memo from Catherine Ward in which she states “the container loaded the vessel in error.” See also Finding #72.

In contrast, Complainants do not offer any evidence whatsoever to support a contrary conclusion. Moreover, Complainants have not and cannot answer the question that is naturally raised by their unsupported assertion that Hapag-Lloyd intentionally loaded and transported this container: Why? The undisputed facts show that there was no benefit to Hapag-Lloyd in doing so. See Findings #59 and #73. Complainants are unable to articulate any plausible reason why Hapag-Lloyd would deliberately load and ship the damaged container because there is none. The only conclusion that makes any sense is the one supported by undisputed evidence and reached by the Presiding Officer: the loading of the damaged container was a mistake. Accordingly, Finding #71 must be affirmed.

3. *Finding #90*

Complainants except to this Finding, which states:

Throughout September and in to October of 2008, Hapag-Lloyd worked with Limco to try to deliver the container via alternate means, including delivery by truck to Poland, delivery by truck directly to the Ukraine, and delivery by rail.

As explained below, the weight of the evidence supports this Finding.

Complainants' cite Exhibit 95, pages 2 through 4, for the proposition that, from August through September 23, 2009⁵, Hapag-Lloyd sought to terminate the transport of the damaged container in Germany. Exception, p. 9. However, Exhibit 95, pages 2 through 4, actually contains correspondence only for the period from September 8 through September 11. Nothing in that Exhibit supports the contention that termination was being considered prior to September 8, 2008 or after September 11, 2008.

Complainants allege that until early September, Hapag-Lloyd only considered shipment by feeder vessel or termination of the shipment and that Hapag-Lloyd did not consider alternate means of transport until September or October of 2008. Exceptions, p. 10. Both of these allegations are wholly unsupported by the facts. Exhibit 94, p. 4, shows that Hapag-Lloyd was considering transport by truck as early as August 1, 2008. In mid-August, Hapag-Lloyd was still seeking to transport the container via feeder vessel. Exhibit 93, p. 2-3. On August 22, 2008, Hapag-Lloyd was considering trans-loading the cargo into a Hapag-Lloyd container. Exhibit 94. Thus, Complainants' efforts to portray Hapag-Lloyd as being focused solely on termination of the transportation, without promptly considering alternatives, are without a basis in fact, and the Presiding Officer's Finding that Hapag-Lloyd worked to try and deliver the cargo by alternate means is supported by the weight of the evidence in the record. Accordingly, this Finding must be affirmed.

4. *Finding #119*

The fourth and final Finding to which Complainants except states:

Limco notified Hapag-Lloyd of the new shipper/consignee details for containers MOGU2002520, MOGU2051660 and MOGU210187 on

⁵ The 2009 date appears to be a typographical error in the Exceptions. The correct date should be September 23, 2008.

March 2, 2000.

On page 12 of the Exceptions, Complainants argue that Exhibit 87 does not show that Limco notified Hapag-Lloyd of the new shipper/consignee details for containers MOGU2002520 or MOGU2101987. This argument appears to be based on the fact that the subject line of the e-mail set forth in Exhibit 87 refers only to container MOGU2051660. However, the text of Exhibit 87 refers to "obls" (i.e., original bills of lading, in the plural). Thus, the Presiding Officer could reasonably infer that this message dealt with containers other than that referred to in the subject line of the e-mail message. In any event, this finding is not material to Complainants' allegations against Hapag-Lloyd.

For the foregoing reasons, Complainants' Exceptions to the four Findings discussed above should be denied, and the Initial Decision affirmed with respect to those Findings.

C. THE PRESIDING OFFICER'S CONCLUSIONS OF LAW ARE CORRECT

Complainants argue that the Presiding Officer erred in finding that (i) the damage, loading and transport of the damaged container was not a violation of Section 41102(c); and (ii) the delay in the delivery of the container was not a violation of 41102(c). As explained further below with respect to each of these allegations, these Exceptions are without merit and must be denied.

1. *Damage To And Loading And Transport Of The Damaged Container Did Not Violate Section 41102(c)*

The Presiding Officer correctly concluded that the damage to, loading of and transport of the damaged container did not violate Section 41102(c).

Complainants argue that under the decision of the administrative law judge in *Bishma International v. Chief Cargo services, Inc., et al.*, 32 S.R.R. 353 (I.D. 2011), a carrier violates section 41102(c) by failing to establish just and reasonable regulations or practices or by failing to observe and enforce the regulations it has established.

Exceptions at p. 5.⁶ Complainants then argue that because it was not Hapag-Lloyd's normal practice to ship damaged containers, the transport of this one damaged container, which the Presiding Officer found to be accidental, is a violation of Section 41102(c).

This argument is wholly lacking in merit.

(a) The Scope of Section 41102(c) Does Not Extend To The Damage To, Or Loading And Transport Of, Container MOGU2002520

As an initial matter, the loading and transport of container MOGU2002520 cannot constitute a violation of section 41102(c) because the Commission has held, based on the plain language of the statute, that this provision does not apply to the transportation of cargo:

Sections 17 and 10(d)(1) do not empower the Commission to address unjust or unreasonable carrier activity that relates to the transportation of property, which is the subject of COGSA. They address only activities which occur before or after the water transportation, the period COGSA does not cover.

Definition of "Package," supra, at 114. COGSA is applicable 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.*

⁶ Under 46 C.F.R. §502.227(5), the decision of the administrative law judge in *Bishma* is inoperative in light of the exceptions to that decision that have been filed with the Commission. Moreover, that decision appears to be inconsistent with Commission precedent requiring that a complainant demonstrate that a respondent's tariff constitutes an unreasonable practice or regulation in order to sustain a violation of Section 41102(c). See, *Lake Charles Harbor and Terminal District v. Port of Beaumont Navigation District of Jefferson County, Texas*, 10 S.R.R. 513, 518 (ALJ 1968).

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). The damage to container MOGU2002520 occurred while the container was being loaded on the vessel. Finding #51. Accordingly, the damage to this container was covered by COGSA. Moreover, its subsequent loading and transport were also covered by COGSA. Thus, the loading and transport of this container, as a matter of law, cannot be the basis for a claim under Section 41102(c) which, by its terms, applies only to receiving, handling, storing or delivering property.

(b) Complainants Have Not Alleged, Much Less Proven, Necessary Elements Of A Section 41102(c) Violation

Even if Section 41102(c) applies to the loading and transport of the damaged container, Complainants have not alleged, much less proven, the necessary elements of a Section 41102(c) violation.

As the following analysis demonstrates, the Commission's jurisprudence with respect to Section 41102(c) (formerly 10(d)(1) and, prior to that Section 17 of the Shipping Act, 1916) can be summarized as follows: a complainant must demonstrate either (i) a pattern of behavior constituting regulations or practices; or (ii) in a case involving a single incident, aggravating behavior on the part of the respondent (such as demanding payment of amounts not lawfully due or double billing and/or knowingly providing false information to the complainant).

The Commission has long held that a single act or incident in and of itself does not and cannot constitute "regulations and practices" for purposes of Section 41102(c). *Kamara v. Honesty Shipping Service and Atlantic Ocean Line*, 29 S.R.R. 321 (Settlement Officer 2001); *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.*, 25 S.R.R. 1273, 1276

(Settlement Officer 1990); *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).

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 can not 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).

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 their own ruling. 8 F.M.C. at 182. In the initial decision adopted by the FMC, the ALJ stated:

Similarly, even should it be found that granting allowances in five instances constituted a 'practice,' there is no violation in the absence of a finding that the practice was unjust or unreasonable.

8 F.M.C. at 199. He then went on to state:

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 *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).

The foregoing cases all stand for the proposition that a single act or occurrence does not constitute a violation of Section 41102(c) (former section 10(d)(1)).⁷ Indeed, *Stockton* suggests that even a series of five instances may not constitute a practice.

Although a pattern of conduct generally is required to establish a violation of what is now Section 41102(c), the Commission has found violations of Section 41102(c) in cases involving a single shipment where there are additional aggravating factors present. Thus, such a violation may be found where the respondent either demanded payment of amounts not lawfully due and/or engaged in a pattern of knowingly providing false information about the shipment or refusing to provide information about the

⁷ See also, *Lake Charles* at note 6, *supra.*, which supports the same conclusion.

shipment.⁸

The decisions of the Commission and its administrative law judges relied upon by Complainants are entirely consistent with the conceptual framework set forth above and do not support a conclusion that Hapag-Lloyd violated Section 41102(c) in this case. In *Houben v. World Moving Services*, 31 S.R.R. 1400 (FMC 2010), the Commission found that a NVOCC violated Section 41102(c) when it failed to pay its destination agent for services rendered, despite having received payment from the complainant shipper, which resulted in the complainant having to pay the destination agent in addition to having already paid the NVOCC. This is effectively the same as double billing. Relying on *Houben*, in *Atsitsobui v. Global Freightways*, 32 S.R.R. 47 (Settlement Officer, 2011), affirmed 32 S.R.R. 162 (FMC 2011), the settlement officer found that a NVOCC violated Section 41102(c) when it cleared vehicles for export via Norfolk when they were in fact located in Baltimore, failed to disclose this to the customer, and then incorrectly informed the customer that the vehicles had been seized by Customs because they were stolen, rather than the real reason for the seizure, which was the improper paperwork for export clearance. This constituted providing false information to the customer. Finally, in *Bishma*, supra., the administrative law judge found that the release of three separate shipments moving on three separate bills of lading over a period of 3 months constituted

⁸ See, *Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.*, 28 S.R.R. 534 (FMC 1998)(double billing); *Bernard & Weldcraft Welding Equipment v. Supertrans International, Inc.*, 29 S.R.R. 1348, 1354-55 (ALJ 2003)(double billing and/or refusal to release cargo without valid reason); *Miller v. French International Movers, Inc.*, 28 S.R.R. 1495, 1496 (Settlement Officer 2000) (repeated and continued deception); *Jordan Valley Agriculture Company v. Africa Mid-East Line*, 28 S.R.R. 1328, 1330 (Settlement Officer 2000)(pattern of knowingly providing false information); *Moreka v. Eastern Mediterranean Shipping Corporation*, 28 S.R.R. 1127, 1128 (Settlement Officer 1999)(pattern of deception and misinformation); *J&D Services International, Inc. v. Ocean Eagle Container Line, Inc.*, 27 S.R.R. 1062, 1062 (Settlement Officer 1997)(pattern of deliberate misinformation).

a violation of Section 41102(c). Thus, *Bishma* did not involve a single act or occurrence, and is distinguishable from this case.

Having established that under Commission precedent Complainants must show a pattern of conduct constituting regulations or practices, or aggravating conduct on the part of Hapag-Lloyd, a review of the factual record demonstrates that Complainants have failed to meet either of these criteria.

The loading and transport of container MOGU2002520 involves a single incident or occurrence. Just as in *Deringer*, there is nothing in the record to demonstrate that Hapag-Lloyd's conduct in this case constitutes a regulation or practice. Indeed, Complainants' Brief, at pages 4-5, acknowledges that this was an isolated incident of the type the foregoing decisions indicate is not a violation of Section 41102(c).

There also is nothing in the record to support any allegation that Hapag-Lloyd was demanding any additional payment from Complainants or anyone else, much less payment of amounts already paid or not otherwise due. Further, the record is clear that Hapag-Lloyd did not refuse to provide information and did not provide false or misleading information. Michael Lyamport of Limco testified that Hapag-Lloyd never refused to provide information about the container and never told Limco anything that wasn't true with respect to the container. Transcript, p. 699. Lines 4-11.

Thus, none of the prerequisites for finding a violation of Section 41102(c) based on either a pattern or conduct or on a single shipment or incident is present here, and the section is inapplicable to this case as a matter of law.

(c) **Hapag-Lloyd's Conduct Was Reasonable**

Even if Section 41102(c) is applied to Hapag-Lloyd's conduct with respect to the loading and transport of the damaged container (which, for the reasons set forth in the preceding paragraphs it should not), Hapag-Lloyd's conduct in loading and transporting the damaged container was just and reasonable.

The record is clear that the loading of the damaged container was an accident. Findings #71-73. Hapag-Lloyd has found no precedent supporting the proposition that the accidental loading of a damaged container constitutes a violation of Section 41102(c), and Complainants cite none. In fact, all of the precedent located by Hapag-Lloyd supports the opposite conclusion.

In *Patricia Eyes v. Wallenius Wilhelmsen Lines*, 30 S.R.R. 1064 (ALJ 2006), administratively final August 11, 2006, a Commission administrative law judge found that the intentional transportation of damaged cargo is not necessarily unreasonable, particularly where the carrier was faced with two less than ideal choices. Complainants question the relevance of this decision, claiming that there was a reasonable choice in this case, i.e., to return the damaged container to the shipper before shipment to Poland.

Exceptions, p. 7.

Complainants' argument suffers from three flaws. First, it incorrectly assumes that Hapag-Lloyd consciously chose to transport the damaged container, which the record shows it did not. Thus, it is inappropriate to discuss a "decision" or "choice" on the part of Hapag-Lloyd in this context. Second, if anyone in this case had a reasonable choice it was the Complainants, who could have and should have chosen to allow Hapag-Lloyd to transload the cargo, since it could have done so more quickly and efficiently than Complainants. Finding #63. Had Complainants agreed to this course of action, the cargo

would have been loaded on the next vessel in an undamaged container and arrived at destination without difficulty. Third, it was Complainants' stubborn and unreasonable insistence that they transload the cargo themselves, and their patently dishonest attempt to recover sums far in excess of their cost, that created the delay in resolving the dispute and led to the inadvertent loading of the container.

Complainants also make much of the fact that the damaged container was loaded contrary to their instructions. However, the Commission has also held that claims for loss of or damage to cargo or for damages due to failure to follow instructions to ship on a particular voyage do not fall within the Shipping Act. See, *Pilgrim Furniture Co., Inc. v. American-Hawaiian Steamship Company*. 2 U.S.M.C. 517 (USMC 1941), cited in *Altieri, supra*.

In light of the foregoing, Hapag-Lloyd's conduct with respect to the damage, loading and transport of container MOGU2002520 did not violate Section 41102(c) of the Shipping Act. *41102(c)*

2. *Delay Of Container MOGU2002520 Was Not A Violation of Section 41102(c)*

Complainants argue that the delay of the damaged container in Germany was a violation of Section 41102(c) because Hapag-Lloyd failed to observe reasonable practices in connection with that delay. However, for the reasons set forth below, the Commission must find that the Presiding Officer correctly held that Hapag-Lloyd's conduct was reasonable and did not violate the Shipping Act.

(a) Section 41102(c) Does Not Apply To Transportation

As a matter of law, delay to the cargo cannot violate Section 41102(c). As noted above at pages 15-16, Section 41102(c) does not apply to the transportation of cargo.

Since any delay in Germany occurred during the transportation service being provided by Hapag-Lloyd (i.e., prior to release from tackle at the port of discharge), that delay is also part of the transportation covered by COGSA and cannot be the basis for a claim under Section 41102(c).

(b) Mere Delay Is Not A Violation Of Section 41102(c)

Even if Section 41102(c) applies to the delay in Germany (which it does not), the Commission's precedent under Section 41102(c) indicates that mere delay does not constitute a violation of this prohibition. The Commission stated in *Meyan SA v. International Frontier Forwarders, supra.*, that:

We note that even if a delay of two months did occur, it is unlikely that mere delay in shipping the cargo would amount to a violation of section 10(d)(1) of the Shipping Act, 46 U.S.C. §41102(c). Previous cases have found a Shipping Act violation for prolonged delay only when additional factors are present, such as a pattern of deception.

30 S.R.R. 1397, 1400, n. 2 (FMC 2007). There are no such additional factors present here, and thus no violation of Section 41102(c). Several Findings of the Presiding Officer, to which Complainants do not except, establish that Hapag-Lloyd's conduct was reasonable and did not involve a pattern of deceit or deception. See, e.g., Findings #81, 83, 89, 90 and 94. The Presiding Officer also found no such additional factors. Initial Decision, p. 26.

Complainants argue that the initial refusal to deliver the container to Poland and later threat of abandonment are aggravating factors that support a finding of a violation of Section 41102(c). This argument is unsupported by the record. As explained above at page 13, Hapag-Lloyd did not "initially refuse" to deliver the container to Poland as alleged by Complainants but was, as demonstrated by undisputed evidence, seeking alternative means to deliver the cargo as from early August. Moreover, while

Complainants correctly note that Hapag-Lloyd threatened to abandon the cargo on September 23, 2008 (Exhibit 96; Exceptions, p. 9), Hapag-Lloyd obviously did not abandon the cargo, either in September or when it later threatened to do so in November of 2008 (see Limco Exhibit 7), since it thereafter delivered the damaged container to Poland and all three containers had been in Poland for approximately two months when liquidated by Int'l TLC.⁹ The threats to abandon the cargo can only be reasonably interpreted as attempts by a frustrated carrier to obtain some clear guidance and assistance in resolving the problem with respect to damaged container MOGU2002520.

***(c) Complainants' Other Arguments With Respect To
Delay Are Devoid Of Merit***

Complainants' Exceptions make two additional arguments with respect to the delay of container MOGU2002520, both of which are devoid of merit.

Complainants argue that the container was delayed because the consignee, Baltic Sea Logistics, did not want to accept it due to the damage it had suffered. Exceptions, p. 9; Exhibit 93, p. 4. In so arguing, Complainants are attempting to portray Hapag-Lloyd as the sole cause of the delay. This allegation is inconsistent with other, undisputed Findings.

The Presiding Officer found that the consignee, Baltic Sea Logistics, was not in contact with the ultimate consignee of the cargo and did not have commercial documents for customs clearance. Findings #82 and #88. The Presiding Officer also found, on the basis of undisputed evidence, that Baltic Sea Logistics had not authorized anyone to

⁹ Given that the cargo had been in Poland for approximately two months before being liquidated by Int'l TLC, that Complainants' ignored a demand for payment made during that period (Finding #110), and that Hapag-Lloyd was not involved in the liquidation (Finding #124), even if Hapag-Lloyd is found to have violated Section 41102(c), Complainants have not and cannot demonstrate the proximate causation necessary to sustain an award of reparations against Hapag-Lloyd.

name it as consignee of the containers and could not provide instructions with respect to same (Finding #92), and that Baltic Sea Logistics was not paid for its services and, in November of 2008, refused to provide any further services with respect to these containers (Finding #97). Based on these other, undisputed Findings, it is reasonable to conclude that the damage to container MOGU2002520 was not the sole reason Baltic Sea Logistics¹⁰ did not wish to accept the container. The logical conclusion is that it did not wish to accept a damaged container for which it had not agreed to act as consignee and for which it did not have the necessary documents,¹¹ particularly since it had no contact with the ultimate consignee.¹²

In any event, Complainants' argument that the delay of container MOGU2002520 in Germany caused it damage is a red herring for two reasons. First, the commercial documents, which would have been needed to clear customs in Poland, were not available in August, when the container was originally scheduled to arrive in Gdynia.

¹⁰ Regardless of whether Baltic Sea Logistics refused to accept MOGU2002520 because it was damaged, because it had not agreed to act as consignee of same and had no instructions or documents with respect to the container, or both, the fact remains that Baltic Sea Logistics was not the agent of Hapag-Lloyd (Finding #18), and any act or omission on the part of Baltic Sea Logistics does not and cannot constitute a violation of the Shipping Act on the part of Hapag-Lloyd.

¹¹ Complainants continue to argue that commercial documents were delivered on September 8, 2008, or at the very latest by October 5, 2008. Exceptions, p. 10. The Presiding Officer found that the commercial documents were delivered on or before October 7, 2008. Finding #91. Thus, the portion of the delay attributable to the lack of documents is longer than Complainants allege (meaning that any delay attributable to other factors is necessary shorter). It is also not clear from the record what documents were sent on or before that date, or whether those documents were sufficient for customs purposes. Exhibit 97, p. 1. Evidence in the record strongly suggests that whatever documents were sent on or before October 7 were not adequate. On November 13, 2008, Baltic Sea Logistics wrote an e-mail referring to "failings and other problems with releasement of the cargo." Complainants' Exhibit 102. Moreover, Ms. Ossowska testified that the cargo was loaded into a different container only when the consignor sent the commercial documents. Testimony of Katarzyna Ossowska. Transcript pp. 638-639. From these two separate pieces of evidence, it must be concluded that the necessary documents were probably not provided until November of 2008, rather than in early September as contended by Complainants, or in October, as concluded by the Presiding Officer.

¹² Complainants indirectly challenge Finding #82, alleging that the testimony of Ms. Ossowska (Transcript, pages 671-672) shows that Baltic Sea Logistics was in touch with the consignee. This is not an accurate description of the testimony. Lines 4 through 7 on page 672 show that Ms. Ossowska had no actual knowledge of any contact between Baltic Sea Logistics and the ultimate consignee.

Finding #91. Thus, even if MOGU2002520 had not been delayed in Germany, it would have been delayed in Poland due to the lack of these documents. As a result, a significant portion of the delay in Germany must be attributed to the failure of Complainants and their agents to prepare and forward the necessary commercial documents.

Second, even if container MOGU2002520 had arrived in Gydnia prior to November 21, 2008, Complainants could not have shipped all five containers together as they allegedly planned because they had not paid the freight on containers MOGU2051660 and MOGU2101987 at that time. Finding #42. On November 21, 2008, Complainants picked up two containers from the port of Gydnia. Finding #33. Thus, after that date, prompt arrival of MOGU2002520 was not urgent since Complainants could no longer move all five containers together. Moreover, there was no market for the plywood in container MOGU2002520, as evidenced by the non-sale of the plywood in the two containers picked up on November 21, 2008. Finding #34. In other words, the delay is not only attributable in significant part to Complainants and/or their agents, but any harm allegedly caused by the delay is greatly exaggerated.

Hapag-Lloyd made *bona fide* and reasonable efforts to move damaged container MOGU2002520 to Poland promptly (Findings ##81, 82, 83 and 90; Exhibits 93 and 94), despite receiving contradictory instructions with respect to the container (Finding #89). While these efforts may not have been as successful as would have been ideal, there was no failure by Hapag-Lloyd to act reasonably in connection with the delay and hence, no violation of Section 41102(c).¹³

¹³ Complainants allege that the cargo, upon arrival, was placed in container MOGU2002520, which was not safe to use in transporting the cargo. In this regard, Finding #100 is erroneous, because nothing in Exhibit 93, p. 4 suggests that MOGU2002520 could only be transported empty. Indeed, the record reflects that

**D. Complainants' Interpretation of Section 41102(c) Is
III-Advised As A Matter Of Law And Policy**

The interpretation of Section 41102(c) advocated by Complainants would be contrary to the plain language of the statute, Commission precedent, Congressional intent, principles of statutory interpretation, and sound policy.

Complainants argue that:

If this case becomes a precedent for the proposition that an accident or an aberration of reasonable regulations or practices is justification for failure to observe or enforce the normal practices and procedures, virtually any act by a carrier, NVOCC or ocean transportation intermediary who fails to observe, comply, and enforce its reasonable procedure or practices could claim an accident or aberration and then be exonerated. Such interpretation would render the purpose of Section 10(d)(1) of the Shipping Act ineffective and thwart the Congressional intent to protect shipping consumers.

Exceptions, p. 8. In other words. Complainants argue for a "strict liability" interpretation of Section 41102(c), wherein any deviation from normal practices would be considered unjust and unreasonable and make the carrier liable for any damages suffered as a result of such departure. As demonstrated below, Complainants' position would lead to absurd results.

The plain language of Section 41102(c) refers to "just and reasonable regulations and practices." The use of the terms "just" and "reasonable" necessarily means that factual considerations must be taken into account. The Commission has long held that use of these terms means that not all conduct is prohibited, but only that conduct which is undue, unjust or unreasonable. See, e.g., *Western Overseas Trade and Development Corp. et al. v. Asia North America Eastbound Rate Agreement*, 26 S.R.R. 651, 658 (1992). Reasonableness is a factual issue, judged according to circumstances at the time.

MOGU2002520 was used to transport the cargo contained therein when it was picked up by truck in Poland. Transcript, p. 325.

Seacon Terminals, Inc. v. Port of Seattle, 26 S.R.R. 886, 899, n. 29 (FMC 1993). The Commission had also held that the unreasonableness must be demonstrated by substantial proof. *Lake Charles Harbor and Terminal District v. Port of Beaumont Navigation District of Jefferson County, Texas*, 10 S.R.R. 1037, 1041, n. 3 (FMC 1969). Thus, under the plain language of Section 41102(c), whether or not an act or course of conduct violates that provision is a factual issue to be decided on a case-by-case basis. Complainants' formulation of the law would depart from the plain language of the statute, read out the factual determination inherent in determining what is "just and reasonable," and hold carriers strictly liable for any deviation from their normal practice. Such a radical departure from the language of the statute and Commission precedent is inappropriate.

Moreover, Complainants' allegation that the interpretation of Section 41102(c) advocated by Hapag-Lloyd would enable carriers to exonerate themselves in any given situation is incorrect. A carrier that is able to demonstrate that its practices and conduct are just and reasonable under the relevant set of factual circumstances would be exonerated, but one that was not able to meet that standard would not. Hapag-Lloyd submits that this is how Section 41102(c) is intended to operate -- on a case-by-case basis taking into account the relevant facts -- rather than the strict liability regime advocated by Complainants.

Complainant's interpretation of Section 41102(c) is also contrary to basic principles of statutory construction. A term appearing in several places in a statute is to be read the same way each time it appears. *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). The Commission has interpreted the terms "unjust" and "unfair" as used in

Section 41102(a) to mean that a shipper does not engage in such conduct through a simple failure to pay freight. See, 46 C.F.R. § 545.2, which states:

An essential element of the offense is use of an 'unjust or unfair device or means.' In the absence of evidence of bad faith or deceit, the Federal Maritime Commission will not infer an 'unjust or unfair device or means' from the failure of a shipper to pay ocean freight. An 'unjust or unfair device or means' could be inferred where a shipper, in bad faith, induce the carrier to relinquish its possessory lien on the cargo and to transport the cargo without prepayment by the shipper of the applicable freight charges.

In other words, a simple failure by a shipper to pay freight is not unjust or unfair. To date, the Commission had interpreted Section 41102(c) in a manner that is consistent with the foregoing interpretation of Section 41102(a) by requiring that there be some course of conduct that is unreasonable or, in the case of a single shipment, an improper demand for payment or deceit on the part of the carrier. Thus, the Commission is interpreting these two bookend statutory provisions in a like fashion.

If the Commission were to adopt Complainants' interpretation of Section 41102(c), the foregoing consistency would be ended and the Commission would be interpreting two similar provisions using the same language in very different fashions. Complainants would read Section 41102(c) to mean that any breach by a carrier of any "carrier obligation" imposed by any source (e.g., the Shipping Act, COGSA, the Federal Bill of Lading Act) would be a violation of Section 41102(c), without regard to reasonableness. This would mean, for example, that any failure to deliver cargo would be a violation of the Shipping Act, even if that failure would be otherwise excused under COGSA.

If the Commission adopts Complainants' view of Section 41102(c), then it must immediately repeal 46 C.F.R. §545.2 and hold that any breach by a shipper of any

“shipper obligation” would violate Section 41102(a). This would include any failure to pay freight, any misdescription of cargo, any misdeclaration of cargo weight, any failure to provide accurate manifest information for submission to Customs or other authorities, or any breach of any other “shipper obligation” arising under any source whatsoever (e.g., Shipping Act, COGSA, Federal Bill of Lading Act, Customs law). Hapag-Lloyd submits the status quo is preferable to the regime that would result from Complainants’ interpretation of Section 41102(c).

Complainants’ position in this proceeding is also contrary to another basic principle of statutory interpretation, namely that in the absence of any express repeal or amendment, a new statute is presumed to be in accord with the legislative policy embodied in existing statutes. 2B Singer & Singer, *Statutes and Statutory Construction*, 7th Ed. 2008, p. 207. When there is tension between two statutes, they are to be construed to give effect to both. *Id.*, p. 225.

Here, Section 41102(c) must be construed to give effect to both it and COGSA. The provisions of Section 41102(c) have their antecedents in Section 17 of the Shipping Act, 1916, which was in effect was COGSA was adopted in the 1930s. Similarly, COGSA was in effect when what is now Section 41102(c) was adopted as section 10(d)(1) of the Shipping Act of 1984. In other words, when it enacted COGSA and the current version of the Shipping Act, Congress was aware of the existence of the other statute and must be presumed to have intended for the two statutes to be consistent with one another.

However, the interpretation of Section 41102(c) advocated by Complainants would violate this principle of statutory construction by expanding Section 41102(c) to

such an extent that it swallows COGSA. Under COGSA, carriers can and do disclaim liability for delays in delivery of cargo, there is a 1-year statute of limitations on claims for cargo loss or damage, and carriers may limit their liability cargo loss or damage to \$500 per package. If Complainants prevail in this case, the Commission will in effect be saying that these rights and protections, which have been granted to carriers by Congress, must yield to a determination by the Commission that a carrier did something that deviates from its normal practices and procedures.

Section 41102(c) of the Shipping Act should continue to be interpreted in a manner that is consistent with COGSA, and in which it does not apply to the transportation of cargo or claims for loss, damage or delay arising from same.

V. CONCLUSION

The Initial Decision of the Presiding Officer, both in terms of Findings and conclusions of law is strongly supported by the weight of the evidence and Commission precedent. As explained in this Reply, Complainants' Exceptions as to issues of both fact and law lack merit. Moreover, Complainants' reading of Section 41102(c) is a radical departure from existing law, is unsupported by precedent and basic principles of statutory interpretation, and would lead to absurd results for the industry regulated by the Commission. For all these reasons, Complainants' Exceptions should be denied and the Initial Decision affirmed.

VI. ORAL ARGUMENT

Hapag-Lloyd believes that oral argument would not enhance the Commission's understanding of the limited issues before it on Exceptions and is unnecessary.

Respectfully submitted,



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March 27, 2012

Certificate of Service

I hereby certify that I have this 27th day of March, 2012, served a copy of the foregoing Reply of Respondents Hapag-Lloyd AG and Hapag-Lloyd (America), Inc. on all parties of record in this proceeding as follows:

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