

FEDERAL MARITIME COMMISSION

BIMSHA INTERNATIONAL,

Complainant,

v.

CHIEF CARGO SERVICES, INC.
and KAISER APPAREL, INC.,

Respondents.

Docket No. 10-08

Served: September 4, 2013

BY THE COMMISSION: Mario Cordero *Chairman*; Rebecca F. Dye, Richard A. Lidinsky, Jr., Michael A. Khouri, William P. Doyle, *Commissioners*. *Commissioner Dye* filed an opinion concurring in part and dissenting in part. *Commissioner Khouri* filed an opinion concurring in part and dissenting in part.

Memorandum Opinion and Order

In this Complaint, Bimsha International (Bimsha) (Complainant) alleged that Chief Cargo Services, Inc. (Chief Cargo) and Kaiser Apparel, Inc. (Kaiser) (collectively Respondents) violated section 10(d)(1)¹ of the Shipping Act of 1984 (the Act).

¹ The President signed a bill reenacting the Shipping Act of 1984 as positive law on October 14, 2006. The purpose of the bill was to

The presiding Administrative Law Judge (ALJ) held that Chief Cargo failed to fulfill its obligations as a non-vessel-operating common carrier (NVOCC), thereby violating section 10(d)(1) of the Act. Bimsha International v. Chief Cargo Services, Inc., 32 S.R.R. 353, 374-375 (ALJ 2011). We affirm the decision of the ALJ.

BACKGROUND

I. Proceeding

On July 28, 2010, Bimsha filed a Complaint alleging that Chief Cargo and Kaiser violated section 10(d)(1) of the Act² and seeking reparations, an order to cease and desist, attorney’s fees and costs. The ALJ issued a September 20, 2010 Order requiring Bimsha to prosecute the proceeding. In response to the Complaint, on September 21, 2010, in lieu of an answer, Chief Cargo filed a Motion to Dismiss for failure to state a claim. Subsequently, on October 1, 2010, Bimsha filed a motion in opposition. On October 22, 2010, the ALJ denied Chief Cargo’s Motion to Dismiss. Chief Cargo filed an Answer with Affirmative Defenses and Cross-Claim

“reorganize[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.” H.R. Rep. 109-170, at 2 (2005). Section 10(d)(1) was codified at 46 U.S.C. §41102(c). The Commission regularly references provisions of the Act by the section numbers found in the Act’s original enactment.

² The Complaint also alleged that the Respondents violated “U.S. Code Title 46 Sec 1(a), Sec 30701(4), 30701(6), 30701(7), 30701(8), Sec 41102-(b), 41102(c) (Shipping Act Sec. 10(a)(1) and 10(d)(1)), 41301 (Sec. 11 (a) of the Shipping Act), 41302, 41303, 41304, 41305, 41309, 305, U.S. Code 49 Sec 80101, 80102, 80103, 80104, 80110, 80111, 80116, 80106.” Complaint at 2. Section 10(d)(1) of the Shipping Act was the only allegation considered, however, as the other citations could not be found as cited, or did not address violations of the Act. The ALJ noted that while the Complaint alleged a violation of 10(a)(1), the ALJ considered the allegation abandoned, as Bimsha did not address it in its briefs. 32 S.R.R. 353, 359, n. 3.

on November 17, 2010. The parties then engaged in discovery. On July 1, 2011, Bimsha filed its proposed findings of fact, brief, and exhibits.

On December 14, 2011, the ALJ issued an Initial Decision (ID) finding Chief Cargo's release of three shipping containers, without requiring presentation of the original bills of lading, was a failure to fulfill its obligations as an NVOCC and a violation of section 10(d)(1) of the Act. 32 S.R.R. at 353, 374-75. The ALJ also ordered Chief Cargo to "cease and desist releasing cargo without requiring presentation of an original bill of lading." *Id.* at 382. The Complaint against Kaiser was dismissed with prejudice. *Id.* at 373-374.

Bimsha and Chief Cargo both filed exceptions to the ID on January 5, 2012 and January 6, 2012, respectively.

II. Initial Decision

A. *Findings of Fact*

The ALJ accurately reviewed the factual offerings by the parties. *See* 32 S.R.R. at 368-370. The ALJ tethered each finding of fact to a citation in the record, and a review of the findings indicates support in the record.

B. *Findings of Law*

The ID addressed the arguments of Chief Cargo and Bimsha, as well as all other relevant issues. Chief Cargo argued that the Commission does not have jurisdiction over the Complaint because jurisdiction for breach of service contract claims lies exclusively with the courts. *Id.* at 360-361. The ALJ cited 46 U.S.C. §41301(a), Anchor Shipping Co. v. Aliança Navegação E Logística Ltda., 30 S.R.R. 991, 999 (FMC 2006) and Cargo One, Inc. v. Cosco Container Lines Co., Ltd., 28 S.R.R. 1635, 1645 (FMC 2000), for the proposition that pursuant to the Act, the Commission

has jurisdiction when a violation of the Act is alleged. 32 S.R.R at 361. The ALJ noted that a violation of section 10(d)(1) of the Act was alleged and, therefore, Bimsha had stated a claim under the Act. The ALJ also noted that Bimsha’s Complaint did not allege breach of contract, nor did Bimsha have a service contract with Chief Cargo, thus Chief Cargo’s argument that the sole remedy was a breach of contract claim was ineffective. *Id.* In response to Chief Cargo’s contention that the Commission did not have jurisdiction because the claim was cognizable under the Webb-Pomerene Act of 1918, the ALJ recognized that the Commission does not have jurisdiction over the Webb-Pomerene Act, but noted that Chief Cargo failed to cite any authority that said an act that violated the Webb-Pomerene Act³ could not also violate the Shipping Act. *Id.* at 362.

The ALJ also addressed Bimsha’s argument that the Respondents violated section 10(d)(1) of the Act. Citing Houben v. World Moving Services, Inc., 31 S.R.R. 1400, 1404 (FMC 2010), where the Commission held that “by definition, only a common carrier, ocean transportation intermediary or marine terminal operator may violate section 10(d)(1),” the ALJ established that Chief Cargo operated as a NVOCC, and is licensed by the Commission as an NVOCC. 32 S.R.R. at 374. However, the ALJ dismissed with prejudice the Complaint against Kaiser, finding that Bimsha had failed to establish that Kaiser was an entity subject to section 10(d)(1). 32 S.R.R. at 373-74. The ALJ also noted that no evidence had been presented to establish Kaiser as an ocean transportation intermediary, common carrier, or marine terminal operator, nor was there any Commission record showing Kaiser had been licensed by the Commission as an NVOCC. The ALJ also determined that there was no evidence that supported a finding that Kaiser was the alter ego of Chief Cargo, or that the shipments were transported to the United States by Kaiser. *Id.*

³ The Webb-Pomerene Act of 1918, *inter alia*, immunized associations in the export trade from violations of the Sherman Act for restraints of trade that have no domestic effects. 15 U.S.C. §§ 61-66.

The ALJ proceeded to address whether Chief Cargo violated the Act and found that Chief Cargo conceded it released three shipping containers without requiring presentation of the original bills of lading. 32 S.R.R. at 374. He cited Houben, 31 S.R.R. at 1405, as authority that the Commission had established a test whereby a violation of section 10(d)(1) is found when an NVOCC fails to fulfill its obligations. 32 S.R.R. at 375. Based on Chief Cargo's release of the three shipping containers, without requiring presentation of the original bills of lading, he found Chief Cargo failed to fulfill its NVOCC obligations and violated section 10(d)(1) of the Act. Id. at 379. The ALJ also cited Symington v. Euro Car Transport, Inc., 26 S.R.R. 871 (ALJ 1993); Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., 26 S.R.R. 788 (ALJ 1992); Adair v. Penn-Nordic Lines, Inc., 26 S.R.R. 11 (ALJ 1991); Maritime Corporation v. Acme Fast Freight of Puerto Rico, 17 S.R.R. 1655 (ALJ 1978), aff'd, 18 S.R.R. 853 (FMC 1978), as support for the proposition that a violation of section 10(d)(1) is found when an NVOCC fails to fulfill its obligations. 32 S.R.R. at 374-78.

The ALJ addressed European Trade Specialists v. Prudential-Grace Lines, 19 S.R.R. 59, 63 (FMC 1979), where the Commission upheld an ALJ's decision that a "practice" as opposed to a single failure or mistake, was necessary for a violation of section 17 of the Shipping Act, 1916.⁴ The ALJ noted the conflict between European Trade Specialists and Houben, but elected to follow the more recent case, Houben, and the line of cases establishing a violation when an NVOCC fails to fulfill an obligation through an act or failure to act. 32 S.R.R. at 378. Furthermore, the ALJ held that Houben did not require the complainant to establish that it was discriminated against because of a specific practice. The ALJ stated that the failure by an NVOCC to *establish* "just and reasonable regulations and practices or by failing

⁴ Section 17 of the Shipping Act, 1916 was the predecessor to section 10(d)(1) of the Shipping Act of 1984.

to observe and enforce those regulations,” violated section 10(d)(1). The failure by Chief Cargo to establish the practice of requiring an original bill of lading before releasing the cargo was a failure to *establish* just and reasonable practices, and a violation. Alternatively, if Chief Cargo had established the practice of requiring an original bill of lading, then by failing to *observe and enforce* the practice would be a violation of the Act. 32 S.R.R. at 379. The ALJ also found, in accordance with Complainant’s Supp. Exhibit 2 (a letter from Chief Cargo to M.R. Group⁵ stating Chief Cargo would not release any shipments without an endorsed bill of lading) that Chief Cargo had established a practice of not releasing cargo without an endorsed bill of lading. *Id.*

The ALJ rejected Chief Cargo’s argument that Bimsha had waived its right to reparations under the Act. Citing the principle established in Ceres Marine Terminal v. Md. Port Admin., 29 S.R.R. 356, 372 (FMC 2001), complaint dismissed on other grounds, 30 S.R.R. 358 (FMC 2004) (because the Commission does not approve agreements filed with it pursuant to section 4 of the Act, now codified at 46 U.S.C. 40302, common law doctrines of waiver and estoppel may not be invoked to prohibit a complaint alleging a violation of the Act), as analogous to the situation in this case, the ALJ found that Bimsha did not waive its rights under the Shipping Act against Chief Cargo by entering into an agreement “with the purchaser of the cargo for payment of the money owed by the purchaser to the shipper.” 32 S.R.R. at 380.

With regard to reparations, the ALJ found that Bimsha, as the Complainant, had the burden of proving an entitlement to reparations, citing James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist., 30 S.R.R. 8, 13 (2003). 32 S.R.R. at 381. The ALJ also found that Bimsha failed to establish the reliability of the documents it asserted proved the reparations it

⁵ M.R. Traders are listed as agents on all three of the applicable bills of the lading. Complainant’s Exhibit 1.

sought. As a consequence, the ALJ did not award any reparations. 32 S.R.R. at 367-68. The ALJ cited the Administrative Procedure Act (APA), 5 U.S.C. §556(d), and Commission Rule 156, 46 C.F.R. §502.156, as the authority to exclude the documents for lack of reliability. *Id.* In determining reliability, he sought assistance from the Federal Rules of Evidence regarding the establishment of an adequate foundation. 32 S.R.R. at 364.

Concerning the cease and desist order, the ALJ found that Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River, 29 S.R.R. 718, 720 (ALJ 2001) and Pittston Stevedoring Corp. v. New Hampshire Terminal, Inc., 13 F.M.C. 33, 44 (FMC 1969) provided the authority for the Commission to issue a cease and desist order in response to a violation of the Shipping Act. 32 S.R.R. at 381. He also cited Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express, 27 S.R.R. 1335 (ALJ 1997) for the proposition that “a cease and desist order is generally issued when there is a reasonable likelihood or expectation that the respondent will continue or resume illegal activities.” 32 S.R.R. at 381. The ALJ cited Marcella Shipping Co. Ltd., 23 S.R.R. 857, 871-72 (ALJ 1986) as requiring the cease and desist order be “tailored to the needs and facts of the specific case.” 32 S.R.R. at 381. Finding that the “boss” of Chief Cargo was personally involved in the decisions to release the cargo, and noting that three separate shipments over three months were released without a presentation of a bill of lading, the ALJ determined that there was a reasonable likelihood that the illegal activity would continue. *Id.* Moreover, the ALJ felt it was necessary to protect the shipping public from this practice by specifically ordering Chief Cargo to cease and desist releasing cargo without an original bill of lading. *Id.* at 382. Citing 46 U.S.C. §41305(b), the ALJ also held that, because there was no reparation award, attorney’s fees could not be awarded; moreover, citing Tienshan v. Tianjin Hua Feng, 32 S.R.R. 52, 67 (ALJ 2011) he found costs could not be awarded. 32 S.R.R. at 382.

III. Positions of the Parties

A. *Complainant*

Bimsha alleged that Chief Cargo and Kaiser violated section 10(d)(1) of the Act by releasing three separate shipments over three months without requiring the original bills of lading to be presented. It sought reparations in the amount of \$207,809.74, plus interest. Complaint at 2. Bimsha also sought costs and legal expenses, bringing the total amount sought to \$287,140.74. Complainant's Brief at 2. Bimsha also requested an order to cease and desist, attorney's fees and costs. Complainant's Supp. Brief at 9. Finally, Bimsha contended that the ALJ should not have dismissed the claim against Kaiser and that it properly established the foundation for the excluded exhibits. Complainant's Exceptions at 2-3.

B. *Respondents*

Chief Cargo argued that the Commission did not have jurisdiction over the Complaint. Motion to Dismiss at 2. It also asserted that it did not violate section 10(d)(1) of the Shipping Act and a Cease and Desist Order should not be entered by the Commission. Respondent's Exceptions at 2. Chief Cargo further argued that it did not violate section 10(d)(1) because "a series of three (3) isolated events" did not establish a "pattern or practice" actionable under section 10(d)(1). Chief Cargo's Exceptions at 5. Moreover, it contended that an agreement between Bimsha and Rich Kids Jeans⁶ served as a novation extinguishing any obligation owed to Bimsha from Chief Cargo. *Id.* Kaiser did not file an answer or participate in the proceeding.

After review of the ALJ's Initial Decision, we adopt the Initial Decision.

⁶ Chief Cargo Exhibit 2 shows an agreement wherein the President of Rich Kids Jeans (the purchaser of the cargo) promised to make "payments to Bimsha for the outstanding payments."

DISCUSSION

The three main issues in this case involve (1) the Commission's jurisdiction; (2) whether there was a violation of section 10(d)(1) of the Shipping Act of 1984; (3) and whether reparations, and other relief, should be awarded. The ALJ analyzed all of these issues succinctly and correctly in the ID.

I. Jurisdiction

The Shipping Act of 1984 states “[a] person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part. . . .” 46 U.S.C. §41301(a). Accordingly, Bimsha filed a sworn complaint alleging a violation of section 10(d)(1) of the Shipping Act, in connection with three shipments handled by Respondents in 2009. Complaint at 2. Breach of contract was not the basis of Bimsha's Complaint. Moreover, “alleged violations of section 10(d)(1) . . . are inherently related to Shipping Act prohibitions and are, therefore, appropriately brought before the Commission.” Cargo One, Inc. v. Cosco Container Lines Co., Ltd., 28 S.R.R. 1635, 1645 (FMC 2000).

Chief Cargo argues that the Commission does not have jurisdiction over the Complaint because jurisdiction for contract claims lie exclusively with the courts. Chief Cargo argues, in what does not appear to be in the alternative, that the claim should be heard in either New York State Court or one of the Federal District Courts in New York, but then immediately follows that argument with a claim that the case arises under the Federal Courts' exclusive admiralty jurisdiction. Reply Brief at 5. Chief Cargo appears to argue that the claim is based on a contract, namely, the bill of lading, and which section 8(c) of the Shipping Act directs to resolution before the courts, not the Commission. The premise, however, is flawed. Section 8(c) applies to “service contracts,” which are defined in the Shipping Act as “a written contract, *other than a bill of lading* or receipt” 46 U.S.C. §40102(20)(emphasis added). Because a bill of lading is not a

contract under the Act, Chief Cargo's contention that the dispute arising from the bill of lading is justiciable only in court thus lacks merit.

Similarly, Chief Cargo's allegation that the claim arises under the Webb-Pomerene Act of 1918 (49 U.S.C. § 80101-80116), and must be heard exclusively in Federal District Court, is baseless. As the ALJ noted, Chief Cargo has pointed to no authority to demonstrate that the actions alleged in the Complaint should be heard exclusively by Federal District Courts.

In the matter at hand, the ALJ correctly recognized that Bimsha alleged that the Respondents violated section 10(d)(1); breach of contract was not the basis of Bimsha's claim, and, therefore, the Commission had jurisdiction. 32 S.R.R. at 361.

II. Violation of Section 10(d)(1)

Section 10(d)(1) of the Act provides that "a common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 42 U.S.C. §41102(c). In deciding whether section 10(d)(1) has been violated, the Commission must first determine whether Chief Cargo and Kaiser fall into a category covered by section 10(d)(1). The ALJ correctly determined that Chief Cargo operated as an ocean transportation intermediary, more specifically a NVOCC. 32 S.R.R at 374. The ALJ correctly pointed out that Bimsha did not provide any evidence that "Kaiser operated as a common carrier, ocean transportation intermediary, or marine terminal operator." *Id.* at 370. The ALJ appropriately dismissed with prejudice the Complaint against Kaiser, finding that Bimsha had failed to establish that Kaiser was an entity subject to section 10(d)(1). *Id.* at 373-74.

After establishing that Chief Cargo, as an NVOCC, was subject to section 10(d)(1) of the Act, the ALJ addressed whether

Chief Cargo violated the Shipping Act. The ALJ correctly found that Chief Cargo conceded that it released three shipping containers without requiring presentation of the original bills of lading. Id. at 374. The ALJ found in the Initial Decision that the Commission's holding in European Trade Specialists "problematic" with regard to requiring repeated and customary action.

However, the Commission has indeed recognized that NVOCCs violate section 10(d)(1) when they fail to fulfill NVOCC obligations, through single or multiple actions or mistakes, and therefore engage in an unjust and unreasonable practice. See Yakov Kobel, et al. v. Hapag-Lloyd A.G., et al., ____ S.R.R. ____ at 19, (FMC July 12, 2013)(Order Vacating Initial Decision In Part and Remanding For Further Proceedings); Houben, 31 S.R.R. at 1405 (FMC 2010) (NVOCC failed to make payments "necessary to secure release of cargo" and failed to resolve a commercial dispute); William J. Brewer v. Saeid B. Maralan (aka Sam Bustani) and World Line Shipping, Inc., 29 S.R.R. 6 at 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 destination port unless additional money was paid, and instructed its agent to place the shipment on hold.); 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.); Symington, 26 S.R.R. at 873 (ALJ 1993) (NVOCC failed to carry out obligation it was paid to perform, thus failing to "establish, observe, and enforce just and reasonable regulations and practices relating to the receiving, etc. of property"); Adair, 26 S.R.R. at 19-20 (ALJ 1991) (NVOCC reneged on agreement and refused to refund freight even though it "never performed the transportation service"); Maritime, 17 S.R.R. at 1662 (ALJ 1978) (section 10(d)(1) violation found because of NVOCC's failure to "pay applicable demurrage charges," subjecting "property of the shipping public to vessel-operating

common carrier's liens"); Corpco Int'l, Inc., v. Straightway, Inc., 28 S.R.R. 296, 300 (1998) (forcing shipper to pay transshipment costs for the release of cargo after shipper had already paid a rate previously agreed was an unreasonable business practice); Total Fitness Equipment, Inc. d/b/a, Professional Gym v. Worldlink Logistics, Inc., 28 S.R.R. 534, 542 (FMC 1998), aff'd, Worldlink Logistics, Inc. v. Federal Maritime Comm'n, 203 F.3d 54 (D.C. Cir. 1999) (attempting to collect an unreasonable debt by refusing the release of cargo was a violation of the Act). In the preceding cases, failures to act, similar to the failure of Chief Cargo to require original bills of lading prior to releasing cargo, were found to constitute violations of section 10(d)(1). Therefore, we concur with the ALJ's decision that Chief Cargo violated section 10(d)(1). 32 S.R.R. at 379. The ALJ's reasoning is sound and it is apparent that Chief Cargo violated section 10(d)(1), by its failure to act.

The Commission has found in the past that agreements between parties filed under section 4 of the Act do not bar later claims for violations of the Act. Ceres at 372, 374. We concur with the ALJ's reasoning that Ceres adequately supports a finding that the agreement between Bimsha and Rich Kids Jeans did not act as a novation.

III. Reparations

Bimsha has the burden to prove reparations with reliable, probative, and substantial evidence. The APA states:

Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the *reliable*, probative, and substantial evidence.

5 U.S.C. §556(d) (emphasis added).

Commission Rule 156 states:

In any proceeding under the rules in this part, all evidence which is relevant, material, *reliable* and probative, and not unduly repetitious or cumulative, shall be admissible. *All other evidence shall be excluded.* Unless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence, Public Law 93-595, effective July 1, 1975, will also be applicable.

46 C.F.R. §502.156 (emphasis added).

The Act allows for reparations for an injury caused by a violation of the Act. 46 U.S.C. §41301(a). In addition, interest and attorneys fees are included. 46 U.S.C. §41305(a)-(b). With regard to Bimsha's demand for interest, costs, and legal expenses totaling \$287,140.74, the ALJ reasonably concluded that Bimsha failed to establish the reliability of the evidence it sought to admit to prove its damages. 32 S.R.R. at 381. Chief Cargo objected to the admission of numerous documents by Bimsha on the basis of lack of foundation. Reply Brief at 1. During argument, Chief Cargo reiterated its objection. Transcript at 42-43. The ALJ advised counsel for Bimsha that it needed to establish a foundation for the documents it contended established the damages. 32 S.R.R. at 364-365. Nevertheless, Bimsha failed to provide testimony or any witness who could establish the foundation for the documents the ALJ excluded. As there was no foundation established for the documents, the ALJ determined that the documents were not reliable⁷ and in accordance with the standards set forth in the Administrative Procedure Act and Commission Rule 156, excluded

⁷ During deposition, Chief Cargo's representative stated he had never seen these documents. Complainant's Supp. Exhibit 8 (Transcript of Chief Cargo Deposition June 3, 2011, at 6-12; 17).

the proffered documents as evidence. 32 S.R.R. at 367.

Because Bimsha failed to lay the foundation for admitting the excluded exhibits, despite the ALJ's admonitions, the Respondent's objection, and a standard that does not require the actual person who prepared the document, the evidentiary exclusion was reasonable and consistent with Commission Rule 156 and the Administrative Procedure Act. Nevertheless, even though the ALJ's decision was reasonable and supported, it may also have been reasonable for him to have allowed the admission of the excluded evidence and then weighted it appropriately. See EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc. - Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations at 46 C.F.R. §515.27, 31 S.R.R. 540, 547 (FMC 2008) where the Commission stated, "[a]n agency Administrative Law Judge (ALJ) should admit all relevant and arguably reliable evidence and then should determine the relative probative value of the admitted evidence when . . . [he] writes . . . [his] findings of fact," citing Kenneth Culp Davis & Richard J. Pierce, Jr., 2 Administrative Law Treatise §10.1, p. 117 (3d ed. 1994). The ALJ provided repeated opportunities to Bimsha to establish a foundation for the admission of the documents into evidence; the ALJ appropriately exercised his discretion and refused to admit them for lack of reliability. See, e.g., ID at 15. Given that the ALJ had a reasonable and supported basis for his decision to exclude the evidence and Commission precedent does not *require* him to admit such evidence, his decision was acceptable.

The ALJ correctly addressed the issue of attorney's fees by holding that, as there was no reparation award, attorney's fees could not be awarded. 32 S.R.R. at 382. The ALJ correctly concluded that the Commission was not authorized to award costs. 46 U.S.C. § 41305(b) (attorney's fees can only be awarded in conjunction with a reparation award).⁸

⁸ See Tienshan v. Tianjin Hua Feng, 32 S.R.R. 52, 67 (ALJ 2011); Global

IV. Cease and Desist

Bimsha sought a cease and desist order. Bimsha Supp. Brief at 9. A cease and desist order may be issued by the Commission when there is a violation of the Shipping Act. Exclusive Tug Franchises—Marine Terminal Operators Serving the Lower Mississippi River, 29 S.R.R. 718, 720 (ALJ 2001); Universal Logistic Forwarding Co. Ltd.,- Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 474, 476 (FMC 2002) (“the language used in cease and desist orders generally mirrors the violations committed coupled with the statutory language”).

Chief Cargo argues that “a cease and desist order is not meant to ‘protect’ hypothetical entities for an indefinite time frame.” Respondent’s Exceptions at 6. The Commission has, however, issued cease and desist orders to protect the shipping public from future possible violations. See, e.g., Alex Parsinia d/b/a/ Pacific Int’l Shipping and Cargo Express, 27 S.R.R. 1335, 1343 (cease and desist order issued even though respondent already had ceased doing business).⁹

In this proceeding, the ALJ appropriately found that Chief Cargo violated section 10(d)(1) of the Shipping Act by releasing cargo without the presentation of the original bills of lading. Moreover, the ALJ’s Order specifically related to the violation, and

Transporte Oceanico S.A. v. Coler Independent Lines Co., 28 S.R.R. 1162, 1163 n.5 (ALJ 1999) (“attorney’s fees” do not include costs).

⁹ See Stallion Cargo, Inc. Possible violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984, 29 S.R.R. 205, 218 (ALJ 2001)(even though no evidence that respondent had continued to violate the Shipping Act, had ceased its unlawful practices, and argued that it had taken measures to prevent future violations, a cease and desist order was appropriate as the respondent intended to stay in business, and had previously persisted in committing numerous violations.)

by ordering Chief Cargo to cease and desist from "releasing cargo without requiring presentation of an original bill of lading," was precisely tailored to remedy the violation found by the ALJ. 32 S.R.R. at 382.¹⁰

CONCLUSION

After review of the Initial Decision and exceptions, we adopt the Initial Decision.

THEREFORE, IT IS ORDERED, That the Commission adopts the Initial Decision.

IT IS FURTHER ORDERED, That Respondent Chief Cargo Services, Inc., cease and desist from the practice of releasing cargo without requiring presentation of an original bill of lading;

IT IS FURTHER ORDERED, That the Complaint against Respondent, Kaiser Apparel, Inc., be dismissed with prejudice;

IT IS FURTHER ORDERED, That Complainant, Bimsha International's, request for an award of costs and attorney's fees be denied;

Finally, IT IS ORDERED, That this proceeding be discontinued.

By the Commission.


Karen V. Gregory
Secretary

¹⁰ Marcella Shipping Co. Ltd., 23 S.R.R. 857, 871-72 (ALJ 1986) (cease and desist orders must be specifically tailored to the individual case).

Commissioner Dye, concurring in part and dissenting in part:

I concur with the majority's decision to uphold the Administrative Law Judge's (ALJ's) decision not to award reparations and attorney's fees to Bimsha International. I also support the majority's decision to uphold the ALJ's dismissal of Kaiser from this proceeding.

I dissent from the majority's decision to uphold the ALJ's finding that Chief Cargo violated section 41102(c) of title 46, United States Code, and his decision to issue a Cease and Desist Order, for the reasons stated in the dissent by Commissioner Khouri, with whom I joined, in Docket No. 10-06, *Yakov Kobel and Victor Berkovich v. Hapag-Lloyd America, Inc., Limco Logistics, Inc., and International TLC, Inc.*

Commissioner Khouri, concurring in part and dissenting in part:

I concur with the majority in their holding to affirm the ALJ's dismissal with prejudice of the Complaint against the party Respondent, Kaiser Apparel, Inc. However, I respectfully disagree with my fellow Commissioners' majority opinion in substantially all other relevant respects and offer my dissenting views and arguments below.

I adopt again and fully incorporate herein the views and arguments set forth in my dissent in *Yakov Kobel and Victor Berkovich v. Hapag-Lloyd, A.G., et al.*, Docket No. 10-06, Order Vacating Initial Decision In Part and Remanding for Further Proceedings, (served July 12, 2013).

Prologue

The foregoing Bimsha majority ruling places primary and significant reliance on the Commission's most recent Kobel decision. Therefore, a first task is to address misunderstandings or

misreadings of dissenting positions in Kobel and to correct a simple misstatement of the law. The Kobel majority miss the mark where they assert:

And the dissent makes no attempt to explain why Congress would have purportedly changed an affirmative obligation contained in the Shipping Act of 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").

Kobel, *supra*, at 31.

I have not offered nor advanced any argument that the 98th Congress intended to change the scope, breadth, depth, or judicial interpretation of the first sentence of the second paragraph of Section 17 of the 1916 Act. To the contrary, I argued that the statutory language in Section 10(d)(1) of the 84 Act was a direct carryover from the subject sentence in the 1916 Act. Moreover, I directly cited the Commission's presiding officer in Tractors and Farm Equipment, *supra*, where – not once, but twice – the ALJ expressly held that the two provisions were the same.¹

¹ "This law [Section 10(d)(1)] essentially carried forward the requirements of Section 17, second paragraph, of the 1916 Act." "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." Tractors and Farm Equipment at 790. (emphasis added)

For the meaningless semantic change from an affirmative statement in the 1916 Act, “Every [regulated entity] shall establish, observe, and enforce just and reasonable regulations and practices . . .”, to the proscriptive formulation in the 1984 Act, “No [regulated entity] may fail to establish, observe, and enforce just and reasonable regulations and practices . . .” -- the most simple and common sense rationale is that a Congressional staff legislative draftsman may well have thought it a desirable drafting goal to bring syntactical harmony to the list of Prohibited Acts in Section 10 by stating all of the various propositions in a common and consistent form. For example, consider Section 10(a), “No person may:”²; Section 10(b), “No common carrier . . . may:”³; Section 10(c), “No conference . . . may:”⁴; Section 10(d)(1), “No [regulated entity] may:”⁵; Section 10(d)(2), “No marine terminal operator may:”⁶; and Section 10(d)(4), “No marine terminal operator may:”⁷.

All of these prohibitions, in one formulation or another, were carryovers from the 1916 Act and all are now crafted by the unknown Congressional draftsman in a uniformly consistent fashion. I am advised that the Congressional and committee record is silent on this point. So rather than relying on a foundation of pure speculation that Congress intended not only a change, but a significant departure from all prior Section 17/Section 10(d)(1) interpretation and jurisprudence, we can look to basic rules of logic and experience. Occam’s razor instructs us that the hypothesis with the simplest explanation and the fewest assumptions is usually the correct answer.⁸ The most simple and common sense hypothesis is that the 98th Congress had no intention, whatsoever, to change

² 46 U.S.C. Section 41101.

³ 46 U.S.C. Section 41104.

⁴ 46 U.S.C. Section 41105.

⁵ 46 U.S.C. Section 41102(c).

⁶ 46 U.S.C. Section 41106(1).

⁷ 46 U.S.C. Section 41106(2).

⁸ For lawyers, *lex parsimoniae*.

anything in old Section 17/new Section 10(d)(1) analysis, application, or jurisprudence.

Continuing, the Kobel majority's discovery that Congress must have intended the word "and" to actually be "or" was discussed in that case's majority and dissenting opinions. The attempt to both confuse the issue and further add to the kerfuffle by attributing a nonsensically disjointed formulation of one phrase within Section 10(d)(1) to my office door⁹ brings no heat and less light to the issue. To revisit the majority straw man argument – a party would be perversely induced to initially "establish" a just and reasonable "practice" and then proceed to systematically ignore such practice with impunity. My rejoinder offered the simple observation that where the respondent party's true method of alleged activity was shown, by record evidence, to have been "uniformly" and "habitually performed" and "the usual course of conduct"¹⁰ and thus the true "normal practice"¹¹, then any hypothetically postulated initial "just and reasonable practice" had never been established in the first place. As when one initially grasps a telescope from the wrong end, the vision and view of the terrain is confused and out of perspective.

Kobel's new found interpretation – as small as the words "and" versus "or" may appear – creates a major difference in the scope and application of the statute. As illustration, consider that the conjunctive "and" formulation has been used in transportation and industry focused Congressional legislation since 1887.¹²

⁹ Kobel at 31.

¹⁰ Stockton Elevators, at 618.

¹¹ European Trade Specialist, at 63 (emphasis in original).

¹² The Interstate Commerce Act of 1887, Ch. 104, 24 Stat 379, 1887. See, 49 USCA 1(6) and 1(11). Paragraph 6 made it the duty of carriers to establish just and reasonable regulations and practices affecting classifications, rates or tariffs. Paragraph 11 required carriers to furnish adequate car service and to establish just and reasonable rules, regulations and practices regarding car service. See also section 208 of the Packers and Stockyards Act of 1921, 7 U.S.C. sections 181-229b. (1921).

Therefore, it is either illuminating or confounding to consider how this new Congressionally intended statutory construction that “and” really means “or” has eluded the sharp eyes and keen minds of so many maritime attorneys and jurists for the past one-hundred and twenty six years.

A companion substantive change is accomplished where the term “practices” has now been totally redefined to an extent that, from all practical prospective, the term has been jettisoned from the statute. Likewise changed by virtue of simply ignoring the element, is the parallel requirement of allegation and credible evidence that the “practice” also fails the “just and reasonable” standard previously found in the statutory language and Commission application of Section 10(d)(1).

Special note is due for the Kobel majority’s deft citation to Dean Rowse v. Platte Valley Livestock, Inc., 597 F. Supp. 1055, 1057-58 (1984) at pages 29-30 of that decision, as support for the parallel newly found view that “. . . a practice should mean a course of conduct of the industry as a whole rather than a course of conduct of a particular respondent”, Id., at 1057, Kobel at 17. Indeed, this was the argument of the United States attorney representing the Secretary of Agriculture. However, when the Rowse court turned to the actual issues of its case *sub judice*, it held:

In the present case, the defendant’s alleged action was not merely an aspect of the debtor-creditor relationship. Rather, it was an instance of a regulated stockyard market agency violating regulations promulgated to carry out the purposes of the act. [citing Department of Agriculture regulations]. Neither regulation authorizes the market agency to pay consignment sale proceeds to itself to satisfy a debt of the consignor or to another debtor of the consignor. [cites omitted]. Therefore, unlike a single instance of a breach of the debtor-creditor

relationship, an evil not targeted by the Packers and Stockyards Act, the transaction here, even if viewed as a single transaction, is a practice which Congress intended to reach and regulate under the Act. Unlike a bad-check transaction, it is not an isolated instance because, according to the Secretary's decision, it is part of an industry wide practice [*i.e.* an unfair, unjust and widely employed practice of improperly applying sale proceeds to antecedent debts] intended to be reached by the Act. In addition, . . . the transaction involving the Rowses was part of a practice by the defendant.

Id. at 1059 (emphasis added) (interpretive comment added).

As the Kobel dissent explained, the Rowse respondents had prior legal troubles with a case in Nebraska state court regarding the same genre of activity, involving three lots of cattle with the proceeds being misapplied by respondent to different parties. Thus, the Secretary found a "practice". The Rowse court did not adopt a position that supports the Commission holding in the Kobel decision or in the Bimsha decision herein. At best, the Rowse decision would support, by way of example, the position that obtaining transportation at rates that otherwise would not apply by knowingly and willfully using a false report of weight, cargo classification, or measure¹³ is an unjust and unreasonable practice, and thus, is an evil targeted by the Shipping Act in any one isolated instance. Reading a case both cover to cover and in context may result in a totally different perspective.

Last, I believe that the Kobel majority's reading of pre-1984 Act law; specifically when their decision offers the proposition that, ". . . the requirements of the 1916 Act whereby, a failure of any one requirement could result in a violation, "Id at 31 (emphasis added), is erroneous. It would logically flow from that statement, that the

¹³ See Section 10(a)(1), 46 U.S.C. Section 41102(a).

1916 Act supports and embraces the Kobel majority opinion and the decision herein in Bimsha. I am unaware of any case law to support that position.

Issues

What is ultimately lost in Kobel and its companion Bimsha majority opinion is a revolving door of confusion followed doggedly by more confusion. Four issues must be noted and addressed. The requisite legal and factual elements of a Section 10(d)(1) complaint have been substantially altered, amended and reduced. Next, it is the majority who offer the argument that something significant changed in 1984 version of Section 10(d)(1). In order to bootstrap themselves to their ultimate objective of completing a major change in course that substantially expands Section 10(d)(1) reach and scope, we are directed to revisit Congress’ wording and change the conjunctive “and” to the disjunctive “or”. The result of such change opens the door for any isolated or single “mistake” by a regulated entity to now come within the reach of Section 10(d)(1). Third, as more fully discussed below, it is the majority who make no attempt to explain this significant change in course, after many years of well established Commission precedent and companion statute precedent, all as had been consistently applied by the federal courts. Last, there is no effort directed toward explanation as to how this expanded reach of the Shipping Act and the Commission’s jurisdiction serves a public policy purpose that can be uniquely advanced by the expertise resident within the Federal Maritime Commission.

I. Section 10(d)(1) elements

Regarding the fundamental elements of a Section 10(d)(1) violation, Stockton Elevators, *supra*, give us full and well reasoned guidance. The complainant must allege and then establish with credible evidence that respondent, through its alleged activity:

1. “Engaged in a ‘practice’ within the meaning of Section 17.” As further guidance, “The essence of a practice is

uniformity. It is something habitually performed and it implies continuity . . . the usual course of conduct. It is not an occasional transaction, such as shown here.” Id. at 618.

2. If respondent’s alleged activity rises to the level of a “practice”, then complainant must also allege and establish that the activity was unjust or unreasonable.
3. To rise to the level of “unjust or unreasonable”, the complainant must allege and establish that the commerce of the United States was deterred. “. . . even if the granting of the five allowances or the granting of 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. at 618 (emphasis added).
4. Direct damage or compensable harm resulting from the unjust or unreasonable practice must be alleged and established. “No one was denied anything, prejudiced, disadvantaged or discriminated against in any way.” Id. at 618.

European Trade Specialist, *supra*, follows in line with Stockton Elevators, where the full Commission held as follows:

Even assuming, without deciding, 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. (*citing Stockton Elevators*)(“practice” emphasis in original, second emphasis added). . . Similarly, because any violation of [46 CFR Section 510.23] of the Commission’s regulations must be considered in terms of Section 17 by operation of the language of the Order on Remand, without a showing of continuing violations

of these regulations no Section 17 violation can be found. Id. at 63 (emphasis added).

The second admonition in the cited case is especially appropriate for the instant Bishma decision where the allegation is that the respondent violated Section 10(d)(1) in the following manner:

- the agreement between the parties required the respondent to release the cargo only upon presentation of the negotiable bill of lading
- thus, respondent had a duty to not misdeliver the cargo
- the industry “practice” concerning negotiable bills of lading may be found in either admiralty common law, contractual terms within the bill of lading, or the Federal Bill of Lading Act, 49 U.S.C. Sections 80101-80116 (the “Pomerene Act”)
- respondent breached the duty established by such “practice”
- now, proceed to calculation of reparation damages and award of all complainant’s attorney fees.

The Commission held in European Trade Specialist that, when considering even the *Commission’s own regulation*, a complainant must allege and establish “continuing violations of these regulations.” in order to implicate Section 10(d)(1). Id. at 63. This followed the Commission’s earlier decision in Maritime Service Corp v. Acme Fast Freight of Puerto Rico, 17 SRR 1655 (ID 1978), where the presiding officer found that the numerous respondent parties had systematically failed to pay any and all demurrage on container chassis and violated several proscriptive sections of the 1916 Shipping Act. Id. at 1662.

The main points of interest on the term “practices” as a consistently interpreted and applied requisite element for a Section 10(d)(1) violation follow.

First, of lesser consequence, is the observation that the Marine Services case, *supra*, was reconsidered on exceptions and substitution of parties, see Sea-Land Services et al v. Acme Fast Freight, 18 SRR 853 (FMC 1978). The full Commission found that, notwithstanding literally thousands of incidents where the respondents had failed to pay chassis demurrage, the record evidence was inadequate and thus dismissed all Section 17 allegations.¹⁴ The Commission and the presiding officers should refrain from offering Sea-Land for any legal precedent, other than the principal that numerous failures by the party respondents to observe and enforce their contractual duty to pay chassis demurrage when due did not ring the bell of a Section 10(d)(1) violation.¹⁵

Second, the “practice” that the Shipping Act is meant to police is the unjust and unreasonable practices of a regulated entity. Looking to the broad seascape of any and all legal “duties” as found in common law, statutory proscriptions and agency regulations; then issuing a blanket declaration that all such matters are “industry practices”, and last, arrogating unto the Commission the authority to police those practices by incorporating them into Section 10(d)(1) is incorrect as a matter of law. As discussed above, while admittedly the attorney for the Secretary of Agriculture argued that

¹⁴ “. . . although there is some indication of at least tacit understanding . . . to oppose dealing with [respondents] and disregard its billing, we find the record inadequate to support the Presiding Officer’s conclusion that Respondents have in fact violated Section 15 of the Act. (internal footnote 8) Nor do we find any violation of Section 17 on the facts and circumstances presented here.” Sea-Land, *supra*, at 857.

¹⁵ As I offered in Kobel, without the benefit of reviewing the full record in Sea-Land, I would be inclined to hold that the systematic withholding of demurrage payments on thousands upon thousands of invoices over an extended period of time could evidence a “practice” by respondents and that such “practice” failed the “just and reasonable” element by virtue of the creation of maritime liens attaching to the cargos of thousands upon thousands of innocent beneficial cargo owners and thus adversely affected the commerce of the entire US to Puerto Rico container trade.

an industry practice was relevant, the Rowse court did not incorporate and endorse that line of argument. Moreover, when read in full context, the Rowse decision, in fact, supports the statutory elements and findings in European Trade Specialist.

A final point on “practices” the Commission must consider. The shift from requiring an allegation and showing of a “practice” that the individual’s normal, habitual and continuous method of doing business was unjust and unreasonable and caused the harm, damage, or injury; over to a new and far more modest requirement of alleging and finding an “industry practice”, as established by common law, statute or regulation, and then, followed by the conclusory allegation that the respondent had a duty to observe and enforce that “industry practice” in any and all business transactions and, at any time and any single incident where the respondent failed in that duty by reason of neglect, inattention, or innocent mistake constitutes a violation of Section 10(d)(1) is a significant departure from Commission precedent and all prior jurisprudence that has considered the same or substantially identical statutory language.

II. Conjunction v. Disjunction

Between the Kobel decision and the Bimsha discussion herein, the two small words “and” and “or” have received more than enough attention. To lay the foundation for a starkly new formulation of a one-hundred plus year old legislative provision on such an implausible proposition is testament to the fundamental lack of substance in the Commission’s position. As with the issues addressed in the FMC v. Seatrain Lines and SEC V. Sloan cases, discussed below, the desire by the Commission majority to embrace a new and expansive array of maritime matters is transparent. Unfortunately, the desire is not supported by the provisions of the Shipping Act.

III. Stare Decisis

Transitioning to the third issue; the Commission majority in Bimsha continues the legal and logical deficiency in Kobel, Houben, Symington, Tractor and Farm Equipment, and Adair – there is no reasoned, much less persuasive, discussion and explanation as to what has changed or why the Commission is so blithely casting overboard Stockton Elevators, European Trade Specialist and all of their prior and related precedent cases.

The principal of *stare decisis* in all jurisprudence, as followed in all state and federal courts and all state and federal agencies, is fundamental to the American system of justice and governance. The full application of *stare decisis* in proceeding before the Commission was well established in Harrington & Co and Palmetto Shipping & Stevedore v. Georgia Port Authority, 23 SRR 753 (ID 1986):

“...a close look at the cases and authorities reveals that administrative agencies follow the doctrine of *stare decisis* in much the same way as do courts. Just as the courts change their minds from time to time, so do the agencies . . . the courts do not bind themselves forever to decisions which experience teaches them to have been wrong and to work harm under present conditions. However, the decision to depart from precedent is not taken lightly and requires compelling reasons Although agencies are given some leeway in changing their minds in light of experience and changing conditions, the courts are emphatic in requiring agencies to follow their precedents or explain with good reason why they choose not to do so. All the circuits impose this requirement.

Id. at 766 (emphasis added).

The following year in a subsequent proceeding in the same matter, Palmetto v. Georgia Ports Authority, 24 SRR 50 (ID 1987), the Administrative Law Judge reiterated this fundamental of administrative *stare decisis* which require that if an agency departs from precedent, it must provide an opinion or analysis supported by substantial evidence of record. Id. at 58.

Numerous federal courts of appeal have provided both compass directions and admonitions on the topic of administrative agency *stare decisis*. The issue of agency *stare decisis* has a well traveled history in the District of Columbia Circuit. That court held in a 2010 case, Jicarilla Apache Nation v. U.S. Dept. of Interior, et al., 613 F. 3d 1112 (D.C. Cir 2010), as follows:

One of the core tenets of reasoned decisionmaking announced in *State Farm* is that “an agency, changing its course . . . is obligated to supply a reasoned analysis for the change.” 463 U.S. 29, at 42, 103 S.Ct. 2856. We have held that “[r]easoned decision making . . . necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent,” and an agency that neglects to do so acts arbitrarily and capriciously. Dillmon v. NTSB, 588 F. 3d 1085, 1089-90 (D.C. Cir 2009), (citing FCC v. Fox Television Stations, Inc. ___ U.S. ___, 129 S. Ct. 1800, 1811 . . . [w]e have never approved an agency’s decision to completely ignore relevant precedent. See LeMoyne Owen College, 357 F. 3d at 61. . . Thus, “[a]n agency’s failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making.” Ramaprakash v. FAA, 346 F. 3d 1121, 1125 (D.C. Cir. 2003) (quoting Columbia Broad Sys. v. FCC, 454 F. 2d 1018, 1027 D.C. Cir. 1971).

Id. at 1119-20.

Numerous examples preceded Jicarilla. Consider Baltimore and Annapolis Railroad v. Washington Metropolitan Area Transit Commission, 642 F. 2d 1365 (DC Cir. 1980), a case that was decided some thirty years prior:

The Commission cannot replace its conclusion that it lacks jurisdiction [over certain transportation services], with a different view, unless the announcement of that different view is accompanied by an explanation of the Commission's reasons for making the change. Furthermore, the reasons contained in the explanation must be consistent with law and supported by substantial evidence on the record. Even absent special circumstances, it is vital that an agency justify a departure from its prior determinations. First, the requirement of reasons imposes a measure of discipline on the agency, discouraging arbitrary or capricious actions by demanding a rational and considered discussion of the need for a new agency standard. The process of providing a rationale that can withstand public and judicial scrutiny compels the agency to take rule changes seriously. The agency will be less likely to make changes that are not supported by the relevant law and facts. Second, the requirement of reasons fulfils the duty of fairness and justice owed by the agency to the party or parties 'victimized' by the agency's decision to shift course. . . 'a disappointed party, whether he plans further proceedings or not, deserves to have the satisfaction of knowing why he lost his case.' [cite omitted] Third, and perhaps most important of all, the requirement of reasons facilitates judicial review. '[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be

clearly disclosed and adequately sustained.' [cite omitted] The burden of justifying an agency decision, especially an agency's decision that contradicts one of its prior decisions, properly belongs to the agency itself and not the courts. [cite omitted].

Id. at 1370.

Other relevant federal cases include RKO General v. FCC, 670 F.2d 215 (DC Cir. 1981), "Failure to explain the reversal of directly controlling precedent is unlawful. [citing Columbia Broadcasting, supra]." Id. at 223, and Federal Trade Commission v. Crowther, 430 F.2d 510, 516 (DC Cir. 1970), "... it is not enough to explain the Commission's changed feeling by merely asserting that it has struck a new balance. Rationality in administrative adjudication requires something more than that." Id. at 516.

As discussed above, the Bimsha/Kobel through Adair line of cases represent a direct departure from Commission precedent. However, a close but separate issue is similarly troubling – the cases also significantly expand the jurisdictional reach of Section 10 of the 1984 Shipping Act. The U.S. Supreme Court addressed this second issue in FMC v. Seatrain Lines, Inc., 411 U.S. 726 (1973). The Commission had, for a number of years, interpreted the general wording of Section 15 of the 1916 Shipping Act to include the authority to approve or disapprove proposed acquisitions of an ocean common carrier by another ocean common carrier. The Commission pointed to the Civil Aeronautics Board and a provision, 49 U.S.C. Section 1382(a), that was quite similar in wording to Section 15. The Supreme Court noted that Congress had, in fact, enacted a fully different provision for airline mergers noting that:

[s]pecific grants of airline merger approval authority [were included in 49 U.S.C. Section 1378(a)(1)]. [The Court was thus]. . . unwilling to construe the

ambiguous provisions of Section 15 to serve this purpose, a purpose for which it obviously not intended. As the Court of Appeals found, the House Committee which wrote Section 15 ‘neither sought information nor had discussion on ship sale agreements. They were neither part of the problem nor part of the solution.’ 148 U.S.App. D.C. at 432, 460 F. 2d at 940. If . . . there is now a compelling need to fill the gap in the Commission’s regulatory authority, the need should be met in Congress where the competing policy questions can be thrashed out and a resolution found. We are not ready to meet that need by rewriting the statute and legislative history ourselves.

Id. at 744.

The Supreme Court then addressed the Commission’s rejoinder arguments:

But the Commission contends that, since it is charged with administration of the statutory scheme, its construction of the statute over an extended period should be given great weight. [cite omitted]. This proposition may, as a general matter, be conceded, although it must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate.

Id. at 745.

Last, see Pittsburg Press Company v NLRB, 977 F. 2d 652 (D.C. Cir. 1992), where the court held, “We do not think it enough to say that this latest decision is consistent with the general drift of NLRB precedent, as it is that very drift that troubles us. . . [t]he

Board has seemed willing merely to go with the flow, offering no reasoned justification for its course.” Id. at 660-61.

Providing due consideration to Commission precedent in Harrington and the above cited Federal Circuit and Supreme Court case direction, the Commission majority in Kobel and in the Bishma decision herein, has not presented nor addressed what new or changed experience has come to light and “taught” the Commission that Stockton and European Trade Specialists were wrongly decided and are now working harm under the present circumstances. The Commission has not articulated an explanation with the “compelling reasons” (Harrington, supra, at 766) why they choose not to follow the agency precedent. Last, the reasons contained in the absent explanation must be consistent with law and supported by substantial evidence on the record.

In summary, the Administrative Law Judge in Adair, Tractor and Farm Equipment, Symington, and Brewer never offered a single word in recognition of Commission precedent regarding section 10(d)(1) or the significant change in the law’s course and compass setting. The Commission continued this monastic vow of silence in Houben.

In our case *sub judice*, the Commission’s Chief Administrative Law Judge did acknowledge the issue of agency precedent in his Initial Decision as follows:

European Trade Specialist, decided under section 17 of the Shipping Act, 1916, is problematic....To the extent there is conflict between Houben and European Trade Specialist, I follow Houben, the more recent case.” Bimsha International v. Chief Cargo Services, Inc., 32 S.R.R. 353, 378 (ALJ 2011).

In an art museum, an Andy Warhol lithograph does not “overrule” a Picasso painting by virtue of its date of artistic

creation. Nor does a more modern date achieve such result in a court of law. As noted in the federal circuit and Supreme Court cases cited above, such matters require serious discussion before an agency jettisons the cargo of long standing statutory interpretation and application.

The Bimsha majority adds nothing to our understanding of why the Commission has abandoned Stockton Elevators and European Trade Specialist. They simply offer, “The ALJ found in the Initial Decision that the Commission’s holding in European Trade Specialist ‘problematic’ *with regard to requiring repeated and customary action.*” (emphasis added). A review of the ALJ’s Initial Decision does not reveal any explanatory words of qualification, distinction, guidance or discussion beyond the ALJ’s single observation that prior Commission precedent is “problematic”.

At the conclusion of the majority opinion in this case, the parties in the proceeding, the Commission’s Administrative Law Judges, the Commission staff, the Commissioner’s offices and the public stakeholders in the maritime community are provided no guidance, indeed no clues, as to why the Commission has cut all mooring lines that previously tied the Shipping Act to a secure berth of the actual language that Congress enacted together with the longstanding and soundly reasoned agency and court legal interpretation.

IV. Public Policy and Purposes – Engines Ahead or Astern

Congress set out the policy and purposes of the Shipping Act in 46 U.S.C. Section 40101. Those purposes include “establish[ing] a nondiscriminatory regulatory process for the common carriage by water . . . with a minimum of government intervention.” The scope of the Commission’s authority is fleshed out in the sections that follow the policy and purposes provision. They seek to strike a balance between ocean common carriers who may engage in certain activities and the Commission’s role in

monitoring and, where statutorily provided, policing those activities. The Commission is blessed with a staff of talented and dedicated professionals, including the expert economists in the Bureau of Trade Analysis who monitor the competitive activities of the regulated maritime community and the expert lawyers in the Bureau of Enforcement who investigate and prosecute those in the regulated maritime community who go off course and violate the express proscriptions of the Shipping Act.

Given these defined areas of jurisdiction, and within which Congress charged the Commission to develop, maintain and exercise a full level of agency expert capacity, it seems a *non sequitur*, if not an outright contradiction, that Congress intended the Commission to be the court room for a single lost motorcycle in Adair, a single lost car in Symington, a single container, damaged in a dock-side loading mishap, but then mistakenly placed on a later vessel call as in Kobel, or three mishandled bills of lading as represented in the Bimsha matter *sub judice*. None of these matters even resemble “an evil” targeted by section 10(d)(1).

The logical conundrums and conflicts appear in other contexts. The ALJ in the initial Bimsha decision and the Commission majority correctly hold that the Pomerene Act does not apply to a bill of lading in a cargo movement that originates in a foreign country with destination in the United States. On reading the full “Application” section¹⁶, we see that Congress included five different origin/destination pair possibilities. The only origin/destination pair that was excluded was a foreign country origin – U.S. destination pair. By application of the canons of statutory interpretation on negative implication¹⁷ it would most clearly appear – by a factor of five – that Congress fully intended to exclude application of the Pomerene Act to the Bimsha foreign country origin - U.S. destination sequence. The question follows: by virtue of what policy directive and analysis, does the Commission

¹⁶ 49 U.S.C. Section 80102.

¹⁷ “*expressio unius est exclusio alterius*”.

now step in and fill that intentional legislative void? Further, the majority holds open the invitation that any single mishandled bill of lading for cargo that originated in the U.S. with destination in a foreign country would also be a violation of Section 10(d)(1).

A similar question concerning Congressional intent and traditional legislative protocols concerns the Shipping Act's provisions on statute of limitations and awarding of attorney fees. Consider a factually straightforward case of a single misdelivered and/or damaged container. The Carriage of Goods by Sea Act (COGSA)¹⁸, provides for a one year statute to assert a claim, the common carrier has the benefit of a limitation on liability to five-hundred dollars per customary freight unit unless the cargo owner makes a written declaration of a higher valuation, and all litigants are bound by the traditional American system where each party bears its own attorney fees and costs. However; if the same factual situation is fully cognizable under Section 10(d)(1), as endorsed in Adair where the presiding officer includes a wide array of causes of action, then the claimant has three years to file its claim. Further, the claimant receives full reparations without any limitation and regardless of the cargo owner's election regarding cargo valuation on shipping documents. Last, if claimant is successful with any portion of its claim, it receives a further award of all or its legal fees and costs.¹⁹

Query: would an attorney commit malpractice if he filed a claim under COGSA, and thereby subject his client to (1) a reduced net recovery on allowed cargo damages and (2) the obligation to

¹⁸ 46 U.S.C. Sections 1300-1315.

¹⁹ See International Steel Supply, LLC v. Zim Integrated Shipping Services, Ltd., FMC Informal Docket No. 1894(I)(Administratively Final), where attorney fees in the amount of \$24,848.75 were awarded in connection with a reparations finding of \$1,367.63 in damages. See also, Tiansham, Inc. v. Tianjin Hua Feng Transp. Agency Co. Ltd., S.R.R. 52, which held that the size or amount of proven and allowed money damages does not limit the size or amount of the attorney fee award.

pay his attorney fees and costs, when the attorney could have filed the identical claim under Section 10(d)(1) of the Shipping Act and obtained a judgment with full recovery without any cargo valuation limitation and the respondent was obligated to pay all of the claimant's attorney fees and costs?

A final conundrum-conflict is clearly exposed when one views the full language of old Section 17 and the new Section 10(d)(1) in a simple side-by-side comparison.

The first paragraph of Section 17 provided that:

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.

The second paragraph of Section 17 provided that:

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

Section 10(d)(1) of the Shipping Act of 1984 provides that:

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 receiving, handling, storing, or delivering property.

The first sentence of the first paragraph of old Section 17 was transferred to what is now Section 10(b)(10) of the 84 Act.²⁰ The authority granted to the Commission in the second sentence of the first paragraph of Section 17, whereby the agency could alter and/or set freight rates, was expressly repealed. In similar fashion, the first sentence of the second paragraph of Section 17 was transferred to Section 10(d)(1) of the 84 Act and the second sentence of the second paragraph, that granted the Commission authority to both find and order the enforcement of agency prescribed regulations and practices, was repealed. Note that the de-regulatory tide affecting the Commission in 1984 was also sweeping away all manner of regulatory authority in all sister transportation agencies.²¹ This is the historical legislative context in which the majority of the Commission, in Kobel and Bishma, offer the implausible proposition that the 98th Congress intended to substantially and significantly

²⁰ Section 10(b)(10) of the 84 Act was reenacted by OSRA in 1998 in Sections 10(b)(4), (5), (8), and (9).

²¹ See, Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210; Staggers Act of 1980, Pub. L. 96-448; Motor Carrier Act of 1980, Pub. L. No. 96-296; Airline Deregulation Act, Pub.L. 95-504; and the Interstate Commerce Commission Termination Act of 1995, Pub.L. 104-88.

expand the regulatory footprint of the Commission by virtue of a new and expansive re-definition of Section 10(d)(1).

When one seeks a simple navigation chart for the intended scope of the jurisdiction of the Shipping Act and the Prohibited Acts of Section 10, the Commission Investigation Report in Stockton Elevators, finding that “deterrence” “to the commerce of the United States” is a requisite element of a Section 10(d)(1) initial complaint and any resulting violation²² is a useful lighthouse. However; this element, together with the previously established and understood elements of “practices” and the “unjust and unreasonable” modifier, have now been cast overboard without any proper prayers or funeral service.

Conclusion

A *sub silentio* refrain that flows below the surface of the Commission’s recent sequence of rulings on Section 10(d)(1), is – if we cannot fit these consumer grievances into Section 10(d)(1), then what statutory tool does the Shipping Act provide to the Commission whereby the Commission can help the complainant? The answer in some cases is to look to other provisions or regulations of the Shipping Act. However, in many of the referenced cases, the answer may simply be that the Shipping Act and the Commission offer no remedy and we should steer the complainant to traditional venues in state and federal courts.

In Tractor and Farm Equipment, *supra*, the respondent was found to have altered bills of lading to make them appear as “clean, cargo on board” bills. This was a violation of the Commission’s then effective regulations for freight forwarders, 46 CFR 510.2(f). The entire case could have been adjudicated and full damages awarded on that basis alone. The presiding officer, *sua sponte*,

²² See Stockton at 618.

amended the complaint in the proceeding to include Section 10(d)(1) and then proceeded down that additional path.

In Brewer v. Bustani²³, Section 10(b)(2)(A)²⁴ was clearly implicated by the facts, yet the presiding officer focused on Section 10(d)(1). As discussed below, such a finding was possible only by virtue of a prior Commission Investigation Report.

In Adair, the presiding officer chronicled sixteen principals of contract law, six principals of agency law, and six principals of admiralty law, including COGSA, that the ALJ opined were all viable causes of action that the complaint could pursue in federal and state court actions. So in Adair, as well as in Tractor and Farm Equipment, Symington, Houben, Kobel, and Bimsha; the complainant had full access to remedies provided by Shipping Act provisions and regulations, other than section 10(d)(1), or federal and state statutes and common law.

In a case involving agency interpretation of its own statute, the Securities and Exchange Commission (SEC) had argued for a broad application of a provision of the Securities Exchange Act of 1934.²⁵ The U.S. Supreme Court pointedly rejected the argument with the following comment:

Even assuming, however that a totally satisfactory remedy – at least from the Commission’s viewpoint – is not available in every instance in which the Commission would like a remedy, we would not be inclined to read Section 12(k) more broadly than its language and the statutory scheme reasonably permit. Indeed, the Commission’s argument amounts to little more than the notion that Section 12(k) *ought*

²³ 28 SRR 1331, (ID 2000).

²⁴ 46 U.S.C. Section 41104(2)(A).

²⁵ Ch. 404, 48 Stat. 881.

to be a panacea for every type of problem which may beset the marketplace. (emphasis in the original)

SEC v. Sloan, 436 U.S. 103, 116 (1978).

Expressing the above concern in relation to the Bishma case and its predecessors, the Commission should not look to Section 10(d)(1) as the panacea for every problem or grievance that arises in the maritime marketplace.

To conclude with positive guidance, prior Commission cases provide good examples of cases worthy of Section 10(d)(1) adjudication. Returning to the Bustani matter, he was the subject of an investigation into possible violations of various sections of the 1984 Shipping Act.²⁶ The investigation established numerous violation and the full Commission adopted the Investigation Report. Note that none of the violations found involved Section 10(d)(1). However, that record of numerous, continuous and normal “practices” of violating the Shipping Act fully supported the application of Section 10(d)(1) in the subsequent Brewer matter. Such record evidence can be developed by either Commission investigation or by normal discovery processes, as provided by Commission rules of procedure, in private party litigation.

In consideration of the foregoing discussion, my judgment and findings are as follows:

1. Complainant, Bishma International, failed to allege requisite facts and elements to state a claim under Section 10(d)(1) of the Act.
2. Respondent, Cargo Chief did not violate Section 10(d)(1) of the Act

²⁶ See Docket 98-19 – Saeid B. Maralan, etc., 28 SRR 932 (ID 1999), adopted in relevant part, 28 SRR 1244 (FMC 1999).

3. Respondent, Cargo Chief, by virtue of no violation of the Act should not be the subject of any sanction, including any Cease and Desist order.
4. Affirm the ALJ's holding that Respondent, Kaiser Apparel, Inc. be dismissed from the proceeding.
5. Affirm the ALJ's holding regarding the admission of evidence concerning damages.
6. Affirm the ALJ's holding of denial of both reparations and attorney fees for two reasons.
 - insufficient admissible record evidence to support either award
 - no violation of Section 10(d)(1) of the Act was either properly alleged or shown by admissible evidence in the record..