

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-09

CENTURY METAL RECYCLING PVT. Ltd.

v.

DACON LOGISTICS, LLC d/b/a CODA FORWARDING; GREAT AMERICAN ALLIANCE INSURANCE COMPANY; AVALON RISK MANAGEMENT; HAPAG-LLOYD AMERICA, INC.; and MITSUI OSK LINES

**INITIAL DECISION ON DEFAULT ON CLAIMS AGAINST
DACON LOGISTICS, LLC d/b/a CODA FORWARDING¹**

On October 19, 2012, complainant Century Metal Recycling Pvt. Ltd. (Century Metal) commenced this proceeding by filing a Complaint alleging that respondents Dacon Logistics, LLC d/b/a CODA Forwarding (Dacon), Great American Alliance Insurance Company (Great American), Avalon Risk Management (Avalon), Hapag-Lloyd America, Inc. (Hapag-Lloyd), and Mitsui OSK Lines (Mitsui) violated the Shipping Act of 1984. All Respondents except Dacon responded to the Complaint, settled the claims against them, and were dismissed from the proceeding. *Century Metal Recycling Pvt. Ltd. v. Dacon Logistics, LLC d/b/a Coda Forwarding; Great American Alliance Insurance Company; Avalon Risk Management; Hapag-Lloyd America, Inc.; and Mitsui OSK Lines*, FMC No. 12-09 (ALJ Dec. 11, 2012) (Order Granting Request to Dismiss Complaint Against Hapag-Lloyd America, Inc.), Notice Not to Review (FMC Jan. 11, 2013); *Century Metal v. Dacon Logistics, LLC*, FMC No. 12-09 (FMC Jan. 10, 2012) (Notice of Voluntary Dismissal of Complaint against Great American Alliance Insurance Company and Avalon Risk Management); *Century Metal v. Dacon Logistics, LLC*, FMC No. 12-09 (ALJ Apr. 4, 2013) (Order Granting Request to Dismiss Complaint Against Mitsui OSK Lines), Notice Not to Review (FMC May 7, 2013).

¹ The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

Century Metal did not receive any monetary compensation in the settlements. (Kaushal Supp. Aff. filed April 22, 2013 ¶ 7.)

As explained more fully below, Dacon, which was licensed by the Commission as an ocean transportation intermediary (OTI) on July 8, 2008, License No. 021544NF, has not answered the Complaint or responded to an order to show cause why an initial decision on default should not be entered against it. Accordingly, Dacon is (1) found to be in default; (2) found to have violated the Act; (3) found to have caused actual injury to Century Metal by its violations; and (4) ordered to pay a reparation award to Century Metal. I note that on May 8, 2013, the Director of the Commission's Bureau of Certification and Licensing issued an Order of Revocation revoking Dacon's OTI license effective April 25, 2013, because Dacon's NVOCC bond and ocean freight forwarder bonds were cancelled. 78 Fed. Reg. 28845 (May 16, 2013). Therefore, it is not necessary to enter a cease and desist order.

This decision is divided into five parts. Part I sets forth the background. Part II sets forth the controlling authority. Part III sets forth the reasons Dacon is found to be in default. Part IV sets forth the findings of fact on which the decision is based. Part V sets forth the conclusions of law.

I. BACKGROUND.

A. Century Metal's Complaint.

The Complaint alleges that Century Metal paid Dacon, an ocean transportation intermediary licensed by the Commission as a non-vessel-operating common carrier and as an ocean freight forwarder (License No. 021544NF), a total of \$60,500.00 to transport thirty containers of aluminum and zinc to India under five separate bills of lading. Dacon then engaged Hapag-Lloyd to transport one shipment of ten containers and Mitsui to transport four shipments of ten, five, two, and three containers. Hapag-Lloyd and Mitsui identified Dacon as the shipper on the bills of lading for these shipments. Hapag-Lloyd and Mitsui refused to release the containers in India because Dacon did not pay Hapag-Lloyd and Mitsui for the ocean transportation. Century Metal contacted Dacon at least twice and Dacon promised it would take care of the problem. As of the date of the filing of the Complaint, however, the containers had not been released and Century Metal was incurring "approximately \$3,000-\$4000.00 [*sic*] per day in detention fees." (Complaint ¶¶ IV.H and IV.L.)

Century Metal contends that Dacon's failure to pay the Hapag-Lloyd and Mitsui charges violates section 10(d)(1) of the Act. 46 U.S.C. § 41102(c).² As a result of Dacon's violations:

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. 109-170, at 2 (2005). The Commission often refers to provisions of the Act by their section numbers in the Act's original enactment, references that are well-known in the industry. *See, e.g., United Logistics (Lax) Inc. – Possible Violations of Sections 10(a)(1) and 10(b)(2) of the Shipping Act of 1984*, FMC No. 13-01

Century Metal has sustained and continues to sustain injuries and damages, including but not limited to daily detention fees in the amount of approximately \$3,000-\$4000.00 [*sic*] per day, economic considerations, lost business, foregone business and other damages amounting to a sum of over one million dollars to be determined more precisely at hearing.

(Complaint ¶ VI.A.) Century seeks the following relief:

(a) An Order compelling Dacon to make payment in the amounts owed to Hapag-Lloyd and Mitsui to facilitate the release of Century Metal's containers;

(b) An Order compelling Dacon to pay the injured Century Metal by way of reparations in the amount of actual injury to be determined at hearing, including the amounts paid to suppliers and compensatory damages, including interest paid to bankers on such payments;

(c) An Order requiring Dacon to compensate Century Metal for its attorneys' fees and expenses incurred in this matter;

(d) An order requiring the release of the bond posted by Dacon with this Commission in favor of Century Metal.

(Complaint ¶ VII.) After it filed the Complaint, Century Metal paid Hapag-Lloyd and Mitsui for the ocean transportation and paid ground rent and detention fees. The containers have been released to the consignee.

I take official notice, 46 C.F.R. § 502.226, of Commission records showing that the Secretary sent the Complaint to Dacon by United Parcel Service (UPS) to the address in the Complaint, 31 Mountain Blvd., Warren, NJ 07059-5644. UPS records indicate that the package was delivered on November 8, 2012, at 9:37 and that "Rose" signed for the package.

B. Century Metal's First Motion for Default.

Dacon did not answer or otherwise respond to the Complaint. On December 21, 2012, Century Metal filed a motion for initial decision on default against Dacon, contending that by not responding to the Complaint, "Dacon has waived its right to appear and contest the allegations of the Complaint and [has] authorized the presiding officer to enter an initial order on default." (Motion for Initial Decision on Default at 1-2.) Dacon did not respond to the motion. The motion for default was denied without prejudice for three reasons: (1) While the factual allegations of the Complaint must be taken as true, Century Metal did not set forth any argument justifying how Dacon's actions violate section 10(d)(1) of the Act; (2) Assuming Dacon's actions violated section

(Jan. 25, 2013) (Order of Investigation and Hearing). I follow that practice in this Initial Decision.

10(d)(1) of the Act, Century Metal did not establish its damages; and (3) Century Metal may have been partially compensated for its alleged harm in its settlements with other Respondents. *Century Metal v. Dacon Logistics, LLC*, FMC No. 12-09, Order at 3-4 (ALJ Feb. 11, 2013) (Order Denying without Prejudice Complainant's Motion for Initial Decision on Default as to Dacon Logistics, LLC).

C. Century Metal's Second Motion for Default.

On April 12, 2013, Century Metal served and filed its second Complainant's Motion for Initial Decision on Default as to Dacon Logistics, LLC (Second Motion for Default). Century Metal addressed the reasons stated for denying without prejudice the first motion and attached Dacon invoices for each shipment, Dacon and Hapag-Lloyd or Mitsui bills of lading for each shipment, and invoices from Hapag-Lloyd and Mitsui for detention charges and ground rent for each shipment. Although the affidavit accompanying the motion set forth the dollar amount Century Metal contended it paid for release of the containers, it did not state whether Century Metal received any monetary compensation in its settlements with the other parties. Century Metal was ordered to file a supplemental affidavit or declaration stating whether it received any monetary compensation in its settlements with the settling Respondents, and if it did, how much it received. *Century Metal v. Dacon Logistics, LLC*, FMC No. 12-09 (ALJ Apr. 17, 2013) (Order for Complainant to Supplement Motion for Default; Order for Respondent Dacon to Respond and to Show Cause).

D. Order for Dacon to Show Cause.

The April 17, 2013, Order also noted that Dacon had not answered or otherwise responded to the Complaint.

Dacon is currently in default. There may be some valid reason why Dacon has failed to respond to the Complaint. Therefore, it will be granted additional time to respond to the Complaint, to respond to Century Metal's second motion for initial decision on default, and to show cause why judgment should not be entered against it. If Dacon fails to respond to this Order by April 29, 2013, an initial decision on default may be entered against it. It is noted that Century Metal seeks a reparation award in the amount of \$329,423.71 plus interest, attorney's fees, and other damages as appropriate.

Id.

On April 17, 2013, the Office of Administrative Law Judges sent the Order to Dacon by UPS and regular mail at 31 Mountain Blvd., Warren, NJ 07059-5644. The UPS package was returned on April 25, 2013, but the regular mail was not returned. On April 30, 2013, the Office of Administrative Law Judges sent another copy of the April 17, 2013, Order to Dacon at 31-U Mountain Blvd., Warren, NJ 07059-5644, a more precise address used by Dacon on its bills of lading and other documents. The second regular mailing has not been returned.

E. Century Metal's Supplements to Second Motion for Default.

In response to the April 17, 2013, Order, on April 22, 2013, Century Metal filed a supplemental affidavit in support of its second motion for default stating that Century Metal paid the amounts demanded by Hapag-Lloyd and Mitsui for release of the shipments and stated that it had not received any monetary compensation in its settlements with Hapag-Lloyd, Mitsui, Great American, or Avalon. (Supplemental Affidavit in Support of Plaintiff's Motion for Default Judgment (filed Apr. 22, 2013) ¶¶ 7-8.) After additional review of the documents submitted with the second motion for default, Century Metal was ordered to submit additional information in response to several questions. *Century Metal v. Dacon Logistics, LLC*, FMC No. 12-09 (ALJ May 14, 2013) (Second Order for Complainant to Supplement Motion for Default). On May 22, 2013, Century Metal filed the Supplemental Affidavit of Rajiv Kaushal responding to the questions.

II. CONTROLLING AUTHORITY.

A. Statutory Background.

The Act defines and regulates a number of different kinds of entities that are involved in the international shipment of cargo by water, including two kinds 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).

The term "shipper" means – (A) a cargo owner; (B) the person for whose account the ocean transportation of cargo is provided; (C) the person to whom delivery is to be made; (D) a shippers' association; or (E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.

46 U.S.C. § 40102(22). To be an NVOCC, the intermediary must meet the 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).

Century Metal alleges that Dacon violated section 10(d)(1) of the Act: “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).

Century Metal filed its Complaint and Amended Complaint pursuant to section 11 of the Act.

A person may file with the . . . Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

46 U.S.C. § 41301(a).

Century Metal seeks a reparation award for its injuries. The Act defines actual injury.

(a) *Definition.* – In this section, the term “actual injury” includes the loss of interest at commercial rates compounded from the date of injury.

(b) *Basic amount.* – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . 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. Evidence and Burden of Persuasion.

Under the Administrative Procedure Act, 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). All documents provided by Century Metal with its Complaint, with its motions for initial decision on default, and with its supplements to the motions on default are hereby admitted as evidence. This initial decision on default is based on the pleadings and exhibits submitted by Century Metal.

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.

A complainant alleging a violation of the Shipping Act “has the initial burden of proof to establish the[] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true.” *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at *3 (ALJ June 13, 2005). See 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. “[A]s of 1946 the ordinary meaning of burden of proof [in section 556(d)] was burden of persuasion, and we understand the [Administrative Procedure Act’s] unadorned reference to ‘burden of proof’ to refer to the burden of persuasion.” *Director, Office of Workers’ Compensation 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. at 102. “[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 Steamship Corp. v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993), adopted in relevant part, 26 S.R.R. 1424 (1994).

III. DACON IS IN DEFAULT.

A. Dacon Received Notice of this Proceeding.

The Complaint alleges that Dacon is located at 31 Mountain Blvd., Warren, NJ 07059-5644. Commission records demonstrate that Dacon listed its address as 31-U Mountain Blvd., Warren, NJ 07059-5644, when it became licensed as an NVOCC and ocean freight forwarder and that was still its address when its license was revoked. 78 Fed. Reg. 28845 (May 16, 2013). See FF 2-4.³ I take official notice, 46 C.F.R. § 502.226, of Commission records showing that the Secretary sent the Complaint to Dacon by United Parcel Service (UPS) to the address in the Complaint, 31 Mountain Blvd., Warren, NJ 07059-5644. UPS records indicate that the package was delivered on November 8, 2012, at 9:37 and that “Rose” signed for the package. FF 42. On April 17, 2013, the

³ FF followed by a number refers to a finding of fact in Section IV below.

Office of Administrative Law Judges sent a copy of the April 17, 2013, Order to Show Cause to 31 Mountain Blvd., Warren, NJ 07059-5644 by first class mail. The mail was not returned. FF 45. On April 30, 2013, the Office of Administrative Law Judges sent another copy of the April 17, 2013, Order to Dacon at 31-U Mountain Blvd., Warren, NJ 07059-5644, by first class mail. The mail was not returned. FF 46.

The Supreme Court has stated “that due process requires the government to provide ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Jones v. Flowers*, 547 U.S. 220, 226 (2006), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

There is a presumption that, in the absence of evidence to the contrary, a notice provided by a government agency is deemed to have been placed in the mail on the date shown on the notice and received within a reasonable time thereafter. *See Me. Med. Ctr. v. United States*, 675 F.3d 110, 114 (1st Cir. 2012); *Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 522, 526 (2d Cir. 1996).

Loubriel v. Fondo del Seguro del Estado, 694 F.3d 139, 143 (1st Cir. 2012).

Based on Commission records and the presumption of delivery articulated in *Loubriel*, I find that Dacon received notice – the Complaint and the order to show cause – that conveyed all of the salient information reasonably calculated, under all the circumstances, to apprise it of the pendency of this proceeding and afford it an opportunity to protect its interests. “The Constitution does not require that an effort to give notice succeed. *See, e.g., Dusenbery v. United States*, 534 U.S. 161, 122 S. Ct. 694, 151 L. Ed. 2d 597 (2002).” *Ho v. Donovan*, 569 F. 3d 677, 680 (7th Cir. 2009).

B. Dacon Has Defaulted.

Despite having received the Complaint and the order to show cause, Dacon has failed to answer or otherwise respond to the Complaint and failed to respond to the notice of default and order to show cause. Under such circumstances, it is customary for the Commission as well as courts to find that a defaulting respondent has admitted the well-pleaded allegations both as to the specific violations of law alleged and as to the specific money damages alleged. *Bermuda Container Line Ltd. v. SHG Int’l Sales, Inc., FX Coughlin Co., and Clark Building Systems, Inc.*, 1998 WL 309055 (ALJ Mar. 24, 1998); *Hugh Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871, 872 (ALJ 1993). *See City of N.Y. v. Michalis Pawn Shop, LLC*, 645 F.3d 114 (2d Cir. 2011). *See also* 46 C.F.R. § 502.62(b)(6)(i) (effective date November 5, 2012) (“Well pleaded factual allegations in the complaint not answered or addressed will be deemed to be admitted.”). I find that Dacon is in default.

IV. FINDINGS OF FACT.

The findings of fact are based on the well-pleaded allegations in the Complaint supplemented by additional information filed by Century Metal in response to the orders to supplement.

1. Century Metal Recycling Pvt. Ltd. (Century Metal) is a private limited company registered in the state of Connecticut. (Complaint ¶ I.A.)
2. Respondent Dacon Logistics, LLC d/b/a CODA Forwarding (Dacon) is located at 31-U Mountain Boulevard, Warren, New Jersey 07059. (Complaint ¶ II.B; Complaint, Exhibit A; 78 Fed. Reg. 28845 (May 16, 2013).)
3. On July 9, 2008, Dacon was licensed by the Commission as an ocean freight forwarder and a non-vessel-operating common carrier, FMC OTI License No. 021544NF. (Official Notice of Commission Records; Complaint ¶ II.A; Complaint, Exhibit B.)
4. On May 8, 2013, the Director of the Commission's Bureau of Certification and Licensing issued an Order of Revocation revoking OTI License No. 021544NF, effective April 25, 2013, because Dacon's NVOCC bond and ocean freight forwarder bonds were cancelled. 78 Fed. Reg. 28845 (May 16, 2013).
5. Century Metal owns a facility in Middletown, Connecticut, that purchases aluminum and zinc that it ships to India for recycling in the manufacture of aluminum and zinc alloys. (Complaint ¶ IV.A.)
6. In July 2012, Century Metal entered into an agreement with Dacon to ship containers containing aluminum and zinc from the United States to India. (Complaint ¶ IV.B.)
7. Dacon then contracted with Hapag-Lloyd America, Inc., (Hapag-Lloyd) and Mitsui O.S.K. Lines, Ltd. (Mitsui) to transport the containers by water from the United States to India. (Complaint ¶ IV.C.)
8. Century Metal paid Dacon a total of \$60,500.00 for Dacon's services and for ocean freight to be paid to the vessel-operating common carriers that carried the shipments. (Complaint ¶ IV.D.)
9. On July 24, 2012, Dacon issued invoice number WR-12-103137, AWB/BL No. DLB-12-101804, to Century Metal for \$19,000.00 for ocean freight services plus a \$50.00 bill of lading fee to ship ten containers of aluminum scrap from the United States to India. (Complaint, Exhibit A.)
10. Century Metal paid invoice number WR-12-103137 in full on August 2, 2012. (Supp. Aff. of Rajiv Kaushal filed May 22, 2013 ¶ 7.)
11. On July 24, 2012, Dacon issued Dacon bill of lading number EDC-906HBLO-12, Export Reference DLB-12-101804, identifying Century Metal, Middletown, CT as the shipper; Century Metal, Faridabad 121102 India, as the consignee; *Dubai Express* as the carrier; Savannah, Georgia, as the port of loading; Mundra [India] as the foreign port of unloading; and identifying the cargo as ten containers of aluminum scrap. (Complaint, Exhibit B.)

12. On July 24, 2012, Hapag-Lloyd issued Hapag-Lloyd bill of lading number HLCUCHI120760536 identifying Dacon as the shipper; Neo Trans Logistics Pvt. Ltd., New Delhi 110037 India, as the consignee; *Dubai Express* as the vessel; Savannah, Georgia, as the port of loading; Mundra [India] as the foreign port of unloading; and identifying the cargo as the ten containers of aluminum scrap identified in Dacon bill of lading number EDC-906HBLO-12. (Complaint, Exhibit B.)
13. The *Dubai Express* shipment arrived in India in early September. When Century Metal attempted to take delivery of the containers, Hapag-Lloyd refused to release the containers because Dacon had failed to pay ocean freight to Hapag-Lloyd. (Complaint ¶ IV.E.)
14. On August 7, 2012, Dacon issued invoice number WR-12-103140, AWB/BL No. DLB-12-101811, to Century Metal for \$19,000.00 for ocean freight services plus a \$50.00 bill of lading fee to ship ten containers of aluminum scrap from the United States to India. (Complaint, Exhibit A.)
15. Century Metal paid invoice number WR-12-103140 in full on August 30, 2012. (Supp. Aff. of Rajiv Kaushal filed May 22, 2013 ¶ 7.)
16. On August 7, 2012, Dacon issued Dacon bill of lading number EDC-907HBLO-12, Export Reference DLB-12-101811, identifying Century Metal, Middletown, CT as the shipper; Century Metal, Faridabad 121102 India, as the consignee; *YM Milestone* as the carrier; Savannah, Georgia, as the port of loading; Mundra [India] as the foreign port of unloading; and identifying the cargo as the ten containers of aluminum scrap. (Complaint, Exhibit C.)
17. On August 7, 2012, Mitsui issued Mitsui bill of lading number MOLU26004552994 identifying Dacon as the shipper; Neo Trans Logistics Pvt. Ltd., New Delhi 110037 India, as the consignee; *YM Milestone* as the vessel; Savannah, Georgia, as the port of loading; Mundra [India] as the foreign port of unloading; and identifying the cargo as the ten containers of aluminum scrap identified in Dacon bill of lading number EDC-907HBLO-12. (Complaint, Exhibit C.)
18. The *YM Milestone* shipment arrived in India in early October. When Century Metal attempted to take delivery of the containers, Mitsui refused to release the containers because Dacon had failed to pay ocean freight to Mitsui. (Complaint ¶ IV.F.)
19. On August 14, 2012, Dacon issued invoice number WR-12-103143, AWB/BL No. DLB-12-101808, to Century Metal for \$11,125.00 for ocean freight services plus a \$50.00 bill of lading fee to ship five containers of aluminum scrap from the United States to India. (Complaint, Exhibit A.)
20. Century Metal paid invoice number WR-12-103143 in full on August 30, 2012. (Supp. Aff. of Rajiv Kaushal filed May 22, 2013 ¶ 7.)

21. On August 8, 2012, Dacon issued Dacon bill of lading number EDC-911HBLO-12, Export Reference DLB-12-101808, identifying Century Metal, Middletown, CT as the shipper; Century Metal, Faridabad 121102 India, as the consignee; MOL *Tyne* as the carrier; Norfolk, VA, as the port of loading; Mundra [India] as the foreign port of unloading; and identifying the cargo as five containers of aluminum scrap. (Complaint, Exhibit D.)
22. On August 14, 2012, Mitsui issued Mitsui bill of lading number MOLU26004519194 identifying Dacon as the shipper; Neo Trans Logistics Pvt. Ltd., New Delhi 110037 India, as the consignee; MOL *Tyne* as the vessel; Norfolk, VA, as the port of loading; Mundra [India] as the foreign port of unloading; and identifying the cargo as the five containers of aluminum scrap identified in Dacon bill of lading number EDC-911HBLO-12. (Complaint, Exhibit D.)
23. The *Tyne* shipment arrived in India in early October. When Century Metal attempted to take delivery of the containers, Mitsui refused to release the containers because Dacon had failed to pay ocean freight to Mitsui. (Complaint ¶ IV.G.)
24. On August 14, 2012, Dacon issued invoice number WR-12-103142, AWB/BL No. DLB-12-101812, to Century Metal for \$4,450.00 for ocean freight services plus a \$50.00 bill of lading fee to ship two containers of aluminum scrap from the United States to India. (Complaint, Exhibit A.)
25. Century Metal paid invoice number WR-12-103142 in full on August 30, 2012. (Supp. Aff. of Rajiv Kaushal filed May 22, 2013 ¶ 7.)
26. On August 8, 2012, Dacon issued Dacon bill of lading number EDC-910HBLO-12, Export Reference DLB-12-101812, identifying Century Metal, Middletown, CT as the shipper; Century Metal, Faridabad 121102 India, as the consignee; MOL *Tyne* as the carrier; Norfolk, VA, as the port of loading; Mundra [India] as the foreign port of unloading; and identifying the cargo as two containers of aluminum scrap. (Complaint, Exhibit D.)
27. On August 14, 2012, Mitsui issued Mitsui bill of lading number MOLU26004565564 identifying Dacon as the shipper; Neo Trans Logistics Pvt. Ltd., New Delhi 110037 India, as the consignee; MOL *Tyne* as the vessel; Norfolk, VA, as the port of loading; Mundra [India] as the foreign port of unloading; and identifying the cargo as the two containers of aluminum scrap identified in Dacon bill of lading number EDC-910HBLO-12. (Complaint, Exhibit D.)
28. The *Tyne* shipment arrived in India in early October. When Century Metal attempted to take delivery of the containers, Mitsui refused to release the containers because Dacon had failed to pay ocean freight to Mitsui. (Complaint ¶ IV.G.)

29. On August 22, 2012, Dacon issued invoice number WR-12-103145, AWB/BL No. DLB-12-101814, to Century Metal for \$6,675.00 for ocean freight services plus a \$50.00 bill of lading fee to ship three containers of aluminum scrap from the United States to India. (Complaint, Exhibit A.)
30. Century Metal paid invoice number WR-12-103145 in full on September 5, 2012. (Supp. Aff. of Rajiv Kaushal filed May 22, 2013 ¶ 7.)
31. On August 22, 2012, Dacon issued Dacon bill of lading number EDC-912HBLO-12, Export Reference DLB-12-101814, identifying Century Metal, Middletown, CT as the shipper; Century Metal, Faridabad 121102 India, as the consignee; MOL *Paramount* as the carrier; Norfolk, VA, as the port of loading; Nhava Sheva (Jawaharlal) [India] as the foreign port of unloading; and identifying the cargo as three containers of aluminum scrap. (Complaint, Exhibit E.)
32. On August 22, 2012, Mitsui issued Mitsui bill of lading number MOLU26004633062 identifying Dacon as the shipper; Neo Trans Logistics Pvt. Ltd., New Delhi 110037 India, as the consignee; MOL *Paramount* as the vessel; Norfolk, VA, as the port of loading; Nhava Sheva – GTI [India] as the foreign port of unloading; and identifying the cargo as the three containers of aluminum scrap identified in Dacon bill of lading number EDC-912HBLO-12. (Complaint, Exhibit E.)
33. The *Paramount* shipment arrived in India in early October. When Century Metal attempted to take delivery of the containers, Mitsui refused to release the containers because Dacon had failed to pay ocean freight to Mitsui. (Complaint ¶ IV.H.)
34. Hapag-Lloyd and Mitsui charged Century Metal approximately \$3,000.00-\$4,000.00 per day in detention fees until the containers were released. (Complaint ¶ IV.I.)⁴
35. In September 2012, Century Metal contacted Dacon inquiring about Hapag-Lloyd's refusal to release the containers. David Larr, a member of Dacon, apologized to Century Metal for the delay in releasing the containers. (Complaint ¶ IV.J; Complaint Exhibit G.)
36. On September 26, 2012, Century Metal once more contacted Dacon and Dacon again promised that it was attending to the release of the containers. (Complaint ¶ IV.J; Complaint Exhibit H.)
37. As of the date of the Complaint, Dacon had failed to resolve the matter or make payments to Hapag-Lloyd and/or Mitsui. (Complaint ¶ IV.L.)

⁴ The Complaint includes two paragraphs IV.I. This is the second ¶ IV.I.

38. Century Metal paid Hapag-Lloyd \$17,540.00 and Mitsui \$37,200.00 for the ocean transportation of the containers. (Supp. Aff. of Rajiv Kaushal filed May 22, 2013 ¶ 10.)
39. On December 11, 2012, Hapag-Lloyd invoiced Neo Trans Logistics 3,250,141.55 Indian Rupees in detention charges and 3,989,903.60 Indian Rupees (a total of 7,240,045.15 Indian Rupees) in ground rent for the ten containers shipped pursuant to Dacon bill of lading number EDC-906HBLO-12 and Hapag-Lloyd bill of lading number HLCUCHI120760536. Century Metal paid a total of \$133,012.21 to secure release of the ten containers. (Kaushal Aff. filed April 12, 2013 ¶ 12 and Aff. Exhibit F; Supp. Aff. of Rajiv Kaushal filed May 22, 2013 ¶ 5.)
40. On December 28, 2012, Mitsui invoiced Neo Trans Logistics 1,075,888.40 Indian Rupees in detention charges and Albatross Inland Ports invoiced Sanjivani Non Ferrous Trading 3,037,090.80 Indian Rupees in ground rent for the ten containers shipped pursuant to Dacon bill of lading number EDC-907HBLO-12 and Mitsui bill of lading number MOLU26004552994. Century Metal paid a total of \$75,661.87 to secure release of the ten containers. (Kaushal Aff. filed April 12, 2013 ¶ 11 and Aff. Exhibit E.)
41. On December 26, 2012, Mitsui invoiced Neo Trans Logistics 454,358.44 Indian Rupees in detention charges and Albatross Inland Ports invoiced Sanjivani Non Ferrous Trading 1,145,510.20 Indian Rupees in ground rent for the five containers shipped pursuant to Dacon bill of lading number EDC-911HBLO-12 and Mitsui bill of lading number MOLU26004519194. Century Metal paid a total of \$29,431.01 to secure release of the five containers. (Kaushal Aff. filed April 12, 2013 ¶ 8 and Aff. Exhibit B; Supp. Aff. of Rajiv Kaushal filed May 22, 2013 ¶ 4.)
42. On December 26, 2012, Mitsui invoiced Neo Trans Logistics 181,743.78 Indian Rupees in detention charges and Albatross Inland Ports invoiced Sanjivani Non Ferrous Trading 451,013.04 Indian Rupees in ground rent for the two containers shipped pursuant to Dacon bill of lading number EDC-910HBLO-12 and Mitsui bill of lading number MOLU26004565564. Century Metal paid a total of \$11,640.12 to secure release of the two containers. (Kaushal Aff. filed April 12, 2013 ¶ 9 and Aff. Exhibit C.)
43. On December 26, 2012, Mitsui invoiced Neo Trans Logistics 285,124.45 Indian Rupees in detention charges and Albatross Inland Ports invoiced Sanjivani Non Ferrous Trading 757,418.50 Indian Rupees in ground rent for the three containers shipped pursuant to Dacon bill of lading number EDC-912HBLO-12 and Mitsui bill of lading number MOLU26004633062. Century Metal paid a total of \$19,178.50 to secure release of the three containers. (Kaushal Aff. filed April 12, 2013 ¶ 10 and Aff. Exhibit D.)
44. I take official notice, 46 C.F.R. § 502.226, of Commission records showing that the Secretary sent the Complaint to Dacon by United Parcel Service (UPS) to the address in the Complaint, 31 Mountain Blvd., Warren, NJ 07059-5644. UPS records indicate that the

package was delivered on November 8, 2012, at 9:37 and signed for by "Rose." (Official Notice of Commission Records.)

45. On April 17, 2013, the Office of Administrative Law Judges sent the April 17, 2013, Notice of Default and Order to Show Cause to Dacon at 31 Mountain Blvd., Warren, NJ 07059-5644, by UPS and regular mail. The UPS package was returned on April 25, 2013, but the first class mail was not returned. (Official Notice of Commission Records.)
46. On April 30, 2013, the Office of Administrative Law Judges sent another copy of the April 17, 2013, Order to Dacon at 31-U Mountain Blvd., Warren, NJ 07059-5644, by first class mail. The mail was not returned. (Official Notice of Commission Records.)

V. CONCLUSIONS OF LAW.

A. Century Metal Has Established That Dacon Operated as a Non-Vessel-Operating Common Carrier for the Transportation of the Five Shipments.

Commission records demonstrate that Dacon was licensed by the Commission as an NVOCC at the time it transported the five shipments. Century Metal established by a preponderance of the evidence that Dacon issued Dacon bills of lading for five multi-container shipments. A vessel-operating common carrier then issued a bill of lading identifying Dacon as the shipper for each of the five shipments:

1. Dacon B/L EDC-906HBLO-12 – Hapag-Lloyd B/L HLCUCHI120760536 – ten containers – FF 11-12.
2. Dacon B/L EDC-907HBLO-12 – Mitsui B/L MOLU26004552994 – ten containers – FF 16-17.
3. Dacon B/L EDC-911HBLO-12 – Mitsui B/L MOLU26004519194 – five containers – FF 21-22.
4. Dacon B/L EDC-910HBLO-12 – Mitsui B/L MOLU26004565564 – two containers – FF 26-27.
5. Dacon B/L EDC-912HBLO-12 – Mitsui B/L MOLU26004633062 – three containers – FF 31-32.

The bills of lading establish that Dacon, FMC License No. 021544NF, operated as an NVOCC on the shipments and that the five shipments (thirty containers) were transported by water from the United States to India.

I find that Dacon (an entity that as an NVOCC licensed by the Commission holds itself out as a common carrier) assumed responsibility for the transportation by water from the United States

to India of the thirty containers identified on Dacon bills of lading. Therefore, Dacon is subject to liability for a violation of section 10(d)(1) of the Act on any shipment at issue.

B. Century Metal Has Established That Dacon Violated Section 10(d)(1) of the Shipping Act.

1. Dacon failed to forward the money for five Century Metal shipments to the vessel-operating common carriers.

Century Metal paid Dacon the money Dacon charged for each of the five shipments, a charge that included the ocean freight charges of Hapag-Lloyd and Mitsui. FF 10, 15, 20, 25, 30. Dacon did not forward the money to pay the ocean freight charges to Hapag-Lloyd and Mitsui. Century Metal then paid Hapag-Lloyd \$17,540.00 and Mitsui \$37,200.00 for the ocean transportation of the containers, FF 38, money that Century Metal paid to Dacon that Dacon should have forwarded to Hapag-Lloyd and Mitsui.

2. Dacon violated section 10(d)(1) when failed to forward the money for ocean freight to Hapag-Lloyd and Mitsui.

a. Commission precedent.

Commission precedent appears to establish that a common carrier can violate section 10(d)(1) in one of two ways: (1) by failing to *establish* just and reasonable regulations and practices; or (2) by failing to *observe and enforce* just and reasonable regulations and practices that it has established.

The Commission recently addressed section 10(d)(1) in *Houben v. World Moving Services, Inc., supra*. In *Houben*, the Complainant/shipper made an agreement with World Moving Services, Inc. (WMS), an unlicensed entity, to ship cargo to Belgium and had made a partial payment to WMS. Complainant then paid the remaining balance as well as overweight charges directly to Cross Country Van Lines, LLC (CCVL), a licensed and bonded NVOCC. CCVL, acting as the NVOCC, consolidated two shipments with Complainant's shipment into a single cargo container and contracted with IM France as its destination agent. Thereafter, CCVL failed to pay IM France for its services on the three combined shipments. In the absence of payment from CCVL, IM France elected to retain the cargo notwithstanding Complainant's payments to WMS and CCVL. When CCVL failed to resolve its commercial dispute with IM France, Complainant sent the total charges required to secure release of his cargo to IM France to prevent its imminent seizure by customs authorities. CCVL's failure to resolve its dispute resulted in substantial delay and financial harm to Complainant.

The Commission has found failing to fulfill NVOCC obligations, as here, failing to pay the destination agent monies which have been received by the NVOCC for such services, an unjust and unreasonable practice in violation of Section 10(d)(1). *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (I.D. 1991); *Symington v. Euro Car*

Transport, Inc., 26 S.R.R. 871, 873 (I.D. 1993); *European Trade[] Specialists v. Prudential Grace Lines*, 19 S.R.R. 59, 62-63 (FMC 1979); *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788, 795 (I.D. 1992); and *Maritime [Service] Corporation v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655 (I.D. 1978), *aff.*, 18 S.R.R. 853 (FMC 1978). In this case, record evidence clearly indicates that CCVL did not dispute that it owed the monies for the three subject shipments and that CCVL did not pay to IM monies which it had collected previously from the Complainant. As a direct consequence of CCVL's failure to fulfill this obligation, a nearly six month delay in completing the shipments ensued. The record contains evidence sufficient to satisfy the burden of proof standard for administrative proceedings. Accordingly, we find that CCVL 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.

The test established by the Commission states that an NVOCC violates section 10(d)(1) when it fails to fulfill an NVOCC obligation. The question for this proceeding becomes: When Dacon failed to pay the vessel-operating common carriers Hapag-Lloyd and Misui for the ocean transportation of the containers out of the money that Century Metal paid Dacon, did Dacon fail to fulfill an NVOCC obligation and engage in an unjust and unreasonable practice in violation of section 10(d)(1)?

It is instructive to examine the NVOCC obligations that the NVOCCs failed to perform in the cases cited by the Commission. In *Adair v. Penn-Nordic Lines*, 26 S.R.R. 11 (ALJ 1991, notice of finality Oct. 24, 1991), the complainant, through freight forwarder Corporate World International, engaged Penn-Nordic Line, an NVOCC, to transport a motorcycle to New Zealand. Corporate World had engaged Penn-Nordic to transport shipments for other shippers in the past and had failed to pay Penn-Nordic for some of those shipments.

On the shipment at issue:

Corporate World booked the motorcycle shipment with Penn-Nordic, filled in the Penn-Nordic bill of lading forms, and arranged to have the shipment moved to California, intending to have it loaded onto the [ship] Penn-Nordic validated the bill of lading and made it an on-board bill, i.e., it announced in the document that the cargo was not only received by Penn-Nordic's agent in California but loaded on board a vessel, indicating loading as of January 14, 1990, with an on-board stamp validated as of that date. Nevertheless, as Penn-Nordic admits, Penn-Nordic removed the cargo from the container at the "last minute." Penn-Nordic did this, it states, because of difficulties Penn-Nordic had been having with Corporate World

in regard to late payments and to Corporate World's "insisting that cargo be released before they pay."

Adair v. Penn-Nordic Lines, 26 S.R.R. at 19. Penn-Nordic stored the motorcycle in a warehouse where it accrued storage charges.

Penn-Nordic contended that it removed the motorcycle from the shipment when it realized that it had been misdescribed and mismeasured. The judge found:

The record suggest[ed] not that Penn-Nordic aborted the shipment because it had visual reason to question the contents or measurement of the crate, but rather that Penn-Nordic did this to pressure Corporate World to pay its delinquent accounts as well as the instant account. The claim that the crate contained a mismeasured and misdescribed cargo appears to be an after-the-fact rationalization. However, whatever the reason, once Penn-Nordic issued an on-board bill of lading, which is an independent document on which Corporate World and other persons customarily rely in shipping, the abrupt termination of the shipment contrary to such a bill subjects Penn-Nordic to liability.

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There is therefore a basis to find that Penn-Nordic unreasonably aborted the motorcycle shipment notwithstanding the fact that it had issued an on-board bill of lading, thereby allowing a misleading shipping document to go forward in the shipping process. However, the negligent or deliberate issuance of an on-board bill of lading is not the only basis for a finding that Penn-Nordic acted unreasonably. Penn-Nordic made no efforts to protect the interests of the cargo owner or consignee. Penn-Nordic argues that it was dealing with the nominal shipper, Corporate World, which listed itself on the bill of lading as both exporter and forwarding agent. However, the bill of lading also clearly identified the consignee of the shipment . . . and even provided his address and telephone number in New Zealand. As Corporate World notes, 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 did not make any effort to notify the consignee that the motorcycle had been placed in a warehouse where it was accruing storage charges. Indeed, even by May 11, 1990, some three months after the shipment was supposed to have arrived in New Zealand and almost one month after Penn-Nordic had been paid for the shipment, Penn-Nordic had still not advised the consignee . . . as to what had happened to his motorcycle.

Penn-Nordic's indifference to the interests of the cargo owner and consignee in New Zealand, as shown above, is consistent with its subsequent behavior when it was finally paid freight for the shipment in April 1990. According to Penn-Nordic's attorney, . . . Penn-Nordic had agreed to move the shipment and absorb ("waive") the storage costs once payment of freight had been received. However, Mr. Garcia of Penn-Nordic simply reneged on this agreement, stating that "our attorney made an error" and that the storage charges could not be waived. Thus, Penn-Nordic issued and allowed an on-board bill of lading to go forward, on which document other persons would rely, failed to notify the cargo interests that the bill of lading was incorrect, and after agreeing, through its attorney, that Penn-Nordic would move the shipment forward and pay storage charges that Penn-Nordic itself had caused to accrue, reneged on its agreement. Moreover, Penn-Nordic has received payment of freight for the shipment, but retains the freight and refuses to refund it, although it never performed the transportation service.

The above litany of misconduct by Penn-Nordic amply demonstrates that Penn-Nordic failed 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 10(d)(1) of the 1984 Act.

Id. at 19-20 (citation to record omitted).

In *Symington v. Euro Car Transport*, 26 S.R.R. 871 (ALJ 1993), Notice Not to Review (FMC Apr. 22, 1993), the complainant entered into an oral contract with Euro Car, an NVOCC, to ship a car. Complainant transmitted \$16,600 to Euro Car, which was supposed to remit \$15,750 to the seller of the car, purchase insurance, and retain the remainder for shipping costs. Euro Car took the money, but failed to carry out its obligations under the contract or to return the money despite repeated demands. Complainant never received his car and was out of pocket in the amount of \$16,600. The administrative law judge held that by retaining complainant's money, but failing to carry out its obligation to pay for the automobile and arrange to carry it to its destination, Euro Car violated several sections of the Act, including section 10(d)(1) by failing to establish, observe and enforce just and reasonable regulations and practices relating to receiving, handling, storing, or delivering property. *Symington v. Euro Car Transport, Inc.*, 26 S.R.R. at 873.

The shipment at issue in *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co.*, 26 S.R.R. 788 (ALJ 1992, admin. final Dec. 31, 1992) (*Tractors and Farm Equipment v. Cosmos*), occurred in 1979, *id.* at 792, when the Shipping Act, 1916, was the controlling statute. Section 17 of the Shipping Act, 1916, provided in part:

Every [common carrier by water in foreign commerce] and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that such

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

46 U.S.C. § 816 (1976) (repealed). Section 17 of the 1916 Act was the forerunner of section 10(d)(1) of the 1984 Act. *See Puerto Rico Ports Authority v. Federal Maritime Comm'n*, 919 F.2d 799, 801 (1st Cir. 1990) (“Section 10(d)(1) of the 1984 Act tracks the language of § 17 of the 1916 Act”); *Crowley Liner Services, Inc. v. Puerto Rico Ports Authority*, FMC No. 00-02, 2001 WL 503699, at *2 (ALJ Apr. 26, 2001) (section 17, second paragraph, Shipping Act, 1916 (46 U.S.C. sec. 816, as it existed prior to 1984) is a predecessor statute to section 10(d)(1)).

Tractors and Farm Equipment (TAFE), a buyer in India, placed orders to purchase 5635 tractor tires from an American manufacturer. To take advantage of a temporary reduction of import duties, the tires had to arrive in Madras, India, by September 30, 1979. Cosmos Shipping Co. (Cosmos), a licensed freight forwarder (26 S.R.R. at 789), prepared the shipping documents. On booking notes and dock receipts, Cosmos identified the tires as “passenger tires,” which take up less space, instead of “tractor tires.” The ship en route to Madras only had room for 3600 tractor tires. Nevertheless, Cosmos prepared a certificate of origin showing that 5635 tractor tires were “clean shipped on board” to be transported to Madras. Cosmos also prepared a bill of lading showing that the tires were “clean shipped on board,” but the vessel-operating common carrier validated the bill of lading as “received for shipment.” Cosmos then changed the bill of lading to indicate falsely that the tires were “clean shipped on board” to meet a requirement to enable Cosmos to obtain payment of freight and cost of the goods under a letter of credit. *Tractors and Farm Equipment v. Cosmos*, 26 S.R.R. at 792-795.

The result of this pattern of misconduct by Cosmos (preparing incorrect or false booking notes, dock receipts, certificate of origin, bills of lading, rejection of [the VOCC’s] offer to transfer tires to another carrier or another ship so as to meet the September 30 deadline, authorizing [the VOCC] to carry the rest of the shipment on later vessels) was that TAFE was induced to pay in full under the letter of credit, although its contract [with the tire manufacturer] was breached, i.e., the entire shipment had not arrived by September 30, 1979. This misconduct by Cosmos caused TAFE damage

Id. at 795.

The record in this case provides an eloquent example of the damage that a freight forwarder can cause if it fails to observe just and reasonable practices and forgets that it acts as a fiduciary having the power to inflict harm on the shipping public. On the basis of the facts discussed above, I conclude that [Cosmos] . . . has violated section 17 . . . (currently section 10(d)(1), 1984 Act) by failing to establish, observe, and enforce just and reasonable practices relating to the receiving, handling, storing or delivering of property.

Id. at 796.

In *Maritime Service Corp. v. Acme Fast Freight*, complainant Maritime Service, the authorized agent for the billing and collecting of certain demurrage due to four vessel-operating common carriers (VOCCs), alleged that twenty-three NVOCCs violated several sections of the 1916 Act, including sections 17 (quoted above) and 18(a), by failing and refusing to pay demurrage due under the terms of the tariffs of the four VOCCs. *Maritime Service Corp. v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655, 1656 (ALJ 1978). Section 18(a) imposed requirements on common carriers by water in interstate commerce that were comparable to the requirements imposed on common carriers by water in foreign commerce by section 17 of the 1916 Act and section 10(d)(1) of the 1984 Act.

Every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

46 U.S.C. § 817(a) (1976) (repealed).

With regard to sections 17 and 18(a), the administrative law judge stated:

It . . . is alleged that the respondents subjected property entrusted to them as NVOCCs to liens for unpaid demurrage without the knowledge or consent of the owners of the property, an unreasonable practice related to the receiving, handling, storing and delivering of property in violation of Sections 17 and 18(a) of the Act.

Maritime Service Corp. v. Acme Fast Freight of Puerto Rico, 17 S.R.R. at 1656. The judge found that:

Respondent NVOCCs hold themselves out to the public to provide transportation facilities between the United States and Puerto Rico. Respondents carry the property of the shipping public which utilizes their services. That carriage of property is subject to the tariffs of the vessel-operating common carriers engaged by the respondents. The bill of lading contracts, a part of the filed tariffs of the vessel-operating common carriers for which [Maritime Service] acts as agent, provide for liens against the cargo for ocean freight and other charges for the transportation.

The respondents' failure to pay applicable demurrage charges subjected the property of the shipping public to vessel-operating common carriers' liens, and this practice resulted in the respondents' failure to establish, observe and enforce just and reasonable practices in connection with the receiving, handling or delivering of property, in violation of Section 17 and Section 18(a) of the Act.

Id. at 1662. The judge concluded that the NVOCCs are “subject to Sections 15, 16, 17, and 18 of the Shipping Act, 1916; and . . . are in violation of those sections.” *Id.* at 1666. On review, the Commission affirmed the finding of the violation of section 18(a) without explanation. *Sea-Land Service, Inc. v. Acme Fast Freight of Puerto Rico*, 18 S.R.R. 853, 854 (FMC 1978), *aff’d sub nom Capitol Transp., Inc. v. United States*, 612 F.2d 1312 (1st Cir. 1979). With regard to section 17, the Commission stated “[w]e do not find any violation of Section 17 on the facts and circumstances presented here.” *Id.*, 18 S.R.R. at 857 n.8.⁵

European Trade Specialists v. Prudential Grace Lines, decided under section 17 of the Shipping Act, 1916, is problematic. In *European Trade*, a United States exporter alleged that the respondent Hipage, a freight forwarder licensed by the Commission, violated section 17 when it failed to notify the exporter of problems with its shipment. In the initial decision, the administrative law judge found that the failure to notify did not constitute a violation of section 17.

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

Since Section 17 speaks only to practices it follows that Hipage, even if this single failure had been established by complainants, would not have violated Section 17 because it had not established, observed or enforce an unjust or unreasonable practice.

European Trade Specialists v. Prudential Grace Lines, 17 S.R.R. 1351, 1365 (ALJ 1977) (citations and footnotes omitted). Upon review, the Commission affirmed the judge’s finding that the failure to notify did not violate section 17.

Even assuming, if not deciding, that [complainant] European was not notified of the classification and rating problem we cannot say that such conduct by Hipage

⁵ The Commission may have based this conclusion on the fact that the transportation at issue was interstate trade between the United States and Puerto Rico governed by section 18(a), not foreign trade governed by section 17. *See* 46 U.S.C. § 801 (1976) (repealed) (definitions of “common carrier by water in foreign commerce” and “common carrier by water in interstate commerce”).

amounts to a violation of Section 17. Unless its normal *practice* was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law. We therefore, need not reach the issue of whether in this case the shipper was so notified.

Similarly, because any violation of § 510.23 of the Commission's regulations must be considered in terms of Section 17 by operation of the language of the Order on Remand, without a showing of continuing violations of these regulations no Section 17 violation can be found.

European Trade Specialists v. Prudential Grace Lines, 19 S.R.R. 59, 63 (FMC 1979) (emphasis in original) (citation omitted). To the extent there is a conflict between *Houben* and *European Trade Specialists*, I follow *Houben*, the more recent case.

To summarize, in *Houben*, the Commission recognized that the following acts or failures to act are violations of section 10(d)(1): Failing to pay the destination agent monies which have been received by the NVOCC for such services (*Houben*); failing to notify the shipper that it had not transported the cargo, failing to transport the cargo after being paid, and failing to transport the cargo to coerce payment for other shipments (*Adair*); failing to carry out its obligations to transport the cargo under the contract or to return the money despite repeated demands (*Symington*); preparing incorrect or false shipping documents, rejecting an offer to transfer tires to another carrier, authorizing the VOCC to carry the rest of the shipment on later vessels to induce to payment (*Tractors and Farm Equipment*); failing to pay applicable demurrage charges (*Maritime Service*).

b. Application of Commission precedent.

Section 10(d)(1) states that a common carrier such as Dacon "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). Based on Commission precedent in *Houben* and the cases cited in *Houben*, I find that section 10(d)(1) requires a common carrier to establish, observe, and enforce just and reasonable regulations and practices relating to timely forwarding money a shipper pays for ocean freight to the vessel-operating common carrier that transports the cargo. If Dacon did not establish just and reasonable regulations and practices for forwarding money paid to it by a shipper to the vessel-operating common carrier that will provide the transportation by water from the United States to a foreign port, it failed to *establish* just and reasonable regulations and practices related to or connected with delivering property in violation of section 10(d)(1). If Dacon did establish just and reasonable regulations and practices for forwarding money paid to it by a shipper to the vessel-operating common carrier that will provide the transportation by water from the United States to a foreign port, but did not follow the regulations and practices, Dacon failed to *observe and enforce* the regulations and practices in violation of section 10(d)(1).

Dacon defaulted in this proceeding. There is no direct evidence that Dacon ever established regulations and practices relating to or connected with forwarding money paid to it by a shipper to

the vessel-operating common carrier that will provide the transportation by water from the United States to a foreign port or if it did, whether the regulations and practices were just and reasonable.⁶ This by itself violates section 10(d)(1).

Dacon was licensed as an NVOCC on July 9, 2008. It was still in business four years later when Century Metal retained it to transport the containers to India. It is unlikely that it would have stayed in business for four years if it did not have regulations and practices requiring the forwarding of ocean freight to the vessel-operating common carrier that transported its shipments. Therefore, there is circumstantial evidence in the record that could support a finding that Dacon established the required regulations.

I find that Century Metal has proven by a preponderance of the evidence that it gave Dacon \$60,500.00 (FF 8) with the expectation that Dacon would pay Hapag-Lloyd \$17,540.00 and Mitsui \$37,200.00 for ocean freight to transport thirty containers by water from the United States to India. FF 38. Assuming that Dacon established just and reasonable regulations and practices, it failed to observe and enforce the regulations and practices on the five shipments at issue in this proceeding. FF 9-33. Therefore, Dacon failed to fulfill the NVOCC obligation to pay ocean freight to Hapag-Lloyd and Mitsui in violation of Section 10(d)(1).

C. Century Metal Is Entitled to a Reparation Award.

Century Metal seeks a reparation award that would include the detention charges and ground rent that it was required to pay to Hapag-Lloyd and Mitsui to obtain release of the thirty containers. Century Metal has the burden of proving entitlement to reparations.

As the Federal Maritime Board explained long ago: “(a) damages⁷ 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.”

⁶ I do not read section 10(d)(1), the Commission’s decision in *Houben*, and the cases cited in *Houben* to require a shipper to prove that an NVOCC has established a practice or procedure that is *not* just and reasonable in order to prove a violation of section 10(d)(1). If a complainant must establish that a respondent has established, observed, and enforced an unjust and unreasonable practice for delivering property to prove a violation of section 10(d)(1), I find that Dacon’s failure to pay ocean freight it had collected from Century Metal to the vessel-operating common carriers on these five shipments establishes that Dacon established unjust and unreasonable regulations and practices relating to or connected with delivering property.

⁷ Reparations under the Shipping Act and damages are synonymous. See *Federal Maritime Comm’n v. South Carolina State Ports Auth.*, 535 U.S. 743, 775 (2002) (Breyer, J., dissenting).

James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist., 30 S.R.R. 8, 13 (2003).

The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.

Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc., 26 S.R.R. 788, 798-799 (ALJ 1992).

The evidence establishes that Century Metal paid Dacon the \$60,500.00 Dacon charged for its services, a payment that included ocean freight charges Dacon should have passed on to Hapag-Lloyd and Mitsui. FF 8. In order to secure release of the thirty containers, Century Metal had to pay Hapag-Lloyd its ocean freight charge of \$17,540.00 and Mitsui its ocean freight charge of \$37,200.00, a total of \$54,740.00. FF 38.

As a result of Dacon's failure to pay the ocean freight to Hapag-Lloyd and Mitsui, Century Metal paid a total of \$133,012.21 in detention charges and ground rent to secure release of the ten containers shipped pursuant to Dacon B/L EDC-906HBLO-12 and Hapag-Lloyd B/L HLCUCHI120760536, FF 39; a total of \$75,661.87 in detention charges and ground rent to secure release of the ten containers shipped pursuant to Dacon B/L EDC-907HBLO-12 and Mitsui B/L MOLU26004552994, FF 40; a total of \$29,431.01 in detention charges and ground rent to secure release of the five containers shipped pursuant to Dacon B/L EDC-911HBLO-12 and Mitsui B/L MOLU26004519194, FF 41; a total of \$11,640.12 in detention charges and ground rent to secure release of the two containers shipped pursuant to Dacon B/L EDC-910HBLO-12 and Mitsui B/L MOLU26004565564, FF 42; and a total of \$19,178.50 in detention charges and ground rent to secure release of the three containers shipped pursuant to Dacon B/L EDC-912HBLO-12 and Mitsui B/L MOLU26004633062. FF 43. Century Metal paid a total of \$268,923.71 in detention charges and ground rent to secure release of containers that were detained because Dacon did not forward the ocean freight paid to it by Century Metal to the vessel-operating common carriers.

I find that Century Metal has proven that it suffered actual injury in the amount of \$54,740.00 that it paid to Hapag-Lloyd and Mitsui for ocean shipping that Dacon should have paid from the money Century Metal paid to Dacon plus \$268,923.71 in detention charges and ground rent caused by Dacon's failure to pay Hapag-Lloyd and Mitsui, at total of \$323,663.71 in actual injury proximately caused by Dacon's violations of section 10(d)(1) of the Shipping Act. 46 U.S.C.

§ 41102(c). Dacon is ordered to pay a reparation award of \$323,663.71 to Century Metal. I infer from the dates of the invoices for detention charges and ground rent that the payment Century Metal made the payments on or about January 1, 2013. Therefore, interest on the reparation award runs from January 1, 2013.

D. Entry of a Cease and Desist Order Is Not Necessary.

“[T]he general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities.” *Portman Square Ltd. – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 S.R.R. 80, 86 (ALJ 1998), admin. final Mar. 16, 1998, citing *Alex Parsinia d/b/a Pacific Int’l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342 (ALJ 1997), admin. final, December 4, 1997. “A cease and desist order must be tailored to the needs and facts of the particular case.” *Marcella Shipping Co. Ltd.*, 23 S.R.R. 857, 871-872 (ALJ 1986), admin. final, Mar. 26, 1986.

On May 8, 2013, the Director of the Commission’s Bureau of Certification and Licensing issued an Order of Revocation revoking Dacon’s OTI license, effective April 25, 2013, because Dacon’s NVOCC bond and ocean freight forwarder bonds were cancelled. FF 4. Therefore, a cease and desist order need not be entered in this proceeding.

E. Century Metal’s Request for Attorney’s Fees.

Century Metal asks for an award of attorney’s fees. Since Century Metal has been awarded reparations, it is entitled to reasonable attorney’s fees as directed by 46 U.S.C. § 41305(b).

The Commission’s regulation (46 C.F.R. 502.254) provides that petitions for attorney’s fees shall normally be filed with the presiding judge in cases where there are no exceptions filed by respondents but only after the Commission makes the judge’s initial decision final, normally about 30 days after service of that decision. A ruling on the petition is not normally issued by the judge until the 30-day review period has expired. See Docket No. 99-14 – *Global Transporte Oceanico S.A. v. Coler Independent Lines Co.*, 28 S.R.R. 1162 (1999) (petition for attorney’s fees in default case filed within one week after service of Initial Decision; judge’s ruling on the petition not issued until after the Commission had made the Initial Decision final). Incidentally, the Commission is authorized only to award reasonable attorney’s fees, a term that does not include “costs.” See *Global Transporte*, 28 S.R.R. at 1163 n.5.

Safmarine Container Lines N.V. v. Garden State Spices, Inc., 28 S.R.R. 1621, 1623 n.5 (ALJ 2000).

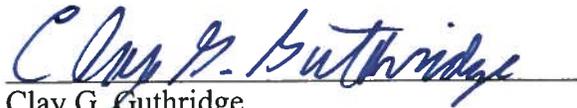
The question of attorney’s fees for Century Metal will be addressed when and how set forth in 46 C.F.R. § 502.254.

O R D E R

Upon consideration of the Motion for Default Judgment against Dacon Logistics, LLC d/b/a CODA Forwarding, the record herein, the conclusion that respondents Dacon violated section 10(d)(1) of the Shipping Act, 46 U.S.C. § 41102(c), and that complainant Century Metal Recycling Pvt. Ltd. suffered actual injury as a result of that violation, and for the reasons stated above, it is hereby

ORDERED that the Motion for Default Judgment be **GRANTED**. An Initial Decision on Default is entered against respondent Dacon Logistics, LLC d/b/a CODA Forwarding. It is

FURTHER ORDERED that respondent Dacon Logistics, LLC d/b/a CODA Forwarding is liable to Century Metal Recycling Pvt. Ltd. for a reparation award in the amount of \$323,663.71 plus interest from January 1, 2013.



Clay G. Guthridge
Administrative Law Judge