

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

DOCKET NO. 1883(F)

FRANK J. KUZELA

v.

A.P. MOLLER-MAERSK A/S

INITIAL DECISION¹

This proceeding is before me for Initial Decision, 46 C.F.R. § 502.318, on the complaint filed by Frank J. Kuzela (Kuzela) alleging that respondent A.P. Moller-Maersk A/S (Maersk) violated section 10(d)(1) of the Shipping Act of 1984, now codified at 46 U.S.C. § 41102(c).² In 2004, Maersk transported two containers loaded with Kuzela's household goods from Zlin, Czech

¹ The dismissal will become the decision of the Commission in the absence of review by the Commission. *See* 46 C.F.R. § 502.318 ("The decision of the administrative law judge shall be final, unless, within twenty-two (22) days from the date of service of the decision, either party requests review of the decision by the Commission, asserting as grounds therefor that a material finding of fact or a necessary legal conclusion is erroneous or that prejudicial error has occurred, or unless, within thirty (30) days from the date of service of the decision, the Commission exercises its discretionary right to review the decision.").

² 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).

Republic, to Miami, Florida. The complaint alleges that when the goods reached their final destination in Palm Bay, Florida, one container had a hole and books and magazines inside the container had been damaged by water. The evidence in the record does not support a finding that Kuzela's goods were damaged while being transported by Maersk, however, or that Maersk violated section 10(d)(1). Therefore, the complaint is dismissed with prejudice.

BACKGROUND

In 2004, complainant Kuzela had a number of household goods in or around Zlin, Czech Republic. He wanted to ship these goods to Palm Bay, Florida.

Kuzela contacted respondent Maersk, a vessel-operating common carrier, FMC Organization No. 020036, and entered into a contract for Maersk to transport the goods to Miami, Florida. On September 7, 2004, Maersk issued Maersk Sealand Acceptance Letter for Transport Order PRHL12276 to Kuzela. The Acceptance Letter states that the goods would be carried by multiple modes of transportation from Zlin to Miami Terminal, Florida.

On September 25, 2004, Maersk issued a non-negotiable waybill for transportation of containers AMFU8597787 and CPIU5558847 loaded with Kuzela's goods from Zlin to Miami. Maersk assumed responsibility for transportation of the goods in Zlin and transported them by rail to Rotterdam, where they were placed on board M/V OLUF MAERSK. On October 6, 2004, M/V OLUF MAERSK arrived in Miami where the containers were discharged from the ship.

Kuzela contracted with Nighthawk Enterprises, Inc. (Nighthawk), a common carrier, to transport container AMFU8597787 on the final leg to Palm Bay, Florida, a distance of 170 miles, and on October 28, 2004, Nighthawk assumed responsibility for transportation of container AMFU8597787. When container AMFU8597787 arrived in Palm Bay on October 29, 2004, a hole

was discovered in the roof. Further inspection revealed that National Geographic magazines and some Czech language books in the container had been damaged by water. Kuzela claims that the damaged magazines and books have a value of \$4,147.80.

Kuzela contacted Maersk in an attempt to obtain reimbursement for the damaged magazines and books. His attempts were unsuccessful. On or about June 19, 2006, Kuzela contacted the Federal Maritime Commission's Office of Consumer Affairs & Dispute Resolution Services (CADRS) to seek assistance with the matter. As a result of these contacts, Kuzela prepared and submitted to the Commission an Informal Complaint against Maersk Sealand in the form prescribed by 46 C.F.R. Subpart S, Exhibit 1, of the Commission's regulations. The Commission received Kuzela's Informal Complaint on November 29, 2006, and assigned Informal Docket No. 1883(I) to the Complaint. The complaint alleges that "Maersk Sealand has violated section 10(d)(1) of the Shipping Act of 1984 by failing to establish and enforce just and reasonable practices related . . . to the handling, storing and delivering of personal household goods," (Complaint at 1), and seeks reparations for the damaged magazines and books.

On January 12, 2007, the Settlement Officer to whom the complaint was assigned served Maersk with the complaint. On February 5, 2007, Maersk served Respondent's Answer & Refusal to Consent to Informal Adjudication Pursuant to Subpart S and Designation for Handling Pursuant to Subpart T and a Memorandum of Law in Support of Motion to Dismiss for Lack of Jurisdiction or in the Alternative, to Dismiss the Complaint Based on the Statute of Limitations and/or Limiting Damages to \$500 per Package under COGSA (Memorandum of Law). On April 25, 2007, the Commission converted Informal Docket No. 1883(I) from an informal docket under 46 C.F.R. Subpart S to a Formal Docket under 46 C.F.R. Subpart T, changed the docket number to 1883(F),

and referred the proceeding to the Office of Administrative Law Judges. 46 C.F.R. §§ 502.304(f) and 502.311.

In its motion to dismiss, Maersk contended that the allegations in Kuzela's complaint "stem from alleged garden variety claim damage to a shipment of household goods carried onboard the M/V OLUF MAERSK in the fall of 2004." (Memorandum of Law in Support of Motion to Dismiss for Lack of Jurisdiction or in the Alternative, to Dismiss the Complaint Based on the Statute of Limitations and/or Limiting Damages to \$500 per Package under COGSA at 2.) Maersk argued that pursuant to the terms of carriage in the waybill, the Carriage of Goods by Sea Act (COGSA), formerly codified at 46 U.S.C. app. §§ 1300-1315,³ controls resolution of the dispute. (*Id.*) On December 13, 2007, I denied the motion because Maersk had not submitted evidence that would require a finding that Kuzela's household goods were damaged while on board the M/V OLUF MAERSK during the "carriage of goods" as defined by COGSA; therefore, Maersk had not established that the goods were damaged during a period in which COGSA applied to Kuzela's claim. *Kuzela v. Maersk*, FMC No. 1883(F), slip op. at 8-9 (ALJ Dec. 13, 2007) (Memorandum and Order on Motion to Dismiss for Lack of Jurisdiction or in the Alternative, to Dismiss the Complaint Based on the Statute of Limitations and/or Limiting Damages to \$500 per Package under COGSA).

On December 13, 2007, I also issued a procedural order with an attachment listing thirty-four tentative findings of fact based on the documents and other evidence then in the record. *Kuzela v. Maersk*, FMC No. 1883(F) (ALJ Dec. 13, 2007) (December 13, 2007, Procedural Order; December

³ See note 2, *supra*. As a result of this reenactment, COGSA is no longer codified at 46 U.S.C. app. §§ 1300-1315. Nevertheless, I will use the codification as it existed at the time the events recited herein occurred.

13, 2007, Procedural Order, Attachment A, Administrative Law Judge Tentative Findings of Fact).

I compiled the documents on which I relied into an ALJ Appendix.

The Order set forth a schedule of actions that I directed the parties to take:

- A. January 18, 2008 – Serve and file response to the Administrative Law Judge Tentative Findings of Fact citing supporting evidence rebutting any tentative finding of fact to which the party objected.
- B. January 18, 2008 – Serve and file Proposed Supplemental Findings of Fact to supplement the Administrative Law Judge Tentative Findings of Fact citing evidence supporting the proposed finding.
- C. February 20, 2008 – Serve and file a response to the Proposed Supplemental Findings of Fact filed by the other party citing supporting evidence rebutting any proposed finding to which the party objected.
- D. Prepare and submit appendices containing the evidence cited in each party's submissions.
- E. March 21, 2008 – Kuzela serve and file memorandum of points and authorities.
- F. April 21, 2008 – Maersk serve and file memorandum of points and authorities.
- G. May 12, 2008 – Kuzela serve and file reply to Maersk's memorandum.

Kuzela v. Maersk, FMC No. 1883(F) (ALJ Dec. 13, 2007) (December 13, 2007, Procedural Order).

On January 17, 2008, this Office received Kuzela's response to the Procedural Order. The response consists of the following: (1) a letter; (2) a Declaration dated January 13, 2008, stating that the "Background" [*Kuzela v. Maersk*, FMC No. 1883(F) (ALJ Dec. 13, 2007) (Memorandum and Order on Motion to Dismiss for Lack of Jurisdiction or in the Alternative, to Dismiss the Complaint Based on the Statute of Limitations and/or Limiting Damages to \$500 per Package under COGSA)], the "ALJ Appendix" [December 13, 2007, Procedural Order, Attachment A, Administrative Law Judge Tentative Findings of Fact, ALJ Appendix], and "The Parties" [December 13, 2007,

Procedural Order, Attachment A, Administrative Law Judge Tentative Findings of Fact] are true and correct; and (3) copies of the documents cited in his Declaration. Kuzela's response did not include any proposed supplemental findings. Since Kuzela's filings did not indicate that they had been served on Maersk, the Secretary sent copies of Kuzela's filings to Maersk's counsel. *Kuzela v. Maersk*, FMC No. 1883(F) (ALJ Jan. 30, 2008) (Notice of Service of Kuzela Documents by the Office of the Secretary). Although Kuzela's filings did not strictly comply with my instructions, I advised the parties that I understood Kuzela's January 13, 2008, Declaration to mean that he agrees with each of the Administrative Law Judge Tentative Findings of Fact. *Id.* at 2. Kuzela submitted a second response in a letter dated January 23, 2008. In that letter, he claimed additional expenses related to the prosecution of his complaint. Kuzela has not filed a memorandum of points and authorities or a reply to Maersk's memorandum discussed below.

On January 18, 2008, Maersk served its Response to the Administrative Law Judge Tentative Findings of Fact (Maersk Response to ALJ Facts). Maersk accepted many of the tentative findings, but noted its objection to eight, setting forth its reasons for objecting and citing to the evidence on which it relied. Maersk also submitted an appendix compiling the evidence cited in its response. I have reviewed the evidence in Maersk's appendix and enter the following rulings on the admissibility of the proffered evidence:

Maersk App. Page	Document	Ruling
1	Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (legible copy)	NOT ADMITTED - 46 C.F.R. § 502.156 - cumulative to Maersk App. 51
2-21	Maersk terms and conditions of carriage	NOT ADMITTED - 46 C.F.R. § 502.156 - cumulative to Maersk App. 52-71

22-30	Maersk verified Answer	ADMITTED - 46 C.F.R. § 502.157
31-35	Declaration of Van Duuren	ADMITTED - 46 C.F.R. § 502.157
36-39	Equipment Interchange Receipts (4)	ADMITTED - FRE 803(6) - Maersk business records authenticated by Van Duuren
40-47	Declaration of Messkoub	ADMITTED - 46 C.F.R. § 502.157
48-49	Maersk Acceptance Letter ("booking note")	NOT ADMITTED - 46 C.F.R. § 502.156 - cumulative to ALJ App. 16-17
50	Maersk Sealand Export Invoice Number PR10060869 - PRHL12276	NOT ADMITTED - 46 C.F.R. § 502.156 - cumulative to ALJ App. 19
51	Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (legible copy)	ADMITTED - FRE 803(6) - Maersk business record authenticated by Messkoub
52-71	Maersk terms and conditions of carriage	ADMITTED - FRE 803(6) - Maersk business record authenticated by Messkoub
72-76	Container Tracking Details (5)	ADMITTED - FRE 803(6) - Maersk business records authenticated by Messkoub
77	Equipment Interchange Receipts (2)	ADMITTED - FRE 803(6) - Maersk business records authenticated by Messkoub
78	Registration of Repair Costs	ADMITTED - FRE 803(6) - Maersk business record authenticated by Messkoub
79-84	Declaration of John C. Yu	ADMITTED - 46 C.F.R. § 502.157
83-94	October 26, 2005, letter from Kuzela to Maersk with attachments	ADMITTED - FRE 803(6) - Maersk business record authenticated by Yu
95-97	Maersk Sealand General Claim Information for our Customers	ADMITTED - FRE 803(6) - Maersk business record authenticated by Yu

98-99	November 22, 2005, Maersk letter to Kuzela regarding Kuzela claim (two copies, one with fax information)	NOT ADMITTED Commission Rules provide: “No stipulation, offer, or proposal shall be admissible in evidence over the objection of any party in any hearing on the matter.” 46 C.F.R. § 502.91(c). <i>See also</i> Fed. R. Evid. 408 (“Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim.”); 46 C.F.R. § 502.156 (“Unless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence . . . will also be applicable.”).
100	December 14, 2005, Maersk letter to Kuzela offering settlement of Kuzela claim	NOT ADMITTED - 46 C.F.R. § 502.91(c); Fed. R. Evid. 408; 46 C.F.R. § 502.156.
101-104	January 2, 2006, letter from Kuzela to Maersk responding to settlement offer	NOT ADMITTED - 46 C.F.R. § 502.91(c); Fed. R. Evid. 408; 46 C.F.R. § 502.156.

I make the following rulings on Maersk’s objections to ALJ Tentative Findings of Fact:

1. Complainant Frank J. Kuzela (Kuzela) shipped household goods from Zlin, Czech Republic, to Palm Bay, Florida. (*Kuzela v. Maersk*, FMC No. 1883(I) (Small Claim Form for Informal Adjudication And Information Checklist) (Complaint) at 1 (ALJ App. 1).)

Maersk objects to this finding on the grounds that “the Maersk waybill reflects [that] the transport performed by Maersk was only from Zlin, Czech Republic to Miami, Florida, not Palm Bay, Florida.” (Maersk Response to ALJ Facts ¶ 1.) While Maersk’s portion of the transport may have ended at Miami, the evidence in the record demonstrates that Kuzela shipped the household goods from Zlin, Czech Republic, to Palm Bay, Florida. Therefore, Maersk’s objection is overruled.

2. Respondent A.P. Moller-Maersk A/S (Maersk), FMC Organization No. 020036, a vessel operating common carrier, carried the household goods from Zlin, Czech Republic, to Palm Bay, Florida. (Complaint at 1 (ALJ App. 1); Official Notice, FMC Vessel Operating Common Carrier list, <https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=voccc>, accessed December 5, 2007.)

Maersk objects to this finding on the grounds that “the Maersk waybill reflects [that] the transport performed by Maersk was only from Zlin, Czech Republic to Miami, Florida, not Palm Bay, Florida.” (Maersk Response to ALJ Facts ¶ 2.) The Maersk waybill required Maersk to transport the goods to the Port of Discharge, Miami, Florida, and does not set forth a place of delivery beyond Miami. (See ALJ App. 18; Maersk App. 51.) Therefore, Maersk’s objection is sustained. ALJ Tentative Finding of Fact 2 is amended to read:

Respondent A.P. Moller-Maersk A/S (Maersk), FMC Organization No. 020036, a vessel-operating common carrier, carried the household goods from Zlin, Czech Republic, to Miami, Florida.

3. On June 19, 2006, Kuzela sent a letter to “Ms. Zoraya” complaining about damage to the household goods that occurred during while the goods were being transported from Zlin to Palm Bay. (Kuzela letter dated June 19, 2006, to “Ms. Zoraya” (ALJ App. 4).)

Maersk objects to this finding on the grounds that “the Maersk waybill reflects [that] the transport performed by Maersk was only from Zlin, Czech Republic to Miami, Florida, not Palm Bay, Florida. Maersk does not contest that Kuzela sent the letter at ALJ App 4-7 to the FMC’s Ms. [Zoraya] complaining about damage to his goods.” (Maersk Response to ALJ Facts ¶ 3.) While Maersk’s portion of the transport may have ended at Miami, Kuzela shipped the household goods from Zlin to Palm Bay and complains about damage to his household goods that occurred while the goods were being transported. Therefore, Maersk’s objection is overruled.

16. Maersk Sealand Non-Negotiable Waybill No. PRHL12276 indicates that Frank Kuzela is the consignee of the containers. (Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (ALJ App. 18).)

Maersk objects on the grounds that “[t]he waybill indicates that Frank Kuzela is the consignee of the containers ‘C/O M. Creech, 30 Lake Arbor Drive, Palm Springs 33461 Florida’.

(Maersk App. [51]).” (Maersk Response to ALJ Facts ¶ 16.) Maersk’s objection is sustained. ALJ Tentative Finding of Fact 16 is amended to read:

Maersk Sealand Non-Negotiable Waybill No. PRHL12276 indicates that Frank Kuzela C/O M. Creech, 30 Lake Arbor Drive, Palm Springs 33461 Florida is the consignee of the containers.

19. Rotterdam is 1211 kilometers from Zlin, Czech Republic. (Google Maps (<http://www.google.com/maps>), directions from Zlin, Czech Republic to Rotterdam, The Netherlands (ALJ App. 20).)

Maersk states that it has “no Objection that Zlin is several hundred kilometers from Rotterdam; however, please note the containers moved by rail over this distance and the rail distance likely differs from the ‘Google’ road distance.” (Maersk Response to ALJ Facts ¶ 19.) Maersk is correct. Therefore, ALJ Tentative Finding of Fact 19 is amended to read:

Rotterdam is several hundred kilometers from Zlin, Czech Republic.

29. Nighthawk Enterprises, Inc., transported containers AMFU8597787 and CPIU5558847 over land from the Port of Miami, Florida, to Palm Bay, Florida. (Nighthawk Enterprises, Inc. Bill of Lading No. 253273 (ALJ App. 23).)

Maersk states that it has “[n]o objection, except to note there is no evidence in the record that Nighthawk was involved in the transport of container CPIU5558847.” (Maersk Response to ALJ Facts ¶ 29.) Maersk is correct. Therefore, ALJ Tentative Finding of Fact 29 is amended to read:

Nighthawk Enterprises, Inc., transported container AMFU8597787 over land from the Port of Miami, Florida, to Palm Bay, Florida.

33. Inspection revealed that National Geographic magazines and some Czech language books in container AMFU8597787 had been damaged by water. (Nighthawk Enterprises, Inc. Bill of Lading No. 253273 (ALJ App. 23); Kuzela letter dated January 2, 2006, to Mr. Yu (ALJ App. 25).)

Maersk objects:

Apart from hearsay statements, and despite Maersk's requests, there has been no direct proof provided to Maersk (or the ALJ) of the purported damage to the magazines and language books. Maersk was not invited to survey the alleged damage and has been provided no report of survey, photographs or other independent hard evidence of damage. Mr. Kuzela has simply not provided proof of the alleged damage despite Maersk's requests. (Maersk App. 81, Affidavit of John C. Yu, ¶¶ 6 & 7).

(Maersk Response to ALJ Facts ¶ 33.) Kuzela's verified complaint (ALJ App. 1-3) sets forth admissible evidence that the damage occurred. Therefore, Maersk's objection is overruled. A citation to the complaint (ALJ App. 1-3) has been added.

34. The value of the damaged magazines and books is \$4,147.80. (Complaint at 1 (ALJ App. 1); Kuzela letter dated January 2, 2006, to Mr. Yu (ALJ App. 25).)

Maersk objects:

Mr. Kuzela has not presented admissible evidence sufficient to prove his quantum sought. Mr. Kuzela relies solely on his letter of January 2, 2006, to Mr. Yu. That letter, inter alia, (a) contains hearsay and double hearsay alone as to the alleged value of the magazines; and (b) overlooks and makes no statement as to the salvage value of the purportedly wetted magazines. Mr. Kuzela failed to provide additional evidence of loss when requested by Maersk to do so. (Maersk App. 81, Affidavit of John C. Yu ¶¶ 6,7).

(Maersk Response to ALJ Facts ¶ 34.) Given the conclusions of law set forth below, it is not necessary to make a finding on this allegation. *See* 46 C.F.R. § 502.223 ("Initial decisions should address only those issues necessary to a resolution of the material issues presented on the record."). ALJ Tentative Finding of Fact 34 is deleted from the Findings of Fact.

The Order also instructed the parties to submit any proposed supplemental findings of fact that they believe are relevant to this proceeding. *Kuzela v. Maersk*, FMC No. 1883(F) (ALJ Dec. 13, 2007) (December 13, 2007, Procedural Order). On January 18, 2008, Maersk served and filed twelve proposed supplemental findings of fact it claims are supported by the affidavits and other evidence included in its appendix. The Procedural Order directed each party to file a response to the other party's proposed supplemental findings stating "whether it objects or does not object to each proposed supplemental finding of fact." *Kuzela v. Maersk*, FMC No. 1883(F), slip op. at 4 (ALJ Dec. 13, 2007) (December 13, 2007, Procedural Order). Kuzela did not file a response to Maersk's proposed findings of fact or submit any traversing evidence. I make the following rulings on the proposed supplemental facts submitted by Maersk:

1. Mr. Kuzela inspected container AMFU8597787 before loading his goods into the container at Zlin, Czech Republic, and there was no hole in the container at that time. (ALJ App. 8).

RULING: The cited evidence establishes this relevant fact. It is included in the Findings of Fact below as paragraph 35.

2. Maersk was responsible for transport of container AMFU8597787 (a) only as far as Miami, Florida and (b) in accordance with the bill of lading (Maersk App. 1) and the incorporated bill of lading Terms and Conditions contained at Maersk App. 2-21. (*See also*, Maersk App. 41-42, 46 Declaration of Messkoub, ¶¶ 4-5, 7, 16).

RULING: The cited evidence establishes this relevant fact. It is included in the Findings of Fact below as paragraph 36.

3. Although Mr. Kuzela alleges that container AMFU8597787 was found, upon receipt by him in Palm Bay, Florida, to have a hole in its roof (which allegedly allowed water to enter the container and damage the magazines and reading materials), there is no evidence of any hole in the roof of the container during the entire period the container was carried by Maersk from Zlin, Czech Republic to A.P. Moller-Maersk Terminals Miami ("APMT Miami") in Miami, Florida. Rather, the evidence shows that the container

was at all times undamaged and in good condition until and including when it left APMT Miami on October 28, 2004, having been delivered into the custody of Claimant Kuzela's trucking contractor Nighthawk Enterprises, Inc. ("Nighthawk") (See, Maersk App. 32-35, Declaration of Van Duuren ¶¶ 4, 6-11; Maersk App. 45-47, Declaration of Messkoub ¶¶ 12-19).

RULING: The cited evidence establishes these relevant facts. They are included in a different form in the Findings of Fact below in paragraphs 38, 39, and 42.

4. After Maersk complied with its delivery obligation to deliver the container to Miami, the containers were picked up at APMT Miami on behalf of Mr. Kuzela by Nighthawk on or about October 28, 2004. (Maersk App. 46, Declaration of Messkoub ¶¶ 16).

RULING: The cited evidence establishes this relevant fact. It is included in the Findings of Fact below as paragraph 37.

5. Four days later, on November 1, 2004, when Nighthawk returned the containers to APMT Miami, roof damage was discovered for the first time on the container. (Maersk App. 46-47, Declaration of Messkoub ¶¶ 17-19).

RULING: The cited evidence establishes this relevant fact. It is included in the Findings of Fact below as paragraph 43.

6. Maersk was not invited by Kuzela to survey the alleged damage to the magazines, slip covers and books. (Maersk App. 80-81, Declaration of Yu, ¶¶ 5-7).

RULING: Given the conclusions of law set forth below, this allegation is not relevant; therefore, it is not necessary to make a finding on this allegation. *See* 46 C.F.R. § 502.223.

7. In fact, Kuzela first gave Maersk notice of his claim in October 2005 about one year after the cargo was delivered in Miami. (Maersk App. 47, Declaration of Messkoub ¶ 21; Maersk App. 79-80, Declaration of Yu ¶ 3).

RULING: Given the conclusions of law set forth below, this allegation is not relevant; therefore, it is not necessary to make a finding on this allegation. *See* 46 C.F.R. § 502.223

8. Despite being requested to do so by Maersk, Mr. Kuzela failed to provide adequate proof by way of photographs, independent survey or the like to Maersk of the alleged damage to the magazines and language books and,

therefore, Mr. Kuzela has not established proof of loss. (Maersk App. 81, Declaration of Yu, ¶¶ 6, 7).

RULING: Given the conclusions of law set forth below, this allegation is not relevant; therefore, it is not necessary to make a finding on this allegation. *See* 46 C.F.R. § 502.223

9. Mr. Kuzela has not presented admissible evidence to prove the amount of damages he alleges he sustained. (Maersk App. 81, Declaration of Yu, ¶¶ 6, 7).

RULING: Given the conclusions of law set forth below, this allegation is not relevant; therefore, it is not necessary to make a finding on this allegation. *See* 46 C.F.R. § 502.223

10. In light of the governing terms in the contract of carriage, Maersk's commercially motivated decision to provide a without prejudice offer to Mr. Kuzela to settle the claim for \$1,000 was fair, reasonable and generous given the lack of proof or evidence as to Maersk's fault for the damages and the lack of the proof of damages alleged by Mr. Kuzela. (Maersk App. 81, Declaration of John C. Yu, ¶ 8)

RULING: Commission Rules provide: "No stipulation, offer, or proposal shall be admissible in evidence over the objection of any party in any hearing on the matter." 46 C.F.R. § 502.91(c). *See also* Fed. R. Evid. 408 ("Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim."); 46 C.F.R. § 502.156 ("Unless inconsistent with the requirements of the Administrative Procedure Act and these Rules, the Federal Rules of Evidence . . . will also be applicable."). This proposed finding of fact is irrelevant and is based on inadmissible evidence; therefore, it is rejected.

11. Mr. Kuzela rejected Maersk's offer. (Maersk App. 82, Declaration of John C. Yu, ¶ 9).

RULING: *See* ruling on Maersk Proposed Finding of Fact 10.

12. Mr. Kuzela has never commenced suit against Maersk on the subject claim either in the United States District Court for the Southern District of New York or the English High Court of Justice in London or any other court of

law for the alleged damage. (Maersk App. 47, Declaration of Messkoub ¶ 22).

RULING: Given the conclusions of law set forth below, this allegation is not relevant; therefore, it is not necessary to make a finding on this allegation. See 46 C.F.R. § 502.223

The Procedural Order also instructed the parties to file memoranda of law:

On or before March 21, 2008, Kuzela shall submit a memorandum of points and authorities setting forth his arguments on the law applicable to this proceeding. On or before April 21, 2008, Maersk shall submit a memorandum of points and authorities setting forth its arguments on the law applicable to these proceedings. On or before May 12, 2008, Kuzela may file a reply to Maersk's memorandum.

Kuzela v. Maersk, FMC No. 1883(F) (ALJ Dec. 13, 2007) (December 13, 2007, Procedural Order).

On April 21, 2008, Maersk served its Memorandum of Points and Authorities Supporting Dismissal (or in the Alternative Limitation) of Claimant's Purported Shipping Act Violation Allegations. Kuzela did not file either an opening or a reply memorandum.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Kuzela filed this complaint alleging the Maersk violated section 10(d)(1) of the Shipping Act. Section 10(d)(1), now codified at 46 U.S.C. § 41102(c), provides: "**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." Kuzela claims that Maersk should pay reparations because National Geographic magazines and books that Maersk transported on Kuzela's behalf had been damaged by water at some point between Zlin, Czech Republic, where

Maersk assumed responsibility for transporting the goods, and Palm Bay, Florida, where Nighthawk delivered the goods to Kuzela.

A complainant who alleges a violation of section 10(d)(1) of the Shipping Act “has the initial burden of proof to establish the[] violation[]. The applicable standard of proof is one of substantial evidence, an amount of information that would persuade a reasonable person that the necessary premise is more likely to be true than to be not true.” *AHL Shipping Company v. Kinder Morgan Liquids Terminals, LLC*, FMC No. 04-05, 2005 WL 1596715, at *3 (ALJ June 13, 2005). As the complainant, Kuzela has the burden of proving entitlement to reparations. See *James J. Flanagan Shipping Corp. v. Lake Charles Harbor and Terminal Dist.*, 30 S.R.R. 8, 13 (2003) (“As the Federal Maritime Board explained long ago: ‘(a) damages⁴ 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.’”); *Tractors and Farm Equipment Ltd. v. Cosmos Shipping Co., Inc.*, 26 S.R.R. 788, 798-799 (ALJ 1992) (“The statements of the Commission in [*California Shipping Line, Inc. v. Yangming Marine Transport Corp.*, 25 S.R.R. 1213 (Oct. 19, 1990)] and the other cited cases are in the mainstream of the law of damages as followed by the courts, for example, regarding the principles that the fact of injury must be shown with reasonable certainty, that the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences, the principle that the damages must be foreseeable or proximate or, in contract law, within the contemplation of the parties at the time they entered into

⁴ 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).

the contract, the fact that speculative damages are not allowed, and that regarding claims for lost profits, there must be reasonable certainty so that the court can be satisfied that the wrongful act caused the loss of profits.”). *See also Kuzela v. Maersk*, FMC No. 1883(F), slip op. at 2-3 (ALJ Dec. 13, 2007) (December 13, 2007, Procedural Order).

The core of Kuzela’s claim is found in his letter dated June 19, 2006, to “Ms. Zoraya” of the Commission’s CADRS office. After describing the discovery of the damaged goods upon opening container AMFU8597787, Kuzela states:

We have found out that Maersk Sealand owns and operates the equipment in the port of Miami when it comes to unloading and loading goods coming on and off the freighters. Our concern is also, that the equipment operators at the port of Miami were negligent when handing the containers, especially the one container with the damage[d] books.

(ALJ App. 5-6.)

Kuzela does not proffer any evidence that would support a finding that container AMFU8597787 and the magazines and books inside were damaged when the container was offloaded from the vessel or at any other time when Maersk was responsible for its carriage. Kuzela provides evidence that the goods were in good condition when they left Zlin and were damaged when they arrived in Palm Bay. Kuzela does not proffer any evidence that would establish the point in that voyage at which the goods were damaged. Other than the inference of Maersk malfeasance that Kuzela suggests should be drawn from the fact that the goods were in good condition when shipped and damaged at the time of arrival, Kuzela does not proffer any evidence that Maersk “fail[ed] 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).

Maersk has submitted as evidence the records of inspections of container AMFU8597787 conducted as Maersk carried the container from Zlin through Rotterdam to its arrival in Miami to the time when Nighthawk assumed responsibility for the container. These records provide proof that container AMFU8597787 was undamaged while it was in Maersk's control and when Nighthawk assumed responsibility for its transportation. (Maersk App. 31-39; Maersk App. 45; Maersk App. 72-74.) When Nighthawk returned container AMFU8597787 to Maersk in Miami after delivering it to Palm Bay, Maersk found that container AMFU8597787 had new damage. (Maersk App. 46; Maersk App. 76; Maersk App. 77.)

Based on the evidence that has been admitted into the record,⁵ I make the following:

FINDINGS OF FACT⁶

1. Complainant Frank J. Kuzela (Kuzela) shipped household goods from Zlin, Czech Republic, to Palm Bay, Florida. (*Kuzela v. Maersk*, FMC No. 1883(I) (Small Claim Form for Informal Adjudication And Information Checklist) (Complaint) at 1 (ALJ App. 1).)
2. Respondent A.P. Moller-Maersk A/S (Maersk), FMC Organization No. 020036, a vessel-operating common carrier, carried the household goods from Zlin, Czech Republic, to Miami, Florida. (Complaint at 1 (ALJ App. 1); Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (ALJ App. 18; Maersk App. 51); Official Notice, FMC Vessel Operating C o m m o n C a r r i e r l i s t , <https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=vocc>, accessed December 5, 2007.)
3. On June 19, 2006, Kuzela sent a letter to "Ms. Zoraya" complaining about damage to the household goods that occurred during while the goods were being transported from Zlin to Palm Bay. (Kuzela letter dated June 19, 2006, to "Ms. Zoraya" (ALJ App. 4-7).)

⁵ The documents cited have been compiled into the ALJ Appendix attached to the December 13, 2007, Procedural Order (cited as ALJ App. page #) or the Maersk Appendix submitted on January 22, 2008 (cited as Maersk App. page #). The ALJ Appendix and the Maersk Appendix are incorporated herein by reference.

⁶ To the extent any of the Findings reflect legal conclusions, they shall be deemed Conclusions and *vice versa*.

4. On October 19, 2006, Kuzela sent a letter to Zoraya de la Cruz, an attorney in the Commission's Office of Consumer Affairs & Dispute Resolution Services (CADRS) with "the shipping documents [de la Cruz] requested for our claim against 'Maersk Sealand.'" (Kuzela letter dated October 19, 2006 to Zoraya de la Cruz (ALJ App. 8-9).)
5. The Commission received the Kuzela letter of October 19, 2006, on October 25, 2006. (Kuzela letter dated October 19, 2006 to Zoraya de la Cruz (ALJ App. 8).)
6. The Commission assigned Informal Docket No. 1883(I) to Kuzela's Complaint. (Memorandum dated November 1, 2006, from Assistant Secretary to Alternative Dispute Resolution Specialist, Subject Informal Docket No. 1883(I), *Frank J. Kuzela v. Maersk Sealand* (ALJ App. 10).)
7. On November 29, 2006, the Commission received Kuzela's Informal Complaint against Maersk Sealand in the form prescribed by 46 C.F.R. Subpart S, Exhibit 1. (Complaint at 1 (ALJ App. 1).)
8. On January 12, 2007, Maersk was served with the complaint in Informal Docket No. 1883(I). (*Kuzela v. Maersk*, FMC No. 1883(I) (Notice of Filing and Assignment) (ALJ App. 11-12).)
9. On February 5, 2007, Maersk served Respondent's Answer & Refusal to Consent to Informal Adjudication Pursuant to Subpart S and Designation for Handling Pursuant to Subpart T. (Respondent's Answer & Refusal to Consent to Informal Adjudication Pursuant to Subpart S and Designation for Handling Pursuant to Subpart T (page 1 and Certificate of Service) (ALJ App. 13-14).)
10. On April 25, 2007, the Commission converted Informal Docket No. 1883(F) from an informal docket under 46 C.F.R. Subpart S to a Formal Docket under 46 C.F.R. Subpart T and referred the proceeding to the Office of Administrative Law Judges. (Memorandum dated April 25, 2007, from Assistant Secretary to Administrative Law Judge, Subject Informal Docket No. 1883(F), *Frank J. Kuzela v. A.P. Moller-Maersk A/S* (ALJ App. 15).)
11. On September 7, 2004, Maersk issued a Maersk Sealand Acceptance Letter⁷ for Transport Order PRHL12276 to Kuzela. (Maersk Sealand Acceptance Letter for Transport Order PRHL12276 (ALJ App. 16-17).)

⁷ Maersk states that this document is more commonly referred to as a "booking note." (Maersk Response to ALJ Facts ¶ 11; Declaration of Messkoub ¶ 4 (Maersk App. 41).) As the term "Acceptance Letter" appears on the document and the term "booking note" does not, I continue to use the term "Acceptance Letter."

12. The Acceptance Letter indicates that the goods will be carried by several modes of transportation from Zlin, Czech Republic, to Miami Terminal, Florida. (Maersk Sealand Acceptance Letter for Transport Order PRHL12276 (ALJ App. 16-17).)
13. The Acceptance Letter indicates that the goods will be carried in two containers. (Maersk Sealand Acceptance Letter for Transport Order PRHL12276 (ALJ App. 16-17).)
14. On September 25, 2004, Maersk issued Maersk Sealand Non-Negotiable Waybill No. PRHL12276 for containers AMFU8597787 and CPIU5558847. (Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (ALJ App. 18; Maersk App. 51).)
15. Maersk Sealand Non-Negotiable Waybill No. PRHL12276 indicates that Frank Kuzela is the shipper of the containers. (Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (ALJ App. 18; Maersk App. 51).)
16. Maersk Sealand Non-Negotiable Waybill No. PRHL12276 indicates that Frank Kuzela C/O M. Creech, 30 Lake Arbor Drive, Palm Springs 33461 Florida is the consignee of the containers. (Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (ALJ App. 18; Maersk App. 51).)
17. Maersk Sealand Non-Negotiable Waybill No. PRHL12276 indicates that the place of receipt of the containers is Zlin, Czech Republic. (Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (ALJ App. 18; Maersk App. 51).)
18. Maersk Sealand Non-Negotiable Waybill No. PRHL12276 indicates that Rotterdam is the port of loading for the containers. (Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (ALJ App. 18; Maersk App. 51).)
19. Rotterdam is several hundred kilometers from Zlin, Czech Republic. (Google Maps (<http://www.google.com/maps>), directions from Zlin, Czech Republic to Rotterdam, The Netherlands (ALJ App. 20).)
20. Maersk Sealand Non-Negotiable Waybill No. PRHL12276 indicates that Miami, Florida, is the port of discharge for the containers. (Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (ALJ App. 18; Maersk App. 51).)
21. Maersk Sealand Non-Negotiable Waybill No. PRHL12276 indicates that M/V OLUF MAERSK is the ocean vessel on which the containers were carried. (Maersk Sealand Non-Negotiable Waybill No. PRHL12276 (ALJ App. 18; Maersk App. 51).)
22. On September 27, 2004, Maersk issued Maersk Sealand Export Invoice Number PR10060869 - PRHL12276. (Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 (ALJ App. 19).)

23. Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 indicates the Frank Kuzela is the payer. (Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 (ALJ App. 19).)
24. Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 concerns containers AMFU8597787 and CPIU5558847. (Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 (ALJ App. 19).)
25. Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 indicates the place of receipt by Maersk of containers AMFU8597787 and CPIU5558847 is Zlin, Czech Republic. (Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 (ALJ App. 19).)
26. Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 indicates the place of delivery of containers AMFU8597787 and CPIU5558847 is Miami. (Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 (ALJ App. 19).)
27. Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 indicates that Maersk charged Kuzela for inland hauling from Zlin, Czech Republic, to the port of loading. (Maersk Sealand Export Invoice Number PR10060869 - PRHL12276 (ALJ App. 19).)
28. Containers AMFU8597787 and CPIU5558847 were discharged from the M/V OLUF MAERSK in Miami, Florida. (Kuzela letter dated June 19, 2006, to "Ms. Zoraya" (ALJ App. 4).)
29. Nighthawk Enterprises, Inc., transported container AMFU8597787 over land from Miami, Florida, to Palm Bay, Florida. (Nighthawk Enterprises, Inc. Bill of Lading No. 253273 (ALJ App. 23); Declaration of Messkoub ¶ 16 (Maersk App. 46).)
30. Palm Bay, Florida, is 170 miles from Port of Miami, Florida. (Google Maps (<http://www.google.com/maps>), directions from Port of Miami, FL, to Palm Bay, FL (ALJ App. 24).)
31. When container AMFU8597787 was loaded in Zlin, container AMFU8597787 did not have a hole in the roof. (Kuzela letter to de la Cruz dated October 19, 2006 (ALJ App. 8).)
32. On October 29, 2004, when container AMFU8597787 arrived in Palm Bay, Florida, a hole was discovered in the roof of container AMFU8597787. (Kuzela letter dated October 19, 2006, to de la Cruz (ALJ App. 8); Nighthawk Enterprises, Inc. Bill of Lading No. 253273 (ALJ App. 23).)
33. Inspection revealed that National Geographic magazines and some Czech language books in container AMFU8597787 had been damaged by water. (Complaint (ALJ App. 1-3;

- Nighthawk Enterprises, Inc. Bill of Lading No. 253273 (ALJ App. 23); Kuzela letter dated January 2, 2006, to Mr. Yu (ALJ App. 25).)
34. [DELETED]
 35. Kuzela inspected container AMFU8597787 before loading his goods into the container at Zlin, Czech Republic, and there was no hole in the container at that time. (Kuzela letter dated October 19, 2006 to Zoraya de la Cruz (ALJ App. 8).)
 36. Maersk was responsible for transport of container AMFU8597787 (a) only as far as Miami, Florida and (b) in accordance with the bill of lading (Maersk App. [51]) and the incorporated bill of lading Terms and Conditions contained at Maersk App. 52-71. (Declaration of Messkoub, ¶¶ 4-5, 7, 16 (Maersk App. 41-42, 46).)
 37. After Maersk complied with its delivery obligation to deliver the container to Miami, the containers were picked up at APMT Miami by Nighthawk on behalf of Mr. Kuzela on October 28, 2004. (Nighthawk Enterprises, Inc. Bill of Lading No. 253273 (ALJ App. 23); Declaration of Messkoub ¶ 16 (Maersk App. 46); Equipment Interchange Receipt (Maersk App. 75).)
 38. Container AMFU8597787 was inspected four times as it arrived in Rotterdam and moved through the terminals to be loaded on board M/V OLUF MAERSK and found to be undamaged. (Declaration of Van Duuren (Maersk App. 31-35); Equipment Interchange Receipts (4) (Maersk App. 36-39); Declaration of Messkoub (Maersk App. 44-45); Equipment Interchange Receipts (2) (Maersk App. 72-73).)
 39. On October 6, 2004, container AMFU8597787 was inspected when it was offloaded from the M/V OLUF MAERSK in Miami, Florida, and found to be undamaged. (Declaration of Messkoub (Maersk App. 45); Equipment Interchange Receipt (Maersk App. 74).)
 40. The waybill required Maersk to deliver the container to Miami; therefore, Maersk held container AMFU8597787 at the Miami terminal until October 28, 2004, when it was picked up by Nighthawk Enterprises, Inc. (Declaration of Messkoub ¶ 16 (Maersk App. 46).)
 41. Kuzela hired Nighthawk Enterprises, Inc., a common carrier, to transport container AMFU8597787 and its contents from the Port of Miami to Palm Bay, Florida. (Nighthawk Enterprises, Inc. Bill of Lading No. 253273 (ALJ App. 23); Declaration of Messkoub ¶ 16 (Maersk App. 46).)
 42. Container AMFU8597787 was inspected when Maersk relinquished and Nighthawk assumed responsibility for its transportation and no damage was noted. ((Declaration of Messkoub ¶ 16 (Maersk App. 46); Equipment Interchange Receipt (Maersk App. 75).)

43. On November 1, 2004, when Nighthawk returned container AMFU8597787 to the Miami terminal, roof damage was discovered for the first time on the container. (Declaration of Messkoub ¶¶ 17-19 (Maersk App. 46-47); Equipment Interchange Receipts (3) (Maersk App. 76-77)).

Based on the facts recited above, I reach the following:

CONCLUSIONS OF LAW

1. The complaint alleges that Maersk violated section 10(d)(1) of the Shipping Act of 1984 (FF 1; ALJ App. 1);⁸ therefore, the Commission has jurisdiction over the complaint. *Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, 30 S.R.R. 991, 1001 (2006) (Blust and Dye, concurring); *Rose International, Inc. v. Overseas Moving Network Int'l, Ltd.*, 29 S.R.R. 119, 159 (2001).
2. Kuzela filed the complaint as an informal proceeding pursuant to 46 C.F.R. Subpart S. As Maersk objected to proceeding pursuant to Subpart S, the Commission properly converted Informal Docket No. 1883(F) from an informal docket under 46 C.F.R. Subpart S to a Formal Docket under 46 C.F.R. Subpart T and referred the proceeding to the Office of Administrative Law Judges. FF 6-10. 46 C.F.R. §§ 502.304(f) and 502.311.
3. Maersk is a common carrier within the meaning of the Shipping Act of 1984. FF 2. 46 U.S.C. § 40102(6); 46 C.F.R. § 515.2(f).
4. Maersk is an ocean common carrier within the meaning of the Shipping Act. FF 2. 46 U.S.C. § 40102(17); 46 C.F.R. § 515.2(m).
5. Kuzela is a shipper within the meaning of the Shipping Act. FF 15. 46 U.S.C. § 40102(22); 46 C.F.R. § 515.2(t).
6. When Maersk issued Maersk Sealand Non-Negotiable Waybill No. PRHL12276, it assumed responsibility for transporting container AMFU8597787 and its contents from Zlin, Czech Republic, the point of receipt, to Miami, Florida, the port of discharge. FF 20, 36. 46 U.S.C. § 40102(6)(ii); *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 18-19 (2004) (“[a] bill of lading records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage.”); 223 F.3d 126, 129 (2d Cir. 2000) (“If anything happens to the goods during the voyage the NVOCC is liable to the shipper because of the bill of lading that it issued.”); *Scholastic Inc. v. M/V Kitano*, 362 F. Supp. 2d 449, 455-456 (S.D.N.Y. 2005) (the bill of lading is the NVOCC’s contract with the shipper).

⁸ FF followed by a number refers to a fact set forth in the Findings of Fact above.

7. When Nighthawk picked up container AMFU8597787, it assumed responsibility for transportation of container AMFU8597787 and its contents and Maersk's responsibility for transportation of container AMFU8597787 and its contents terminated. FF 40, 41.
8. The evidence in the record establishes that container AMFU8597787 was undamaged when Maersk relinquished responsibility for transportation of the container to Nighthawk. FF 38, 39, 42.
9. The evidence in the record establishes that container AMFU8597787 was damaged when Nighthawk returned container AMFU8597787 to the Miami terminal. FF 43.
10. Complainant Kuzela has not presented evidence establishing that his goods were damaged during a time when Maersk was responsible for their transportation.
11. Kuzela has not established that Maersk violated section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. § 41102(c).
12. Therefore, the complaint must be dismissed.

CONCLUSION

The evidence presented by Maersk persuades me that when Nighthawk assumed responsibility for the transportation of container AMFU8597787, neither the container nor the goods inside were damaged. Therefore, the goods had not been damaged when Maersk's responsibility for transporting them ended. Maersk cannot be held responsible for subsequent damage.

ORDER

For the reasons set forth above, it is hereby

ORDERED that the complaint herein be **DISMISSED WITH PREJUDICE** and that this proceeding be **DISCONTINUED**.


Clay G. Guthridge
Administrative Law Judge