

FEDERAL MARITIME COMMISSION

PETRA PET, INC.,

Complainant,

v.

PANDA LOGISTICS LTD., PANDA
LOGISTICS CO. LTD., and RDM
SOLUTIONS, INC.,

Respondents.

Docket No. 11-14

Served: October 31, 2013

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

Memorandum Opinion and Order

In this complaint, Petra Pet, Inc. (*a/k/a Petrapport*) (“Petra Pet” or “Complainant”) alleged that Panda Logistics Ltd., Panda Logistics Co. Ltd. (*f/k/a Panda International Transportation Co., Ltd.*) (collectively “Panda”); and RDM Solutions, Inc. (“RDM”) (“Respondents”) violated section 10(d)(1)¹ of the Shipping Act of

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 “reorganize[e] and restat[e] the laws currently in the appendix to title 46.

1984 (“the Act”). The presiding Administrative Law Judge (ALJ) held that Panda and RDM violated section 10(d)(1) of the Shipping Act of 1984. *See Petra Pet Inc. v. Panda Logistics Ltd; Panda Logistics Co., Ltd and RDM Solutions*, 32 S.R.R. 675 (ALJ 2012) (administratively final May 24, 2012); *Petra Pet Inc. v. Panda Logistics Ltd; Panda Logistics Co., Ltd and RDM Solutions*, 32 S.R.R. 787 (ALJ 2012) (I.D.). We affirm the decision of the ALJ.

BACKGROUND

I. Proceeding

On August 26, 2011, Petra Pet filed a Complaint alleging that Panda and RDM violated section 10(d)(1) of the Act. Petra Pet sought \$269,940.68 in reparations, plus interest, attorney’s fees and costs. Complaint at 9-11. RDM did not file an answer or otherwise respond. On October 31, 2011, the ALJ issued a Notice of Default and Order to Show Cause, ordering RDM to show why a decision should not be entered against it and allowing additional time to respond. *Petra Pet Inc. v. Panda Logistics Ltd; Panda Logistics Co., Ltd and RDM Solutions*, 32 S.R.R. 565 (2012). Panda filed an Amended Answer and Affirmative Defenses to Complaint (“Amended Answer”) on December 20, 2011. On February 13, 2012, Petra Pet and Panda filed a Joint Motion for Default Judgment against RDM who did not respond. The ALJ issued a briefing schedule on March 28, 2012, and the parties were again served all prior orders, including the Notice of Default and Order to Show Cause, with RDM given additional time to respond. RDM did not respond. The ALJ issued a default judgment on April 20, 2012, ordering RDM to pay \$207,977.18, plus interest to Petra Pet.

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, however, references provisions of the Act by the section numbers in the Act’s original enactment.

32 S.R.R. 675, 677. No exceptions were filed to the default judgment.

The proceeding continued against Panda. On May 22, 2012, Petra Pet filed a Brief in Submission of Claim for Reparations and Damages (“Petra Pet Brief”), Proposed Findings of Fact, and Appendix, in which Petra Pet reduced the total amount of reparations it sought to \$207,977.18 from \$269,940.68. Petra Pet Brief at 13-14. The parties filed additional briefs, findings of fact, and supporting documentation. On August 14, 2012, the ALJ issued an Initial Decision (“I.D.”) finding violations of the Shipping Act and ordering Panda to pay \$177,229.38 in reparations to Petra Pet. 32 S.R.R. 787, 805. The Commission served a notice of *sua sponte* review on August 20, 2012. Panda timely filed exceptions (“Panda Exceptions”) on September 5, 2012, and Petra Pet timely filed an Opposition to Panda’s Exceptions (“Petra Pet Exceptions”) on October 2, 2012.²

II. *Positions of the Parties*

A. *Complainant*

Petra Pet alleged that Panda violated section 10(d)(1) of the Act, by diverting seven containers from China bound for a final destination in the United States back to China without authorization, failing to provide timely and proper transport documents, engaging in extortion, unjustly permitting the accrual of storage and demurrage charges on the seven containers returned to China, and unjustly and unreasonably refusing to issue freight releases pertaining to containers accruing demurrage and storage at

² On March 15, 2013, counsel for Petra Pet, Robert D. Stang, filed a Motion to Withdraw as Counsel. The motion was denied on April 3, 2013. On April 24, 2013, the motion was renewed and subsequently granted on June 3, 2013. Petra Pet requested and was granted an extension to file its exceptions until October 2, 2012.

ports in the United States. Complaint at 9-10. Petra Pet also alleged that RDM violated section 10(d)(1) of the Act by failing to remit freight payments and failing to communicate with or provide the status of shipments to Petra Pet. *Id.* It sought \$269,940.68, plus interest, attorney's fees and costs, from both Panda and RDM. *Id.* In its Brief, however, Petra Pet amended the amount it sought to \$207,977.18. Petra Pet Brief at 13-14. Subsequently it withdrew the claim of reparations for \$963.80 (attributable to double freight payments in the first wire transfer), reducing the total amount it sought to \$207,013.38. Petra Pet Revised Reply at 1 n.2.

Petra Pet argued that Panda failed to release and/or transport cargo in order to extort payments; failed to transport seven containers as required by the bills of lading; failed to communicate with Petra Pet regarding the location of the seven containers; and failed to pay applicable demurrage and other charges that resulted from Panda's wrongdoing. Petra Pet Brief at 4-5. In addition, Petra Pet alleged that Panda forced it to indemnify Panda for harm caused by RDM; that Panda demonstrated a clear course of dealing with RDM and Petra Pet in which Petra Pet and RDM were only responsible for paying each other; and that Panda's failure to perform its fiduciary duties to Petra Pet demonstrates a violation of section 10 (d)(1) of the Act. Petra Pet Brief at 5-13.

Petra Pet replied to Panda's opposition brief (See *infra* II.B.) that Panda had admitted to violating section 10(d)(1) of the Act by diverting the containers consigned to Petra Pet; Panda's diversion of Petra Pet's cargo was illegal and its relationship with RDM was irrelevant; Panda violated the bills of lading; a number of the assertions by Panda were based upon "speculation, incomplete statements or mischaracterizations of the evidence;" and, because of the "overwhelming evidence that Panda and RDM had a direct business relationship, it was immaterial whether RDM acted as Panda's agent or as Panda's [sic]coloader." Petra Pet Revised Reply at 1-14.

B. Respondents

RDM failed to respond and did not participate in the proceeding.³ Panda denied all allegations. Amended Answer at 5. Panda also contended that RDM was liable to Panda for any liability suffered by Petra Pet and that RDM shared joint liability to Petra Pet. Amended Answer at 8. Panda contended that RDM was acting as Petra Pet's agent, as evidenced by the bills of lading and other contemporaneous documents. Panda's Revised Brief and Response at 2-6. Panda also alleged that Petra Pet did not establish an agency relationship between Panda and RDM and that payment to RDM did not absolve Petra Pet of its obligation to pay Panda for transportation services it had rendered. Panda's Revised Brief and Response at 7-14.

III. *Initial Decision*

A. *Findings of Fact*

The ALJ accurately reviewed the factual offerings by the parties. *See* 32 S.R.R. at 791-97. The ALJ tethered each finding of fact ("FOF") to a citation in the record, and a review of the findings indicates support in the record.

B. *Findings of Law*

The I.D. addressed the arguments of Panda and Petra Pet, as well as all other relevant issues. The ALJ concluded that the Commission had jurisdiction over the Complaint, and that the

³ On February 10, 2012, Petra Pet and Panda filed a Joint Motion for Default Judgment against RDM Solutions. The ALJ analyzed the issue of default judgment in the April 20, 2012, initial decision. The ALJ found that the evidence demonstrated that, as a consequence of the violations by RDM, Petra Pet suffered \$207,977.18 in actual injury for demurrage costs, storage, shipping charges, and additional payments to Panda, plus interest. 32 S.R.R. at 677.

Complainant had “the burden of proving by a preponderance of the evidence that the Respondents violated the Act.” ALJ Decision, 32 S.R.R. at 797. This was not excepted to by the parties.

The ALJ determined that Panda, registered⁴ with the Federal Maritime Commission as a Non-Vessel-Operating Common Carrier (“NVOCC”), is an Ocean Transportation Intermediary (“OTI”). *Id.* at 800. The ALJ also determined that because a freight forwarder dispatches shipments “from the United States,” and RDM was dispatching shipments “to the United States,” RDM could not be a freight forwarder as that term is defined in the Act. *Id.* (emphasis in original). After analyzing the interactions between RDM, Panda, and Petra Pet, the ALJ determined that RDM was a “go-between” and not an agent of either party, concluding that RDM was best categorized as an NVOCC. *Id.*

The ALJ next determined that Panda had violated section 10(d)(1) of the Act. The ALJ cited *Bernard & Weldcraft Welding Equip. v. Supertrans Int’l, Inc.*, 29 S.R.R. 1348 (ALJ 2003), for the proposition that a maritime lien “only secures payment for the shipment of the cargo subject to that lien.” *Id.* The ALJ also cited *Bernard*, 29 S.R.R. at 1356, *Brewer v. Maralan (a/k/a Sam*

⁴ Panda, as a foreign based NVOCC is registered with the Commission, however it is not licensed. See 42 CFR § 515.19 (a) (“Any NVOCC whose primary place of business is located outside the United States and does not elect to become licensed by the Commission shall register with the Commission by submitting to the Director of the Bureau of Certification and Licensing (BCL) a completed registration form, Form FMC-65 (Foreign-based Unlicensed NVOCC Registration/Renewal”); *but see* 42 CFR § 515.3 (“Except as otherwise provided in this part, no person in the United States may act as an ocean transportation intermediary unless that person holds a valid license issued by the Commission. . . . For purposes of this part, a person is considered to be “in the United States” if such person is resident in, or incorporated or established under, the laws of the United States. . . .”)

Bustani) and World Line Shipping, Inc., 29 S.R.R. 6, 9 (FMC 2001) and *Total Fitness Equip. v. Worldlink Logistics, Inc.*, 28 S.R.R. 534, 541 (1998), *aff'd sub nom. Worldlink Logistics, Inc. v. Federal Maritime Comm'n*, 203 F.3d 54, 28 S.R.R. 1118 (DC Cir. 1999) for the proposition that withholding the release of cargo based on a debt unrelated to the specific cargo in order to facilitate payment of a debt is an unreasonable practice, and thus violates section 10(d)(1). *Id.* at 801. In addition, the ALJ cited *Houben v. World Moving Services, Inc. & Cross Country Van Lines*, 31 S.R.R. 1400, 1405 (FMC 2010) to support a finding that when an NVOCC fails to fulfill its obligations, it is a violation of section 10(d)(1). *Id.*

Furthermore, the ALJ relied on *Adair v. Penn-Nordic Lines*, 26 S.R.R. 11, 19 (ALJ 1991), in which a section 10(d)(1) violation was found when the respondent aborted a shipment in order to pressure the freight forwarder to pay delinquent monies. *Id.* The ALJ also cited *Adair*, 26 S.R.R. at 21, for the proposition that “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.” *Id.* at 802.

The ALJ determined that Panda’s failure to provide notice to Petra Pet of overdue payments by RDM and the diversion and eventual return of a shipment of seven containers, was consistent with the finding in *Adair*, 26 S.R.R. at 19, of a section 10(d)(1) violation where no effort was made to notify the consignee that a shipment was “aborted.” *Id.* at 804. Based on these authorities, the ALJ determined that Panda breached its duty to Petra Pet 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.” *Id.* at 802.

With regard to reparations, the ALJ found that the evidence demonstrated that, as a consequence of the violations by Panda, Petra Pet had suffered \$177,229.38 in actual injury for demurrage costs, storage, shipping charges, and additional payments it had

made to Panda. Petra Pet was also found to be entitled to interest. 32 S.R.R. at 805 (citing section 11(g) of the Act). The reparations awarded by the ALJ consisted of: (1) \$130,526.73 for “amounts coerced through the second wire transfer covering containers diverted back to China in excess of the shipping costs for those seven containers;” (2) \$27,932.65 for “demurrage and storage costs paid to Chinese authorities with respect to containers diverted back to China;” (3) \$6,170.00 for a “miscellaneous payment to Panda with respect to containers diverted back to China,” and (4) \$12,600.00 for a “second miscellaneous payment to Panda with respect to containers diverted back to China.” *Id.* at 805. The ALJ did not award the \$29,013.38 sought by Petra Pet for “demurrage paid in the United States as a result of Panda’s failure to provide freight releases.” The ALJ found that the “amount appeared 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.” *Id.*

C. *Exceptions*

In its exceptions, Panda disagreed with the ALJ’s FOF. Panda Exceptions at 2-10. Panda also reiterated the argument it had made in its original Brief and Response before the ALJ that payment to RDM did not absolve Petra Pet of its obligation to pay for transportation services, as well as argued that Panda had a valid lien on goods in its possession; exercising the lien did not violate the Act; and Petra Pet failed to establish that it paid RDM the freight charges that Panda had invoiced to RDM. *Id.* at 10-32.

Petra Pet responded to Panda’s Exceptions by stating that it believed that Panda “must be held liable for the consequent damages to Petra Pet of \$177,229.38 as detailed in the ID.” Petra Pet Exceptions at 36. Furthermore, it argued that Panda had mischaracterized the evidence and law; Panda “did not have a valid lien on cargo in prior shipments already released;” RDM’s status as a freight forwarder is irrelevant; “Petra Pet paid the party that Panda identified for freight charges under the Panda bills of lading;” and

Petra Pet has established that it paid RDM the freight it owed. *Id.* at 20-34.

DISCUSSION

The two main issues of concern in this matter are whether Panda violated section 10(d)(1) of the Act, and, if so, whether they caused Petra Pet actual injury for which reparations, and other relief, should be awarded. The ALJ analyzed all of these issues succinctly and correctly in the I.D.

I. Violation of Section 10(d)(1) of the Act

After review of the ALJ's I.D., we affirm the I.D. RDM and Panda both operated as OTIs and NVOCCs. 32 S.R.R. at 800. In 2010, RDM, received payment from Petra Pet for a number of shipments but did not transmit the payment to Panda. 32 S.R.R. at 789. As a result of RDM's failure to remit payment owed to Panda, Panda diverted seven containers that had shipped from China back to China. *Id.* 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." *Id.* Panda also "extracted additional payments of \$6,170 and \$12,600 while these seven containers were on the water." *Id.* As a result, Petra Pet alleged that Panda violated section 10(d)(1) of the Act. 32 S.R.R. at 798.

The ALJ correctly reviewed the alleged violations of section 10(d)(1) the Act. Section 10(d)(1) provides that "[a] common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 42 U.S.C. § 41102(c). In deciding whether section 10(d)(1) has been violated, the Commission must first determine whether Panda falls into a category covered by section 10(d)(1). The ALJ determined that the

evidence supported a finding that Panda operated as an OTI (specifically an NVOCC instead of a freight forwarder, given its registration with the Commission as an NVOCC), rather than as an agent. 32 S.R.R at 800.

In response to Panda's argument that RDM was a freight forwarder, and Petra Pet's agent, the ALJ was correct in the determination that RDM was neither. A freight forwarder dispatches shipments "from the United States." 46 U.S.C. § 40102 (18). As alleged in the Complaint, RDM dispatched the shipments to the United States from China. Petra Pet Appendix at 79-83. Therefore, RDM could not have acted as a freight forwarder for the shipments in question. Moreover, evidence in the record demonstrating the interactions⁵ between RDM, Panda, and Petra Pet, support the ALJ's conclusion that RDM was not an agent of either party, but acted as an NVOCC. 32 S.R.R. at 800.

After establishing that Panda was an NVOCC and therefore subject to section 10(d)(1) of the Shipping Act, the ALJ addressed whether Panda had violated the Shipping Act. The ALJ correctly found that Panda: (1) "aborted" shipments, (2) held cargo, demanding payments for other shipments, and (3) failed to provide notice regarding the whereabouts of seven containers. *Id.* at 802. The Commission has recognized in numerous decisions that NVOCCs violate section 10(d)(1) when they fail to fulfill NVOCC obligations, through single or multiple actions or mistakes, and therefore fail to observe and enforce just and reasonable practices. *See Yakov Kobel, et al. v. Hapag-Lloyd A.G., et al.*, ___ S.R.R. ___, ___ (FMC 2013); *Bimsha International v. Chief Cargo Services, Inc. and Kaiser Apparel, Inc.*, ___ S.R.R. ___, ___ (FMC 2013); *Smart Garments v. Worldlink Logix Services, Inc.*,

⁵ For instance, RDM told Petra Pet that Betty Sun, a Panda employee, had "been with RDM since the beginning," implying that Panda employees worked for RDM. Petra Pet Appendix at 92-93. Also, RDM instructed Panda not to quote any rates to Petra Pet during a visit by Petra Pet with Panda. Petra Pet Appendix at 95.

____S.R.R.____,(FMC 2013); *Brewer*, 29 S.R.R. at 9 (FMC 2001) (withholding documentation needed to secure the release of property held to violate section 10(d)(1)); *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); *Hugh Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871, 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”); *Corpco International Inc., v. Straightway, Inc.*, 28 S.R.R. 296, 300 (FMC 1998) (forcing the shipper to pay transshipment costs for the release of cargo after the shipper had already paid a rate previously agreed to was an “unreasonable practice”); and *Total Fitness*, 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) (attempting to collect an unreasonable debt by refusing the release of cargo was a violation of the Act).

In the preceding cases, failures similar to Panda’s unreasonable refusal to release documents⁶ and transport cargo, were violations of section 10(d)(1). Therefore, we concur with the ALJ that Panda violated section 10(d)(1). In addition, Panda’s failure to communicate with Petra Pet regarding the location of the seven containers was also a violation of section 10(d)(1). *See Adair*, 26 S.R.R. at 19; *see also Panalpina Inc. v. Eastern Mediterranean Shipping Corp.*, 28 S.R.R. 525, 526 (ALJ 1998) (respondent violated section 10(d)(1) when it failed to see that the cargo booked with it was delivered and failed to respond to the complainant’s request for status reports). The ALJ’s reasoning is sound and we agree that Panda’s failure to observe just and reasonable practices therefore violated section 10(d)(1).

⁶ Panda withheld Hanjin bills of lading preventing shipment of seven containers unless Petra Paid \$153,926. 73. Petra Pet Appendix at 147-178.

The exceptions filed by Panda do not invalidate any of the ALJ's FOF. Panda took exception to FOF: 8, 9, 10, 11, 13, 14, 18, 22, 25, 26, 32, 40, 45, 49, 55, 57, 63, 74, 75, 76, 78. Panda Exceptions at 2-10. None of these exceptions, however, have merit. In some of these exceptions, Panda did not actually dispute the ALJ's findings, but rather asked for additional findings of fact. (For example, FOF 63 and 74). In others, Panda's arguments gave more support to the ALJ's findings, were based on conjecture, were not supported by the evidence, were irrelevant, or did not outweigh the evidence supporting the ALJ's finding.

In the exceptions, Panda also reiterated its argument that payment to RDM did not absolve Petra Pet of its obligation to pay for transportation services. Panda Exceptions at 12-24. The ALJ adequately addressed this argument in the discussion of the facts and applicable case law. *Petra Pet*, 32 S.R.R. 787, 800-05. See *Bernard*, 29 S.R.R. 1348, 1356 n.14 (“[D]isputes over unrelated shipments cannot be used by either a carrier or a shipper as justification for refusing to release cargo . . .”). In support of this argument, Panda cited numerous cases which were either irrelevant or did not contradict the ALJ's analysis. None of the arguments made by Panda overcame the well-supported facts and authority cited by the ALJ that held that by withholding and aborting a shipment to coerce payment of debt for other shipments, Panda violated the Act. 32 S.R.R. at 804.

Panda also argued that it had a valid lien on the goods in its possession, and that exercising the valid lien did not violate the Act. Panda Exceptions at 24-30. The ALJ also correctly addressed this argument determining that a maritime lien only secures money owed pertaining to the carriage of a particular shipment. 32 S.R.R. 787, 800. Moreover, Panda's argument that it did not “abort” or “divert” cargo, as the ALJ determined, does not alter the accuracy of the ALJ's finding that its actions violated the Act. Panda's attempt to portray its return of the shipment to China as a “stoppage in transit,” and imply that it provided adequate notice of the reversal

to Petra Pet because Petra Pet received notice a few weeks later, are mischaracterizations of the facts. Panda Exceptions at 9, 29. The ALJ's description of what occurred appears sound:

Instead of arriving in January, Petra Pet's final seven containers were delayed by almost six months. Without informing Petra [Pet], 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 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.

32 S.R.R at 802.

Finally, Panda argues that Petra Pet had failed to establish that it paid RDM the freight charges requested by Panda. Panda Exceptions at 30. The ALJ accepted an affidavit by a Vice-President of Kuehne + Nagel, Inc.⁷ as sufficient proof that payment was made. 32 S.R.R. at 792. Citing *Gov't of Territory of Guam v. Sea-Land Service Inc.*, 29 S.R.R. 894 (ALJ 2002), Panda argues that in order to provide reparations, the Complainant must demonstrate that the carrier was paid, and no presumption should attach without sufficient documentation. Panda Exceptions at 30. In the matter at hand, reparations were assessed by the ALJ based upon the payment coerced from Petra Pet, payment of which has not been disputed by Panda, therefore Panda's reliance on *Guam* is irrelevant. Nevertheless, the documentation accepted by the ALJ does not appear to be lacking. *Guam* does not state that the presentation of checks were required in all cases, as Panda implies.⁸

⁷ Kuehne + Nagel, Inc. was Petra Pet's customs broker. Petra Pet Appendix at 8.

⁸ The ALJ in *Guam* merely gave an example of a case, *Cotton Import & Export Co. v. Sea-Land Service, Inc.*, 20 S.R.R. 260 (FMC 1980), where

Rather, the question in *Guam* was whether documentation appeared to be lacking, which it does not in this case. Thus, Panda's argument is irrelevant and the authority it cites does not invalidate the finding by the ALJ that Petra Pet, through Kuehne + Nagel, Inc., paid RDM the freight charges requested by Panda. However, even though the affidavit was sufficient to show that Petra Pet had paid RDM, whether the actual checks for payments to RDM were produced, is not especially relevant to a determination of whether Panda's acts were a failure to observe reasonable practices. The amount of \$177,229.38 in actual damages was still incurred by Petra Pet as a result of Panda coercing payments, aborting a shipment, withholding cargo, and failing to provide notice in violation of the Act. 322 S.R.R. at 805.

II. *Reparations*

As a result of the Respondents' violations of the Act, Petra Pet sought "each of them, be ordered separately or collectively," to pay a sum of no less than \$269,940.68, plus interest, for violating section 10(d)(1) of the Act. Complaint at 9-11. The total amount demanded included: (1) \$130,526.73 for "amounts extorted through the second wire transfer covering containers diverted back to China from Korea;" (2) \$27,932.65 for "demurrage and storage costs paid to Chinese authorities with respect to containers diverted back to China from Korea;" (3) \$6,170.00 for a "first miscellaneous payment to Panda Global with respect to containers diverted back to China from Korea;" (4) \$12,600.00 for a "second miscellaneous payment to Panda with respect to containers diverted back to China from Korea;" (5) attorneys' fees of \$61,963.50; (6) \$29,784.00 for "demurrage paid in the United States as a result of Panda Global's failure to provide freight releases;" and (7) \$963.80 for "amounts attributable to double freight payments in first wire transfer." *Id.* Subtracting the amount for attorneys' fees of \$61,963.50,⁹ this

the Commission had held copies of both the front and back of the check were required in that specific case. *Guam*, 295 S.R.R. at 905 (ALJ 2002).

⁹ Pursuant to Commission Rule 254, the complainant may file a petition

amount becomes \$207,977.18. As discussed above, Petra Pet later reduced its demand against Panda to \$207,013.38 by removing its claim for \$963.80. Petra Pet Reply Brief at 1 n.1. The evidence supported the ALJ's FOF. 32 S.R.R. at 791-97.

The Act allows for reparations for actual injury caused by a violation of the Act. 46 U.S.C. § 41301(a). Section 11(g) of the Act states "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's fees." 46 U.S.C. § 41305(b). Petra Pet sufficiently established the reparations it claimed were as a direct result of Panda's violation of section 10(d)(1). *See James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) (complainant has the burden of proving an entitlement to reparations.)

The ALJ correctly awarded reparations against Panda in the amount of \$177,229.38. 32 S.R.R. at 805. The ALJ was correct to deny reparations for \$29,784.00, alleged in the Complaint at 11, for "demurrage paid in the United States as a result of Panda Global's failure to provide freight releases," because Petra Pet did not present sufficient evidence to demonstrate that these damages were the result of a violation of the Act by Panda.

CONCLUSION

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

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

IT IS FURTHER ORDERED, That Panda is liable for reparations in the amount of \$177,229.38 to Petra Pet.

for attorney's fees after a final reparation award. 46 C.F.R § 502.254.

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

By the Commission.

Karen V. Gregory
Secretary

Commissioner Dye, dissenting:

I dissent from the majority's decision to uphold the Administrative Law Judge's (ALJ's) finding that Panda Logistics Limited violated 46 U.S.C. § 41102(c), and the ALJ's award of \$177,229.38 in reparations, for the reasons stated in the dissent by Commissioner Khouri, with whom I joined, in Docket No. 10-06. *Yakov Kobel v. Hapag-Lloyd A.G.*, __S.R.R.__, (FMC 2013).

Commissioner Khouri, concurring in part and dissenting in part:

I concur with the majority's decision to affirm the ALJ's finding that Petra Pet did not present sufficient evidence regarding demurrage paid in the United States as a result of Panda Global's failure to provide freight releases and thus denying the claimed \$29,784.00 in reparations.

I do not agree with the majority's decision to uphold the ALJ's Initial Decision concerning the finding that Panda violated section 10(d)(1), 46 U.S.C. Section 41102(c), of the Shipping Act and that Panda is therefore liable for any reparations to Petra Pet.

I adopt and fully incorporate herein the views, arguments and reasoning set forth in my dissents in *Yakov Kobel, et al. v. Hapag-Lloyd A.G., et al.*, __S.R.R.__ (FMC 2013); *Bimsha*

International v. Chief Cargo Services, Inc., et al., __S.R.R.__ (FMC 2013); *Smart Garments v. Worldlink Logix Services, Inc.*, __S.R.R.__ (FMC 2013) and *Temple v. Anderson, et al.*, __S.R.R. __, Case No. 1919(I) (FMC 2013) (Order vacating and remanding decision of Settlement Officer).

As was the situation in these above cited cases, the Respondent in the case *sub judice* may well be in breach of the contractual terms of the applicable bills of lading, may well be in breach of fiduciary duties imposed by relevant provisions of agency law, may well be liable to claimant under the tort of conversion, and, last, may well be in violation of certain admiralty law canons concerning maritime liens. Notwithstanding such potential causes of action that might be recognized in an appropriate court of law, the facts presented in this case do not begin to address the requisite elements of a section 10(d)(1) claim.

There is no allegation and no evidence submitted by the complainant that respondents engaged in a “practice” of diverting cargos or asserting maritime liens on cargo to enforce an antecedent “lien” that no longer existed due to a prior release of the proper related cargo. As discussed in *Kobel, Bimsha, Smart Garments*, and *Temple*, a successful claim under section 10(d)(1) of the Shipping Act requires more. As I held in *Temple*:

[A] cognizable section 10(d)(1) claim requires (i) a “practice” of conduct, acts or omissions, with the term “practice” meaning the complained of activity was continual and habitual conduct over time, (ii) a determination that such conduct, acts or omissions are unjust and unreasonable, and, last, (iii) the practice of employing such unjust and unreasonable activity is adverse and detrimental to the commerce of the United States.¹⁰

¹⁰ *Temple, supra*, at __. See *Stockton Elevators*, 8 F.M.C. 187, 201 (emphasis added)(“However, even if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be

Based on the foregoing analysis, I find that the alleged facts, with full benefit of assumptions as to truth and veracity, do not state a claim that is cognizable under section 10(d)(1) of the Shipping Act.

found to be unjust or unreasonable. *The commerce of the United States was not deterred.*")