

FEDERAL MARITIME COMMISSION

WALTER MUZORORI,

Claimant,

v.

CANADA STATE AFRICA LINES,
INC. (CSAL),

Respondent.

Docket No. 1949(F)

Served: July 14, 2016

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

Order Affirming Initial Decision

On December 23, 2015, the Administrative Law Judge (ALJ) issued an Initial Decision: (1) dismissing Claimant's 46 U.S.C. § 41102(b) claim for not adhering to the shipping agreement; and (2) determining that Respondent violated § 41102(c) by failing to deliver Claimant's cargo to the agreed upon port of discharge and awarding reparations to Complainant. Pursuant to a Commissioner's request to review the Initial Decision, the Federal Maritime Commission (Commission) determined, on January 5, 2016, to review the Initial Decision. Neither party filed exceptions to the Initial Decision. *See* 46 C.F.R. § 502.227.

The Commission has recently reviewed many § 41102(c) cases. The Commission has recognized in numerous decisions that NVOCCs or freight forwarders violate § 41102(c) when they fail to fulfill NVOCC or freight forwarder obligations, through single or multiple actions or omissions, and thereby failed to establish, observe, and enforce just and reasonable regulations and practices. *See Kobel v. Hapag-Lloyd, A.G.*, No. 10-06, 2015 FMC LEXIS 6 (FMC May 26, 2015); *Smart Garments v. Worldlink Logix Services, Inc.*, 33 S.R.R. 65, 69 (FMC 2013); *Century Metal Recycling Pvt. Ltd. v. Dacon Logistics*, 33 S.R.R. 17, 19 (FMC 2013); *Best Way USA, Inc. v. Marine Transport Logistics*, 33 S.R.R. 13, 14 (FMC 2013); *Petra Pet, Inc. v. Panda Logistics Ltd.*, 33 S.R.R. 4, 9 (FMC 2013); *Bimsha International v. Chief Cargo Services, Inc.*, 32 S.R.R. 1861, 1866 (FMC 2013); and *Houben v. World Moving Services, Inc.*, 31 S.R.R. 1400, 1405 (FMC 2010) (when an NVOCC fails to fulfill its obligations it violates § 41102(c)). *See also Brewer v. Maralan (a/k/a Sam Bustani) and World Line Shipping, Inc.*, 29 S.R.R. 6, 9 (FMC 2001) (withholding documentation needed to secure the release of property held to violate section 10(d)(1)); *Total Fitness Equip. v. Worldlink Logistics, Inc.*, 28 S.R.R. 534, 542 (FMC 1998), *aff'd sub nom. Worldlink Logistics, Inc. v. Federal Maritime Comm'n*, 203 F.3d 54 (D.C. Cir. 1999) (attempting to collect an unreasonable debt by refusing the release of cargo held a violation of the Shipping Act); *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" in violation of section 10(d)(1) of the Shipping Act); *Symington v. Euro Car Transp., 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 . . . of property," in violation of the Shipping Act); *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 19-20 (ALJ 1991) (NVOCC failed to fulfill agreement and refused to refund freight even though it "never performed the transportation service" in violation of section

10(d)(1) of the Shipping Act); *European Trade Specialists v. Prudential Grace Lines*, 19 S.R.R. 59, 62-63 (FMC 1979); *Maritime Services Corp. v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655 (ALJ 1978), *aff'd.*, 18 S.R.R. 853 (FMC 1978).

Similarly, the Commission has addressed arguments raised by dissenting Commissioners at length in *Kobel v. Hapag-Lloyd, A.G.*, 32 S.R.R. 1720, (FMC 2013) and *Kobel Hapag-Lloyd, A.G.*, No. 10-06, 2015 FMC LEXIS 6 *19.

The Commission hereby adopts the ALJ's Initial Decision and affirms the Initial Decision.

THEREFORE, IT IS ORDERED, That the ALJ's Initial Decision is affirmed.

IT IS FURTHER ORDERED, That by July 29, 2016 Respondent Canada State African Lines, Inc. (CSAL) pay Complainant Mr. Walter Muzorori reparations in the amount of \$6,405.60, and interest in the amount of \$25.19, totaling \$6,430.79.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

Karen V. Gregory
Secretary

Commissioner Khouri, concurring in part and dissenting in part, in which *Commissioner* Dye joins.

I concur in the majority's decision to affirm the Administrative Law Judge's (ALJ) Initial Decision dismissing the 46 U.S.C. § 41102(b) claim against Canada States Africa Lines, Inc. (CSAL). I respectfully dissent, however, from the majority's decision to affirm the ALJ's determination that CSAL violated 46 U.S.C. § 41102(c) of the Shipping Act of 1984 (1984 Act) and awarding reparations to Complainant.

I. SUMMARY

As noted by the majority, Complainant alleged that CSAL, a vessel-operating common carrier (VOCC), failed to deliver Complainant's cargo, two Volvo 2005 road tractors, to the agreed upon port of discharge. On this basis, the majority found that CSAL violated 46 U.S.C. § 41102(c) of the Shipping Act of 1984 (1984 Act) and awarded reparations to Complainant. The evidence in the record clearly indicates that the alleged failure by CSAL was nothing more than a single isolated and inadvertent act or omission following an effort by CSAL to accommodate (at no additional charge) a request by the Complainant to change the original port of destination from Cape Town to Durban. There is no evidence in the record whatsoever that CSAL's failure in this case was pursuant to normal "regulations or practices" of the VOCC. Notwithstanding, based on the facts presented, the majority affirmed the ALJ's finding that CSAL "failed to observe and enforce just and reasonable practices in violation of § 41102(c)."

II. § 41102(c)

In the case *sub judice*, the majority continues to perpetuate an interpretation of § 41102(c) of the 1984 Act that runs afoul of numerous traditional tools and canons of statutory construction. My

disagreement with the majority's interpretation of § 41102(c) is longstanding, and I adopt and fully incorporate herein the views, arguments and reasoning regarding the Commission's erroneous interpretation of § 41102(c) set forth in multiple dissents.¹

The majority contends in the case *sub judice* that, “[t]he Commission has recently reviewed many § 41102(c) cases. The Commission has recognized in numerous decisions that NVOCCs or freight forwarders violate § 41102(c) when they fail to fulfill NVOCC or freight forwarder obligations, through single or multiple actions or omissions, and thereby fail to establish, observe, and enforce just and reasonable regulations and practices. (cites omitted).” While the difference between the majority restatement

¹ *Yakov Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1720 (FMC 2013) (“*Kobel* Remand Order”); *Bimsha International v. Chief Cargo Services, Inc.*, 32 S.R.R. 1861 (FMC 2013) (“*Bimsha*”); *Smart Garments v. Worldlink Logix Services, Inc.*, 33 S.R.R. 65 (FMC 2013); *Temple v. Anderson*, Docket No. 1919(I), 33 S.R.R. 708 (FMC October 22, 2013) (Order vacating and remanding decision of Settlement Officer); *Petra Pet, Inc., v. Panda Logistics Ltd.*, 33 S.R.R. 4 (FMC 2013); *Best Way USA, Inc. v. Marine Transport Logistics*, 33 S.R.R. 13 (FMC 2013); *Century Metal Recycling Pvt. Ltd., v. Dacon Logistics LLC*, 33 S.R.R. 17 (FMC 2013); *Sulaiman Bah v. Amadu K. Jah*, Docket No. 1915(I), 33 S.R.R. 726 (FMC 2013); *Shekinah International Mission, Inc. v. Sefco Export Management Company, Inc., World Cargo Transport, Inc., Eagle Systems, Inc., and Zim Integrated Shipping Ltd.*, Docket No. 1914(I), 33 S.R.R. 733 (FMC 2013); *Adebisi Adenariwo v. BPD International, Zim Integrated Shipping, Ltd. And its Agent (Lansal) et al.*, Docket No. 1921(I), 33 S.R.R. 223 (FMC 2014); *Michael Anad Styer v. Online Shipping Advisers*, Docket No. 1863(I), 33 S.R.R. 536 (FMC 2014); *Geo Machinery FZE v. Watercraft Mix, Inc.*, Docket No. 1935(I), 33 S.R.R. 329 (FMC 2014); and *Medisend International, Inc. v. TJD International, Inc.*, Docket No. 1936(I), 33 S.R.R. 492 (FMC 2014), *Bai Koroma et al. v. Global Freightways (USA Ltd. Et al.*, 33 S.R.R. 624 (FMC 2013), *Yakov Kobel v. Hapag-Lloyd A.G., No. 10-06, 2015 FMC LEXIS 6 *19* (“*Kobel* Order Affirming Remand Initial Decision”), *Auto 1 Pay v. Heavy Haulers*, 33 S.R.R. 1038 (FMC 2015), *Tarazona v. MH Int'l Freight Services*, 33 S.R.R. 1119 (FMC 2015), *Toussaint v. K.O.V. Shipping Express Cargo*, 33 S.R.R. 1163 (FMC 2015), *Orolugagbe V. A.T.I., U.S.A., Inc.*, 33 S.R.R. 1367 (FMC 2015), and *Abusetta D/B/A/ Sammy's Auto Sales v. Jax Auto Shipping, Inc. and Marine Transport Logistics, Inc.*, __ S.R.R. __ (FMC 2015).

and the original statutory language may appear to be subtle and inconsequential, the majority's reformulation entirely changes the original purpose and intention of § 41102(c) of the Shipping Act. As discussed below, Congress used the word "practice" and the full phrase, "establish, observe, and enforce just and reasonable regulations and practices," in the original 1916 Shipping Act (1916 Act)², and as now found in § 41102(c), in a particular way and in a context that stands in clear and unambiguous opposition to the Commission's construction and current application of the section. With respect to the number of cases cited by the majority in support of its position, the majority's repetition in reaffirming an erroneous statutory interpretation in no way transmutes its legal error into a correct interpretation of § 41102(c) or good law.

As I noted in the *Yakov Kobel v. Hapag-Lloyd A.G., No. 10-06, 2015 FMC LEXIS 6 *19*, the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), directed lower courts and federal agencies to "give effect to the unambiguously expressed intent of Congress" as concerns the statute which the agency administers. *Id.* at 843. In *Natural Resources Defense Council v. Browner*, 57 F.3d 1122 (D.C. Cir. 1995), the U.S. Court of Appeals for the District of Columbia Circuit directed federal agencies to "exhaust the traditional tools of statutory construction" and interpretation as each agency searches for, examines, analyzes, and discusses – for the benefit of the regulated community and the public at large – the agency's findings as regards the intent of Congress and the statute which the agency administers. *Id.* at 1125. In *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), the D.C. Circuit held that, in determining whether a statute is ambiguous and in ultimately determining whether the agencies interpretation is permissible or instead is foreclosed by statute, we must employ all the tools of statutory interpretation. *Id.* at 1016.

² The Shipping Act of 1916, Sept. 7, 1916, Ch. 451, 39 Stat. 728.

As the 1916 Act and other statutes contemporaneous with the enactment of the 1916 Act clearly demonstrate, Congress knew *exactly* what it was doing in using the phrase “establish, observe, and enforce just and reasonable regulations and practices” - and what those words meant. Notwithstanding the efforts of the Commission to doggedly portray the phrase and the term “practice” as ambiguous, this statutory language was not ambiguous when enacted by Congress and is not ambiguous now for anyone willing to fairly utilize established tools and canons of interpretation to delve into the statute’s purpose, legislative history, and established judicial interpretation.

In the case *sub judice*, as in other cases, the Commission fails (i) to properly engage in a full *Chevron* Step One examination and (ii) to give effect to the expressed intent of Congress in enacting § 41102(c) of the Shipping Act. Ultimately, the Commission’s acts, judgments and orders of award of reparations in this case are *ultra vires*.³ These views are supported by the discussion, analysis and reasoning set forth below.

A. MAJORITY POSITION

In order to understand the fundamental error of the majority’s interpretation of § 41102(c) in this and other recent cases, one must take an in-depth journey into the history of the early railroad industry and the steam ship cartels and conferences that, together, dominated U.S. domestic land transportation and foreign borne ocean transportation at the turn of the 20th century. Then one must consider the development of the Interstate Commerce Act of 1887 (ICA)⁴, the 1916 Act, and the 1984 Act. Finally, one must understand the history of reviewing court decisions and the

³ See [City of Arlington v. FCC, 133 S. Ct. 1863, 1869 \(2013\)](#). “Both their (agencies charged with administering congressional statutes) power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*.”

⁴ The Interstate Commerce Act of 1887, Ch. 104, 24 Stat. 379 (1887).

transportation deregulation movement in the late 1970s and 1980s. It is a journey that the majority has repeatedly eschewed. So, to once more set sail.

The Commission's current interpretation of the term "practices," as Congress used such term in § 41102(c) of the 1984 Act, now means any and all commercial and industry requirements and proscriptions as found anywhere in the legal universe including the common law of agency, contracts, torts, and admiralty among others; all state laws, and all federal statutes together with accompanying regulations, such as the Carriage of Goods by Sea Act (COGSA), Title 46 United States Code §§ 1300-1315.⁵

In the majority's current interpretation of § 41102(c), any maritime entity that is properly subject to the jurisdiction, oversight, and regulation of the Commission - be it a common carrier, an ocean transportation intermediary, or a marine terminal operator - has a duty to follow and abide by all afore described commercial and industry "practices".⁶ Any failure by the regulated entity in any single incident or in any isolated series of incidents to so comply with the "duty" to "establish, observe, and enforce" such "industry" practices or legal obligation is a violation of § 41102(c) of the 1984 Act. It is axiomatic that compliance with such "industry practice(s)" or legal obligation(s) is "just and reasonable". Along that path, the majority also finds that Congress *really meant* to use the disjunctive

⁵ Rendered down to its essence, the majority's position is that all federal and state laws and regulations together with all common law jurisprudence, including the common law of agency, admiralty, contracts, torts and similar sources of common law duties that in any way relate to or have some connection with the business relationships between common carriers, ocean transportation intermediaries, or marine terminal operators on one hand and the shipping public on the other and regarding the receiving, handling, storing, or delivering of property are, individually and collectively, just and reasonable regulations and practices. Any failure to observe any such just and reasonable regulation or practice even in a single instance is a violation of § 41102(c) of the Shipping Act.

⁶ The prohibited acts proscribed in section § 41102(c) apply to "common carriers, ocean transportation intermediaries, or marine terminal operators." 46 U.S.C. § 41102(c).

“establish, observe, *or* enforce” rather than the actual conjunctive language as enacted in the statute.

To put the new formulation in stark legislative language, through a series of small claim case decisions, the majority has effectively amended § 41102(c) to now provide:

No common carrier, ocean transportation intermediary, or marine terminal operator may fail to observe *any* legal or commercial duty imposed by federal or state law, or by *any* common law provision, including, but not limited to the law of agency, admiralty, contract, or tort or other similar strictures relating to or connected with receiving, handling, storing, or delivering property.

The majority has confused and conflated “industry practice” with a *practice* that is established *by a regulated entity* concerning the receipt, handling, storage and delivery of property pursuant to the Shipping Act and the utilization of such practice by the regulated entity on a *normal, customary, and continuous basis*. One might concede that a single violation of a legal duty found in the law of agency is an unjust and unreasonable act that may be presented to a court of proper jurisdiction. The question remains, however, does the regulated entity commit such act on a *normal, customary, and continuous* basis and thereby implicate the 1984 Act. The practical effect of the majority position is the Federal Maritime Commission becomes a court of common pleas for all such state and federal claims and common law causes of action with new and sweeping jurisdiction over judicial matters that Congress never intended, much less authorized by enactment of the 1984 Act

B. MINORITY POSITION

As I noted in *Yakov Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R 1720 (FMC 2013) (“*Kobel* Remand Order”) and my dissents in other cases referenced in footnote 2, *supra*, Congress first used statutory language addressing the legal duty of transportation common

carriers to “establish, observe, and enforce just and reasonable . . . regulations and practices . . . affecting [cargo] classification, rates, or tariffs . . . [and] the manner and method of presenting, marking, packing, and delivering property for transportation . . .” in the 1910 Mann-Elkins Act amendment (Mann-Elkins) to the Interstate Commerce Act (ICA).⁷ From that time forward, the Interstate Commerce Commission (ICC), the United States Shipping Board (USSB) (the agency created by Congress in the 1916 Act), its successor agencies, and the currently constituted Federal Maritime Commission⁸, together with state and federal courts have consistently ruled that “practice” means; 1) the acts/omissions of the regulated common carrier that were positively established by the regulated common carrier and imposed on the passenger/cargo interest, and 2) such act/omission was the normal,⁹ customary, often

⁷ Mann-Elkins Act, [61st Congress](#), 2nd session, Ch. 309, 36 [Stat. 539](#), enacted June 18, 1910.

⁸ The United States Shipping Board (USSB) was succeeded in 1933 by the United States Shipping Board Bureau of the Department of Commerce (USSBB), Executive Order No.6166 (1933). The USSBB was succeeded in 1936 by the United States Maritime Commission (USMC), 49 Stat. 1985. In 1950, the USMC was succeeded by the Federal Maritime Board (FMB), 64 Stat.1273. The FMC was established as an independent regulatory agency by Reorganization Plan No. 7, effective August 12, 1961. The U.S. Supreme Court treated the FMC and all predecessor agencies as the “Commission” for purposes of judicial review. *See Volkswagenwerk v. Federal Maritime Commission*, 390 U.S. 261, 269 (1968).

⁹ *See European Trade Specialists v. Prudential-Grace Lines*, 19 S.R.R. 59, 63 (FMC 1979). (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 [emphasis in original].”

repeated,¹⁰ systematic,¹¹ uniform,¹² habitual,¹³ and continuous manner¹⁴ (hereinafter “Normal, Customary & Continuous”) in which the regulated common carrier was conducting business

Then, the third element; such “practice” must be proven to be unjust or unreasonable within the context of the Shipping Act. A seminal Commission case gave the further context that a measure of whether the “practice” was unjust or unreasonable was whether such practice

¹⁰ See *Intercoastal Investigation, 1935*, 1 USSBB 400, 432. (“Owing to its wide and variable connotations a practice which unless restricted ordinarily means an *often* and *customary action*, is deemed to acts or things belonging to the same class as those meant by the words of the law that are associated with it [cites omitted][emphasis added].”

¹¹ See *Whitam v. Chicago, R.I. & P. Ry. Co.*, 66 F.Supp. 1014 (ND TX 1946)(“The word ‘a practice’ as used in the decision, or used anywhere properly, implies *systematic* doing of the acts complained of, and usually as applied to carriers and shippers generally [emphasis added].”

¹² See *Stockton Elevators*, 3 S.R.R.605, 618 (FMC 1964). (“It cannot be found that the Elevator engaged in a ‘practice’ within the meaning of Section 17. The essence of a practice is *uniformity*. It is something habitually performed and it implies continuity ... the usual course of conduct. It is not an occasional transaction such as here shown. *Intercoastal Investigation, 1935*, 1 USSBB 400, 432; *B&O By. Co. v. United States* 277 U.S. 291, 300, *Francesconi & Co. v. B&O Ry. Co.*, 274 F 687, 690; *Whitham v. Chicago R.I. & P. Ry. Co.*, 66 F Supp. 1014; *Wells Lamont Corp. v. Bowles*, 149 F. 2d 364.[emphasis added]” See also, *McClure v. Blackshere*, F.Supp. 678, 682 (D. Md. 1964)(“‘Practice’ ordinarily implied uniformity and continuity, and does not denote a few isolated acts, and *uniformity* and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated [cites omitted][emphasis added].”

¹³ See *Stockton Elevators*, 3 S.R.R.605, 618 (FMC 1964). (“It cannot be found that the Elevator engaged in a ‘practice’ within the meaning of Section 17.... It is something *habitually* performed and it implies continuity ... the usual course of conduct. [cites omitted][emphasis added].”

¹⁴ See *Stockton Elevators*, 3 S.R.R.605, 618 (FMC 1964). (“It cannot be found that the Elevator engaged in a ‘practice’ within the meaning of Section 17.... It is something habitually performed and it *implies continuity* [cites omitted][emphasis added]” See also, *McClure v. Blackshere*, F.Supp. 678, 682 (D. Md. 1964)(“‘Practice’ ordinarily implied uniformity and continuity, and does not denote a few isolated acts, and *uniformity* and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated [cites omitted][emphasis added].”

“deterred the commerce of the United States.”¹⁵ This plain, ordinary meaning prevailed until 1991 when an Administrative Law Judge (ALJ) serving at the Commission took a course change in a minor *pro se* proceeding.¹⁶ Thus began the slow, quiet, red tide that mutated the definition of “practice” into the majority’s current position.

The minority position concerning proper construction of § 41102(c) follows:

The word “practice”, within the phrase “regulations and practices” – when read together, in context, and after consideration of all rules and canons of statutory construction and interpretation – means the business rules, protocols, and methods utilized by the regulated entity as it conducts transportation services in international waterborne commerce. The compass setting of the view begins at the regulated entity and flows toward the cargo shipper. The practice must be the Normal, Customary & Continuous manner in which the regulated entity does business with the cargo shipper. For Shipping Act purposes, such practice must also be found to be “unjust or unreasonable”.

To overlay the facts of this case into the minority perspective, if OCL mistakenly sent the container to the wrong destination, a breach of a contractual duty or a breach of some fiduciary duty owed by CSAL to Complainant may have occurred.

This act or omission by CSAL however, *without more*, may not properly fall within the bounds of the Commission’s statutory authority under the Shipping Act. The Shipping Act occupies a

¹⁵ See *Practices of Stockton Elevators*, 8 F.M.C. 187, 201 (FMC 1964) (“However, even if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust or unreasonable. The commerce of the United States was not deterred. (emphasis added)”)

¹⁶ See *William R. Adair v. Penn-Nordic Lines, Inc.*, 26. S.R.R. 11 (ALJ 1991).

parallel sphere that looks to protect U.S. importers and exporters at a different and broader level than other “private” maritime remedies. These two spheres do not, however, jointly occupy the same space.¹⁷ If the record evidence showed that CSAL failed to properly route a shippers’ containers on a “Normal, Customary, and Continuous” basis, then, arguably, § 41102(c) of the 1984 Act may be implicated and the provisions of § 41102(c) could come into play.

C. FRAMEWORK FOR ANALYSIS

The U.S. Supreme Court changed the foundation of administrative law, federal agency responsibility, and court review protocols in 1984 in *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). The first arm of that seminal decision states:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress.

Id. at 842-843 (emphasis added).

This first principle is further illuminated by footnote 9 of the *Chevron* decision, as follows:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [citations omitted] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

¹⁷ See discussion of *A. N. Deringer, Inc. v. Marlin Marine Services, Inc.*, 25 S.R.R. 1273, 1277, *infra*.

Id. at n.9.

A commonly overlooked but key concept in *Chevron* analysis is that the federal agency's positions and arguments concerning its construction of the statute within the Step One phase are not due one iota of deference by the reviewing court. *Chevron* Step One analysis and determination is in the sole domain and responsibility of the Article III court. Federal Courts have continued to add explanation concerning the application of *Chevron* Step One. In a 1997 case, *Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), the U.S. Court of Appeals for the District of Columbia Circuit offered the following additional direction:

Under the first step of *Chevron*, the reviewing court “must first *exhaust* the ‘traditional tools of statutory construction’ to determine whether Congress has spoken to the precise question at issue.” The traditional tools include examination of the statute’s text, legislative history, and structure; [cite omitted] as well as its purpose. This inquiry using the traditional tools of construction may be characterized as a search for the plain meaning of the statute. If this search yields a clear result, then Congress has expressed its intention as to the question, and deference is not appropriate. . . [T]extual analysis is a language game played on a field known as “context”. The literal language of a provision taken out of context cannot provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use. In short, “the meaning of statutory language, plain or not, depends on context.” . . . Context serves an especially important role in textual analysis of a statute when Congress has not expressed itself as univocally as might be wished.

Id. at 1047 (citations omitted)(emphasis added).

In *Pharmaceutical Research and Manufacturers of America v. Thompson*, 252 F.3d 219 (D.C. Cir. 2001), the District of Columbia Circuit Court in 2001 considered a Medicare statute and an

expansive definition of the word “payment” being proffered by the U.S. Department of Health and Human Resources. Appellant Pharmaceutical Research argued that use of traditional canons of statutory construction compelled a more circumscribed definition. Citing *Bell Atlantic Telephone*, the court held:

[W]e need not decide whether the Department’s approval of the PDP [prescription drug price] would be entitled to *Chevron* deference, for using traditional tools of statutory interpretation – text, structure, purpose, and legislative history, – we conclude that Congress has “directly spoken to the precise question at issue”; that is, whether “payments” includes expenditures that are fully reimbursed by manufacturer rebates. . . . Although . . . the word “payment” is broad enough to include reimbursed expenditures, consideration of the word’s context – the statute’s purpose and legislative history – reveals a far narrower meaning.

Id. at 224 (citation omitted).

In *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), a case that is a close, if not exact, analogue to the proceeding *sub judice*, the District of Columbia Circuit considered a statute enacted in 1884 that authorized the Secretary of Treasury to regulate individuals who “practice” before the Department as a “representative” of a claimant before the Department. The traditional definition of “representative” had been attorneys, accountants, and other tax professionals who appear in adversarial proceedings before the agency. In 2011, the Internal Revenue Service (IRS) decided it would newly denominate all tax-return preparers – hundreds of thousands of individuals – as “representatives” – and thus bring them into the IRS’s regulatory oversight. The Court began its *Chevron* analysis as follows:

In determining whether a statute is ambiguous and in ultimately determining whether the agency’s interpretation is permissible or instead is foreclosed by the statute, we must employ all the tools of statutory interpretation, including “text, structure, purpose, and

legislative history” (citing *Pharmaceutical Research*). “No matter how it is framed, the question a court faces when confronted with an agency’s interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its authority*” (citing *City of Arlington*).

Id. at 1016 (emphasis in original).

D. PURPOSE, TEXT, LEGISLATIVE AND JUDICIAL HISTORY, AND STRUCTURE

With the foregoing analytical framework before us, let’s work through the elements. Since analysis of the origins of the text of § 41102(c) of the Act, as first used by Congress in 1910 in the Mann-Elkins Act amendment to the ICA, and the tools and canons of statutory interpretation and construction tend to overlap in the four listed categories, I will begin with statutory purpose.

1. Purpose

The ICA was enacted to bring federal regulatory order to the rapidly expanding railroad industry in the late 19th Century. The ICA established the first independent federal regulatory commission; the Interstate Commerce Commission (ICC). From there began the now common dance between a federal regulatory agency and a reviewing federal court. The railroads held substantial regional and national economic power. Consumers were at the mercy of these large and vital transportation companies. The railroads set forth their classifications of various cargos, freight rates, and relevant business regulations and practices in published tariffs. Cargo customers and passengers conducted business with the railroads on the railroads’ terms. The Sherman Act¹⁸ and broader business competition regulation was still three years away. As railroad regulation began

¹⁸ 26 Stat. 209, 15 U.S.C. §§ 1–7. Officially re-designated and to be recognized from then on as the "Sherman Act" by Congress in the [Hart-Scott-Rodino Antitrust Improvements Act of 1976](#), (Public Law 94-435, Title 3, Sec. 305(a), 90 Stat. 1383 at [p. 1397](#)).

to find its feet and gain credibility, Congress was asked to grant further authority to the ICC and Congress answered with Mann-Elkins¹⁹ as discussed below regarding statutory text.

In the ocean transportation arena at the turn of the 20th Century, numerous loose associations or liner ship owner “conferences” dominated virtually all sea trade lanes. A conference agreement would fix the agreed rate and all regulations, practices, terms and conditions for the receiving, handling, storing, and delivering of a specified cargo class over a specified trade route. For example, finished iron goods shipped from England to the U.S. North Atlantic (Boston-to-New York) would have an ocean carrier conference agreement with subscribing members. Every ship owning member of the conference was bound by the conference agreement, tariff rate, rules, regulations, and practices. Every cargo owner of finished iron goods that wanted to move that cargo over that trade route had the benefit of a public and common freight rate and common application of the conference’s regulations and practices for the transportation.

Congress was asked to bring federal regulation and oversight to these powerful shipping conferences that dominated the ocean borne imports and exports in U.S. commerce. Congress answered with the 1916 Act. In essence, the 1916 Act was an antitrust statute and a regulatory statute. It provided that the ocean vessel conferences could agree on rates, regulations and practices; provided however, that (i) the conferences must file their conference agreements that set forth the tariff rules, freight rates, other charges (e.g. demurrage or terminal storage fees), cargo classifications, regulations, and practices with the Commission’s predecessor agency, the United States Shipping Board, and then receive the Board’s approval, and, further, (ii) the conference and its individual member steam ship companies must comply with all various provisions of the Shipping Act, such as establishing just and reasonable rates, regulations and

¹⁹ Mann-Elkins Act, 61st Congress, 2d Session, Ch. 309, 36 Stat. 539, enacted June 18, 1910.

practices and abstaining from discriminatory activity as to individuals, cargos and ports. A Board approved conference agreement and compliance with all Shipping Act provisions granted the conferences and their ship owner members with immunity from application of the Sherman Act.

Before moving into the statute's text, legislative and case law history, it is worth noting that the purpose of the Shipping Act and the scope of the Commission's regulatory authority began to change and diminish in 1984 with the enactment of a revised Shipping Act²⁰ and then again in 1998 with passage of the Ocean Shipping Reform Act²¹. The 1984 Act allowed for more freedom by all regulated entities to offer market-based freight contracts, and importantly, removed significant areas of the Commission's regulatory authority. Of highest relevance in considering a § 41102(c) controversy, note that Congress took section 17 of the 1916 Act and repealed the Commission's authority to find freight rates as unreasonable and to order new, lower, more reasonable rates. Congress also repealed the Commission's authority to draft and order newly formed, more just or reasonable regulations or practices. As discussed below, what remains of the significantly circumscribed provision from section 17 of the 1916 Act was moved to § 41102(c).

All of this Congressional activity in ocean transportation deregulation took place in the context of broader transportation deregulation: the railroad deregulation statutes of 1976 and 1980, the trucking deregulation in 1980, and the deregulation of the domestic airlines and termination of the Interstate Commerce Commission and replacement by the Surface Transportation Board by the 104th Congress.²²

²⁰ Shipping Act of 1984, Pub. L. 98-237, 98 Stat. 67 (1984).

²¹ Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902 (1998).

²² See the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210; Staggers Act of 1980, Pub. L. 96-448; Motor Carrier Act of 1980, Pub. L. No. 96-296; Airline Deregulation Act, [Pub.L. 95-504](#); and the Interstate Commerce Commission Termination Act of 1995, [Pub.L. 104-88](#).

2. Statutory Text Language

The embarkation point for this analysis is the language of the 1910 Mann-Elkins amendments to the ICA referenced above.

And it is hereby the duty of all common carriers subject to the provisions of this Act to establish, observe and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, 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 facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.²³

The Mann-Elkins language clearly focused on the operating and business practices of railroads as commonly used and imposed upon passengers and cargo shippers. Also note that the term “practice” is juxtaposed to the term “regulation” in this inaugural Congressional enactment. With the ICC serving as the first federal independent regulatory agency, litigation and judicial decisions interpreting this statutory language followed, as discussed below.

²³ Mann-Elkins Act, [61st Congress](#), 2nd session, ch. 309, 36 [Stat. 539](#), enacted June 18, 1910 (emphasis added).

Six years after Mann-Elkins came the 1916 Act. The 1916 Act was Congress' response to the perceived commercial abuses that the market dominate shipping cartels were imposing on the U.S. import and export ocean commerce. Section 17 of the 1916 Act provided as follows:

Section 17. Discriminatory rates prohibited; correction by shipping board; supervision by board of regulations of carrier.

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

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

Section 17 of the 1916 Act (emphasis added).

The two separate provisions of section 17 of the Shipping Act were commonly referred to as “section 17, first paragraph” and “section 17, second paragraph”.²⁴ As with the ICA and Mann-Elkins, the

²⁴ For purposes of discussion, arguments and responses, I will further cleave the section as follows: section 17, first paragraph, part A and part B, and section 17, second paragraph, part A and part B. This dissection is to recognize each of the four sentences as separate sub-parts of section 17 of the 1916 Act.

term “practices” is again juxtaposed to the term “regulations.” And again, the statute directs the common carrier to draft, to implement, and to enforce these just and reasonable “regulations and practices.”

Section 18 of the 1916 Act addressed interstate commerce by water and gives more contextual reference to the terms “regulations and practices.” It provides, in relevant part:

Section 18. Common carriers to establish schedule of rates and reasonable regulations for conduct of business; filing with shipping board; charge of more than maximum rates.

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, marketing, 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.

Whenever the board finds that any rate, fare, charge, classification, tariff, regulation, or practice, demanded, charged, collected, or observed by such carrier is unjust or unreasonable, it may determine, prescribe, and order enforced a just and reasonable maximum rate, fare, or charge, or a just and reasonable classification, tariff, regulation, or practice.

Section 18, 1916 Act (emphasis added).

The section heading states simply and clearly that common carriers are to establish reasonable regulations for the conduct of the business of waterborne transportation. Further, the carriers are directed to establish such regulations and practices in the same

manner that the common carriers establish rates, fares, charges, (cargo) classifications, and tariffs. Last, by obvious implication of the concept of “common carriage”, each and every category listed in the section was universally observed and made applicable by the common carrier to each and every passenger and cargo shippers.

As referenced earlier, during the 1970’s and 1980’s, every mode of passenger and cargo transportation in the United States – railroads, truck lines, air lines, and ocean carriers –underwent Congressional scrutiny and deregulatory legislation. Federal agency oversight provisions and regulatory powers were rolled back, and, in many cases, totally repealed in favor of allowing free competition and market place dynamics to control and level the playing field for all providers of transportation services and their respective consumers.

Following two rounds of railroad deregulation²⁵, Congress turned its deregulatory pen to the 1916 Act. The 1984 Act diminished the ability of steamship conferences to meet, agree on, and enforce common freight rates. Steamship lines were allowed to enter into individual contracts with cargo shippers. And of highest significance to our current inquiry, the power of the Commission to affirmatively correct unjust or unreasonable carrier behavior under § 17 - the second sentence of § 17, first paragraph, and the second sentence of §17, second paragraph - were both repealed and thrown overboard.

Significantly, for purposes of the inquiry *sub judice*, it is important to note that the Commission’s authority to determine a “regulation or practice” to be “unjust or unreasonable” carried over into § 41102(c) of the 1984 Act. However, the Commission’s authority to “determine, prescribe and order enforced a just and reasonable regulation or practice” was eliminated in the 1984 Act.

²⁵ See the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210; Staggers Act of 1980, Pub. L. 96-448.

Thus we come to the current Congressional formulation of § 41102(c), the statutory provision in question.

SEC. 10. PROHIBITED ACTS

(d) Common Carriers, Ocean Transportation Intermediaries, and Marine Terminal Operators

(1) No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

On its face, the language of § 41102(c), without context and without reference to any standard canons of statutory construction, could be subject to some degree of open reading. What is a “just regulation”? What is a “reasonable practice”? However, such concession does not mean that the Commission is thereby granted a clean “white board”, untethered from any further inquiry and thus free to incorporate any creative interpretation that might suit its objective du jour. *Chevron* and the canons of statutory interpretation simply do not permit an agency to simply do whatever it wants.

Before we submerge into context and all related canons of construction, we must first consider the Syntactic Canon concerning grammar. In *Flora v. United States*, 362 U.S. 145 (1960), the Supreme Court concisely defined this canon:

This Court does not review congressional enactments as a panel of grammarians; but neither do we regard ordinary principals of English prose as irrelevant to a construction of those enactments.

Id. at 150.

Reviewing § 41102(c) under this initial canon of construction, one can observe that the regulated entity is the subject of the sentence. The subject is directed – i.e. do not fail to – then comes the active

verbs – “establish, observe, and enforce” just and reasonable regulations and practices. The regulated entity is ordered to, first, initiate the creation, dissemination, and publication of such just and reasonable regulations and practices, and simultaneously, to observe and enforce those regulations and practices that were created by that regulated entity. It tortures the construction to the point of absurdity to suggest, as the majority does, that by this language Congress was ordering the regulated entity to initiate and “establish” a regulation and practice that was already in existence out in the ancient and modern realm of both common and statutory *corpus juris*. Stated differently – why would Congress, through this language in the Shipping Act, be ordering or directing regulated entities not to fail to comply with all laws “established” (i) by all legislative bodies, and (ii) by common law courts in terms of common law duties? Such syntactic construction is obviously incorrect.

Some of the section’s other terms are defined elsewhere in the statute, such as “common carrier”, “ocean transportation intermediary”, and “marine terminal operator”. Such entities are required to file various forms and obtain various licenses from the Commission in order to operate in the foreign waterborne commerce of the United States. As regulated and licensed entities, certain of their activities are regulated by the Shipping Act. Other non-Shipping Act activities are regulated by other government agencies, such as the U.S. Coast Guard and Customs and Border Protection. And still other activities, such as various commercial activities, are subject to various federal and state laws and regulations.

Other terms that Congress used in both the 1916 and the 1984 versions of the Shipping Act, namely “regulations and practices”, require additional steps in order to determine the Congressional meaning and intent. The next and most fundamental rule of statutory construction is the Ordinary Meaning Canon - the words of a statute are to be taken in their natural and ordinary signification and import.²⁶

²⁶ See, e.g., James Kent, *Commentaries on American Law* 432 (1826) “The words

The cases referenced in footnotes 9 through 17 above and in the discussion of judicial interpretation of the phrase “practices” by multiple courts applying the Mann-Elkins Act, the 1916 Act, and other statutes, all utilized the Ordinary Meaning Canon to find the meaning of the term “practice” as intended by Congress.²⁷ All came to a reasoned conclusion that confirms the minority position and further, that stands in direct opposition to the majority position.

of a statute are to be taken in their natural and ordinary signification and import; and if technical words are used, they are to be taken in a technical sense.” A recent Commission decision took a small first step toward addressing the statutory and technical meaning of “practice”. (see *Bimsha*) Unfortunately, the parties in that case did not even begin a full and reasoned analysis of section § 41102(c) of the 1984 Act. Thus, the Court was left with what amounted to a default judgment in favor of the Commission.

In most simple terms, the Second Circuit’s review of the Commission’s interpretation and application of § 41102(c) of the Act was governed by *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) and its well-known two-step process. The Court considered Step One, and being presented with no reasoned position from the appellant, moved easily into *Chevron* Step Two, with the predictable deference to agency interpretation. However; the Court took the most unusual step of commenting on the paucity of the appellant’s presentation. See *Chief Cargo Services, Inc. v. Federal Maritime Commission, United States of America*, Summary Order, Case 13-4256, Document 54-1(2d Cir. 2014)“To the extent dissenters to the FMC’s decision identified further reasons for doubting the agency’s liability determination, Chief Cargo does not advance those contentions here, and thus we deem any such arguments abandoned.” *Id.* at 5.

Thus the legal arguments that were advanced in the various cases cited in the opening section of this dissent and in the *Bimsha* case dissent in particular were judicially recognized as not presented by appellant to the Second Circuit, were deemed abandoned by the appellant, and therefore unavailable for further appeal. The Second Circuit’s unusual note also established that the issues set forth in the *Bimsha* dissent together with its reasoning and legal analysis remain a matter of first impression for any federal reviewing court.

²⁷ See *Intercoastal Investigation*, 1935, 1 F.M.C 400 (1935); *Whitam v. Chicago, R.I. & P. Ry. Co.*, 66 F. sup 1014 (N.D. Tex. 1946); *McClure v. Blackshere*, 231 F. Supp. 678 (D. Md. 1964); *Stockton Elevators*, 8 F.M.C. 187 (1964); and *European Trade Specialists*, 19 S.R.R. 59 (FMC 1979).

3. LEGISLATIVE AND JUDICIAL HISTORY

As we begin to review the legislative and judicial history of the Shipping Act - both the 1916 original enactment and the 1984 re-enactment and where § 41102(c) properly fits within that analysis, the full text of the Statute, together with the context of the phrase must be kept in mind. The Whole-Text Canon is a fundamental concept in interpreting a legal phrase and in finding Congressional intent. As Justice Scalia has written, “[c]ontext is a primary determinant of meaning The entirety of the document thus provides the context for each of its parts.”²⁸ This rule of construction has deep roots in our jurisprudence. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), Chief Justice John Marshall invoked the rule in an early case concerning the United States Constitution where he called for “a fair construction of the whole instrument.” *Id.* at 406. In a more contemporary case, *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 439 (1935), Justice Cardozo stated, “[t]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.” *Id.* at 439. Returning to Justice Scalia in *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.* 484 U.S. 365 (1998) for a more recent gloss, Scalia in that case referred to statutory construction as a “holistic endeavor.” *Id.* at 371.

a) Pre-1984

The text and heritage of the statutory language itself provides compass direction as to Congressional intent. Justice Frankfurter expressed the maxim as, “[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”²⁹ In *United States Navigation Co. v. Cunard S.S. Co. Ltd.*, 284 U.S. 474 (1932), the U.S. Supreme Court

²⁸ Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (1st ed. 2012).

²⁹ Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

tied a tight knot binding the ICA and the 1916 Act. The Court gave a general review of the various sections of the 1916 Act, including section 17 - the predecessor to § 41102(c) of the 1984 Act, and ruled that:

[t]hese and other provisions of the Shipping Act clearly exhibit the close parallelism between the act and its prototype, the ICA, and the applicability both of the principals of construction and administration.

Id. at 484 (emphasis added).

In *Baltimore & Ohio Railroad Company v. United States*, 277 U.S. 291 (1923), the U.S. Supreme Court considered the question of what constituted a “practice” within the contemplation of Congress in the ICA. The dispute concerned the division of rates and revenue between eastern railroads, western railroads, and a jointly owned company that operated the bridge spanning the Mississippi River. The Court ruled that the rate and revenue division was not a practice, and utilized the following canon of construction:

The word “practice”, considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it.

Id. at 299-300 (citation omitted)(emphasis added).

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

The Court was employing the common canon of construction that associated words bear on one another's meaning. Specifically, the Court is holding that the meaning and application of the word "practices" must be narrowly confined to the class of words associated with it. In *Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312 (1977), the U.S. Supreme Court articulated the Associated Words Canon where Justice Stevens held, "words grouped in a list should be given related meanings." *Id.* at 322.³⁰

As one reviews the construction of the 1910 Mann-Elkins amendment to the ICA and the words that juxtapose and surround the term "practice", the association cannot be missed – much less ignored. Consider:

[E]stablish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs . . . and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the States and with foreign countries is prohibited and declared to be unlawful.³¹

The Associated Words Canon requires that the meaning of "practice" to be confined in this case to a context similar to a rate, a tariff provision, a cargo classification, or related regulation "made or prescribed" by the common carrier and thereby imposed and made applicable to the cargo shipper community as a whole.

³⁰ See also *City of Fort Worth v. Cornyn*, 86 S.W.3rd 320, 327 (Tex. App.-Austin 2002) ("The doctrine of construction – *noscitur a sociis* – teaches that "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute, and that where two or more words of analogous meaning are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations and give color and expression to each other." (citation omitted).

³¹ Mann-Elkins Act, 61st Congress, 2nd Session, ch. 309, 36 Stat. 539, enacted June 18, 1910.

A few years later, the United States Shipping Board Bureau (USSBB), a predecessor to the Commission, considered the term “practice” as used in the 1916 Act in *Intercoastal Investigation, 1935*, 1 FMC 400 (1935), an investigation that covered sixteen years of steam ship conference activities. The USSBB held:

The provisions of the Shipping Act, 1916, also apply to these respondents. It is there provided . . . that carriers shall establish, observe, and enforce just and reasonable rates, charges, (cargo) classifications, and tariffs and just and reasonable regulations and practices related thereto . . . The terms “rates”, “charges”, “tariffs”, and “practices” as used in transportation have received judicial interpretation . . . Owing to its wide and variable connotation, a practice, which unless restricted ordinarily means an often repeated and customary action, is deemed to apply only to acts or things belonging to the class as those meant by the words of the law that are associated with it. . . . In section 18, the term “practices” is associated with various words, including “rates”, “charges”, and “tariffs”.

Id. at 431-432 (emphasis added).³²

Thus the Commission employed both the Ordinary Meaning Canon and the Associated Words Canon of construction and found that the application of the term “practices” must be confined within transportation’s specialized lexicon. “Rates”, “charges”, cargo “classifications”, “tariffs”, and “practices” are all transportation specific terms that the common carrier applies uniformly to the passenger and cargo shipper community. Specifically, the USSBB held that “practices” meant “an often repeated and customary action”. *Id.* at 432.

³² *Intercoastal Investigations* cited two ICA railroad cases as authority. See *Baltimore & Ohio Railroad Company v. United States*, 277 U.S. 291 (1923) and *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 257 (1931).

A decade later, in *Whitam v. Chicago R.I. & P. Ry. Co.*, 66 F. Supp. 1014 (N.D. Tex. 1946), a federal trial court considered the term “practice” as used in the ICA and held that, “[the] word a ‘practice’ as used in the decision, or used anywhere properly, implies systematic doing of the act complained of . . .” *Id.* at 1017.

Eleven years after Congress enacted the Mann-Elkins amendment and five years after replanting that same soil into the 1916 Act, Congress used near identical language in another statute. In *McClure v. Blackshere*, 231 F. Supp. 678 (D. Md. 1964), a federal trial court considered the term “practice” as used in section 208 of the Packers and Stockyards Act of 1921³³ and, by use of the Ordinary Meaning Canon, offered the following reasoning and conclusion:

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

Id. at 682.

The Commission considered a marine terminal dispute in 1962, where the terminal had overcharged for demurrage in one shipment and then refused to refund the overcharge to the shipper. Instead, the terminal applied the refund amount to an alleged prior

³³ The Packers and Stockyards Act of 1921 was passed to maintain competition in the livestock industry. The Act bans discrimination, manipulation of price or weight, livestock or carcasses; commercial bribery; misrepresentation of source, condition, or quality of livestock; and other unfair or manipulative practices. section 208 of the Packers and Stockyards Act of 1921 provides that “[i]t shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services . . .” 7 U.S.C. § 208.

outstanding debt owed by the shipper. In *J.M. Altieri v. Puerto Rico Port Authority*, 7 F.M.C. 416 (ALJ 1962), the shipper filed an action to recover the overpayment and the ALJ denied the claim based on the following reading and application of section 17, second paragraph, part A:

The unjust and unreasonable practices condemned by section 17 are those, in the words of the statute, “relating to or connected with the receiving, handling, storing or delivering of property.” The practices that are intended to fall within the coverage of this section are shipping practices. It is these practices and only these that were assigned to the special expertise of the Agency. . . . [R]espondent has unilaterally effected an offset of monies admittedly owing to complainant against a disputed claim The categorical statement . . . that respondent had a right to withhold the refund and offset it against the other claim is without foundation. This unlawful act of respondent, if it is one, may provide the basis for an action in court; but it is not necessarily a violation of section 17.

The dispute is over the question whether respondent must refund an overpayment. The issues incident to this question would be exactly the same if the overpayment were on the purchase price of groceries. They are not so peculiar to shipping matters that they require or warrant the intervention of the Commission. A court can handle all aspects of these issues. That is not to say, of course, that court and agency actions are always mutually exclusive.

If the action of respondent were one of a series of such occurrences, a *practice* might be spelled out that would invoke the coverage of section 17.

Id. at 419-20 (emphasis in the original)

In the same year that the *McClure* federal court decision was decided, the Commission considered the *Stockton Elevators* case.³⁴

³⁴ *Stockton Elevators*, 8 F.M.C. 187 (1964).

In the most complete case in which the full Commission analyzed the meaning of section 17 of the 1916 Act and the meaning of the term “practice”, the Commission issued a decision that is four square on point and is diametrically opposed to the current majority position.

Stockton Elevators operated an export terminal on the West coast that was experiencing incoming rail car congestion. It had granted a variance to its published tariff in favor of a customer on five transactions so as to expedite the sale and unloading of the trains. The alternative was to begin diverting incoming loaded trains to holding yards some distance from the terminal facility. A competitor complained that Stockton Elevators had violated section 17 of the 1916 Act. The Commission held:

[I]t cannot be found that the Elevator engaged in a “practice” within the meaning of Section 17. The essence of a practice is uniformity. It is something habitually performed and implies continuity . . . the usual course of conduct. It is not an occasional transaction as here shown. . . .

Id. at 200-201.³⁵

The second relevant finding was “[e]ven if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust or unreasonable. The commerce of the United States was not deterred.” *Id.* at 201.

³⁵ Cited therein as prior judicial precedent and authority for this general proposition are a number of cases from different courts and commercial contexts, including railroad, shipping and manufacturing cases: “*Intercoastal Investigation*, 1935, 1 F.M.C 400, 432 (1935); *B&O By. Co. v. United States*, 277 U.S. 291, 300 (1928); *Francesconi & Co. v. B&O Ry. Co.*, 274 F 687, 690; *Wells Lamont Corp. v. Bowles*, 149 F. 2d 364.” *Id.*

Some fifteen years following the *Stockton Elevator* investigation and a short five years prior to the Congressional passage of the 1984 Act, the full Commission again considered section 17 of the 1916 Act and addressed the precise question of the term “practice”. In *European Trade Specialists v. Prudential-Grace Lines*, 19 S.R.R. 59 (FMC 1979), a unanimous Commission held:

Even assuming, without deciding, that European was not notified of the classification and rating problem, we cannot say that such conduct by Hipage amounts to a violation of Section 17. Unless its normal practice was not to so inform the shipper, such adverse treatment cannot be found to violate the section as a matter of law.

Id. at 63 (emphasis on “practice” in the original)(emphasis on “matter of law” added).

The Commission continued:

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

Id. (emphasis added).

This section describes the judicial record and legislative context in existence when Congress took up the task of considering the reform of the 1916 Act and then enacting the 1984 Act. As discussed above, Congress was deregulating all modes of transportation during this period. Several points of disagreement between my position and the majority position are revealed at this juncture in the legislative and judicial history of § 41102(c) of the 1984 Act.

b) Congress enacts the Shipping Act of 1984

To restate the initial proposition – we are looking for reasonable indications of Congress’s intent with regard to a word and phrase it used in a statute. As the Supreme Court held in *Chevron*, “If the intent of Congress is clear, that is the end of the matter” *Chevron*, 467 U.S. at 842-843. Aside from the near exact mirror image of the Mann-Elkins Act language and section 17 of the 1916 Act, lets again consider section 17 of the 1916 Act and of § 41102(c) of the 1984 Act with a reasonable edit that does no injury to the syntax or semantical sense of the two provisions.

The relevant portion of section 17 of the 1916 Act provides that: “[Every regulated entity shall] establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property.

§ 41102(c) of the 1984 Act provides that: [No regulated entity may fail to] establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property.

Any argument that these two provisions are different – in any legally or logically relevant manner – lacks reason, foundation, or plausibility.

The Prior-Construction Canon has strong support from the U.S. Supreme Court. In *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998), Justice Kennedy wrote, “[W]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well. *Id.* at 645 (emphasis added).

The Prior-Construction Canon provides another solid foundation for my position that Congressional intent as to the meaning, interpretation and construction of the phrase “establish, observe, and enforce just and reasonable regulations and practices related to or

connected with the receiving, handling, storing, or delivery of property” is clear and unambiguous. Congress used the same 1916 Shipping Act language in the new 1984 Act. The Commission’s holdings in *Intercoastal Investigation, 1935*, 1 F.M.C. 400 (1935), the case law, including ICA federal court cases, cited therein as supporting precedent³⁶, *Altieri*,³⁷ *Stockton Elevators*³⁸, the case law, including ICA federal court cases, cited therein as supporting precedent, and *European Trade*³⁹ was incorporated into the new statute as well.

In previous decisions, the Commission attempts to distinguish *Stockton Elevator* and *European Trade*. In their *Kobel Remand Order*, 32 S.R.R. 1720 (FMC 2013), the majority asserts:

Stockton Elevators was not a case that discussed whether the respondent’s regulations and practices in question were “unjust or

³⁶ *Intercoastal* at 432.

³⁷ *J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416 (ALJ 1962)(“If the action of respondent were one of a series of such occurrences, a *practice* might be spelled out that would invoke the coverage of section 17. *Hecht, Levis and Kahn, Inc. v. Isbrandtsen, Co., Inc.*, 3 F.M.B. 798 (1950). However, the action of the respondent is an isolated or ‘one shot’ occurrence. Complainant has alleged and proved only the one instance of such conduct. It cannot be found to be a ‘practice’ within the meaning of the last paragraph of section 17.” Id.at 420. (emphasis in original).)

³⁸ *Stockton Elevators* at 618 (“It cannot be found that the Elevators engaged in a ‘practice’ within the meaning of section 17. The essence of a practice is uniformity. It is something habitually performed and it implies continuity . . . the usual course of conduct. It is not an occasional transaction such as here shown. *Intercoastal Investigation, 1935*, 1. USSBB 400, 432; *B&O Ry. Co.*, 274 F. 687, 690; *Whitham v. Chicago R.I. & P. Ry. Co.*, 66 F. Supp. 1014; *Wells Lamont Corp. v. Bowles*, 149 F.2d 364.”)

³⁹ *European Trade Specialists* at 63. (“Even assuming, without deciding, that *European* was not notified of the classification and rating problem we cannot say that such conduct by Hipage amounts to a violation of Section 17. Unless it normal *practice* was not to so notify the shipper, such adverse treatment cannot be found to violate the section as a matter of law. *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 181, 200 (3 S.R.R. 605)(1964)”(emphasis in original).

unreasonable”, but whether five specific instances of transactions violated section 17 of the Shipping Act of 1916.

Id. at 1732.

First, the Commission’s assertion is a *non sequitur*, in that it has no relationship to the question of whether Stockton Elevators engaged in a “practice” of granting exceptions to its filed tariff rate. More importantly, the majority’s assertion is not merely incorrect, it is directly contradicted by the Commission’s published report. The final report, *Investigation of Certain Practices of Stockton Elevators*, 3 S.R.R. 605 (1964), considered exceptions filed by the Commission’s Hearing Counsel to the Commission Examiner’s initial decision. The Commission ruled as follows:

The Examiner concluded that neither the Elevator nor Mitsui had participated in any act which was unfair, unjust or unreasonable within the meaning of Sections 16 and 17 and that the proceedings should be discontinued The exceptions are in the nature of general conclusions that Stockton Elevators . . . engaged in a practice which was unjust and unreasonable in violation of Section 17 of the Act; . . . and in arranging wharfage at a reduced rate, engaged in an unjust and unreasonable practice in violation of Section 17.

Id. at 606.

The Commission then adopted the Examiners Decision as its own and made it a part of the final Investigation Report, including the Examiner’s final statement:

ULTIMATE CONCLUSION. Regardless of other legal points raised, there has been no showing that either respondent participated in any act which was unjust, unfair, or unreasonable. The proceeding should be discontinued.

Id. at 618

The Commission places full reliance for support of its position upon the change that Congress made to the old section 17 language when it reenacted that language in the new § 41102(c) of the 1984 Act. In the *Kobel* Remand Order, 32 S.R.R. 1720 (FMC 2013), the Commission offered the following rationale as they dismissed, if not outright rejected, prior federal court decisions and the Commission's prior unequivocal and authoritative rulings on § 41102(c):

Stockton Elevators discussed section 17. . . of the Shipping Act of, 1916, language of which is different from section 10(d)(1) of the Shipping Act of 1984. As discussed below, section 17 of the Shipping Act, 1916 stated, “[w]henver the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.” (cite omitted) That language, however, was later removed from the legislation of the Shipping Act of 1984, and section 10(d)(1) does not contain it. (cite omitted) Therefore, although *Stockton Elevators* discussed the predecessor to section 10(d)(1), it did not discuss the same statutory language in the same context as section 10(d)(1) and thus is not directly precedential in the analysis of section 10(d)(1) (footnote omitted).

Id. at 1732 (emphasis added).

The Commission's *Kobel* Remand Order, 32 S.R.R. 1720 (FMC 2013), then moves to *European Trade Specialists* and simply bootstrapped its prior argument as follows:

As *Stockton Elevators* discussed above, *European Trade Specialists* discussed section 17 of the Shipping Act, 1916, which gave the predecessor to the Commission an authority to “determine, prescribe, and order enforced a just and reasonable regulation or practice,” whenever it finds any regulation or practice unjust or unreasonable. Therefore, *European Trade Specialists* also discussed different statutory section with different context and is not directly precedential in the analysis of section 10(d)(1).

Id. at 1733 (emphasis added).

While I am left flummoxed by the Commission's attempt to distinguish prior controlling precedent, the majority ignores two rather glaring problems with its reasoning. First, neither *Stockton Elevators* nor *European Trade Specialists* made any reference in any manner whatsoever to that portion of section 17, second paragraph, part B of the 1916 Act that deals with the Commission's authority to "determine, prescribe, and order enforced a just and reasonable regulation or practice," whenever it finds any regulation or practice unjust or unreasonable – not a single word. Why? Because the issue of the Commission determining and ordering enforced an agency initiated and crafted "regulation and practice" was never alleged, never discussed, nor offered as a potential remedy. Second, and far more logically compelling, is precisely the historical context in which Congress excised and thus repealed the second sentence (i.e. part B) of the second paragraph of section 17 of the 1916 Act. As discussed above in Subsection D1, Purpose, Congress was deregulating all modes of transportation in the 1980s. This Congressional deregulation process meant reducing and removing the scope of authority and regulatory "footprint" of all federal transportation regulatory agencies. The Commission was subjected to the same deregulatory knife.

This actual statutory history points towards a totally different conclusion. Congress moved the first sentence (part A) of the second paragraph of section 17 of the 1916 Act over to the new 1984 Act wholly in good form. That language – requiring that no regulated entity may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property - is now found in § 41102(c) of the 1984 Act. The second sentence, the one to which the majority refers in the *Koble* Remand Order, is that portion having to do with the Commission's authority to "determine, prescribe, and order enforced a just and reasonable regulation or practice," whenever it finds any regulation or practice unjust or unreasonable

(what I call “part B” of the second paragraph of section 17) - was indeed removed and thus repealed, meaning that Congress intended to diminish and truncate the Commission’s statutory authority to address regulated entity activity as regards their compliance with the provision; “establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Therefore, according to a reasoned application of both clear legislative fact combined with the majority’s position, Congress intended, and in fact did reduce the Commission’s statutory authority by repealing part B, the second sentence of the second paragraph of section 17. However, with the very same stroke of the legislative pen, Congress intended to significantly increase the Commission’s statutory authority, scope, and reach in part A, first sentence of the second paragraph of section 17 via a new and substantially expanded reading, interpretation, and application of § 41102(c). Such a conclusion lacks any foundation and is beyond quizzical – it is implausible.

The next traditional rule of statutory interpretation that offers strong guidance on the original intent of Congress and that the majority fails to consider or address is the Presumption of Consistent Usage. In *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427 (1932), the U.S. Supreme Court framed this canon of construction as follows, “[t]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. *Id.* at 433 (emphasis added).

In the 1984 Act, Congress used the term “practice” or “practices” eight times in three different sections of the new legislation: section 5 (Agreements); section 8 (Tariffs); and section 10 (Prohibited Acts).

Congress first uses the term “practices” in section 5(f) Maritime Labor Agreements, of the 1984 Act, as follows:

This subsection does not exempt from this Act any rates, charges, regulations, or practices of a common carrier that are required to be set forth in a tariff, or are essential terms of a service contract whether or not those rates, charges, regulations, or practices arise out of, or are otherwise related to a marine labor agreement. 46 U.S.C. § 40301(d) [emphasis added].

The 1984 Act next uses the term “practices” in section 8(a)(1) addressing tariffs as follows:

Section 8(a)(1) – [e]ach common carrier and conference shall keep open to public inspection ..., tariffs showing all its rates, charges, classifications, rules, and practices, between all points or ports on its own route and on any through transportation route that has been established.” 46 U.S.C. 41104(2)(A) [emphasis added].

These usages of “practice” are in complete harmony with the original 1910 Mann-Elkins Act and the original section 17 of the 1916 Act’s usage of “practices” referenced above.

Then, in section 10, the Prohibited Acts section of the 1984 Act, the term “practices” is used in six sub-sections. In five sub-sections, the term’s usage is consistent with the plain and ordinary meaning, i.e. an act or omission by the regulated party that is performed as its Normal, Customary, & Continuous method of conducting business with shippers and cargo representatives. Consider the following:

46 U.S.C. § 41104(2)(A) – No common carrier, either alone or in conjunction with any other person, directly or indirectly, may: (2) provide service in the liner trade that: (A) is not in accordance with the rates, charges, classifications, rules, and practices contained in a tariff published or a service contract entered into under section 8 of this Act unless excepted or exempted under section 8(A)(1) or section 16 of this Act. [emphasis added].

46 U.S.C. § 41104(4) – No common carrier, either alone or in conjunction with any other person, directly or indirectly, may: (4) for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of: (A) rates or charges; (B) cargo classifications; (C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (D) the loading and landing of freight; or (E) the adjustment and settlement of claims. [emphasis added].⁴⁰

46 U.S.C. § 41104(5) – No common carrier, either alone or in conjunction with any other person, directly or indirectly, may: (5) for service pursuant to a service contract, engage in any unfair or unjustly discriminatory practice in the matter of rates or charges with respect to any port. [emphasis added].

46 U.S.C. § 41105(3) – No conference or group of two or more common carriers may: (3) engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier. [emphasis added].

46 U.S.C. § 41105(7) – No conference or group of two or more common carriers may: (7) for service pursuant to a service contract, engage in any unjustly discriminatory practice in the matter of rates or charges with respect to any locality, port, or persons due to those persons' status as shippers associations or ocean transportation intermediaries [emphasis added].

⁴⁰ The Administrative Law Judge in *William J. Brewer, v. Saeid B. Maralan (aka Sam Bustani) and World Line Shipping, Inc.*, 28 S.R.R. 1331 (ALJ 2000) noted that “[t]he Commission observed that a persistent pattern of quoting rates and failing to file them could constitute a violation of . . . section 10(b)(4)(A), which forbids carriers from engaging in unfair practices in the matter of rates. See *Martyn Merritt – Possible Violations of Shipping Act of 1984*, 25 S.R.R. 1495, 1500 (1991).” *Id.* at 1334 (emphasis added).

46 U.S.C. § 41102(c) – No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. [emphasis added].

As recently as *Altieri, Stockton Elevators*, and *European Trade Specialists* as discussed above, and in *A.N. Deringer*⁴¹, and *Kamara*,⁴² the Commission likewise used the term “practice” in a consistent manner for all the places it appears in the Shipping Act. However, the Commission has now redefined “practice” to mean something entirely different in § 41102(c) – i.e. a “practice” is established by the transportation industry’s normal method of conducting business, including the common custom – translation, “duty” – of complying with all statutes and common law duties. Further, any single failure to comply and observe such duty is a violation of § 41102(c). The newly discovered meaning is starkly discordant and jarringly out of harmony with the clear usage and common sense application of “practice” in every other section in the statute. Thus the majority construction runs directly counter to the canon of interpretation that a term should be given a consistent definition and construction within a statute or section. Further, the Associated Words Canon, discussed above, is again applicable in the re-enacted version of section 17 / section 10(d)(1) / § 41102(c).

⁴¹ See *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.*, 25 S.R.R. 1273 (ALJ 1990).

⁴² See *Kamara v. Honesty Shipping Service*, 29 S.R.R. 321 (ALJ 2001) (“...it is not clear that a carrier’s simple failure to remit payment to a subcontracting carrier constitutes a Shipping Act violation, although the shipper would certainly have a commercial contractual claim. A series of cases alleging Section 10(d)(1) violations has established that a complainant must demonstrate regulations and practices, as opposed to identifying what might be an isolated error or understandable misfortune. See, for example Informal Docket No. 1745(I), *Mrs. Susanne Brunner v. OMS Moving Inc.*, slip decision served January 27, 1994, administratively final March 8, 1994. In the present case, however, despite the SO’s request, the complainants failed to either cite a specific statutory violation or attempt to describe a relevant pattern of behavior.”) *Id.* at 322. N 8.

c) Post 1984 Commission Jurisprudence and the Decisional Drift/Shift/Change/Overruling of *Intercoastal Investigation/Altieri/Stockton Elevators/European Trade*.

In *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.*, 25 S.R.R. 1273, 1276, 1277 (FMC 1990), a post 1984 case that followed the *Altieri, Intercoastal Investigation, Stockton Elevators, European Trade Specialists* line of precedent in a case considering what is now § 41102(c), the ALJ dismissed claims regarding missing cargo with the following ruling:

In any case, the sustaining of an alleged violation of Section 10(d)(1) requires more than the showing of unjust or unreasonable activity. It requires that the complainant prove failure “. . . to establish, observe, and enforce just and reasonable *regulations and practices* . . .” Marlin’s failure to specify on the bill of lading the number of boxes hardly demonstrates any shortcomings in this area. If Marlin did act improperly, only the existence of an isolated error has been demonstrated. Nothing in the record casts light upon its regulations or practices, and this constitutes a fatal flaw in Deringer’s case.

Id. at 1276 (emphasis on “regulations and practices” in the original, other emphasis added). The ALJ continued:

It is clear that C.O.G.S.A. was enacted to clarify the responsibilities as well as the rights and immunities of carriers and ships with respect to loss and damage claims. Consequently, the use of the Shipping Act of 1984 to circumvent C.O.G.S.A provisions would constitute a wholly unwarranted frustration of Congressional intent. Furthermore, some of the logical conclusions of such a step would be absurd. For example, C.O.G.S.A provides a one-year period for the filing of suit; after that period, a claim is time barred. To accept Deringer’s premise, one would have to conclude that a one-year period exists during which a claimant may file suit, but two additional years exist in which to file with the FMC. Inasmuch as C.O.G.S.A stipulates that the carrier and ship, in the absence of a

suit, are discharged from liability after one year, such a conclusion is unacceptable.

Id. at 1277 (footnotes omitted).⁴³

The Commission’s case law regarding § 41102(c) of the 1984 Act first navigated outside of the established sailing channel with the 1991 decision in *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11 (ALJ 1991). The case involved a *pro se* claimant who contracted with a freight forwarder, who then contracted with Penn-Nordic Line for the shipment of a single motorcycle from the U.S. to New Zealand. Adair paid the freight forwarder; however, the freight forwarder did not pass such payment over to Penn-Nordic. The motorcycle had been delivered to a U.S. port warehouse, but never moved further. The complaint was filed under the Commission’s informal docket procedures, i.e. small claims process.

My dissent in the *Kobel* Remand Order, 32 S.R.R. 1720 (FMC 2013), discusses this initial “springboard” decision at some length⁴⁴ and I will only summarize main points here.

- The motorcycle moved overland to a U.S. port warehouse and no further. It was never even touched by an ocean common carrier. Therefore, the subject matter jurisdiction of the Shipping Act was never shown or established.
- The Commission’s ALJ stated that Adair could file his suit in “a court of law” in Washington State and use one or all legal theories from contract law, tort law or agency law.
- The ALJ *sua sponte* suggested that Adair amend his complaint to allege a violation of what is now § 41102(c) of the 1984 Act.

⁴³ In addition, with any COGSA litigation, the parties pay their own legal fees. Under a recent amendment to the 1984 Act in Title IV of the Howard Coble Coast Guard and Maritime Transportation Act of 2014, Pub. L. No. 113-281 enacted on December 18, 2014, the prevailing party in Shipping Act claims wins full reparation and the award of attorney fees.

⁴⁴ *Kobel*, 32 S.R.R. at 1757-1758.

- The ALJ ruled, “I find that the record shows both respondents to have acted unreasonably.”⁴⁵
- The ALJ found respondents “liable for the monetary injury inflicted on Adair as a result of their unreasonable conduct”.⁴⁶
- The ALJ concluded, “The above litany of misconduct . . . amply demonstrates that Penn-Nordic failed to ‘establish, observe, and enforce just and reasonable practices relating to or connected with receiving, handling, storing, or delivering of property.’”⁴⁷
- The ALJ continued, “The facts . . . show that Penn-Nordic behaved unreasonably under Section 10(d)(1) . . . this conduct would undoubtedly have contravened other standards of law principals of contract law and common carrier law applicable in courts of law and . . . Adair could have obtained relief . . . in a court of law or perhaps admiralty . . .”⁴⁸
- The ALJ’s legal epistle continued with a review of sixteen principals of contract law, six principals of admiralty law including COGSA and six principals of agency law.⁴⁹
- The ALJ continued his summation, “The application of the above principals of admiralty, contract, and agency law becomes apparent when considering the facts of this case.”⁵⁰
- The ALJ further concluded, “[t]herefore, this record amply demonstrates that Penn-Nordic behaved unreasonably and in violation of Section 10(d)(1).”⁵¹
- The ALJ further concluded, “[a]s an agent and fiduciary of . . . Adair, [the freight forwarder] did not maintain the standard of care required by [common agency] law of such

⁴⁵ *Adair*, 26 S.R.R. at 19.

⁴⁶ *Adair*, 26 S.R.R. at 15.

⁴⁷ *Adair*, 26 S.R.R. at 20.

⁴⁸ *Adair*, 26 S.R.R. at 20.

⁴⁹ *Adair*, 26 S.R.R. at 20-21.

⁵⁰ *Adair*, 26 S.R.R. at 21.

⁵¹ *Adair*, 26 S.R.R. at 22 (emphasis added).

fiduciaries nor fulfill its duties to . . . Adair. Consequently, I conclude that Corporate World [freight forwarder] failed to observe just and reasonable regulations and practices, in violation of Section 10(d)(1) of the 1984 Act.”⁵²

- The ALJ offered another lengthy review of the common law of agency and freight forwarder’s fiduciary duties, and then again concluded, “Freight forwarders have been held liable under admiralty and negligence law in suits brought before federal courts because of the breach of their fiduciary duties towards their shipper-principals.”⁵³
- Again and finally concluding, the ALJ held, “I find that Corporate World [freight forwarder] failed to exercise the standard of care and diligence which the [common agency] law requires of fiduciaries . . . and that Corporate World [freight forwarder] failed to observe just and reasonable regulations and practices with regard to the shipment . . . in violation of Section 10(d)(1) of the 1984 Shipping Act.”⁵⁴

Note that the ALJ focused on behavior that he deemed to be unreasonable by virtue of common law proscriptions and various federal statutes including COGSA.⁵⁵ He misstated the 1984 Act in

⁵² *Adair*, 26 S.R.R. at 22 (emphasis added).

⁵³ *Adair*, 26 S.R.R. at 23.

⁵⁴ *Adair*, 26 S.R.R. at 24 (emphasis added).

⁵⁵ The ALJ cited record evidence that could have easily brought the entire matter under other sections of the 1984 Act. Of most relevance here, there was evidence that the case was centered on cargo misdescription and a “practice” of same by the freight forwarder. “Penn-Nordic discovered that the shipment was not used household goods but rather a motorcycle and that Penn-Nordic had no specific rate for motorcycles in its tariff. . . . [A]ccording to [Penn-Nordic], the [freight forwarder] misdescribed the shipment and the cubic measurement on the shipment and on shipments it had booked with Penn-Nordic in the past. . . . [A]ccording to Penn-Nordic, the [freight forwarder] had ‘knowingly misdeclared this shipment to get himself a lower rate as this is his practice.’ “ *Adair*, 26 S.R.R. at 16 (emphasis added). Thus the entire *Adair* case could have been resolved squarely within the *Intercoastal Investigation/Altieri/Stockton Elevators/European Trade/Deringer* line of § 41102(c) case law or under section 10(a)(1) of the 1984 Act that prohibits use of false cargo classification to obtain a lower transportation rate in any single transaction.

that he ignored the two terms “establish” and “enforce” and condensed that element down to the phrase, “failed to observe”. This shorthand treatment of the statutory phrase would quite likely be embraced by the majority since it, in most simple fashion, eliminates all of the twisting and hopscotching in their deconstructing of the statute.

With Mr. Adair’s *pro se* representation, supported by zealous counsel from the ALJ, and amid the sixteen dense and tightly spaced pages of the *Adair* decision, there is not a single reference to any Commission precedent or federal court interpretation of the statutory language of what is now § 41102(c) of the 1984 Act or its predecessor provision in the 1916 Act, section 17. Pointedly, there was no acknowledgement, to paraphrase the Commission’s clearly articulated requirement in *European Trade Specialists* that, “[u]nless its normal practice was to [fail to comply with the law of contract, law of torts, law of agency, law of admiralty], such adverse treatment cannot be found to violate the section [section 17 of the 1916 Act / section 10(d)(1) of the 84 Act / § 41102(c)] of the 1984 Act as a matter of law.”⁵⁶

In this and other decisions, the Commission relies on a series of cases for their proposition that a single failure to “observe and enforce just and reasonable regulations and practices” is a violation of § 41102(c) of the 1984 Act of the 1984 Act.⁵⁷

Citing *Maritime Service Corporation v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655 (ALJ 1978), *aff’d* 18 S.R.R. 853 (FMC 1978), a 1978 Commission case, as support for the majority position that failure to fulfill common law or statutory obligations in a single incident is all that is needed to find the regulated party has engaged in an unjust and unreasonable practice, the Commission ignores the dissent’s discussion in *Bimsha International v. Chief Cargo*

⁵⁶ See *European Trade Specialists*, 19 S.R.R. at 63.

⁵⁷ See *Yakov Kobel v. Hapag-Lloyd A.G.*, No. 10-06 2015 FMC LEXIS 6 *19 (“*Kobel* Order Affirming Remand Initial Decision”).

Services, 32 S.R.R. 1861 (FMC 2013), that points out the clear error in that reliance.⁵⁸ In fact, in *Maritime Services Corporation*, the full Commission considered the Section 17 allegations and findings and then expressly dismissed and rejected all counts of section 17, 1916 Act violations.⁵⁹ Thus, the *Maritime Services Corporation* case stands as both a rejection of the majority position and an affirmation of my minority position

Following the *Adair* decision, the Commission next relies upon *Tractors and Farmers Equipment v. Cosmos Shipping*, 26 S.R.R. 799 (ID 1992), for precedential support. As fully discussed by the dissent in the *Kobel* Remand Order, 32 S.R.R. 1720 (FMC 2013), the entire case could and should have been handled under other FMC regulations that directly prohibited the alleged activity.⁶⁰ Instead, once again the ALJ *sua sponte* ordered the parties to amend their complaint to include section 10(d)(1) of the 1984 Act. When the complainant failed to so amend the complaint, the ALJ *sua sponte* amended the complaint on the parties behalf to include an allegation of violation of section 10(d)(1) of the 1984 Act. Then, with a full thumb on the scale, the ALJ found a violation of section 10(d)(1) of the 1984 Act. Again, not a single reference to Commission precedent and case law that required a finding of a Normal, Customary, & Continuous practice is found in the *Tractors and Farmers* decision.

The Commission relies on *Symington v. Euro Car Transport, Inc.*, 26 S.R.R. 871 (ID 1993), as precedent. Again, as more fully

⁵⁸ See *Bimsha International v. Chief Cargo Services*, 32 S.R.R. at 1872 (FMC 2013).

⁵⁹ See *Sea-Land Service v. Acme Fast Freight*, 18 S.R.R. 853 (FMC 1978)) "[W]e conclude that the Presiding Officer's findings and conclusions ... were erroneous with respect to the Section ... 17 violations." Note: by substitution of complainant parties, FMC proceeding No. 73-3, *Maritime Service Corporation v. Acme Fast Freight of Puerto Rico*, 17 S.R.R. 1655 (ALJ 1978), was renamed *Sea-Land Services, Inc., et al v. Acme Fast Freight of Puerto Rico*, 18 S.R.R. 853 (FMC 1978).

⁶⁰ *Bimsha*, 32 S.R.R. at 1759.

discussed by the dissent in the *Kobel* Remand Order, 32 S.R.R. 1720 (FMC 2013),⁶¹ the same ALJ who decided the *Adair* and *Tractor and Farmers* cases took a simple, single automobile shipment from the US to England that could and should have been adjudicated under sections § 41104(6) and § 41104(12) of the 1984 Act, once again ignored traditional concepts of judicial modesty, economy, and restraint, and found that a single breach of an oral contract to be a violation of § 41102(c) of the 1984 Act.

In past cases, the Commission relied on *Total Fitness Equipment, Inc. d/b/a/ Professional Gym v. Worldlink Logistics, Inc.*, 28 S.R.R. 45 (ID 1997) to support its position. This is yet another case where the ALJ who earlier decided the *Adair, Tractor and Farmers, and Symington* cases took a complaint involving the “Filed-Rate Doctrine”⁶² and misdescription of cargo by an NVOCC for violating §§ 41104(1) and 41104(6) of the 1984 Act and inserted a § 41102(c) count on top of the other allegations. Interestingly, the record evidence showed that the NVOCC had prior incidents of using the scheme to offer one rate and then claim that – due to the cargo classification issue and the “Filed-Rate Doctrine” – the NVOCC was required to collect a higher rate. In essence, the NVOCC was operating a maritime “bait and switch” operation. The ALJ ignored the opportunity to bring the *Total Fitness Equipment* case within the proper *Intercoastal Investigation/Altieri/Stockton Elevators/ European Trade/Deringer* line of Commission precedent.

Then in *Abubakar Kamara and Abdulai Kamara v. Honesty Shipping Service and Atlantic Ocean Line*, 29 S.R.R. 321, 322 (FMC 2001), a different Commission ALJ took the opposite course and returned to traditional case precedent as to what constitutes a “practice” in dismissing a complaint alleging a violation of § 41102(c):

⁶¹ See *Kobel*, 32 S.R.R. at 1759.

⁶² The “Filed-Rate Doctrine” provides that any entity required to file tariffs governing the rates, terms, and conditions of service must adhere strictly to those terms.

It is not clear that a carrier's simple failure to remit payment to a subcontracting carrier constitutes a Shipping Act violation, although the shipper would certainly have a commercial contractual claim. A series of cases alleging § 41102(c) violations has established that a complainant must demonstrate regulations and practices, as opposed to identifying what might be an isolated error or understandable misfortune. See, for example Informal Docket No. 1745(I), *Mrs. Susanne Brunner v. OMS Moving Inc.*, slip decision served January 27, 1994, administratively final March 8, 1994. In the present case, however, despite the SO's request, the complainants failed to either cite a specific statutory violation or attempt to describe a relevant pattern of behavior.")

Id. at 322 N 8 (emphasis added).

Last in line and leading up to *Houben v. World Moving Services, Inc.*, 31 S.R.R. 1401 (FMC 2010), is the Commission's decision in *William J. Brewer v. Saeid B. Maralan (aka Sam Bustani) and World Line Shipping, Inc.*, 29 S.R.R. 6 (FMC 2000). In its *Kobel* Remand Order, 32 S.R.R. 1720 (FMC 2013), the Commission cited *Brewer* as follows:

The Commission has found that a failure to observe and enforce just and reasonable practices is a violation of section 10(d)(1), regardless of whether it involves a single shipment or multiple shipments. See . . . *William Brewer* (cite omitted) (NVOCC held to have violated section 10(d)(1) with respect to a single shipment when it refused to release cargo at the destination port unless additional money was paid, and instructed its agents to place the shipment on hold).

Id. at 1731-1732.

As discussed at some length in the *Kobel* Remand Order, the dissent listed the full chronical of Mr. Bustani's misdeeds as an NVOCC.⁶³ One year prior to Mr. Brewer's proceeding and based on numerous

⁶³ See *Kobel*, 32 S.R.R. at 1759-1760.

complaints, the Commission had ordered a formal investigatory proceeding into Mr. Bustani's activities. When the ALJ discussed application of law to the facts of that case, he relied on *Total Fitness Equipment d/b/a/ Professional Gym v. Worldlink Logistics, Inc.*, 28 S.R.R. 45 (ID 1997), aff'd. 28 S.R.R. 534 (FMC 1998), and most pointedly on the recent Commission Investigation as follows:

This is a type of "bait and switch" tactic that the Commission has recently encountered in the case of *Total Fitness*. [internal footnote: In another case involving an ethically deficient NVOCC who had engaged in the "bait and switch" tactic, the Commission observed that a persistent pattern of quoting rates and failing to file them could constitute a violation of section 10(b)(6) of the Act (now 10(b)(4)(A)) which forbids carriers from engaging in unfair practices in the matter of rates.] . . . Respondents' conduct is even more deplorable in the instant case because they have been the subject of a formal Commission investigation as well as many informal complaints, ultimately being penalized some \$100,000 and ordered to cease and desist from committing violations of the Act. By such conduct respondents can now take their place alongside ethically deficient NVOCCs who have mishandled shipments, improperly demanded more money, blamed their agents, or even held shipments "hostage" in order to extract more money from the shippers who were trying to obtain release of their cargo.

Id. at 1334 (cites omitted)(emphasis added).

Three issues are clearly presented by the *William Brewer* case. First, the ALJ relies on the "Normal, Customary, & Continuous" business practices of Mr. Bustani, as found in the then quite recent Commission investigation, as support for his ruling. In fact, the entire context of Mr. Bustani's activities would be a proper "poster child" for § 41102(c) cases.

Second, the *William Brewer* case does not lend support to the majority's position that a single incident, standing alone, meets the

requirements of § 41102(c). To the contrary, when read in its full context, it supports the minority position.

Third, is the illuminating footnote in *Brewer* where the ALJ acknowledges the 1984 Act's requirement that the term "practices" means, in his words, a "persistent pattern" of complained of improper activity.⁶⁴ As noted above in the discussion of the Presumption of Consistent Usage, it is not possible to reconcile a definition of "practice" within section § 41104(4) as meaning a "persistent pattern", with a definition of "practice" within § 41102(c) as meaning – take one's pick – any single industry practice, any single unjust practice, or any single customer problem with their international shipment.

Last is the case of *Houben v. World Moving Services, Inc.*, 31 S.R.R. 1400 (FMC 2010), where in 2010, the Commission came out into the sunlight and held that a single shipment is within the purview of § 41102(c) of the 1984 Act. The facts involved a single shipment of household goods from the U.S. to Belgium. In an informal (small claims) proceeding and a *pro se* complainant, the settlement officer had amended the complaint *sua sponte* to incorporate a § 41102(c) allegation. The case was presented to the Commission on an expedited *de novo* review basis. The Commission cited *Adair*, *Symington*, *European Trade Specialists*, *Tractors and Farmers*, and *Maritime Services* as precedent for their holding that the freight forwarder had violated § 41102(c). Of interest, as discussed above, *European Trade Specialists* stands in complete contradiction to the *Houben* decision and, in *Maritime Services*, the full Commission expressly dismissed all claims under Section 17 claims, the predecessor provision to section 10(d)(1) of the 1984 Act.

⁶⁴ *Brewer*, 28 S.R.R. at 1334. n. 4 ("In another case involving an ethically deficient NVOCC who and engaged in the "bait and switch" tactic, the Commission observed that a *persistent pattern* of quoting rates and failing to file them could constitute a violation of 10(b)(6) of the Act (now sec. 10(b)(4)(A)), which forbids carriers from engaging in unfair *practices* in the matter of rates. See *Martyn Merritt – Possible Violations of Shipping Act of 1984*. 25 S.R.R. 1495, 1500 (1991)." (emphasis added).

Thus, the Commission holds out as the precedent foundation for its current position on what constitutes a violation of § 41102(c) a line of Commission cases, beginning with an informal small claims proceeding concerning the shipment of a single motorcycle in *Adair*, a single shipment of tires in *Tractors and Farmers*, and the shipment of a single automobile in *Symington*. The majority dismisses or ignores the line of Commission cases in *Intercoastal Investigation*, *Altieri*, *Stockton Elevators*, *European Trade Specialists*, *Deringer*, and *Kamara* offering precedent as to what constitutes a “practice” under the Shipping Act. The legal rules concerning federal agency *stare decisis* is discussed below.

4. Structure and Statutory Scheme

In *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), the D.C. Circuit Court directs us to consider and examine the broader statutory framework in interpreting a statute.⁶⁵ The *Loving* court then noted that Congress had enacted numerous other provisions and revisions over many years concerning the tax preparation business. “Under the IRS’s view here, however, all of Congress’s statutory amendments would have been unnecessary.”⁶⁶ With the IRS’s new and expansive interpretation of its agency’s century old statutory language, “[t]hat would have already covered all (or virtually all) of the conduct that Congress later spent so much time specifically targeting in individual statutes regulating tax-return preparers.”⁶⁷ The court concluded its discussion on this section of the decision, with, “As the Supreme Court has stated, ‘the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.’ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133,

⁶⁵ *Loving* at 1020 (“Fourth is the broader statutory framework. ‘It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme . . . See *Roberts v. Sea-Land Services, Inc.*, ___ U.S. ___, 132 S.Ct. 1350, 1357, 182 L.Ed.2d 341 (2012)(internal quotation marks omitted). *Id.* at 1020.

⁶⁶ *Loving*, 742 F.3d at 1020.

⁶⁷ *Id.*

120 S. Ct. 1291, 146 L.Ed.2d 121 (2000).”⁶⁸

The reasoning and holding of the *Loving* court is, again, directly on point. If, as the Commission held in the case *sub judice*, § 41102(c) of the 1984 Shipping Act applies to each single incident of cargo delay, damage, or related breach in performance of the regulated entity’s duties concerning receipt, handling, storage, and delivery of property, then why did Congress even bother to enact COGSA in 1936 with its carefully crafted and balanced regime of limited common carrier defenses on one hand and limited common carrier liability on the other?⁶⁹

In *Bimsha International v. Chief Cargo Services*, 32 S.R.R. 1861 (FMC 2013), the Commission ignored a highly specific federal statute covering the proper handling of negotiable bills of lading in maritime commerce. In that case, concerning a cargo move from Pakistan to the United States, an ocean transportation intermediary erroneously and improperly delivered the negotiable bills of lading on three containers involved in a single transaction to the U.S. buyer without first receiving payment.

The Federal Bills of Lading Act (the “Pomerene Act”)⁷⁰ sets forth five specific cargo origin and delivery destination possibilities (intra-state, inter-state and foreign destination).⁷¹ The single origin-destination pair that is omitted from coverage under the act is a foreign origin of shipment and U.S. delivery destination. Hornbook law explains, “[s]ince the Pomerene Act does not apply to bills of lading issued in foreign countries for shipments to the United States, the negotiability of such bills would depend on the law of the country of issue.”⁷² The Commission did not consider Pakistani law, but simply “filled the gap” that Congress must have inadvertently

⁶⁸ *Id.* at 1020-1021.

⁶⁹ See Notes 18 and 44 and case discussion, *supra*.

⁷⁰ Federal Bill of Lading Act, 49 U.S.C §§80101 – 80116.

⁷¹ 49 U.S.C §§80102.

⁷² Grant Gilmore and Charles L. Black, *The Law of Admiralty* 95 (2d ed. 1975).

left, reasoning that misdelivery of any negotiable bill of lading was “unjust and unreasonable”.

Given the specificity of Congress’s consideration of all various origin-destination shipment possibilities in the Pomerene Act enacted the same year as the 1916 Act, the Negative-Implication Canon is directly applicable in this context. Consider the following commentary:

[I]f Parliament in legislating speaks only of specific things and specific situations, it is a legitimate inference that the particulars exhaust the legislative will. The particular which is omitted from the particulars mentioned is the *casus omissus*, which the judge cannot supply because that would amount to legislation.

J.A. Corry, *Administrative Law and the Interpretation of Statutes*, 1 U. Toronto L.J. 286, 298 (1936). As Justice Brandeis noted in *Ebert v. Poston*, 266 U.S. 548 (1925), “A *casus omissus* does not justify judicial legislation.” *Id.* at 554.

I submit that where it is improper for a court to supply an omitted particular lest it engage in “judicial legislation”, it is equally, if not more, improper for a federal regulatory agency to supply an omitted particular into a statute, especially so when considering a statute that Congress has not assigned to such agency for administration.

Further undeterred, the Commission asserted that its subject matter jurisdiction extended to all matters expressly covered by the Pomerene Act.

Even if the Pomerene Act applied, “[w]hen there are two [federal] acts upon the same subject, the rule is to give effect to both if possible,” unless there is “positive repugnancy” between them. *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939). There is no conflict between the Shipping Act and the Bills of Lading Act. And if there were, the Shipping Act is the later enacted statute and

would control.⁷³

Brief of the Respondents, Federal Maritime Commission and United States of America, *Chief Cargo Services Inc. v. FMC and USA*, 11 (2 Cir. 2014)(no.13-4256AG).

So the Commission has asserted that the 1984 Act has extraterritorial application, in contradiction of the presumption that a statute has no extraterritorial application.⁷⁴ More implausibly, the Commission would have the maritime regulated community and the public at large believe that on Tuesday, August 29, 1916 Congress enacted the detailed and specific provisions of the Federal Bills of Lading Act, and then, on the following Thursday, September 7, 1916 – *just nine days later* – Congress enacted the 1916 Act and that Congress intended for the Shipping Act to both (i) apply to the same maritime issues as the Pomerene Act, and (ii) be the controlling statute in such identical fact situations concerning negotiable bills of lading, due to its more recent birth date.

Never considered by the Commission is the far more logical and probable Congressional intention that the new Shipping Act apply to a different spectrum of maritime problems and abuses, say, for example, a regulated maritime entity that exhibited a “Normal, Customary, and Continuous” - i.e. the normal, customary, often repeated, systematic, uniform, habitual and continuous - *practice* of misdelivering negotiable bills of lading without first receiving payment from the consignee/purchaser of the cargo. The Pomerene Act has a set process for civil penalties. The Shipping Act has processes for ordering reparations, and for ordering civil penalties, and for ordering the revocation of the regulated entity’s FMC license

⁷³ The Shipping Act, 1916, 39 Stat. 728, was enacted on Sept. 7, 1916, a mere week after the Bills of Lading Act, Aug. 29, 1916, 39 Stat. 545.

⁷⁴ See *Black’s Law Dictionary* 1874 (9th ed. 2009)(“Statutes are confined to their own territory and have no extraterritorial effect.”) See also *Sandberg v. McDonald*, 248 U.S. 185 (1918)(“Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction.”) *Id.* at 195.

and operating certificate, and for ordering a cease and desist order, enforceable in federal court, and for the award of attorney fees. With different statutory purposes, the 1916 Shipping Act and the Pomerene Act operate at two totally different levels.

The broader statutory framework of The Shipping Act maintains a constant compass setting that directs us towards the current minority position as set forth above, all reflecting the clear intent of Congress and articulated in *Intercoastal Investigation*, *Altieri*, *Stockton Elevators*, *European Trade*, and *Deringer*.

A final argument that falls within statutory structure, statutory scheme and Whole-Text Canon analysis is consideration of the clear Congressional expression of the context and relative place that the Shipping Act occupies in maritime legislation and jurisprudence as set forth in section 16 of the 1984 Act. To once again reference the deregulatory legislative intent of the 1984 Act, Congress gave the Commission the statutory right to grant exemptions from requirements of the 1984 Act upon certain findings. The 1984 version of section 16, in relevant part, provides:

Section 16. Exemptions

The Commission, upon application or on its own motion, may by order or rule exempt for the future . . . any specified activity of [persons subject to this Act] if it finds that the exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in substantial reduction in competition, or be detrimental to commerce.

46 U.S.C. § 40103.

This section 16 exemption authority was enhanced and further liberalized in the 1998 amendments to the Shipping Act of 1984. Congress eliminated two of the four findings that the Commission was required to make prior to granting any exemption from regulation: that the exemption would substantially impair effective

regulation by the Commission or be unjustly discriminatory. Following enactment of the Ocean Shipping Reform Act of 1998, the Commission need only find that a section 16 exemption would not result in substantial reduction in competition or be detrimental to commerce.

Thus, the Congressional intent, overall context and statutory mandate of the 1984 Shipping Act together with the 1998 changes to the Commission's section 16 exemption authority, makes clear that Congress wanted the Commission to focus its regulatory authority on maritime activities that: i) result in substantial reduction in competition, and ii) are detrimental to commerce.

With the 1998 amendments, Congress injected additional competitive market-driven provisions into the Shipping Act of 1984. Several provisions were expanded, including new provisions that retreated from traditional common carriage concepts. For example, vessel operators were newly allowed to enter into private confidential contracts with shippers. A shipper's competitors and other shipping lines were no longer allowed to see the commercial terms of such contracts and were no longer allowed to claim "me too" status and thereby demand equal commercial terms. In short, Congress wanted more reliance on competition, less reliance on regulation.⁷⁵

The Whole-Text Canon, as discussed above, is the cornerstone of canons of statutory interpretation when one is seeking context and legislative intent and has been long observed in the law. Sir Edward Cook explained this canon over three hundred and eighty years ago:

[I]t is the most natural and genuine exposition of a statute to construe

⁷⁵ In the Ocean Shipping Reform Act of 1998, Congress added a new element to the 1984 Act's statutory policy. 46 U.S.C. § 40101 ("Section 2. Declaration of policy. The purposes of this Act are . . . (4) to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.")

one part of the statute by another part of the same statute, for that best expresseth the meaning of the maker. . . If any section [of the law] be intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of the other.⁷⁶

In a more contemporary comment, *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), the U.S. Supreme Court expressed the Whole-Text Canon as follows:

In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.

Id. at 291.

We must align and juxtapose § 41102(c) with section 16 and then consider the question:

- (i) did Congress enact § 41102(c) with the intent to bring federal agency oversight and regulation to regulated entities who abuse the maritime shipping public by imposing unjust and unreasonable business methods, and who do so on a normal, customary, and continuous basis, and thereby negatively impact maritime transportation competition or inflict detrimental effect upon the commerce of the United States;

OR

- (ii) did Congress enact § 41102(c) with the intent to bring

⁷⁶ Edward Coke, *The First Part of the Institutes of the Laws of England, or a Commentary upon Littleton* section 728, at 381a (1628, 14th ed. 1791).

regulation to a vessel-operating-common carrier (VOCC) such as CSAL whose alleged failures, based on the record evidence in this case, occurred in only this single incident.⁷⁷

I find that the answer is clearly the first, and most decidedly not the later.

E. New Commission Arguments

To support its interpretation of § 41102(c), the Commission relies on an argument that, until recently, never surfaced in the full one-hundred years since Congress first enacted the now familiar phrase, “establish, observe, and enforce just and reasonable regulations and practices . . .” in the 1910 Mann-Elkins Act amendments to the ICA. The Commission’s argument and construction of the statute as outlined in its *Kobel* Order Affirming Remand Initial Decision and applied in the case *sub judice* defies any reasoned summation. After numerous readings of the Commission’s opinion in *Kobel*, I cannot determine whether the Commission’s construction is circular reasoning – restating the premise as the conclusion – or if it is more properly characterized as either a rhetorical tautology or a logical tautology.

In an effort to pry apart the Commission’s dense seven page construction in the *Kobel* Remand Order,⁷⁸ first consider their attempt to dismember the initial phrase, “establish, observe, and enforce” and then to utilize the canon of construction that holds, if possible, every word of a statute is to be given effect.⁷⁹ The

⁷⁷ There is not a single fact in the record to support an argument that CSAL’s acts or omissions constitute a “practice” that is proscribed by § 41102(c) of the 1984 Act.

⁷⁸ See *Kobel*, 32 S.R.R. 1728-1735.

⁷⁹ In the *Kobel* Remand Order, 32 S.R.R. 1720 (FMC 2013), the majority states that, “[t]he Commission must ‘give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.’ *Inhabitants of Montclair Tp. V. Ramsdell*, 107 U.S. 147, 152 (1883). *Id.* at 1729.

Commission's argument begins with the clever creation of a claimed absurdity and then artificially buttresses the claim with a naked finding that Congress really intended to use the disjunctive "or" rather than the conjunctive "and" in the phrase. Once disjoined, the Commission asserts that each, now separate element, must have its separate application so as to avoid application of the Surplusage Canon.

[I]t would be a violation of the section only when a complainant can demonstrate that a respondent simultaneously committed all [of] the three elements of the section. If a respondent established just and reasonable regulations and practices, it would not violate section 10(d)(1) even if that respondent failed to observe or enforce the established just and reasonable regulations and practices. Under this scenario, a violation cannot occur because the respondent established a just and reasonable regulation and practice and thus the complainant would never satisfy the first of the three elements of the section. This reasoning, however, contains a fatal flaw in that it completely disregards the language "observe and enforce" in section 10(d)(1).

Kobel, 32 S.R.R. at 1729.

The Commission then adds a gloss of the Absurdity Canon and the Plain Meaning Canon where it holds:

Even the failure in a single transaction can be a failure to observe and enforce a just and reasonable regulation and practice, and therefore, a violation of section 10(d)(1). This interpretation gives effect to every word of section 10(d)(1) and avoids the construction that "the legislature was ignorant of the meaning of the language it employed." This interpretation also avoids the irrational incentive for regulated parties to establish just and reasonable regulations and practices, but not to observe and enforce them, which the Commission believes would be in complete derogation of the plain language of section 10(d)(1).

Id. at 1730.

To begin a logical process of unscrambling the Commission's argument in *Kobel*, I would first reflect back to *Bell Atlantic Telephone v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), discussed above in the Framework for Analysis: "[T]extual analysis is a language game played on a field known as 'context.'" *Id.* at 1047 (emphasis added).

The Commission's "language game" of conjunctives versus disjunctives and "irrational incentives" ignores three issues that, individually and collectively, point us towards an opposite compass course.

First, the context of transportation statutes and regulations over a full century of analysis, litigation, and application by the ICC, the FMC and its predecessor agencies, and all reviewing federal courts have never witnessed the dissection and dismemberment of the phrase, "establish, observe, and enforce" in any manner that remotely resembles the Commission position. Second, the Commission refuses to acknowledge the simple and most logical response to their "irrational incentive" argument – namely, if a regulated entity "established" a just and reasonable "practice" but then proceeded to act in an opposite manner - i.e. an unjust or unreasonable manner - and did so on a Normal, Customary, and Continuous basis, then the regulated entity clearly never "established" the feigned just and reasonable "practice" in the first place. Thus the contrived disharmony disappears.

In discussing the Surplusage Canon, Justice Antonin Scalia addressed limitations on the canon's use that are most relevant in the current analysis.

[a] court may well prefer ordinary meaning to an unusual meaning that will avoid surplusage. So like other canons, this one must be applied with judgment and discretion, and with a careful regard to

context. . . Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach. Doublets and triplets abound in legalese: *Execute and perform* – what satisfies one but not the other.

See Scalia and Garner, *supra*, at 176-77 (emphasis in original).

In their attempt to employ the Surplusage Canon of statutory construction, the Commission fails to give any regard to the history of the liner shipping business, the legislative history, or the judicial history – all of which provides context for the “triplet” phrase “establish, observe, and enforce”. If the “triplet” that Justice Scalia acknowledges as “legalese” is given a common sense construction that has survived since 1910 without question or assault, then the majority’s position collapses.

In *Kobel*, the Commission invokes the Surplusage Canon in such a manner that tortures out a uniquely new interpretation⁸⁰ of § 41102(c) of the 1984 Act. But what the Commission refuses to either recognize or acknowledge is the clear fact that this construction not only ignores, but actively throws overboard, a far more fundamental term in the statute – namely the term “practice” as used by Congress and recognized by the ICA, the Commission and its predecessor agencies, and federal courts since 1910. Thus the Commission’s usage and construction fundamentally violates the Surplusage Canon.

The Commission in *Kobel* attempts to incorporate a different place for the term “practice” to reside within the section where they offer the following as framework and their version of “context”:

⁸⁰ In debates on current world events, the discussion of “enhanced interrogation techniques” (EIT) seems apropos concerning the majority’s interpretation of the phrase “establish, observe, and enforce” – namely, if one employs sufficient EITs, the words will eventually say anything you want them to say.

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

Kobel, 32 S.R.R. at 1730.

This argument may have relevance for addressing whether a given regulation or practice is "just and reasonable." But the Commission's point is an answer to a separate and unasked question that is not relevant to the case *sub judice*. A VOCC may well have a duty to properly deliver a customer's cargo to the proper port of destination. That would fall within a general category of a "just and reasonable" method of conducting business.

However, the *relevant* question for the purposes of § 41102(c) of the 1984 Act is – did CSAL engage in a Normal, Customary, & Continuous *practice* of failing to deliver cargo to the agreed port of discharge. If the record evidence shows only this single incident, then the case may be justiciable before a State or Federal court of general jurisdiction by reason that CSAL's alleged act or omission might constitute a breach of contract or fiduciary duty claims. If the record evidence shows that such failure to properly deliver customers' cargo is CSAL's Normal, Customary, and Continuous *practice*, then it would be a matter that could implicate the Shipping Act and the Commission. The simple facts of the case *sub judice* are so analogous to the *European Trade Specialist* decision that the unanimous Commission holding bears repetition:

Even assuming . . . that [the shipper] was not notified of the [cargo] classification and rating problem, we cannot say that such

conduct by [the OTI] amounts to a violation of Section 17. Unless its normal *practice* was not to so inform the shipper, such adverse treatment cannot be found to violate the section as a *matter of law*. *Id.* at 63 (emphasis on “practice” in the original decision)(emphasis on “matter of law” added)

F. Beyond *Chevron* “Step One” – Two Arguments

The above sections have focused on the legal analysis required under *Chevron* “Step One” and the process of finding the intent of Congress. Upon finding Congress’s intent, then that is the end of the matter and we do not move over into *Chevron* “Step Two” where deference to the agency’s discretion as regards filling in legislative gaps and holes has been ruled as appropriate, subject to some limitations. However, two further matters remain and need discussion.

1. The Commission has built an impressive string of cases over the last four years since *Houben*, 31 S.R.R. 1400 (FMC 2010), for its position that a single failure to observe a duty is a violation of § 41102(c). Accordingly, a sub textual refrain emerges whereby this new line of cases is now the foundation and supporting precedent for the majority position.

I addressed this issue in *Bimsha*, 32 S.R.R. 1861 (FMC 2013), with reference to a prior situation where the Commission was admonished by the U.S. Supreme Court for regulatory overreach when it spread its jurisdictional net beyond the three-mile limit of the 1916 Act and over a far wider ocean. In *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726 (1973), the Commission was challenged over its interpretation and application of section 15 of the 1916 Act. The Commission had, for a number of years, interpreted the general wording of the section that required vessel common carriers to file joint operating and conference agreements at the Commission and obtain prior approval, to include Commission authority to approve or disapprove proposed acquisitions and mergers of an ocean

common carrier by another ocean common carrier. The Commission pointed to the Civil Aeronautics Board (CAB) and their statute which contained similar wording. The U.S. Supreme Court noted that Congress had enacted a separate and specific provision for airline mergers in a different section of the CAB statute, and held as follows:

[s]pecific grants of airline merger approval authority [were included in 49 U.S.C. Section 1378(a)(1)].[The Court was thus] . . . unwilling to construe the ambiguous provisions of Section 15 to serve this purpose, a purpose for which it is obviously not intended. As the Court of Appeals found, the House Committee which wrote Section 15 “neither sought information nor had discussion on ship sale agreements. They were neither part of the problem nor part of the solution.” [cite omitted] If . . . there is now a compelling need to fill the gap in the Commission’s regulatory authority, the need should be met in Congress where the competing policy questions can be thrashed out and a resolution found. We are not ready to meet that need by rewriting the statute and legislative history ourselves.

Id at 744, 745.

The Commission then further argued that proposed ocean common carrier merger and acquisition agreements had been filed with and ruled on by the Commission for a number of years. The Supreme Court addressed the Commission’s rejoinder argument as follows:

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

Id at 745 (emphasis added).

In *Pittsburg Press Company v. NLRB*, 977 F. 2d 652 (D.C. Cir. 1992), the Court of Appeals for the District of Columbia Circuit considered a federal agency's argument that its current decision was following recent agency precedent and ruled as follows:

We do not think it enough to say that this latest decision is consistent with the general drift of NLRB precedent, as it is that very drift that troubles us . . . [t]he Board has seemed willing to go with the flow, offering no reasoned justification for its course.

Id. at 660-61.

The Commission's steady course change in its interpretation of § 41102(c) of the 1984 Act does not gain added degrees of correctness with each re-affirming decision as described in the opening section of this dissent. As with *Seatrain Lines*, the Commission cannot bootstrap itself into a new, broadly expanded § 41102(c) scope where the agency has no statutory grant of Congressional authority in the first place.

2. The D.C. Circuit's *Loving* decision, 742 F.3d 1013 (D.C. Cir. 2014), acknowledges a federal agency's right to change its collective mind and adopt a new or different interpretation of a statute. The Court then points out a fundamental logical flaw in the IRS's new statutory interpretation as follows:

The IRS is surely free to change (or refine) its interpretation of a statute it administers. [cite omitted] But the interpretation, whether old or new, must be consistent with the statute. And in the circumstances of this case, we find it rather telling that the IRS had never before maintained that it possessed this authority. [cite omitted] In light of the text, history, structure and context of the statute, it becomes apparent that the IRS never before adopted its current interpretation for a reason. It is incorrect.

Id. at 1021.

The proposition that a federal agency is “free to change its interpretation” of a statute is further governed and constrained by a judicial rule of considerable importance – the rule of federal agency *stare decisis*. The U.S. Supreme Court held in *Motor Vehicle Mfrs. Ass’n v. State Farm Insurance*, 463 U.S. 29 (1983), “[a]n agency changing its course . . . is obligated to supply a reasoned analysis for the change. . .” *Id.* at 42.

The full application of *stare decisis* in Commission proceedings was recognized in *Harrington & Co and Palmetto Shipping & Stevedore v. Georgia Port Authority*, 23 S.R.R. 753 (ID 1986):

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

Id. at 766 (emphasis added).

Numerous federal courts of appeal have addressed the issue of administrative agency *stare decisis*. The District of Columbia Circuit held in *Jicarilla Apache Nation v. U.S. Dept. of Interior, et al.* 613 F. 3d 1112 (D.C. Cir 2010), and citing *State Farm Insurance*⁸¹ as follows:

We have held that “[r]easoned decisionmaking . . . necessarily requires the agency to acknowledge and provide an adequate

⁸¹ *State Farm Insurance*, 463 U.S. 29 (1983).

explanation for its departure from established precedent,” and an agency that neglects to do so acts arbitrarily and capriciously. [cites omitted] [W]e have never approved an agency’s decision to completely ignore relevant precedent. [cite omitted] Thus, [a]n agency’s failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making.

Id. at 1119-20 (cites omitted).

The District of Columbia Circuit gave a full and pointed explanation concerning the requirements and reasons for an independent agency to either follow its own precedent or explain any change with full justification in *Baltimore and Annapolis Railroad v. Washington Metropolitan Area Transit Commission*, 642 F. 2d 1365 (D.C. Cir. 1980) as follows:

The [WMAT] Commission cannot replace its conclusion that it lacks jurisdiction [over transportation services], with a different view, unless the announcement of that different view is accompanied by an explanation of the Commission’s reasons for making the change. Furthermore, the reasons contained in the explanation must be consistent with law and supported by substantial evidence on the record. Even absent special circumstances, it is vital that an agency justify a departure from its prior determinations.

First, the requirement of reasons imposes a measure of discipline on the agency, discouraging arbitrary and capricious actions by demanding a rational and considered discussion of the need for a new agency standard. The process of providing a rationale that can withstand public and judicial scrutiny compels the agency to take rule changes seriously. The agency will be less likely to make changes that are not supported by the relevant law and facts.

Second, the requirement of reasons fulfils the duty of fairness and justice owed by the agency to the party or parties “victimized” by the agency’s decision to shift course . . . a “disappointed party, whether he plans further proceedings or not, deserves to have the satisfaction of knowing why he lost his case.” [cite omitted]

Third, and perhaps most important of all, the requirement of reasons facilitates judicial review. “[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.” [cite omitted]

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

Id. at 1370.

Other relevant federal circuit decisions concerning *stare decisis* and the rule forbidding arbitrary and capricious agency decision making include *RKO General v. FCC*, 670 F. 2d 215, 223 (D.C. Cir 1981): “Failure to explain the reversal of directly controlling precedent is unlawful. *Id.* at 223 (cite omitted)(emphasis added). Also see *Federal Trade Commission v. Crowther*, 430 F. 2d 510 (D.C. Cir 1970): “[I]t is not enough to explain the Commission’s changed feeling by merely asserting that it has struck a new balance. Rationality in administrative adjudication requires something more than that.” *Id.* at 516.

The treatment of Commission precedent was addressed in Section D 3, Legislative and Judicial History, *supra*. That decisional language bears repetition for this discussion of federal agency *stare decisis*. The majority held in the *Kobel* Remand Order:

Stockton Elevators was not a case that discussed whether the respondent’s regulations and practices in question were “unjust or

unreasonable,” but whether five specific instances of transactions violated section 17 of the Shipping Act, 1916. The presiding officer⁸² held that considering the justifiable reason (alleviating the grain elevator congestion), the six instances of deviation from the established regulations and practices were not violations of the section. *Stockton Elevators* discussed section 17 (and section 16) of the Shipping Act of, 1916, language which is different from section 10(d)(1) of the Shipping Act of 1984. . . [s]ection 17 of the Shipping Act, 1916 stated, “[w]henver the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe and order enforced a just and reasonable regulation or practice.” *Id.* at 196. That language, however, was later removed from the legislation of the Shipping Act of 1984, and section 10(d)(1) does not contain it. [cite omitted] Therefore, although *Stockton Elevators* discussed the predecessor to section 10(d)(1), it did not discuss the same statutory language in the same context as section 10(d)(1) and thus is not directly precedential in the analysis of section 10(d)(1).

Kobel, 32 S.R.R. at 1732.⁸³

In its *Kobel* Remand Order, the Commission dismissed another Commission controlling precedent, *Altieri*, 7 F.M.C. 416 (Examiner 1962), with an even lighter flip of the wrist in a footnote:

⁸² The *Stockton Elevators* investigation report was issued by the full Commission.

⁸³ In *Kobel*, the Commission omitted significant relevant language from the *Stockton Elevators* investigation report, *Investigation of Certain Practices of Stockton Elevators*, 3 S.R.R. 605 (FMC 1964): “It cannot be found that the Elevator engaged in a “practice” within the meaning of Section 17. The essence of a practice is uniformity. It is something habitually performed and it implies continuity . . . the usual course of conduct. It is not an occasional transaction such as here shown. [citing *Intercoastal Investigations*, *Whitman*, and *Wells Lamont*] . . . [e]ven if the granting of the five allowances or the arranging for the single wharfage reduction could be designated practices, neither could be found to be unjust or unreasonable. The commerce of the United States was not deterred . . . Regardless of other legal points raised, there has been no showing that either respondent participated in any act which was unjust, unfair, or unreasonable.” *Id.* at 618 (emphasis added).

“Respondent Hapag-Lloyd also discussed *Altieri* [cite omitted] which later became the decision of the Commission. As *Stockton Elevators*, *Altieri* discussed section 17 of the Shipping Act, 1916, and thus is not precedential in section 10(d)(1) analysis.” *Kobel*, 32 S.R.R. at 1732, n. 14.

Last, in *Kobel* the Commission takes on the controlling precedent, *European Trade Specialists*, 19 S.R.R. 59 (FMC 1979), and directly quotes that decision’s language and reasoning at length, including a key holding, where the majority states, “The Commission affirmed the [*European Trade Specialists*] ALJ’s decision because the respondent’s conduct was not ‘a normal practice.’”, 32 S.R.R. at 1733. The Commission then leaps all chasms of logic and states:

As *Stockton Elevators* discussed above, *European Trade Specialists* discussed section 17 of the Shipping Act, 1916, which gave the predecessor to the Commission⁸⁴ an authority to “determine, prescribe, and order enforced a just and reasonable regulation or practice,” whenever it finds any regulation or practice unjust or unreasonable. Therefore, *European Trade Specialist* also discussed different statutory section with different context and is not directly precedential in the analysis of section 10(d)(1).

Kobel, 32 S.R.R. at 1733 (emphasis added).

As previously discussed and exposed, the sentence that Congress omitted in 1984 when it revised the 1916 Act had nothing to do with the matters consider by the Commission in the *Stockton Elevators* investigation report. Also as demonstrated above, the wording of section 10(d)(1) of the 1984 Act and section 17, second

⁸⁴ The Commission is in error. The current Commission descended from the Federal Maritime Board by Congressional act in 1961 and has continued in its current status to this date. The *Altieri* case was decided in October, 1962, the *Stockton Elevators* investigation report was considered and approved by the full Commission in June, 1964, and the *European Trade Specialists* case was decided by the full Commission in March, 1979.

paragraph, Part A – first sentence of the 1916 Act is so close to identical mirror image that any argument asserting the prior Commission case law “discussed statutory section with different context and is not directly precedential in the analysis of section 10(d)(1)” is vacuous and unsupported other than the *ipse dixit* of the majority.

The Commission has consistently refused to address or even acknowledge the fact that the Commission ALJ’s decisions in *Adair/Tractors/Symington* began the tidal change that implicitly overruled prior and well established Commission precedent including full Commission decisions, a comprehensive Commission Order of Investigation Report,⁸⁵ and corresponding federal court decisions applying companion ICA statutory provisions. Recall that *Houben* was a small claims matter with a *pro se* claimant handled by a settlement officer. Commission staff initiated an expedited *de novo* review by the full Commission. There were no legal briefs prepared by either party as both were not represented by counsel. That is the *Houben* record. The Commission’s *Houben*⁸⁶ decision in 2010 was the first to put the new rule that a single incident was all that was needed to find a violation of § 41102(c) in clear focus for the regulated maritime community to see, consider, and digest.

The closest that the Commission has come to acknowledging any change from prior established Commission jurisprudence is found in a brief comment in the *Bimsha* matter. See the ALJ’s Initial Decision in *Bimsha*, 32 S.R.R. 353 (ID 2011), where he is placing substantial reliance on the *Houben* decision’s construction of section 10(d)(1). His decisional reasoning, in full, is as follows:

European Trade Specialists v. Prudential Grace Lines, decided under section 17 of the Shipping Act, 1916, is problematic . . . To the extent there is a conflict between *Houben* and *European Trade Specialists*, I follow *Houben*, the more recent case.

⁸⁵ *Stockton Elevators*, 3 S.R.R. 605 (FMC 1964).

⁸⁶ *Houben*, 31 S.R.R. 1400 (FMC 2010).

Id. at 378 (cites omitted)(emphasis added).

Such is the full record of the Commission’s “reasoned analysis”,⁸⁷ “compelling reasons”,⁸⁸ and “substantial evidence on the record”⁸⁹ that supports the change in navigation course – a full 180 degree course change – from the long held, affirmed, and reaffirmed position on what elements were necessary to establish a § 41102(c) violation. From 1910 through 1991, we had a fully consistent application of the law. In 1991, a Commission ALJ began a course change. In 2001, a different ALJ tried to bring the ship back into the navigation channel. Then, in 2010, through a *pro se* small claims matter, the Commission threw the rudder hard over to effectuate a radical departure from the historical and traditional jurisprudence. We have gone from:

A section 17, second paragraph/section 10(d)(1)/§ 41102(c) violation is established upon presentation by the claimant of credible record evidence that (i) respondent is a regulated entity; (ii) respondent engaged in an act, an activity, or, by way of omission, failed to act in a maritime context concerning the receipt, handling, storage, or delivery of property in international waterborne commerce; (iii) such act, activity, or omission was the Normal, Customary, & Continuous manner in which the regulated entity performed its maritime business with the general public, i.e. the regulated entity’s “practice(s)”; (iv) such practice was unjust or unreasonable as determined by some relevant standard, such as “the commerce of the United States was being deterred” or by reference to established maritime standards, duties, or proscriptions. All four elements must be established to prove a violation of § 41102(c) of the 1984 Act.

⁸⁷ See *State Farm Insurance*, 463 U.S. 29 (1983).

⁸⁸ See *Harrington & Co and Palmetto Shipping & Stevedore v. Georgia Port Authority*, 23 S.R.R. 753 (ID 1986).

⁸⁹ See *Baltimore and Annapolis Railroad v. Washington Metropolitan Area Transit Commission*, 642 F. 2d 1365 (D.C. Cir. 1980)

over to the new majority position, summarized as:

CSAL's failure to deliver Claimant's cargo to the proper port of destination in this one instance violated section 41102(c) of the 84 Act. The majority never identifies or discusses the "practice" that CSAL engaged in, but simply leaps to the conclusion that the CSAL's action violated § 41102(c).

In reinterpreting and expanding § 41102(c) beyond anything contemplated by Congress in enacting the provision or the legislative and judicial history interpreting the statutory language, the Commission majority has been steadfast and consistent in refusing to articulate the experience that has taught the Commission that prior FMC and ICC case law was both wrong and was working harm under present conditions.⁹⁰ Likewise, the Commission has failed to provide "reasoned analysis,"⁹¹ "compelling reasons,"⁹² to "acknowledge and provide adequate explanation",⁹³ or provide "substantial evidence on the record" for the complete volte-face from prior section § 41102(c) case law, as described above, to the new majority position in the case *sub judice* that a single failure by an VOCC is a violation of § 41102(c) of the 1984 Act.

As stated in the *Baltimore and Annapolis Railroad* decision, 642 F. 2d at 1370, the burden is squarely on the Commission's shoulders to justify the diametrical conflict between *Baltimore & Ohio Railroad Company* (a 1923 ICC case), *Intercoastal Investigations, 1935*, (a United States Shipping Board Bureau case), *Whitam v. Chicago R.I & P. Ry.* (a 1946 ICC case), *Altieri* (a 1962 FMC case), *McClure* (1964 case addressing a USDA regulation), *Stockton Elevators* (a 1964 FMC case), *Sea-Land Service* (formerly *Maritime*

⁹⁰ See *Harrington & Co and Palmetto Shipping & Stevedore v. Georgia Port Authority*, 23 S.R.R. 753 (ID 1986).

⁹¹ See *State Farm Insurance*, 463 U.S. 29 (1983).

⁹² See *Harrington*, 23 S.R.R. 753 (ID 1986).

⁹³ See *Jicarilla Apache Nation v. United States Department of the Interior*, 613 F.3d 1112, 1119-1120 (D.C. Ct. App. 2010).

Service, a 1978 FMC case), *European Trade Specialists* (a 1979 FMC case), *A.N. Deringer* (a 1990 FMC case), *Kamara* (a 2001 FMC case), on one side, and the new majority's favored cases of *Adair* (1991 FMC case), *Tractor* (1992 FMC case), *Symington* (1993 FMC case), *Houben* (2010 FMC case), and *Kobel* (2015 FMC case).⁹⁴ The failure to provide such justification thereby relegates the Commission's actions to the status of arbitrary, capricious, and unlawful.

G. Summary

The foregoing presents the purpose, text, legislative and judicial history, and the structure and statutory scheme of the 1984 Act and § 41102(c) thereof. The Commission's current construction of § 41102(c) does not withstand the examination required by "Step One" of *Chevron*. In determining whether the statute is ambiguous or whether Congress has spoken to the issue in question, the majority's position in the case *sub judice* is on the wrong side of numerous traditional canons of statutory construction, including:

- Syntactic Canon
- Ordinary Meaning Canon
- Whole Text Canon
- Associated Words Canon
- Prior Construction Canon
- Presumption of Consistent Usage Canon
- Negative Implication Canon
- Presumption Against Extraterritorial Application Canon
- Surplusage Canon

Further, the Commission maintains its position in complete disregard of its burden and duty as set forth under the doctrine of federal agency *stare decisis*.

⁹⁴ Also note: under this *stare decisis* rule, a government agency has the initial and ultimate burden of production and persuasion. There is no element of "agency discretion" to lighten or eliminate the agency's burden.

The Commission has expressed, *sub silentio*, the desire to offer assistance to property owners who have difficulties and suffer losses in the movement of their cargo in international waterborne commerce. As has been often noted, the pathway to purgatory and a lower, warmer region is paved with the bricks of good intentions. The Securities and Exchange Commission (SEC) interpreted a section of its statute⁹⁵ so as to broadly capture all nature of problems in the securities marketplace. In *SEC v. Sloan*, 436 U.S. 103 (1978), the U.S. Supreme Court pointedly rejected the agency's argument with the following comment:

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

Id. at 116 (emphasis in the original).

To express the Supreme Court's concern and holding in relation to the case *sub judice* and the current line of cases cited in the preamble to this dissent, the Commission should not look to § 41102(c) as the *panacea* for every problem or grievance that arises in the maritime realm of receiving, handling, storing, or delivering property. Moreover, it is not as though claimants would be adrift without any remedy. Several of the cases cited herein clearly document that the claimants would have full and adequate remedies under numerous legal proscription including common law, state statutes, and admiralty law. Such claims should be presented to proper courts of common pleas. Further, in several cases, the claimant could have received full remedy at the Commission under other specifically applicable sections of the 1984 Act.

⁹⁵ Securities Exchange Act of 1934, Ch. 404, 48 Stat. 881.

The Court of Appeals for the District of Columbia Circuit's holding in *Loving* framed the proper application of *Chevron*, *Pharmaceutical Research*, and *City of Arlington* as follows:

In determining whether a statute is ambiguous and in ultimately determining whether the agency's interpretation is permissible or instead is foreclosed by the statute, we must employ all the tools of statutory interpretation, including "text, structure, purpose, and legislative history."

Loving, 742 F.3d at 1016 (internal cites omitted).

The foregoing dissenting discussion and analysis more than amply shows that what is now § 41102(c) was not ambiguous for near one century, and is not ambiguous today. Proper consideration and application of the nine canons of statutory construction discussed above demonstrates that Congress has spoken to the issue at hand and has spoken "univocally".⁹⁶ Therefore, we may comfortably stop the inquiry at the *Chevron* Step One stage. We never get to the *Chevron* Step Two stage – a destination that the majority so assiduously strives for in order to claim an ambiguity in the language of the statute. However, if a "doubting Thomas" remains unconvinced, then the agency's interpretation of § 41102(c) is still not permissible because its interpretation is unreasonable in light of the proper application of the tools of statutory interpretation discussed *supra*. Further, the failure by the Commission to observe and follow the requirements of the doctrine of federal agency *stare decisis*, as discussed above, condemns the majority's order and decision to be improper and unlawful.

⁹⁶ See *Bell Atlantic Telephone Companies v. Federal Communications Commission*, 131 F.3d 1044 (D.C. Ct. App. 1997) ("Context serves an especially important role in textual analysis of a statute when Congress has not expressed itself as univocally as might be wished." *Id.* at 1047.

IV. CONCLUSION

By reason of the foregoing discussion and analysis, I respectfully dissent from the majority's Order Affirming Initial Decision wherein they affirm the ALJ's finding that CSAL violated § 41102(c) of the Shipping Act and award reparations. I would affirm and uphold the dismissal of Complainant's § 41102(b) claim.