

FEDERAL MARITIME COMMISSION

DOCKET NO. 11-14

PETRA PET, INC. (a/k/a PETRAPPORT)

v.

**PANDA LOGISTICS LIMITED; PANDA LOGISTICS CO., LTD. (f/k/a PANDA
INT'L TRANSPORTATION CO., LTD.); and RDM SOLUTIONS, INC.**

INITIAL DECISION¹

I. INTRODUCTION

A. Overview and Summary of Decision

Complainant Petra Pet, Inc. (“Petra Pet”) filed a complaint against respondents Panda Logistics Limited and Panda Logistics Co., Ltd. (collectively “Panda”) and RDM Solutions, Inc. (“RDM Solutions”) claiming violations of the Shipping Act of 1984 (“Shipping Act”), 46 U.S.C. § 40101 et seq.² Petra Pet alleges that the respondents, ocean transportation intermediaries, violated 46 U.S.C. § 41102(c) (formerly section 10(d)(1)), by failing to establish, observe, and enforce reasonable regulations and practices relating to or connected with receiving, handling, storing, and delivering complainant’s shipments from China to the United States. Complaint at 3.

Respondent RDM Solutions did not respond to the complaint and did not participate in the proceedings. Mario Ruiz opened RDM Solutions in 2007 and had previously handled shipments

¹ This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.227.

² On October 14, 2006, the President signed a bill reenacting the Shipping Act as positive law. The bill’s purpose was to “reorganiz[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. 109-70, at 2 (2005).

between the parties while working at a series of other companies. An initial order on default of RDM Solutions was issued on April 20, 2012, and became administratively final on May 24, 2012. The proceeding continued between complainant Petra Pet and remaining respondent Panda.

Petra Pet ships pet food from China to the United States. Panda, a non-vessel-operating common carrier (“NVOCC”), has shipped hundreds of Petra Pet’s containers since 2003.³ Mario Ruiz, at RDM Solutions and at previous companies, acted as the intermediary on these shipments. In 2010, RDM Solutions accepted payments for a number of shipments from Petra Pet but failed to remit the payments to Panda. RDM Solutions and Mario Ruiz disappeared. Panda requested payment from Petra Pet and Petra Pet contended that it already paid RDM Solutions for the shipments. After negotiations, in early January 2011, Petra Pet paid Panda \$94,381.93 for shipments that were at destination ports accruing demurrage but for which RDM Solutions had not paid Panda. This did not resolve the issue of payment for shipments which Panda had released to Petra Pet without obtaining payment from RDM Solutions.

Meanwhile, Petra Pet had shipped seven containers from China on December 18, 2010. However, when RDM Solutions failed to remit payment to Panda, Panda diverted these shipments back to China. Petra Pet was not aware that these shipments had been diverted when it paid Panda the \$94,381.93 in early January. Panda refused to re-ship these containers until Petra Pet paid \$153,926.73, although the ocean common carrier only charged Panda \$24,400 for the shipments. Panda then extracted additional payments of \$6,170 and \$12,600 while these seven containers were on the water. Petra Pet finally received its final seven containers six months later, in June of 2011.

The parties agree that RDM Solutions is primarily to blame – it accepted payment for the shipments from Petra Pet and then disappeared. At this point, RDM Solutions’ liability is not at issue. RDM Solutions has been found in violation of the Shipping Act and reparations awarded. The issue *sub judice* is the actions of the remaining parties when faced with this unfortunate situation. As Panda noted at the time, they were both victims. However, the evidence shows that rather than compromise or allow the issues to be resolved in court, Panda took matters into its own hands. Panda, in violation of its NVOCC duties and its own bills of lading, aborted the shipment of seven containers and withheld the cargo to extract over \$153,000 from Petra Pet for amounts Panda claimed were owed by RDM Solutions.

As discussed more fully below, the evidence demonstrates that Panda violated the Shipping Act by aborting shipments, withholding cargo, and failing to provide notice. This conduct demonstrates the failure to establish, observe, and enforce reasonable regulations and practices relating to or connected with receiving, handling, storing, and delivering complainant’s shipments. Accordingly, complainant has met its burden to demonstrate a Shipping Act violation.

³ The parties do not quantify the number of shipments between the parties. Petra Pet indicates that it identified over 200 arrival notices and corresponding bills of lading reflecting the same consignee (Petra Pet) and the same issuer (RDM Solutions). Petra Pet’s Replacement Findings of Fact at 2, n.1.

B. Procedural Background

This proceeding was initiated by a complaint filed with the Federal Maritime Commission alleging that the respondents violated the Shipping Act in connection with the transportation of cargo from China to the United States. The notice of filing of complaint and assignment was issued on August 26, 2011. An initial decision on default of RDM Solutions, Inc., was filed on April 20, 2012, and became administratively final on May 24, 2012. Post-trial briefing was completed when Petra Pet filed its reply brief on July 2, 2012. The parties subsequently filed replacement pleadings to include page identifiers on the appendix pages. The case is now ripe for decision.

C. Request for Oral Argument

On July 12, 2012, Panda filed an unopposed motion for oral argument. The request was made to clarify and narrow the issues and to address issues raised in Petra Pet's reply brief. Having reviewed the evidence and briefs submitted by the parties, additional argument by counsel is not required. Accordingly, the motion for oral argument is hereby **DENIED**.

D. Evidence

Panda objects to complainant's evidence, arguing that many documents contain inadmissible hearsay which lacks independent indicia of reliability, lacks an evidentiary basis, and that particular emails constitute compromise offers and negotiations in violation of Rule 408 of the Federal Rules of Evidence. Panda's Revised Response to Petra Pet's Proposed Findings of Fact at 11. Panda specifically requests that the appendix, which summarizes or paraphrases the evidence, be stricken. Panda's Revised Response to Petra Pet's Proposed Findings of Fact at 1. In addition, Panda specifically objects to the reference on the page titled Exhibit 1 and the reference to "Bills of Lading nominating RDM as U.S. collection agent." Panda's Revised Response to Petra Pet's Proposed Findings of Fact at 5.

Petra Pet objects to the declaration of Betty Sun, Panda's overseas manager, as self-serving, uncorroborated, and contrary to existing correspondence. Petra Pet Reply Brief at 13. Petra Pet further contends that documents which Petra Pet produced are party admissions and therefore not hearsay or are business records which are subject to an exception to the hearsay rule. Petra Pet Reply Brief at 14. Moreover, Petra Pet asserts that its evidence is corroborated and consistent with other evidence submitted. Petra Pet Reply Brief at 14.

Pursuant to Commission Rule 156 and the Administrative Procedures Act ("APA"), "all evidence which is relevant, material, reliable and probative, and not unduly repetitious or cumulative, shall be admissible." 46 C.F.R. § 502.156; 5 U.S.C. §556(d). The Commission explained:

Consistent with guidelines set out in the APA and Commission rules governing the admission of evidence, "[i]n comparison with court trials, administrative adjudications generally are governed by liberal evidentiary rules that create a strong

presumption in favor of admitting questionable or challenged evidence.” In administrative proceedings, “[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.”

EuroUSA Shipping, Inc., Tober Group, Inc., and Container Innovations, Inc., 31 S.R.R. 540, 547 (FMC 2008) (citation omitted).

Federal Rule of Evidence 408 generally excludes compromise offers and negotiations. Rule 408 is “inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions; e.g., libel, assault, breach of contract, unfair labor practice, and the like. . . . [W]rongful acts are not shielded because they took place during compromise negotiations.” 23 Fed. Prac. & Proc. Evid. § 5314 (Charles Alan Wright & Kenneth W. Graham, Jr.) (1st ed.). Here, Petra Pet alleges that cargo was withheld to coerce payments. Panda cannot shield these exchanges by arguing that they were negotiations.

Consistent with the liberal admission of evidence standard applicable to administrative litigation, all evidence which is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, will be admitted. Although many of the documents submitted by both sides are hearsay, given the liberal admission of evidence standard applicable to administrative litigation, they will be admitted. The reliability of the evidence is considered in assigning weight to the evidence. So, for example, self-serving, unsubstantiated statements and evidence summaries are given less weight than objective, contemporaneous evidence. Accordingly, all of the evidence submitted by the parties is admitted.

Under the APA, an Administrative Law Judge may not issue an order “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); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based on the pleadings, exhibits, testimony, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties. Citations to specific numbered findings of fact in this initial decision are designated by “F.”

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this initial decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the complaint or the defenses thereto. Administrative adjudicators are “not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis R.R. Co. v. United States*, 361 U.S. 173, 193-94 (1959); *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983). To the extent individual findings of fact may be deemed conclusions of law, they shall also be considered conclusions of law. Similarly, to the extent individual conclusions of law may be deemed findings of fact, they shall also be considered findings of fact.

Part two provides specific findings of fact. Part three provides analysis and conclusions of law and includes a discussion of preliminary issues, arguments of the parties, statutory framework, legal analysis, and damages. Part four provides the Order.

II. FINDINGS OF FACT

A. Parties

1. Petra Pet is in the business of purchasing pet treats from vendors in China and importing those goods into the United States. App. Petra 8, 10-17, 19-23; App. Petra 29. Petra Pet's offices are listed as 5801 Westside Ave., North Bergen, NJ 07047. App. Petra 180-182.
2. Panda Logistics Limited ("Panda Logistics") is a corporation organized and existing pursuant to the laws of Hong Kong with its principal place of business at 51F, Block B, Profit Ind. Bldg., Kwai Chung, N.T., Hong Kong. Panda Appendix 1 at 1.
3. Panda Logistics Co., Ltd. ("Panda International") is a corporation organized and existing pursuant to the laws of the Republic of China with its principal place of business 5F, No. 209, Sec. 3, Civic Blvd., Taipei, Taiwan 10492. Panda Appendix 1 at 1.
4. Panda Logistics (FMC Org. No. 017098) and Panda International (FMC Org. No. 020182) (collectively "Panda") are foreign-based NVOCCs, registered with the Federal Maritime Commission, which provide ocean transportation services. Panda Appendix 1 at 1.
5. Panda operated as an NVOCC for Petra Pet's shipments from China to the United States. Panda issued bills of lading and purchased transportation services from vessel-operating common carriers. App. Petra 17, 23.
6. RDM Solutions, 154-09 146th Ave. Jamaica, New York 11434, is owned by Mario Ruiz. App. Petra 36.
7. Mario Ruiz, working at a series of companies, provided international freight and logistics services to Petra Pet utilizing Panda since at least 2003. App. Petra 37, 40.

B. Background

8. On or about September 2005, Mario Ruiz left his employer at that time, Amber Worldwide, to run a new logistics company he formed, Worldport Logistics. App. Petra 38.
9. Shortly before Mario Ruiz left Amber Worldwide, Betty Sun, an overseas manager for Panda, became aware that Mario Ruiz had formed his new company and asked Mr. Ruiz "What services can WORLDPORT LOGISTICS offer? Maybe you can send me a profile?" App. Petra 38; Panda Appendix 1 at 1.

10. In response, Mario Ruiz advised Betty Sun that “Worldport will be able to provide you with all of the services expected form [sic] a Freight forwarder and partner in the U.S. *** Trucking all over the U.S. and count [sic] with agent offices in the U.S. and all over the world. Your company being one of them.” App. Petra 38.

11. The first evidence in the proceeding of payment issues occurred in 2006 when Mario Ruiz sent an email marked “Extremely Urgent !!!” to Betty Sun stating:

Please see the attached mentioned e-mail from my client which is most embarrassing for both our companies. I can not believe that this has happened. I do not understand why you did not mentioned this to me first istead [sic] of the shipper getting and ‘official notification

As I mentioned I on my last payment I will get up to date by the end of the month.
...

I will kee [sic] paying you also the week after. I can not really undestand [sic] why you are delaying house bills to them. . . .

Please!!!!!!!!!!!!!!!!!!!!!! release the house bill of lading to the shipper and Hold the master if you need I will not let you down.

App. Petra 46; Panda Appendix 3 at 17. Petra Pet was not copied on this correspondence.

12. In 2007, Mario Ruiz opened RDM Solutions and told Panda that he has been approved to be an FMC licensed NVOCC. App. Petra 47.

13. RDM Solutions charged Petra Pet for ocean freight by billing Petra Pet’s customs broker, Kuehne + Nagel, Inc. (“Kuehne + Nagel”). Representative arrival notices confirm that RDM Solutions billed Kuehne + Nagel for ocean freight. App. Petra 50, 52, 202.

14. Petra Pet produced more than 200 arrival notices and corresponding bills of lading reflecting the same consignee (Petra Pet), the same issuer (RDM Solutions) and the same “Bill To” party (Kuehne + Nagel). Replacement Proposed Findings of Fact at 2 n.1.

15. Petra Pet has no business relationship with RDM Solutions outside of these shipments. App. Petra 48-49, 184.

16. In 2008, Mario Ruiz advised a number of companies, including Panda through an email to Betty Sun, that he should be contacted through his RDM Solutions email account. App. Petra 54.

17. On March 4, 2008, Panda quoted rates to RDM Solutions, with the comment that “If you have other commodities, please check with us before you offer to your client.” Panda Appendix 4 at 19.

18. In March 2008, Mario Ruiz asked “are we going to be able to coload with you on your [H]anjin contract for the dog chews” and Panda responded that “We need handling fee USD80/container, if you coload our contract rates with Hanjin.” App. Petra 56.

19. On April 3, 2008, Panda agreed via email that Panda and RDM Solutions should provide logistics services to Petra Pet on the following terms. (1) Panda would ship the goods freight prepaid on a master bill of lading (“MBL”) and would “always use fast vessels, shipping lines include HANJIN and OOCL.” (2) Panda would extend credit time of fifteen days after vessel arrival at destination port noting “That is roughly 45 days after vessel departure date.” (3) Panda required USD 150 per container as profit share. (4) The MBLs would be original and would be couriered to RDM Solutions weekly. Neither Panda nor RDM Solutions copied Petra Pet on correspondence concerning the proposed profit sharing arrangement. App. Petra 57.

20. From December 10, 2008, through December 15, 2008, RDM Solutions and Panda exchanged emails concerning RDM Solutions’ overdue and late payments to Panda for a number of shipments. Petra Pet was not copied on any of these emails. App. Petra 58-61.

21. On December 17, 2008, Panda notified RDM Solutions that RDM Solutions had accumulated a “huge overdue payment;” indicated that failing to clear up these payments quickly would “cost more times for releasing cargo at your side;” advised RDM Solutions to “follow our agreement strictly;” and listed twelve shipments. Petra Pet was not copied on this correspondence. App. Petra 62.

22. Panda continued to do business with RDM Solutions, issuing bills of lading identifying Petra Pet as the consignee; identifying RDM Solutions in the section on the bills of lading for freight; and identifying Petra Pet’s customs broker, Kuehne + Nagel, as the “Notify” party. App. Petra 63-68.

23. Panda issued debit notes directly to RDM Solutions corresponding to Panda’s bills of lading, which identified exact amounts for “ocean freight,” “AMS Charges” (i.e., automated manifest systems charges), “Profit Share,” and/or “Handling Charge.” App. Petra 70, 75. These Panda debit notes were only sent to RDM Solutions. App. Petra 72.

24. Panda has produced at least 18 debit notes from the Panda Group reflecting the same “Bill to” party (RDM Solutions) referencing ocean freight amounts. Petra Pet Replacement Proposed Findings of Fact at 4 n.3

25. Kuehne + Nagel made the required ocean freight payments to RDM Solutions by check. App. Petra 202.

26. RDM Solutions billed Petra Pet directly for logistics and freight forwarding services other than ocean freight (for example, trucking, demurrage, lab tests, etc.) and Petra Pet paid RDM Solutions directly by check for those services. App. Petra 85-87.

27. Neither the RDM Solutions arrival notices billed to Kuehne + Nagel with ocean freight amounts nor the RDM Solutions invoices to Petra Pet for additional freight forwarding and logistics services identified amounts for profit sharing, handling fees, or other profits that RDM Solutions earned on Petra Pet shipments. App. Petra 50-53, 65, 85-86.

28. Steven Mendal, an owner of Petra Pet, traveled to China in April 2009 and met with personnel from Panda. Prior to the trip, Mario Ruiz sent Mr. Mendal an email stating "I have spoken to panda in china last night they have your cell phone number and will be in contact with you asap. The people that will meet you will be: Betty Sun, she is the office manager of the Shanghai office. She was station in Beijing before and has been with RDM since the beginning. She is fully aware of the goings of your business." App. Petra 92-93.

29. Regarding the April 2009 trip by Mr. Mendal, Mario Ruiz emailed Panda requesting that they meet with Mr. Mendal, offering to pay for the trip, and stating "NO RATES TO HIM PLEASE!!!!" App. Petra 94. Mr. Ruiz also stated "Also as for the consolidation I believe we will be doing that in Shanghai this is one of the thing that he want to talk to you about. So we can get a better handle on this. As mentioned no pricing. . . . Please explain all of the procedures for the export since he would like to know details in order to work with the factory to expedite orders. He does not want to take the word of the factory as to why orders get delay and they need to wait another week for sailings." App. Petra 95. There is no additional information in the record about this meeting.

30. It is not unusual that a party in RDM Solutions' capacity would not want the NVOCC to disclose to the shipper the rates the NVOCC is charging for fear that its customer might deal directly with the NVOCC. Panda Appendix 4 at 32.

31. On June 30, 2009, Panda emailed RDM Solutions a list of nine invoices with the comment "Too many invoices are over-due long time. Below invoices need you to pay URGENTLY." Petra Pet was not copied on this correspondence. App. Petra 96.

32. A year later, on July 26, 2010, Betty Sun at Panda sent Petra Pet an email with the subject line "overdue freight invoices" and stating "I have to ask for your help for a very important issue. . . . As you are our VIP client, we has [sic] agreed with RDM for payment term, which is different from the agreements with other clients. . . . But now we have many overdue freight invoices, total amount is amazing. . . . We can not bear longer credit term. We need money to make business run smoothly. Today our Management Dept. has made decision: if we can not get paid for all overdue freight invoices this week, we will have to hold. Let me know whether you can help us." App. Petra 97-98.

33. Petra Pet forwarded Panda's July 26, 2010, email to Mario Ruiz, stating "Please need a reply to them with a payment, if u [sic] can not continue let me know but I can't suffer with freight without knowing." App. Petra 97 (original in all caps).

34. Mario Ruiz responded to Petra Pet's email within minutes, stating "Taken care off [sic] will send copy of e-mail." App. Petra 97.

C. The Dispute

35. Panda sent Mario Ruiz emails on November 9, 2010, November 15, 2010, November 19, 2010, November 22, 2010, November 23, 2010, and November 29, 2010, noting accrual of overdue amounts eventually totaling \$110,630.03 and requesting urgent payment. Petra Pet was not copied on these emails. App. Petra 99-101.

36. Petra Pet emailed Mario Ruiz on November 24, 2010, insisting that the containers in three shipments needed to be released and stating "MARIO, Please call me, I have my boss and everybody in top of me asking for releases. FOR A WEEK I AM BEEN TRY TO CONTACT YOU THRU YR OFFICE, TEXT, VOICE MAIL AND EMAIL AND NO REPLY AT ALL?." App. Petra 103.

37. Petra Pet emailed Panda on December 1, 2010, stating "Please be aware that Mario from RDM is not given us original BL's for containers and/or LCL of the following" three shipments and that "All freight for those containers are been paid by our broker to him." Petra Pet further noted to Panda "I am very surprised you did not advice [sic] us on this problem, now it comes to the point that we have been hurt...." App. Petra 107-108.

38. On December 1, 2010, Panda replied to Petra Pet that:

We are very very sorry for the inconvenience caused to you. Our accountant told me that RDM didn't respond to her Emails for two weeks. The total overdue amount is as high as USD125000 in Panda favor. Some old invoices were even dated Sep.. We do not know what happened to RDM or to Mario. We feel panic facing such situation.

We didn't bother you again for such problem, because we know your focus is taking good care of your customers and to do more good businesses.

We are grateful for your long term supports. We didn't want to bring trouble to you. But our accountant only listens to our big boss. She has all original B/Ls in hands.

The solution is in RDM , Mario. Could you catch hold of him?

App. Petra 107.

39. On December 3, 2010, Panda sent an email to RDM Solutions stating "RDM owes Panda Global totally USD129,686.93;" referring to a statement of accounts ("SOA") detailing those charges and asking RDM Solution "[w]hen will you pay all the overdue invoices to us?" App. Petra 111.

40. On December 13, 2010, Panda stated to Petra Pet that the total amount owing Panda was USD 250,330.03, including USD 144,455.53 that RDM Solutions owed to Panda in Beijing and USD 29,142.30 that RDM Solutions owed to Panda in Shanghai. App. Petra 79-80.

41. In certain instances Petra Pet's responses to Panda's emails consisted of replies immediately after the statements in the Panda emails. For example, in response to the December 13, 2010 email from Panda (Liyan) stating "Pls see attached SOA . . . totally USD250330.03 in Panda Global favor," Petra Pet (Patty Deavila) responded on December 14, 2010 that "As per yr attachment we already paid to your agent some of the cargos on your SOA sheet." App. Petra 79.

42. In response to Panda's claims, Petra Pet responded that Petra Pet had already paid RDM Solutions for a certain amount of the freight charges claimed; that Petra Pet had cashed checks to prove payment; and that Panda's payment difficulties with RDM Solutions had nothing to do with Petra Pet. App. Petra 79-80.

43. The statement of accounts addressed to RDM Solutions and dated Dec. 6, 2010, lists 28 shipments from Panda in Beijing. These shipments had an "ETD" from September 4, 2010, to November 20, 2010. App. Petra 82.

44. The statement of accounts addressed to RDM Solutions and dated Dec. 6, 2010, lists 14 shipments from Panda in Shanghai. These shipments were dated from August 23, 2010, to October 29, 2010. App. Petra 83.

45. On December 16, 2010, Petra Pet received advice from its customs broker, Kuehne + Nagel, which stated "Ok, I see several problems here. First, RDM was contracted by Panda as their agent, therefore, if you Have paid RDM and can prove it (we will provide cashed checks) then Panda needs to go after RDM not Petra. Panda cannot legally hold future shipments against the nonpayment of previous files – they can only hold current shipments which you have not yet paid for." App. Petra 77.

46. On December 17, 2010, Panda's General Manager emailed Petra Pet stating that he felt "very very sorry for what had happened!" and that "You has been our client for almost 8 years. I am happy that we have been cooperating with you indirectly for so long time." App. Petra 115. Panda proposed that Petra Pet pay USD 100,000 within three days and Panda would provide the documents for cargo that had arrived at the destination ports. App. Petra 115. Panda stated that:

Then you and we need time to discuss how to solve such big headache? I do not hope two victims to deepen our wounds further! Wish GOD can forgive us- two innocent persons. Let's forget all words that hurt each other.

During our meeting, we all know you are victim, you are innocent. You have no fault. If you are in China, we will comfort your heart with the Chinese etiquette. Please accept my apologies!

I am also victim. But, we , two victims had arguments which should not have happened. This is caused by MARIO!

Do you agree that Mario is the cause? We do not want you to face bigger loss. We do not want our hurt to each other to deepen! This is totally unfair for you and me.

App. Petra 115-116.

47. On December 21, 2010, Petra Pet sent Panda a formal proposal to settle the dispute including an agreement to be responsible for freight on the water and the freight at the port of Newark where the freight charges had not yet been paid, an amount totaling \$66,156.80. Petra Pet would not be responsible for freight charges on goods already released to Petra Pet where Petra Pet paid Panda or Panda's designated third party, RDM Solutions, for the freight. App. Petra 119-120.

48. From December 22, 2010 to December 24, 2010, Petra Pet and Panda exchanged emails regarding the Petra Pet proposal. For example, Panda asked "If we sign the contract, will you respect it and act according to all terms in it? Will you be responsible for the matters not included in the contract?" Petra Pet responded "We have and will continue to work honestly and fairly with Panda and fulfill our legal and financial responsibilities. However, we are not liable for, nor party to your payment disputes with RDM and will accept no further financial responsibility regarding this issue." App. Petra 123.

49. On December 24, 2010, Panda's General Manager emailed Petra Pet stating "I totally agree that you do not get involved in the financial problem between Panda and RDM. Neither do I want you to get involved. This problem indeed have nothing to do with you." However, a few paragraphs later, Panda said "I can not imagine what I should do now. Is all true? Pls forgive my words. Your partner may cheat me. Pls ask your partner to talk to us and find out why this happened, and now how to resolve." It does not appear that there was ever an agreement for the payment of \$66,156.80 for goods on the water and at port. App. Petra 121-122.

50. On January 4, 2011, Petra Pet's CEO asked Panda's General Manager for a telephone call to "try to make something work." App. Petra 121.

51. On January 4, 2011, Panda responded that RDM Solutions is Petra Pet's agent and therefore Panda has the right to collect freight from Petra Pet. Panda proposed that Petra Pet pay Panda USD 150,000 and Panda would release all the goods that are in the destination port, although this payment "does not mean any waiver for any original rights and interests of Panda." App. Petra 124-125.

52. On January 4, 2011, Panda issued a statement of accounts to Petra Pet identifying 17 bills of lading covering 24 containers that would be released in exchange for \$91,744.80. App. Petra 127-130.

53. Since Petra Pet's cargo at the U.S. ports was accruing storage and demurrage and Petra Pet was not able to make certain deliveries due to inventory shortages, Petra Pet paid Panda the \$91,744.80 demanded. Due to exchange rates, Petra Pet wired \$94,381.93 to Everfun, Panda's agent, to cover the freight payments in question. App. Petra 127-130; *see also* Respondents' Opposition to Complainant Petra Pet, Inc.'s Proposed Findings of Fact at 11.

54. Petra Pet also paid an additional \$29,784 to the U.S. ports in demurrage charges. *See* schedule prepared by the ocean carrier (Hanjin Shipping Co. Ltd.) ("Hanjin") detailing demurrage charges. App. Petra 135, 177.

55. After paying Panda \$94,381.93 in January 2011, Petra Pet believed that it had paid Panda for all but seven containers, which shipped from China on or about December 18, 2010. App. Petra 138-141.

56. The seven containers shipped from China to the United States on or about December 18, 2010. App. Petra 177. The seven containers are identified in four Panda bills of lading which list the consignee as Petrabort (aka Petra Pet) and the notify party as Kuehne + Nagel, Petra Pet's agent. App. Petra 180-183.

57. Pursuant to an uncontradicted sworn statement, the vessel carrying the seven containers stopped for a scheduled transshipment in Pusan, Korea, whereupon, at the instruction of the shipper identified on the Hanjin bills of lading, which is a different party than the shipper identified on the Panda bills of lading, the seven containers were taken off of the vessel, held in Korea, and then returned to Shanghai, China, where they were held under the control of the shipper identified on the Hanjin bills of lading. App. Petra 177.

58. Petra Pet followed up on the arrival of those containers and subsequently learned that while the containers had in fact shipped from China to the United States via Pusan, Korea, Panda stopped the containers in Korea and had those containers returned to China. App. Petra 143, 185-186.

59. Because Petra Pet had paid the manufacturers in China approximately \$519,000 for the goods in the seven containers diverted back to China, those containers had substantial worth to Petra Pet. App. Petra 186.

60. On March 14, 2011, Panda demanded RMB 1,006,680.84 to re-export the seven diverted containers to the United States. App. Petra 149-150.

61. On March 27, 2011, Hanjin confirmed that the freight charges associated with the seven containers amounted to \$23,400 and the detention charges were \$23,833.64. App. Petra 147, 178.

62. On May 8, 2010, the seven containers sailed from China to the United States, with an estimated arrival on May 30, 2010. App. Petra 89-90.

63. Panda refused to permit those seven containers to ship until Petra Pet paid \$130,526.73 in addition to the \$23,400 freight charges for the seven containers, for a total of \$153,926.73. App. Petra 147-178; App. Petra 152-153.

64. In March, 2011, Petra Pet sent Panda USD 153,926.73. App. Petra 149-150, 152-153, 186.

65. Petra Pet also paid \$27,932.65 directly to Hanjuin to satisfy demurrage and storage costs in China. App. Petra 157, 167, 178, 186.

66. On April 2, 2011, Petra Pet indicated it would pay Hanjin directly for both the storage and the ocean freight and that Petra Pet would pay Panda \$6,170 for a variety of fees (port charge of "80/container," trucking fee, import customs declarations, etc.) associated with the final seven containers. App. Petra 157, 160-161, 186; *see also* Panda's Revised Response to Petra Pet's Proposed Findings of Fact at 14.

67. On May 20, 2011, Panda billed Petra Pet \$12,600 to satisfy miscellaneous fees (demurrage fee, terminal handling fee, customs fees, etc.) associated with the final seven containers. App. Petra 163, 186; *see also* Panda's Revised Response to Petra Pet's Proposed Findings of Fact at 14. Panda emailed Petra Pet an invoice and stated that USD 6170 "is not enough to cover all the charges at Shanghai. Pls see attached our invoice and **arrange payment to us today.**" App. Petra 165 (emphasis in original).

68. On May 21, 2011, Petra Pet responded that "We paid all charges directly to Hanjin for Shanghai demurrage and storage. There should be no charges on your invoice. We already paid customs inspections charges on your original invoice, also. In addition, isn't the terminal handling charge part of the storage fees paid to Hanjin?" App. Petra 165.

69. On May 26, 2011, Panda responded:

Pls recall : On Mar.14 Letter of Guarantee to Yantai ASKA we stated to move the containers to USA within 120 days. Now we made it within 60days. You can not imagine the difficulties in China. I made it, then I kept the promise to your company.

If you ask 100 freight forwarders, no more than 2% have the capability to arrange this task. Do you want to compare the service/charges of other freight forwarder ? If you want, I can move the containers back to Shanghai port tomorrow. Then you ask K/N or any other big famous forwarder to arrange the movement for you again.

Tell me your decision today. Then I will act tomorrow.

App. Petra 164.

70. On May 26, 2011, Petra Pet stated that the "wire transfer will be sent tomorrow morning. How can I trust that you will release the documents without further charges?" App. Petra 164.

71. Petra Pet's final seven containers were loaded on board a vessel in China in May of 2011 and were delivered to Petra Pet in the United States in June 2011. App. Petra 167, 169.

72. Panda Logistics' conditions of carriage state:

14 LIEN The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier under this contract and for general average contributions to whomsoever due and for the cost of recovering the same, and for that purpose shall have the right to sell the Goods by public auction or private treaty without notice to the Merchant.

Panda Appendix 2(A) at 6.

73. Panda Logistics' conditions of carriage state:

24 Disputes arising under this Bill of Lading may only be instituted in the country where the Carrier has his principal place of business and shall be decided according to the law of such country.

Panda Appendix 2(A) at 6.

74. Panda International's conditions of carriage state:

14. Lien The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.

Panda Appendix 2(B) at 15.

75. The note to rule 2-020 in Panda's tariff states: "In no event shall any such transfer or arrangements under which it is performed by such as to result directly or indirectly in any lessening or increasing of the cost or expense which the shipper would have borne had the shipment cleared through the port originally intended." App. Petra 187.

76. Bills of lading issued by Panda acting in its capacity as an NVOCC for Petra state "freight collect" and identify RDM Solutions as the "Freight amount" party. App. Petra 17, 23, 51, 53.

D. Damages

77. Petra Pet seeks expenses and injuries as a result of Panda's actions involving Petra Pet shipments. Alleged damages include demurrage paid in the United States as a result of Panda's failure to provide freight releases of \$29,784.00. App. Petra 135, 177.

78. Through a second wire transfer covering containers diverted back to China, Petra Pet paid Panda \$130,526.73 in excess of the shipping costs for those seven containers. App. Petra 147, 152-153.

79. Petra Pet paid demurrage and storage costs paid to Chinese authorities with respect to containers diverted back to China of \$27,932.65. App. Petra 157, 178, 186.

80. Petra Pet paid a first miscellaneous payment to Panda with respect to containers diverted back to China of \$6,170.00. App. Petra 160-161, 186.

81. Petra Pet paid a second miscellaneous payment to Panda with respect to containers diverted back to China of \$12,600.00. App. Petra 163-165, 186.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a “person may file with the . . . Commission a sworn complaint alleging a violation of this part.” 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 997 (FMC 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co.*, 28 S.R.R. 1635, 1645 (FMC 2000) (allegations of violations of section 10(d)(1) involving just and reasonable regulations and practices “are inherently related to Shipping Act prohibitions and are therefore appropriately brought before the Commission.”). The parties have not contested jurisdiction.

2. Burden of Proof

To prevail in a proceeding brought to enforce the Shipping Act, a complainant has the burden of proving by a preponderance of the evidence that the respondents violated the Act. 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); 46 C.F.R. § 502.155; *Exclusive Tug Franchises*, 29 S.R.R. 718, 718-19 (ALJ 2001). “[A]s of 1946 the ordinary meaning of burden of proof was burden of persuasion, and we understand the APA’s unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Dir., Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 276 (1994). The party with the burden of persuasion must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). “[W]hen the evidence is evenly balanced, the [party with the burden of persuasion] must lose.” *Greenwich Collieries*, 512 U.S. at 281. It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation.

Waterman S.S. Corp. v. General Foundries Inc., 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (FMC 1994).

B. Arguments of the Parties

Petra Pet contends that Panda failed to transport cargo and/or release documents in order to coerce payments; failed to transport seven containers according to the bills of lading; failed to notify Petra Pet concerning the whereabouts of the seven containers; and failed to pay applicable demurrage and similar charges caused by Panda's wrongdoing. Petra Pet Brief at 4-5. Petra Pet also alleges that Panda forced Petra Pet to indemnify Panda for harm caused by Panda's co-loader RDM Solutions; that Panda established a clear course of dealing with RDM Solutions and Petra Pet whereby Petra Pet was only responsible for paying RDM Solutions and only RDM Solutions was responsible for paying Panda; and that Panda's failure to perform its fiduciary duties with respect to Petra Pet shipments demonstrates a violation of section 41102(c) of the Shipping Act. Petra Pet Brief at 5-13.

Panda contends that RDM Solutions is Petra Pet's agent, based on bills of lading and contemporaneous documents. Panda Brief and Response at 2-7. In addition, Panda alleges that Petra Pet's evidence does not establish an agency relationship between Panda and RDM Solutions and that payment to RDM Solutions does not absolve Petra Pet of its obligation to pay Panda for transportation services rendered. Panda Brief and Response at 7-14.

In its reply brief, Petra Pet contends that Panda admits to actions violating the Shipping Act, specifically, diverting seven containers; Panda's relationship with RDM Solutions is irrelevant to Panda's illegal diversion of Petra Pet's cargo; Panda violated the terms of the bills of lading; many of the assertions in Panda's brief are based on speculation, incomplete statements, or mischaracterizations of the evidence; and, given the overwhelming evidence that Panda and RDM had a direct business relationship it is immaterial whether RDM Solutions acted as Panda's agent or as Panda's co-loader. Petra Pet Reply at 1-14.

C. Statutory Framework

Petra Pet alleges that Panda violated section 41102(c) (formerly section 10(d)(1)) of the Shipping Act, which states:

(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.

46 U.S.C. § 41102(c).

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean

transportation intermediaries. “The term ‘ocean transportation intermediary’ means an ocean freight forwarder or a non-vessel-operating common carrier.” 46 U.S.C. § 40102(19).

“The term ‘ocean freight forwarder’ means a person that – (A) 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; and (B) processes the documentation or performs related activities incident to those shipments.” 46 U.S.C. § 40102(18).

“The term ‘non-vessel-operating common carrier’ means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier.” 46 U.S.C. § 40102(16). To be an NVOCC, the entity must meet the Shipping Act’s definition of “common carrier.”

The term “common carrier” – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6).

The statutory definitions are echoed in the Commission’s regulations:

Ocean transportation intermediary means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term

- (1) *Ocean freight forwarder* means a person that –
 - (i) 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; and
 - (ii) processes the documentation or performs related activities incident to those shipments; and
- (2) *Non-vessel-operating common carrier (“NVOCC”)* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(o).

Common carrier means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

- (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
- (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country

46 C.F.R. § 515.2(f); see *Landstar Express Am., Inc. v. FMC*, 569 F.3d 493, 494-95 (D.C. Cir. 2009).

The Commission promulgated regulations providing examples of ocean freight forwarder services and NVOCC services performed by ocean transportation intermediaries.

Freight forwarding services refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by a common carrier, which may include, but are not limited to, the following:

- (1) Ordering cargo to port;
- (2) Preparing and/or processing export declarations;
- (3) Booking, arranging for or confirming cargo space;
- (4) Preparing or processing delivery orders or dock receipts;
- (5) Preparing and/or processing ocean bills of lading;
- (6) Preparing or processing consular documents or arranging for their certification;
- (7) Arranging for warehouse storage;
- (8) Arranging for cargo insurance;
- (9) Clearing shipments in accordance with United States Government export regulations;
- (10) Preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;

- (11) Handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;
- (12) Coordinating the movement of shipments from origin to vessel; and
- (13) Giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargoes' dispatch.

46 C.F.R. § 515.2(i).

Non-vessel-operating common carrier services refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:

- (1) Purchasing transportation services from a [vessel-operating common carrier] and offering such services for resale to other persons;
- (2) Payment of port-to-port or multimodal transportation charges;
- (3) Entering into affreightment agreements with underlying shippers;
- (4) Issuing bills of lading or equivalent documents;
- (5) Arranging for inland transportation and paying for inland freight charges on through transportation movements;
- (6) Paying lawful compensation to ocean freight forwarders;
- (7) Leasing containers; or
- (8) Entering into arrangements with origin or destination agents.

46 C.F.R. § 515.2(l).

D. Legal Analysis

1. Panda operated as an ocean transportation intermediary.

An ocean transportation intermediary is an ocean freight forwarder or a non-vessel-operating common carrier. 46 C.F.R. § 515.2(o). “The term ‘ocean freight forwarder’ means a person that – (A) 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; and (B) processes the documentation or performs related activities incident to those shipments.” 46 U.S.C. § 40102(18). A non-vessel-operating common carrier does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier. 46 U.S.C. § 40102(16).

Panda Logistics (FMC Org. No. 017098) and Panda International (FMC Org. No. 020182) are foreign based NVOCCs, registered with the Federal Maritime Commission, which provide ocean transportation services. F. 4. The evidence supports a finding that Panda operated as an NVOCC for Petra Pet’s shipments from China to the United States. Panda issued bills of lading and purchased transportation services from vessel-operating common carriers. F. 5. Accordingly, Panda is an ocean transportation intermediary, as defined by the Shipping Act.

The parties focus on whether RDM Solutions operated as an NVOCC or a freight forwarder. In the Shipping Act, a freight forwarder is defined as dispatching shipments *from* the United States. The shipments at issue were dispatched *to* the United States. Accordingly, RDM Solutions could not be considered a freight forwarder within the meaning of the Shipping Act under these facts.

In addition, the evidence does not support a finding that RDM Solutions was acting as an agent for either Petra Pet or Panda. In preparation for Petra Pet’s owner’s trip to China, RDM Solutions told Petra Pet in 2009 that Betty Sun, a Panda employee, “has been with RDM since the beginning,” implying that Ms. Sun and the other Panda employees who met with Petra Pet’s owners worked for RDM Solutions. F. 28. Meanwhile, RDM Solutions instructed Panda not to quote any rates to Petra Pet during the visit. F. 29. Clearly, RDM Solutions positioned itself as the intermediary between Petra Pet and Panda. Panda, being in the shipping industry, was more likely to understand the nature of the relationship than Petra Pet, which undertook the China trip, at least in part, to gain a better understanding of the shipping process.

RDM Solutions, although not squarely fitting the description, would best be categorized as an NVOCC. Indeed, in 2007 when Mario Ruiz opened RDM Solutions, he described the company to Panda as an FMC licensed NVOCC. F. 12. Even if RDM Solutions was considered a freight forwarder, it would not alter the analysis of Panda’s violations of the Shipping Act.

2. Panda violated section 41102(c)

Pursuant to section 41102(c) a “common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c). The evidence establishes that Panda violated this section by coercing Petra Pet into paying amounts owed to Panda by RDM Solutions. Specifically, Panda aborted shipments, withheld cargo, and failed to provide notice.

A maritime lien secures money lawfully owed for the carriage of that particular shipment. The lien only secures payment for the shipment of the cargo subject to that lien, however. As summarized by Judge Kline:

A carrier can withhold delivery of cargo to compel the shipper to pay freight money that is lawfully owed and has a cargo lien which the carrier can assert if necessary, which lien the carrier loses if it surrenders the cargo. *See Johnson Products Co., Inc. v. M/V Molinera*, 628 F. Supp. 1240, 1248 (S.D. N.Y. 1986); Gilmore and Black, *The Law of Admiralty* (2d ed.) sec. 3-45; 70 Am Jur 2d, Shipping, sec. 793. Conversely, if a shipper or consignee induces the carrier to surrender the cargo and thus lose its lien, and thereafter refuses to pay the lawful freight money owed because the shipper or consignee has outstanding disputes with the carrier on earlier unrelated shipments, and withholds payment of the lawful freight as a means to coerce the carrier to settle the disputes on earlier unrelated shipments, the shipper or consignee has acted unlawfully, in violation of section 10(a)(1) of the 1984 Act. *See Waterman Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173 (I.D.), affirmed with slight modifications, 26 S.R.R. 1424 (1994). Thus, disputes over earlier unrelated shipments cannot be used by either a carrier or a shipper as justification for refusing to release the cargo or to pay lawful freight money.

Bernard & Weldcraft Welding Equip. v. Supertrans Int'l, Inc., 29 S.R.R. 1348, 1356 n.14 (ALJ 2003), admin. final Feb. 12, 2003; *see also American Steel Barge Co. v. Chesapeake & O. Coal Agency Co.*, 115 F. 669, 672 (1st Cir. 1902) (a lien against cargo "cannot be applied . . . beyond the amount of freight stipulated in the bill of lading"); *The Albert Dumois*, 54 F. 529, 530 (E.D.N.Y. 1893) ("By virtue of this provision the shipowner may enforce a lien upon the cargo for the freight stated in the respective bills of lading, but for no more.").

The Commission, in *Total Fitness Equip., Inc. v. Worldlink Logistics, Inc.*, found that respondent Worldlink violated section 10(d)(1) of the Shipping Act by forcing complainant Total Fitness to pay twice for the same shipment and holding up Total Fitness's cargo until the unreasonable double billing was paid. *Total Fitness Equip., Inc. v. Worldlink Logistics, Inc.*, 28 S.R.R. 534, 542 (FMC 1998), *aff'd sub nom, Worldlink Logistics, Inc. v. Federal Maritime Comm'n*, 203 F.3d 54 (D.C. Cir. 1999) (Table). In *Total Fitness*, the Commission reaffirmed that the existence of a dispute between an NVOCC and its agent does not excuse the NVOCC from discharging its obligations to its shipper-customer. *Total Fitness*, 28 S.R.R. at 540 (citing *Corpco Int'l Inc. v. Straightway, Inc.*, 28 S.R.R. 296, 299-300 (FMC 1998)). Similarly, in *Brewer v. Maralan & World Line Shipping, Inc.*, the Commission affirmed a violation of Section 10(d)(1) where the NVOCC held up cargo seeking additional payments and refused to provide a bill of lading. *Brewer v. Maralan & World Line Shipping, Inc.*, 29 S.R.R. 6, 9 (FMC 2001).

More recently, in *Houben v. World Moving Services, Inc. & Cross Country Van Lines, LLC*, the Commission reiterated that failing to fulfill NVOCC obligations is an unjust and unreasonable practice in violation of section 10(d)(1). *Houben v. World Moving Services, Inc. & Cross Country Van Lines, LLC*, 31 S.R.R. 1400, 1405 (FMC 2010). In *Houben*, the NVOCC "violated Section

10(d)(1) by failing to engage in just and reasonable practices relating to receiving, handling, storing, or delivering property by failing to timely make payments necessary to secure release of the cargo in circumstances when it had already been paid by the shipper and by its failure to resolve a commercial dispute, practices which resulted in both delay and financial harm to the shipper.” *Houben*, 31 S.R.R. at 1405.

A number of cases address situations where NVOCCs hold cargo hostage while demanding additional payments from an innocent cargo owner. In *Bernard & Weldcraft Welding Equip. v. Supertrans Int’l, Inc.*, respondent NVOCC refused to allow the goods to be released without payment by Jenkar, who owed Supertrans money and who had previously performed services for Lincoln, the purchaser of complainant’s goods. *Bernard & Weldcraft Welding Equip. v. Supertrans Int’l, Inc.*, 29 S.R.R. 1348, 1353-54 (ALJ 2003) (notice of finality Feb. 12, 2003).

It is clear from Commission precedent that when Supertrans refused to release the cargo it had contracted to carry for B & W and Lincoln despite its lack of a valid legal excuse, it interfered with the contractual rights of the buyer and seller, Lincoln and B & W, and failed to observe just and reasonable practices relating to the handling and delivery of the subject shipment. Whatever grievance Mr. Lee and Supertrans had with the third party, Jenkar, which arose out of totally unrelated shipments in the past, did not give Supertrans any just reason whatsoever, in effect, to hold the cargo hostage in the hopes of inducing the innocent buyer and seller to put pressure on Jenkar to pay the alleged debt owed by Jenkar to Supertrans. Nor, of course, could Supertrans hold the cargo hostage while demanding extra freight money beyond that which had been agreed upon when the shipment was first booked. Unfortunately, this is not the first time that an NVOCC has held cargo hostage to its demands for more money which the innocent cargo owner had no legal obligation to pay and whenever such an NVOCC has acted in this manner, it has been held to have violated section 10(d)(1) of the 1984 Act as well as other sections of that law. Several Commission decisions in recent years amply illustrate this point.

Bernard & Weldcraft Welding Equip., 29 S.R.R. at 1354 (citations omitted).

In *Adair*, respondent Penn-Nordic aborted a shipment for complainant Adair to pressure freight forwarder Corporate World to pay its delinquent accounts. *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 19 (ALJ 1991) (notice of finality Oct. 24, 1991).

Penn-Nordic need not have aborted the shipment. It could have shipped the motorcycle to New Zealand, and if payment had still not been received in the United States, could have retained possession of the cargo until paid in New Zealand by the consignee or by Corporate World. Instead, Penn-Nordic aborted the shipment, ignored the interests of the cargo owner and the consignee, and didn’t make any effort to notify the consignee that the motorcycle had been placed in a warehouse where it was accruing storage charges.

Adair, 26 S.R.R. at 19. The decision concludes that the facts show amply that Penn-Nordic behaved unreasonably under section 10(d)(1) of the 1984 Act. *Adair*, 26 S.R.R. at 20. In addition, the decision finds that under contract law, “if a party enters into a contract with another party, having reason to believe at the time that the other party might be unreliable or unsound financially, the first party has in effect assumed the risk and cannot later refuse to perform.” *Adair*, 26 S.R.R. at 21 (citations omitted).

The evidence demonstrates that when Panda issued bills of lading agreeing to ship the final seven containers from China to the United States, it entered into a contract with Petra Pet. Panda had a duty, under its bills of lading and its tariff, to arrange for transportation of these seven containers from China to the United States. Panda breached its duty by (1) aborting the shipments, (2) withholding cargo and demanding payments for other shipments, and (3) failing to provide notice to Petra Pet regarding the whereabouts of the containers.

a. Aborting Shipments

When RDM Solutions disappeared, Petra Pet paid for shipments sitting in destination ports and obtained their release. After paying Panda \$94,381.93 in January 2011, Petra Pet believed that it had paid Panda for all but seven containers, which shipped from China on or about December 18, 2010. F. 55. These seven containers are identified in Panda bills of lading which list the consignee as Petrapport (aka Petra Pet) and the notify party as Kuehne + Nagel, Petra Pet’s agent. F. 56. Pursuant to an uncontradicted sworn statement, the vessel carrying the cargo stopped for a scheduled transshipment in Pusan, Korea, whereupon, at Panda’s instruction, the seven containers were taken off of the vessel, held in Korea, and then returned to Shanghai, China, where they were held under Panda’s control. F. 57. There is no evidence in the record that Petra Pet agreed to, or even was aware of, the return of the seven containers back to China.

After Petra Pet paid \$94,381.93 to Panda, Petra Pet followed up on the arrival of the seven containers. Subsequently, Petra Pet learned that while the containers had in fact shipped from China to the United States via Pusan, Korea, Panda stopped the containers in Korea and had those containers returned to China. F. 58. Because Petra Pet had paid the manufacturers in China approximately \$519,000 for the goods in the seven containers diverted back to China, those containers had substantial worth to Petra Pet. F. 59.

Instead of arriving in January, Petra Pet’s final seven containers were delayed by almost six months. Without informing Petra Pat, Panda returned the shipments to China and held them until it received a payment of over \$153,000 from Petra Pet. Given that the shipping charges for these seven containers were under \$24,000, the only plausible reason for the diversion was to extract additional payments from Petra Pet. Panda held these seven containers in China until it extracted over six times the cost of shipping the containers.

Panda’s own bills of lading state that disputes arising under a bill of lading “may only be instituted in the country where the carrier has his principal place of business and shall be decided according to the law of such country.” F. 73. This provision does not permit Panda to exercise self-

help and unilaterally re-route the cargo. Such diversion violates Panda's duty under its bill of lading.

Panda had a duty, under its bill of lading, to arrange transportation of the seven containers from China to the United States. Panda breached that duty by terminating the shipments and arranging for the goods to be returned to China. By aborting the shipments, Panda failed to fulfill its NVOCC obligations. Similar to *Adair*, the shipments could have continued to the destination port while the parties attempted to resolve the situation. *Adair*, 26 S.R.R. at 19. Indeed, even Panda's own conditions of carriage merely permit a lien on a shipment, not aborting the shipment. F. 72. As established in *Adair*, the abrupt termination of a shipment contrary to a bill of lading subjects the party to liability. *Adair*, 26 S.R.R. at 19.

Panda aborted the shipments, ignoring the interests of the cargo owner and the consignee. Panda failed to meet its obligation to establish, observe, and enforce just and reasonable regulations and practices and failed to complete the ocean transportation it had contracted to perform. This conduct constitutes the failure to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property in violation of section 41102(c).

b. Withholding Cargo

On March 14, 2011, Panda demanded RMB 1,006,680.84 to re-export the seven diverted containers to the United States. F. 60. On March 27, 2011, Hanjin confirmed that the freight charges associated with the seven containers amounted to \$23,400 and the detention charges were \$23,833.64. F. 61. Panda refused to permit those seven containers to ship until Petra Pet paid \$130,526.73 in addition to the \$23,400 freight charges for the seven containers, for a total of \$153,926.73. F. 63. Petra Pet also paid \$27,932.65 directly to Hanjin to satisfy demurrage and storage costs in China. F. 65.

On April 2, 2011, Petra Pet indicated it would pay Hanjin directly for both the storage and the ocean freight and that Petra Pet would pay Panda \$6,170 for a variety of fees (port charge of "80/container," trucking fee, import customs declarations, etc.) associated with the final seven containers. F. 66. On May 20, 2011, Panda billed Petra Pet an additional \$12,600 to satisfy miscellaneous fees (demurrage fee, terminal handling fee, customs fees, etc.) associated with the final seven containers. F. 67. Panda emailed Petra Pet an invoice and stated that USD 6170 "is not enough to cover all the charges at Shanghai. Pls see attached our invoice and arrange payment to us today." F. 67. On May 21, 2011, Petra Pet responded that "We paid all charges directly to Hanjin for Shanghai demurrage and storage. There should be no charges on your invoice. We already paid customs inspections charges on your original invoice, also. In addition, isn't the terminal handling charge part of the storage fees paid to Hanjin?" F. 68.

On May 26, 2011, Panda responded:

Pls recall: On Mar.14 Letter of Guarantee to Yantai ASKA we stated to move the containers to USA within 120 days. Now we made it within 60days. You can not imagine the difficulties in China. I made it, then I kept the promise to your company.

If you ask 100 freight forwarders, no more than 2% have the capability to arrange this task. Do you want to compare the service/charges of other freight forwarder ? If you want, I can move the containers back to Shanghai port tomorrow. Then you ask K/N or any other big famous forwarder to arrange the movement for you again.

Tell me your decision today. Then I will act tomorrow.

F. 69. On May 26, 2011, Petra Pet stated that the “wire transfer will be sent tomorrow morning. [H]ow can I trust that you will release the documents without further charges?” F. 70. Petra Pet’s final seven containers were loaded on board a vessel in China in May of 2011 and were finally delivered to Petra Pet in the United States in June 2011. F. 71.

These facts are similar to those in *Bernard & Weldcraft Welding Equip.*, where Supertrans refused to allow the goods to be released to Lincoln unless Supertrans was paid the additional money owed to it by Jenkar. *Bernard & Weldcraft Welding Equip.*, 29 S.R.R. at 1353-54. The decision states, “Unfortunately, this is not the first time that an NVOCC has held cargo hostage to its demands for more money which the innocent cargo owner had no legal obligation to pay and whenever such an NVOCC has acted in this manner, it has been held to have violated section 10(d)(1) of the 1984 Act as well as other sections of that law.” *Bernard & Weldcraft Welding Equip.*, 29 S.R.R. at 1354.

This was not the first time that Panda had trouble obtaining payment from RDM Solutions. For example, on June 30, 2009, Panda emailed RDM Solutions a list of nine invoices with the comment “Too many invoices are over-due long time. Below invoices need you to pay URGENTLY.” F. 31. Petra Pet was not copied on this correspondence. F. 31.

In July, 2010, Panda again had trouble obtaining payment from RDM Solutions. On July 26, 2010, Betty Sun at Panda sent Petra Pet an email with the subject line “overdue freight invoices” and stating:

I have to ask for your help for a very important issue. . . . As you are our VIP client, we has [sic] agreed with RDM for payment term, which is different from the agreements with other clients. . . . But now we have many overdue freight invoices, total amount is amazing. . . . We can not bear longer credit term. We need money to make business run smoothly. Today our Management Dept. has made decision: if we can not get paid for all overdue freight invoices this week, we will have to hold. Let me know whether you can help us.

F. 32. Petra Pet forwarded Panda’s July 26, 2010, email to Mario Ruiz, stating “Please need a reply to them with a payment, if u [sic] can not continue let me know but I can’t suffer with freight

without knowing.” F. 33. Mario Ruiz responded to Petra Pet’s email within minutes, stating “Taken care off [sic] will send copy of e-mail.” F. 34.

Panda suggests that this email put Petra Pet on notice of potential issues with RDM Solutions. *See* Panda Brief and Response at 5-6. This issue was, from Petra Pet’s perspective, a one-time event that resolved quickly. Panda knew that this was not an isolated event, but rather, that RDM Solutions continued to remain behind on payments. Knowing the history of payment issues, Panda nonetheless extended credit terms to RDM Solutions different from that extended to other clients. This was a unilateral decision of Panda, not requested by Petra Pet, that allowed the amounts due and owing to grow so high. When RDM Solutions defaulted on its payments, Panda expected Petra Pet to compensate it for its business decision to extend credit to RDM Solutions.

When Petra Pet’s owner traveled to China, RDM Solutions instructed Panda not to quote any rates. As Panda’s evidence shows, it is not unusual that a party in RDM’s capacity would not want the NVOCC to disclose to the shipper the rates the NVOCC is charging for fear that its customer might deal directly with the NVOCC. F. 30. There is no evidence in the record that Petra Pet was ever asked to pay Panda directly, rather, the evidence suggests that Panda withheld information from Petra Pet so as not to cause conflict with RDM Solutions.

Even if Petra Pet were responsible for RDM Solutions’ debts, the issue should have been resolved following lawful procedures, not by withholding cargo. None of the cases cited by respondents permit withholding cargo shipments for payment of debts for previous, unrelated shipments. And, Commission precedent is clear (and was relied upon by complainants) that transportation of cargo cannot be aborted or cargo held to coerce payment of debt for other shipments. *Bernard & Weldcraft Welding Equip.*, 29 S.R.R. at 1354; *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. at 19. Indeed, the Commission would not necessarily be the appropriate venue to decide the freight collection issue where, as here, there is an innocent shipper. *See Unpaid Freight Charges*, 26 S.R.R. 735 (FMC 1993); *see also China Ocean Shipping Co. v. DMV Ridgeview, Inc.*, 26 S.R.R. 50 (ALJ 1991), *rehrg. denied* 26 S.R.R. 200 (FMC 1992).

Panda failed to meet its obligation to establish, observe, and enforce just and reasonable regulations and practices and failed to deliver cargo to induce Petra Pet to pay debts owed by RDM Solutions. Panda aborted the shipments, ignoring the interests of the cargo owner and the consignee. Panda withheld seven containers to extract additional money, in clear violation of a long line of Commission precedent. This conduct constitutes the failure to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property in violation of section 41102(c).

c. Failing to Provide Notice

Panda sent RDM Solutions emails on November 9, 2010, November 15, 2010, November 19, 2010, November 22, 2010, November 23, 2010, and November 29, 2010, noting accrual of overdue amounts eventually totaling \$110,630.03 and requesting urgent payment. F. 35. Petra Pet was not

copied on these emails. F. 35. Indeed, it was Petra Pet who contacted Panda on December 1, 2010, to notify Panda that RDM Solutions had not provided bills of lading for three shipments.

Panda responded that:

We are very very sorry for the inconvenience caused to you. Our accountant told me that RDM didn't respond to her Emails for two weeks. The total overdue amount is as high as USD 125000 in Panda favor. Some old invoices were even dated Sep. We do not know what happened to RDM or to Mario. We feel panic facing such situation.

We didn't bother you again for such problem, because we know your focus is taking good care of your customers and to do more good businesses.

F. 38.

Although Panda could not reach RDM Solutions for two weeks and had overdue amounts of \$125,000, going back for two months to September, they did not contact Petra Pet. This is particularly surprising because previously, when RDM Solutions had failed to remit payment, the matter was immediately resolved with an email to Petra Pet. By not notifying Petra Pet of the problem promptly, Panda allowed the amount due to escalate.

Moreover, Panda failed to notify Petra Pet that the seven containers were diverted. As in *Adair*, Panda "did not make any effort to notify the consignee" that the shipment had been aborted. *Adair*, 26 S.R.R. at 19. Panda failed to meet its NVOCC obligation to transport the final seven containers and hid its conduct. This failure to notify constitutes the failure to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property in violation of section 41102(c).

D. Damages

Petra Pet seeks \$207,013.38 from Panda for: demurrage paid in the United States as a result of Panda's failure to provide freight releases (\$29,784.00); amounts coerced through the second wire transfer covering containers diverted back to China in excess of the shipping costs for those seven containers (\$130,526.73); demurrage and storage costs paid to Chinese authorities with respect to containers diverted back to China (\$27,932.65); first miscellaneous payment to Panda with respect to containers diverted back to China (\$6,170.00); and second miscellaneous payment to Panda with respect to containers diverted back to China (\$12,600.00). Petra Pet Brief at 13-14. Petra Pet initially sought amounts attributable to double freight payments in the first wire transfer of \$963.80, however, this amount has since been withdrawn. Petra Pet Reply Brief at 1 n.1.

Pursuant to section 11(g) of the Shipping Act "the Federal Maritime Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees." 46 U.S.C. § 41305(b). Commission case law states that:

“(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.” *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (1950); *see also James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 30 S.R.R. 8, 13 (FMC 2003).

Petra Pet paid Panda \$94,381.93 to obtain the release of shipments that had arrived and were accruing demurrage charges. This payment was in addition to the payments that had been originally made to RDM Solutions for these shipments. Petra Pet is not seeking compensation for these payments. Rather, Petra Pet seeks compensation for additional money demanded for the final shipment of seven containers, over and above the shipping costs for those containers. Presumably, these payments covered debts owed to Panda by RDM Solutions, including possibly Petra Pet shipments which had been released. Once those shipments were released, any maritime lien expired. Panda was not justified in holding cargo hostage to recover the amounts due for the released containers.

Petra Pet has not established that the demurrage paid in the United States as a result of Panda’s failure to provide freight releases, \$29,784.00, is compensable in this proceeding. This amount appears to be for shipments that were still subject to a maritime lien as Panda had not received payment and the goods had not been delivered. The evidence does not support a finding that Panda held this cargo after receiving the \$94,381.93 payment from Petra Pet. Therefore, there is insufficient evidence to award this amount.

Amounts coerced through the second wire transfer covering containers diverted back to China in excess of the shipping costs for those seven containers totaled \$130,526.73. These amounts, which were coerced even after payment of \$94,381.93, are properly awarded. Similarly, the demurrage and storage costs paid to Chinese authorities with respect to containers diverted back to China, of \$27,932.65, are awarded. Pursuant to Panda’s own tariff, shippers should not incur additional charges due to cargo diversion by the carrier. F. 75.

Petra Pet seeks two sets of miscellaneous charges it paid to Panda, including the first set of charges totaling \$6,170.00 and the second set of charges totaling \$12,600. Petra Pet Brief at 13. Pursuant to Panda’s own tariff, shippers should not incur additional charges due to cargo diversion by the carrier. F. 75. This would include additional port fees and charges that are reflected in both the first and second set of miscellaneous charges. Moreover, these miscellaneous charges are suspect as Petra Pet paid Hanjin directly for demurrage and storage and had already paid customs inspections charges. F. 68. When asked to justify the expenses, Panda responded that the goods had shipped quickly, although it is not clear why that would justify the additional charges. F. 69. The second miscellaneous set of charges were demanded while the goods were en route, with a threat that “I can move the containers back to Shanghai port tomorrow.” F. 69.

The evidence demonstrates that as a consequence of the violations by Panda, Petra Pet has sustained \$177,229.38 in actual injury for shipping charges, storage, and demurrage costs, and additional payments to Panda. Petra Pet is also entitled to interest running from December 18, 2010,

to be calculated by the Commission when this judgement and decision become administratively final. *See* 46 C.F.R. § 502.253. In addition, the complainant may be eligible for attorney's fees, upon petition, pursuant to Commission Rule 254. 46 C.F.R. § 502.254.

IV. ORDER

Upon consideration of the findings and conclusions set forth above, and the determination that Panda Logistics Limited and Panda Logistics Co., Ltd. violated 46 U.S.C. § 41102(c), it is hereby

ORDERED that the claims herein be **GRANTED**.

It is **FURTHER ORDERED** that Panda Logistics Limited and Panda Logistics Co., Ltd. be jointly and severally liable to Petra Pet for damages of \$177,229.38.



Erin Masson Wirth
Administrative Law Judge