

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 10-06

**YAKOV KOBEL AND VICTOR BERKOVICH
COMPLAINANTS,**

v.

**HAPAG-LLOYD AG, HAPAG-LLOYD AMERICA, INC.,
LIMCO LOGISTICS, INC. AND INTERNATIONAL TLC, INC.
RESPONDENTS.**

**RESPONDENT LIMCO LOGISTICS, INC.'S EXCEPTIONS TO REMAND INITIAL
DECISION AND BRIEF IN SUPPORT THEREOF**

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Pursuant to Rule 227 of the Federal Maritime Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.227 (2013), Respondent Limco Logistics, Inc. ("Limco") hereby respectfully submits its Exceptions to the Remand Initial Decision (hereinafter, "Remand ID" or "RID"), served in this proceeding on July 30, 2014. As set forth more fully below, Limco challenges the conclusion in the Remand ID that Limco violated Section 10(d)(1) of the Shipping Act by following the instructions of the Complainants' designated forwarder to make changes to three house bills of lading. In addition, Limco challenges the Remand ID's calculation of recoverable damages.

I. FACTUAL AND PROCEDURAL BACKGROUND

This proceeding arises in connection with the ocean transportation of five containers from Portland, Oregon to Gdynia, Poland during the period May-December, 2008. Initial Decision, Findings of Fact ("Findings") 5, 26, 29, 41, 76, 103. Complainants engaged International TLC, Inc. ("ITLC") to act as their forwarding agent with respect to the transportation of the five containers at issue. Findings 5, RID at 6. ITLC thereupon engaged Limco - a licensed non-vessel operating common carrier ("NVOCC") - to provide ocean transportation for the five containers from Portland, Oregon to Gdynia, Poland. Findings 3, 7. Limco, in turn, engaged Hapag-Lloyd to act as the underlying ocean carrier for the containers. Findings 7.

Limco issued house bills of lading covering the five containers based on information provided by ITLC. Findings 13, 24, 27, 37, 39, 49. Each of the bills of lading at issue listed one of the Complainants as shipper and several individuals, including one of the Complainants, as consignees.¹ *Id.* In addition, the bills of lading listed a destination agent in Poland selected by ITLC - Baltic Sea Logistics ("Baltic"). *Id.*

¹ It appears that all the consignees were associated in some way with the Complainants, and that the Complainants retained ownership interests in the cargo. Findings 1.

The first two of the five containers were transported to Poland in the normal course, arriving in July 2008. Findings 26, 29. These two containers remained in demurrage status at the Port of Gdynia until they were picked up by the named consignees in November 2008. Findings 33. The next two containers were also transported to Poland without incident, arriving in Gdynia in September 2008 (the “September Containers”), but consignees did not timely pay the freight charges or pick up those containers. Findings 41-44. As a result, these two containers began accruing demurrage charges at the Port of Gdynia. Findings 104. The last container was damaged during loading, and did not reach Gdynia until December 2008 (the “December Container”). Findings 51, 103. The consignees did not timely pick up the December Container, and it too entered demurrage status at the Port of Gdynia. Findings 113, 115.

By late October 2008, demurrage charges on the September Containers were mounting because Complainants had still not picked them up. Findings 104-105. Consequently, Hapag-Lloyd, Limco, ITLC and Baltic all began to engage in discussions designed to encourage and/or pressure Complainants into having their containers picked up in order to cut off the continued accrual of demurrage. Findings 105-108. For example, on October 28, 2008, Limco advised ITLC that Limco would consider confiscating the cargo unless arrangements were made to have the containers promptly picked up or otherwise disposed of. Findings 105. On November 10, 2008, Hapag-Lloyd advised Limco that, unless the September Containers were promptly picked up, Hapag-Lloyd would consider the cargo abandoned and subject to sale or disposal without further notice. Findings 106. On December 18, 2008, Baltic advised ITLC that it would unload and liquidate the September and December Containers if they were not picked up by the end of December 2008. Findings 107. On January 9, 2009, ITLC sent Complainants a “Final Demand”

for payment of freight on the September Containers and threatened to liquidate the cargo if the debt was not settled and the containers picked up by January 14, 2009. Findings 108.

Despite repeated requests made over several months that Complainants take delivery of the September and December Containers, Complainants appeared to be unwilling or unable to pay the accrued freight and demurrage charges and pick up the containers.² Findings 105-108, 112. The September and December Containers remained in storage in late February 2009 – almost five months after the September Containers arrived in Gdynia. Findings 113. On February 23, 2009, ITLC liquidated the cargo in the three containers and entered into an agreement to sell the cargo to a third party. Findings 117.

On March 2, 2009, ITLC instructed Limco to change the names of the shipper and consignee on the Limco bills of lading governing the three containers still in storage. Findings 118. Limco's general practice was to follow the instructions of the shipper's designated forwarder, and consistent with that practice, Limco accepted ITLC's instructions and amended the bills of lading. Findings 119, 122; RID at 13 (*citing* Trial Tr. at 392). At the time it followed ITLC's instructions to amend the bills of lading, Limco was not aware that ITLC had liquidated and sold the cargo, much less that such a liquidation would have been improper.³ Initial Decision at 31. There is no evidence in the record that ITLC advised Limco of the purpose of the requested amendments, and in particular, whether the requested amendments were for the purposes of a sale or disposition by Complainants, liquidation by ITLC or Baltic, or some other disposition.

² Although Complainants promised ITLC in January 2009 that they would promptly pay the freight and demurrage charges and pick up the containers, they made only a partial payment and failed to take delivery of the three containers. Findings 112.

³ As discussed below, Limco was not privy to the contractual arrangements between Complainants and ITLC, but could have reasonably assumed that ITLC had terms and conditions establishing contractual lien rights, as is typical in the forwarding industry.

Limco had no reason to question ITLC's continuing authority to issue instructions on behalf of Complainants. Although ITLC had in January 2009 previously advised Complainants of its intention to sell the cargo if the containers were not picked up, there is no evidence in the record that Complainants ever advised Limco that ITLC was no longer its agent, that ITLC had no right to issue instructions on its behalf, or that Limco should not follow any future instructions from ITLC. Accordingly, there is no evidence in the record to suggest, let alone prove, that Limco had reason to believe that ITLC was acting either beyond the scope of its authority as Complainants' agent or adverse to the interests of Complainants.

Complainants commenced this proceeding alleging multiple violations of the Shipping Act by Hapag-Lloyd, Limco and ITLC. Following discovery, a four-day hearing before Administrative Law Judge Erin M. Wirth, and a full briefing of the issues, ALJ Wirth issued an Initial Decision on February 14, 2012, dismissing Complainants' claims with prejudice. On July 12, 2013, the Commission affirmed the dismissal of all claims except the Section 10(d)(1) claims against ITLC and Limco, and remanded this case for further proceedings to determine whether Limco and ITLC violated Section 10(d)(1) of the Shipping Act. *See Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1720 (FMC 2013) (hereinafter, "Remand Order"). The Commission outlined the issues on remand relating to Limco as (1) whether Limco established just and reasonable regulations and practices with respect to changing the bills of lading, and, if so, (2) whether Limco failed to observe and enforce its reasonable practice. *See Remand Order*, 32 S.R.R. at 1739.

On July 30, 2014, ALJ Wirth issued the Remand ID holding Limco liable for violation of Section 10(d)(1) of the Shipping Act and awarding damages in the amount of \$126,072, plus interest. The Remand ID determined that Limco had properly established a just and reasonable

practice of following the instructions of the shipper's forwarder to amend bills of lading, and that Limco had, in fact, observed and enforced that reasonable practice in this case. Remand ID at 14. Nonetheless, the Remand ID held that Limco violated Section 10(d)(1), suggesting that Limco was not entitled to observe and enforce its just and reasonable practice under the circumstances of this case. In doing so, the Remand ID not only failed to follow the plain language of Section 10(d)(1) and the mandate of the Remand Order, but also relied on speculative assumptions and conclusions unsupported by – and inconsistent with – the evidence of record. In addition, the Remand ID calculated damages without taking into account the demurrage costs and other expenses incurred by the cargo, thus placing the Complainants in a better position than they would have been if the cargo had not been liquidated by ITLC.

II. LIMCO'S EXCEPTIONS TO THE REMAND INITIAL DECISION

Limco takes exception to the following conclusions, findings, and statements contained in the Remand ID:

1. The evidence supports finding Section 10(d)(1) Shipping Act violations by Limco. (RID at 2, 14.)
2. Limco failed to establish, observe, and enforce just and reasonable regulations and practices in changing the bills of lading at ITLC's request, when it knew, or should have known that ITLC was acting adversely to Complainants' interests. (RID at 2, 14.)
3. Complainants have met their burden to demonstrate Section 10(d)(1) Shipping Act violations by Respondent Limco. (RID at 2.)
4. Limco was notified about the liquidation and/or sale by ITLC prior to following ITLC's instructions to amend the bills of lading. (RID at 12.)
5. There is some dispute as to whether Limco knew about the liquidation by ITLC prior to following ITLC's instructions to amend the bills of lading. (RID at 13.)
6. Limco knew or should have known ITLC intended to liquidate the cargo. (RID at 14.)
7. Limco knew or should have known that ITLC was without legal authority to liquidate the containers. (RID at 14.)

8. Limco knew or should have known of the improper liquidation by ITLC. (RID at 14.)

9. Limco knew or should have known that ITLC was contemplating an improper liquidation that would be adverse to the interests of Complainants. (RID at 14.)

10. Without the bills of lading changes, the liquidation would not have been effective. (RID at 14.)

11. Limco was not entitled to rely solely on the freight forwarder's request to amend the bills of lading because Limco knew or had reason to know that the freight forwarder was acting contrary to the principal's interests. (RID at 14.)

12. The record reflects that Limco knew that ITLC was investigating and planning to liquidate the containers. (RID at 14.)

13. Limco failed to deliver the three liquidated containers to Complainants in Poland. (RID at 14.)

14. By changing the bills of lading for three containers when it knew or had reason to know that the change was requested due to an improper liquidation, Limco violated Section 10(d)(1) of the Shipping Act.

15. Complainants' losses were proximately caused by the Limco's conduct in following the instructions of Complainants' designated forwarding agent. (RID at 15, 18.)

16. The evidence demonstrates that as a consequence of the violations by ITLC and Limco, Complainants have sustained \$126,072 in actual injury for loss of the three containers and their cargo, transportation and freight charges. (RID at 18.)

17. Limco's failure to follow its just and reasonable practice regarding following the instructions of the shipper's designated forwarding agent is a violation of Section 10(d)(1) of the Shipping Act.

18. Limco's isolated act of changing the bills of lading based on the instructions of the shipper's designated forwarding agent constitutes a violation of Section 10(d)(1) of the Shipping Act.

III. LIMCO'S CONDUCT CONSISTENT WITH ITS CLEARLY JUST AND REASONABLE PRACTICE CANNOT CONSTITUTE A VIOLATION OF SECTION 10(d)(1)

The Remand ID's determination that Limco violated Section 10(d)(1) is fundamentally at odds with the plain language and policy underlying Section 10(d)(1) as well as the Commission's Remand Order in this case. Unlike other provisions of Section 10 of the Shipping Act, Section

10(d)(1) is not a “prohibited acts” provision describing particular acts or specific conduct that violates the Shipping Act. Instead, Section 10(d)(1) is solely directed to the establishment, observance and enforcement of just and reasonable *practices*. Specifically, Section 10(d)(1) provides that:

A common carrier, marine terminal operator or ocean transportation intermediary may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

46 U.S.C. §41102(c) (2013). Thus, pursuant to the plain language of Section 10(d)(1), an OTI like Limco can violate Section 10(d)(1) only if it fails to establish, observe and enforce a reasonable practice. As the Commission stated in its Remand Order, the relevant questions with respect to Limco are:

If Limco failed to establish just and reasonable regulations and practices with respect to changing bills of lading, it violated section 10(d)(1). If it is found, however, that Limco established just and reasonable regulations and practices for changing bills of lading, it must be asked whether Limco failed to observe and enforce them with respect to Complainants’ three containers . . .”

Remand Order, 32 S.R.R. at 1739.

In the case at hand, there can be no doubt that Limco’s practice of accepting the instructions of the shipper’s designated forwarder with respect to amendments to the bills of lading is reasonable – as even the Remand ID acknowledges. RID at 14 (“Limco established the just and reasonable practice of changing bills of lading at the request of the freight forwarder”). Goods in international trade are often sold, resold, transferred or redirected while in the custody of the carrier, requiring amendments to the bill of lading. Moreover, the resale or reassignment of the goods is particularly common in cases where the cargo has not been promptly picked up at destination and begins to accrue substantial demurrage, detention and/or storage charges. There is, accordingly, nothing unusual or inherently suspicious about a request for a change of the

consignee on a bill of lading – particularly when that request comes from the shipper’s designated agent and fiduciary. Similarly, there is also no doubt that Limco followed its reasonable practice in this case by accepting and following the instructions of Complainants’ designated forwarder.

The Remand ID nonetheless held Limco liable for following the instructions of the shipper’s designated forwarder – a practice the Remand ID itself concedes is a just and reasonable practice. Thus, the Remand ID reaches the anomalous conclusion that Limco violated Section 10(d)(1) because it established and observed a just and reasonable practice. In other words, the Remand ID holds that Limco violated Section 10(d)(1) by *complying* with its requirements. This result stands in direct contradiction to the Commission’s Remand Order in this case. Remand Order, 32 S.R.R. at 1730 (“If the conduct of a common carrier, MTO or OTI does not constitute a failure to observe and enforce established practice, the conduct is not a violation of section 10(d)(1), regardless whether the conduct involves a single transaction or multiple occurrences”).

Limco recognizes that the Remand ID concluded that Limco should not have followed its otherwise reasonable practice under the circumstances of this case because Limco “should have known” that ITLC had wrongfully liquidated the cargo. For the reasons discussed in detail below, Limco strongly disagrees with the conclusion that Limco knew or should have known that ITLC had wrongfully liquidated the cargo. But even if it was a mistake for Limco to follow its otherwise reasonable practice based on the particular facts of this case, which Limco strenuously denies, such a simple act of misjudgment or negligence consistent with and undertaken in reliance on a clearly reasonable practice – not to mention a practice widely

adopted by the industry at large – simply cannot constitute a violation of Section 10(d)(1).⁴ *See* Remand Order, 32 S.R.R. at 1730 (conduct that does not constitute a failure to follow a reasonable practice is not a violation of Section 10(d)(1)).

The practical effect of holding that conduct consistent with a reasonable practice violates Section 10(d)(1) would be to undermine the policy underlying Section 10(d)(1) and ultimately frustrate its purpose. The purpose of requiring both the establishment and observance of reasonable practices is to encourage carriers and OTIs to act in a uniform and consistent manner. Indeed, uniformity and consistency is the very essence of a practice. *See Investigation of Practices of Stockton Elevators*, 8 F.M.C. 181, 200-201 (FMC 1964)(“The essence of a practice is uniformity. It is something habitually performed and it implies continuity . . . the usual course of conduct”). But the establishment and observance of reasonable practices cannot be beneficial or meaningful to the industry or the shipping public, if carriers and OTIs cannot be assured that conduct consistent with a reasonable practice will be considered presumptively reasonable. If a carrier or OTI cannot follow its own reasonable practices as a matter of course without fear of being second-guessed based on a *post hoc* review of the particular facts and circumstances of each case, then there can be no uniformity or continuity and the incentives to establish and observe reasonable practices will be undermined.

Accordingly, as the Commission has already stated, a carrier or OTI that establishes and observes a just and reasonable practice should not be held to violate Section 10(d)(1).⁵ Given

⁴ If Limco’s conduct in reliance on the instructions of Complainants’ forwarder violated some other duty or law, or is in and of itself an act specifically prohibited by the Shipping Act, then Limco might nonetheless be held liable under the law addressing such conduct. But Section 10(d)(1) is solely concerned with the establishment and observance of reasonable practices, and so long as Limco established and observed a reasonable practice – as it clearly did here – it cannot be held to have violated Section 10(d)(1).

⁵ At a minimum, if the Commission were inclined to alter its position as outlined in the Remand Order and implement a policy under which carriers can be second-guessed for following as a reasonable practice, the facts and evidence necessary to establish a violation in such circumstances should meet a heightened evidentiary standard. At

that Limco established and observed a reasonable practice – indeed, a reasonable practice widely followed in the industry – Limco should not be held to have violated Section 10(d)(1) – particularly under the facts in this case. The Remand ID should be reversed as it applies to Limco and the Section 10(d)(1) claim against Limco should be dismissed.

IV. THE EVIDENCE OF RECORD DOES NOT SUPPORT THE REMAND ID’S CONCLUSION THAT LIMCO VIOLATED SECTION 10(d)(1) BY FOLLOWING THE INSTRUCTIONS OF COMPLAINANTS’ DESIGNATED FORWARDING AGENT TO AMEND THE BILLS OF LADING

A. The Remand ID Correctly Held That Limco’s Practice Of Following The Instructions Of The Shipper’s Designated Forwarding Agent Regarding Changes To Bills Of Lading Was A Just And Reasonable Practice Under Section 10(d)(1).

The Remand ID found that Limco had established and observed a practice of following the instructions of freight forwarders when making changes to bills of lading. RID at 13. Noting that “changes to bills of lading are within the scope of authority for the freight forwarder,” the Remand ID expressly held that Limco’s practice of following the instructions of forwarders was a just and reasonable practice consistent with the requirements of Section 10(d)(1). RID at 14 (“Limco established the just and reasonable practice of changing bills of lading at the request of the freight forwarder”).

As the Remand ID appears to implicitly acknowledge, it is standard industry practice for ocean carriers (both NVOCCs and, where applicable, VOCCs) to rely on the instructions of the shipper’s designated forwarder.⁶ There are a number of good reasons why the practice of following the instructions of the forwarder is just and reasonable as well as sound policy. As a

a minimum, no carrier should be held liable for violating Section 10(d)(1) for anything less than clear, indisputable, and overwhelming evidence that observing an otherwise reasonable practice would be unreasonable under the circumstances. As discussed below, there is no such clear, indisputable and overwhelming evidence in the record of this case.

⁶ The Commission has noted in this case that in analyzing whether a carrier’s practice is just and reasonable, it is relevant to consider whether the practice is followed by the industry as a whole. *See* Remand Order, 32 S.R.R. at 1730.

practical matter, carriers must of necessity rely on the instructions of forwarders acting on behalf of their shipper-clients. The forwarder has the direct business relationship with the shipper, has the contact details for the persons responsible for handling transportation matters, and is typically charged with handling all communications with carriers on behalf of its shipper-client. Perhaps more to the point, it would be impracticable for carriers to contact the shipper to confirm every instruction received from the shipper's forwarder, or to investigate on a case-by-case basis whether the shipper's designated agent and fiduciary is trustworthy or acting within the scope of its fiduciary obligations to the shipper. Indeed, such a requirement would make the efficient handling and transportation of cargo all but impossible.⁷

Moreover, requiring a carrier to confirm with the shipper that the forwarder's instructions are authorized would undermine the ability of forwarders to fulfill one of their most important functions – acting as the shipper's representative with carriers and other entities involved in the chain of transportation. Indeed, many, if not most, shippers engage a forwarder precisely because they do not wish to deal directly with carriers, port officials, and other transportation vendors. As the Commission has previously noted in this case, “ocean freight forwarders are fiduciaries performing vital, sensitive functions, and who are required to observe the highest standards of behavior towards their principals, the shippers.” *See* Remand Order, 32 S.R.R. at 1743. The fact that forwarders are fiduciaries held to the highest standards of behavior toward their shipper principals is another compelling reason that a carrier should be able to rely on the instructions of the shipper's designated forwarder as a matter of course.

⁷ In addition, any carrier that made a practice of confirming with the shipper that the instructions of its forwarder are authorized or proper would almost certainly be accused of attempting to interfere with the business and fiduciary relationships between the forwarder and the shipper or attempting to steal away the shipper as a customer.

B. The Remand ID's Determination That Limco Knew Or Should Have Known That ITLC Had Wrongfully Liquidated The Cargo Is Erroneous And Unsupported By The Evidence Of Record.

The Remand ID held that Limco violated Section 10(d)(1) by following the instructions of ITLC – Complainants' designated forwarding agent – despite the fact that Limco's established practice of relying on forwarder instructions was found to be just and reasonable. In doing so, the Remand ID held that "Limco was not entitled to rely solely on the freight forwarder's request under these facts, because Limco knew or should have known that the forwarder was acting contrary to the principal's interest." RID at 14. As discussed more fully below, the Remand ID's conclusion that Limco "knew or should have known" that ITLC was acting contrary to Complainants' interests is based on speculation unsupported by, and inconsistent with, the evidence in the record.

There is absolutely no evidence in the record to support a conclusion that Limco knew ITLC was acting improperly or adverse to the interests of Complainants when it requested that the bills of lading be amended. The evidence is clear that Limco did not direct, authorize or participate in the liquidation of the cargo by ITLC. *See* RID at 14 (evidence indicates that "Limco did not direct or participate in the liquidation"). Indeed the evidence of record is that Limco did not even know that ITLC had liquidated the September and December Containers at the time Limco complied with ITLC's instructions to amend the bills of lading. *See* Initial Decision at 31 ("There is no evidence that Limco knew that the containers had been liquidated by Int'l TLC . . .").⁸ Similarly, there is no evidence in the record to support a finding that Limco

⁸ The Remand ID suggests that there is some dispute as to whether Limco knew about the liquidation by ITLC prior to following ITLC's instructions to amend the bills of lading. RID at 13. However, the Remand ID cites no testimony or documentary evidence that Limco actually knew that ITLC had liquidated the cargo. Instead, the Remand ID cites to evidence that Limco was aware that ITLC – like every other entity involved with the transportation of the three containers – was *considering* liquidation of the cargo as a means of finally cutting off the further accrual of demurrage charges. Obviously, knowledge that ITLC was considering liquidating the cargo does

knew that any liquidation by ITLC would be wrongful. Accordingly, the award against Limco appears to be based solely on the Remand ID's conclusion that Limco *should have known* that ITLC was acting adverse to the interests of Complainants when it instructed Limco to amend the bills of lading.

The Remand ID's conclusion that Limco should have known ITLC was acting adverse to the interests of Complainants is based on two related assumptions – (1) that Limco should have known that ITLC had liquidated the containers when it requested the bills of lading be amended, and (2) that Limco should have known that any such liquidation by ITLC necessarily would be improper and without legal authority. Neither of these conclusions is supported by evidence sufficient to meet Complainants' burden of proof, but instead are based on assumptions and speculation that do not stand up to closer scrutiny.

For example, the Remand ID assumes that Limco should have known ITLC had liquidated the containers when Limco received instructions to change the bills of lading because Limco knew that ITLC previously had been considering liquidating the cargo as a means of cutting off the mounting demurrage charges on the containers. *See* RID at 11 (“Limco knew that ITLC was considering liquidating the containers and knew that ITLC was the freight forwarder, with a fiduciary duty to Complainants”). But the fact that ITLC had been considering liquidation is no basis to conclude that it had actually done so – much less that such a liquidation would necessarily have been wrongful.⁹

not constitute knowledge that ITLC had actually liquidated the cargo. Similarly, knowledge that ITLC was considering liquidation does not even suggest, much less demonstrate, that such a liquidation would be wrongful.

⁹ The Remand ID suggests that Limco should have asked ITLC the purpose of the requested changes to the bills of lading. *See* RID at 14. However, even if ITLC had told Limco it was liquidating the cargo, Limco would have had no basis to conclude that such a liquidation was wrongful. As discussed below, Limco had every reason to expect that a forwarder like ITLC would have enforceable lien rights. Indeed, ITLC's January 2009 demand letter to Complainants had expressly asserted the right to liquidate the cargo. As also noted below, Complainants did not

While Limco knew that ITLC was considering liquidation, Limco also knew (or could have reasonably assumed) that ITLC was also attempting to get the Complainants to pick up the containers or arrange, by sale or otherwise, to have someone else take the containers out of storage. Getting the containers picked up and cutting off the continued accrual of demurrage charges was in everyone's interests, including Complainants.¹⁰ Indeed, Limco was aware that *all* the parties to the transportation - Hapag-Lloyd, ITLC, Baltic, and even Limco itself - were considering all options to cut off the mounting demurrage charges, including liquidation. Accordingly, the request for an amendment of the bills of lading could just as easily have been related to a sale by or on behalf of Complainants or a liquidation by Baltic, Hapag-Lloyd or some other party, as opposed to an improper liquidation by ITLC.¹¹

Moreover, Limco had good reasons to continue to rely on the bona fides of ITLC. Limco was well aware that ITLC, the forwarding agent selected by Complainants to deal with Limco, had a fiduciary duty not to act adverse to Complainants' interests. As a result, it was clearly reasonable for Limco to expect that the instructions it received from ITLC would not be adverse to the interests of Complainants. Limco's reliance on the authority of ITLC to act on

challenge ITLC's right to liquidate the cargo after receiving the January 2009 demand letter nor did they advise Limco that ITLC was no longer authorized to act on their behalf.

¹⁰ As the shippers and owners of the cargo, Complainants were ultimately responsible for the demurrage charges assessed on their cargo. There was evidence in the record suggesting that Complainants did not have the funds to pay the accrued freight and storage charges necessary to get the containers released from storage. Under those circumstances, it would not be unreasonable to conclude that liquidation and auction of the cargo might actually be in the Complainants' best interests.

¹¹ The Remand ID acknowledges that if the Complainants had sold the containers themselves, similar changes to the bills of lading would have been requested by ITLC and would have been entirely proper. *See* RID at 14. Although the Remand ID notes that the record does not reflect any discussion or suggestion that the Complainants were willing to sell the containers themselves, it is equally true that there is nothing in the record to suggest that Complainants were NOT willing to sell the cargo. *See* RID at 14. Since the Complainants have the burden of proof in this proceeding, the Remand ID's holding cannot properly be based on such a negative inference when the opposing inference is just as likely. As the Remand ID itself notes, "when the evidence is evenly balanced, the [party with the burden of persuasion] must lose." *See* RID at 3, *citing Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

Complainants' behalf is buttressed by the fact that Complainants never advised Limco that ITLC was no longer authorized to act as its agent – despite the fact that ITLC had threatened to liquidate the cargo months before ITLC instructed Limco to amend the bills of lading.

Similarly, the Remand ID's conclusion that Limco should have known that any liquidation by ITLC would be wrongful is completely unsupported by any evidence in the record and clearly erroneous as a matter of law. The Remand ID simply assumes – without any factual or legal basis – that ITLC could not possibly have had a right to liquidate the cargo under any foreseeable set of circumstances. Although it does not expressly say so, the Remand ID appears to assume that because a freight forwarder does not have a carrier's lien on cargo, it could never have legal authority to liquidate cargo for nonpayment or other breaches by its shipper-principal. But that assumption is clearly at odds with industry practice and the law.

Freight forwarders commonly include contractual lien rights in their terms and conditions and/or agreements with their shipper-clients, and it is at least equally reasonable for Limco to assume that ITLC had enforceable contractual lien rights than it was to assume it did not.¹² Moreover, a forwarder could also have lien rights under the Uniform Commercial Code and/or state law. Indeed, the Remand ID discusses just that possibility in dealing with the claims against ITLC. *See* RID at 6 (discussing lien requirements under the Uniform Commercial Code and Washington state law and concluding that ITLC did not satisfy the requirements for enforcement of a lien under those provisions). Since it was not only clearly possible, but actually quite likely, that ITLC could have had enforceable lien rights against the cargo, there is

¹² NVOCCs are not typically knowledgeable about the specific contractual relationships between a forwarder and its customers, and there is no evidence of record to suggest that Limco was privy to the contractual arrangements between ITLC and Complainants. Moreover, Complainants did not discharge ITLC after receiving the January 9, 2009 letter threatening liquidation of the cargo unless the containers were picked up. Nor did the Complainants notify Limco that ITLC was no longer authorized to act on their behalf or that ITLC did not have any contractual or other legal right to liquidate the cargo. Under those circumstances, it was clearly reasonable for Limco to believe that ITLC was acting within the scope of its rights and obligations with respect to Complainants.

no logical or rational basis for concluding that Limco should have known that any liquidation by ITLC would be wrongful.¹³

Consequently, there is no evidentiary basis to conclude that Limco knew or should have known that ITLC's instructions to amend the bills of lading were improper or adverse to the interests of Complainants. As discussed above, there is no evidence that Limco actually knew, nor is there any basis for concluding that Limco should have known, that ITLC had already liquidated the cargo when it instructed Limco to amend the bills of lading. Similarly, there is no evidence to even suggest that Limco knew that any liquidation by ITLC would necessarily be wrongful, nor is there any basis in law or logic to conclude that Limco should have known that such a liquidation would be improper. The Remand ID's conclusion that Limco violated Section 10(d)(1) should therefore be reversed and the Section 10(d)(1) claim against Limco should be dismissed.

C. A Single Act Or Isolated Conduct – As Opposed To A Pattern Of Conduct – Should Not Constitute A Violation Of Section 10(d)(1)

An interpretation of Section 10(d)(1) to impose liability for a singular act – without regard to whether the conduct involved intentional misconduct or instead involved a contractual dispute – raises a number of serious issues. As a preliminary matter, since the essence of a violation of Section 10(d)(1) is the failure to establish and observe a reasonable practice, once a carrier is found not to have followed what is deemed a reasonable practice in one instance (*i.e.*, if the carrier simply has made a mistake), liability will be established. Since there is no clear

¹³ The question whether or not Limco knew or should have known that any liquidation by ITLC would be wrongful, is relevant only to the extent that Limco is charged with knowledge of the liquidation by ITLC. Since there is no evidentiary basis for concluding that Limco knew or should have known that ITLC had already liquidated the cargo when it instructed Limco to amend the bills of lading, the propriety of ITLC's liquidation is a moot point as to Limco.

standard of culpability in the language of Section 10(d)(1), there appear to be no defenses to a Section 10(d)(1) claim based on a single mistake.

The interpretation of Section 10(d)(1) to impose strict liability for any failure to follow a reasonable practice essentially makes carriers guarantors of mistake-free service. For example, since it is a reasonable practice for carriers to avoid damaging cargo, any instance where cargo is damaged would become a Section 10(d)(1) violation. The breadth of the potential scope of Section 10(d)(1) liability, the strict liability standard for Section 10(d)(1) claims, and the attorney's fees provision in the Shipping Act, will make the Commission the presumptive forum for virtually all claims having anything to do with the ocean transportation of property. Just as important, the interpretation of Section 10(d)(1) to cover almost any deviation from what is determined in hindsight to be a reasonable practice, will in all likelihood lead to the filing of marginal, and even frivolous, claims. Moreover, the increased risk of strict liability and the significant cost of litigating or settling a flood of claims will inevitably lead to higher freight rates.

The application of Section 10(d)(1) to a single act or isolated conduct will also inevitably lead to anomalous results based on *post hoc* determinations of what is a reasonable practice under the circumstances and what constitutes a deviation from a reasonable practice. Every decision by a carrier will be subject to being second-guessed, and carriers may even find themselves in the position of being "damned if you do, dammed if you don't." For example, in this case, the Remand ID held that Limco violated Section 10(d)(1) by observing its admittedly reasonable practice of following the instructions of the shipper's designated forwarder based, on a *post hoc* determination that circumstances required Limco to deviate from its reasonable practice in this case. However, if Limco had deviated from its reasonable practice as the

Remand ID suggests, it would clearly be liable for a prima facie violation of Section 10(d)(1) for failing to observe its reasonable practice.¹⁴

Limco respectfully suggests that Section 10(d)(1) should apply only to an unreasonable pattern of conduct or to conduct involving intentional malpractices rather than single or isolated acts that are in reality contractual disputes and can properly be addressed in a commercial forum.

V. THE REMAND ID IMPROPERLY CALCULATED DAMAGES BY FAILING TO DEDUCT STORAGE AND OTHER CHARGES INCURRED BY THE CARGO PRIOR TO THE LIQUIDATION

Reparations under the Shipping Act are awarded based on the actual damages incurred. *See Tractor & Farm Equipment Ltd. v. Cosmos Shipping Inc.*, 26 S.R.R. 788, 798 (ALJ 1992). In general, the award of actual damages should place the injured party in the same position he would have been in if the breach had not occurred. The Remand ID applied the “market value at port of destination” standard for calculating the measure of damages in cargo claims under COGSA, but found that it was not possible to determine the fair market value of the cargo in Poland.¹⁵ Instead, the Remand ID awarded Complainants the retail purchase price of the goods as an approximation of the value of the goods at the port of destination. *See* RID at 17-18.

However, in calculating the damages, the Remand ID failed to deduct from the value of the goods the demurrage and other charges incurred by the cargo as a result of the Complainants’ failure to promptly pick up the containers upon arrival at the Port of Gdynia. In doing so, the

¹⁴ For example, ITLC’s request for amendments to the bills of lading could well have been to effectuate a sale of the goods by Complainants. If Limco had refused to promptly follow ITLC’s instructions, but instead taken the time to confirm the instructions with Complainants, Limco would almost certainly be held liable for the proceeds of the sale if, in the interim, the goods were seized by Polish customs or liquidated by another party.

¹⁵ Complainants purchased the goods in the United States at retail with the hopes of reselling the goods at a profit in the Ukraine. Findings 131. However, there was substantial evidence suggesting that Complainants would not have been able to resell the goods in Ukraine at all, much less for a profit. Findings 134-35. In fact, the first two containers that Complainants picked up in November 2008 and transported to the Ukraine, remained unsold and stored on the property of a relative at the time of the trial in August 2011 – three years after they were picked up by Complainants. Findings 34.

Remand ID improperly placed the Complainants in a better position than they would have been if the liquidation had never occurred. In particular, had the liquidation not occurred, Complainants would have had to pay duties as well as the accrued demurrage and storage charges – charges incurred solely because Complainants failed to promptly pick up their containers – in order to take possession of their cargo. In other words, in the absence of the liquidation, the value of the goods to Complainants would have been reduced by the amount of demurrage charges they would have had to pay to the Port of Gdynia. By failing to deduct demurrage charges from the award of damages, the Remand ID requires Respondents to indirectly pay for the demurrage charges incurred solely as a result of Complainants failure to promptly pick up their containers.¹⁶

VI. CONCLUSION

For all the foregoing reasons, the holding of the Remand ID that Limco's conduct in this case violated Section 10(d)(1) of the Shipping Act should be reversed and Complainants' claims against Limco should be dismissed.

Respectfully submitted,



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¹⁶ The demurrage charges on the September and December Containers totaled approximately \$15,000. Findings 123; Complainants' Exhibit 76 at 337.

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document was delivered to the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, and/or by electronic transmission, this 22nd day of September 2014:

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