

FEDERAL MARITIME COMMISSION

YAKOV KOBEL AND VICTOR
BERKOVICH

v.

HAPAG-LLOYD, A.G., HAPAG-
LLOYD AMERICA, INC., LIMCO
LOGISTICS, INC, AND
INTERNATIONAL TLC, INC.

Docket No. 10-06

Served: July 12, 2013

BY THE COMMISSION: Mario CORDERO, *Chairman*, Richard A. LIDINSKY, Jr. and William P. DOYLE, *Commissioners*; Rebecca F. DYE and Michael A. KHOURI, *Commissioners*, dissenting.

Order Vacating Initial Decision In Part and Remanding For Further Proceedings

I. INTRODUCTION

Yakov Kobel and Victor Berkovich (collectively Complainants) filed a complaint with the Federal Maritime Commission (FMC or Commission) on July 6, 2010. A Verified

Amended Complaint was filed with the Commission on October 15, 2010. Complainants alleged that Hapag-Lloyd A.G. and Hapag-Lloyd America, Inc. (collectively Hapag-Lloyd), Limco Logistics, Inc. (Limco), and International TLC, Inc. (ITLC) violated various sections of the Shipping Act, and sought reparations and other relief.

On February 14, 2012, the Administrative Law Judge (ALJ) issued an Initial Decision dismissing all of Complainants' claims against all Respondents with prejudice. This proceeding is before the Commission by Complainants' timely filing, on March 7, 2012, of Exceptions to the Initial Decision (Complainants' Exceptions).

For the reasons stated below, the Commission:

- (1) affirms the Initial Decision dismissing all claims against Respondent Hapag-Lloyd;
- (2) vacates the Initial Decision with respect to Respondent Limco's possible violation of section 10(d)(1); remands for further adjudication whether Limco failed to establish, observe, and enforce just and reasonable regulations and practices by issuing changed bills of lading and facilitating ITLC's liquidation of Complainants' three containers; and, if it is found that Limco violated section 10(d)(1) by such action, whether the violation caused injury to Complainants;
- (3) vacates the Initial Decision with respect to the dismissal of Complainants' section 10(d)(1) claim against Respondent ITLC and remands that issue for further adjudication consistent with this Order; and
- (4) affirms the Initial Decision with respect to the dismissal of all other claims.

II. BACKGROUND

A. Factual Background

Between April and July 2008, Complainants entered into oral agreements with ITLC to arrange for the shipment of five containers (MOGU2112451, MOGU2003255, MOGU2002520, MOGU2051660, and MOGU2101987) from Portland, Oregon to Gdynia, Poland. Initial Decision, Findings of Fact (hereinafter Findings or Finding)¹ 5. Complainants were the owners of the five containers and the cargoes contained therein. Finding 1. ITLC was not licensed by the Commission as either a freight forwarder or a non-vessel-operating common carrier (NVOCC) at the time of the dispatch of the five shipments, which occurred between May 8, 2008 and July 19, 2008. Findings 4, 26, 29, 41, and 76.²

Between April and July 2008, ITLC made bookings for the five containers with Limco. Finding 7. Limco was, at all material times, a licensed NVOCC. Finding 3. Limco issued five house bills of lading naming “Viktor Verkovich [sic]” as exporter or shipper and consignee. Findings 13, 24, 27, 37, 39, and 49. Limco’s house bills of lading also listed Limco as the forwarding agent, as agent to ITLC and Baltic Sea Logistics, SP Z.O.O (BSL) under domestic routing/export instructions. Findings 24, 27, 37, 39, and 49. BSL was the destination agent in Gdynia, Poland, and had been designated by ITLC. Finding 18.

Limco then made bookings for the five containers with Hapag-Lloyd. Finding 7. At all material times, Hapag-Lloyd was an ocean common carrier. Finding 2. Hapag-Lloyd issued five

¹ The ALJ’s Initial Decision includes well-organized Findings of Fact. Initial Decision at 4-17. As Complainants and Respondents in their Exceptions and Replies also refer to the numbered Findings of Fact, we cite the numbered Findings of Fact in the Initial Decision as “Finding(s).”

² ITLC was licensed on July 24, 2008 as an NVOCC. Finding 4.

master bills of lading listing Limco as shipper and BSL as consignee. Findings 25, 28, 38, 40, and 50.

Two containers (MOGU2112451 and MOGU2003255) were transported and picked up by Complainants without incident.³ Finding 21.

On or about April 28, 2008, Limco made a booking with Hapag-Lloyd for container MOGU2002520, along with the aforementioned two containers, to ship the container on a Hapag-Lloyd vessel leaving Portland, Oregon. Finding 45. On or about May 7, 2008, Complainants delivered container MOGU2002520 to a terminal at the Port of Portland. Findings 47-48. On May 8, 2008, the container was damaged while being loaded onto a Hapag-Lloyd vessel. Finding 51. On or about May 9, 2008, Complainants were contacted by Limco and ITLC, notifying them that the container was damaged. Finding 55. On May 13, 2008, Complainants, through Limco, rejected Hapag-Lloyd's offer to transfer the cargo to another shipper-owned container and requested that the damaged container be returned to Complainants for inspection, transloading, or repair. Finding 58. Hapag-Lloyd agreed to Complainants' request in principle and requested documentation of the costs. Finding 59. While Complainants, Limco, and Hapag-Lloyd were discussing the costs and disposition with respect to the damaged container, the damaged container was isolated in the yard, set aside from the rest of the containers on the pier, awaiting disposition. Findings 60-68.

On or about May 25, 2008, when the next Hapag-Lloyd vessel called in Portland, Oregon, the damaged container was loaded on that vessel. Finding 71.⁴ Complainants never authorized

³ These two containers are not the subject of this proceeding.

⁴ Although Finding 71 states that the container was loaded on a vessel on or before June 2, 2008, it appears that the container was loaded on the vessel on or about May 25 or 26, 2008, considering the vessel departure date in Finding 76 and Hapag-Lloyd's and

Hapag-Lloyd or Limco to load the damaged container, but rather persistently demanded its return to them. Finding 75. On May 26, 2008, the damaged container departed Portland, Oregon, on a Hapag-Lloyd vessel and arrived in Hamburg, Germany, in late June or early July 2008. Finding 76. Due to the damage to the container, the container was not accepted by the feeder operator for transportation from Hamburg, Germany, to Gdynia, Poland. Finding 79. While Hapag-Lloyd, Limco, and BSL discussed the damaged container, it remained in Hamburg, Germany, until on or about November 15, 2008. Findings 81-103. The cargo in the damaged container was eventually transferred to a Hapag-Lloyd container, and it left Germany for Poland on or about November 15, 2008. Findings 80 and 99. The damaged container, once empty, was then transported by truck without difficulty. Finding 100. On or about December 23, 2008, the replacement container and the cargo therein, and the now-empty damaged container arrived in Gdynia, Poland. Findings 80 and 103. Transloading of the cargo in the damaged container to a Hapag-Lloyd container, and transporting of the replacement container and now-empty damaged container from Germany to Poland, were performed at Hapag-Lloyd's expense. Finding 101. Once the container and cargo arrived in Gdynia, Poland, the cargo was transferred back into the damaged container. Findings 80 and 102.

Pursuant to the oral agreement with Complainants, ITLC booked a reservation with Limco to ship containers MOGU2051660 and MOGU2101987 from Portland, Oregon, to Gdynia, Poland. Findings 5 and 35. On or about July 19, 2008, the two containers were shipped from Portland, Oregon, and arrived in Gdynia, Poland, on or about September 1, 2008. Finding 37-41.⁵ The two

Limco's bills of lading dates in Findings 49-50. Complainants object to Finding 71 that the loading was inadvertent. Complainants' Exceptions at 4-8. This issue will be discussed below.

⁵ Although Finding 41 and the parties' Initial Statement of Undisputed Facts 26 state that the containers were shipped from

containers were not damaged during loading, transit, or discharge. Finding 41. After arriving in Gdynia, the two containers accrued storage charges from early September 2008 until they were liquidated in February 2009. Findings 41 and 104. Between October and December 2008, BSL and Limco contacted ITLC, and Hapag-Lloyd contacted Limco informing it that the two containers had not been picked up and were accruing demurrage charges. Findings 105-107. On January 9, 2009, ITLC sent a letter to Complainants entitled "Final Notice of Unpaid Balance" advising them that the two containers were not picked up and also advising them that if the unpaid freight charge on the containers in the amount of \$43,727.73 was not paid, the cargo would be "utilized" to cover the amount due to ITLC. Findings 108-109. Although Complainant Kobel testified that he "ignored [ITLC's letter] because it's an incorrect amount," ITLC had a telephone conversation with Complainant Kobel and issued a revised invoice listing just the unpaid freight charges for the two containers totaling \$10,200, and Complainants paid \$1,500 of the outstanding balance on or about the same day of Complainants' receipt of the ITLC letter. Findings 110-112.

On February 3, 2009, BSL sent an email and threatened to hold ITLC liable for storage costs for the three containers (the two containers that had arrived on or about September 1, 2008, Finding 41, and the one damaged container that had arrived on or about December 23, 2008, Finding 80) remaining at the Port of Gdynia, and demanded action by February 6, 2009. Finding 113. After receiving the email from BSL on February 3, 2009, ITLC decided to liquidate the three containers. Finding 114. On or about February 13, 2009, Complainants contacted BSL regarding storage fees for the three containers, and BSL responded that it needed payment. Finding 115. On or about February 23, 2009, ITLC entered into an agreement with a purported buyer to sell the three containers and

Portland, Oregon on or about July 9, 2008, it appears that they were shipped on or about July 19, 2008, considering Hapag-Lloyd's and Limco's bills of lading dates of July 19, 2008.

their contents for the amount of \$9,900 plus fees owed to BSL. Finding 117.

ITLC instructed Limco, on March 2, 2009, via email to issue changed bills of lading for the three containers changing exporter/shipper and consignee from Victor Berkovich to Oleg Remishevskiy, the purported buyer of the three containers and the cargoes therein. Finding 118. On March 2, 2009,⁶ Limco notified Hapag-Lloyd of the new shipper/consignee details for the three containers. Finding 119.⁷ Complainants did not authorize or consent to the change of shipper and consignee on Limco bills of lading for the three containers. Finding 120. Hapag-Lloyd did not authorize the change of shipper and consignee of the Limco's three bills of lading, was not involved in the liquidation sale of the three containers, and did not receive any of the proceeds of that liquidation sale. Findings 121 and 124. Also on March 2, 2009, Limco notified BSL that the shipper/consignee on the Limco bills of lading had been changed to Oleg Remishevskiy for the three containers, and copies of the new Limco bills of lading were attached to Limco's email. Finding 122. Storage charges on the liquidated containers were paid to BSL by Oleg Remishevskiy. Finding 123.

Complainants thereafter paid ITLC \$7,065.00 on or about March 26, 2009, and \$1,635.00 on or about April 2, 2009. Finding 125. Complainant Victor Berkovich testified that on April 6, 2009, he went to pick up the containers at the container terminal in Gdynia, but discovered that the containers were no longer there. Finding 126. Complainants did not discover until after April 6,

⁶ Although Finding 119 states the date as March 2, 2000, this appears to be a typographical error.

⁷ Complainants object to Finding 119. Complainants allege that Limco notified Hapag-Lloyd to release only one container and there is no evidence that Limco notified Hapag-Lloyd of the new shipper/consignee for the other two containers on March 2, 2009. Complainants' Exceptions at 12.

2009 that Limco's three bills of lading for the three containers had been reissued showing Oleg Remishevskiy as shipper and consignee. Finding 127. On May 13, 2009, ITLC refunded the payments they received from Complainants for two of the three liquidated containers in the amount of \$10,200, after Complainant Kobel demanded information regarding his containers in person at the ITLC office on or about May 5, 2009. Findings 111-112, 125, and 128-129.

B. Procedural Background

This proceeding was initiated by a complaint filed with the Commission on July 6, 2010. A Verified Amended Complaint (Complaint) was filed with the Commission on October 15, 2010. Complainants alleged that Hapag-Lloyd, Limco, and ITLC violated various sections of the Shipping Act, and sought reparations and other relief with respect to the loss of three containers (MOGU2002520, MOGU2051660, and MOGU2101987) and the cargoes therein allegedly caused by Respondents' violations of the Shipping Act.⁸

A hearing was held in Portland, Oregon, between August 8 and 11, 2011. Complainants' and Respondents' post-trial briefs and Complainants' reply to Respondents' briefs were filed between September and November 2011. Initial Decision at 3. On February 14, 2012, the ALJ issued an Initial Decision dismissing the Complaint with prejudice.

⁸ On May 24, 2011, the ALJ issued an Order on Dispositive Motions. The ALJ denied most of Complainants' and Respondents' dispositive motions. The ALJ, however, dismissed Complainants' claim for double damages because Complainants did not allege violations of the Shipping Act sections, for which double damages can be allowed. On June 24, 2011, the dismissal of the claim for double damages became administratively final.

On March 7, 2012, Complainants filed Exceptions to the Initial Decision. Complainants excepted to some of the Findings of Fact and to the conclusions that Hapag-Lloyd did not violate section 10(d)(1) (46 U.S.C. § 41102(c)); Limco did not violate sections 10(d)(1), 10(b)(4)(E), and 10(b)(10) (46 U.S.C. §§ 41102(c), 41104(4)(E), and 41104(10)); and, ITLC did not violate sections 10(d)(1) and 19(a) (46 U.S.C. §§ 41102(c) and 40901(a)).

On March 27, 2012, Hapag-Lloyd filed a Reply to Complainants' Exceptions. (Hapag-Lloyd's Reply). Hapag-Lloyd alleged that Complainants' Exceptions should be dismissed for lack of subject matter jurisdiction because Complainants' claims are pre-empted by the Carriage of Goods by Sea Act (COGSA), note to 46 U.S.C. § 30701. Hapag-Lloyd stated that nothing in the record supports a conclusion that the Initial Decision's Findings of Fact excepted by Complainants are in error and that the Initial Decision's conclusions of law should be affirmed as they are well-grounded in the undisputed Findings of Fact and by Commission precedent.

Limco and ITLC filed Replies to Complainants' Exceptions on April 12, 2012 (Limco's Reply) and April 10, 2012 (ITLC's Reply) respectively.⁹ Limco alleged that Complainants' causes of action are actually COGSA claims for damage or loss to cargo and thus should be dismissed for lack of subject matter jurisdiction, that Complainants lack credibility and trustworthiness, and that the ALJ's conclusions of law are well-reasoned. ITLC alleged that its liquidation sale of the three containers due to nonpayment for

⁹ Pursuant to the Commission's rules of practice and procedure, a reply to exceptions must be filed within 22 days of service of exceptions. 46 C.F.R. § 502.227(a)(2). Therefore, Limco's and ITLC's Replies were filed late by 14 and 12 days respectively. For better consideration of this proceeding and in view of the fact that ITLC filed its Reply *pro se*, the Commission accepts the late filed Replies of Limco and ITLC.

freight and storage charges was not a violation of any provisions of the Shipping Act.

In their Exceptions to the Initial Decision, Complainants requested oral argument to address issues raised in the Exceptions. Complainants' Exceptions at 26. On July 27, 2012, the Commission granted Complainants' request for oral argument, but limited it to the issue of section 10(d)(1). The Commission heard the oral arguments on October 18, 2012. On December 4, 2012, the Commission issued an order requesting each party to submit a post-hearing brief. Complainants and Respondents filed post-hearing briefs on or before January 31, 2013.

III. DISCUSSION

A. Standard of Review by Commission

Hapag-Lloyd alleged that as Complainants have excepted to certain factual findings and to the conclusion that Hapag-Lloyd did not violate section 10(d)(1) (46 U.S.C. § 41102(c)), only issues relating to section 10(d)(1) are now before the Commission. Hapag-Lloyd's Reply at 2. Pursuant to the Commission's rules of practice and procedure, however, where exceptions are filed to, or the Commission reviews, an initial decision, "the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). As stated above,¹⁰ the Commission adopts the ALJ's well-organized Findings of Fact. However, as the Commission did not limit the issues in this proceeding by either a notice or a rule, the Commission reviews the ALJ's Initial Decision *de novo*.

¹⁰ See Footnote 1 *supra*.

B. Jurisdiction

Hapag-Lloyd asserted below that claims for cargo loss or damage cloaked in negligence, fraud, conversion, and breach of contract theories are pre-empted by the Carriage of Goods by Sea Act (COGSA). The ALJ held that this case does not involve merely the damage and delay of one container, but the shipment of five containers and the liquidation of three containers. Initial Decision at 17-18.

Hapag-Lloyd cites a federal court's ruling that a plaintiff could not circumvent COGSA by couching the complaint in terms of conversion or breach of contract. Hapag-Lloyd's Reply at 5 (citing Barretto Peat, Inc. v. Luis Ayala Colon Sucrs., Inc., 896 F.2d 656, 661 (1st Cir. 1990)). Hapag-Lloyd stated that it is apparent from Complainants' own language (such as "fraud," "conversion," or "tantamount to conversion at common law") that Complainants are asserting the types of claims that the courts have consistently held are to be determined in accordance with COGSA. Id. at 6.

Complainants alleged that Respondents violated section 10(d)(1) (46 U.S.C. § 41102(c)) and other sections by loading a damaged container in Portland, Oregon, and liquidating three containers in Gdynia, Poland, and that these violations caused injury. It appears that Complainants' allegation of "defraud[]" or "fraud" was made to support their claim for Respondents' violations of the Shipping Act. Complaint at 11 and 13. Complainants' claims are not for simple loss or damage to their cargo, although the measure of the alleged injury to Complainants may include the value of their lost cargo, among others. It appears that Complainants did not claim that the damage to container MOGU2002520 or cargo therein during loading in Portland, Oregon, caused injury to them. On the contrary, Complainants stated that "no one knew whether or not there was any damage to cargo." Complainants' Exceptions at 7. At that time, Complainants "did not know the extent of the damage or if the cargo was damaged." Id. at 11. Complainants alleged that the loading and

transporting of the damaged container, in disregard of Complainants' request to return the container and Hapag-Lloyd's agreement in principle to return it, and its eventual liquidation were the facts that gave rise to a violation of the Shipping Act, and which caused injury to them. Id.

In their post-hearing briefs, Respondents asserted again that Complainants' claim is a COGSA claim and thus must be dismissed for lack of jurisdiction. Hapag-Lloyd stated that "[C]omplainants in this case may not invoke the limited jurisdiction of the Commission by cloaking their cargo-related claims as Shipping Act issues." Hapag-Lloyd's Post-Hearing Brief at 6. Limco stated that Complainants' allegations "could and should have been prosecuted under COGSA." Limco's Post-Hearing Brief at 26. ITLC also asserted that "Complainants' causes of action are actually COGSA claims based on damage or cargo loss/conversion." ITLC's Post-Hearing Brief at 8. Complainants stated that "[t]he Commission may adjudicate alleged violations of the [S]hipping [A]ct, even if those claims may overlap or co-exist with other potential common law or statutory claims." Complainants' Post-Hearing Brief at 16.

As the Respondents discussed in their post-hearing briefs, the Commission held that the appropriate test for the Commission's jurisdiction is whether Complainants' allegations "also involve elements peculiar to the Shipping Act." Cargo One, Inc. v. COSCO Container Lines Company, Ltd., 28 S.R.R. 1635, 1645 (FMC 2000). Hapag-Lloyd asserted that Cargo One stands for the proposition that the Commission is not authorized to decide non-Shipping Act issues. Hapag-Lloyd's Post-Hearing Brief at 4. As Hapag-Lloyd claimed, however, that "[j]ust as plaintiffs in federal court may not avoid COGSA by cloaking their claims in terms of negligence, fraud, conversion, and breach of contract theories, the complainants in this case may not invoke the limited jurisdiction of the Commission by cloaking their cargo-related claims as Shipping Act issues," Id. at 6, Respondents in this proceeding cannot avoid the Shipping Act issue by cloaking Complainants' claims in terms of COGSA.

Complainants' claims are not for simple loss or damage to their cargoes, but for injuries caused by Respondents' alleged violations of the Shipping Act. As discussed below, Complainants' allegations involve elements peculiar to the Shipping Act. Cargo One also stands for the proposition that the Commission is authorized to decide claims that "also involve elements peculiar to the Shipping Act." Cargo One, 28 S.R.R. at 1645. Therefore, the Commission affirms the ALJ's holding that Complainants' claims fall under the Commission's jurisdiction.

C. Section 10(d)(1) (46 U.S.C. § 41102(c))

Although Complainants alleged that Respondents violated multiple sections of the Shipping Act, the Commission does not find, as discussed below, any error in the ALJ's dismissal of Complainants' claims other than that of section 10(d)(1). Therefore, the Commission first reviews section 10(d)(1) as the only remaining issue in this proceeding.

1. Positions of the Parties

In their Post-Hearing Brief, Complainants stated that "if a regulated party only established just and reasonable practices but failed to observe and enforce the just and reasonable practice and was not deemed to be a violation of section 10(d)(1), then such an interpretation would defeat the overriding purpose of the statute to prohibit unjust and unreasonable practices." Complainants' Post-Hearing Brief at 3. They further stated that "[s]uch interpretation would essentially give no meaning or effect to the words 'observe and enforce.'" Id. Citing Johnnie Corley v. U.S., 129 S. Ct. 1558, 1566 (2009), Complainants claimed that "[s]uch interpretation would be contrary to the general rule of construction that a statute should be constructed so that effect is given to all of its provisions and no part will be inoperative, superfluous or void." Id. at 3. Complainants asserted that the phrase in section 10(d)(1) of "fail[ure] to establish, observe[,] and enforce," must be read

collectively or together and “failure to perform any of these elements constitutes a violation of [s]ection 10(d)(1).” Id. at 4. With respect to the question whether a single failure to observe and enforce a just and reasonable regulation and practice may be a violation of section 10(d)(1), Complainants stated that “[a] literal reading of [s]ection 10(d)(1) indicates that only a singular ‘failure’ is required for a violation of [s]ection 10(d)(1) as only the singular and not the plural of ‘failure’ is used in the statute. Id. at 5.

Hapag-Lloyd asserted in its Post-Hearing Brief that a single failure to observe and enforce a regulation or practice is not a violation of section 10(d)(1), Hapag-Lloyd’s Post-Hearing Brief at 10, and a sequence of failures to observe and enforce regulations and practices within a contemporaneous shipment/transaction is also not a violation of the section. Id. at 15. Hapag-Lloyd stated that “[t]he Commission has long held that a single act or incident does not and cannot constitute ‘regulations and practices’ for purposes of section [10(d)(1)].” Id. at 10. Hapag-Lloyd further alleged that even assuming that the acts or omissions were unjust or unreasonable, “such acts or omission with respect to a single shipment or transaction lack the uniformity and continuity necessary to constitute a practice, and hence would not be a violation of section 10(d)(1).” Id. at 15. Limco stated that “[w]here ‘and’ is used, all listed requirements must be satisfied.” Limco’s Post-Hearing Brief at 12. Alleging that Complainants must establish that a party “failed to establish and observe and enforce” regulations and practices, Limco further stated that “[i]t is not enough to show a party failed to establish regulations, or failed to observe them.” Id. ITLC stated that “[u]se of ‘regulations’ and ‘practices’ in [section 10(d)(1)] suggests that Congress provided that numerous acts established a violation of [s]ection 10(d)(1)” and that section 10(d)(1) “does not apply to a single failure by the party to either observe or enforce a regulation and practice.” ITLC’s Post-Hearing Brief at 5.

2. Statutory Analysis

Section 10(d)(1) of the Shipping Act, 46 U.S.C. § 41102(c), states that:

(c) PRACTICES IN HANDLING PROPERTY.—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.

According to Respondents' positions discussed above, as the conjunctive "and" is used in section 10(d)(1) rather than the disjunctive "or," a respondent can violate the section only when it (1) failed to establish just and reasonable regulations and practices, (2) failed to observe the just and reasonable regulations and practices, and (3) failed to enforce the just and reasonable regulations and practices. In other words, it would be a violation of the section only when a complainant can demonstrate that a respondent simultaneously committed all the three elements of the section. If a respondent established just and reasonable regulations and practices, it would not violate section 10(d)(1) even if that respondent failed to observe or enforce the established just and reasonable regulations and practices. Under this scenario, a violation cannot occur because the respondent established a just and reasonable regulation and practice and thus the complainant would never satisfy the first of the three elements of the section.

This reasoning, however, contains a fatal flaw in that it completely disregards the language "observe and enforce" in section 10(d)(1). Under this reasoning, whether or not a common carrier, marine terminal operator (MTO), or ocean transportation intermediary (OTI) violated section 10(d)(1) would boil down to a simple question of whether the regulated entity established a just and reasonable regulation and practice. Once the common carrier, MTO, or OTI established a just and reasonable regulation and

practice, the Commission could never find that it had violated the section, regardless of whether it observed and enforced the regulation and practice. If the common carrier, MTO, or OTI failed to establish a just and reasonable regulation and practice, the Commission would not even need to review whether the common carrier, MTO, or OTI observed and enforced a just and reasonable regulation and practice because there would be no just and reasonable regulation and practice to observe and enforce. In this regard, Hapag-Lloyd has conceded that “[u]nder a literal reading of the language, there would be no violation of the statute unless the respondent had failed to establish, to observe and to enforce a practice or regulation (i.e., had failed with respect to all three elements of the statute). However, this makes little sense, as it would be impossible to observe or to fail to observe a practice or regulation unless one has first established it. Moreover, under this reading of the statute, no violation would occur if one establishes a just and reasonable practice and regulation but fails to observe and enforce it. This is not a sensible result.” Hapag-Lloyd’s Post-Hearing Brief at 18.¹¹

As stated above, this faulty reasoning completely omits the language “observe and enforce” from section 10(d)(1). The Commission, however, must “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.” Inhabitants of Montclair Tp. v. Ramsdell, 107 U.S. 147, 152 (1883). As Limco stated with respect to the interpretation of statute, the Commission must “presume that a legislature says in a statute what it means and means in a statute what it says there.” Limco’s Post-Hearing Brief at 9 (citing

¹¹ Although Hapag-Lloyd’s reading is not a “literal reading” of section 10(d)(1), as we further discuss, and its suggested approach with respect to a single shipment is flawed, the statement cogently captures the flaws in the reasoning that a failure to observe and enforce just and reasonable regulations and practices is not a violation of section 10(d)(1).

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)). The Commission must find that the Congress says what it means and means what it says when it included “observe and enforce” in section 10(d)(1).

As the conjunctive “and” is used, all three elements that a common carrier, MTO, or OTI may not fail to “establish, observe, and enforce” just and reasonable regulations and practices must be performed by the common carrier, MTO, or OTI. It would be a violation of section 10(d)(1) if a common carrier, MTO, or OTI either (1) fails to “establish” just and reasonable regulations and practices, (2) fails to “observe” just and reasonable regulations and practice, or (3) fails to “enforce” just and reasonable regulations and practices.

We note that the relevant framework in analyzing the Commission’s jurisprudence is common carriage. In a common carriage context, a common carrier, MTO, or OTI provides services to the general public. When analyzing whether a common carrier’s, MTO’s, or OTI’s regulations and practices are just and reasonable, it is relevant to consider the usual course of conduct of the common carrier, MTO, or OTI and also the course of conduct of other common carriers, MTOs, or OTIs under similar circumstances.¹²

¹² In Rowse, discussed below, the United States, which intervened to defend the Secretary of Agriculture’s jurisdiction, argued that “Congress intended that a ‘practice,’ under the second clause [of 7 U.S.C. § 208(a)], be read to mean a course of conduct of the industry as a whole rather than a course of conduct of a particular respondent.” Dean Rowse v. Platte Valley Livestock, Inc., 597 F.Supp. 1055, 1057 (D. Neb. 1984). It appears that the court adopted this position when it stated that “it is not an isolated instance because, according to the Secretary’s decision, it is part of an industry-wide practice intended to be reached by the Act.” Id. at 1059. The position the United States took in Rowse is consistent with the Commission’s position here: when the Commission considers whether the practice of a particular respondent is “just

When examining, however, whether a common carrier, MTO, or OTI failed to “observe and enforce” the established just and reasonable regulations and practices, one must inevitably consider whether there has been a failure or failures to observe and enforce the established regulations and practices with respect to particular shippers or specific transactions. If a common carrier, MTO, or OTI failed to establish just and reasonable regulations and practices or the established regulations and practices are unjust or unreasonable, section 10(d)(1) analysis may end there, as failing to establish just and reasonable regulations and practices itself would constitute a violation of the section. If a common carrier, MTO, or OTI has in fact established just and reasonable regulations and practices, the relevant question then becomes whether it has observed and enforced the regulations and practices.

Even if a common carrier, MTO, or OTI has established just and reasonable regulations and practices, it yet may have violated section 10(d)(1) by failing to observe and enforce those on one or a number of transactions. Conversely, if a common carrier, MTO, or OTI failed to observe and enforce just and reasonable regulations and practices in specific instances, that does not necessarily mean that its regulations and practices are unjust and unreasonable. The common carrier, MTO, or OTI yet may have followed just and reasonable regulations and practices in numerous other similar instances.

If it is demonstrated that the established regulations and practices of a common carrier, MTO, or OTI are just and reasonable, the next question to ask is not whether the conduct involves a single occurrence or multiple occurrences, but whether the common carrier, MTO, or OTI failed to “observe and enforce” those established regulations and practices. If the conduct of the common carrier, MTO, or OTI does not constitute a failure to

and reasonable,” it considers not only the respondent’s course of conduct (or practice), but also the course of conduct (or practices) of the whole industry.

observe and enforce the established practices, the conduct is not a violation of section 10(d)(1), regardless of whether the conduct involves only a single occurrence or multiple occurrences. Even the failure in a single transaction can be a failure to observe and enforce a just and reasonable regulation and practice, and therefore, a violation of section 10(d)(1). This interpretation gives effect to every word of section 10(d)(1) and avoids the construction that “the legislature was ignorant of the meaning of the language it employed.” This interpretation also avoids the irrational incentive for regulated parties to establish just and reasonable regulations and practices, but not to observe and enforce them, which the Commission believes would be in complete derogation of the plain language of section 10(d)(1). As one of the Respondents concedes, “[t]his is not a sensible result.” Hapag-Lloyd’s Post-Hearing Brief at 18.

The Commission believes that the meaning of conjunctive and disjunctive depends on the context. In Ann McCormick v. Dep’t of the Air Force, the Federal Circuit stated that “[t]he Supreme Court ruled over 100 years ago that ‘[i]n the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. In order to do this, courts are often compelled to construe ‘or’ as meaning ‘and.’” 329 F.3d 1354, 1355 (Fed. Cir. 2003) (citing U.S. v. Fisk, 3 Wall. 445, 70 U.S. 445, 447, 18 L.Ed. 243 (1865)). The court further stated that “[o]ur sister circuits have likewise read ‘or’ to mean ‘and’ or ‘and’ to mean ‘or’ in order to effectuate Congress’s intent.” Id. If it is a violation of section 10(d)(1), as argued by Respondents, only when regulated entities fail to perform all three of “establish, observe, and enforce” just and reasonable regulations and practices, it leads to a problematic result that the regulated entities, once they have established just and reasonable regulations and practices, would not be required to observe and enforce them. We do not believe that Congress would have intended this counterintuitive result in enacting section 10(d)(1).

ITLC asserted that “Congress’s use in the Shipping Act of 1916 [sic] of the plural term ‘regulations and practices’ suggests that a single event does not constitute a Shipping Act violation. This raises the issue of the Commission’s jurisdiction, which is limited and deals with practices and procedures.” ITLC’s Post-Hearing Brief at 6. This allegation, however, ignores one of the basic rules of statutory interpretation that we have to avoid “any construction which implies that the legislature was ignorant of the meaning of the language it employed.” Ramsdell, 107 U.S. at 152. If section 10(d)(1) is not intended for a single event, as ITLC alleged, Congress could have easily achieved that by using the singular “practice” because the singular “practice” already means “the usual way of doing something” (Merriam Webster’s Collegiate Dictionary, Tenth Edition) implying more than a single event. We believe that Congress used the plural “regulations and practices,” not because section 10(d)(1) is not applicable to a single event, but because the section is applicable to four different regulations and practices of common carriers, MTOs, or OTIs: i.e., (1) receiving, (2) handling, (3) storing, or (4) delivering property. For example, a common carrier’s transaction even for a single shipment may involve, most of the time, all four regulations and practices of receiving the shipment from the shipper, handling the shipment while it is under the custody and control of the common carrier, storing the shipment in the common carrier’s container yard or warehouse, and delivering the shipment to the consignee at the port of discharge or place of delivery.

The corollary of this faulty line of reasoning is that a single failure to observe and enforce already established just and reasonable regulations and practices is not a violation of the section, because specific instances of failures are not a “practice.” In other words, a violation of section 10(d)(1) occurs only when a respondent establishes an unjust and unreasonable regulation and practice, observes that unjust and unreasonable regulation and practice, and enforces that unjust and unreasonable regulation and practice. Section 10(d)(1) requires regulated entities not only to “establish” just and reasonable regulations and practices, but also to

“observe and enforce” the established just and reasonable regulations and practices. The allegation that a single failure to “observe or enforce” just and reasonable regulations or practices is not a failure does not comport with the language of section 10(d)(1), which mandates regulated entities not to “fail to . . . observe, and enforce” just and reasonable regulations and practices. As discussed above, when we consider whether a respondent “observe[d] and enforce[d]” just and reasonable regulation and practices, the proper test is not whether the allegation involves a single shipment or multiple shipments. Rather, the proper test is whether there was a failure in observing and enforcing the established just and reasonable regulations and practices, regardless of whether the question involves a single shipment or multiple shipments. A common carrier, MTO, or OTI can establish just and reasonable regulations and practices that are applicable to all their potential customers, but may still fail to observe and enforce the established regulations and practices with respect to a single shipment, a single transaction, or a single shipper.

Finally, it does not appear from the plain language of section 10(d)(1) that “accidental” conduct can somehow make it just and reasonable, contrary to Hapag-Lloyd’s allegation. Hapag-Lloyd’s Reply at 21. No language of section 10(d)(1) indicates that only an intentional or willful failure would constitute a violation.¹³ If that

¹³ Compare, for example, sections 10(b)(11) and (12) (46 U.S.C. § 41104(11) and (12)) that state that a common carrier, either alone or in conjunction with any other person, directly or indirectly, may not: (11) knowingly and willfully accept cargo from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title; or (12) knowingly and willfully enter into a service contract with an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title, or with an affiliate of such an ocean transportation intermediary.

were the intent of Congress, we believe that Congress would have drafted the provision differently.

3. Commission Precedent

The Commission has found that a failure to observe and enforce just and reasonable practices is a violation of section 10(d)(1), regardless of whether it involves a single shipment or multiple shipments. See, e.g., Paul Houben v. World Moving Services, Inc., 31 S.R.R. 1400 (FMC 2010) (NVOCC's failure to pay the destination agent monies already received by the NVOCC for such services was held a violation of section 10(d)(1) by "failing to engage in just and reasonable practices."); William J. Brewer v. Saeid B. Maralan (aka Sam Bustani) and World Line Shipping, Inc., 29 S.R.R. 6 (FMC 2001) (NVOCC held to have violated section 10(d)(1) with respect to a single shipment when it refused to release the cargo at the destination port unless additional money was paid, and instructed its agent to place the shipment on hold.); Hugh Symington v. Euro Car Transport, Inc., 26 S.R.R. 871 (ALJ 1993) (NVOCC's failure to carry out its obligation to transport the cargo or to return the money despite repeated demands was held a violation of section 10(d)(1) as it showed "a failure to establish, observe and enforce just and reasonable regulations and practices."); Tractors and Farm Equipment Limited v. Cosmos Shipping Co., Inc., 26 S.R.R. 788 (ALJ 1992) (freight forwarder held to have violated section 10(d)(1) by failing to establish, observe and enforce just and reasonable practices with respect to two shipments when the freight forwarder prepared incorrect booking notes and dock receipts, and issued an altered bill of lading containing false information.); and William R. Adair v. Penn-Nordic Lines, Inc., 26 S.R.R. 11 (ALJ 1991) (NVOCC failed to establish, observe, and enforce just and reasonable regulations and practices in violation of section 10(d)(1) when the NVOCC unreasonably aborted a shipment, notwithstanding the fact that it had issued an on-board bill of lading, thereby allowing a misleading shipping document to go forward in the shipping process.)

In Stockton Elevators, which was later adopted by the Commission in its entirety, the Presiding Examiner held that “[t]he essence of a practice is uniformity. It is something performed and it implies continuity . . . the usual course of conduct. It is not an occasional transaction. . . .” Investigation of Certain Practices of Stockton Elevators, 8 F.M.C. 187, 200-201 (Examiner 1964). In Stockton Elevators, a marine terminal operator allowed a customer one reduction in wharfage and allowances for five shipments. Stockton Elevators, 8 F.M.C. at 197. Finding that the divergence from the established practice was done in order to free up the elevator, and in each case constituted a much less expensive solution of the problem than available alternatives, the Presiding Examiner held that the MTO did not violate the predecessor to section 10(d)(1). Id. at 201. The Presiding Examiner stated that “even if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust and unreasonable.” Id. The Presiding Examiner considered the discount and allowances as instances of occasional transactions because they were not the “usual course of conduct” of the MTO, and did not find a violation. Id. at 200-201. Stockton Elevators was not a case that discussed whether the respondent’s regulations and practices in question were “unjust or unreasonable,” but whether five specific instances of transactions violated section 17 of the Shipping Act, 1916. The presiding officer held that considering the justifiable reason (alleviating the grain elevator congestion), the six instances of deviation from the established regulations and practices were not violations of the section. Stockton Elevators discussed section 17 (and section 16) of the Shipping Act of, 1916, language of which is different from section 10(d)(1) of the Shipping Act of 1984. As discussed below, section 17 of the Shipping Act, 1916 stated, “[w]henver the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.” Id. at 196. That language, however, was later removed from the legislation of the Shipping Act of 1984, and section 10(d)(1) does not contain it. Pub. L. No. 98-237, § 10(d)(1), 98 Stat. 67, 80 (1984). Therefore, although Stockton Elevators

discussed the predecessor to section 10(d)(1), it did not discuss the same statutory language in the same context as section 10(d)(1) and thus is not directly precedential in the analysis of section 10(d)(1).¹⁴

In European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 17 S.R.R. 1351 (ALJ 1977), the ALJ held that a freight forwarder did not violate section 17 of the Shipping Act, 1916 with respect to a single shipment. The issue was described as “[w]hether the respondent did in fact fail ‘to notify the shipper of any disputes as to the applicable tariff rates’ and if so whether such a failure constitutes an unjust and unreasonable practice under section 17 of the Shipping Act, 1916.” Id. at 1361. The ALJ stated that:

A “practice” unless the term is in some way restricted by decision or statute, means “an often repeated and customary action.” The record demonstrates that it is the “practice” of Hipage to notify shippers of problems arising over their shipments. Thus what we have here is not a question of the establishment of a just or unjust practice but an allegation of a single departure from a practice which I am sure complainants would characterize as just and reasonable. In other words, complainants have not, in any meaningful way, alleged nor have they shown that Hipage established, observed and enforced the practice of not notifying shippers of problems involving their shipments. Indeed complainants offer as one of the ground for the violations of Section 17 that Hipage treated them differently than it did other shippers.

¹⁴ Respondent Hapag-Lloyd also discussed J. M. Altieri v. Puerto Ports Authority, 7 F.M.C. 416 (Examiner 1962), which later became the decision of the Commission. As Stockton Elevators, Altieri discussed section 17 of the Shipping Act, 1916, and thus is not precedential in section 10(d)(1) analysis.

Id. at 1365 (internal citations omitted). The ALJ further stated that because section 17 speaks only to practices, it follows that the respondent, even if a single failure had been established by complainants, would not have violated the section because it had not established, observed and enforced an unjust or unreasonable practice. Id. The Commission affirmed the ALJ's decision because the respondent's conduct was not "a normal practice." European Trade Specialists, Inc. v. Prudential-Grace Lines, Inc., 19 S.R.R. 59, 63 (FMC 1979). As Stockton Elevators discussed above, European Trade Specialists discussed section 17 of the Shipping Act, 1916, which gave the predecessor to the Commission an authority to "determine, prescribe, and order enforced a just and reasonable regulation or practice," whenever it finds any regulation or practice unjust or unreasonable. Therefore, European Trade Specialists also discussed different statutory section with different context and is not directly precedential in the analysis of section 10(d)(1).

4. Similar Statutes

At the direction of the Commission in its order of December 4, 2012, the parties discussed other statutes with language similar to section 10(d)(1).

a. Section 17 of the Shipping Act, 1916

The second paragraph of section 17 of the Shipping Act, 1916 stated that:

Every such carrier and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices related to or connected with receiving, handling, storing or delivering of property. Whenever the board finds that any such regulation or practice is unjust and unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Public Law 64-260, 39 Stat. 728 (emphasis added). Hapag-Lloyd asserted that the above statutory language assumes that any conduct which constitutes an unjust and unreasonable regulation or practice is susceptible to correction by an order prescribing a just and reasonable regulation. Hapag-Lloyd's Post-Hearing Brief at 19. Hapag-Lloyd disregards, however, that the emphasized sentence of section 17 of the Shipping Act, 1916 does not exist in section 10(d)(1). As Complainants stated, Complainants' Post-Hearing Brief at 5, section 17 of the Shipping Act, 1916 was repealed, and the emphasized sentence was omitted entirely from section 10(d)(1) of the Shipping Act of 1984.¹⁵

b. Interstate Commerce Act

Complainants stated that language comparable with section 17 of the Shipping Act, 1916 is found in section 1, paragraph 3 of the Interstate Commerce Act of 1887. Complainants' Post-Hearing Brief at 7. The paragraph states that:

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

24 Stat. 379. As every unjust and unreasonable charge is prohibited and unlawful, the language appears to support that each and every instance of unjust and unreasonable charges is prohibited and unlawful.

c. Packers and Stockyards Act

¹⁵ See also discussion of the Commission cases, supra, discussing section 17 of the Shipping Act, 1916.

With respect to the Packers and Stockyards Act of 1921, 7 U.S.C. §§ 181-229b, the language similar to section 10(d)(1) is found at 7 U.S.C. § 213(a). The section states that:

It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

After citing federal courts' rulings discussing the above-referenced section of the Packers and Stockyards Act, especially Hutto Stockyard, Inc. v. U.S. Dep't Agriculture, 903 F.2d 299 (4th Cir. 1990) and Bill Rice v. Clenis Wilcox, 630 F.2d 586 (8th Cir. 1980), Hapag-Lloyd stated that "the two U.S. Courts of Appeals that have addressed the issue of what constitutes a regulation and practice under the Packers and Stockyards Act held that an isolated instance does not constitute a practice." Hapag-Lloyd's Post-Hearing Brief at 14. Contrary to Hapag-Lloyd's allegation, a close reading of Hutto in fact supports that a specific instance of failure to observe a practice can be a violation of section 213(a). In Hutto, U.S. Department of Agriculture's (USDA) Packers and Stockyards Administration (PSA) conducted a sting operation to investigate the weighing practice at a hog buying station operated by Hutto Stockyard, Inc. Hutto, 903 F.2d at 302. PSA's two representatives weighed 13 hogs on a scale in their truck. They then transported the hogs to Hutto's station and reweighed six of the hogs and recorded the weights. Impersonating a farmer, they then transported these six hogs to Hutto's buying station where they offered to sell them. Hutto's weightmaster weighed the six hogs. The weights of the hogs as determined by the weighmaster were less than the weights earlier determined by the PSA representatives. After receiving payment for the hogs, the two representatives then

reweighed the second group of seven hogs on their scale and drove back to the buying station where the weighmaster weighed the hogs. Again, there were discrepancies between the weights determined by the weighmaster and the weights earlier determined by the two representatives. USDA charged Hutto with falsely weighing livestock in violation of 7 U.S.C. § 213(a), which prohibits “stockyard operators from using ‘any unfair . . . or deceptive practice or device in connection with . . . [the] weighing . . . of livestock.’” *Id.* at 303. After stating that Hutto actually committed “only one violation,” the court stated that “[w]e see no reasonable basis for finding that Hutto committed more than one unfair or deceptive ‘practice’ of false weighing.” *Id.* at 306. “‘Practice’ within the context of section 213 means ‘uniformity and continuity, and does not denote a few isolated acts.’” *Id.* (internal citations omitted). The court then held that “[t]he conduct USDA complains of here occurred during a few hours of a single day. Accordingly, we hold that the facts of this case support a finding of only one violation of section 213(a).” *Id.* (emphasis added). In sum, the court held that Hutto committed “one unfair or deceptive ‘practice’ of false weighing” and thus violated section 213(a) of the Packers and Stockyards Act. As stated above, the court’s holding supports that specific instances of conduct can be a violation of the section.

Limco also discussed Rice and asserted that “the court stated, ‘[t]he case law demonstrates and the parties concede that an isolated instance does not constitute a practice.’” Limco’s Post-Hearing Brief at 14 (internal citations omitted). Rice discussed section 208(a) of the Packers and Stockyards Act, which is another section purportedly similar to section 10(d)(1). Section 208(a) of the Act, 7 U.S.C. § 208(a), states:

It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited

and declared to be unlawful.

There is a critical difference between section 208(a) of the Packers and Stockyards Act and section 10(d)(1) of the Shipping Act. In Rice, the court discussed a statutory section that prohibits “every unjust, unreasonable, or discriminatory regulation or practice.” Section 10(d)(1) of the Shipping Act, however, contains an affirmative duty that the regulated entities may also not fail to “observe and enforce” just and reasonable regulations and practices. Further, as Hapag-Lloyd stated, Rice was later questioned by a lower court. Hapag-Lloyd’s Post-Hearing Brief at 13. In Dean Rowse v. Platte Valley Livestock, Inc., the district court stated as follows:

The reasoning laid out in *Rice* leaves unclear whether the “practice” was the entire course of action, including honoring 17 checks, or was the two instances of dishonoring checks. The latter was the unfair practice found by the Secretary and upheld by the actual holding of the case. Unless the court believed that honoring the first 17 was deceptive because Davis intended all along to dishonor the last two, which I doubt, then the unfair practice was connected with the last two. Because the court said an isolated transaction was insufficient for a practice, it must have meant either that two unfair transactions do constitute a practice, regardless of the context of prior fair transactions, or that one or two transactions become a practice when they derive their unfairness from the defendant's abrupt change of a previous course of conduct on which the plaintiff has relied to his detriment. I believe the latter is the proper explanation for the *Rice* result, and the court was not consciously adopting a “one free bite” rule. Rather the court was giving a broad reading to the power of the Secretary to protect cattle sellers while heeding the idea that the Packers and Stockyards Act was not

meant to make the Secretary a collecting agency or provide a federal administrative remedy for every worthless check or dishonored draft.

597 F. Supp 1055, 1057-58 (D. Neb. 1984). The district court's reasoning supports that one or two transactions can be a violation of the Packers and Stockyards Act.

Regardless of whether Rice or Rowse can shed light in interpreting the meaning of "practice," they are not necessarily apposite to the consideration of section 10(d)(1) of the Shipping Act. Because of their different construction with different context, comparisons to section 17 of the Shipping Act, 1916, Interstate Commerce Act, and Packers and Stockyards Act do little to illuminate section 10(d)(1) of the Shipping Act of 1984.

We do not today, contrary to the dissent's assertions, adopt a rule that requires "a 100% positive result in each and every ocean shipment transaction." Post at 60. Nor is there any merit to the dissent's contention section 10(d)(1) is "the proper portal and venue for all maritime grievances and the Commission is a court of common maritime pleas," post at 87. There is no merit to the assertion that the Commission is "a court of common pleas and general jurisdiction for all matters maritime involving container cargo troubles, injuries[,] and losses." Post at 61. In particular, we do not interpret the statute as rendering "no general or specific defenses . . . applicable," post at 58, as the current case amply demonstrates – though Hapag Lloyd failed to observe a reasonable practice, it nevertheless is not liable for damages that its failure did not cause.

If Congress wished to only prohibit unfair practices, it would have simply said that "[a] common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish . . . just and reasonable . . . practices relating to or connected with receiving, handling, storing, or delivering property." Instead, we have interpreted the statute in a reasonable

way that gives meaning to *all* words in the statute, not just the word “practices.”

The dissent also claims that we must adopt a position that one party has described as “not a sensible result.” Hapag-Lloyd’s Post-Hrg. Br. at 18. And the dissent makes no attempt to explain why Congress would have purportedly changed an affirmative obligation contained in the Shipping Act, 1916 to the prohibition in the Shipping Act of 1984. Under the dissent’s reading of the statute, Congress intended to change the requirements of the 1916 Act whereby a failure of any one requirement could result in a violation (regulated entities “*shall* establish, observe, and enforce just and reasonable regulations and practices . . .,” Public Law 64-260, 39 Stat. 728 (emphasis added)), to a regime where a regulated entity commits a violation *only* when it has failed all three requirements (“may not fail to establish, observe, *and* enforce”).

In view of the above, the Commission believes that it is a violation of section 10(d)(1) if (1) a common carrier, MTO, or OTI fails to “establish” just and reasonable regulations and practices, or its established regulations and practices are unjust or unreasonable or (2) a common carrier, MTO, or OTI’s established regulations and practices are just and reasonable, but the common carrier, MTO, or OTI has failed to “observe and enforce” the established just and reasonable regulations and practices, regardless of whether the failure occurred for a single shipment or multiple shipments.

D. Hapag-Lloyd

1. Hapag-Lloyd violated section 10(d)(1) (46 U.S.C. § 41102(c)) by loading and transporting a damaged container in disregard of its established practice, but that violation was not the cause of Respondents’ injury.

Complainants allege that Hapag-Lloyd violated section 10(d)(1) “by shipping a damaged container, MOGU2002520, without [Complainants’] authorization and failing to return it as

requested to Complainants' yard for inspection or repair and reloading before shipment." Initial Decision at 22 (citing Complainants' Post-Trial brief). Hapag-Lloyd asserts that its practice is to not load damaged containers and that practice is just and reasonable. With respect to Complainants' damaged container, however, it does not argue that this established practice was followed. Hapag-Lloyd argues that the loading of the damaged container "was an accident" and that "Hapag-Lloyd has found no precedent supporting the proposition that the accidental loading of a damaged cargo constitutes a violation of section 41102(c), and Complainants cite none." Id. at 23 (citing Hapag-Lloyd's Post-Trial brief).

Hapag-Lloyd asserts that 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 10(d)(1)." Hapag-Lloyd's Reply at 16. Hapag-Lloyd also argues that, in some cases, "the Commission found section 10(d)(1) violation with respect to only one shipment." Id. at 18. To address this apparent inconsistency, Hapag-Lloyd argues that the Commission has found section 10(d)(1) violation with respect to a single shipment only when there were additional aggravating factors. Id.

The ALJ found that loading the damaged container was an aberration from Hapag-Lloyd's practice. Initial Decision at 24. The ALJ also stated that "[t]his is not a case where the Respondents said that they usually ship damaged containers," and that "this was a deviation from normal procedure or practice." Id. at 24-25. The ALJ stated that "the parties agree that damaging containers during loading, and then shipping damaged and potentially unseaworthy containers, is not Hapag-Lloyd's normal practice." Id. at 23. The ALJ held that conduct did not constitute a violation of section 10(d)(1), because loading a damaged container and shipping it was an aberration from Hapag Lloyd's normal practice. Id. at 23-24.

In their Post-Hearing Brief, Complainants stated that “the initial decision never reached the critical single failure issue raised in oral argument and in the Commission’s order of December 4, 2012.” Complainants’ Post-Hearing Brief at 13. Complainants further stated that “because the ALJ found that Hapag-Lloyd had established reasonable practices (not loading and shipping damaged containers), the court did not consider the issue of whether or not HLAG observed and enforced this practice.” *Id.* Complainants asserted that “[s]uch an analysis is flawed because it apparently interprets Section 10(d)(1) as requiring proof of all three elements (establish, observe and enforce) for a violation.” *Id.* Hapag-Lloyd alleged that its conduct in this case is “without question an isolated or ‘one shot’ occurrence and hence is not a practice as that term has been defined by the Commission.” Hapag-Lloyd’s Post-Hearing Brief at 12. Hapag-Lloyd even asserted that “[t]he Commission should make clear that a sequence of failures to observe or enforce regulations and practices within a contemporaneous shipment/transaction is not a violation of the Shipping Act.” *Id.* at 15.

Contrary to Hapag-Lloyd’s inconsistent allegation, the Commission has found violations with respect to a single shipment not because there were “aggravating factors,” but because there was a failure to observe and enforce just and reasonable regulations and practices. As discussed above, section 10(d)(1) requires Hapag-Lloyd not only to “establish” just and reasonable regulations and practices, but also to “observe and enforce” the established just and reasonable regulations and practices. Hapag-Lloyd itself does not deny that for the damaged container in question, it failed to observe its own established regulation and practice of not loading damaged containers. A single failure is still a failure and thus a violation of section 10(d)(1) regardless of whether there was only one failure or whether the single failure is a part of a sequence of failures or multiple failures.

The Commission believes that Complainants have adequately demonstrated that (1) Hapag-Lloyd’s just and reasonable

practice was not to load damaged containers and (2) Hapag-Lloyd failed to observe and enforce its own just and reasonable practice by loading and transporting Complainants' damaged container MOGU2002520, and thus violated section 10(d)(1) of the Shipping Act. The relevant consideration at issue here is not whether Hapag-Lloyd's established practices are just and reasonable. If that were the case, the Commission would need to consider the usual course of conduct that connotes more than a single act or incident. Rather, the relevant question in this proceeding is whether Hapag-Lloyd observed and enforced its already-established just and reasonable practice, in which case we must consider specific instances of transactions that may sometimes involve only a single act or incident. The Commission believes that the ALJ's analysis of section 10(d)(1) is flawed because it erroneously substituted Hapag-Lloyd's established regulations and practices with specific instances of its transactions that fail to follow the established practices. The violation occurred because Hapag-Lloyd failed to observe and enforce its established just and reasonable regulations and practices.

The ALJ discussed Patricia Eyes v. Wallenius Wilhelmsen Lines, 30 S.R.R. 1064 (ALJ 2006), to support the proposition that the intentional loading of damaged cargo may be reasonable. Initial Decision at 23. In Patricia Eyes, a claim for reparations was denied after the presiding officer found that the practice to transport a motor home damaged at an intermediate port to its ultimate destination was not unjust or unreasonable where the carrier would have been subject to claims whether it discharged the motor home at the intermediate port or delivered it to its final destination and had chosen the course of conduct which was least disruptive to its vessel operations. Because we believe whether the act in question was intentional or accidental is irrelevant to the analysis, we do not find Patricia Eyes particularly instructive in section 10(d)(1) analysis.

Complainants also alleged that the delay in Germany prevented the damaged container, MOGU2002520, from arriving in the final destination of Gdynia, Poland, for nearly seven months

from the time of departure. Initial Decision at 25 (citing Complainants' post-trial brief). Although Hapag-Lloyd violated section 10(d)(1) by loading and transporting Complainants' damaged container, it does not appear that the delay in Hamburg was an additional violation of section 10(d)(1). Once the damaged container arrived in Hamburg, Hapag-Lloyd continued to communicate with Limco and BSL for on-carriage to Gdynia, Poland. Considering the damage to the container, the feeder operator's refusal to accept the damaged container, the change of mode of on-carriage from feeder vessel to truck, the documentation issue because of the change of mode of on-carriage, and the conflicting instructions from the consignor and consignee, it does not appear that Hapag-Lloyd failed to follow just and reasonable regulations and practices in Hamburg. Although the significant delay in Hamburg was not praiseworthy, it is notable that eventually Hapag-Lloyd transloaded the cargo in the damaged container to its own container, transported the replacement container with the cargo and now-empty damaged container from Germany to Poland, and transferred the cargo back into the damaged container once the containers arrived in Gdynia, Poland, all at Hapag-Lloyd's own expense. Findings 80, 101, and 102. Therefore, we believe that the ALJ was correct in determining that "[a] delay, under these circumstances, does not support a violation of the Shipping Act." Initial Decision at 26.

The damaged container and the cargo arrived in Gdynia, Poland on December 23, 2008. Findings 80, 103. The container and its cargo were sold on or about February 23, 2009. Finding 115. Between late December 2008 and late February 2009, Complainants had time to pick up the container and cargo therein. Complainants asserted that their "alleged failure to pick up was a passive and not active force" because the untrustworthy condition of the damaged container for on-carriage continued after delivery. Complainants' reply to Respondents' post-trial brief at 12. This claim is not credible considering Complainants' delay in promptly picking-up other containers. For example, containers MOGU2112451 and MOGU2003255, which are not the subject of this proceeding,

arrived in Gdynia without any delay and incident on or around July 2, 2008. Findings 26 and 29. Complainants, however, picked up the two containers more than four months later, on or about November 21, 2008. Finding 33. Complainants admitted that, when picking up these two containers, they paid storage charges for their release. Complainants' post-trial brief at 13 and Complainants' reply to Respondents' post-trial brief at 18. By payment of storage charges, Complainants showed that they knew that their pickup of the two containers was significantly late. In fact, Complainants claimed that even if Hapag-Lloyd handled the damaged container MOGU2002520 in a reasonable and timely manner, it would have been picked up on or around November 17, 2008, Complainants' post-trial brief at 13, more than four months after its originally expected arrival on or about July 2, 2008. Similarly, containers MOGU2051660 and MOGU2101987 arrived in Gdynia, Poland on or about September 1, 2008 without any delay or incident. Findings 37-41. The payment of ocean freight for these two containers, however, was made in three installments only on or about January 9, 2009, March 26, 2009, and April 2, 2009. Findings 112 and 125. Considering these delays in picking up the other four containers that were also transported by Hapag-Lloyd from Portland, Oregon to Gdynia, Poland, we do not believe it credible that Complainants did not pick up container MOGU2002520 because of the damage to the container. It appears that Hapag-Lloyd fulfilled its duty to deliver the damaged container, even though it appears to have been a constructive delivery, as Complainants failed to pick it up timely.

Complainants claimed that they intended to ship all five containers together by rail from Gdynia, Poland to Ukraine. Complainants' post-trial brief at 14. Complainants also claimed that they delayed shipment of other containers, waiting for the damaged container to arrive in Gdynia, Poland, and as a result lost their rail appointments. *Id.* This allegation does not seem credible because Complainants did not plan to send all five containers at the same time from Portland, Oregon. It appears that Complainants' plan was to send three containers from Portland, Oregon in early May 2008, and the other two containers not until mid-July 2008. In

fact, Complainants' three containers, including the damaged container, left Portland on or about May 8, 2008 and May 25, 2008, and the other two containers left Portland on July 19, 2008. Findings 26, 29, 41, and 76.

In any event, Hapag-Lloyd's loading and transporting of the damaged container and its delay in arriving in Gdynia, Poland did not cause Complainants' injury. We believe that Complainants' injury was caused by the dubious liquidation of Complainants' containers by ITLC and/or Limco. Therefore, Complainants' section 10(d)(1) claim against Hapag-Lloyd is dismissed.

2. Sections 10(b)(4)(D), 10(b)(4)(E), 10(b)(10), 10(b)(11), and 10(b)(12) (46 U.S.C. §§ 41104(4)(D), (4)(E), (10), (11), and (12)).

In their Complaint, Complainants claimed that Respondents violated various other sections of the Shipping Act. The ALJ dismissed Complainants' claims against Hapag-Lloyd with respect to sections 10(b)(4)(D), 10(b)(4)(E), 10(b)(10), 10(b)(11), and 10(b)(12) (46 U.S.C. §§ 41104(4)(D), (4)(E), (10), (11), and (12)). Initial Decision at 27-30. With respect to Hapag-Lloyd, Complainants only excepted to the ALJ's dismissal of their section 10(d)(1) claim. Complainants' Exceptions at 4-12. As the Commission reviews the ALJ's Initial Decision *de novo*, we now turn to the dismissal of these claims.

Sections 10(b)(4)(D) and (E) state that a common carrier, either alone or in conjunction with any other person, directly or indirectly, may not:

(4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of –

.....

- (D) loading and landing of freight; or
- (E) adjustment and settlement of claims;

46 U.S.C. §§ 41104(4)(D) and (E). All five containers, including the damaged container MOGU2002520, were moved by Hapag-Lloyd under a service contract with Limco. Finding 15. Complainants did not except to this Finding. Sections (4)(D) and (4)(E) are applicable only to tariff movements, but, as far as Hapag-Lloyd is concerned, all five containers, including the damaged container MOGU2002520, were moved under a service contract. As the ALJ correctly noted, therefore, as a matter of law, sections (4)(D) and 4(E) do not apply to these movements with respect to Hapag-Lloyd. Initial Decision at 28-29.

Section 10(b)(10) states that a common carrier may not “unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41104(10). As the ALJ noted, the parties continued to negotiate regarding how to handle the damaged container until it was shipped. Initial Decision at 28. As we discussed above, Hapag-Lloyd eventually transloaded the cargo in the damaged container to another container, transported the replacement container with the cargo and now-empty damaged container from Germany to Poland, and transferred back the cargo into the damaged container once the containers arrived in Gdynia, Poland, all at Hapag-Lloyd’s own expense. Findings 80, 101, and 102. It does not seem that Hapag-Lloyd unreasonably refused to deal or negotiate with respect to the damaged container, as it continued to negotiate and eventually fulfilled its duty to deliver the container at its own expense.

Sections 10(b)(11) and (12), 46 U.S.C. §§ 41104(11) and (12), state that a common carrier may not:

(11) knowingly and willfully accept cargo from or transport cargo for the account of an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title; or

(12) knowingly and willfully enter into a service contract with an ocean transportation intermediary that does not have a tariff as required by section 40501 of this title and a bond, insurance, or other surety as required by section 40902 of this title, or with an affiliate of such an ocean transportation intermediary.

As the above sections prohibit a common carrier from providing service for or entering into a service contract with an OTI without a tariff and a bond, insurance, or other surety and as only an NVOCC (but not a freight forwarder) is required to have a tariff under section 8(a)(1) (46 U.S.C. § 40501(a)(1)), Hapag-Lloyd could have violated these two sections only if it provided service for or entered into a service contract with an untariffed and unbonded NVOCC. The parties in this proceeding have stipulated that Limco is, and was at all material times, a licensed NVOCC. Initial Decision at 29. The record shows that Hapag-Lloyd entered into a service contract with Limco and accepted cargo from Limco. *Id.* at 30. As there is no evidence that Limco was either untariffed or unbonded, there was no violation of these two sections.

The ALJ stated that the record suggests that ITLC may have acted as a freight forwarder. Initial Decision at 37. In its Reply to Exceptions, ITLC specifically denied that ITLC acted as an NVOCC. On the contrary, ITLC persuasively asserted that Limco performed “all NVOCC-related functions during the transport of Complainants’ shipments.” ITLC’s Reply at 1-2. As ITLC did not act as an NVOCC with respect to the damaged container, Hapag-Lloyd could not have violated the two sections with respect to ITLC.

We affirm the ALJ’s Initial Decision dismissing Complainants’ claims against Hapag-Lloyd with respect to sections 10(b)(4)(D), 10(b)(4)(E), 10(b)(10), 10(b)(11), and 10(b)(12) (46 U.S.C. §§ 41104(4)(D), (4)(E), (10), (11), and (12)).

E. Limco**1. Section 10(d)(1) (46 U.S.C. § 41102(c)).**

Complainants alleged that Limco violated section 10(d)(1) by changing the Limco bills of lading for the three liquidated containers, MOGU2002520, MOGU2051660, and MOGU2101987, without Complainants' permission or consent, thereby aiding and facilitating the unlawful liquidation of these three containers. Complainants' post-trial brief at 14-15. On March 2, 2009, Limco notified BSL of the change of shipper/consignee, attaching the altered Limco bills of lading showing the release of cargo to Oleg Remishevskiy. Id. at 15. Complainants never authorized Limco or ITLC to change the three bills of lading to Oleg Remishevskiy. Id.

The ALJ found that Limco changed the shipper in the bills of lading at the direction of ITLC after the containers had been sold to a third party. Initial Decision at 31. The ALJ also found no evidence that Limco knew that the containers had been liquidated by ITLC or that Limco acted unreasonably in handling any of these containers. Id. The ALJ concluded that “[u]nder these facts, Complainants have not demonstrated an unreasonable practice or procedure.” Id.

As it is discussed above, the questions relevant to section 10(d)(1) are: (1) whether Limco established just and reasonable regulations and practices with respect to changing the bills of lading; and (2) whether Limco failed to observe and enforce just and reasonable regulations and practices by changing Complainants' three bills of lading and thus facilitating the liquidation of the containers. If Limco failed to establish just and reasonable regulations and practices for 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 then be asked whether Limco failed to observe and enforce them with respect to Complainants' three containers, and that failure caused injury to Complainants.

Limco issued its bills of lading showing Complainants as exporter/shipper and consignee and ITLC in the “Forwarding Agent” box. Findings 24, 27, 37, 39, and 49. Limco knew or should have known that Complainants were the owners of the cargo and that ITLC was acting as a freight forwarder, regardless of whether Limco knew that ITLC was not licensed. Limco asserted that Complainants never had a contract or contractual relationship with Limco and that there is no privity of contract between Complainants and Limco. Limco’s post-trial brief at 11. As discussed above, Limco issued bills of lading showing Complainants as exporter/shipper and consignee. Bills of lading may serve three different functions: (1) a formal receipt of goods; (2) a memorandum of contract of affreightment; and (3) a document of title. Thomas J. Schoenbaum, Admiralty and Maritime Law, § 8-11, 547-548 (4th Edition 2004). Contrary to Limco’s arguments, “in common carriage, the bill of lading issued by the carrier is also evidence of the contract of carriage.” *Id.* While asserting that ITLC acted as a freight forwarder, Limco alleged that Complainants entered into contractual relationship with ITLC for the transport of the five containers. Limco’s post-trial brief at 11. Under the Shipping Act, however, only a common carrier such as Limco, but not a freight forwarder such as ITLC, can assume responsibility for the transportation. 46 U.S.C. § 40102(6)(A). Limco’s assertions show only that Limco might have lacked basic understanding of international shipping, and thus it might have failed to observe and enforce just and reasonable regulations and practices for receiving, handling, storing, or delivering Complainants’ liquidated containers.

Limco issued the changed bills of lading upon the request of ITLC, when it appears that Limco knew or should have known that ITLC was acting as a freight forwarder and that Complainants were the owners of the containers. Limco’s post-trial brief at 11 and Complainants’ post-trial brief at 16. There is no evidence that Limco asked Complainants regarding the change to its bills of lading. Complainants alleged that despite repeated personal contact

between Complainants and Limco's personnel regarding the damaged container, Limco never asked Complainants about ITLC's instruction to change the shipper and consignee to Oleg Remishevskiy. Complainants' post-trial brief at 16. Limco notified BSL on March 2, 2009, that the shipper/consignee on the Limco bills of lading had been changed to Oleg Remishevskiy. Finding 122. Limco also notified Hapag-Lloyd, on March 2, 2009, of the new shipper/consignee details for the three containers (Finding 119), although Complainants argue that Limco's notification related to only one of the containers. Complainants' Exceptions at 12.

It appears that ITLC, not Limco, played a major role in liquidating the three containers. It could be possible that even without Limco's changed bills of lading or facilitation, ITLC might have been able to liquidate the containers, in view of the fact that ITLC had entered into a sale agreement with Oleg Remishevskiy on or about February 23, 2009 (Finding 117), while Limco had issued the changed bills of lading only on March 2, 2009 (Finding 118). Limco asserted that if the liquidation of the cargo was not proper, ITLC would be solely liable to the Complainants for any and all damages sustained. Limco's post-trial brief at 5. It appears uncertain, however, what role Limco's changed bills of lading and notifications to BSL and Hapag-Lloyd played in the liquidation of the three containers.

The ALJ found no evidence that Limco knew that the containers had been liquidated by ITLC. Initial Decision at 31. Complainants asserted that Limco knew that the "containers would be sold." Complainants' Exceptions at 13 and post-trial brief at 16. Complainants alleged that both Limco's and ITLC's personnel admitted that they had "big discussions" about the containers almost every day. *Id.* Especially with respect to the damaged container, Limco communicated with Complainants and it appears that Limco knew that Complainants were the owners of the damaged container and the cargo. Findings 55, 58, 61, and 65. Considering that Limco knew or should have known that Complainants were the owners of the containers, it appears questionable whether Limco did not know

that ITLC was selling or liquidating the containers. The Commission has found that an NVOCC's failure to fulfill its obligation constitutes a violation of section 10(d)(1). Houben, 31 S.R.R. at 1405 (internal citations omitted).

In view of the above, the Commission vacates the ALJ's holding that Limco did not violate section 10(d)(1); remands for further adjudication whether Limco failed to establish, observe, and enforce just and reasonable regulations and practices by issuing changed bills of lading and facilitating ITLC's liquidation of Complainants' three containers; and, if it is found that Limco violated section 10(d)(1) by such action, whether the violation caused injury to Complainants.

2. Sections 10(b)(4)(E), 10(b)(10), and 10(b)(11) (46 U.S.C. §§ 41104(4)(E), (10), and (11)).

Complainants alleged that Limco engaged in an unfair shipping practice by unreasonably refusing to deal, negotiate, or settle Complainants' claim for damages to container MOGU2002520. Initial Decision at 31 (internal citation omitted). The ALJ stated that Limco promptly conveyed Complainants' concerns to Hapag-Lloyd and Hapag-Lloyd's position to Complainants, Limco reasonably dealt with and negotiated Complainants' damages claim, and it was Complainants' unreasonable demands, not Limco's actions, which hindered reaching an agreeable resolution. Id. at 32. We agree with the ALJ's conclusion that the evidence does not support a finding that Limco refused to deal, negotiate, or settle Complainants' claim for damages. Id.

Complainants alleged that on or about May 30, 2008, Hapag-Lloyd approved a settlement amount. Complainants' Exceptions at 16. Complainants also alleged that Limco (as a shipper on Hapag-Lloyd's bills of lading) had a duty and responsibility to negotiate and obtain settlement for the damaged container for Complainants, but had failed and refused to do so

without any justification. Id. at 16-17. With respect to the damaged container, Limco was basically a middleman between Complainants and Hapag-Lloyd. As such, Limco could not obtain a settlement without Complainants' agreement with Hapag-Lloyd. There is no evidence that Limco failed to communicate or withheld any information for Complainants' negotiation with Hapag-Lloyd with respect to the damaged container. Initial Decision at 32. We agree with the ALJ that Limco did not engage in unfair or unjustly discriminatory practice in settlement of claims in violation of section 10(b)(4)(E) (46 U.S.C. § 41104(4)(E)), nor did Limco unreasonably refuse to deal or negotiate in violation of section 10(b)(10) (46 U.S.C. § 41104(10)).

Complainants alleged that Limco violated section 10(b)(11) by knowingly and willfully accepting cargo from an OTI that did not have a tariff and a bond or other surety as required by the Shipping Act. Initial Decision at 32 (internal citation omitted). In its Exceptions, Complainants did not discuss the ALJ's dismissal of their section 10(b)(11) claim. Regardless, as discussed above with respect to Hapag-Lloyd, Limco could have violated this section only when Limco willingly and knowingly accepted cargo from untariffed and unbonded NVOCC. The evidence strongly indicates, however, that ITLC acted as an ocean freight forwarder. As Limco accepted cargo from ITLC, a freight forwarder, Limco could not have violated section 10(b)(11).

In view of the above, the ALJ was correct in dismissing Complainants' claims against Limco with respect to sections 10(b)(4)(E), 10(b)(10), and 10(b)(11) (46 U.S.C. §§ 41104(4)(E), (10), and (11)).

F. ITLC

1. Section 19(a) (46 U.S.C. § 40901(a)).

Complainants alleged that ITLC engaged in unlawful shipping activities in violation of section 19(a), 46 U.S.C. §

40901(a), by operating as an ocean freight forwarder without a license. Initial Decision at 33 (internal citation omitted).¹⁶ It appears that the ALJ was correct in holding that “Complainants have not established a ca[us]al relationship to the loss,” *Id.* at 38, because even if ITLC was licensed as an ocean freight forwarder, the liquidation of Complainants’ containers by ITLC, as an ocean freight forwarder, appears dubious, and probably unlawful anyway.

The record strongly indicates that ITLC acted as an unlicensed freight forwarder. According to ITLC, Complainants alleged that they have met their burden to demonstrate that ITLC operated as an OTI, specifically as a freight forwarder. ITLC’s Reply at 1. ITLC asserted that Complainants presented no credible evidence to support that ITLC unlawfully operated as an OTI at the time Complainants’ subject shipments were made. *Id.* ITLC then persuasively and credibly alleged that it did not act as an NVOCC, but Limco acted as an NVOCC. *Id.* at 1-2. This is consistent with the ALJ’s findings and the record. ITLC did not deny in its Reply that it acted as a freight forwarder for Complainants’ shipments.

2. Section 10(d)(1) (46 U.S.C. § 41102(c)).

ITLC arranged for Limco to make shipping arrangements for the Complainants’ shipments. Initial Decision at 37 (internal citation omitted). ITLC accepted payment for the containers from Complainants and forwarded the payment to Limco. *Id.* ITLC designated BSL as the destination agent in Gdynia, Poland. ITLC, however, did not issue bills of lading. There is no evidence that ITLC hid the name of the NVOCC, and Complainants were listed on the Limco bills of lading. ITLC did not have a service contract with Hapag-Lloyd. All five containers were booked and moved under Limco’s service contract with Hapag-Lloyd. Bills of lading were issued by Limco, not ITLC, listing one of the Complainants as the shipper. The ALJ stated that these factors suggest that ITLC

¹⁶ In their Exceptions, Complainants did not discuss the ALJ’s dismissal of their section 19(a) claim.

might have acted as an ocean freight forwarder. Id.

In the section 19(a) discussion, the ALJ stated that it is not necessary to determine whether ITLC operated as a freight forwarder on these shipments. Id. The ALJ further stated that even if ITLC had operated as a freight forwarder, they met their fiduciary duty to arrange shipment to Poland. Id.

In the section 10(d)(1) discussion, the ALJ concluded that where ITLC completed its obligation to deliver the containers and the Complainants failed to complete their obligations to pick up and pay for the containers, the Complainants have not demonstrated that it was unreasonable for ITLC to liquidate the containers in an effort to control their financial exposure and stop the accrual of additional demurrage. Id. at 39. The ALJ did not discuss, however, whether it was just and reasonable for a freight forwarder to liquidate Complainants' containers, when ITLC, as a freight forwarder, could not legally have exercised a carrier's lien and did not demonstrate any other legal rights to liquidate Complainants' three containers.

The term "ocean freight forwarder" means a person that in the United States, "dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers." 46 U.S.C. § 40102(18). A freight forwarder such as ITLC dispatches shipments only "on behalf of shippers." They are not themselves shippers. As such, a freight forwarder, such as ITLC, cannot enter into a service contract with an ocean common carrier such as Hapag-Lloyd. A freight forwarder's name may appear in the shipper identification box on the bill of lading, but the freight forwarder must be identified as the "shipper's agent." 46 C.F.R. § 515.42(a). Under the Commission's rules, when a shipper employs the services of a freight forwarder to facilitate the ocean transportation, the shipper is considered as a principal. 46 C.F.R. § 515.2(q). In particular, the Commission's rule states that:

(c) *Information provided to the principal.* No licensed freight forwarder shall withhold any information concerning a forwarding transaction from its principal, and each licensed freight forwarder shall comply with the laws of the United States and shall exercise due diligence to assure that all information provided to its principal or provided in any export declaration, bill of lading, affidavit, or other document which the licensed freight forwarder executes in connection with a shipment is accurate.

46 C.F.R. § 515.32(c). Further, a freight forwarder is prohibited from preparing, filing, or assisting in the preparation or filing of any documents concerning an OTI transaction which the OTI has reason to believe is false or fraudulent. 46 C.F.R. § 515.31(e).

ITLC asserted that it liquidated Complainants' three containers to recover the costs associated with Complainants' nonpayment of ocean freight and their failure to pick up the containers in Poland. ITLC's Reply at 4. ITLC further asserted that the liquidation sale of the three containers due to nonpayment for freight and storage charges is not a violation of any provision of the Shipping Act. *Id.* at 5. Any advance payment ITLC may have made to Limco, however, did not create any beneficial interest in Complainants' three containers that would have entitled ITLC to liquidate them. 46 C.F.R. § 515.2(b).

Complainants claimed that they had paid the freight for damaged container MOGU2002520 on July 25, 2008, Complainants' post-trial brief at 18, which, it appears, ITLC did not deny. Complainants also paid \$1,500 on or about January, 2009, which was a partial payment for containers MOGU2051660 and MOGU2101987. Finding 112. Although it appears that BSL pressured to hold ITLC liable for storage costs for the three containers remaining at the Port of Gdynia and demanded action by February 6, 2009, Finding 113, there is no evidence that ITLC ever advanced any storage charges to BSL on behalf of Complainants.

Even if ITLC had advanced some storage charges, such a payment would not have created any beneficial interests in Complainants' cargo. BSL's pressure for storage charges cannot justify the liquidation of Complainants' three containers by ITLC, a freight forwarder, without any legal rights, court's order, or Complainants' authorization.

Whether ITLC acted as a freight forwarder is important because the prohibitions of section 10(d)(1) apply only to common carriers, MTOs, and OTIs. 46 U.S.C. § 41104(c). An intermediary's conduct, not what it labels itself, will be determinative of its status. EuroUSA Shipping, Inc., 31 S.R.R. 967, 975 (ALJ 2009) (internal citation omitted). We agree with the ALJ's finding that "[ITLC] may have acted . . . as a freight forwarder." Initial Decision at 37.

ITLC alleged that Complainants' failure to pay ITLC, their failure to timely pick up the containers, and their failure to act on ITLC's final notice resulted in the liquidation of Complainants' three containers, which was done by ITLC to recover the costs associated with Complainants' failures. Id. at 3-4. ITLC also alleged that the liquidation sale due to nonpayment for freight and storage charges is not a violation of any provision of the Shipping Act. Id. at 5. ITLC asserted that Complainants had no prior experience with international shipping and selling and failed to investigate the import regulations for importing oil products into Ukraine. Id. ITLC further alleged that Complainants had no written contracts with the buyers of their cargo in Ukraine, nor were they able to sell any of the cargo that had been on their father's property since 2008; that one of the Complainants filed for bankruptcy soon after purchasing the cargo for shipping; that Complainants continued to do business with ITLC after the liquidation sale of Complainants' containers; and that one of the Complainants was not a credible witness. Id. at 6. ITLC, however, did not demonstrate what legal rights it had, as a freight forwarder, to liquidate Complainants' cargo.

Even if all of ITLC's above-referenced allegations were true, it appears that none of them can justify a freight forwarder's unlawful liquidation of a shipper's cargo in breach of the freight forwarder's fiduciary duty to the shipper. Further, Complainants paid ITLC \$1,500 on or about January 9, 2009, \$7,065 on or about March 26, 2009, and \$1,635 on or about April 2, 2009, although ITLC later refunded the payments to Complainants after Complainants had demanded information regarding the containers. Findings 112, 125, and 129. Therefore, at the time of ITLC's liquidation of Complainants' three containers in late February or early March 2009, it appears that Complainants' outstanding freight charges were approximately \$9,000. ITLC liquidated Complainants' containers for approximately \$9,000 plus BSL's pressure to resolve outstanding storage charges. Complainants claim that the containers and the cargo therein had a documented value exceeding \$120,000 and, specifically that the value of the cargo alone was over \$114,000. Complainants' Exceptions at 23 and Complainants' post-trial brief at 34.

In United States v. Armand Ventura, 724 F.2d 305 (2d Cir. 1983), the Second Circuit described a freight forwarder's fiduciary duty as follows:

A shipper retains a freight forwarder because of the freight forwarder's expertise in securing the dispatch of cargo to a foreign destination. Because of this expertise and the freight forwarder's greater access to information from NVOCCs and VOCCs, the shipper relies on the freight forwarder's representations regarding the suitability, efficiency, and economy of using certain carriers, the availability of ships, and other matters relating to the shipment. Moreover, because of the shipper's inability to monitor every step in the shipping process, the freight forwarder must often make arrangements for shipment details without express approval for these arrangements

from the shipper. The freight forwarder thus exercises considerable control over the transport-related decisions of the shipper. In describing the shipping industry, the government's expert witness termed the relationship between a shipper as principal and freight forwarder as agent "a fiduciary relationship" "of the greatest trust and fidelity," and stated that the freight forwarder "has the obligation of trying to obtain for the shipper the cheapest and the most efficient and most economical transportation that he can." Recognizing the nature of this relationship, courts have described freight forwarders as "agents of the shipper" for the purposes of arranging cargo transport, and as, essentially, "export departments for their shipper clients."

Id. at 310-311 (internal citations omitted).

The Commission also has long held that ocean freight forwarders are fiduciaries performing vital, sensitive functions, and who are required to observe the highest standards of behavior toward their principals, the shippers. Nordana Line AS v. Jamar Shipping, Inc., 27 S.R.R., 233, 236 (ALJ 1995). A freight forwarder's breach of its fiduciary duty can be a violation of section 10(d)(1). See id. Freight forwarders have long been held to high standards of care and integrity because they are fiduciaries who are in unique positions of trust and are able to inflict harm on their clients and on the shipping public. Tractors and Farm Equipment Ltd., 26 S.R.R. at 796.

In view of the above, the Commission remands this proceeding for further adjudication of whether ITLC, as a freight forwarder, violated section 10(d)(1) by unlawfully liquidating Complainants' three containers and the cargo therein.

THEREFORE, IT IS ORDERED, That all claims against Respondent Hapag-Lloyd are dismissed;

It is FURTHER ORDERED, That the Initial Decision with respect to Respondent Limco's possible violation of section 10(d)(1) is vacated and remanded for further adjudication whether Limco failed to establish, observe, and enforce just and reasonable regulations and practices by issuing changed bills of lading and facilitating ITLC's liquidation of Complainants' three containers; and, if it is found that Limco violated section 10(d)(1) by such action, whether the violation caused injury to Complainants;

It is FURTHER ORDERED, That the Initial Decision dismissing Complainants' section 10(d)(1) claim against Respondent ITLC is vacated and remanded for further adjudication consistent with this Order; and

It is FURTHER ORDERED, That the Initial Decision is affirmed with respect to the dismissal of all other claims.

Finally, it is ORDERED, That the ALJ shall issue an Initial Decision consistent with this Order on or before April 30, 2014, and the Commission's final decision shall be issued on or before June 30, 2014.

By the Commission.

Karen V. Gregory
Secretary

Commissioner KHOURI, With Whom Commissioner DYE Joins, Dissenting:

1. Overview

I respectfully disagree with my fellow Commissioners' majority opinion and offer my dissenting views and arguments below.

As a point of embarkation, I ask – how did the Commission take the requirement of section 10(d)(1) of the Shipping Act – “no common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property” – and arrive at the final port in this case that a vessel operator's inadvertent and innocent mistake in loading a damaged container and a freight forwarder's alleged breach of a fiduciary duty involving three containers in a single transaction are violations of section 10(d)(1)? The question is offered in light of the plain words of the statute, long-standing judicial interpretations of identical or similar wording in 19th and contemporaneous 20th century statutes, and U.S. Supreme Court directions concerning statutory interpretation generally and specifically, the Shipping Act's purposes and context.

In enacting the Shipping Act of 1916, its older regulatory cousin – the Interstate Commerce Act of 1887, and other early 20th Century legislative enactments such as the Packers and Stockyards Act of 1921 (7 U.S.C. §§ 181-229b) – Congress employed identical or closely similar statutory language to that in section 10(d)(1). See 46 U.S.C. § 41102(c). In all of these statutes, Congress intended to protect our nation's domestic economy and foreign commerce from various forms of abuse by essential market and transportation interests that had power, opportunity, and means to undermine competition and injure commerce.

In the case of the Shipping Act, the feared economic abuses were catalogued in what is now commonly referred to as Section 10 of the Shipping Act and included the various proscribed business acts, devices, means, methods and practices that Congress deemed to be harmful to our nation's oceanborne international trade. The United States Shipping Board, the United States Maritime Commission, and ultimately their successor agency, the Federal Maritime Commission, were charged with the responsibility to oversee and regulate the nation's international ocean liner trades to prevent harm to the nation's commerce.

The Shipping Act of 1916 addressed the world of ocean borne commerce where numerous ship owner conferences dominated virtually all sea trade lanes. A conference agreement would fix the agreed rate and all regulations, practices, terms and conditions for the receiving, handling, storing, and delivering of a specified cargo class over a specified trade route. Every ship owning member of the conference was bound by the conference agreement, tariff rate, rules, and practices. Every cargo owner that wanted to move a specified cargo over the specified trade route had the benefit of a public and common rate and common application of other rules and practices for the transportation. This was the historical context for the Shipping Act of 1916, the original language of section 10(d)(1) and the similar statutes of the era. All were intended to address and regulate regular practices and established regulations of essential – but powerful – market players that undermined and harmed the flow of commerce.

This mandate to protect commerce in a broad sense is clear from Congress' statement of the purposes of the statute itself. Congress has revisited and amended the Shipping Act over its ninety-seven year history. Any fair review of the current Declaration of Policy in the Shipping Act of 1984 indicates the Congressional intention that the Shipping Act's scope and focus is ocean commerce on a larger scale. See Pub. Law No. 98-237, § 2 (currently codified at 46 U.S.C. § 40101). The Declaration of

Policy charges the Commission to (1) “establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States . . . ,” (2) “provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar a possible, in harmony with, and responsive to, international shipping practices,” (3) “to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security needs,” and (4) “to promote the growth and development of United States exports through competitive and efficient ocean transportation by placing a greater reliance on the marketplace.” See Pub. Law No. 98-237, § 2.

A review of the originally-enacted Section 10 shows that the Prohibited Acts provisions of the Shipping Act are reflective of and aligned with Congress’s broad statement of purposes designed to ensure the integrity of the “commerce of the United States.”

No person may knowing and willfully...by means of false billing . . . classification . . . weighing . . . report of false weight . . . measurement, or by any other unjust device or means obtain . . . ocean transportation at less than the rates...that would otherwise be applicable. Pub. Law No. 98-237, § 10(a)(1).¹⁷

No person may operate under an agreement required to be filed under . . . the Act that is not lawfully in effect and must operate within the terms of such lawful agreement. Pub. Law No. 98-237, §§ 10(a)(2) and (3).¹⁸

Section 10(b) – No common carrier, either alone or jointly with other person may (2) provide service in the liner

¹⁷ Commission rule and precedent further requires a finding of fraud or concealment. See 46 C.F.R § 545.2.

¹⁸ This applies to any two or more vessel operating common carriers or any two or more marine terminal operators.

trade that...

A. is not in accordance with the rates . . . rules and practices contained in a published tariff or service contract (emphasis added). Pub. Law No. 98-237, § 10(b)(2)(A) (emphasis added).

(3) retaliate against any shipper by refusing, or threatening to refuse, cargo space accommodations, when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint or any other reason. 46 App. U.S.C. § 1709(b)(3) (2004) (emphasis added).

[F]or service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of –

rates or charges, cargo classifications, cargo space accommodations . . . , loading and landing of freight, or the adjustment and settlement of claims.. 46 App. U.S.C. § 1709(b)(4)(A-E) (emphasis added).

for service pursuant to a service contract, engage in any unfair or unjustly discriminatory practice in the matter of rates or charges with respect to any port. 46 App. U.S.C. § 1709(b)(5) (emphasis added).

use a vessel or vessels in a particular trade for the purpose of excluding, preventing, or reducing competition by driving another ocean common carrier out of that trade. 46 App. U.S.C. § 1709(b)(6).¹⁹

[for service pursuant to a tariff or service contract], give any undue or unreasonable preference or

¹⁹ This subsection is a maritime version of proscribing operational and/or predatory pricing tactics.

advantage or impose any undue or unreasonable prejudice or disadvantage. 46 App. U.S.C. § 1709(b)(8) and (9).

Section 10(c) – Concerted Action. No conference or group of two or more common carriers may:

- boycott or take any other concerted action resulting in an unreasonable refusal to deal. 46 App. U.S.C. § 1709(c)(1).
- engage in conduct that unreasonably restricts the use of intermodal services or technological innovations. 46 App. U.S.C. § 1709(c)(2).
- engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier. 46 App. U.S.C. § 1709(c)(3) (emphasis added).
- allocate shippers among specific carriers that are parties to the agreement or prohibit a carrier that is party to the agreement from soliciting cargo from a particular shipper 46 App. U.S.C. § 1709(c)(6)
- for service pursuant to a service contract, engage in any unjustly discriminatory practice in the matter of rates or charges with respect to any locality, port, or persons due to those persons’ status as shippers associations or ocean transportation intermediaries. 46 App. U.S.C. § 1709(c)(7) (emphasis added).

With the foregoing statutory preamble, we arrive at Section 10(d) – Common Carriers, Ocean Transportation Intermediaries (“OTI”), and Marine Terminal Operators (“MTO”).

- No common carrier, OTI or MTO may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering

property. 46 App. U.S.C. § 1709(d)(1) (emphasis added).

- No [MTO] may agree with another [MTO] or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, any common carrier or ocean tramp. 46 App. U.S.C. § 1709(d)(2).
- No [MTO] may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person. 46 App. U.S.C. § 1709(d)(4).

All of the above-cited sections of the Shipping Act are focused on conduct wholly peculiar to ocean commerce or on abusive maritime business practices that would have substantive adverse impacts on the ocean commerce of the United States.

Viewing the Shipping Act's broad purposes and the commandments and prohibitions as a contextual whole together with the words and phrases that Congress incorporated into Section 10(d)(1), it simply tortures the statute's words, legal reason, and logic to embrace an ultimate conclusion – that a single act or omission, some isolated and non-related acts or omissions, a common contract law breach, a common tort law breach, a common admiralty law breach, a statute based admiralty law breach (i.e., Carriage of Goods by Sea Act (COGSA) 46 U.S.C. §§ 1300-1315), a common agency law breach or other similar causes of action traditionally heard in either courts of common pleas or federal courts sitting in admiralty are all within the reasonable contemplation of Congress, within the reasonable reading of the Shipping Act and, thus, within the subject matter jurisdiction of the Commission.

In this decision, the majority has completed a process that began in the early 1990's that administratively expanded Section 10(d)(1) and thereby broadened the jurisdictional boundary of the Federal Maritime Commission far beyond anything Congress could

have intended or that can be supported by any common sense reading of the statute itself. Under the majority's opinion, any regulated ocean carrier that fails to deliver the cargo, in any single shipment, in timely good and satisfactory order has committed a Section 10(d)(1) violation. Likewise, any regulated ocean transportation intermediary which fails in any duty found in the law – including, but not limited to, any fiduciary duties found in agency law or any duties based in torts, general contract law, admiralty law, fraud and perhaps others - with respect to a single ocean shipment transaction has committed a Section 10(d)(1) violation.²⁰

Presenting further trouble and concern is that no general or specific defenses appear to be applicable. The majority's test contains no requirements that a complainant allege, identify and establish through credible evidence that a specific "practice" utilized by the regulated entity was the causal element in its alleged loss. Likewise, the rule adopted today has no requirement that the complainant allege and establish through credible evidence that the "practice" was, by reasonable construction of such term, utilized with other cargo owners who similarly suffered the same or similar injury and reparation claim. It does not appear from the majority's opinion that a complainant must allege and establish through credible evidence that the identified "practice" was "unjust or unreasonable." Respondent can, as in the instant case, assume the burden of identifying the "practice" and then presenting credible evidence that the "practice" involved was "just and reasonable," well "established," commonly "observed," and judiciously "enforced" in all instances except for the case at bar – and the respondent will still be in violation of section 10(d)(1) under the majority's opinion. This simply cannot be what Congress intended in 1916 or in any subsequent renewal of the statute.

²⁰ See Adair v. Penn-Nordic Lines, Inc. at 20. ("Interestingly, [the Respondent's] conduct would undoubtedly have contravened other standards of law under principles of contract and common carrier law applicable in courts of law and quite possibly Mr. Adair could have obtained relief had he sued [the Respondent] in a court of law or perhaps admiralty rather than before this Commission.")

Viewed in this context and as further developed in the following discussion, the prohibitions in what is now section 10(d)(1) of the Shipping Act were clearly intended by Congress to protect the *flow of commerce* in our international trades from a specific identified “practice” that was generally “established, observed and enforced” by the regulated conference participants and, as applied to all cargo owners in the affected trade, and provided, further such practice was proven to be “unjust and unreasonable” within a context of distorting, disrupting or deterring commerce. The ocean transportation industry has undergone many changes over the last century as containerized cargo became the principal mode of ocean liner transportation. Congress responded to those changes by amending the Shipping Act on several occasions, but the language and purpose of what is now section 10(d)(1) remains the same: to protect competition and commerce, and that is what distinguishes the Shipping Act from other maritime cargo delay, diversion, disruption, non-payment, damage and loss claims or similar maritime causes of action.

The mission of protecting and promoting fair and open *competition* in our nation’s ocean commerce is a far different matter than protecting each individual consumer that has a specific dispute or discordant result with a single shipment. In certain defined areas, such as some sections 10(a) and 10(b), the Shipping Act does address a single shipment and single act.²¹ But even for these other provisions in section 10 of the Shipping Act, the underlying purpose is to protect the integrity of competition and commerce, not the individual complainant in any and every maritime cargo case.

At its core, the majority’s opinion rests on the conclusion that Congress really intended one thing when Congress said another in the Shipping Act. The opinion makes much of the conjunctive

²¹ Section 10(a)(1) (presenting a false bill or weight); Section 10(a)(2) (two vessels with unrelated ownership operating under a common agreement that was not filed with the Commission and effective under the Shipping Act); Section 10(b)(7) (pay a deferred rebate).

versus disjunctive – that Congress said “and” but really intended “or”. The practical effect of this reading is that the Commission’s revised version of section 10(d)(1) - “establish, observe, or enforce” - now becomes a guarantee under the Shipping Act that a regulated entity must provide and a shipper must obtain a 100% positive result in each and every ocean shipment transaction. Otherwise, the regulated entity will have violated section 10(d)(1) and be liable not only for reparations, but attorney’s fees as well. I do not believe that Congress had any intention for such interpretation or application of section 10(d)(1) as proposed by the majority. I believe that my view is soundly supported by a review of the statute itself and analysis of the history of the transportation statutes and the various court decisions referenced herein. Also instructive in the analysis is the interpretation and application of the term “practice” in other non-transportation statutory schemes. Additional support is found in the numerous anomalous legal implications and results that would obtain through future enforcement of the majority’s decision.

The Commission has a valuable and central role to play in our oversight of ocean container commerce and protection of fair competition. The Shipping Act was enacted and subsequently revised and amended for an important purpose: to ensure competition and protect commerce, and to protect the maritime shipping community in the larger context of the “ocean commerce of the United States”²² from certain types of behavior by regulated entities that is harmful or detrimental to such commerce.²³ The Commission is specifically tasked to address unfair and unjust regulations and practices that undermine the flow of commerce and the positive objectives of the Shipping Act. By focusing the Commission’s finite resources on these objectives, we will serve the Congress, the Executive Branch and our Nation well. We must

²² See discussion of Declaration of Policy of Shipping Act of 1984, supra.

²³ See Stockton Elevators, 8 F.M.C. 187, 201 (emphasis added) (“However, even if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust or unreasonable. The commerce of the United States was not deterred.”)

avoid the temptation to divert our course toward Article III of the Constitution where we become a court of common pleas and general jurisdiction for all matters maritime involving container cargo troubles, injuries and losses.

2. The Statute and the Majority's Position

The statutory language of section 10(d)(1) is straight forward and includes specific elements – “[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)). The U.S. Supreme Court has often addressed the question of how to interpret the words and phrases that Congress uses in statutes. A brief review with relevant language and citations follows:

In Pilot Life Insurance v. Dedeaux, the Court held “[o]n numerous occasions we have noted that, ‘[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy.’” 481 U.S. 41, 51 (1987) (citing Kelley v. Robinson, 479 U.S. 36, 43 (1986), quoting Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207,221 (1986), quoting Mastro Plastics Corp. v. NLRB, 350 U.S. 270,285 (1956), in turn quoting United States v. Heirs of Boisdore, 8 How. 113, 122 (1849)).

Shell Oil Co. v. Iowa Department of Revenue, 488 U.S. 19, 25 (1988) held the “meaning of words depends on their context.”

Massachusetts v. Morash, 490 U.S. 107, 115 (1989) (“*Morash*”) cited and reaffirmed the Pilot Life decision.

William “SKY” King v. St. Vincent Hospital, 502 U.S. 215, 221 (1991), reaffirmed the Morash and Shell Oil decisions and held that, “[w]e...follow the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not,

depends on context.” *Id.* (internal citation to *Morash*, 490 U.S. at 115, omitted).

Hibbs v. Winn, et al, 542 U.S. 88, 101 (2004), incorporates a parallel rule of construction where the court held that “[t]he rule against superfluties complements the principle that courts are to interpret the words of a statute in context. *Id.* (emphasis added) (citing 2a N. Singer, *Statutes and Statutory Construction* Section 46.06 pp. 181-186 (rev. 6th ed. 2000)).”

Corley v. United States, 556 U.S. 303, 314-15 (2009), is cited by the Kobel Claimants and endorsed in the majority opinion for the purpose of the Hibbs “superfluties” language, “[a] statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant” (citation omitted). The reference and reliance on this language ignores the Corley decision’s further admonition to be mindful of the overriding “[c]ardinal rule that a statute is to be read as a whole.” *Id.* (emphasis added) citing and reaffirming the King decision.

The majority approvingly cites rules of statutory interpretation that all words should be given effect so as to avoid any part being rendered inoperative, superfluous or void. (Majority Opinion at 16-18.) The majority cites Inhabitants of Montclair Tp. v. Ramsdell, 107 U.S. 147 (1883), for the parallel rule of construction that we must “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.” (Majority Opinion at 16.) The majority acknowledges Respondent Limco’s Post-Hearing Brief argument (*Id.*) that “the Commission must presume that a legislature says in a statute what it means and means in a statute what it says there.’ (Majority Opinion at 16, citing Connecticut Nat’l. Bank v. Germaine, 503 U.S. 249, 253-54 (1992)).

Interestingly, the majority decision immediately dovetails these admonitions with the introduction of one of its central propositions – that the United States Congress was ignorant of the meaning of the conjunctive “and” versus the disjunctive “or”.

Within the original text of Section 10, Prohibited Acts, of the 1984 Shipping Act, Congress utilized the word “and” as well as the word “or” in numerous provisions. Even after subsequent revisions, the language utilized in the 1984 version of section 10(d)(1) is, in every relevant respect, identical to the language that Congress used sixty-eight years earlier in 10(d)(1)’s predecessor statute, Section 17 of the Shipping Act of 1916. As noted by the presiding officer in Tractors and Farm Equipment Limited v. Cosmos Shipping, Inc., 26 S.R.R. 788 (ALJ 1992), the amendments to the Shipping Act of 1916 embodied in the Shipping Act of 1984, “...essentially carried forward the requirements of (section 10(d)(1)’s predecessor) section 17, second paragraph of the 1916 Act.” See Tractors and Farm Equipment, 26 S.R.R. at 790.

The distinction in language between the original section 17 in the 1916 Act and 1984 Act that the majority utilizes in its efforts to distinguish and discard original section 17’s jurisprudence merely highlights the 1984 Act’s amended and truncated remedies that Congress allowed the Commission to exercise. Further, as discussed below, Congress used the same or closely similar language in other statutes such as the Interstate Commerce Act of 1887 and the Packers and Stockyards Act, enacted five years after the Shipping Act of 1916, where the flow of commerce might suffer at the hands of large businesses imposing unfair or unjust business practices or regulations on the public.

Congress certainly understood the difference between “and” and “or” in these statutes, including the Shipping Act of 1916. Notwithstanding, the majority contends that the clause “establish, observe and enforce” should now be amended, by action of the Commission, to read “establish, observe or enforce” - a strained conclusion that is a novel concept in this area of jurisprudence.

A likewise novel proposal advanced by the majority is that:

Congress used the plural “regulations and practices” not because section 10(d)(1) is not applicable to a single event, but because the section is applicable to four different regulations and practices of common carriers, MTOs, or OTIs: i.e. (1) receiving, (2) handling, (3) storing, or (4) delivering property. For example, a common carrier’s transaction even for a single shipment may involve, most of the times, all four regulations and practices of receiving the shipment from the shipper, handling the shipment while it is under the custody and control of the common carrier, storing the shipment in the common carrier’s container yard or warehouse, and delivering the shipment to the consignee at the port of discharge or place of delivery.

(Majority Opinion at 20 (emphasis added).)

There is a singular “practice” for each of the four segments of an overall ocean transportation transaction? This argument is (1) novel in the long jurisprudence of the Shipping Act, (2) divorced from any commercial realities in the ocean shipping industry, and (3) a non sequitur in that it advances no legal or logically relevant position for any party in this proceeding.

After presenting a list and discussion of prior Commission cases, each of which will be addressed below, the majority last brings forth the argument concerning the OTI Respondents and the concept that an OTI owes a fiduciary duty to the cargo owner. (Majority Opinion at 49-50.) Further, however, is the proposition that any breach of that common law fiduciary duty is a violation of section 10(d)(1). Id. And there is no limit to the elasticity of this concept. The majority adopts the broad proposition that any breach by a vessel owner or ocean transportation intermediary of any duty

found within any area of law – agency, admiralty contract, torts or others – is a violation of section 10(d)(1). See, e.g., Adair v. Penn-Nordic Lines, Inc., 26 S.R.R. 11 (ALJ 1991); Houben v. World Moving Services, Inc., 31 S.R.R. 1400 (FMC 2010).

A single problem remains: the statutory language of section 10(d)(1) itself does not offer any support for the majority’s propositions and holdings.

3. Companion and similar statutes

The Interstate Commerce Act of 1887 (ICA), Ch. 104, 24 Stat. 379 (1887), is the early statutory embodiment of the duty of common carriers to establish just and reasonable regulations and practices affecting classifications, rates or tariffs. Questions concerning limits of the scope of the ICA and the corresponding exclusive jurisdiction of the Interstate Commerce Commission (ICC) versus state and federal courts created frequent disputes. The question of what matters were properly within the definition of “practices” was an element of such disputes.

In Baltimore & Ohio R. Co. v. United States, 277 U.S. 291 (1928), the U.S. Supreme Court addressed a decades long controversy between eastern rail carriers, western rail carriers and the Terminal Railroad Association, which was jointly owned by the two rail groups and operated the rail bridge across the Mississippi River at St. Louis. The dispute concerned division of rates and the practice of the east rail lines requiring the west lines to bear the expense of westbound traffic across the river.

The Court addressed the question of what was a “practice” within the contemplation of Congress in the ICA. The ICC had determined that the complained of practice was unjust and unreasonable. The Court analyzed the term “practice” and reversed the ICC ruling. The Court held that,

The word “practice”, considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it. [citation omitted]. When regard is had to that rule and the restrictions required to give the word a reasonable construction, it seems quite clear that “practice” as used in the provisions relied on by the [ICC], does not include or refer to the method or basis used by the connecting carriers for their divisions of rates or revenues.

Id. at 299-300. The Court concluded that, “even if the matter in controversy were a ‘practice’ within the meaning of the act, the [ICC] would not be authorized to set it aside without evidence that it is unjust and unreasonable.” Id. at 300.

The Baltimore & Ohio decision directs us to view the term “practice” with a reasonable eye towards “context” and those activities within the general class of matters covered by the statute – for this case, the prohibited acts in section 10 of the Shipping Act, as discussed herein.

The U.S. Supreme Court again visited the term “practice” in Missouri Pacific R. Co. v. Norwood, 283. U.S. 249 (1931). In reaffirming the Baltimore & Ohio decision, supra, the Court held that the Act [ICC] did not have jurisdiction in a matter of state requirements concerning the number of rail crew assigned to a train. The Court noted that, “The [ICA does not use that word [practice] in respect of any subject that reasonably may be thought similar to or classified with the regulation of the number of men to be employed in such crews.” Id. at 257.

The term “practice” within the ICA has been addressed by other federal courts. In Whitam v. Chicago, R.I. & P. Ry. Co., 66 F. Supp. 1014 (N.D. Tex. 1946), the court held... “[the] word ‘a practice’ as used in the decision, or used anywhere properly, implies systematic doing of the act complained of, and usually as applied to carriers and shippers generally.” Id. at 1017 (emphasis added).

In a case affirming the jurisdiction of the ICC, the Supreme Court of Pennsylvania centered the construction of “practice” on the purpose of the ICA. The case involved the railroad practice of:

“tampering with, repairing, repacking or reconditioning any packages of perishable commodities after arrival Before delivering the containers, [the railroad] restores the packages damaged in transit, thereby minimizing its liability for injury in shipment. The [railroad’s] rule, enforced by all carriers using the facilities . . . was adopted for determining the nature and extent of damage at the time of delivery of carload fruit, vegetables and melons, and the settlement claims thereon.”

T. Mendelson Co., Inc. v. Pennsylvania R. Co., 332 Pa. 470, 471 (Pa. Sup. Ct 1938). Twenty-six different parties who were regular consignees of produce from other states delivered by the railroad sought to enjoin the above described practice. In citing to what was then Section 1(6) of the ICA which at that time provided that rail carriers were required to “establish, observe and enforce...just and reasonable practices affecting . . . matters relating to or connected with the receiving, handling, transporting, storing and delivery of property,” the Court held that, “the term ‘practices’ is not to be narrowly construed . . . but . . . must be given the meaning the act intended which would embrace a safe delivery of property.” T. Mendelson Co., 332 Pa. at 473.

For the purpose of analysis and application to the instant case, the court was considering an acknowledged process used by

the Pennsylvania Rail Road, universally observed and enforced to the detriment of all regional cargo consignees, including the twenty-six party complainants, and affecting a regional multi-state flow of commerce in everyday produce products. The broad purposes of the ICA to secure the safety and integrity of shipments were clearly implicated and jurisdiction was properly assigned. In the absence of such a proscribed unjust or unreasonable railroad generalized practice, a one-off case of a damaged container of melons would be relegated to a simple cargo claim in a state court of common pleas.

Interstate Commerce Commission jurisprudence is directly relevant to Federal Maritime Commission jurisprudence. The historical and textual relationship of the ICA and the Shipping Act of 1916 was addressed by the U.S. Supreme Court in United States Navigation Co. v. Cunard S.S. Co., Ltd., 284 U.S. 474 (1932). The Court cited prior railroad cases for the broad statutory purpose of uniform treatment of all complainants. “Uniform treatment would not result, even if all sued, unless the highly improbable happened and the several juries and courts gave to each the same measure of relief.” Id. at 483. The Court observed that:

The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. When the Shipping Act was passed, the Interstate Commerce Act had been in force . . . for more than a generation. Its provisions had been applied to a great variety of situations, and had been judicially construed in a large number and variety of cases.

Id. at 480-481 (internal citation omitted).

The Court engaged in a general review of the various sections of the Shipping Act of 1916, including Section 17, the predecessor statute of § 10(d)(1) and concluded, “[t]hese and other provisions of the Shipping Act clearly exhibit the close parallelism between that act and its prototype, the ICA, and the applicability to

both of the principles of construction and administration.” Id. at 484.

Before bringing the focus to the Shipping Act, we should note the other areas where Congress and various state and local legislative bodies have used the concept of “practices” in diverse commercial settings.

Section 208 of the Packers and Stockyards Act of 1921 (Stockyards Act),²⁴ 7 U.S.C. § 208 provides that “[i]t shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services”²⁵ Addressing the purpose of the Stockyards Act in Stafford v. Wallace, 258 U.S. 495 (1922), the U.S. Supreme Court held:

The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of the region, and thence in the form of meat products to the consuming cities of the country in the Middle West, or, still as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market. * * * Any unjust or deceptive practice or combination that unduly and directly enhances them [the stockyards] is an unjust obstruction to that commerce.

Id. at 514-515.

²⁴ The Packers and Stockyards Act of 1921 was passed to maintain competition in the livestock industry. The Act bans price discrimination; manipulation of price or weight, livestock or carcasses; commercial bribery; misrepresentation of source, condition, or quality of livestock; and other unfair and deceptive practices.

²⁵ 7 U.S.C. §

The majority dismisses the foregoing policy review and all of the Stockyards Act cases as non-instructive because the act was enacted for a different purpose. (Majority Opinion at 30.) The Stockyards Act, however, was enacted five years after the Shipping Act of 1916 and Congress used virtually identical language in both acts. Section 208 of the Stockyards Act is mainly aligned with Section 10(d)(1) of the Shipping Act of 1984 while Section 213 of the Packers and Stockyards Act is mainly aligned with what is now Section 10(a)(1) of the Shipping Act of 1984, together with other specific sub-parts of Section 10 of the Shipping Act that proscribe specific activities by regulated entities. The similarity in statutory language and the similarity in the purpose of protecting and enhancing the flow of United States commerce – among the several states and in both our import and export trades – cannot be so casually dismissed.

Several federal courts have addressed the same or companion issues as those presented by the instant case. In McClure v. Blackshere, 231 F. Supp. 678 (D. Md 1964), the court considered the question of whether a single transaction where an agent violated his fiduciary duty to his principal by misusing authority and client/principal funds came within the scope of Section 208 of the Stockyards Act. The court held:

While conceivably a consistent course of conduct, even with respect to nonpayment of bills, might in time become a ‘practice’, it is difficult to see how a single instance of the nonpayment of a bill could be so denominated. ‘Practice’ ordinarily implies uniformity and continuity, and does not denote a few isolated acts, and uniformity and universality, general notoriety and acquiescence must characterize the actions on which the practice is predicated.

Id. at 682 (citations omitted).

In Guenther v. Morehead, 272 F. Supp 721 (D. Iowa 1967), the court considered another breach of agency authority under the

Stockyards Act in the context of a single misapplied check for payment of livestock. The court reviewed several sections of the act and, in dismissing the section 208 claim, cited the McClure reasoning, holding that, “practice ordinarily implies uniformity and continuity, and does not denote a few isolated acts.” Id. at 726. Interestingly, the court also found that a claim based on § 213(a) of the Stockyards Act, for unfair, unjustly discriminatory, or deceptive practice would require: (1) that a specified manner of dealing be found to be unfair or deceptive; because specific methods of trade were contemplated and not a generalized course of dealing, and (2) that the “ordinary usage of words such as ‘manner’ or ‘method’ of dealing implies a normal, customary way of approaching a particular business transaction. There would of necessity, have to be a number of such transactions in order for the approach to become normal or customary.” Id. at 728. Numerosity of transactions is required before the U.S. Department of Agriculture (DoA) could exercise its authority and exclusive jurisdiction pursuant to the act.

More recent cases have affirmed and reinforced these holdings. In Rice v. Wilcox, 630 F.2d 586 (8th Cir. 1980), the U.S. Court of Appeals for the Eighth Circuit, in considering the word “practice” in § 208(a) of the Stockyards Act, held that, “[t]he case law demonstrates and the parties concede that an isolated instance does not constitute a practice.” Id. at 591. The court distinguished a Tenth Circuit case, Hays Livestock Commission Co. v. Maly Livestock Commission Co., 498 F. 2d 925 (10th Cir. 1974), by observing that such court “was satisfied that after establishing a practice of honoring drafts, the dishonoring of three drafts constituted an unjust and unreasonable practice.” Rice, 680 F.2d at 591. The Eighth Circuit found a violation within their case’s specific facts; noting, however that, “In so holding, we emphasize that isolated transactions do not constitute a practice.” Id. (emphasis added).

Contrary to the majority’s characterization of Hutto Stockyard, Inc. v. Department of Agriculture, 903 F.2d 299 (4th Cir. 1990), the Fourth Circuit affirmed and cited with approval the

holdings in both Guenther, supra, and McClure, supra, regarding the proper usage of the term “practice.” The matter before the Hutto court was a “sting operation” by federal agents concerning the false weighing of livestock. Section 213 of the Stockyards Act prohibits the use of “any unfair...or deceptive practice or device in connection with...[the] weighing of livestock.”²⁶ The court held that false weighing is an unfair or deceptive practice under the Stockyards Act. This would be directly analogous to a false weight or false bill under Section 10(a)(1) of the Shipping Act. The record evidence in Hutto established that five groups of hogs had been weighed over a few hour period on a single day. The court was addressing the question of how many violations of the act had occurred. There were a total of five different lots of hogs with a total of thirteen animals. The court held that a single violation had occurred. “To hold otherwise would allow an operator to be successively penalized under section 213 for what is actually only one violation.” Hutto, 903 F. 2d at 306.

If five containers moved under one bill of lading and the cargo owner or OTI had knowingly and willfully presented a false weight for all five containers, the Commission would have the same question under the Shipping Act – one violation or five, with resulting one fine or five fines. The majority cites the Hutto decision as support for the proposition that a single specific instance of failure to observe a practice can be a violation of the section. (Majority Opinion at 27.) The Fourth Circuit’s Hutto decision does not, in any fair reading, support the majority’s position regarding section 10(d)(1) of the Shipping Act.

The last Stockyards Act case is Rowse v. Platte Valley Livestock, Inc., 597 F. Supp. 1055 (D. Neb. 1984). The majority provides a lengthy citation from the district court opinion and then concluded, “The district court’s reasoning supports that one or two

²⁶ 7 U.S.C. § 213.

transactions can be a violation of the Packers and Stockyards Act.” (Majority Opinion at 30).

One does not need a close reading of Rowse to disconfirm the majority’s conclusion as to one transaction. In brief, the Nebraska district court specifically affirmed its own controlling Eighth Circuit policy in Rice, but ruled that the facts were distinguishable. The court then held that it was enforcing the U.S. Agriculture Secretary’s final decision and reparation award; therefore, the court was confined and required to consider all facts and findings of the Secretary as true.

The Agriculture Secretary had found that the defendant in Rowse had engaged in the same practice of misapplying monies held in trust as had been found in a prior civil court case. In the prior state court action, Platte Valley had engaged in the same conduct of misapplying monies received from various other parties and paying such client funds to itself to cover other debts. Based on that prior civil court record and final ruling, the Agriculture Secretary found that, while the current plaintiff had not had such related problems with the defendant, the current conduct with the plaintiff was not an isolated transaction. Thus, the Agriculture Secretary made the specific fact finding that Platte Valley’s conduct had moved from an isolated transaction to a practice. The district court ruled that the prior civil case, “is crucial to the question of whether the present defendant’s action was a ‘practice’ under section 208,” and then held, “...the repetition makes it a “practice.” Id. at 1058.

Regarding a proposition that one isolated transaction may not be a practice, or that a few isolated and unrelated transactions may not be a practice, but two related transactions would establish a practice, we indeed do need to carefully consider the Eighth Circuit’s reasoning in Rice, supra. The federal appeals court focused on the duration and totality of the commercial relationship between the relevant parties. The court’s reasoning brings the case more closely within section 213(a) of the Stockyards Act and, by

inference, section 10(a)(1) of the Shipping Act which requires the element of fraud or concealment. The Rice court's ultimate finding is:

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

Rice, 680 F.2d at 591-592 (emphasis added).

Other legislative bodies, federal, state and municipal, have proscribed various business and commercial "practices" in a wide variety of other venues. The issue of whether one act, one omission, one event or one occurrence of the conduct addressed by the legislative enactment is a violation thereof has received substantial judicial attention. The broad conclusion of the cases addressed below is that the defendant respondent in virtually all situations must be engaging in the proscribed activity on a regular, frequent, and continuous basis. The sole exception is a person engaging in the "practice" of a profession. A single act of unlawfully practicing medicine or law is not allowed.

Young Jin Choi v. United States, 944 F. Supp. 323 (S.D.N.Y. 1996), addressed a Food and Nutrition Service review of

a Food Stamp Program violation of the Food Stamp Act.²⁷ Mr. Choi owned a small grocery and liquor store. The Food Stamp Act provided for a three year disqualification “if it is the firm’s practice to accept food stamps in exchange for alcoholic beverages. 7 C.F.R. § 278.6(e)(3)(ii)”. The district court held that “[t]he regulations define a ‘firm’s practice’ as ‘the usual manner in which personnel of the firm or store accept food coupons as shown by the actions of the personnel at the time of the investigation. 7 C.F.R. § 271.2. Notably, all five attempts by the FNS undercover investigator to use food stamps to purchase ineligible items were successful.” *Id.* at 325.

The U.S. Bankruptcy court for the Eastern District of Wisconsin examined “practice” in *In Re Thompson*, 350 B.R. 842 (Bankr. E.D. Wis. 2006), in the context of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601-2617. A mortgage servicing company failed to timely notify and respond to a debtor’s requests. The question was – did such failure demonstrate a “practice” under section 2605 of RESPA²⁸ that would entitle the debtor to statutory damages. The bankruptcy court reviewed cases where one failure to respond was not a practice, *id.* at 852, two failures to respond was not a practice, *id.*, and five failures to respond did constitute a practice, *id.*

Congress has utilized the term “practice” in other legislative contexts. In its efforts to redress years of discrimination in America and to provide a remedy for such injustice, Congress enacted Title VII of the Civil Rights Act of 1964 (Pub.L. 88-352)(Title VII). In *Beard v. Whitley County REMC*, 656 F. Supp 1461 (N.D. Ind. 1987), *aff’d*. 840 F.2d 405 (7th Cir.1988), the federal district court

²⁷ The provision at issue in *Young Jin Choi* involved § 2 of the Food Stamp Act of 1977, 7 U.S.C. 2011, et seq.

²⁸ RESPA provides that failure to comply with the act shall result in “any actual damages to the borrower as a result of the failure; and any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not to exceed \$2,000.” 12 U.S.C. § 2605(f)(1)(A-B)

addressed a question concerning office and clerical workers, as a group and the trades and craft employees group; all of whom worked for the same employer. A pay dispute arose. Plaintiffs wanted the court to utilize Title VII disparate impact analysis. The court ruled that “[i]t is necessary for the plaintiff to identify a facially neutral employment practice so that the defendant can respond by offering proof of job relatedness or business necessity.” Id. at 1468. The court continued that, “the decision not to give the office and clerical group a wage increase in 1985 was a single decision; it was not a policy or practice. The plaintiffs cannot simply attack the unfavorable impact of any decision made by the defendant (citation omitted). The defendant’s decision not to give plaintiffs a wage or benefit increase in 1985 is simply not a policy or practice for disparate impact purposes.” Id. at 1469.

In Council 31, AFSCME v. Ward, 771 F. Supp. 247 (N.D. Ill. 1991), the federal district court addressed a Title VII claim under the Civil Rights Act of 1964, supra, involving employee layoffs by the Illinois Department of Employment Security (“IDES”). In granting the employer IDES’s motion for summary judgment, the court cited the Beard case, supra, and held:

We find support for the proposition that a single decision, although implemented over time, is not an employment practice subject to disparate impact analysis. In every impact case we have seen (and plaintiffs can show no exception) the employment practice at issue is a continuing, ongoing system or method used by the employer in the course of regularly conducted employment activity.

Id. at 251.

The court noted that plaintiffs were challenging the single decision by IDES on how IDES would allocate one round of layoffs. Id. at 252. The court concluded, “[i]f we were to find otherwise, it would mean that every single act, intentional or not, which has an adverse impact on a protected class is actionable

under Title VII. We do not believe Congress intended that result.”
Id.

4. Commission Precedent

In addressing Commission precedent regarding section 10(d)(1), the majority cites first and relies most heavily on the Commission’s 2010 decision Houben v. World Moving Services, Inc., 31 S.R.R. 1400 (FMC 2010). (Majority Opinion at 22.) Before addressing Houben, however, it is instructive to review the original section 17 provision in the Shipping Act of 1916 and then, in proper order, the precedent cases that the Commission relied upon in Houben and the current case.

Section 17 of the Shipping Act of 1916 was commonly divided into two parts and referred to as “Section 17, first paragraph” and “Section 17, second paragraph.”²⁹ The first paragraph addressed unjustly discriminatory rates charged to

²⁹ Section 8146 I (Act Sept. 7 1916 c. 451, section 17)

Discriminatory rates prohibited; correction by shipping board of regulations of carrier.

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged or collected, it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

shippers or ports by common carriers – either a single carrier or a jointly agreed conference tariff rate. While reparation of improper rates was a remedy, this section also gave the Commission the remedy of ordering the regulated entities to correct the rate and to enjoin the collection of the unjust rate.

The second paragraph addressed just and reasonable practices by carriers, again, either individually or within conference agreements. A remedy for violation could include reparation for monetary damage, subject to normal proof of any damage claim. As with the first paragraph, Congress gave the Commission the additional remedies of ordering the regulated carrier, conference group of carriers or other entity to cease the unjust or unreasonable regulation or practice and order “enforced a just and reasonable regulation or practice.”

The 1980’s was a period of regulatory reform in all modes of transportation – airlines, trucking, railroads, as well as ocean shipping. In 1984, Congress enacted the Shipping Act of 1984, which substantially amended the 1916 Act by significantly reducing ocean carrier cooperation authority, injecting more competition and market forces into ocean liner shipping, and reducing the scope of the agency’s regulations, particularly the Commission’s power to approve carrier agreements (now denominated as “discussion” agreements) or enter agency orders on rates or practices.

As a part of that 1984 Shipping Act reform, Congress retained the first sentence of old Section 17’s first paragraph and placed those provisions in different sub-section of new Section 10. However, Congress removed the Commission’s authority to determine a freight rate as “unjustly discriminatory” or “unjustly prejudicial” and to order the parties to charge a proper rate, as previously set forth in the second sentence of the first paragraph of old Section 17. Likewise, Congress reenacted the first sentence of old Section 17’s second paragraph and placed that provision in new Section 10(d)(1). Congress, however, removed the Commission’s authority to determine a “practice” as “unjust or unreasonable” and

then order the parties to enforce a new Commissioned fashioned “just and reasonable...practice” as was set forth in the second sentence, second paragraph of old Section 17. It is worthy to note that, within this historical and statutory context of Congress reducing the Commission’s authority, regulatory scope and remedies, the Majority pursues the proposition that Congress intended new Section 10(d)(1) to have a substantially broader interpretation, scope and regulatory footprint than the pre-1984 Commission or court jurisprudence had recognized. The tide flow of Congressional history and the direction of the Kobel majority are directly opposite.

To begin the review of Commission 10(d)(1) precedent, Practices of Stockton Elevators, 8 F.M.C. 187, 200-201 (1964) is a case decided under the Shipping Act of 1916 arising out of a Commission Order of Investigation into the practices of Stockton Elevators in connection with terminal charges. The Commission considered the question of whether Stockton Elevators engaged in a “practice” within the meaning of section 17. The majority in the current case before us begins its discussion of Stockton Elevators with the acknowledgement of the decision’s finding that “the essence of a practice is uniformity.” (Majority Opinion at 22-23.) The majority then begins its attempt to distinguish the case by stating, “Stockton Elevators was not a case that discussed whether the respondent’s regulations and practices in question were ‘unjust or unreasonable,’ but whether five specific instances of transactions violated section 17 of the Shipping Act, 1916.” Of interest is the Commission Report’s opening sentence in Stockton Elevators, “This is an investigation ...into the practices of Stockton Elevators in connection with terminal charges....” Stockton Elevators, 8 F.M.C. at 181.

The Commission’s Stockton Elevators Report closes with two findings relevant to the instant case. First, regarding “practices”, the Commission’s Report concluded that, “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 as here shown.” Id. at 200-201. Cited therein as prior judicial precedent and authority for this general proposition are a number of cases from different courts and commercial contexts, including railroad, shipping and manufacturing cases: “Intercoastal investigation, 1935, 1 USSBB 400, 432; B&O By. Co. v. United States 277 U.S. 291, 300; Francesconi & Co. v. B&O Ry. Co., 274 F 687, 690; Whitam v. Chicago R.I. & P. Ry. Co., 66 F. Supp. 1014, Wells Lamont Corp. v. Bowles, 149 F 2d 364.” Id.

The second relevant finding was, “even if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust or unreasonable. The commerce of the United States was not deterred.” Id. (emphasis added).

The Commission in Stockton thus correctly connected the concept and usage of “unjust and unreasonable” to the larger purpose of the Shipping Act. It is the negative effect on the commerce of the United States that renders the “practice” unjust or unreasonable. A few isolated instances or transactions do not equal a “practice”. Furthermore, a “practice” must have some detrimental effect, impact or substantive relationship to or on the commerce of the United States to rise to the level of “unjust or unreasonable.”

The majority last attempts to simply discard Stockton Elevators *in toto* by reason of the removal by Congress in 1984 of the second sentence of the second paragraph of old Section 17. As discussed above, the second sentences of both portions of Section provided the Commission with broad remedial and injunctive authority. In 1984, Congress removed the Commission’s remedial and injunctive authority, but left intact the basic language of the section. In a 1992 Commission decision, one that the majority endorses as supporting its holding, Tractors and Farm Equipment Limited v. Cosmos Shipping Co., Inc., 26 S.R.R. 788 (ALJ 1992), the presiding officer held, “This law [Section 10(d)(1)] essentially

carried forward the requirements of Section 17, second paragraph, of the 1916 Act.” Id. at 790. The presiding officer later added, “respondent . . . might have engaged in unreasonable practices, in violation of section 17, second paragraph of the 1916 Act, now section 10(d)(1) of the 1984 Act.” Id. (emphasis added).

Next in the time line, Houben cites and relies upon Maritime Service Corp. v. Acme Fast Freight of Puerto Rico, 17 S.R.R. 1655 (I.D. 1978), for the proposition that the single failure to fulfill non vessel-operating common carrier (NVOCC) obligations, such as obligations to pay monies when due, was a practice and further, was “an unjust and unreasonable practice” and; therefore a violation of Section 10(d)(1) Houben, supra, at 1405. Maritime Service Corp. involved a complaint filed with the Commission by the four primary vessel-operating common carriers (VOCC) in the U.S. to Puerto Rico trade against twenty-three non vessel-operating common carriers (NVOCC) operating in that trade. The VOCCs created Marine Service Corp. as their joint billing and collection agency for demurrage due on container trailers in the trade. The allegation was that the respondents collectively and in concert engaged in the practice of refusing to pay demurrage on trailer chassis. Approximately 400,000 container trailer transactions were involved. The ALJ found that, “The respondents’ failure to pay applicable demurrage charges subjected the property of the shipping public to vessel-operating common carriers’ liens, and this practice resulted in the respondents’ failure to establish, observe and enforce just and reasonable practices in connection with the receiving, handling or (sic) delivering of property, in violation of Section 17” Id. at.1662 The ALJ concluded that, “[t]he record as a whole is completely convincing . . . six respondents offered no defense. . . [and] two respondents . . . have a history of either not paying on a consistent pattern or evasiveness of their obligation to pay demurrage.” Id. at 1665-1666.

Maritime Service Corp. does not support either Houben or the majority’s holding in this case. Maritime Services Corp. stands for the proposition that the practice adopted by the twenty-three

NVOCCs to collectively refuse to pay demurrage to the principal VOCCs that served the Puerto Rico trade was harmful to the public in general by virtue of subjecting all containers and the cargo contained therein to the liability of VOCC liens. Such general public harm resulted in the practice being deemed unjust and unreasonable. That totality of elements resulted in an initial finding by the presiding officer of a violation of Section 17 of the Shipping Act.

The full Commission later considered the ALJ's Initial Decision in Maritime Services Corp. on exceptions by the vessel carrier parties. In Sea-Land Service v. ACME Fast Freight, 18 S.R.R. 853 (FMC 1978), the Commission affirmed the ALJ's decision on violation of Section 16 and 18 of the 1916 Act due to the NVOCCs knowing and willful refusal to pay demurrage. However, to both further diminish the reliance of Houben and the Kobel majority on this case, and to further support the premise of this dissent, the full Commission in Sea-Land Service ruled that "...although there is some indication of at least tacit understanding among the Respondents to oppose dealing with MSC and disregard its billings, we find the record inadequate to support the presiding officer's conclusion that Respondents have in fact violated Section 15 of the Act" Id. at 857. Nor did the Commission find any violation of Section 17 on the facts and circumstances presented. Id.

The full Commission's finding that an evidence record with only an "indication" of "tacit understanding" among twenty-three regulated NVOCCs to engage in a continuous and usual course of conduct; namely, refusal to pay demurrage on thousands upon thousands of trailers and thereby place their client's cargo at risk of carrier liens is an inadequate record to support a violation of Section 17 does not support a new Commission rule of law that a single or isolated transactions of NVOCC failure to pay monies when due is an unjust and unreasonable practice in violation of Section 10(d)(1).

In time sequence, both the Houben decision and the Kobel majority cite European Trade Specialists, Inc. v. Prudential-Grace

Lines, Inc., 17 S.R.R. 1351 (ALJ 1977). The majority provides a review of the ALJ's Initial Decision and then a brief one sentence review of the later full Commission's holding on Section 17. A more fulsome account of the full Commission's European Trade Specialists v. Prudential-Grace Lines, 19 S.R.R. 59 (FMC 1979), Section 17 discussion provides,

Even assuming . . . that European was not notified of the classification and rating problem we cannot say that such conduct by Hipage amounts to a violation of Section 17. Unless its normal practice was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law Similarly, because any violation of section 510.23 of the Commission's regulations must be considered in terms of Section 17, without a showing of continuing violations of these regulations no Section 17 violation can be found."

Id. at 63 (emphasis on "practice" in the original, further emphasis added).

The full Commission thus reaffirmed the proposition that a normal practice of conduct must be established in the record and specifically, as with European's allegations of the freight forwarder's violation of duties set forth in Commission regulations, such violation of regulations must be shown to be continuous, that is the normal practice of the freight forwarder, to be found as a violation of Section 17.

As with its Stockton Elevators argument, the majority attempts to cast European Trade Specialist overboard together with its contrary holding by stating "European Trade Specialist also discussed a different statutory section with different context and is not directly precedential in the analysis of 10(d)(1). (Majority Opinion at 25). As discussed above, Section 17, second paragraph, first sentence of the 1916 Act and Section 10(d)(1) of the 1984 Act are identical twins fully and firmly joined.

Houben and the Kobel majority also rely on the post-1984 Act in Adair v. Penn-Nordic Lines, Inc., 26 S.R.R. 11 (I.D. 1991). This case involved the shipment of a single motorcycle from the U.S. to New Zealand. The motorcycle was transported to a warehouse and never moved further. Payment had been made to the freight forwarder, but such monies were not then forwarded to the carrier, Penn-Nordic. Mr. Adair filed his complaint *pro se* under the Commission's informal small claim procedure. The Commission's ALJ provided the *pro se* claimant with legal advice, *sua sponte* motions and findings.

The ALJ commented that, "the case was unusual because it involved a claim by a shipper or cargo owner that a carrier had failed to carry, which is a claim not usually heard by the Commission under the shipping acts but rather one usually heard in courts under contract or admiralty law." Id. at 13. The ALJ further noted that a potential party, the freight forwarder, was not named as a respondent. Id. Then the ALJ suggested that Mr. Adair could file suit in "a court of law" and use any one or all of three legal theories – contract law, tort law or agency law. Id. Alternately, the ALJ suggested that the shipper amend his complaint, add the freight forwarder and allege a violation of Section 10(d)(1) of the 1984 Shipping Act. Id.

Following review of the documentary evidence, the ALJ found both respondents "liable for the monetary injury inflicted on Mr. Adair as a result of their unreasonable conduct." Id. at 22. "I find that the record shows both respondents to have acted unreasonably." Id. at 19. "The above litany of misconduct . . . amply demonstrates that Penn-Nordic failed to 'establish, observe and enforce just and reasonable practices relating to or connected with receiving, handling, or delivering property' in violation of Section 10(d)(1)." Id. at 20 (emphasis added).

The ALJ continued:

The facts . . . show amply that Penn-Nordic behaved unreasonably under Section 10(d)(1) . . . this conduct would undoubtedly have contravened other standards of law principals of contract and common carrier law applicable in courts of law and . . . Mr. Adair could have obtained relief . . . in a court of law or perhaps admiralty. . . . Id.

A legal treatise of the common law of contracts, admiralty law and the law of agency then followed. Over several pages, the ALJ reviews sixteen principals of contract law, six principals of admiralty law including Carriage of Goods by Sea³⁰ and six principals of agency law. Id. at 20-21. Then, as transition from the law compendium to an introduction of his summation of the facts concerning the single abandoned motorcycle, the ALJ held, “The application of the above principals of admiralty, contract, and agency law becomes apparent when considering the facts of this case.” Id. at 21 (emphasis added).

The ALJ presented a summary of the evidence record concerning the single shipment of the motorcycle and provided his conclusion, “therefore, this record amply demonstrates that Penn-Nordic behaved unreasonably and in violation of Section 10(d)(1) . . . (emphasis added)”. Id. at 22. Concerning the freight forwarder respondent, “as an agent and fiduciary of the cargo owner, Mr. Adair, [the freight forwarder] did not maintain the standard of care required by [common agency] law of such fiduciaries nor fulfill its duties to the cargo owner, Mr. Adair. Consequently, I conclude that [freight forwarder] failed to observe just and reasonable regulations and practices, in violation of Section 10(d)(1) of the 1984 Act.” Id. at 22.

Assuming that repetition would add to the correctness of the holding, the ALJ offered another lengthy review of agency law and a freight forwarder’s duties towards its principal, and once again concluded that, “Freight forwarders have been held liable under

³⁰ Title 46 United States Code §§ 1300-1315.

admiralty and negligence law in suits brought before federal courts because of the breach of their fiduciary duties towards their shipper-principals.” *Id.* at 23. Continuing, the ALJ again stated, “I find that [freight forwarder] failed to exercise the standard of care and diligence which the [common agency] law requires of fiduciaries, such as freight forwarders, and that [freight forwarder] failed to (sic) observe (sic) just and reasonable regulations and practices with regard to the shipment...in violation of Section 10(d)(1) of the 1984 Act.” *Id.* at 24.

With Mr. Adair’s *pro se* representation, supported by zealous counsel from the presiding officer, I do not find a single reference to prior Commission precedent or federal court decisions nor any discussion or review of any concept of “practices.” The Commission itself did not take the case up under review nor offer to add its vote of approval. We have a “small claims” complaint that began as an informal proceeding, was presented *pro se*, and then was allowed to go into effect by procedural rule following the regulatory thirty day period. However, that case established, either directly or by logical implication, the following four principals:

- Any singular act, omission, behavior or conduct by a regulated entity, be it accidental, innocent, negligent, or intentional, that violates a duty or obligation found in the common law or code enactments thereof, of admiralty (including COGSA), contracts, agency, and negligent torts is, with any and each formulation, a violation of Section 10(d)(1) of the 1984 Shipping Act. The ALJ found that both Respondents were guilty of “unreasonable behavior,” *Id.* at 15, that they “acted unreasonably,” *Id.* at 19, and that Penn-Nordic “behaved unreasonably,” *Id.* at 22.
- There is no reference to prior Commission cases and their requirements for pleadings, allegations and record evidence that respondents have engaged in a “practice,” meaning a regular, continuous, or habitual act, omission or conduct regarding the noxious behavior; nor is there

any reference to prior federal court rulings that address and require such application of “practice” in regulatory proceedings. Obviously, there was an equal lack of legal analysis on these ignored matters.

- Section 10(d)(1) of the 1984 Shipping Act was, therefore, the proper portal and venue for all maritime grievances and the Commission is a court of common maritime pleas. However, once inside, this Commission has subject matter jurisdiction to the exclusion of state and federal court venues.
- Further, as discussed below, the complainant has the benefit of a three year period to file (not one year, as with COGSA), the complainant is not encumbered by any limitation of liability and defenses available to the carrier by virtue of COGSA or otherwise by contract or law, nor any such limitation of liability and defenses available to the ocean transportation intermediary by virtue of a Himalaya Clause granted by an upstream carrier. Last, a complainant who prevails on any portion of its claim is granted an award of all attorney fees from respondent. A prevailing respondent is awarded nothing.

The Houben and Kobel majority decisions then cite Tractors and Farmers Equipment v. Cosmos Shipping, 26 S.R.R. 788 (I.D. 1992), a case considered by the Adair presiding officer one year following that decision. The dispute involved a cargo owner alleging that the freight forwarder booked a single shipment of tires from the U.S. to India, that the first ship had inadequate space to accommodate the entire shipment so two different ships became involved and, last, various shipping and bank letter documents and bills of lading were altered, misdelivered and were otherwise incorrect or false. The entire case was covered by Commission regulation which proscribed such acts; either in any single incident or any number of incidents. Notwithstanding all established rules of judicial economy and restraint, the presiding officer *sua sponte* both directed the parties to amend their complaint to include Section 10(d)(1) and then, with more active engagement, amended the

complaint on his own motion to include such Section 10(d)(1) allegation.

I also notified the parties in rulings supplemental to those cited above that the complaint needed to be amended to add section 10(d)(1) of the 1984 Act, 46 USC sec. 1709(d)(1). This law, dealing with the practices of freight forwarders, essentially carried forward the requirements of section 17, second paragraph, of the 1916 Act, in effect at the time of the alleged violations. Id. at 790.

I advised the parties that the evidence presented by the complainant in its direct case showed that the respondent Cosmos, by its conduct surrounding the booking of the subject shipment of tires and the preparation and tendering of the relevant bills of lading and other documents, might have engaged in unreasonable practices, in violation of section 17, second paragraph of the 1916 Act, now section 10(d)(1) of the 1984 Act Accordingly, I notified the parties that the complaint would be treated as being amended to conform to the evidence that had been presented and that when and if respondent Cosmos wished to present evidence in its defense, it should be prepared to defend against evidence and charges that it had violated section 17, second paragraph, of the 1916 Act. Id.

I conclude that respondent . . . has violated the Commission's regulations in effect at the time of the conduct described, 46 CFR 510.23(h) (currently 46 CFR 510.21(f)), by falsifying bills of lading and the certificate of origin, and has violated section 17, second paragraph, Shipping Act, 1916 (currently, section 10(d)(1), 1984 Act), by failing to establish, observe and enforce just and reasonable practices relating to the receiving, handling, storing or delivering of property (emphasis added). Id. at 796.

Importantly, the Tractors case could have – and should have – been adjudicated, in full satisfaction of the complainants, under Commission regulations in effect at the time of the conduct in question.

As in Adair, the ALJ in Tractors did not offer any analysis or acknowledgement to [1] any of the various elements of Section 10(d)(1), such as the element of “practices”, or [2] any prior Commission or court rulings on “practices”, such as the European Trade, supra, Commission precedent that specifically held, “without a showing of continuing violations of these regulations no Section 17 violation can be found.” European Trade at 63.

One year later, the ALJ who presided in Adair and Tractors decided the Hugh Symington v Euro Car Transport, 26 S.R.R. 871 (I.D. 1993), a matter involving a default under a prior settlement agreement. Symington had relied on an “oral contract” with Euro Car and forwarded \$16,600 to respondent to [1] complete a purchase of an auto in Californian, [2] obtain insurance, and [3] ship the car to England. Euro Car defaulted and Symington filed a complaint with the Commission. Euro Car entered into a settlement agreement with Symington. Such agreement included a provision by which “. . . Euro Car agreed to confess judgment, as provided by California law, and to authorize entry of judgment against it by the Commission.” Id. at 871.

The ALJ declined the expeditious opportunity to simply rule that that respondent had admitted to a violation of Sections 10(b)(6), 10 (b)(12) and 10(d)(1) and thereby enter a final judgment that could then be entered and enforced in court. Instead, the presiding officer chose to demure to a constraint that the Commission is not a court of common law jurisdiction. He then engaged in another sequel of the prior cases and, citing Adair as precedent, held in essence that a breach of an oral contract is a violation of all three of the aforementioned sections of the Shipping Act. Id. at 873.

In three years, an Administrative Law Judge effectively removed “practices” from Section 10(d)(1) and ignored – without any comment nor the slightest motion of genuflection toward – any prior Commission or court jurisprudence covering over one-hundred years since the late 19th century enactment of the Interstate Commerce Act. In its place, the ALJ amended the Shipping Act and replaced the excised terms with any act, conduct or behavior that is in violation of any common law duty found in treatises on contracts, admiralty, agency or torts, or a violation of any other statute – such as COGSA – and the act, conduct, or behavior occurred within any single transaction; then such act, conduct or behavior – singular, innocent, episodic, accidental, inadvertent, contrary to any regulations or practices long established by custom or written declaration as it may be – is *a fortiori* and conclusively “unjust and unreasonable” and therefore, a violation of Section 10(d)(1) of the Shipping Act.

Last in time sequence, the majority cites William J. Brewer v. Saeid B. Maralan (aka Sam Bustani) and World Line Shipping, Inc., 29 S.R.R. 6 (FMC 2001) with the following summary characterization:

NVOCC held to have violated section 10(d)(1) with respect to a single shipment when it refused to release the cargo at the destination port unless additional money was paid, and instructed its agent to place the shipment on hold.

(Majority Opinion at 22.)

A more fulsome review of Mr. Bustani’s record of activities is instructive for multiple purposes. The Commission ordered a formal investigatory proceeding on November 2, 1998 into the activities of Mr. Bustani and two of his companies. 28 S.R.R. 593, 63 FR 60345 (Nov. 9, 1998), Saeid B. Maralan (AKA Sam Bustani), World Line Shipping, Inc. d/b/a/ World Line Shipping and World Line Shipping International Shipping Co. and Atlas World Line, Inc. d/b/a/ Atlas World Line and Atlas World Line

International Shipping Co – Possible Violations of Sections 8(a)(1), 19(a), and 23(a) of the Shipping Act of 1984. Note, the investigation charge was “possible violations of sections 8(a)(1), 10(b)(1), 19(a) and 23(a) of the Shipping Act of 1984”. Section 10(d)(1) was not included in the scope of the Commission’s investigation order.

On June 15, 1999, the Adair/Tractors/Euro Car presiding officer entered his Initial Decision, 28 S.R.R. 1331 (I.D. 2000). The full Commission reviewed the Initial Decision and, in December 1999, affirmed the ALJ’s findings in relevant part 28 S.R.R. 1244 (FMC 1999), and concluded:

The ALJ found . . . Bustani . . . carried 19 shipments without a tariff or bond. (violating Sections 8(a) and 23(a)). The ALJ also found...Bustani violated 10(b)(1) by failing to collect the proper tariff rates on file...Section 10(b)(1) indicates that common carriers may not ‘charge, demand, collect, or receive greater, less, or different compensation for the transportation of property...than the rates and charges that are shown in [their] tariffs or service contracts’...The ALJ ruled that...Bustani...charged rates other than those on file on 10 shipments between December, 1997 and April, 1998. The ALJ’s factual findings and conclusions of law regarding the violations of section 10(b)(1) are supported by the evidence and are correctly reasoned.

Id. at 1247. Section 10(d)(1) was never considered in any aspect by the FMC’s Bureau of Enforcement or the ALJ or the Commission in its investigation findings and conclusions.

In October, 1999, two months prior to the above proceeding’s final Commission decision, Mr. Brewer filed a complaint with the Commission alleging that Mr. Bustani violated six sections of the Shipping Act, namely sections 8(a)(1), 8(a)(2), 8(c)(1), 10(a)(1), 10(b)(3) and 10(d)(1) concerning a move of household goods from Michigan to Egypt. Mr. Bustani had charged

one rate, and then demanded a higher rate in order to complete the transportation move. After a review of the sad facts of Mr. Brewer's shipment and under the section 10(d)(1) banner, the presiding officer held;

Respondents' conduct is even more deplorable in the instant case because they have been the subject of a formal Commission Investigation as well as many informal complaints, ultimately being penalized some \$100,000 and ordered to cease and desist from continuing violations of the Act By such conduct respondents can now take their place alongside ethically deficient NVOCCs....

Id. at 1334.

The ALJ then considered the other alleged violations of the Shipping Act, as follows:

. . . because the evidence shows that respondents billed and collected freight under an unfiled rate . . . and attempted to collect additional money under an inapplicable [filed] rate . . . respondents clearly violated...former section 10(b)(1) [i.e. the primary focus of the Commission Investigation]. Id. at 1334. However, Mr. Brewer did not specify 10(b)(2)(A), (formerly 10(b)(1)) in his complaint. Id.

The ALJ explained this new rule of judicial restraint in a foot note, citing FMC Docket 99-05, "[i]n its order, having found the practice to violate section 8(c) of the Act and a Commission regulation, the Commission found it unnecessary to determine if the practice violated another section of the Act." Id.

The Bustani decision cited by the majority, while lacking any section 10(d)(1) analysis or articulated reasoning, does contain sufficient language, as referenced above (whether inadvertent or not) that brings both the facts and the result full square within the European Trades Specialist Section 10(d)(1) reasoning and rule of

law. By virtue of the ALJ's clear incorporation of the contemporaneous Commission Investigation and Report concerning Mr. Bustani's multiple Shipping Act transgressions, the Bustani case does not support the Majority's stated proposition that a single shipment is subject to Section 10(d)(1) sanctions.

Thus we arrive at Houben, a "small claim" informal proceeding involving a single shipment of household goods from the U.S. to Belgium. The *pro se* complainant was quoted one rate then charged additional fees. The complaint alleged violations of Section 10(a) and 10 (b) of the Shipping Act. The case had languished in the Commission's Office of Consumer Affairs and Dispute Resolution Service and was presented to the full Commission on an expedited *de novo* review basis. The initial settlement officer had already amended the pleadings *sua sponte* to add a Section 10(d)(1) allegation. The case, as thus presented to the Commission, cited the above referenced precedents.

After research and reflection, I regret my agreement to accept the suggestion of expedited *de novo* review. Such review was improvidently granted. I likewise regret adding my signature to Houben. I am now clear in my view that Houben was incorrectly decided for all of the reasons set forth in this dissenting opinion.

5. Conclusion

The majority's argument that a practical real world application of the simple straightforward language of Section 10(d)(1) would lead to an absurd result is flawed. The Majority's argument is summarized as follows:

The regulated entity would have all incentive to establish just and reasonable practices and regulations, print them in large font and post them in all visible work areas. Thereafter, the regulated entity could ignore and violate any or all of such practices and regulations with impunity.

This straw man is toppled with one simple breath of reason – if the facts and evidence show that the regulated entity is – on a regular basis, ignoring and violating its own so-called “established” practices and regulations – then the subject practice or regulation was never established in the first place. This common sense reading gives full and due recognition to all words and phrases in section 10(d)(1).

However; the majority then continues by bootstrapping its straw position to thereby discover a new and totally novel revision of the Congressional language, “establish, observe, and enforce just and reasonable practices and regulations”. After more than a century that Congress has been using this common statutory phrase and, over the same period, Federal courts have been ruling on “practice” cases – we now learn that Congress really intended “or”, not “and”.

The majority’s argument is a classical revival of *reductio ad absurdum*. However; no such absurdity was argued in the numerous cases referenced herein nor any found by the many jurist who have considered this often used Congressional phrase. And no such absurdity exists today.

As further contrast, several practical queries and results flow from the majority’s opinion.

If a purely innocent and singular incident – such as befell Hapag-Lloyd with the accidental loading of a damaged container – is not a defense to a 10(d)(1) violation, then how would any regulated entity present a defense?

If the practical result of the majority opinion is in alignment with a “strict liability” legal regime – should we address the need for a highly specific and clear expression from Congress that indeed, that is what Congress intended with the language in Section 10(d)(1)?

If COGSA, as enacted by Congress in 1936, provided a \$500 per package limitation of liability, but the cargo loss or damage claim can be equally pled as a Section 10(d)(1) claim and claimant can recover full damages – why would anyone ever pursue a COGSA claim again?

Why did Congress even bother to enact COGSA if Section 10(d)(1) is equally applicable?

According to the majority,

As Hapag-Lloyd claimed, however, that “[j]ust as plaintiffs in federal court may not avoid COGSA by cloaking their claims in terms of negligence, fraud, conversion, and breach of contract theories, the complainants in this case may not invoke the limited jurisdiction of the Commission by cloaking their cargo-related claims as Shipping Act issues” [cite omitted], Respondents cannot avoid the Shipping Act issues by cloaking Complainant’s claims in terms of COGSA.

Id. at 12. A perfect nautical rhetorical tautology.

Where are the boundary lines and limitations of the Commission’s jurisdiction?

The majority asserts that, “complainants claims are not for simple loss or damage to their cargoes, but for injuries caused by Respondents’ alleged violations of the Shipping Act Complainants’ allegations involve elements peculiar to the Shipping Act.” (Majority Opinion at 12(emphasis added)). But, under Houeben, Adair, Tractors, Symington, and Brewer, precisely what elements are “peculiar to the Shipping Act?”

If going into a state or federal court with a claim bottomed in contract, admiralty, agency or tort includes the common burden of the “American” system – i.e. each party bears its own attorney

fees and court costs – why would anyone ever pursue such claim in those courts when the Shipping Act claimant only needs to prevail on some aspect of its claim and they are awarded full attorney’s fees?³¹

In summary, the overwhelming weight of Congressional history, consistent application in other legislative areas such as railroads, stockyards and meat production and employment practices, consistent judicial interpretation, consistent application of U.S. Supreme Court rules for statutory interpretation, consistent Commission interpretation – up until Adair, Tractor and Farm Equipment, Symington, Houben, and their related line of cases – combined with sound reason all lead me to respectfully disagree with the Majority opinion.

I find that Adair, Tractor and Farm Equipment, Symington, Houben, and their related line of cases should be given a due and proper burial at sea. Stockton Elevators, Maritime Cargo, and European Trade Specialists should be resurrected and resume their position of controlling Commission precedent. As further guidance, I believe that the Maritime Services/Sea-Land fact record should support consideration as a section 10(d)(1) claim. I also believe that the Brewer evidence record, if properly connected to the Bustani investigation evidence record, would be a reasonable model for section 10(d)(1) application.

As a post script, I revisit the Guenther decision cited earlier where the cattleman claimant had unquestionably been subjected to a common law wrong. His trusted agent misapplied funds and he lost his money. The thoughtful Federal District Judge closed as follows:

³¹ See International Steel Supply, LLC. v. Zim Integrated Shipping Services, Ltd., FMC Informal Docket No. 1894(I)(Administratively Final)(Attorneys’ fees in the amount of \$24,848.75 awarded for a reparations award in the amount of \$1,367.63.”); See also, Tianshan, Inc. v. Tianjin Hua Feng Transp. Agency Co., Ltd., S.R.R. 52 (size of attorney’s fees not limited by the money damages awarded).

Before closing, the Court feels that it must disclose that the result reached herein is, in all honesty, due solely to its abiding conviction as to the importance of the rule of law. The Court is acutely aware that the equities unquestionably lie with plaintiff. Thus, the Court has not been without reservation in arriving at this judgment.

Guenther, 272 F. Supp at 728.

In parallel thought and reflection, I am aware of the equities that lie with complaints such as Mr. Adair and his lost motorcycle, Tractor and Farm Equipment and its delayed tractor tires, Mr. Symington and his lost car, Mr. Brewer and his hostage household goods. It is my respect for the rule of law; however, that leads me to the conclusion that these and similar simple container cargo delay, diversion, overcharge, hostage, damage or loss cases are not within the proper statutory boundary of section 10(d)(1) of the Shipping Act. The statute requires far more. Therefore, I believe that the Commission lacked subject matter jurisdiction in those matters.

I do not offer any judgment as to the equities surrounding Mr. Kobel and his actions in this matter. The vessel common carrier, Hapag-Lloyd, presented full evidence of its efforts to do everything within reason to complete the container movement to ultimate destination, yet the Majority finds that Hapag-Lloyd is nonetheless in violation of Section 10(d)(1). The equities concerning the ocean transportation intermediaries are less straightforward. Similar to a common law warehouseman, OTIs have duties. However, they also have rights. One right is to be paid. If not paid, then following reasonable notice, the warehouseman may sell his clients goods to recover justly accrued charges. I offer no judgment on whether the OTIs in this case met those standards; however, as expressed above, the alleged facts in this case do not fit within Section 10(d)(1). I would simply affirm

the presiding officer's ruling on the record of evidence presented and concur with the dismissal of the claims against the OTIs.