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December 23, 2015  
FEDERAL MARITIME COMMISSION

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 1949(F)**

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**WALTER MUZORORI**

v.

**CANADA STATES AFRICA LINES INC. (CSAL)**

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**INITIAL DECISION<sup>1</sup>**

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**I. INTRODUCTION**

**A. Overview and Summary of Decision**

Claimant Walter Muzorori filed a small claim form for informal adjudication under Subpart S (“Claim”) alleging that respondent Canada States Africa Lines, Inc. (“CSAL”) violated sections 41102(b)(2) and 41102(c) of the Shipping Act of 1984<sup>2</sup> when it did not honor an agreement to change the port of delivery of a shipment of two vehicles from Cape Town, South Africa, to Walvis Bay, Namibia, causing significant harm including damages totaling \$21,980. Complainant’s Brief at 6.<sup>3</sup>

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<sup>1</sup> This initial decision will become the decision of the Commission in the absence of review by the Commission. 46 C.F.R. § 502.318. An appeal by a party must be filed with the Commission’s Office of the Secretary within twenty-two days from the date of service of the decision. 46 C.F.R. § 502.318.

<sup>2</sup> On October 14, 2006, the President signed a bill reenacting title 46, United States Code, Shipping, as positive law. The bill’s purpose was to “reorganiz[e] and restat[e] the laws currently in the appendix to title 46. It codifies existing law rather than creating new law.” H.R. Rep. 109-170, at 2 (2005).

<sup>3</sup> Complainant’s Brief was not numbered. Pages will be referred to as if sequentially numbered. The attached exhibits will be referred to by page number, with the first exhibit page labeled as Complainant Brief Ex. at 1. Claimant and Complainant are used interchangeably.

Respondent CSAL filed an objection to proceeding under Subpart S and asserts that there was no modification of the contract; the cargo was delivered to the port indicated on the bill of lading; and the expenses claimed are not established. Respondent's Opposition at 17-18.

As explained below, the evidence in the record supports a finding that CSAL violated section 41102(c) of the Shipping Act but does not support finding a violation of section 41102(b)(2) nor does the evidence support all of the damages claimed. Therefore, the claim is granted in part and reparations of \$6,405.60 are awarded. After discussion of the procedural background, evidence, and arguments of the parties, part two provides specific findings of fact, part three provides analysis and conclusions of law, and part four provides the Order.

## **B. Procedural Background**

On December 23, 2014, the Commission received Walter Muzorori's initial filing of an informal claim under Subpart S. 46 C.F.R. § 502.304. On January 5, 2015, a Notice of Filing of Small Claims Complaint and Assignment was issued, stating that Mr. Muzorori filed an informal claim alleging a violation of the Shipping Act, sections 41102(b)(2) and 41102(c), and including a statement of events and exhibits.

On January 29, 2015, respondent CSAL filed its answer to the claim objecting to the informal procedure, denying liability, and raising affirmative defenses. On February 2, 2015, the case was converted to a formal proceeding under Subpart T, 46 C.F.R. § 502.311, and an Administrative Law Judge was assigned.

On February 19, 2015, an Initial Order was served. On March 19, 2015, the parties both filed status reports. On May 4, 2015, a pre-hearing conference was held to discuss the status of discovery and settlement negotiations. On May 12, 2015, a Briefing Schedule was issued.

On July 15, 2015, Mr. Muzorori filed his initial brief with proposed findings of fact and exhibits. On July 15, 2015, CSAL filed its opposition brief with proposed findings of fact and exhibits. On July 28, 2015, a notice of appearance and request for enlargement of time to file the reply brief was received by counsel for Mr. Muzorori, who had previously proceeded *pro se*. On July 29, 2015, the requested enlargement of time was granted and the parties were instructed to file a joint status report. On August 7, 2015, the parties filed a joint status report. On August 29, 2015, Mr. Muzorori filed his reply brief which, appropriately, did not include any additional exhibits. The proceeding is now ripe for decision.

## **C. Evidence**

Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based

on the pleadings, exhibits, testimony, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties. All of the exhibits provided by the parties, including those attached to the initial pleadings and to the briefs, are admitted and were considered.

Pursuant to the APA, all evidence which is not irrelevant, immaterial, or unduly repetitious is admissible. 5 U.S.C. §556(d); *see also* 46 C.F.R. § 502.156. The Commission explained:

Consistent with guidelines set out in the APA and Commission rules governing the admission of evidence, “[i]n comparison with court trials, administrative adjudications generally are governed by liberal evidentiary rules that create a strong presumption in favor of admitting questionable or challenged evidence.” In administrative proceedings, “[a]n agency Administrative Law Judge (ALJ) should admit all relevant and arguably reliable evidence and then should determine the relative probative value of the admitted evidence when . . . [writing]. . . findings of fact.”

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

The record includes evidence of settlement negotiations between the parties. These documents are admitted and show that the parties engaged in settlement negotiations. During settlement, parties frequently offer to settle in an effort to avoid litigation expenses without regard to the merits of the claim. The content of the settlement discussions is not relevant to the issues in the proceeding and is not given weight.

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

#### **D. Arguments of the Parties**

Mr. Muzorori contends that CSAL violated the Shipping Act when it did not adhere to the modification of the contract which changed the port of delivery from Cape Town, South Africa, to Walvis Bay, Namibia. Complainant’s Reply at 17. Mr. Muzorori asserts that CSAL’s failure to adhere to the terms of the modification caused significant harm to him, including damages totaling \$21,980 which includes the initial shipping charges, costs of re-routing the goods, and cost of ground transportation from Cape Town, South Africa, to Harare, Zimbabwe. Complainant’s Reply at 17.

CSAL asserts that there was no modification of the contract and that the cargo was delivered to the port indicated on the bill of lading. Respondent's Opposition at 17-18. In addition, Respondent contends that even if there was a Shipping Act violation, the expenses claimed to have been incurred to move the cargo would not constitute damages as it is not clear whether there was any extra cost to Claimant. Respondent's Opposition at 18-19. Respondent requests attorney's fees and costs. Respondent's Opposition at 19-20.

## **II. FINDINGS OF FACT**

### **A. Parties**

1. Walter Muzorori is a resident of Oxford, Pennsylvania. Small Claim Form for Informal Adjudication ("Claim") at 1.<sup>4</sup>
2. CSAL is a shipping company incorporated in Canada with offices at 478 McGill Street, Montreal, Quebec H2Y 2H2, Canada. Answer at 1.

### **B. Shipment**

3. Claimant booked carriage from Baltimore, Maryland, to Cape Town, South Africa, for two Volvo 2005 road tractors ("cargo") aboard the CSAL vessel Atlantic Impala, suggesting that CSAL may have been both an NVOCC and ocean common carrier. Respondent's Opposition Exhibit ("RX")-6.
4. The record includes a document labeled "draft" with booking number S002863CH, bill of lading number BACP03140002, shipper Walter Muzorori, vessel Atlantic Impala, port of loading as Baltimore and the port of discharge as Cape Town, and date of 05.10.2014. RX-6.
5. The record includes a document nearly identical to RX-6, with CSAL's logo, a label of "international bill of lading," a stamp stating "original," and a signature stamp stating "MITCHELL COTTS MARITIME, A member of the Sturrock Grindrod Maritime Group As agents only for C.S.A.L." and a signature. RX-6.
6. Claimant asked CSAL to change the cargo's port of discharge from Cape Town, South Africa, to Walvis Bay, Namibia, while the Atlantic Impala was en route to Cape Town. Claimant and CSAL exchanged communications discussing this request. Answer at 1-2.

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<sup>4</sup> Claimant's small claim form and exhibits were not numbered when filed and will be referred to as if sequentially numbered, with the first page referred to as Claim at 1 and the first exhibit page referred to as Claim Ex. at 1

7. On May 15, 2014, at 2:00 PM, Mr. Muzorori emailed CSAL, in part asking whether it would be possible to change the destination for his cargo from Cape Town to Durban. Claim Ex. at 20.
8. On May 16, 2014, at 3:58:03 PM, CSAL emailed Mr. Muzorori that they would “have to charge USD 500.00 for change of POD to Durban because we will have to shift the trucks before cargo to Cape Town will be discharged.” Claim Ex. at 21.
9. On May 16, 2014, at 12:40 PM, CSAL emailed Mr. Muzorori, stating “We could discharge at Walvis Bay at no additional charge. Please advise.” RX-7.
10. On May 19, 2014, at 9:42 PM, CSAL emailed Mr. Muzorori, stating “Please advise whether POD change is still required and to which port as we have to send docs to customs soon.” RX-7.
11. On May 19, 2014, at 1:46 PM, Mr. Muzorori emailed CSAL, stating “We have decided to go with Walvis Bay. Please let me know if there is something to provide on my end. I also just left the bank and they have requested full wire institutions [sic] in order for me to complete the transfer. Thank you.” RX-8.
12. On May 19, 2014, at 2:06 PM, CSAL emailed Mr. Muzorori, stating “Please find attached CSAL bank details for wire payment.” RX-8.
13. Mr. Muzorori received a document showing Walvis Bay as the port of discharge for the cargo. RX-9. This document does not have CSAL’s name or logo, is not marked as an original, and is unsigned. The bill of lading, booking number, and date are the same as RX-7.
14. On May 27, 2014, CSAL requested from Mr. Muzorori the clearing agent information in Walvis Bay. Since he did not have one, Mr. Muzorori requested that the shipping line recommend one and they provided him with two companies they use. Mr. Muzorori went with their referral and appointed a company called Woker Freight in Namibia. Respondent’s Opposition at 6, admitting Claimant’s proposed finding number 7.
15. On May 28, 2014, at 12:37 PM, CSAL sent an email to Mr. Muzorori with the subject “RE: Inv. 2005571 - S002863CH/BACP03140002 / Atlantic Impala S403 POD change to WV” stating “Please find attached revised draft with added clearing agent details at Walvis Bay. Please confirm that all in order to issue originals at destination to Clearing Agent.” Claim Ex. at 27-28.
16. On May 29, 2014, at 10:15 AM, Mr. Muzorori emailed CSAL requesting a change in the consignee. Claim Ex. at 26-27.

17. On May 29, 2014, at 4:17 PM, CSAL emailed Mr. Muzorori, stating "Please find attached revised draft and kindly confirm all in order." Claim Ex. at 26.
18. On May 30, 2014, at 2:40:14 PM, CSAL emailed Mr. Muzorori, requesting that he "urgently confirm." Claim Ex. at 24.
19. On May 30, 2014, at 10:51 AM,<sup>5</sup> Mr. Muzorori emailed CSAL, stating "Confirmed." This email appears in the same chain of emails, with the consistent subject of "Inv. 2005571 - S002863CH/BACP03140002 / Atlantic Impala S403 POD change to WV." Claim Ex. at 23.
20. On May 30, 2014, at 3:02:59 PM, CSAL emailed Mr. Muzorori, stating, "I have sent instructions to issue originals at destination to Clearing Agent. Thank you and have a great weekend to all." RX-13.
21. On June 4, 2014, at 6:46 PM, CSAL sent an email to Mitchell Cotts Maritime, presumably the ocean common carrier, with the subject "BACP03140002 (POD changing)" which said "We had 2 trucks under BL BACP03140002 showed on stowage for discharging in Cape Town (underwing portside #3AFT). But as per documents their destination was changed to Walvis Bay. Please advise whether they were discharged in Walvis Bay or they are still on board?" RX-17.
22. On June 5, 2014, at 2:37 AM, Mitchell Cotts Maritime emailed CSAL, stating "I did not receive any COD for the cargo and the B/L I was sent stated Cape Town. Attached WVB out turn report does not show these VIN numbers." RX-17.
23. A series of emails between Mitchell Cotts Maritime and Sturrock Grindrod from June 5-6, 2014, indicate that a draft bill of lading with Cape Town shown as the POD was provided by the clearing agent. RX-17.
24. The record includes a draft bill of lading which bears a Namibian customs and excise stamp dated June 3, 2014, as well as similar stamps on a landing order and customs release order, suggesting that the agent in Walvis Bay mistakenly cleared, reviewed, and released cargo that never arrived at their port. Respondent's Opposition at 7.
25. On June 5, 2014, at 3:00 PM, Mr. Muzorori sent an email to CSAL stating "The final bill of lading is Walvis Bay confirmed and, we remitted payment for that service. I think you should honor your mistake and correct it accordingly." RX-18.

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<sup>5</sup> Although the time stamps are not chronological, that can occur based on computer settings and time zones.

26. On June 5, 2014, at 3:03 PM, CSAL emailed Mr. Muzorori, stating “Understood below as no intention to discharge in Durban. We’ll proceed with discharging in Cape Town.” RX-18.
27. On June 5, 2014, at 3:11 PM, Mr. Muzorori sent an email to CSAL stating “Please be advised that I do not need my cargo in Cape Town.” RX-18.
28. The cargo was still on board the vessel when it docked in Cape Town and was discharged there. Respondent’s Opposition at 9.
29. Mr. Muzorori claims damages of \$21,948.19<sup>6</sup> and includes receipts for \$9,842.59 for port clearing charges at Cape Town, \$6,156 for transportation fees for Cape Town to Namibia border, and \$249.60 for drivers’ plane fares to Cape Town. Claim Ex. at 9-19. These are the only receipts included by Mr. Muzorori.

### III. ANALYSIS AND CONCLUSIONS OF LAW

#### A. Burden of Proof

Pursuant to Rule 155 and the APA, “the burden of proof shall be on the proponent of the rule or order.” 46 C.F.R. § 502.155; 5 U.S.C. § 556(d) (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”); *Sea-Land Serv. Inc.*, 30 S.R.R. 872, 889 (FMC 2006). The Commission has said that “the party seeking affirmative relief from the Commission has the initial burden of establishing a violation of the Act. . . . [and] the ultimate burden of proof or persuasion remains fixed throughout the litigation on the complainant.” *California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R.1213, 1222 (FMC Oct. 19, 1990). The party with the burden of proof must prove its case by a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981). When the evidence is evenly balanced, the party with the burden of proof must lose. *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

As the claimant, Mr. Muzorori has the burden of proving entitlement to reparations.<sup>7</sup> See *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) (quoting *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (1950)) (“As the Federal Maritime Board explained long ago: ‘(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis

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<sup>6</sup> Damage amounts were converted from local currency into US dollars without objection.

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

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

## **B. Discussion**

The Commission has jurisdiction over this proceeding because CSAL is an ocean transportation intermediary and the complaint alleges violations of the Shipping Act for a shipment between Baltimore, Maryland, and Cape Town, South Africa. CSAL initially objected to this proceeding on the basis that it should be decided by arbitration, however, that argument was not briefed and would not preclude jurisdiction over the Shipping Act claims alleged here.

### **1. Operating Contrary to Agreement, Section 41102(b)(2).**

Mr. Muzorori states that CSAL violated the Shipping Act “by not delivering my trucks at the agreed port of destination.” Complainant’s Brief at 3. Mr. Muzorori appears to contend that CSAL violated its contract, or agreement, with him. Mr. Muzorori’s reply brief asserts that an amendment to the agreement was created changing the port of discharge and that CSAL violated section 41102(b)(2) when it failed to deliver the cargo to the amended destination. Complainant’s Reply at 17-19.

CSAL asserts that the 41102(b)(2) claim “is based on Claimant’s unsupported assertion that the Contract of carriage (which designated Cape Town as the Port of Discharge) was somehow amended while the Cargo was en route.” Respondent’s Opposition at 17 (citations omitted). CSAL also focuses on the agreement, or lack thereof, between the parties.

Under the Shipping Act, a “person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if . . . the operation is not in accordance with the terms of the agreement or any modifications to the agreement made by the Federal Maritime Commission.” 46 U.S.C. § 41102(b)(2). Section 40302, with limited exceptions, requires that “every agreement referred to in section 40301(a) or (b) of this title shall be filed with the Federal Maritime Commission.” 46 U.S.C. § 41103. Section 40301(a) requires the filing of certain agreements between or among ocean common carriers (but not their agreements with individual shippers) and section 40301(b) requires the filing of certain agreements between marine terminal operators. 46 U.S.C. § 40301.

The term ocean common carrier “means a vessel-operating common carrier.” 46 U.S.C. § 40102(17). The term marine terminal operator “means a person engaged in the United States in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49 [49 USCS § 13521].” 46 U.S.C. § 40102(14).

Section 40305 requires that an “assessment agreement shall be filed with the Federal Maritime Commission and is effective on filing.” 46 U.S.C. § 40305. The term “assessment

agreement” means an agreement, whether part of a collective bargaining agreement or negotiated separately, to the extent the agreement provides for the funding of collectively bargained fringe-benefit obligations on other than a uniform worker-hour basis, regardless of the cargo handled or type of vessel or equipment used. 46 U.S.C. § 40102(3)

The evidence does not establish that Mr. Muzorori and CSAL are ocean common carriers nor that either party is a marine terminal operator. The evidence does not establish that the agreement at issue was an assessment agreement. The evidence does not establish, therefore, that the contract of carriage between the parties here was required to be filed with the Federal Maritime Commission. This section of the Shipping Act is not designed to regulate agreements between individual shippers and ocean transportation intermediaries but rather between ocean common carriers and marine terminal operators. Accordingly, there is not sufficient evidence to find that section 41102(b)(2) applies to this situation. Claimant’s section 41102(b)(2) claim will therefore be dismissed.

## **2. Practices in Handling Property, Section 41102(c).**

Mr. Muzorori contends that CSAL violated the Shipping Act “by not delivering my trucks at the agreed port of destination.” Complainant’s Brief at 3. Many of Mr. Muzorori’s arguments discussing section 41102(b)(2) apply as well to section 41102(c). Mr. Muzorori alleges that the failure to deliver cargo to Walvis Bay was an unreasonable practice in handling his cargo.

CSAL maintains that the “claimant provides absolutely no evidence, facts, or arguments to support” the section 41102(c) claim. Respondent’s Opposition at 17 (citation omitted). CSAL asserts that:

By his own admission, the Claimant knew before the *Atlantic Impala* departed Baltimore that Cargo was to be delivered to Cape Town. The Claimant also knew that Cape Town was the ultimate Port of Discharge when he *requested* a deviation to Walvis Bay. The initial bill of lading designated Cape Town as the Port of discharge, as did the signed, original bill of lading that constitutes the Contract. Even the draft bill of lading that was forwarded to Claimant’s clearing agent designated Cape Town, not Walvis Bay, as the Port of Discharge.

The fact that there was an exchange of correspondence regarding Claimant’s request to change the Port of Discharge does not alter this fundamental fact. Nor does the existence of two draft bills of lading identifying Walvis Bay. As described in greater detail above, those documents do not have CSAL’s name or logo, were not signed by CSAL, were not stamped by CSAL, and were not identified as “original.” Moreover, Claimant has not produced correspondence or other documentary evidence tending to substantiate his assertion that these unsigned, draft bills of lading somehow served to amend the parties’ Contract. To the extent that CSAL personnel referenced these draft documents in e-mail correspondence, they do so exclusively as drafts.

Respondent's Opposition at 17-18 (footnotes omitted) (emphasis in original). CSAL further contends that "Claimant's brief fails to articulate a single instance where CSAL's regulations or practices produced an unreasonable or unfair result." Respondent's Opposition at 19.

Section 41102(c), formerly section 10(d)(1), states: "(c) Practices in handling property. – A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). An ocean transportation intermediary may be a non-vessel-operating common carrier ("NVOCC") or an ocean freight forwarder ("OFF"). 46 U.S.C. § 40102(19).

"The term 'non-vessel-operating common carrier' means a common carrier that – (A) does not operate the vessels by which the ocean transportation is provided; and (B) is a shipper in its relationship with an ocean common carrier." 46 U.S.C. § 40102(16). An NVOCC assumes responsibility for transportation of a shipment. 46 U.S.C. § 40102(6)(A). An NVOCC's failure to fulfill its obligation constitutes a violation of section 10(d)(1). *Houben v. World Moving Serv., Inc.*, 31 S.R.R. 1400, 1405 (FMC 2010); *William J. Brewer v. Saeid B. Maralan and World Line Shipping, Inc.*, 29 S.R.R. 6, 9 (FMC 2001); *William R. Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. 11, 22 (ALJ 1991).

"The term 'ocean freight forwarder' means a person that – (A) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and (B) processes the documentation or performs related activities incident to those shipments." 46 U.S.C. § 40102(18). Ocean freight forwarders are fiduciaries who are required to observe the highest standards of behavior toward their principals, the shippers. *Nordana Line AS v. Jamar Shipping, Inc.*, 27 S.R.R., 233, 236 (ALJ 1995). A freight forwarder's breach of its fiduciary duty can be a violation of section 10(d)(1). *See id.* Freight forwarders have long been held to high standards of care and integrity because they are fiduciaries who are in unique positions of trust and are able to inflict harm on their clients and on the shipping public. *Tractors and Farm Equipment Ltd., v. Cosmos Shipping Co., Inc.*, 26 S.R.R. at 796.

CSAL is an ocean transportation intermediary to whom section 41102(c) applies. It appears that CSAL was an NVOCC which did not operate the vessels by which the shipment at issue was transported and was a shipper in its relationship with the ocean common carrier. Even if CSAL was an ocean freight forwarder, a higher standard of care would apply, and the result would be the same.

As explained below, the evidence establishes that Mr. Muzorori clearly communicated to CSAL his desire to change the cargo's destination to Walvis Bay, CSAL accepted the change, and CSAL stated that final documents would be provided at the destination. More than an exchange of correspondence, the contemporaneous written documents provide evidence of an agreement. Once problems arose, CSAL's own emails demonstrate that it thought that the destination had been changed. As a factual issue, the evidence does not support CSAL's contention that the destination port was not changed.

The evidence shows that on May 19, 2014, at 1:46 PM, Mr. Muzorori emailed CSAL, stating “We have decided to go with Walvis Bay. Please let me know if there is something to provide on my end. I also just left the bank and they have requested full wire institutions in order for me to complete the transfer.” RX-8. On May 19, 2014, at 2:06 PM, CSAL emailed Mr. Muzorori, stating “Please find attached CSAL bank details for wire payment,” RX-8, indicating that the email confirming destination change and requesting bank wire information was received.

On May 28, 2014, at 12:37 PM, CSAL sent an email to Mr. Muzorori with the subject “RE: Inv. 2005571 - S002863CH/BACP03140002 / Atlantic Impala S403 POD change to WV” stating “Please find attached revised draft with added clearing agent details at Walvis Bay. Please confirm that all in order to issue originals at destination to Clearing Agent.” Claim Ex. at 28-29. On May 30, 2014, at 10:51 AM, Mr. Muzorori emailed CSAL, stating “Confirmed.” This email appears in the same chain of emails, with the consistent subject of “Inv. 2005571 - S002863CH/BACP03140002 / Atlantic Impala S403 POD change to WV.” Claim Ex. at 24. On May 30, 2014, at 3:02:59 PM, CSAL emailed Mr. Muzorori, stating, “I have sent instructions to issue originals at destination to Clearing Agent. Thank you and have a great weekend to all.” RX-13. Given this representation, it would be reasonable for Mr. Muzorori not to anticipate receiving further documentation regarding the changed destination.

Once problems arose, CSAL’s email indicates that it thought that the cargo’s destination was changed to Walvis Bay. On June 4, 2014, at 6:46 PM, CSAL sent an email to Mitchell Cotts Maritime with the subject “BACP03140002 (POD changing)” which said “We had 2 trucks under BL BACP03140002 showed on stowage for discharging in Cape Town (underwing portside #3AFT). *But as per documents their destination was changed to Walvis Bay.* Please advise whether they were discharged in Walvis Bay or they are still on board?” RX-17 (emphasis added).

CSAL was not required to change the port of discharge. Indeed, Mr. Muzorori initially requested to change the port of discharge from Cape Town to Durban. Claim. Ex. at 21. When he was informed that this change would incur an additional charge, he decided against it. CSAL suggested that the discharge port be changed to Walvis Bay at no additional charge and Mr. Muzorori confirmed the change in destination port. Under these facts, once CSAL agreed to change the discharge port, it had a duty to deliver the cargo to the new discharge port. There is no evidence in the record that CSAL informed Mr. Muzorori that the port of discharge would not be changed until a final, original, or signed bill of lading was issued. Rather, CSAL specifically represented to Mr. Muzorori that the originals would be issued at destination to the clearing agent. Mr. Muzorori relied on these representations in arranging to retrieve the cargo. CSAL breached its duty, causing Mr. Muzorori damages.

CSAL argues that the draft bill of lading provided by the agent in Walvis Bay, Woker, which designated Cape Town as the port of discharge weighs in favor of finding that there was no agreement to change the port. This document, provided by a third party, is not dispositive of the agreement between the parties here and any miscommunication would not make the Claimant responsible for any alleged damages. In addition, the Namibian customs and excise stamp dated

June 3, 2014, which appears on the draft bill of lading, a landing order, and customs release order, suggest that the paperwork provided by the agent in Walvis Bay was not reliable.

The evidence establishes that CSAL violated the Shipping Act when it failed to deliver cargo to the agreed upon destination port, after agreeing to change the destination port. CSAL either failed to establish and observe just and reasonable regulations and practices relating to or connected with delivering property or failed to enforce just and reasonable regulations and practices relating to or connected with delivering property. The failure to deliver the cargo to the agreed upon port caused Mr. Muzorori damages as discussed below. Thus, the evidence is sufficient to find that CSAL violated section 41102(c).

### **C. Damages**

Mr. Muzorori asserts that CSAL asked him to mitigate loss by making alternative arrangements to move his cargo to the final destination, which he did. Complainant's Brief at 6. Mr. Muzorori further asserts that he incurred huge unplanned expenses that ruined his business. Complainant's Brief at 6.

CSAL asserts that:

To prevail in a case brought to enforce the Shipping Act, the Claimant must prove by a preponderance of the evidence that CSAL violated that Act, that CSAL's violations caused actual injury, and that his injuries were the proximate cause of those violations.[] This burden is his alone. Commission case law states that "there is no presumption of damage" in Shipping Act proceedings, and that violations "without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation." Stated differently, Claimant must show a violation, an injury, and a proximate cause for each claim he asserts.

Respondent's Opposition at 16 (citations omitted). CSAL contends that with "no showing as to the ultimate, all-in costs, it is impossible to establish whether (i) there was any need to bring the cargo to Walvis Bay from Cape Town in order to get it to Harare, or (ii) whether there was any extra, net cost to Claimant associated with his delivery of tractors to his buyer in Harare." Respondent's Opposition at 18 (citation omitted).

Under 46 U.S.C. § 41305(b), a complainant is entitled to reparations for "actual injury caused by a violation of this part." In order to recover reparations, a complainant must show with reasonable certainty that the violation of law is the proximate cause of the loss or injury. *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, 29 S.R.R. 119, 187 (FMC 2001); *Adair v. Penn-Nordic Lines, Inc.*, 26 S.R.R. at 25.

Complainants have the burden of proving entitlement to reparations.

As the Federal Maritime Board explained long ago: “(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.”

*James J. Flanagan Shipping Corp. v. Lake Charles Harbor & Terminal Dist.*, 30 S.R.R. 8, 13 (FMC 2003) (quoting *Waterman v. Stockholms Rederiaktiebolag Svea*, 3 F.M.B. 248, 249 (1950)).

Reparations will only be awarded based on actual damages. *Tractors & Farm*, 26 S.R.R. at 798. Actual damages means “compensation for the actual loss or injuries sustained by reason of the wrongdoing.” *Cal. Shipping Line, Inc.*, 25 S.R.R. at 1230. Regardless of the method used to calculate damages, “the amount [of damages] can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences.” *Tractors & Farm*, 26 S.R.R. at 798-99. Calculation of reparations for violations of the Shipping Act are not controlled by contractual language.

Mr. Muzorori claims damages of \$21,948.19 and includes receipts for \$9,842.59 for port clearing charges at Cape Town, \$6,156 for transportation fees from Cape Town to the Namibia border, and \$249.60 for drivers’ plane fares to Cape Town. These amounts have been converted to United States dollars from local currency, without objection. These are the only receipts included by Mr. Muzorori.

The other amounts sought by Mr. Muzorori include \$2,000 for fuel from the Namibian boarder to Walvis Bay, \$2,200 in drivers’ wages at \$1,100 each, and \$1,500 in miscellaneous charges such as hotels, meals, tolls, etc. There are no receipts in the record for these charges. Because they are not documented, there is not sufficient evidence in the record to award them. Complainant bears the burden of establishing damages and CSAL has consistently challenged the damage calculation, putting Mr. Muzorori on notice of this issue. Accordingly, these charges will be denied as there is not sufficient evidence in the record to support them.

Mr. Muzorori seeks damages for port and clearing charges at Cape Town and provides appropriate receipts for these charges. However, if the cargo had been delivered to Walvis Bay, there would have been port and clearing charges for that port. There is no evidence that the port and clearing charges were higher in Cape Town than they would have been in Walvis Bay. These are charges that would have been incurred at some level regardless of the port of entry. Accordingly, there is not sufficient evidence in the record to award reparations for these charges.

CSAL contends that it should not have to pay damages for transportation to Walvis Bay when that was not the intended final destination for the cargo. The remaining charges, however, are for transportation to the Namibia border and driver’s plane fares to Cape Town. These charges would have been incurred whether the cargo was traveling to Walvis Bay or to Harare, as CSAL contends.

The remaining charges of \$6,156 for Transportation fees Cape Town to Namibia border, and \$249.60 for drivers' plane fares to Cape Town, totaling \$6,405.60, are properly documented, caused by the failure to delivered to Walvis Bay as agreed, and appear reasonable. Accordingly, there is sufficient evidence to support a reparations award of \$6,405.60 to Mr. Muzorori.

#### **IV. ORDER**

Upon consideration of the whole record, the conclusion that CSAL violated section 41102(c) of the Shipping Act, 46 U.S.C. § 41102(c), and for the reasons stated above, it is hereby

**ORDERED** that the violation of section 41102(b)(2) of the Shipping Act be dismissed. It is

**FURTHER ORDERED** that CSAL be found in violation of section 41102(c) of the Shipping Act. It is

**FURTHER ORDERED** that CSAL be ordered to pay Walter Muzorori reparations in the amount of \$6,405.60.



Erin M. Wirth

Administrative Law Judge