DECISIONS OF THE FEDERAL MARITIME COMMISSION

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July 27, 2022

Daniel B. Maffei, Chairman

Rebecca F. Dye, Commissioner

Louis E. Sola, Commissioner

Carl W. Bentzel, Commissioner

Max M. Vekich, Commissioner

Office of Administrative Law Judges

Erin M. Wirth, Chief Administrative Law Judge

The Federal Maritime Commission makes decisions in cases brought by parties who claim they have been harmed because of a violation of the legal prohibitions in the Shipping Act of 1984, 46 U.S.C. Chapters 401-143. The Commission can also determine to investigate a possible violation of the same law. In the first instance, these claims are heard by an Administrative Law Judge who issues an Initial Decision. That Initial Decision may become the final decision of the Commission 30 days later. However, the Initial Decision can be appealed by the parties to the proceedings, or any Commissioner can ask to review the Initial Decision. In either case, the Commission would then review the Initial Decision and issue a Final Decision in the case. This publication provides a compendium of Initial and Final Decisions in these matters and selected other Orders that may be significant or establish a new legal precedent.

TABLE OF CASES REPORTED BY DOCKET NUMBER

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FEDERAL MARITIME COMMISSION

GREATWAY LOGISTICS GROUP, LLC, *Complainant*

v.

OCEAN NETWORK EXPRESS PTE. LTD., *Respondent*.

DOCKET NO. 21-04

Served: January 5, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's November 30, 2021, Initial Decision Approving Settlement Agreement has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

MOHAWK GLOBAL LOGISTICS CORP. DBA MOHAWK GLOBAL LOGISTICS, *Complainant*

v.

MSC MEDITERRANEAN SHIPPING COMPANY (USA) INC. AS AGENT FOR MEDITERRANEAN SHIPPING COMPANY, S.A., GENEVA, *Respondent*.

DOCKET NO. 1971(F)

Served: January 12, 2022

NOTICE NOT TO REVIEW

Notice is given that the time within which the Commission could determine to review the Administrative Law Judge's December 9, 2021, Initial Decision Approving Confidential Settlement Agreement has expired. Accordingly, the decision has become administratively final.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

COVID-19 IMPACT ON CRUISE INDUSTRY | **FACT FINDING NO. 30**

Served: January 14, 2022

FINAL REPORT

I. Executive Summary

In early 2020, we transitioned to a new reality in America as we faced an unprecedented disruption that has restricted our movement, taken the lives of loved ones, and dealt a blow to our economy. In keeping with its mission, the Federal Maritime Commission (Commission) determined that it should examine the impact of the COVID-19 pandemic on the cruise industry. As a result of COVID-19 outbreaks on various passenger vessels, on March 14, 2020, the Centers for Disease Control and Prevention (CDC) issued a No Sail Order and Suspension of Further Embarkation, causing passenger vessel operators (PVOs) to cease all operations. Although no single federal agency has exclusive or comprehensive authority over cruise lines, the Commission has a mandate to: (1) ensure an efficient and economic transportation system in the ocean commerce for goods and passengers under the Shipping Act; and (2) ensure that PVOs maintain adequate financial responsibility to indemnify passengers for nonperformance of transportation and meet any liability for death or injury to passengers or other individuals under 46 U.S.C. Chapter 441. Therefore, the Commission possesses a clear and compelling responsibility to actively investigate and respond to the impact of COVID-19 on the cruise industry and the U.S. ports that rely on it. Consequently, on April 30, 2020, the Commission designated Commissioner Louis E. Sola to serve as Fact Finding Officer for Fact Finding Investigation No. 30, "COVID-19 Impact on Cruise Industry" (Fact Finding 30 or FF30). The Commission charged him to work with key industry stakeholders in an attempt to identify commercial measures that might be adopted to mitigate COVID-19 related impacts to the passenger vessel sector of the maritime industry as well as explore where and how the Commission might facilitate changes that will benefit both consumers and cruise lines.

The Commissioner was granted full authority under 46 C.F.R. §§ 502.281-291 to perform his investigative duties, including the ability to issue subpoenas, take depositions, and hold hearings.

During the course of his investigation, Commissioner Sola:

- Engaged cruise industry stakeholders to identify solutions to COVID-19 related issues interfering with the operations of the industry;
- Interacted with maritime related COVID-19 task forces to gather information and data related to the impact of COVID-19 on the cruise industry; and

- Established teams of leaders from the cruise industry, as well as other stakeholders, to develop commercial solutions to the challenges created by the COVID-19 pandemic.

As the investigation progressed, Commissioner Sola produced eight interim reports: six of which were economic impact reports broken down geographically; one which focused upon statutory and regulatory financial responsibility requirements upon PVOs; and one dedicated to consumer protection.

This final report provides the Commission a summary of the accomplishments of the Fact Finding 30 to date and formally discontinues Fact Finding 30 upon the Commission's acceptance of this report.

II. Temporary Relief to Small Passenger Vessel Operators

After numerous in-person and virtual meetings and conversations with state and local government officials, senior executives of cruise lines and marine terminal operators, longshore labor leaders, and Commission collaborative panels, Commissioner Sola issued an initial report. That report identified a regulatory step to address a critical COVID-19 fiscal impact experienced by the cruise industry generally, but most significantly by small passenger vessel operators that are largely U.S.-based businesses that mostly sail U.S. flagged vessels.

The Commission regulations require that all passenger vessel operators demonstrate financial responsibility to the agency through the submission of some form of financial instrument equal to 110 percent of the greatest amount of Unearned Passenger Revenue (UPR) the carrier held over the previous two years. This required amount for financial responsibility, generally provided in surety bonds, is capped at $32 million subject to adjustment every two years based upon the consumer price index. Currently, only the smaller PVOs hold a surety bond at an amount below the cap. It is also common for most sureties to require some form of collateral from the PVOs prior to the issuance of a bond.

In the initial report, Commissioner Sola proposed a path for smaller PVOs to request reducing the required financial responsibility amount to more accurately reflect the UPR reduced by the cessation of operation and thereby reducing the premiums paid for the surety bond and the costs associated with a corresponding collateral amount. These savings would free up capital to allow for the payment of salaries and maintenance of the PVOs' fleets while simultaneously ensuring that sufficient funds were available to refund those customers who had purchased a ticket for a cruise that did not sail.

On July 23, 2020, the Commission voted unanimously to adopt the proposal. In approving the "Policy Statement on Passenger Vessel Financial Responsibility," the Commission determined it would look favorably upon requests from small PVOs for alternative forms of evidence of financial responsibility provided applicants meet key conditions. To be considered for the relief the Commission is providing, PVOs must agree to comply with two requirements. The first is that PVOs agree to provide monthly reports to the Commission that satisfactorily demonstrate the company's UPR. The second is that if a PVO fails to comply with the

requirements and conditions of the alternative form of evidence of financial responsibility, they will be subject to the default financial responsibility amounts in the Commission's regulations.

It should be noted that many of the small carriers have a limited sailing season and were unable to operate for all or most of the 2020 season and over one half of the 2021 season. Consequently, the UPR of these small carriers has been substantially less than in the previous two years prior to the pandemic, which were generally robust. As a result of a strong market in 2018 and 2019, the financial responsibility amounts for the small carriers reflect a UPR substantially higher than the current commercial reality under the pandemic.

Granting relief to these PVOs was intended not only to benefit the persons employed by them, but also to directly assist the ports which the cruise vessels call home as well as the ones they visit.

III. PVO Financial Responsibility Rule (Refunds)

[Graphic: Recommended that the Commission establish in 46 C.F.R. part 540 clear process for the resolution of complaints that allege the failure of a PVO to maintain financial responsibility by failing to indemnify a passenger for nonperformance as defined in 46 C.F.R. part 540 and required in 46 U.S.C. § 44102.[1]]

FF30 was not initiated as a consumer protection examination, however, as the Fact Finding Officer began to look at the financial fallout resulting from the cessation of cruise operation, it became apparent that each cruise line had different refund policies; none of which were designed to address the complete suspension of service.

As the Commission began to field calls from passengers, it became apparent that much confusion existed as to what options passengers had concerning ticket refunds. The majority of passengers were satisfied with credits for future cruises although some, due to changes in their personal situations, were unable to avail themselves of credits for future cruises and were precluded from obtaining a financial refund. A significant number of passengers complained about the length of time the cruise lines were taking to resolve their claims.

As a result, as Fact Finding Officer, Commissioner Sola proposed that the Commission clarify when and how a passenger may obtain a refund if a PVO cancels a voyage, makes a significant schedule change, or significantly delays a voyage. The Commission adopted the proposal and in October 2020, issued an Advance Notice of Proposed Rulemaking seeking the public's comments. On August 24, 2021, the Commission issued a Notice of Proposed Rulemaking (NPRM) proposing to define when nonperformance of transportation has occurred and to establish uniform procedures regarding how and when passengers may make claims for refunds under a PVO's financial responsibility instrument when nonperformance occurs. Specifically, the Commission proposes that nonperformance be defined as cancelling a voyage or delaying a voyage by three or more calendar days if a passenger elects not to embark on a

[1] Federal Maritime Commission, Fact Finding 30 Interim Report: Refund Policy (July 27, 2020), https://www2.fmc.gov/readingroom/docs/FFno30/RefundsInterimReportFinal.pdf/.

delayed or substituted voyage offered by a PVO. The Commission also proposes to change its regulations to allow passengers of delayed or cancelled voyages to make direct claims against financial responsibility instruments, such as bonds, maintained by PVOs, subsequent to the passenger's unsuccessful attempt to receive a refund directly from the PVOs. Finally, the proposal provides that all fees, including ancillary fees, paid by a passenger to a PVO be eligible for a refund.

[Graphic: **What the proposed changes would mean for passengers**
1. Refunds are available if the voyage is cancelled or if the ship is delayed by three or more calendar days from the scheduled sailing date.
2. Claims must be resolved in 180 days.
3. Refunds to include all money paid directly to the cruise line.
4. Refunds cannot exceed amount of money paid.
5. Clear notice on both the cruise line's website and the Commission's website on how to claim a refund.
6. Nothing prevents passenger and cruise line from entering into an alternative agreement for cruise credits.
* The proposed changes are prospective only.]

Parties with comments relevant to the proposed changes were given until October 25, 2021, to submit their comments to the Commission. As Fact Finding Officer, Commissioner Sola believes this proposed regulation will bring clarity of process and a reasonable time limit for claim resolution.

IV. Financial Impact Reports

Between September 2020 and August 2021, six regional reports were issued on the economic impact of COVID-19.[2] These were not focused on losses of the major cruise lines, but rather focused on the impact on the local economies. Nationwide in 2019, the cruise industry was responsible for over $25 billion in direct spending by the cruise lines, cruise passengers, and crew.[3] The cruise industry accounts for an estimated 436,000 jobs throughout the country, including direct, indirect, and induced jobs.[4] Many of these jobs are directly related to the tourism industry, such as cruise passengers taking flights and/or taxis to the ports. Others are related to the ships, such as stevedoring and pilot services. Others are farther-reaching, such as beef and beer brought in from other states that are served on cruise ships. Due to cruise operation

[2] Reports can be found at https://www.fmc.gov/fact-finding-30/.
[3] Cruise Lines International Association, The Contribution of the International Cruise Industry to the U.S. Economy in 2019 (November 2020), https://cruising.org/-/media/research-updates/research/2019-usa-cruise-eis.ashx (last visited Aug. 30, 2021).
[4] *Id.*

disruptions, $39 billion in total economic loss occurred between March 2020 and March 2021; incorporated therein was an estimated 301,000 jobs and $16.5 billion in wages lost.[5]

In Florida alone, the cruise industry was responsible for almost 159,000 jobs and $8.1 billion in income.[6] Florida has the three busiest cruise ports in the world,[7] and has seen enormous growth in the last decade. From 2010 to 2019, Florida cruise passenger embarkations grew from about 5.8 million to about 8.3 million.[8] As of July 2021, the Florida Seaport Transportation and Economic Development Council believes that "Once the CDC's conditional sail order is fully engaged by the cruise brands either through vaccination mandated sailings or through the simulated voyage process and public confidence in travel-related convenience and safety protocols recovers it is expected that the number of cruise passengers moving through Florida's ports will rebound and resume [its] pre-pandemic growth trajectory."[9]

In 2019, Alaska had over 1.3 million cruise visitors.[10] The cruise industry supports over 23,000 jobs in the state and would bring in $1.28 billion in direct spending annually.[11] Several port towns have a population of just a few hundred to a few thousand but have hundreds of thousands to over a million cruise visitors a year. This results in millions of dollars in economic impact for small towns like Skagway and Hoonah.[12]

The Gulf Coast is also reliant on the cruise industry. In Galveston, Texas, the number of cruise passengers more than doubled from 2011 to 2019, going from 459,448 cruise passengers in 2011 to 1,091,622 cruise passengers in 2019.[13] Around 8% of cruise embarkations in the U.S.

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[5] Cruise Lines International Association, United States Estimated Economic Impact of Cruise Suspensions, https://cruising.org/-/media/Infographics/Enhanced%20Public%20Health%20Measures/Suspension%20Impact%20US%20and%20Key%20States/USA (last visited Aug. 30, 2021).

[6] Florida Seaport Transportation and Economic Development Council, Seaport Mission Plan (Jul. 27, 2021), https://flaports.org/success-story/fsted-seaport-mission-plan/ (last visited Aug. 30, 2021).

[7] *Id.*

[8] *Id.*

[9] *Id. at 55*

[10] Alaska Travel Industry Association, Alaska Visitor Volume Report Winter 2018-19 and Summer 19 (June 2020), http://www.alaskatia.org/wp-content/uploads/Alaska-Visitor-Volume-2018-19-FINAL-7_1_20.pdf (last visited Aug. 31, 2021).

[11] Cruise Lines International Association, Alaska Estimated Economic Impact of Cruise Suspensions, https://cruising.org/-/media/Infographics/Enhanced%20Public%20Health%20Measures/Suspension%20Impact%20US%20and%20Key%20States/Alaska (last visited Aug. 31, 2021).

[12] For more information see the Fact Finding 30 Report, Interim Report: Economic Impact of COVID-19 on the Cruise Industry in Alaska, Washington, and Oregon (Oct. 20, 2020), https://www2.fmc.gov/readingroom/docs/FFno30/20-20_AK_WA_OR_FF30_Final_Interim_Report.pdf/ (last visited Aug. 31, 2021).

[13] Port of Galveston, 2019 Comprehensive Annual Financial Report (Year Ending 2019), https://www.portofgalveston.com/DocumentCenter/View/2747/Final-2019-Port-of-Galvestion-CAFR (last visited Aug. 31, 2021).

are in Galveston,[14] and cruise, ferry, and harbor cruise activity combined result in $347 million in direct business revenue and $111 million in direct, indirect, and induced personal income.[15]

A number of other ports, both home ports and ports of call, on the gulf coast, west coast, east coast, and Pacific and Caribbean states and territories, bring in hundreds of thousands to millions of cruise visitors each year, though none rely solely on the cruise industry for the regions' economy. A few rely heavily on the tourism industry, such as Hawaii, but the cruise industry is not the main source of its tourism revenue.

Individual Actions Taken as a Result of Impact Study

Through the course of the economic impact studies, Commissioner Sola coordinated briefings between affected parties and key members of the White House COVID-19 Task Force on the financial impact of the CDC No Sail Order. These briefings allowed task force members to hear directly from, not only cruise industry leaders, but also state and local elected officials, port managers, organized labor, and members of other industries affected by the no-sail order on the wider-reaching economic impact on their industry, state, or community.

Commissioner Sola traveled to Alaska in 2020 and met with elected officials, union members, and those working in the tourism industry. He saw first-hand the impact that the no-sail order had on small towns like Whittier and Seward, Alaska. Research and additional meetings showed those towns were not alone in Alaska – others farther south, such as Ketchikan and Skagway, were also heavily dependent on the cruise industry.

The effect of the No Sail Order on Alaska was further complicated by Canada's extension of their ban on cruise ships, previously set to expire in February 2021 but now ending in February 2022. At the time of the issuance of the no-sail order, the Passenger Vessel Services Act (PVSA) necessitated all foreign-flagged cruise ships (all medium and large cruise ships sailing to Alaska) to stop in a foreign port, such as Vancouver or Victoria, Canada. Commissioner Sola worked with the Alaska delegation on a PVSA exemption, when it became apparent that the CDC no-sail order would end but cruises sailing to Alaska would still be prevented from sailing due to the closure of Canada's ports. Commissioner Sola also wrote editorial items in support of the PVSA exemption. The bill allowing for the exemption, the Alaska Tourism Restoration Act, was passed in the House and Senate on May 20, 2021, and on May 24, 2021, it was signed by the President.[16] Ships began sailing from Seattle to Alaska on July 19, 2021.

Commissioner Sola has encouraged the governors of Florida, Texas, New York, New Jersey, and California to help vaccinate port workers and crews calling on their state's ports. He

[14] Cruise Lines International Association, The Contribution of the International Cruise Industry to the U.S. Economy in 2019 (November 2020), https://cruising.org/-/media/research-updates/research/2019-usa-cruise-eis.ashx (last visited Aug. 30, 2021).
[15] County of Galveston & City of Galveston, The Economic Impact of Galveston County's Maritime Industry Cluster (Feb. 22, 2017), http://gcenergyservices.com/wp-content/uploads/2017/08/The-Economic-Impact-Galveston-Countys-Maritiime-Industry-Cluster.pdf (last visited Oct. 12, 2021).
[16] 117th Congress, H.R.1318 - Alaska Tourism Restoration Act, Bill History, https://www.congress.gov/bill/117th-congress/house-bill/1318/all-actions?overview=closed#tabs (last visited Aug. 31, 2021).

also recognized that though there are more than enough vaccine doses for all who want to be vaccinated in the U.S., that is not the case in the Caribbean and Central American countries. To support the cruise industry and promote the safety of Americans cruising to the Caribbean and Central America, Commissioner Sola recommended to President Biden that the U.S. deliver surplus vaccines to neighboring Caribbean and Central American countries for the purpose of vaccinating those that support the U.S. cruise industry.

V. Conclusion

[Graphic: "Americans are resourceful, enterprising, and resilient, none more so than the men and women who make their living on our waterways. In times when these people need a hand, regulators should be nimble, adaptive, and willing to provide relief where it can make a difference." Commissioner Louis E. Sola]

Fact Finding 30 was established in an effort to determine the economic stability of the cruise industry. When we talk about the "cruise industry" we tend to think of the ships and vessel operators, but there is an exhaustive list of American employees and businesses who rely on the work they do for the cruise lines and the port communities that support them, not to mention the cruise consumers who wish to take cruises for vacation, leisure, or celebrating important events in their lives. The sooner cruise lines are able to resume full operations and provide certainty to the public about the lines' financial security, the sooner we can bring stability to enterprises and communities that rely on the cruise industry for their livelihoods.

The cruise industry plays a unique role in the American economy. The industry's broad national, interdependent supply chain of U.S. companies encompasses ports, travel agents, airlines, hotels, retailers, and farmers. Collectively, its direct supply chain spends billions of dollars in the United States annually. The cruise industry is also an important contributor to the financial health of seaports across the country through the payment of port fees covering berthing, security, customs and immigration, harbor pilotage, and other port logistical services such as longshore labor.

As Fact Finding Officer, Commissioner Sola worked with the various stakeholders to determine what, in addition to those issues addressed by other Commissioners, should be examined to help ensure fairness and efficiency in the cruise industry. Those reviews produced the comprehensive economic studies referenced above which in turn were utilized by various authorities to establish policies dedicated to the benefit of labor, business, and the consumer. Not only were these studies utilized by federal actors but also by state and local policy makers.

Thanks to the development of several vaccines and the implementation of shore side agreements between cruise lines, ports, and local health establishments to treat passengers and crew infected with the SARS-CoV-2 virus, cruise ships began limited sailings in the summer of 2021 with a gradual increase planned throughout the remainder of the year. Cruise lines have adapted to the COVID-19 situation, making it easy for those who are fully vaccinated to sail. Additional steps being taken vary by cruise line and generally include testing prior to boarding regardless of vaccination status, mask requirements on parts of the ship, and measures for quarantining and/or returning passengers to the U.S. if they have a positive COVID-19 test. Many of these protocols were required by the CDC as a condition to sail, and others were

initiated by the lines as best practices to protect passengers and crew. These protocols and practices are now being put to the test with the emergence of the Omicron variant. Notwithstanding the transmissibility of this latest variant, the Director of the CDC has stated that the conditional sail order (CSO), which is scheduled to expire on January 15, 2022, will not be extended. The CDC has, however, issued an advisory recommending against cruise ship travel at the present time due in part to the significant case load observed on land. The CDC decision to not extend the CSO is due in no small part to the agency's recognition that the PVOs have indicated that the safety protocols implemented as the result of the pandemic will not be modified when the expiration of the CDC order occurs. Indeed, the Director of the CDC, when recently asked why the agency would issue an advisory rather than extend the CSO, responded "What I will say about the conditional sail order is that, generally, ships and companies are subscribing to the order without arguing to have the order that they are voluntarily practicing all of the things within that order and that we are doing the exact same oversight as we would do if the order was in place."[17]

I commend the decision to allow the cruise lines to operate unimpeded so long as they employ best practices that are reasonable and customary for the hospitality and transportation industry. The cruise lines continue to adapt to the circumstances presented by new variations of Covid-19 and modify their actions as needed to mitigate harm. Consequently, notwithstanding the recent altered itineraries and cancelled sailings in response to the Omicron variant, the cruise industry is on the road to resuming operations in 2022. While it is not possible nor desirable for the Fact Finding to predict the speed in which the fiscal losses wrought by the pandemic will be recovered, we can note the significant pent-up demand for the cruise product. Anecdotal evidence confirms that the ardor for cruising has not diminished and indeed, due to the inability to sail for more than a year, it may have increased. How other future economic factors may affect this desire is beyond the scope of our review. One thing is certain, however, that as a result of this unprecedented pandemic there has been an improvement in industry health and safety practices and certain regulations have been modified to the benefit of both the consumer and industry.

Although Fact Finding 30 is being brought to a close, I encourage the Commission to continue to monitor the industry's fiscal health and its response to the pandemic both in the areas of public safety and consumer affairs. Acknowledging the vagaries of this current pandemic, the Commission should keep a close watch on how the industry addresses Covid-19 in its varied iterations.

[17] POLITICO, Weekly Transportation (January 10, 2022), https://www.politico.com/newsletters/weekly-transportation/2022/01/10/airports-pan-short-term-5g-deal-799763.

As Fact Finding Officer, I would like to take a point of personal privilege and express my sincere gratitude to all who participated as members of my consultative panels and the staff at the Commission, especially the FF30 team members, who made this investigation possible.

LOUIS E. SOLA
COMMISSIONER

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

NNABUGWU CHINEDU ANDREW, AVERS LOGISTICS LTD., AND CJ DELUZ NIGERIA LTD., *Complainants*

v.

MARINE TRANSPORT LOGISTICS, INC., ALLA SOLOVYEVA, AND RAYA BAKHIREV, *Respondents.*

DOCKET NO. 20-12

Served: January 24, 2022

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION[1]

[Exceptions filed by Complainants, 02/15/2022, Commission final decision pending.]

I. INTRODUCTION

A. Overview

Complainants Nnabugwu Chinedu Andrew, Avers Logistics Ltd., and CJ Deluz Nigeria Ltd. commenced this proceeding by filing a complaint alleging that Respondents Marine Transport Logistics, Inc. ("MTL"), Alla Solovyeva, and Raya Bakhirev violated the Shipping Act of 1984 ("Shipping Act") sections 41102(c), 41104(3), 41104(10), 40901(a), 41102(6), and 41102(b), with regard to seventeen automobiles. Complaint at 32-34.

Respondents filed an answer denying the allegations, arguing that Complainants abandoned the subject vehicles, and asserting that the claims are barred by the statute of limitations and the doctrine of laches. Opposition at 1-5.

As discussed more fully below, Complainants have not established a violation of the Shipping Act because they have not established that Respondents' practices were unreasonable, occurred on a normal and customary basis, or were the proximate cause of loss.

B. Procedural History

On August 6, 2020, a notice of filing of complaint and assignment was issued for this proceeding. On August 27, 2020, Respondents filed their answer.

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

On September 16, 2020, Complainants filed a motion seeking an order striking Respondents' answer, prohibiting Respondents from supporting their defense or introducing documents, and issuing a default decision. On September 17, 2020, Respondents filed their opposition to the motion for default decision. The motion was denied on September 18, 2020.

The parties engaged in discovery. On May 6, 2021, an order on motions to compel granted in part and denied in part both Complainants' motion to compel and Respondents' cross-motion to compel, and a briefing schedule was issued. Complainants filed a motion for reconsideration, which was denied, and a second motion for reconsideration, which was also denied.

On August 31, 2021, Complainants filed their brief, proposed findings of fact, and appendix. On September 28, 2021, Respondents filed their opposition brief, appendix, proposed findings of fact, and opposition to Complainants' proposed findings of fact. On October 13, 2021, Complainants filed their reply brief and response to Respondents' proposed findings of fact. Some pages were missing from the reply brief and the complete reply brief was filed on October 21, 2021. No objection was received, and the complete reply brief is hereby accepted.

C. Arguments of the Parties

Complainants argue that Respondents acted as ocean transportation intermediaries ("OTIs"); the claimed acts and omissions occurred on a normal, customary, and continuous basis; the acts and omissions are unjust and unreasonable; and the acts and omissions are the proximate cause of Complainants' claimed loss. Brief at 28-48.

Respondents assert that Raya Bakhirev should be dismissed, and a finding made that the case against her was frivolous, as her role as an accountant/bookkeeper has no relationship to a violation of the Shipping Act. Opposition at 1. Respondents further assert that the claims are barred by the statute of limitations and the doctrine of laches and Complainants abandoned the subject vehicles. Opposition at 1-5.

In their reply, Complainants assert that the claims are not barred by the statute of limitations or the doctrine of laches and the argument that the vehicles were abandoned has no merit and is contradicted by the evidence. Reply at 4-18.

D. Evidence

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this 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 in 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.

Specific findings of fact are in section two, prior to the analysis and conclusions of law in part three, and the order in part four.

II. FINDINGS OF FACT

A. Relevant Entities

1. Complainant CJ Deluz Nigeria Ltd. is a foreign limited liability corporation located in Lagos, Nigeria. Complaint at 1 ¶ 1.

2. Complainant Avers Logistics Ltd. is a foreign limited liability corporation located in Lagos, Nigeria. Complaint at 1 ¶ 2.

3. Complainant Nnabugwu Chinedu Andrew is an individual residing in Lagos, Nigeria, who represented Complainants in their business dealings with Respondents giving rise to this proceeding. Complaint at 2 ¶¶ 3-4.

4. Complainants are automobile dealers. Complaint at 10 ¶ 55; Opposition at 2-3.

5. Respondent MTL is a New York Corporation licensed by the Federal Maritime Commission as a non-vessel-operating common carrier ("NVOCC"), FMC License No. 018709. Complainants' Proposed Findings of Fact ("CPFF") ¶ 13; Respondents' Response to Proposed Findings of Fact ("RCPFF") ¶ 13; *see also* www2.fmc.gov/oti/NVOCC.aspx (last visited December 29, 2021).

6. MTL is a New Jersey Corporation with its primary place of business at 63 New Hook Road, Bayonne, NJ 07002. Complaint at 2 ¶ 5; Answer at 2 ¶ 5.

7. MTL is an international shipping company, providing freight forwarding and logistics services to customers on a worldwide basis. CPFF ¶ 11; RCPFF ¶ 11.

8. Respondent Alla Solovyeva is an individual with a last known business address located at 63 New Hook Road, Bayonne, NJ 07002. Complaint at 2 ¶ 6; Answer at 2 ¶ 6.

9. Alla Solovyeva is an officer of MTL. Complaint at ¶ 8; Answer at ¶ 8.

10. Alla Solovyeva is a shareholder of MTL. Complaint at ¶ 9; Answer at ¶ 9.

11. Alla Solovyeva has signatory authority and direct control over MTL. Complaint at ¶ 10; Answer at 10.

12. The operation and supervision of MTL's activities are conducted by Alla Solovyeva. Complaint at ¶ 11; Answer at ¶ 11.

13. Respondent Raya Bakhirev is an individual with a last known business address located at 63 New Hook Road, Bayonne, NJ 07002. Complaint at ¶ 7; Answer at ¶ 7.

14. Raya Bakhirev is an employee of MTL. Complaint at ¶ 13; Answer at ¶ 13.

15. Raya Bakhirev is employed by MTL as an accountant/payroll employee. CPFF ¶¶ 8-9; RCPFF ¶¶ 8-9; Complaint at ¶ 15; Answer at ¶ 15.

B. Shipments at Issue

16. There are 17 automobiles in dispute in this proceeding:

- 2007 Toyota 4Runner VIN # JTEZU14R670096538; Storage Entry Date 9/21/2017;
- 2010 Lexus RX 350 VIN # 2T2BK1BABAC039422; Storage Entry Date 9/29/2017;
- 2009 Toyota Venza VIN # 4T3ZK11A79U017319; Storage Entry Date 8/31/2017;
- 2006 Lexus GS 300 VIN # JTHBH96S865006993; Storage Entry Date 8/7/2017;
- 2008 Lexus RX 350 VIN # 2T2HK31U58C080845; Storage Entry Date 6/9/2017;
- 2007 Lexus RX 350 VIN # 2T2HK31U47C022708: Storage Entry Date 6/7/2017;
- 2001 Toyota Camry VIN # 4T1BF22K51U966626; Storage Entry Date 5/9/2017;
- 2007 Toyota Avalon VIN # 4T1BK36B57U245968; Storage Entry Date 5/2/2017;
- 2011 Toyota Venza VIN # 4T3ZK3BB2BU041102; Storage Entry Date 1/26/2017;
- 2004 Toyota Camry VIN # 4T1BA32K34U502288; Storage Entry Date 1/25/2017;
- 2002 Lexus ES 300 VIN # JTHBF30G725019803; Storage Entry Date 1/25/2017;
- 2008 Honda Accord VIN # 1HGCP26728A103906; Storage Entry Date 1/25/2017;
- 2010 Toyota Venza VIN # 4T3BK3BBXAU030283; Storage Entry Date 1/24/2017;
- 2003 Lexus ES 300 VIN # JTHBF30G830101344; Storage Entry Date 1/17/2017;
- 2002 Lexus RX 300 VIN # JTHF10UX20257130; Storage Entry Date 1/17/2017;
- 1996 Toyota Avalon VIN # 4T1BF12BXTU132140; Storage Entry Date 3/9/2017
- 2006 Toyota 4Runner VIN # JTEZU14R560072942; Storage Entry Date 9/20/2017

Complaint Appendix A at CX 1; Respondents' Appendix, Ex. 5 at 1-2.[2]

17. Complainants purchased the automobiles from auto auctions in the United States and hired MTL to pick up the vehicles and arrange for trucking of the vehicles to MTL's warehouses. Complaint ¶ 49; Answer ¶¶ 21, 49.

18. In addition to picking up the vehicles and warehousing them, MTL provided a range of other services to Complainants, including delivery of the vehicles to the port of loading, ocean freight forwarding services, and customs clearance cargo consolidation services. Complaint at 3 ¶ 21; Answer at 3 ¶ 21; CPFF ¶ 12; RCPFF ¶ 12.

[2] Respondents failed to include page numbers on the exhibits in the appendix. For ease of reference, the exhibits are treated as numbered beginning with the first page in each exhibit.

19. MTL also shipped some of Complainants' vehicles to Nigeria and issued house bills of lading for those vehicles. Complaint ¶ 30; Answer ¶ 30; CX 116, CX 119-120.

20. Mediterranean Shipping Company S.A. ("MSC") transported some of the vehicles at issue to Nigeria and issued a master bill of lading for those shipments. Complaints' Appendix B at 25; Complainants' Appendix A at CX 102-103.

21. An email from MTL dated March 24, 2016, provides MTL's storage policy that vehicles were entitled to receive free storage for 30 days and $10 per day after expiration of the 30 days and states: "MTL reserves the right to place a lien on any cargo/vehicle/boat stored at our warehouse facilities with unpaid storage charges, MTL also reserves the right to dispose of such cargo at owner's expense or sell it at public or private auction to satisfy outstanding charges." Respondents' Appendix, Ex. 5 at 31-33 (email from Oleg Smirnov at MTL listing MTL's storage fee schedule with a link to MTL's website detailing MTL's policies and list of Complainants' vehicles in storage).

22. MTL reminded Complainants of the storage policy of 30 free days, then $10/day. Respondents' Appendix, Ex. 5 at 10 (Email from MTL to Avers Logistics dated May 5, 2017, Subject "Re: 960609912), at 1 (Email dated January 23, 2018, from MTL to Alla Solovyev and Avers Logistics, Subject "Reconciliation").

23. Some of Complainants' vehicles exceeded the free 30 days storage and some of them accrued unpaid storage charges. Complainants' Appendix A at CX 15-24, CX 101-108; Respondents' Appendix, Ex. 1 at 1-2, 12-13; Respondents' Appendix, Ex. 2 at 1-3, 5-20, 24-26, 29-35, 37; 45, 48-51, 55-56, 58-64, 72-81, 87, 89, 97-98, 106-109, 113, 117-120, 122-133; Respondents' Appendix, Ex. 5 at 1-4.

24. MTL issued a discount on some of the storage fees owed by Complainants. Respondents' Appendix, Ex. 2 at 29 (invoice for $500, reflecting 202 days of storage fees with $1,520 discount applied), at 30 (invoice for $500, reflecting 139 days of storage fees with $890 discount applied), at 31 (for $500, reflecting 138 days of storage fees with $880 discount applied), at 32 (invoice for $500, reflecting 118 days of storage fees with $680 discount applied), at 33 (invoice for $65, reflecting 26 days of storage fees with 75% discount applied), at 34 (invoice for $40, reflecting 16 days of storage fees with 75% discount applied), at 35 (invoice for $35, reflecting 14 days of storage fees with 75% discount applied).

25. MTL billed Complainants for "cutting and dismantling" of some of Complainants' vehicles. Respondents' Appendix, Ex. 2 at 4; Complainants' Appendix A at CX 119.

26. Some of the vehicles at issue were purchased as salvage vehicles and some appear to have substantial damage. Respondents' Appendix, Ex. 6.

27. "Cutting and dismantling" as described in MTL's invoice appears to mean that MTL cut or positioned in a secure manner the parts that were dangling from salvage vehicles, for example, a salvage vehicle with a loose front bumper must be cut before it can be loaded.

Respondents' Response to Proposed Findings of Fact at 15, ¶ 162; Respondents' Appendix, Ex. 6.

28. MTL raised concerns to Complainants about their failure to make payments and Complainants promised to make payments and tried to renegotiate storage and shipping fees. Respondents' Appendix, Ex. 1 at 4-9; Ex. 5 at 1-4, 16-33.

29. For example, an email from Complainants to MTL dated April 19, 2017, states:

> I made an offer of 20% and all ALLA could say to me is that somebody is asking for her storage… Please I want Alla to know that she did not tell me that she gave my vehicles to someone. And maybe she is asking for the storage to use it and replace my car as IT may be that the vehicle is gone too like others ... NOW I AM MAKING AN OFFER OF $1000 FOR THE 2004 HIGHLANDER. PLEASE IF YOU CAN NOT HELP ME WITH THAT.. THEN IT MEANS THAT THE VEHICLE IS ALSO GONE… I WILL HAVE NO OTHER CHOICE THAN TO FORGET IT…

Respondents' Appendix, Ex. 5 at 26.

30. An email from MTL dated October 11, 2017, states "You are well aware of storage policies (30 days free $10/car per day thereafter). We are being billed by the warehouse. [T]hese charges are not from MTL, but from warehouse." Respondents' Appendix, Ex. 5 at 16.

31. In an email to MTL on October 12, 2017, Complainants express frustration that a vehicle was not shipped and that MTL has his "money and I am waiting to hear that you have loaded and ship for over 3 weeks not just for you to hear that the car has storage." The email also blames MTL for the delays and additional storage but then states "if you can not accept my offer of $250 now on the storage. Please remove the 2013 ford edge and replace with 2007 Camry" indicating that "I can not sell them because of its high cost" and asked if "you can put them back for auction and give me the 80% of what I bought them." He further asks for an accounting of the money that had already been sent. Respondents' Appendix, Ex. 5 at 15 (Capitalization in original).

32. An email from Alla Solovyeva dated October 12, 2017, in response states:

> By this time you have a lot of storage fees on your inventory, and I sent to you numerous emails with The same question, if you are agree to pay for the storage fees, but never received no answer from you. For this reason I do not give instructions to Maria for the loading and permission as well. She is not loaning (sic) Your containers, and you are getting frustrated and accusing her being bad to you. Please can you get More organized? If you keep your vehicles for 6 month in storage, than you know you have to pay for that, Or make your purchases and deliveries faster. Until we will get the confirmation from you that you will be Responsible for the storage charges

> in LA and will not receive the payment for the storage we will not be Able to load no containers for you. If you have any questions please do not hesitate to reply. I want to remind to you about my last emails about storage fees in NY. I negotiated the storages from thousands of Dollars down to $300/vehicle, but you never replied to me that you agree, and will pay. For this reason we are not Loading your cargo in NY too. Please lets resolve all these issues amicably, and advise when we will get the payment For all storage fees. Maria will send to you update with the charges in NY and LA.

Respondents' Appendix, Ex. 5 at 14 (Capitalization in original).

33. MTL warned Complainants about the storage fees numerous times and attempted to work with Complainants to resolve outstanding invoices but Complainants did not make the promised payments. Respondents' Appendix, Ex. 2 at 29-35; Ex. 5 at 13-26; Ex. 5 at 1-4.

34. MTL notified Complainants that they had unpaid storage charges for their vehicles and that a lien would be placed on the cars should the storage charges not be paid. Respondents' Appendix, Ex. 1 at 4-9.

35. An email from Alla Solovyev dated January 23, 2018, regarding reconciliation states: "My Company will not proceed with the shipping unless the full prepayment for the services will be received. Do not forget that the storage charges are building up daily." Respondents' Appendix, Ex. 5 at 4.

36. An email from Alla Solovyev to Complainants dated February 5, 2018, regarding reconciliation states:

> Chinnedu we never received no respond on this email with the storage charges calculations. Please advise how are you going to resolve this issue? Your vehicles are in storage since 2016[.] And you still did not pay for the storage services of your cars. MTL is trying to negotiate the storage charges Amicably and requsting (sic) you seriously look at this issue and resolve it asap.

Respondents' Appendix, Ex. 5 at 1.

37. Notices dated March, 23, 2018, regarding non-payment for storage and services, warns that failure to receive payment "will cause us, without further notice, to record a claim of Lien and/or serve a Stop Notice and/or proceed with any other collection measures we consider necessary for the protection of our investment," stating:

> With our preliminary notice date 03/06/2018, we complied with the lien provision of state of New Jersey, USA with the NJ state code. Because we are reluctant to file a claim of lien on all of your cargo, without once again notifying all concerned. Be advised that we not received your payment in the amount of our service and a storage of your cars up to today March 23, 2018.

Respondents' Appendix, Ex. 1 at 4-9.

38. MTL seized some of Complainants' vehicles on the basis that they were for compensation for storage charges owed. Respondents' Appendix, Ex. 2 at 1, 3, 23.

39. MTL also refused to load Complainants' shipments for delivery until Complainants paid outstanding charges owed on their vehicles. Respondents' Appendix, Ex. 5 at 13, 15.

40. ALJ Forwarders is listed as "consignee" or the "notify party" on some of MTL's shipping documents for the shipments at issue, as well some MSC bills of lading. *See, e.g.*, Complainants' Appendix, Ex. A at CX 102, CX 109, CX 116, CX 118, CX 120, CX 136, CX 137, CX 142, CX 144.

41. The record contains a June 25, 2018, email from Andre Bou Jaoude, Managing Director/CEO of ALJ Forwarders Services Ltd Lagos, Nigeria, to MTL stating: "Mr. Chinedu Andrew Nnabugwu refuse to clear his vehicles, claiming that there is an issue between him and MTL, further more he mentioned that he didn't give MTL order to ship his vehicles. So let me know what next pls." Respondents' Appendix, Ex. 7; *see also* Respondents' Appendix, Ex. 13 at 2-3 ("The container can be released and below [are] the Agent contact details.").

42. Complainants did not pick up Container # TCNU2645133, which was a 40 Ft High Cube containing 5 vehicles:

> 2010 Lexus RX 350 Vin # 2T2BK1BA8AC039422
> 2011 Toyota Venza Vin # 4T3ZK3BB2BU041102
> 2008 Honda Accord EX Vin # 1HGCP26728A103906
> 2009 Toyota Venza Vin # 4T3ZK11A79U017319
> 2008 Lexus RX 350 Vin # 2T2HK31U5BC080845

Respondents' Appendix, Ex. 5 at 7-9.

43. Storage charges accrued on all of the vehicles at issue. Respondents' Appendix, Ex. 5 at 13. Although there were agreements to reduce the storage charges due, the vehicles continued to remain in storage and incurred additional storage charges. Respondents' Appendix, Ex. 2 at 1, 3, 29-35; Ex. 5 at 13-26.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 2006 FMC LEXIS 19, at *33, 30 S.R.R. 991,

997-99 (FMC May 10, 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co.*, Docket No. 99-24, 2000 FMC LEXIS 14, at *38-42, 28 S.R.R. 1635, 1645 (FMC Oct. 31, 2000). Complainants allege a violation of the Shipping Act within the Commission's jurisdiction.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, a complainant bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 FMC LEXIS 35, at *41 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics,* Docket No. 15-04, 2021 FMC LEXIS 125, at *4 (FMC Aug. 18, 2021) ("*Crocus Remand FMC*"). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180, 1993 FMC LEXIS 73, at *40 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 FMC LEXIS 19 (FMC June 13, 1994).

B. Relevant Law

The Shipping Act defines and regulates a number of different types of entities that are involved in the international shipment of goods by water, including two types of ocean transportation intermediaries. "The term 'ocean transportation intermediary' means an ocean freight forwarder or a non-vessel-operating common carrier." 46 U.S.C. § 40102(20). "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(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(17). To be an NVOCC, the entity must meet the Shipping Act's definition of common carrier.

> The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(7).

The statutory definitions are echoed in the Commission's regulations:

> *Ocean transportation intermediary* means an ocean freight forwarder or a non-vessel-operating common carrier. For the purposes of this part, the term
>
> (1) *Ocean freight forwarder (OFF)* means a person that – (i) 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 (ii) Processes the documentation or performs related activities incident to those shipments; and
>
> (2) *Non-vessel-operating common carrier (NVOCC)* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

46 C.F.R. § 515.2(m).

> *Common carrier* means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:
>
> (1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and
>
> (2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 C.F.R. § 515.2(e).

The Commission promulgated regulations providing examples of NVOCC services performed by OTIs.

> *Non-vessel-operating common carrier services* refers to the provision of transportation by water of cargo between the United States and a foreign country for compensation without operating the vessels by which the transportation is provided, and may include, but are not limited to, the following:
>
> (1) Purchasing transportation services from a common carrier and offering such services for resale to other persons;
>
> (2) Payment of port-to-port or multimodal transportation charges;
>
> (3) Entering into affreightment agreements with underlying shippers;
>
> (4) Issuing bills of lading or other shipping documents;
>
> (5) Assisting with clearing shipments in accordance with U.S. government regulations;

(6) Arranging for inland transportation and paying for inland freight charges on through transportation movements;

(7) Paying lawful compensation to ocean freight forwarders;

(8) Coordinating the movement of shipments between origin or destination and vessel;

(9) Leasing containers;

(10) Entering into arrangements with origin or destination agents;

(11) Collecting freight monies from shippers and paying common carriers as a shipper on NVOCC's own behalf.

46 C.F.R. § 515.2(k).

The complaint alleges that Respondents violated section 41102(c) of the Shipping Act, which states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

On September 7, 2018, the Commission issued a notice of proposed rulemaking "to obtain public comments on clarification and guidance regarding the Commission's interpretation of the scope of 46 U.S.C. 41102(c)." Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367 (Sept. 7, 2018) ("NPRM"). In the notice of proposed rulemaking, the Commission stated *inter alia*:

> Specifically, the Commission is considering an interpretive rule consistent with Commission precedent . . . that would restore the scope of § 41102(c) to prohibiting unjust and unreasonable *practices* and *regulations*. These decisions require that a regulated entity engage in a practice or regulation on a *normal, customary,* and *continuous* basis and a finding that such practice or regulation is unjust or unreasonable to violate that section of the Shipping Act.

NPRM, 83 Fed. Reg. at 45368 (emphasis in original, internal citations omitted).

On December 17, 2018, the Commission issued a final rule adopting the September 7, 2018, notice of proposed rulemaking without change. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018) ("Final Rule"). Rule 545.4, states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;

(b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

(c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

(d) The practice or regulation is unjust or unreasonable; and

(e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

C. Discussion

Complainants allege in their complaint that Respondents violated sections 41102(c), 41104(3), 41104(10), 40901(a), 41102(6), and 41102(b) of the Shipping Act, with regard to the seventeen automobiles in dispute. Complaint at 32-34. However, in their brief and reply, Complainants only argue that Respondents violated section 41102(c) and make no arguments about sections 41104(3), 41104(10), 40901(a), 41102(6), and 41102(b). "[F]ailure to brief and argue [an] issue during the proceedings is grounds for finding that the issue has been abandoned." *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta,* 219 F.3d 130l, 1326 (11th Cir. 2000) (internal citations omitted). Accordingly, as Complainants failed to argue these violations, they are deemed abandoned.

To adjudicate the remaining claim of a section 41102(c) violation, the first question is whether Respondents were regulated entities with respect to the vehicles. If so, then the next question is whether the elements required by Commission Rule 545.4 have been met. Finally, the remaining arguments will be addressed.

1. Whether Respondents Acted as Regulated Entities

a. MTL

The parties agree that at "all times relevant hereto, MTL is an international shipping company, providing freight forwarding and logistics services to customers on a worldwide basis." CPFF ¶ 11; RCPFF ¶ 11. The parties further agree that at all times relevant hereto, MTL is licensed by the Federal Maritime Commission as non-vessel operating common carrier ("NVOCC") under license number 018709. CPFF ¶ 13; RCPFF ¶ 13. Therefore, MTL is a regulated entity. This element is not in dispute and has been established by Complainants.

b. Alla Solovyeva

Complainants assert: "On the issue of the personal liability of Alla Solovyeva being personal [sic] liable as QI, as well as Raya Bakhirev's personal involvement in the matters set forth herein resulting in her own personal liability, the Presiding Officer is respectfully referred to the Zenkovich Affidavit and the emails of Alla Solovyeva." Brief at 22. Respondents do not directly address the liability of Alla Solovyeva in their opposition.

Section 41102(c) governs the conduct of regulated entities, not individuals. To violate section 41102(c), one must be acting as an ocean common carrier, marine terminal operator, or an ocean transportation intermediary. There is no evidence in the record showing that Ms. Solovyeva acted as one of the above entities. Acting as a QI and being personally involved in an entity's business, or even being an owner of an entity, is not sufficient to pierce the corporate veil and treat the person as the entity's alter ego. *See generally Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, Docket No. 96-05, 2001 FMC LEXIS 39, *154 (FMC June 1, 2000). Moreover, Dennis Zenkovich outlines questionable business practices but not practices that would justify piercing the corporate veil. Complainants' Appendix, Ex. A at CX 121-125. The claims against Ms. Solovyeva are therefore dismissed with prejudice.

c. Raya Bakhirev

The parties agree that at all times relevant hereto, Raya Bakhirev was employed by MTL as an accountant/payroll employee. CPFF ¶¶ 8-9; RCPFF ¶¶ 8-9. Complainants do not assert that Ms. Bakhirev was an OTI, arguing only that she was an accountant, that she and MTL were playing "accounting games," and that "she admits to her involvement with and knowledge of the manner in which complainants' monies were handled by MTL." Brief at 22; Reply at 5.

Respondents contend:

> Raya Bakhirev should be dismissed from this case at the outset — and a finding made that the filing and maintaining a case as against her was frivolous — as her role as an accountant/bookkeeper has no relationship to any allegation of a violation of the Shipping Act. Complainants abandoned any theory of liability as to Ms. Bakhirev, which is evidenced by the fact that Ms. Bakhirev is not mentioned in anywhere in the Complainants'194 proposed findings of fact, except that she was employed by MTL as an accountant/bookkeeper.

Opposition at 1.

Counsel for Complainants should be well aware that individual corporate employees should not be named as parties to Shipping Act claims unless there is a basis to pierce the corporate veil and find that they acted as an alter ego of the corporation. Counsel is cautioned that in future Commission proceedings, naming individuals instead of, or in addition to corporations, without sufficient reason, may result in a finding that the claim against the individual was frivolous and imposition of sanctions. The claims against Ms. Bakhirev are dismissed. The analysis of the section 41102(c) elements will focus only on Respondent MTL.

2. Section 41102(c) Elements

To establish a violation of section 41102(c), a complainant must demonstrate that the respondent is a regulated entity; the practice or regulation is connected with receiving, handling, storing, or delivering property; the practice or regulation is unjust or unreasonable; the claimed acts or omissions occurred on a normal, customary, and continuous basis; and the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4. Each element is discussed below.

a. MTL Acted as an OTI

Because section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries, to violate it an entity must be a common carrier, marine terminal operator, or an ocean transportation intermediary within the meaning of the Shipping Act. As discussed above, the parties agree that MTL acted as an NVOCC and a regulated entity. An NVOCC is a type of OTI. 46 U.S.C. § 40102(20). Accordingly, the evidence establishes that MTL acted as an OTI as required for the first element.

b. Connected with Receiving, Handling, Storing, or Delivering Property

Complainants assert that the alleged violations are directly related to and connected with the receiving, handling, storing, and/or delivering of property as the vehicles were stored in anticipation of export. Brief at 5. MTL asserts that the vehicles were abandoned but does not contest that the alleged violation is connected with receiving, handling, storing, or delivering property. Opposition at 3-4.

This dispute centers on the receiving, handling, storing, or delivering of seventeen vehicles. The evidence shows that Complainants, who are automobile dealers located in Nigeria, hired Respondents to accept delivery of seventeen automobiles purchased by Complainants at automobile auctions located within the United States, and then ship them abroad. Complaint ¶¶ 30, 49; Answer ¶¶ 21, 30, 49. Accordingly, the evidence shows that the alleged violations involved receiving and storing the vehicles in anticipation of export and was connected to receiving, handling, storing, or delivering the vehicles. Complainants have established this element.

c. Unjust and Unreasonable

Complainants assert that MTL violated section 41102(c) of the Act by "releasing complainants' automobiles to unauthorized consignees, detaining various automobiles and refusing to ship them due to allegedly unpaid storage charges for other unrelated automobiles; by misdelivering said automobiles; and in one instance, by destroying two automobiles and cutting them in half without receiving instructions from complainants to do so." Brief at 2, 46-47. Complainants also assert that refusal to ship vehicles based on debts from "other unrelated (older) cargo" is unreasonable. Brief at 41-42.

MTL contends that Complainants failed to pay storage for the vehicles, abandoned the vehicles, refused to pick up their vehicles, and were not aware of the condition of the salvage vehicles that they purchased. Opposition at 3-5.

The evidence includes numerous email exchanges between 2016 and 2018, wherein MTL advised Complainants of storage fees and raised concerns about Complainants' failure to make payments, while Complainants tried to negotiate storage and shipping fees and promised to make payments. Respondents' Appendix, Ex. 1 at 4-9; Ex. 5 at 1-4. The evidence shows that MTL warned Complainants about the storage fees numerous times, provided notice that a lien might be imposed, and attempted to work with Complainants to resolve outstanding invoices but that Complainants did not make the promised payments. Respondents' Appendix, Ex. 2 at 29-35; Ex.

5 at 1-4, 13-26. It appears that Respondents did not think they should have to pay storage fees or that they expected to be able to renegotiate the storage fees. *See, e.g.*, Respondents' Appendix, Ex. 5 at 26, 15. Complainants have not established that the storage fees were unreasonable, that the liens were asserted without notice or in an unreasonable manner, or that the vehicles were delivered unreasonably.

The evidence does not support a finding that Complainants refused to ship vehicles based on debts from other unrelated (older) cargo but rather that storage charges accrued on all of the vehicles at issue. Respondents' Appendix, Ex. 5 at 13. In addition, although there were agreements to reduce some of the storage charges due, the vehicles continued to remain in storage and incurred additional storage charges. Respondents' Appendix, Ex. 2 at 1, 3, 29-35; Ex. 5 at 13-26. Although payment was not due until after vehicles shipped, it was reasonable for MTL to seek assurances that Complainants would pay for the storage fees prior to shipping and to refuse to ship the vehicles until such assurances were received.

The evidence does not show that MTL damaged any vehicles, but rather that the salvage vehicles were purchased in a damaged condition. The evidence shows that loose or dangling parts or bumpers from the damaged vehicles needed to be removed in order to secure those vehicles for transportation. Respondents' Appendix, Ex. 6. The evidence also shows that MTL sold some of the vehicles to recover payments due and that Complainants were advised that this would occur. Respondents' Appendix, Ex. 2 at 1, 3; Ex. 1 at 4, 7, 9. The evidence is not sufficient to find that MTL acted unreasonably, given the condition of the vehicles and Complainants' failure to pay.

Moreover, the evidence shows that Complainants failed to pick up vehicles when given the opportunity. Respondents' Appendix, Ex. 7. Complainants did not pick up Container TCNU2645133, which was a 40 Ft High Cube containing 5 vehicles. Respondents' Appendix, Ex. 5 at 7-9. While MTL could have been more clear about how Complainants' funds were applied and what amounts were due, the evidence is not sufficient to find that MTL acted unreasonably under these facts.

MTL contends that Complainants abandoned the vehicles. The evidence is not sufficient to find that the vehicles were abandoned because Complainants were continuing to negotiate and engage with MTL about the vehicles. However, Complainants have the burden of proof and it is not necessary for Respondents to establish that the vehicles were abandoned. Complainants have not met their burden to establish that MTL's conduct was unreasonable.

The evidence is not sufficient to find that MTL acted unreasonably given Complainants' repeated failure to make payments. Complainants have not met their burden to establish this element of a section 41102(c) claim. Even though the claim cannot be successful without this element, for a full analysis, the other elements will also be discussed.

d. Normal, Customary, and Continuous Basis

Complainants allege that Respondents' acts that violated the Shipping Act occurred on a normal, customary, and continuous basis. Brief at 39-55. Complainants assert that MTL's practice was alleged in another Commission case, Docket No. 16-16, and that there are

"numerous examples of MTL's various unjust and unreasonable acts" in this proceeding. Brief at 40-43. Complainants also point to two other Commission proceedings, informal dockets 1901(I) and 1932(I). Brief at 44.

MTL does not directly address this argument, focusing on Complainants' abandonment of the vehicles. Opposition at 4-5.

Complainants have the burden to establish that the unjust and unreasonable acts in question occurred on a normal, customary, and continuous basis and thus were a "regulation or practice" by Respondent. In this case, the evidence shows that MTL's normal and customary policies regarding storage rates and policies were shared with the Complainants multiple times, including as early as 2016. Respondents' Appendix, Ex. 5 at 1, 10, 31-33.

Other than MTL's storage rates and policies entered into evidence by the parties, there is limited evidence regarding MTL's normal and customary policies regarding storage rates and policies. The record contains evidence regarding the vehicles at issue in this proceeding and shipments in a few other FMC proceedings. Complainants also point to two previous cases alleging that MTL violated section 41102(c): *Best Way USA, Inc. v. Marine Transport Logistics* and *Samir Abusetta d/b/a Sammy's Auto Sales v. JAX Auto Shipping and Marine Transport Logistics*.

In *Best Way*, the Commission affirmed a Settlement Officer's finding that MTL violated section 41102(c) for a 2007 shipment, in part based on unlawful storage charges at origin as well as en route. *Best Way USA, Inc. v. Marine Transport Logistics*, 33 S.R.R. 13, FMC Docket No. 1901(I), Order Affirming Settlement Officer Decision ("FMC Order") at 9 (FMC Nov. 8, 2013). The *Best Way* decision was issued prior to the 41102(c) interpretive rule and stands for the proposition that the NVOCC is responsible for increases in shipping costs after agreeing to transport goods. *Best Way*, FMC Order at 3-4. In *Best Way*, it does appear that there was a violation of section 41102(c) based, in part, on unreasonable storage charges assessed prior to a vehicle being exported. *Best Way*, FMC Order at 3. The *Best Way* case, decided prior to the interpretive rule, does not discuss whether or not this occurred on a normal, customary, and continuous basis.

In *Samir Abusetta*, Jax Auto Shipping was found liable for violating the Shipping Act. *Samir Abusetta d/b/a Sammy's Auto Sales v. Jax Auto Shipping and Marine Transport Logistics,* FMC Docket No. 1932(I), Order Reversing, In Part, Decision of the Settlement Officer and Issuing Reparations ("FMC Order") (FMC Oct. 18, 2016). The Commission stated that "to determine whether Jax violated § 41102(c), the Commission must analyze whether it acted as an OTI in connection with Claimant's shipment." *Samir Abusetta*, FMC Order at 6. However, the Commission also found that the claimant hired Jax, not MTL, to ship the cargo and therefore that MTL did not violate the Shipping Act. *Samir Abusetta*, FMC Order at 7. Complainants' argument that this put MTL on notice is not relevant to whether the conduct occurred on a normal, customary, and continuous basis, the issue in this proceeding, as MTL was not found responsible.

Two other more recent cases against MTL, Docket No. 15-04 and Docket No. 16-16, have addressed the question of whether MTL violated section 41102(c). In Docket No. 15-04, the Commission found that the interpretive rule applies and that Crocus had not proven that MTL's conduct occurred on a normal, customary, and continuous basis as required by Rule 545.4 where there was only one other violation, in December 2007. *Crocus Remand FMC*, 2021 FMC LEXIS 125, at *2-3; 46 C.F.R. § 545.4. The claims in Docket No. 16-16, also with a different complainant, resulted in an initial decision finding that MTL had an unreasonable practice of liquidating vehicles without sufficient notice or legal process. *MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, FMC Docket No. 16-16(I), Initial Decision on Remand (ALJ Sept. 29, 2021). That decision is currently on appeal before the Commission.

Even if MTL's conduct in this proceeding was found to be unreasonable, the evidence does not show that MTL engaged in the allegedly unreasonable conduct on a normal, customary, and continuous basis. The findings in *Best Way* that the storage charge for the one shipment was unreasonable, in Docket No. 15-04 that the storage charge for one shipment was unreasonable, and in Docket No. 16-16 of an unreasonable practice regarding liquidation, are not sufficient to establish that MTL's storage practices and procedures were unreasonable in this proceeding or that they occurred on a normal, customary, and continuous basis. Accordingly, Complainants fail to meet their burden to demonstrate that the allegedly unjust and unreasonable acts by MTL occurred on a normal, customary, and continuous basis, a prerequisite for a successful claim for reparations under the section 41102(c) interpretive rule. 46 C.F.R. § 545.4; Final Rule, 83 Fed. Reg. at 64479.

Complainants also contend that the interpretive rule should not be applied retroactively. Brief at 45-46. The Commission, in *Crocus Remand FMC*, thoroughly discussed the retroactivity of this Final Rule, finding that "§ 545.4 is not impermissibly retroactive as applied to Crocus's § 41102(c) claim for reparations." *Crocus Remand FMC*, 2021 FMC LEXIS 125, at *6-14. The same logic would apply to this proceeding and it is therefore appropriate to apply Commission Rule 545.4 to this proceeding.

Complainants have not established that MTL's alleged unreasonable conduct is occurring on a normal, customary, and continuous basis and is a part of MTL's normal business practices. Indeed, this proceeding is fact intensive and focused on negotiations between the parties, rather than normal business practices. Accordingly, this element of a section 41102(c) violation is not met.

e. Proximate Cause of Loss

Complainants allege that despite paying "numerous sums of monies to respondents for storage and other charges," that they never saw the seventeen cars again and were never compensated for their loss. Brief at 47-48. Respondents assert that "Complainants were counting on these vehicles to be disposed so that they can file this case, and such is consistent with their behavior, as mentioned above, in refusing to pick up the vehicles." Opposition at 5.

The evidence shows that the vehicles were lost due to complainant's failure to pay for and pick up the vehicles. The evidence is not sufficient to determine Complainants' motivation, however, such a finding is not necessary. Accordingly, Complainants have not met their burden to establish this element of a section 41102(c) claim.

3. Remaining Arguments

Given the findings above, Respondents' affirmative defenses, including statute of limitations and laches, are moot. In addition, the extensive record was sufficient to rule on the material issues in this proceeding. Additional discovery regarding these vehicles would not have impacted the findings that MTL's conduct was not unreasonable, did not occur on a normal, customary, and continuous basis, and was not the proximate cause of loss. The evidence does not support finding that failure to provide discovery impacted the determination.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that Complainants have not established a violation of the Shipping Act, it is hereby

ORDERED that the complaint filed by Nnabugwu Chinedu Andrew, Avers Logistics Ltd., and CJ Deluz Nigeria Ltd. be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that any other pending motions or requests be **DISMISSED AS MOOT**. It is

FURTHER ORDERED that this claim be **DISCONTINUED.**

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of the Administrative Law Judges

TERENO SDN BHD, *Claimant* v. C.H. ROBINSON INTERNATIONAL, INC., *Respondent*.	**DOCKET NO. 1972(I)**

Served: January 27, 2022

BEFORE: Theresa DIKE, *Small Claims Officer*.

INITIAL DECISION[1]

I. INTRODUCTION

Claimant Tereno Sdn Bhd ("Tereno") initiated this proceeding by filing a complaint against Respondent C. H. Robinson International, Inc. ("C.H. Robinson"), alleging that C.H. Robinson violated 46 U.S.C. § 41102(c) by charging Claimant for demurrage that Claimant alleges accrued due to C.H. Robinson's failure to timely respond to a request from the Customs and Border Protection ("CBP"). Claimant further alleges that by charging the demurrage, Respondent acted contrary to the Commission's guidance in the interpretive rule on demurrage and detention charges. C.H. Robinson denies the allegations and asserts that the demurrage charge was imposed by the ocean common carrier that transported Claimant's cargo and that it simply passed through the charge to Claimant.

A. Background and Procedural History

Claimant Tereno hired Respondent C.H. Robinson, an FMC-licensed ocean transportation intermediary ("OTI"), to deliver Claimant's cargo consisting of instant coffee and instant noodles from Malaysia to the United States and tendered the shipment to C.H. Robinson on March 12, 2021. Complaint Pg. 1 at ¶¶ 2, 4; Answer Pg. 4 at ¶¶ 7, 8. C.H. Robinson coloaded the shipment with Vanguard Logistics ("Vanguard"), an FMC-licensed ocean transportation intermediary. Answer Pg. 4 at ¶ 7; C.H. Robinson Supplemental Information Ex. 1, Pg. 1. Vanguard shipped the container through Orient Overseas Container Line ("OOCL"), an ocean common carrier. Answer Pg. 6 at ¶ 36. The free time for the cargo at port was to begin on April 26, 2021, and end on April 29, 2021. Complaint Pg. 1 at ¶ 4; Answer Pg. 4 at ¶ 7. On March 25, 2021, CBP put a hold on the shipment prior to its arrival to the United States at the request of the U.S. Department of Agriculture ("USDA"). Complaint Pg.2 at ¶ 12; Answer Pg. 5

[1] Pursuant to 46 C.F.R. § 502.304(g), this decision will become final unless the Commission elects to review it within 30 days of service.

at ¶ 29. CBP released the hold on the container on May 17, 2021, and OOCL released the container for pick up on May 18, 2021. Answer Pg. 6 at ¶ 36. Because the free time for the container expired on April 29, 2021, OOCL imposed demurrage charges totaling $8,205.00, on the shipment from April 29, 2021, to May 18, 2021, which C.H. Robinson passed through to Tereno. Complaint Pg. 1 at ¶ 7; Answer Pg. 6 at ¶ 37. Tereno paid the demurrage charges under protest and initiated this proceeding against C.H. Robinson to recover the demurrage payment, asserting that the demurrage charges would not have accrued but for C.H. Robinson's failure to respond to CBP when the cargo was still in free time. Complaint Pg. 4 at ¶¶ 23-24.

On September 3, 2021, the Secretary of the Federal Maritime Commission ("FMC" or "Commission") issued a Notice of Filing of Small Claims Complaint and Assignment stating that Tereno had filed an informal complaint against C.H. Robinson and instructing C.H. Robinson to file a response to the complaint by September 28, 2021, and indicate whether it consented to the use of the Commission's informal procedures at Subpart S for adjudication of the complaint. On September 17, 2021, C.H. Robinson filed a response to the complaint and consented to the use of the informal procedures. On September 20, 2021, the Chief Administrative Law Judge assigned this proceeding to the undersigned for adjudication.

Pursuant to 46 C.F.R. § 502.301(a) and (e) of the Commission's Rules, which authorize the Small Claims Officer ("SCO") in a Subpart S proceeding to, if deemed necessary, request additional documents or information from the parties, on September 28, 2021, an order was issued directing the parties to submit any discovery requests that would aid them in establishing their claims and defenses by October 28, 2021. On September 29, 2021, Tereno responded that it did not require additional documents from C.H. Robinson. On October 20, 2021, C.H. Robinson responded that it did not require any additional documents from Tereno. On October 28, 2021, an order requesting additional information and documents was issued, directing the parties to provide the requested information by November 29, 2021, and for any party wishing to file a response to the opposing party's submission to do so by December 14, 2021. Order to Submit Supplemental Information, October 28, 2021. Tereno submitted its response ("Tereno Supplemental Information") on November 15, 2021. C.H. Robinson requested additional time to respond and was granted until December 29, 2021. On December 6, 2021, C.H. Robinson submitted its response ("C. H. Robinson Supplemental Information"), and on December 15, 2021, a reply to the Tereno Supplemental Information. Tereno did not file a reply.

As discussed in greater detail below, it is found that the evidence does not demonstrate that Respondent violated section 41102(c), and the complaint is dismissed with prejudice.

B. Argument of the Parties

Tereno alleges that C.H. Robinson failed to respond to CBP's request for documents for the shipment between April 26, 2021, and April 29, 2021, when the cargo was still in free time, causing the shipment to incur demurrage charges. Complaint at Pg. 4 ¶ 23. Tereno also asserts that C.H. Robinson was made aware of the customs hold on April 26, 2021, but failed to inform Tereno's customs broker, Clearit, of the hold until May 7, 2021, and failed to provide all information needed to clear the goods, resulting in inability to clear the cargo within the allotted free time and accrual of demurrage charges. Tereno Supplemental Information Pg. 1. at ¶ 1(a)-(e). Tereno claims that it timely submitted all documents for the cargo and should not be liable

for any demurrage charges caused by the failure to timely submit documents to clear the cargo. Complaint Pg. 3 at ¶19. Tereno states that Clearit and Respondent are passing the blame to each other and that it is caught "in the cross-fire." Complaint Pg. 3 at ¶ 20.

Tereno states that the Commission's Interpretive Rule on Demurrage and Detention under the Shipping Act "provides that importers, exporters, intermediaries, and truckers should not be penalized by demurrage and detention practices when circumstances are such that they cannot retrieve containers from, or return containers to, marine terminals because under those circumstances the charges cannot serve their incentive function" and thus C.H. Robinson erred by forcing Tereno to pay the demurrage charge. Tereno Supplemental Information Pg. 2 at ¶ 5.

C.H. Robinson denies that the demurrage charges accrued because it failed to timely respond to CBP's request and avers that the demurrage charges were beyond its control to avert. Answer Pgs. 3-4, 5 at ¶¶ 6, 21. C.H. Robinson asserts moreover, that although it was not the customs broker for the shipment and was not responsible for clearing the shipment it nevertheless "made every timely effort to reach CBP, but CBP was not timely in responding causing additional demurrage charges." C.H. Robinson Supplemental Information at Pg.1.

C.H. Robinson states that CBP notified Vanguard of the hold on April 26, 2021, but did not specify the reason for the hold. It explains that on April 27, 2021, Vanguard sent the container manifest to CBP and specifically asked CBP "if the hold was '*just a paper review*' in which case the manifest was needed (and was attached) or was it a '*hold with exam required*' in which case Vanguard would move the shipment '*to CES for the exam(s) . . . without paying extra demurrage on the pier*'" but CBP did not immediately respond and Vanguard then sent two other emails on May 3, 2021, and on May 7, 2021, before CBP finally responded. Answer Pgs. 5-6 at ¶¶ 29-31; C.H. Robinson Supplemental Information at Pg, 1. C.H. Robinson states that when CBP finally responded, requesting documents for the shipment, it timely forwarded CBP's email to Tereno and Clearit, Tereno's customs broker for response. Answer Pg. 6 at ¶ 32 and Answer at Attachments 1-3. C.H. Robinson states that it followed up with Clearit regarding the status of the hold on the container and when the container was released, picked it up at the earliest time it could. Answer Pg. 6 at ¶¶ 34-35. C.H. Robinson states that OOCL imposed demurrage charges on the cargo from April 29, 2021, through May 18, 2021, and that the $8,205.00 it invoiced to Tereno for demurrage was a pass through of the demurrage charges imposed by OOCL, without any mark-up. Answer Pg. 6 at ¶ 37; C.H. Robinson Supplemental Information Ex.1. C.H. Robinson asserts that it rightfully collected the demurrage payment from Tereno.

II. PERTINENT FACTS ESTABLISHED BY THE RECORD ("PF")

1. Claimant Tereno is a corporation and a seller in online marketplaces such as Amazon and Ebay, with its principal place of business at Selangor, Malaysia. Complaint pg. 1 at ¶ 1.

2. Respondent C.H. Robinson is an FMC-licensed OTI (No. 003282NF), licensed both as an ocean freight forwarder and a non-vessel-operating common carrier, with its principal place of business at Eden Prairie, Minnesota. Answer Pg. 3 at ¶ 5; https://www2.fmc.gov/oti/FF.aspx.

3. C.H. Robinson's office located in Torrance, California handled the shipment at issue and communicated with Tereno. Complaint Pg. 1 at ¶ 2; Answer Pg. 3 at ¶ 5.

4. Tereno hired C.H. Robinson through Freightos, a freight booking marketplace, to deliver Tereno's cargo consisting of instant coffee and instant noodles from Port Klang, Malaysia, to the United States and tendered the cargo to C.H. Robinson on March 12, 2021. Complaint Pgs. 1, 2 at ¶¶ 4, 9; Answer Pg. 4 at ¶¶ 7, 9; Tereno Supplemental Information Attachment C (Freightos Proforma Invoice).

5. On March 23, 2021, C.H. Robinson issued bill of lading No. 348763836KUL for the shipment under its dba name CHRistal Lines. Complaint Ex. 1[2]; C.H. Robinson Supplemental Information at Ex. 2[3].

6. C.H. Robinson coloaded the shipment with Vanguard, an FMC-licensed OTI (No. 019927), which issued house bill of lading PKGNYC1154427V for the shipment on March 23, 2021. Answer Pg. 4 at ¶ 7; C.H. Robinson Supplemental Information at Ex. 1.

7. Vanguard shipped the cargo through OOCL, which issued Bill of Lading No. OOLU2655427850 for the shipment. Answer Pg. 6 at ¶ 36; Answer at Attachment # 4.

8. On March 25, 2021, the container was put on hold by CBP. C.H. Robinson Supplemental Information at Ex. 4, Pg. 2 (Vanguard document titled "HOLD REMOVED/NEW ETA – Arrival Notice & Invoice" ("Vanguard Invoice")).

9. On April 24, 2021, the container arrived in New York. Complaint Pg. 2 at ¶ 14; Answer Pg. 4 at ¶ 16; Tereno Supplemental Information at Attachment B.

10. On April 26, 2021, CBP notified Vanguard that a hold had been placed on the container at the request of USDA and requested the manifest for the container. Answer Pg. 5 at ¶ 29; Answer at Attachment #1, Pg. 1.

11. On April 27, 2021, Vanguard responded to CBP, stating:

> We are the NVOCC and CFS for the subject FAK container . . . . If the hold is just for paper review, please kindly find the container manifest as attached, and advise ASAP which cargo or AMS# if you needed more details, so we could check it with the cnee/broker/importer there soon. If the hold is actual exam required, kindly help to check and update the IX at AMS ASAP for the CES to move it to CES for exam(s) there soon without paying extra demurrage at the pier. If not, kindly remove the hold for us to

[2] Claimant did not number its exhibits. For ease of reference each exhibit has been numbered sequentially beginning with "Complaint Ex. 1," for the first exhibit.

[3] C.H. Robinson did not number its supplemental exhibits. For ease of reference, each exhibit has been numbered sequentially beginning with "C.H. Robinson Supplemental Information Ex. 1," for the first exhibit.

> move it under PTT back to our CFS (F587) here, and advise which AMS-HBL# is needed to held up at the CFS for your further exam here if any.

C.H. Robinson Supplemental Information Ex. 6, Email from Vanguard Import Coordinator to CBP, with manifest attached, dated April 27, 2021. See also C.H. Robinson Supplemental Information Ex. 11 (container manifest).

12. On May 3, 2021, Vanguard resent the above email to CBP. C.H. Robinson Supplemental Information Ex. 7 (Email from Vanguard Import Coordinator to CBP, stating "Re-sending.").

13. On May 7, 2021, Vanguard sent a third email to CBP stating:

> 3rd URGENT REQUEST.
> Dear CBP Inspectors,
> Please urgent help to check and advise the below request ASAP.

C.H. Robinson Supplemental Information Ex. 8 at Pg. 1 (Email from Vanguard Import Coordinator to CBP).

14. On May 7, 2021, CBP responded to Vanguard, stating: "We need the documents uploaded in DIS for HBL # CHSL-348763836KUL." C.H. Robinson Supplemental Information at Ex. 9, Pg. 1 (Email from CBP Agriculture Specialist, Tactical Operations Division, Port of New York/Newark, to Vanguard).

15. On May 7, 2021, C.H. Robinson forwarded the email from CBP to Clearit and Freightos. Complaint at Pg. 15; Answer at Attachment #3, Pg. 1; Tereno Supplemental Information at Attachment D.

16. On May 8, 2021, C.H. Robinson advised Tereno, "Your shipment is on USDA Hold. Have forwarded Customs email to your Customs Broker Clearit. Exam related charges will get billed, once available." Complaint at Pg. 15 (email from Kratu Pandya, C.H. Robinson Senior Global Forwarding Agent, to Lai Sai Thong (Tereno Representative)).

17. Lai Sai Thong from Tereno responded: "Thanks for the update, please let me know if you need anything else from us." Complaint at Pg. 15 (email from Lai Sai Thong to Kratu Pandya, cc: Clearit and Vanguard representatives).

18. On May 13, 2021, Kratu Pandya from C.H. Robinson wrote:

> Hello Jacky,
>
> We have advised Customs Broker Clearit to contact US Customs since your initial email about the USDA Hold and I have also sent email to Customs and provided CI & PL.
>
> **Hello Clearit:**

> You will need to be more active, as you are the designated Customs Broker and will need to contact Customs NY-NWKPROBRES@cbp.dhs.gov on priority basis. Please note all the storage charges due will be Customer's responsibility.

Complaint at Pg. 15 (email from Kratu Pandya to Jacky, Vanguard representative, and other recipients including Clearit representatives) (emphasis in original).

19. On May 13, 2021, Lai Sai Thong from Tereno wrote:

> Hi Mary,
>
> This is Lai from Tereno. Are you the representative from Clearit OR anyone from Clearit can response immediately? What do you mean you need the "IT bond information and arrival notice"? We have all documents submitted before my shipment arrive and I believe Kratu [from C.H. Robinson] has provided you the required documents. Please help to contact Customs NY-NWKPROBRES@cbp.dhs.gov on priority basis and work with Jacky [from Vanguard] to have my items clear from custom ASAP.

Complaint at Pg. 15 (email from Lai Sai Thong from Tereno to Kratu Pandya from C.H. Robinson, Mary from Clearit, and other recipients including Clearit and Vanguard representatives).

20. On May 15, 2021, Tereno sent another email to Clearit, inquiring: "Any progress on my shipment? This is food item carried expiry, we need the goods deliver ASAP. Your immediate action is greatly appreciated. Thank you. Complaint at Pg. 16 (email from Lai Sai Thong to Clearit representatives and other recipients, including C.H. Robinson, Vanguard and Freightos representatives).

21. CBP released its hold on the container on Thursday, May 17, 2021. C.H. Robinson Supplemental Information at Ex. 4, Pg. 2 (Vanguard Invoice).

22. OOCL released its hold on the container on Monday, May 17, 2021. C.H. Robinson Supplemental Information at Ex. 4, Pg. 2 (Vanguard Invoice); C.H. Robinson Supplemental Information at Ex. 5 (Invoice for Demurrage charges from OOCL to Vanguard).

23. OOCL imposed demurrage charges of $8,205, on the container from April 29, 2021, through May 18, 2021. Answer at Attachment #4 (Invoice for Demurrage charges from OOCL to Vanguard).

24. On May 18, Vanguard passed through the demurrage charges to C.H. Robinson. C.H. Robinson Supplemental Information at Ex. 4 (Vanguard document titled "HOLD REMOVED/NEW ETA – Arrival Notice & Invoice").

25. C.H. Robinson picked up the container on May 18, 2021, paid Vanguard for the demurrage charges on May 19, 2021, and passed through the charges to Tereno for

payment. Answer at ¶ 35; C. H. Robinson Supplemental Information at Ex. 3 (EFT from C.H. Robinson to Vanguard).

26. Tereno paid the demurrage charges to C.H. Robinson on June 16, 2021. Complaint at 24.

III. DISCUSSION

A. Controlling Authority

Respondent C.H. Robinson is an ocean transportation intermediary, licensed both as an ocean freight forwarder and a non-vessel-operating common carrier. "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(19). A non-vessel-operating-common carrier is "a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with ocean common carrier." 46 U.S.C. § 40102(17). An ocean common carrier is a vessel operating common carrier. 46 U.S.C. § 40102(18).

A "common carrier" is a person that –

(i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation;

(ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . . .

46 U.S.C. § 40102(7).

Claimant alleges that Respondents violated section 41102(c) of the Shipping Act. Section 41102(c) provides that: "A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

To establish a successful claim for reparations under section 41102(c), the claimant must demonstrate that:

(a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;

(b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

(c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

(d) The practice or regulation is unjust or unreasonable; and

(e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

B. Evidence and Burden of Proof.

"In all cases governed by the requirements of the Administrative Procedure Act, 5 U.S.C. 556(d), the burden of proof is on the proponent of the motion or the order." 46 C.F.R. § 502.203. Thus, a claimant alleging a violation of the Shipping Act bears the burden of proving its allegations against the respondent. The term, "burden of proof" is understood to mean "the burden of persuasion." *Director v. Greenwich Collieries,* 512 U.S. 267, 276 (1994). The party bearing the burden of persuasion must prove its case by a preponderance of the evidence. *See Steadman v. SEC*, 450 U.S. 91, 102 (1981). When the party with the burden of persuasion produces sufficient evidence (characterized as a prima facie case), the burden of production shifts to the other party to produce evidence rebutting that case. *In re South Carolina State Ports Auth. for Declaratory Order*, 27 S.R.R. 1137, 1161 (FMC 1997). *See also Steadman*, 450 U.S. at 101 ("Where a party having the burden of proceeding has come forward with a prima facie or substantial case, he will prevail unless his evidence is discredited or rebutted."). When direct evidence is unavailable inferences may be drawn from certain facts and circumstantial evidence may be sufficient so long as the fact finder does not rely on mere speculation. *Waterman S.S. Corp v. General Foundries, Inc.*, 26 S.R.R. 1173, 1180 (ALJ 1993). If the evidence produced by both parties is evenly balanced the party with the burden of persuasion will not prevail. *See Greenwich Collieries,* 512 U.S. at 281.

C. Claimant Fails to Demonstrate the Elements Required to Find a Violation of Section 41102(c).

1. Criteria Required to Prevail in a Section 41102(c) Claim for Reparations

Claimant alleges that Respondent violated section 41102(c), which states that common carriers, marine terminal operators, and ocean transportation intermediaries 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.

To succeed in its claim for reparations, Claimant must demonstrate that five elements are present - 1) Respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary; 2) the alleged illegal conduct is "occurring on a normal, customary, and continuous basis;" 3) the practice or regulation in question relates to or is connected with receiving, handling, storing or delivering property; 4) the practice or regulation in question is unjust or unreasonable; and, 5) the practice or regulation in question is the proximate cause of the loss Claimant alleges to have suffered. *See* 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.4(d). As discussed below, Claimant fails to demonstrate that the alleged conduct is occurring on a

normal, customary, and continuous basis. Claimant also fails to prove that the practice in dispute is unjust and unreasonable.

a. Respondent is an Ocean Transportation Intermediary

Respondent C.H. Robinson is an FMC-licensed ocean transportation intermediary (No. 003282NF), licensed both as an ocean freight forwarder and a non-vessel-operating common carrier. PF 2. Accordingly, the first element required to find a violation of section 41102(c) is present.

b. Claimant Fails to Prove that the Practice in Dispute is Unjust and Unreasonable

Claimant alleges that Respondent failed to timely respond to CBP's request for documents for Claimant's shipment, and failed to timely inform Claimant's customs broker, Clearit, of the customs hold on the shipment and provide all information needed to clear the shipment, resulting in the inability to clear the cargo within its allotted free time and the accrual of demurrage charges on the shipment. Complaint at Pg. 4, ¶ 23; Tereno Supplemental Information Pg. 1. at ¶ 1(a)-(e). The evidence shows that following CBP's notification of the hold on May 26, 2021, to Vanguard (the NVOCC with which Respondent co-loaded the container), Vanguard contacted CBP on May 27, 2021, seeking information regarding the hold, and sent two additional emails to CBP before finally receiving a response from CBP one May 7, 2021, nine days after its initial email. Respondent forwarded CBP's email to Claimant's customs broker, Clearit, the same day and updated Claimant the next day. PFs 10 – 16; C.H. Robinson Supplemental Information Exs. 6 – 9; Complaint at Pg. 15. Nothing in the evidence indicates that Respondent was made aware of the customs hold prior to May 26, 2021.

As Claimant's customs broker, Clearit, not Respondent, was responsible for submitting the necessary documentation to clear the shipment. The evidence suggests that Clearit was not diligent in responding to CBP's request, leading Claimant and Respondent to caution Clearit to be more diligent. Evidence submitted by Claimant shows that on May 13, 2021, a week after forwarding the CBP request for documents to the customs broker, Respondent wrote another email to the customs broker admonishing it "to be more active, as you are the designated Customs broker and will need to contact Customs NY-NWKPROBRES@cbp.dhs.gov on priority basis. Please note all the storage charges due will be Customer's responsibility." PF 18; Complaint at Pg. 15. Again, on May 13, 2021, Claimant emailed the customs broker, asking: "What do you mean you need the 'IT bond information and arrival notice'? We have all documents submitted before my shipment arrive and I believe [C.H. Robinson] has provided you the required documents. Please help to contact Customs . . . on priority basis and work with [Vanguard] to have my items clear from custom ASAP." PF 19; Complaint at Pg. 15. By May 15, 2021, Claimant still had not heard from its customs broker, causing Claimant to send another email inquiring about the status of its shipment and directing the customs broker to take "immediate action." PF 20; Complaint at Pg. 16.

Therefore, the evidence refutes Claimant's allegation that Respondent did not timely contact CBP and did not timely notify Claimant's customs broker of the customs hold. Further, while CBP's delay in responding was a major reason for the failure to clear the shipment when it

was in free time, the customs broker's lack of diligence also appears to have contributed to the delay in clearing the shipment. While Clearit denied any blame for the demurrage charges, claiming in an email to Claimant that "the lack of information from your forwarder may have exacerbated the situation leading to storage fees" (Complaint at Pg. 18), no evidence supports this claim.

As noted by Claimant, the Commission stated in the interpretive rule on demurrage and detention that importers, exporters, intermediaries, and truckers should not be penalized by demurrage and detention practices when circumstances beyond their control prevent them from timely retrieving or returning containers (Tereno Supplemental Information Pg. 2 at ¶ 5). However, in this case the ocean common carrier that imposed the demurrage charges at issue is not a party in this proceeding and Respondent merely passed through the charges from the ocean common carrier. Forcing Respondent to absorb the demurrage charges from the ocean common carrier when Respondent acted promptly and reasonably to move the cargo, would not serve to promote freight fluidity. Accordingly, Claimant fails to demonstrate that Respondent's conduct was unjust and unreasonable, another element required to find a section 41102(c) violation.

c. The Practice in Dispute Relates to or is Connected with Receiving, Handling, Storing, or Delivering Property

Claimant's complaint concerns Respondent's conduct in connection with the delivery of Claimant's cargo from Malaysia to the United States. The element requiring that the practice in dispute be related to or connected with receiving, handling, storing, or delivering property is thus demonstrated.

d. The Evidence does not Demonstrate that the Alleged Conduct is Occurring on a Normal, Customary, and Continuous Basis

Even if Claimant were able to prove its allegations against Respondent, the most that could be said is that on one occasion Respondent failed to timely respond to a request from the CBP and to timely notify Claimant's customs broker of the customs hold on Claimant's container and provide the correct information needed to clear the container, causing the shipment to exceed its free time at the port and to accrue demurrage charges which Respondent then required Claimant to pay. The conduct at issue is the failure to timely respond and communicate, not Respondent's demurrage and detention practices. These claims involve one instance of alleged unreasonable conduct and Claimant has not provided any evidence indicating similar conduct by Respondent on other occasions or that this was Respondent's practice.

The Commission has stated that "finding a section [41102(c)] violation based on a single act or omission, is inconsistent with the original intent of Congress, the rules of statutory construction, and Commission precedent. Properly interpreted, § 41102(c) applies to acts omissions that occur on a normal, customary, and continuous basis." N*gobros and Co. Nigeria v. Ocean Cargo Link, LLC*, FMC Docket No. 14-15, 2019 FMC LEXIS 85, at *4 (FMC 2019) (internal citations omitted). In *Hangzhou*, the Commission affirmed the administrative law judge's finding that the respondent's release of three shipments on three different occasions over the course of two months to the same consignees without obtaining the original bill of lading as required, or authorization from the claimant, was not sufficient to demonstrate that the conduct

was occurring on a normal, customary, and continuous basis. *Hangzhou Qianwang Dress Co., Ltd v. RDD Freight Int'l, Inc.*, FMC Docket No. 17-02, 2020 FMC LEXIS 192, at *7 (FMC 2020). Similarly, in *Crocus*, the Commission stated:

> Commission precedent has made clear that a single shipment or isolated act or omission does not show a pattern or practice. An "occasional transaction" or isolated act is not a "practice." Two or three incidents over a short time period are not enough to show that the conduct in question is an entity's normal and customary practice. Even six instances of "unreasonable conduct" carried out over a period of several months involving the same entities have been ruled insufficient to prove that conduct was "uniform or continuous."

Crocus Investments, LLC v. Marine Transp. Logistics, Inc., FMC Docket No. 15-04, 2021 FMC LEXIS 125, at *14 – 15 (FMC 2021) (internal citations omitted). Accordingly, Claimant fails to demonstrate this element required to find a section 41102(c) violation.

e. The Practice is the Proximate Cause of the Loss Suffered by Claimant

Claimant alleges that it was forced to pay the $8,205 charge for demurrage caused by Respondent's improper response to the CBP request for documents to clear the shipment in question. Claimant thus demonstrates that the demurrage it was forced to pay was the proximate cause of the loss it suffered, the fifth element required to prevail on a claim for reparations under section 41102(c). However, as discussed, the evidence does not establish Claimant's allegations that Respondent's conduct caused the demurrage to accrue.

IV. CONCLUSION

Claimant, Tereno Sdn Bhd. fails to demonstrate that Respondent C.H. Robinson International, Inc. violated section 41102(c) of the Shipping Act of 1984, 46 U.S.C. § 41102(c). Accordingly, it is hereby **ORDERED** that Claimant's request for reparations be **DENIED** and its complaint be **DISMISSED WITH PREJUDICE**.

_____

Theresa Dike
Small Claims Officer

FEDERAL MARITIME COMMISSION

PETITION OF EXPEDITORS INTERNATIONAL OF WASHINGTON, INC. FOR A TEMPORARY EXEMPTION FROM STATUTORY TARIFF PUBLICATION REQUIREMENTS

PETITION NO. P1-22

Served: March 8, 2022

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M. VEKICH, *Commissioners*.

ORDER GRANTING PETITION FOR EXEMPTION

Expeditors International of Washington, Inc. (Expeditors) filed a petition with the Commission seeking a 90-day exemption from the statutory and regulatory tariff publication requirements due to a recent cyberattack on their information technology systems. For the reasons described below, the Commission grants the request for exemption from the relevant tariff publishing requirements, subject to certain conditions, with respect to cargo received on or after the date of this order. The 90-day exemption expires on June 6, 2022.

I. BACKGROUND

The petitioner is a non-vessel-operating common carrier under the Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.* (Shipping Act). *See* 46 U.S.C. § 40102(17). Expeditors announced on February 20, 2022, that it suffered targeted cyber-attack that caused it to shut down most of its operating systems globally in protection of its systems, including its ability to access and update its electronic ocean transportation rate tariffs. Pet. at 1-2.

Expeditors states that it has a limited ability to conduct operations, including but not limited to arranging for shipments of freight or managing customs and distribution activities for shipments. Pet. at 2. The petitioner further says that NVOCC shipment documents it issues are directly affected because they are linked to its tariff to ensure that rates charged conform to those in the published tariff. Without access to the tariff, those documents and related freight bills must be issued by other means, based on available rate information not affected by the cyber-attack. *Id*.

On February 25, 2022, Expeditors petitioned the Commission for an exemption from tariff publication requirements. Expeditors requests exemption from 46 C.F.R. §§ 520.7(c), 520.8(a)(1), and 520.8(a)(4) to apply tariff rates, charges, and rules communicated to customers but not yet published. *Id.* at 3.

Expeditors states that the requested exemption would apply to shipments for which a rate

has been quoted in writing to a shipper, and agreed by the shipper, but which cannot be published in the tariff until the operation of the tariff has been restored. Expeditors claims that rates published in the tariff based on these agreed quotations are ordinarily reductions from the general cargo NOS rate that would otherwise apply. Expeditors would use its written internal records of such agreed rate quotations during the tariff interruption period, so that the tariff can be updated to reflect the agreed rates once service is restored. *Id.*

Expeditors asserts that the exemption would not in any way affect competition, that it would benefit shippers by allowing them to have uninterrupted service at agreed rates and that it would avoid further strain on an ocean transportation system already under duress. *Id.*

On February 25, 2022, the Commission issued a notice of Expeditors' petition and requested comments from interested parties. The notice was published in the Federal Register on March 3, 2022. 87 FR 12169.

II. DISCUSSION

The Shipping Act and the Commission's regulations require that common carriers publish tariffs showing all their rates, charges, classifications, rules, and practices between all points or ports on their own routes and on any through transportation route that has been established. *See* 46 U.S.C. § 40501; 46 C.F.R. § 520.3. Changes in rates, charges, rules, regulations, or other tariff provisions that result in a decrease in cost to the shipper may become effective on publication. *See* 46 U.S.C. § 40501(e)(2); 46 C.F.R. § 520.8(a)(4). On the other hand, new or initial rates, charges, or changes in existing rates that result in an increased cost to a shipper may go into effect no earlier than 30 days after publication. 46 U.S.C. § 40501(e)(1); 46 C.F.R. § 520.8(a)(1). Commission regulations also provide that the applicable rates for any given shipment are those in effect on the date the cargo is received by the carrier. 46 C.F.R. § 520.7(c).

Expeditors requests exemption from the tariff publication requirements under these provisions so that it can apply tariff rates, charges, and rules communicated to customers but not yet published, provided that these tariff changes are published by June 6, 2022. The requested exemption would apply to tariff rates, charges, and rules that, but for Expeditors' inability to publish, would have been effective with respect to cargo received on or after March 8, 2022.

Exemptions from the statutory requirements in 46 U.S.C. § 40501 and the regulatory requirements in 46 C.F.R. part 520 are governed by 46 U.S.C. § 40103 and the Commission's Rules of Practice and Procedure in 46 C.F.R. part 502. *See* 46 C.F.R. §§ 520.13(a), 502.92. As discussed above, § 40103(a) provides that the Commission may grant prospective exemptions from Shipping Act requirements, "if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce."

Expeditors notes that it has more than 100 offices on five continents. It handles a very large volume of ocean cargo, making the rating of shipments and the updating of the

tariff a complex undertaking. The 90-day exemption would allow sufficient time to restore operation of the tariff and update it accordingly. Expeditors also states the exemption would only apply to shipments for which a rate has been quoted in writing to a shipper, and agreed by the shipper, but which cannot be published in the tariff until the operation of the tariff has been restored. Expeditors asserts that the requested exemption will not reduce competition or be detrimental to commerce.

We agree. Expeditors seeks permission to apply tariff rates, charges, and rules that have been communicated to shippers but not published due to the cyberattack. Without an exemption, the agreed rates cannot be applied because the rates cannot be published. Further, Expeditors claims that rates published in the tariff based on these agreed quotations are ordinarily reductions from the general cargo NOS rate that would otherwise apply. The Commission believes that Expeditors will try to maintain the status quo had the cyberattack never occurred.

Given the potential harm to shippers that could be charged higher rates without the exemption and the limited duration and number of shipments subject to the exemption, the Commission finds that the requested exemption will not result in substantial reduction in competition or be detrimental to commerce, subject to certain conditions.

Expeditors must provide written notice to shippers at least 30 days in advance of applying tariff changes that result in increased rates or charges, and such notice must be given in a manner that is likely to be seen by shippers. Acceptable forms of notice include: (1) emails to all of Expeditors' customers; (2) prominent posting on Expeditors' websites; or (3) other forms of notice determined to be acceptable by the Commission's Director of the Bureau of Trade Analysis. Any increases set to go into effect 30 days or more after June 6, 2022, would have to comply with the normal notice and publication requirements.

Although Expeditors' petition does not request retroactive relief for cargo received prior to the date of the exemption, it did mention "[i]f an exemption is granted, Expeditors anticipates that it would follow [the special docket application] procedures for shipments on which rates were quoted and agreed during the period from the date of the attack to the effective date of the exemption." P1-22 at 4. Under § 40103, the Commission may "*exempt for the future* any specified activity of" regulated entities from Shipping Act requirements. The Commission's authority under this provision is therefore limited to prospective relief; the Commission cannot exempt past activities from the requirements of the Shipping Act. The Shipping Act and the Commission's regulations require that carriers apply published tariff rates, charges, and rules in effect on the date cargo is received. *See* 46 U.S.C. § 40501(e); 46 C.F.R. §§ 520.7(c); 520.8. Because the Commission's exemption authority is limited to prospective relief, Expeditors would need to use the special docket application procedures provided by 46 U.S.C. § 40503 and 46 C.F.R. part 502, subpart Q, to seek permission from the Commission to refund or waive collection of freight charges for shipments due to failure to publish a tariff.

III. CONCLUSION

For the reasons discussed above, the Commissions grants the petition, subject to the conditions stated below.

THEREFORE IT IS ORDERED, that Expeditors' request for exemption from the tariff publication requirements at 46 U.S.C. § 40501(e) and 46 C.F.R. §§ 520.7(c), 520.8(a)(1), 520.8(a)(4) is GRANTED with respect to cargo received by Expeditors on or after the date of this order, provided that:

1. All tariff rates, charges, and rules subject to the exemption must be published in accordance with the requirements of 46 C.F.R. part 520 no later than June 6, 2022.

2. Expeditors must provide written notice to shippers at least 30 days in advance before applying any new or initial rate, charge, or change in an existing rate that results in an increased cost to a shipper, and such notice must be given in a manner that is likely to be seen by shippers. Acceptable forms of notice include: (1) emails to all of Expeditors' customers; (2) prominently posting on Expeditors' websites; or (3) other forms of notice determined to be acceptable by the Commission's Director of the Bureau of Trade Analysis. Any increases set to go into effect 30 days or more after June 6, 2022, would have to comply with the normal notice and publication requirements.

3. The exemption from 46 C.F.R. §§ 520.7, 520.8(a)(1), 520.8(a)(4) expires on June 6, 2022. June 6, 2022 is the last day on which the exemption applies.

FINALLY, IT IS ORDERED, that this proceeding be discontinued.

By the Commission.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

TERENO SDN BHD, *Claimant*,

v.

C.H. ROBINSON INT'L, INC., *Respondent*.

DOCKET NO. 1972(I)

Served: March 22, 2022

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M. VEKICH, *Commissioners*.

ORDER AFFIRMING INITIAL DECISION

The SCO's Initial Decision (I.D.) was issued on January 27, 2022, and denied Claimant's request for reparations and dismissed its complaint. The Commission determined to review this decision under 46 C.F.R. § 502.304(g) and now affirms, with one clarification. The SCO noted that "in this case the ocean common carrier that imposed the demurrage charges at issue is not a party in this proceeding and Respondent merely passed through the charges from the ocean common carrier." I.D. at 10. This could be read as creating a defense to liability under 46 U.S.C. § 41102(c) for regulated entities who "pass on" charges that originate with other entities.

The Commission clarifies that "passing on" a charge is not necessarily a defense under § 41102(c). Here, Claimant dealt with Respondent, and it was Respondent who imposed demurrage on Claimant. Claimant's claim fails, not because Respondent was passing on the charge, but because Claimant did not prove that Respondent acted unreasonably and because there was evidence that Claimant did not satisfy its obligation to timely provide the documentation needed to release its cargo.

THEREFORE, IT IS ORDERED, That the Initial Decision be **AFFIRMED**.

IT IS FURTHER ORDERED, That Claimant's claims be **DENIED**.

IT IS FURTHER ORDERED, That this proceeding be discontinued.

By the Commission.

William Cody
Secretary

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

YSN IMPORTS INC. D/B/A/ FLAME KING, *Complainant*

v.

FEIGE "PEGGY" OBERLANDER, U SHIPPERS GROUP INC., U SHIPPERS GROUP MANAGEMENT CO., INC., *Respondents*.

DOCKET NO. 21-02

Served: April 11, 2022

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

On March 25, 2022, Complainant YSN Imports, Inc. d/b/a/ Flame King ("YSN") and Respondents Feige "Peggy" Oberlander, U Shippers Group, Inc., and U Shippers Group Management Co., Inc. filed a a joint motion ("Motion") seeking approval of a settlement agreement, voluntary dismissal of the complaint, and requesting confidential treatment of the settlement agreement. A copy of the confidential settlement agreement was attached to the motion. The parties state that they "have mutually agreed to settle all of their disputes and issues that are the subject of this Proceeding as well as separate ongoing litigation in the United States District Court for the Eastern District of New York." Motion at 1.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." 46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old*

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

Ben Coal Co. v. Sea-Land Serv., Inc., 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state:

> Here, the Parties' settlement reflects a fair and considered judgment of the relative strengths of their respective positions, the desire to avoid continuing litigation costs and to avoid the risks inherent in litigation. The settlement is the product of arms-length negotiations, in which counsel for both parties participated, and is free of fraud, duress, or undue influence. The Parties also submit that the settlement is free of mistake or other defects which might make it unapprovable.

> Further, the settlement does not contravene law or public policy. It is not an unjust or discriminatory device, has no adverse effect on any third parties or the market for transportation services, and does not run afoul of any provision of the Shipping Act. Rather, it constitutes a prudent decision to settle costly litigation in which the ultimate outcome was uncertain. In sum, because the settlement is fair, reasonable and adequate, and is the product of prudent and considered judgment on the part of the Parties, it should be approved.

Motion at 2-3.

Based on the representations in the motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in arms-length settlement discussions. The proceeding would require potentially expensive briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the settlement agreement between YSN Imports, Inc. and Respondents Feige "Peggy" Oberlander, U Shippers Group, Inc., and U Shippers Group Management Co. Inc. be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is

FURTHER ORDERED that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

CCMA, LLC, *Complainant*

v.

MAERSK A/S AND PORTS AMERICA CHESAPEAKE, LLC, *Respondents*.

DOCKET NO. 22-01

Served: April 13, 2022

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION APPROVING SETTLEMENT AGREEMENT[1]

Originally, Complainant CCMA, LLC ("CCMA") initiated this proceeding by filing a complaint on December 27, 2021, against Safmarine, Inc. ("Safmarine") and Ports America Chesapeake, LLC ("PAC"). On February 2, 2022, Complainant filed a motion to amend its Complaint to add Maersk A/S as a Respondent in this action and dismiss Safmarine Inc. as a Respondent. On February 7, 2022, Complainant's motion was granted, and on March 7, 2022, Respondents filed their answers. Therefore, the only parties before us are Complainant CCMA and Respondents Maersk and PAC.

On March 29, 2022, Complainant CCMA, LLC and Respondents Maersk A/S ("Maersk") and Ports America Chesapeake, LLC ("PAC") filed a a joint motion ("Motion") seeking approval of a settlement agreement, dismissal of Complainant's claims with prejudice, and requesting confidential treatment of the settlement agreement. A copy of the confidential settlement agreement was attached to the motion. The parties state that they "have mutually agreed to settle all of their disputes and issues that are the subject of this Proceeding." Motion at 1.

Using language borrowed in part from the Administrative Procedure Act, Rule 75 of the Commission's Rules of Practice and Procedure gives interested parties an opportunity, *inter alia*, to submit offers of settlement where "time, the nature of the proceeding, and the public interest permit." 46 C.F.R. § 502.75(b); *see* 5 U.S.C. § 554(c). If dismissal is sought due to a settlement by the parties, "the settlement agreement must be submitted with the motion for determination as to whether the settlement appears to violate any law or policy and to ensure the settlement is free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable."

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

46 C.F.R. § 502.72(a)(3). "Unless the order states otherwise, a dismissal under this paragraph is without prejudice." 46 C.F.R. § 502.72(a)(3).

The Commission has a strong and consistent policy of "encourag[ing] settlements and engag[ing] in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v. Sea-Land Serv., Inc.*, 29 S.R.R. 975, 978 (ALJ 2002) (quoting *Old Ben Coal Co. v. Sea-Land Serv., Inc.*, 18 S.R.R. 1085, 1091 (ALJ 1978) (*Old Ben Coal*)). *See also Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 20 S.R.R. 761, 762 (ALJ 1981).

> The law favors the resolution of controversies and uncertainties through compromise and settlement rather than through litigation, and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy. . . . The courts have considered it their duty to encourage rather than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims. . . . The desire to uphold compromises and settlements is based upon various advantages which they have over litigation. The resolution of controversies by means of compromise and settlement is generally faster and less expensive than litigation; it results in a saving of time for the parties, the lawyers, and the courts, and it is thus advantageous to judicial administration, and, in turn, to government as a whole. Moreover, the use of compromise and settlement is conducive to amicable and peaceful relations between the parties to a controversy.

Old Ben Coal, 18 S.R.R. at 1092 (quoting 15A AM. JUR. 2D *Compromise and Settlement* § 3 (1976)).

"While following these general principles, the Commission does not merely rubber stamp any proffered settlement, no matter how anxious the parties may be to terminate their litigation." *Old Ben Coal*, 18 S.R.R. at 1092. However, if "a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval." *Old Ben Coal*, 18 S.R.R. at 1093. "[I]f it is the considered judgment of the parties that whatever benefits might result from vindication of their positions would be outweighed by the costs of continued litigation and if the settlement otherwise complies with law the Commission authorizes the settlement." *Delhi Petroleum Pty. Ltd. v. U.S. Atlantic & Gulf/Australia – New Zealand Conf. and Columbus Line, Inc.*, 24 S.R.R. 1129, 1134 (ALJ 1988) (citations omitted).

"Reaching a settlement allows the parties to settle their differences, without an admission of a violation of law by the respondent, when both the complainant and respondent have decided that it would be much cheaper to settle on such terms than to seek to prevail after expensive litigation." *APM Terminals North America, Inc. v. Port Authority of New York and New Jersey*, 31 S.R.R. 623, 626 (FMC 2009) (citing *Puerto Rico Freight Sys. Inc. v. PR Logistics Corp.*, 30 S.R.R. 310, 311 (ALJ 2004)).

The parties state:

> Here, the Parties' settlement reflects a fair and considered judgment of the relative strengths of their respective positions, the desire to avoid continuing litigation costs and to avoid the risks inherent in litigation. The settlement is the product of arms-length negotiations between sophisticated parties, in which counsel for the Parties participated, and is free of fraud, duress, or undue influence. The Parties also submit that the settlement is free of mistake or other defects which might make it unapprovable.
>
> Further, the settlement does not contravene law or public policy. It is not an unjust or discriminatory device, has no adverse effect on any third parties or the market for transportation services, and does not run afoul of any provision of the Shipping Act. Rather, it constitutes a prudent decision to settle costly litigation in which the ultimate outcome was uncertain. In sum, because the settlement is fair, reasonable and adequate, and is the product of prudent and considered judgment on the part of the Parties, it should be approved.

Motion at 2-3.

Based on the representations in the motion and other documents filed in this matter, the parties have established that the settlement agreement does not appear to violate any law or policy or contain other defects which might make it unapprovable. The parties are represented by counsel and have engaged in arms-length settlement discussions. The proceeding would require potentially expensive briefing. The parties have determined that the settlement reasonably resolves the issues raised in the complaint without the need for costly and uncertain litigation. Accordingly, the settlement agreement is approved.

The parties request that the settlement agreement be kept confidential. Pursuant to Commission Rule 5(b), parties may request confidentiality. 46 C.F.R. § 502.5(b); *see also* 46 C.F.R. § 502.141(j). "If parties wish to keep the terms of their settlement agreements confidential, the Commission, as well as the courts, have honored such requests." *Al Kogan v. World Express Shipping, Transportation and Forwarding Services, Inc.*, 29 S.R.R. 68, 70 n.7 (ALJ 2000) (citations omitted); *Marine Dynamics v. RTM Line, Ltd.*, 27 S.R.R. 503, 504 (ALJ 1996); *Int'l Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 1607, 1609 (ALJ 1991).

The full text of the settlement agreement has been reviewed by the undersigned and is available to the Commission. Given the parties' request for confidentiality, confidential information included in the settlement agreement, and the Commission's history of permitting agreements settling private complaints to remain confidential, the parties' request for confidentiality for the settlement agreement is granted. The settlement agreement will be maintained in the Secretary's confidential files.

Upon consideration of the motion, the settlement agreement, and the record, and good cause having been stated, it is hereby:

ORDERED that the motion to approve the settlement agreement between Complainant CCMA, LLC and Respondents Maersk A/S ("Maersk") and Ports America Chesapeake, LLC ("PAC") be **GRANTED**. It is

FURTHER ORDERED that the request for confidential treatment be **GRANTED**. It is **FURTHER ORDERED** that this proceeding be **DISMISSED WITH PREJUDICE**.

Erin M. Wirth
Chief Administrative Law Judge

FEDERAL MARITIME COMMISSION

Office of Administrative Law Judges

HAPAG-LLOYD, A.G. AND HAPAG-LLOYD (AMERICA) LLC– POSSIBLE VIOLATIONS OF 46 U.S.C. § 41102(C)	**DOCKET NO. 21-09**

Served: April 22, 2022

ORDER OF: Erin M. WIRTH, *Chief Administrative Law Judge*.

INITIAL DECISION[1]

I. INTRODUCTION

A. Overview

On November 10, 2021, the Commission issued an Order of Investigation and Hearing ("OIH") initiating this adjudicatory proceeding against Respondents Hapag-Lloyd, A.G. ("HLAG") and Hapag-Lloyd (America) LLC ("Hapag-Lloyd America"), (collectively "Hapag-Lloyd"), and naming the Commission's Bureau of Enforcement ("BOE") as a party. The OIH initiated this proceeding to:

> determine whether Hapag is in violation of 46 U.S.C. § 41102(c) of the Shipping Act of 1984 by its practice of assessing detention charges when: either (a) Hapag Lloyd failed to provide an equipment return location, or (b) if Hapag Lloyd did provide an equipment return location, appointments were unavailable for equipment return during the allocated free time. Furthermore, upon such charges being disputed and evidence being produced to Hapag-Lloyd that no such appointments were available during free time, Hapag-Lloyd failed to waive detention. If so, this proceeding also shall determine whether civil penalties should be assessed and, if so, in what amount, and whether a cease-and-desist order should be issued.

OIH at 5.

On December 6, 2021, Hapag-Lloyd filed an answer, denying the allegations in the complaint and asserting that the Commission lacks jurisdiction, any inability to return empty containers within free time was due to the acts and/or omissions of the motor carrier and/or the

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

cargo interest, and Hapag-Lloyd's conduct was reasonable in light of the totality of the circumstances. Answer at 3.

Goods arrive at the port of LA and Long Beach ("LALB") on ships laden with thousands of standard size containers, which are picked up by trucks with chassis, the wheels used to transport the containers over land, and delivered to customers. Once the customer unloads the container, a truck and chassis are scheduled to pick up the empty container and return it. Non-party terminals accept a limited number and type of empty containers on a schedule which changes daily. Typically, an appointment is required to return an empty container and those appointments fill up. If a container is not returned within a specified period of free time, per diem detention fees are imposed by the ocean common carrier, also referred to as the steamship line. This case is about the detention fees imposed for eleven empty containers returned from one to eleven days after free time expired.

The Commission has a long history of addressing demurrage and detention practices. As early as 1937, the Commission adjudicated the appropriate amount of free time at ports. *Storage of Import Property*, Docket No. 221, 1 U.S.M.C. 676 (FMC Nov. 16, 1937). The issues regarding port congestion and detention and demurrage charges have continued as ship size and shipping cargo volumes have increased. As explained in more detail below, the Commission held four regional port forums in 2014, issued a 2015 report, received a 2016 petition and held hearings, conducted a fact finding investigation leading to a report in 2018, and issued a notice of proposed rulemaking in 2019, which culminated in a final *Interpretive Rule on Demurrage and Detention under the Shipping Act* ("demurrage and detention rule"). 85 FR 29638 (May 18, 2020). This proceeding is the Commission's first enforcement proceeding alleging a violation of the demurrage and detention rule.

Golden State Logistics ("GSL"), a drayage company, provided transportation for the eleven containers at issue. This decision addresses the question of whether it is appropriate to impose detention when empty containers cannot be returned because there are insufficient appointments available, described by BOE as scarcity or finite opportunity. As a simplified example of the argument, if there are 100 appointments and 125 containers that need to be returned, even though 100 containers were returned, no amount of detention fees could incentivize the return of the remaining 25 containers.

As discussed more fully below, BOE, which has the burden of proof, does not establish by a preponderance of the evidence that *all* of the detention charges for these eleven containers were unreasonable. However, BOE does establish that on some of the days for which detention was charged, there were not sufficient appointments to return the containers, and Hapag-Lloyd, A.G.'s policy and practices regarding detention charges were unreasonable. Therefore, the evidence supports a finding that Hapag-Lloyd, A.G. violated section 41102(c) by imposing and refusing to waive detention charges where there were insufficient appointments to return these empty containers. Accordingly, civil penalties and a cease and desist order are imposed.

B. Procedural History

The Commission ordered an expedited proceeding, with discovery completed within 90 days of service of Respondents' answer, and the initial decision issued within 75 days after

completion of discovery. OIH at 7-8. Discovery was completed on March 4, 2022, and briefing concluded on March 25, 2022. Accordingly, the initial decision is due by May 18, 2022. The Commission also waived the requirements of a pre-enforcement process under 46 C.F.R. § 502.63(d) for the expeditious conduct of business and to "help alleviate the unprecedented stress being placed on the supply chain, including the significant role that unreasonable detention plays in congestion and freight fluidity." OIH at 5.

On December 16, 2021, the parties filed a joint status report with proposed schedule. On December 20, 2021, an order was issued rejecting the parties' proposed schedule and requiring a second joint status report. Pursuant to the presiding officer's right to waive rules "if the expeditious conduct of business so requires," 46 CFR § 502.10, all deadlines were shortened to half the time allowed by the Commission's Rules, rounded up. Order Rejecting Proposed Schedule at 2. On January 6, 2022, a scheduling order was issued.

Orange Avenue Express, Inc. ("OAE") filed a motion to intervene in this proceeding after filing a complaint in Docket No. 21-10 alleging that Hapag-Lloyd violated the Shipping Act regarding the return of empty reefer (refrigerated) containers. Motion to Intervene at 2. On December 30, 2022, OAE's motion to intervene was denied due to the factual and legal differences between the cases.

On March 11, 2022, BOE filed its brief with proposed findings of fact ("BOE Brief") and an appendix with exhibits. On March 16, 2022, BOE filed a corrected appendix and public versions of the brief and appendix (version 2). On March 21, 2022, Hapag-Lloyd filed their opposition brief, labeled as a reply, with proposed findings of fact and responses to BOE's proposed findings of fact ("HL Opposition") and an appendix with exhibits. On March 25, 2022, BOE filed its reply brief ("BOE Reply").

On March 25, 2022, Hapag-Lloyd filed a motion for leave to file a supplement to the record ("Motion to Supplement") with the supplement, an affidavit, and two exhibits. On March 31, 2022, the parties filed a timely joint motion for confidential treatment of certain materials ("Motion for Confidential Treatment"). On April 15, 2022, BOE filed a revised public appendix (version 3) correcting the bates page numbers so that citations are accurate.

C. Arguments of the Parties

BOE argues that Hapag-Lloyd, A.G. is a common carrier, liable for the actions of its agent Hapag-Lloyd America and that the Hapag-Lloyd entities failed to establish, observe, and enforce just and reasonable regulations and practices. BOE Brief at 17-24. BOE requests civil penalties and a cease and desist order. BOE Brief at 24-30. In its reply, BOE responds to Hapag-Lloyd's arguments, although it did not file specific responses to Hapag-Lloyd's proposed findings of fact.

Hapag-Lloyd assert that the proceeding should be discontinued on legal grounds, BOE has the burden of proof, Hapag-Lloyd have not violated the Shipping Act, and BOE's penalty calculation is not supported by the facts or law. HL Opposition at 2-4, 25-48.

D. Evidence

1. Standard

Under the Administrative Procedure Act, an administrative law judge may not issue an order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Steadman v. SEC*, 450 U.S. 91, 102 (1981). This initial decision is based on the pleadings, exhibits, briefs, proposed findings of fact and conclusions of law, and replies thereto filed by the parties.

This initial decision addresses only material issues of fact and law. Proposed findings of fact not included in this 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 in 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.

2. Evidentiary Issues

The parties submitted a document labeled as joint stipulations of fact ("JSF"), signed by both parties. In it, Hapag-Lloyd, A.G. stipulated to certain facts, while BOE stipulated to another fact. No objections were raised regarding the facts in the stipulation. The stipulated facts are admitted into the record as facts to which both parties jointly agree.

Hapag-Lloyd objects to the admission of two verified statements and a demonstration by the Commission's LALB area representative Gabriel Padilla on the basis that they are hearsay. HL Opposition at 10, Reply to BOE PFF 26. BOE replies that hearsay is admissible, the testimony is not hearsay, and the statements are trustworthy and probative. BOE Reply at 8-9. Mr. Padilla describes his understanding of terminal operations and provides context and background. BOE 101.[2] This testimony will be admitted, although it has limited relevance and significant portions are hearsay. The evidence discusses Mr. Padilla's understanding of operations at the YTI and TTI terminals and the Blue Cargo website, but does not address these eleven containers specifically. Moreover, some of the statements are unclear. For example, Mr. Padilla states that at YTI, "there are unused appointments daily for import/export appointments" but it is not clear whether or not this includes appointments to return empty containers. BOE 103. Ms. Cruz's testimony, which is based on GSL's experiences with these specific containers, is more reliable regarding the availability of appointments and the appointment making process they used and therefore is given greater weight.

[2] Citations to the appendices are listed by bates numbers, such as BOE 101 or HL 37. More detailed citations are provided in the findings of fact.

BOE objects to an affidavit by Hapag-Lloyd manager Sandeep Govil, dated March 21, 2022, asserting that it was not previously produced and he was not disclosed. BOE Reply at 6-7. Hapag-Lloyd states that Mr. Govil is a manager with greater insight into corporate policies than Hapag-Lloyd employee Ms. Saavedra. HL Opposition at 33. The Govil affidavit could be excluded for failure to produce the document or disclose the witness. However, BOE had an opportunity to respond to the evidence and given the expedited nature of this proceeding, it will be admitted. In future proceedings, however, such undisclosed evidence may be excluded. In addition, greater weight is given to the contemporaneous emails between the parties and to the testimony of Ms. Saavedra, who was deposed in this proceeding and who emailed GSL about the detention charges for these specific containers.

On March 25, 2022, Hapag-Lloyd filed a motion for leave to supplement the record, arguing that it just uncovered relevant factual information and justice requires its consideration. Motion to Supplement at 1. Hapag-Lloyd state that they provided the exhibits to BOE on March 24, 2022, in time for BOE to review prior to filing their reply brief. Motion to Supplement at 1; BOE Reply at 18-19. BOE argued in its reply brief that the new evidence did not alter its analysis of the case nor the reasonableness of Hapag-Lloyd's practices. BOE Reply at 18-19. The new evidence is relevant, newly discovered, and not contested. Accordingly, it is admitted into the record.

Although BOE did not provide specific responses to Hapag-Lloyd's proposed findings of fact, proposed findings must be supported by the evidence. The failure to respond was not treated as an admission. In addition, parties are reminded that an appendix of exhibits should always have a table of contents, all exhibits should have legible bates numbers on every page, public versions must have page numbers matching the confidential versions, and briefs should have accurate citations to the bates numbers on exhibits.

Specific findings of fact are in section two, prior to the analysis and conclusions of law in section three, and the order in section four.

II. FINDINGS OF FACT

A. Hapag-Lloyd

1. Hapag-Lloyd, A.G. is a vessel-operating common carrier ("VOCC") headquartered in Hamburg, Germany at Postfach, 102626, Ballindamm 25, 2000 Hamburg 1, Germany. Joint Stipulations of Fact ("JSF") at 1, No. 1.

2. Hapag-Lloyd Container Line GmbH converted into a stock company known as Hapag-Lloyd, A.G. on or about July 21, 2006. JSF at 1, No. 3.

3. Hapag-Lloyd, A.G. is a member of THE Alliance. JSF at 1, No. 4.

4. Hapag-Lloyd (America) LLC is a wholly-owned subsidiary of Hapag-Lloyd, A.G. and acts as Hapag-Lloyd, A.G.'s agent in the United States, with its offices at 5515 Spalding Drive, Peachtree Corners, GA 30092. JSF at 1, No. 2; Response of Hapag-Lloyd to BOE's Third Interrogatories and Request for Production of Documents ("HL Resp. to 3rd BOE Interrog."), Ex. F, BOE 118, No. 2.

5. Hapag-Lloyd America is not an ocean common carrier, marine terminal operator, or ocean transportation intermediary. JSF at 3, No. 1.

6. Hapag-Lloyd, A.G. is a common carrier as defined by 46 U.S.C. § 40102(7). JSF at 2, No. 5, line 1.

7. Hapag-Lloyd, A.G. provides transportation for property between the United States, including the ports of LALB and foreign countries. JSF at 2, No. 6; Response of Hapag-Lloyd to BOE's First Requests for Admission ("HL Resp. BOE First RFA"), Nos. 1, 2, 9, BOE Ex. E at BOE 111, 113.

8. Hapag-Lloyd, A.G. receives, handles, stores, and delivers property at West Basin Container Terminal ("WBCT"); TraPac Terminal, LLC ("TraPac"); Yusen Terminals, LLC ("YTI"); SSA Terminal at Pier A ("Pier A"); International Transportation Service, Inc. ("ITS"); and Total Terminals, Inc. ("TTI"). HL Opposition at 6, HL Reply to BOE's Proposed Finding of Fact ("Reply to BOE PFF"), No. 9.

9. Hapag-Lloyd, A.G. discharges cargo and/or collects empty containers at marine terminals including WBCT, TraPac, YTI, Pier A, ITS, and TTI. JSF at 2, No. 7; HL Opposition at 6, Reply to BOE PFF 10.

10. Hapag-Lloyd, A.G. also receives, handles, stores, and/or collects empty containers at APM Terminals ("APMT"). BOE Ex. M at BOE 290, 304; HL Opposition at 21, HL Proposed Finding of Fact ("RPFF") RPFF 26.

11. Hapag-Lloyd America has internal reports based on equipment events that enable it to estimate the number of each type of container dwelling at a terminal. Hapag-Lloyd has industry standard electronic data interface connections with its marine terminals, which are used to report container movement information (e.g., gate-in, gate-out, vessel load, vessel discharge) as well as information about containers to be loaded or discharged. HL Resp. to 3rd BOE Interrog., BOE Ex. F, BOE 119, Nos. 4-6.

12. Hapag-Lloyd America receives a daily report from the terminals identifying the number and type of Hapag-Lloyd containers on the terminal. This report is typically transmitted via email but can be supplemented via telephone conversations. HL Resp. to 3rd BOE Interrog., BOE Ex. F, BOE 119, Nos. 4-6.

13. Hapag-Lloyd, A.G. allows free time on shipments. HL Resp. BOE First RFA, No. 4, BOE Ex. E, BOE 112.

14. Under Hapag-Lloyd, A.G.'s tariff rules, detention charges are imposed on shipments transported by Hapag-Lloyd when free time is exceeded, which rules may be modified by individual service contracts. Hapag-Lloyd Resp. BOE First RFA, No. 5, Ex. E, BOE112.

15. Hapag-Lloyd, A.G. provided ocean transportation for the eleven containers at issue. JSF at 2, No. 8.

16. Hapag-Lloyd America, on behalf of Hapag-Lloyd A.G., issued invoices to Golden State Logistics ("GSL") for detention charges on all eleven containers. JSF at 2-3 at No. 9; Hapag-Lloyd Ex. B, Ex. 2 at HL 37; BOE Ex. M at BOE 283-365.

17. At most, detention of $10,135 was charged for these eleven containers. BOE Ex. M at BOE 283-365; *see also* Answer at 3 (Admitting "that invoices for detention charges ranging from $160.00 to $1,845 were issued for the containers" at issue here.).

B. Golden State Logistics

18. GSL, a company whose business is in the drayage of international ocean containers, provided transportation for the eleven containers for which Hapag-Lloyd America charged detention. Transcript of Deposition of Kimberly Lissette Cruz ("Cruz Dep."), BOE Ex. B at BOE 37, page 13, line 21 – BOE 38, page 14, line 3; BOE 46, page 22, lines 13-20.

19. Kimberly Lissette Cruz is an employee of GSL who mainly works in equipment control and manages per diem issues, as well as empty containers going in and out of the port. Cruz Dep., BOE Ex. B at BOE 32, page 8, lines 4-14.

20. GSL understands per diem charges to be charges that the ocean carrier assesses when the equipment is not returned within the allotted free time. Cruz Dep., BOE Ex. B at BOE 47, page 23, lines 11-17.

21. GSL uses the term "per diem" interchangeably with the term "detention." Cruz Dep., BOE Ex. B at BOE 81, pages 57, lines 3-10.

22. GSL works exclusively in the LALB area, has about 75 drivers, and handles approximately 500 containers a week. Cruz Dep., BOE Ex. B at BOE 37, page 13, line 14-BOE 38, page 14, line 19; Cruz Dep., BOE Ex. B at BOE 40, page 16, lines 13-19.

23. Ms. Cruz mainly works in equipment control managing empties but the five dispatch employees also make appointments. Cruz Dep., BOE Ex. B at BOE 41, page 17, lines 4-12; Cruz Dep., BOE Ex. B at BOE 53, page 29, line 18-BOE 54, page 30, line 2.

24. When GSL receives notice from a customer that a container is empty and ready to return, dispatch employees look for an appointment and try to match up loads out of the terminal with empties going in. Cruz Dep., BOE Ex. B at BOE 51, page 27, lines 1-12.

25. GSL tries to jump on appointments as soon as they are released but sometimes they don't have a driver to get the empty. Cruz Dep., BOE Ex. B at BOE 56, page 32, line 17-BOE 57, page 33, line 7.

26. GSL does not take a screen shot each time it looks for appointments. Cruz Dep., BOE Ex. B at BOE 72, page 48, lines 9-12; Cruz Dep., BOE Ex. B at BOE 79, page 55, lines 5-8.

27. Ms. Cruz usually takes screen shots in the morning, when she and dispatch have been unable to make appointments. Cruz Dep., BOE Ex. B at BOE 72, page 48, line 9-BOE 74, page 50, line 3.

28. GSL knows where to take the empty container and which terminal the container is supposed to go to, because the steamship lines send GSL an empty broadcast, also referred to as the empty container matrix, by 4:00 pm the day before the container is scheduled to be returned, and that empty broadcast matrix is an instruction from the steamship lines advising GSL where to return the steamship lines' containers. Cruz Dep., BOE Ex. B at BOE 48, page 24, line 12 - BOE 49, page 25, line 11; BOE Ex. M at BOE 283-365.

29. GSL then tries to create an appointment to return the container based on the empty broadcast matrix from the steamship line. Appointments can be made in two ways – GSL may receive an empty broadcast and then create an appointment when it receives confirmation of an empty container, or GSL may receive confirmation of an empty container before receiving an empty broadcast matrix and upon receiving an empty broadcast it would then create an appointment based on the return locations indicated in the empty broadcast matrix. Cruz Dep., BOE Ex. B at BOE 51, page 27, line 14 – BOE 52, page 28, line 7.

30. Appointments must be made through each individual terminal's website. HL Opposition at 9, Reply to BOE PFF 22; Padilla Demo, Ex. G, page 5, BOE 127.

31. An appointment cannot be created to return containers without entering specific information, such as the container type, number, size, what steamship line the container belongs to, and the chassis the container is sitting on. Cruz Dep., BOE Ex. B at BOE 82, page 58, line 12 – BOE 83, page 59, line 9.

32. After finding an available appointment, a person only has a limited time to enter the container information before the appointment window closes and sometimes they are not able to gather all information required to create an appointment before the appointment window closes. The information regarding available appointments changes minute to minute. Cruz Dep., BOE Ex. B at BOE 86, page 62, lines 4-15.

33. Appointments are listed by shifts, typically three shifts but sometimes two shifts, depending on the terminal. Cruz Dep., BOE Ex. B at BOE 83, page 59, lines 11-19.

34. The first shift for empty appointments starts at 8:00 am and ends at 4:00-5:00 pm, depending on the terminal; the second shift starts from 6:00-7:00 pm and ends at approximately 1:00-2:00 am, the following day. Cruz Dep., BOE Ex. B at BOE 84, page 60, lines 8-14.

35. GSL preplans its appointments the day before and tries to make appointments throughout the day. Cruz Dep., BOE Ex. B at BOE 52, page 28, lines 11-19.

36. GSL has found it more difficult to make appointments since the start of the COVID-19 pandemic, roughly since March 2020. Cruz Dep., BOE Ex. B at BOE 52, page 28, line 21-BOE 53, page 29, line 9.

37. In order to return a container to a terminal not indicated in a steamship line's return instructions, GSL would have to obtain authorization from the steamship line, typically by reaching out to them for permission. Cruz Dep., BOE Ex. B at BOE 60, page 36, lines 1-8.

38. In the event that there are no appointments at the terminals where steamship lines instruct, GSL reaches out to the steamship lines daily, asking them for alternate locations, or exemptions to allow return of the containers on time. Cruz Dep., BOE Ex. B at BOE 60, page 36, lines 14-21 – BOE 61, page 37, line 1.

39. Sometimes GSL has, without authorization from Hapag-Lloyd, returned a container at a terminal not designated by Hapag-Lloyd in order to free up space in GSL's yard due to congestion and to allow the use of chassis needed to pick up loaded containers out of the port. To do so, GSL sometimes calls in favors to the terminals, which sometimes grants them permission to do so. GSL is sometimes charged a fee by the steamship lines for delivering a container to a destination not designated by the steamship line. Cruz Dep., BOE Ex. B at BOE 61, page 37, line 15 – BOE 63, page 39, line 4; BOE 85, page 61, lines 5-15.

40. GSL uses Blue Cargo, a third-party website, to create data information regarding appointment availability at terminals. Cruz Dep., BOE Ex. B at BOE 64, page 40, lines 12-14.

41. GSL had difficulty obtaining appointments to return each of the eleven containers at issue and presented appointment charts, created using Blue Cargo, to demonstrate its difficulty obtaining appointments from the terminal to return the containers. HL Resp. BOE First RFA, No. 3, BOE Ex. E at BOE 113; HL Opposition at 10, Reply to BOE PFF 27; BOE Ex. M at BOE 286-365.

C. These Eleven Containers

42. GSL followed its regular procedures with regard to the eleven containers at issue and there was nothing different or unusual about returning the empties other than the difficulties in obtaining an appointment. Cruz Dep., BOE Ex. B at BOE 47, page 23, lines 3-10.

43. There are a series of emails from GSL employee Kim Cruz to the Hapag-Lloyd equipment team about these eleven containers. They generally state: "Please see below empty restrictions and back up. Kindly assist with alternate return locations and/or empty exemptions. Thank you for your help." BOE Ex. M at BOE 286-365.

44. Each of these emails has the Hapag-Lloyd empty return broadcast matrix on the bottom and GSL's email with a chart of containers of concern and appointment availability screen shots which list the next available appointment for Hapag-Lloyd containers, of

specific sizes, on a specific date and time. The emails are frequently sent to Hapag-Lloyd after the screen shot times but the screen shot times are the best evidence of when GSL checked and found no appointments, so they are listed below. BOE Ex. M at BOE 286-365.

45. This chart summarizes the shipments, explained in more detail below, including number, container number, invoice number (all start with 2119), type, gate out date (all dates in 2021), end free time date, return date, dates when appointments were unavailable, and return terminal. For the final columns, U is number of days unavailable on/after return date, W is number of days waived, and V is the number of days of violations. For appointment unavailable column: **bold** are on/after return date, **[brackets]** are the return date, and ~~strikethrough~~ were waived.

No	*Container Number*	*Invoice 2119…*	*Type*	*Gate Out 2021*	*End Free Time*	*Ret Date*	*Appt. Unavailable*	*Ret*	*U*	*W*	*V*
1	GESU3644906	642180	20	5/5	5/19	5/20	5/11, 5/12, 5/17, **5/19**	YTI	1	0	1
2	TEMU1467361	704796	20	5/20	6/4	6/10	5/24, 5/26, 5/27, 5/28, ~~5/25, 5/31,~~ 6/3, **6/4, ~~6/7~~, 6/8, 6/9,** [**6/10]**	YTI	4	2	2
3	FFAU2104882	711233	40HC	5/24	6/8	6/11	5/26, 5/27, 5/28, ~~5/31~~**, [6/11]**	ITS	0	0	0
4	FFAU2094681	721993	40HC	5/24	6/8	6/14	5/26, 5/27, 5/28, ~~5/31~~, **6/11,** [**6/14]**	WB CT	1	0	1
5	SEGU5670431	731378	40HC	5/24	6/8	6/17	5/26, 5/27, 5/28, ~~5/31~~, **6/11, 6/14, 6/15, 6/16**	WB CT	4	0	4
6	HLBU1593348	739508	45	6/10	6/16	6/21	~~6/14~~, 6/15, **6/16, 6/18**	YTI	2	1	1
7	HLXU9003126	739508	45	6/10	6/16	6/18	~~6/14~~, 6/15, **6/16, [6/18]**	YTI	1	0	1
8	HLBU8048860	741085	45	6/11	6/18	6/21	~~6/14~~, 6/15, 6/16, **6/18, [6/21]**	YTI	1	0	1
9	HLBU8039554	748477	45	6/10	6/16	6/22	~~6/14~~, 6/15, **6/16, 6/18, 6/21**	YTI	3	1	2
10	HLBU8038687	748477	45	6/11	6/18	6/22	~~6/14~~, 6/15, 6/16, **6/18, 6/21**	YTI	2	1	1
11	HAMU1302165	752845	40HC	5/24	6/8	6/11	5/26, 5/27, 5/28, ~~5/31~~, [**6/11]**	YTI	0	0	0
	TOTALS								*19*	*5*	*14*

JSF at 2-3 at No. 9[3]; Hapag-Lloyd Ex. B, Ex. 2 at HL 37; BOE Ex. M at BOE 283-365.

[3] This joint stipulation of fact was mislabeled as No. 5 in the parties' filing. Because it follows JSF No. 8, it is hereby corrected to read as No. 9.

1. 20-Foot Containers 1-2

46. GSL emailed Hapag-Lloyd regarding the first container, GESU3644906, due May 19, returned May 20, showing no available appointments as of May 11 at 11:34,[4] May 12 at 10:52, May 17, 2021 at 12:49 pm, and May 19 at 11:00. BOE Ex. M at BOE 286-290; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

47. On May 12, prior to detention being charged, the email from GSL shows an appointment available at WBCT for a 20 ST, but WBCT is not listed as an option on the Hapag-Lloyd empty return broadcast matrix. BOE Ex. M at BOE 287.

48. For container one, the evidence shows that appointments were full and therefore unavailable on May 11, May 12, and May 17, before free time ended on May 19; and on May 19. BOE Ex. M at BOE 286-290; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

49. GSL emailed Hapag-Lloyd regarding the second container, TEMU1467361, due June 4, returned June 10, showing no available appointments as of May 24 at 9:59, May 26 at 10:20, May 27 at 11:42, May 28 at 12:09 pm, June 3 at 11:09, June 4 at 10:12, June 8 at 10:51, June 9 at 9:39, and June 10 at 10:17 (date returned; available appointment for 40 HC but not 20 ST). BOE Ex. M at BOE 293-304; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

50. On June 3, there was an appointment for June 4 at WBCT for a 20 ST, but by June 4 at 10:12 am, there were no appointments showing for a 20 ST. BOE Ex. M at BOE 299-300.

51. Hapag-Lloyd states that they waived two days of detention for this container, but their shut-out calendar suggests it waived two days prior to the end of free time May 25, May 31) and one day after free time (June 7) for all 20-foot containers. Govil Aff. ¶ 21, Hapag-Lloyd Ex. B at HL 12; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

52. For container two, the evidence shows that appointments were full and therefore unavailable on May 24, May 25, May 26, May 27, May 28, May 31, and June 3, before free time ended; and on June 4, June 7, June 8, June 9, and June 10 (return date). BOE Ex. M at BOE 293-304; Govil Aff. ¶ 21, Hapag-Lloyd Ex. B at HL 12; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Hapag-Lloyd waived two days, therefore, GSL was charged detention for two days, excluding the return date, when appointments were unavailable.

2. 40 HC Containers 3-5, 11

53. GSL emailed Hapag-Lloyd regarding the third container, FFAU2104882, due June 8, returned June 11, showing no available appointments as of May 26 at 10:20, May 27 at 11:42, and May 28 at 12:09 pm. BOE Ex. M at BOE 305-309, 318; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

[4] The times cited are the "Next available appointments" just before the "stop the clock" button on the appointments calendar. All times are in the morning (am) unless noted.

54. Container three was returned on June 11, 2021, to ITS, which was not listed in the Hapag-Lloyd matrix. HL Opposition at 19, HL RPFF 19.

55. GSL emailed Hapag-Lloyd regarding the fourth container, FFAU2094681, due June 8, returned June 14, showing no available appointments as of May 26 at 10:20, May 27 at 11:42, May 28 at 12:09 pm, and June 14 at 10:10. BOE Ex. M at BOE 312-325; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

56. GSL emailed Hapag-Lloyd regarding the fifth container, SEGU5670431, due June 8, returned June 17, showing no available appointments as of May 26 at 10:20, May 27 at 11:42, May 28 at 12:09 pm, June 14 at 10:10, June 15 at 10:21, and June 16 at 11:50. BOE Ex. M at BOE 312-328; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

57. Container five was returned on June 17, 2021, to WBCT, which was not listed in the matrix. HL Opposition at 19, HL RPFF 19.

58. GSL emailed Hapag-Lloyd regarding the eleventh container, HAMU1302165, due June 8, returned June 11, showing no available appointments as of May 26 at 10:20, May 27 at 11:42, May 28 at 12:09 pm, and June 10 at 10:17. BOE Ex. M at BOE 358-365; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

59. Hapag-Lloyd state that they waived detention charges for all 40' HC containers for May 31, which is before free time ended for these four containers. Govil Aff. ¶ 22, Hapag-Lloyd Ex. B at HL 12.

60. On June 10, as of 10:17 am, GSL sent an email indicating no appointments for the second container and also listing the four 40 HC containers, however, the attached appointment calendar shows appointments available at ITS and APMT and the Hapag-Lloyd empty return broadcast matrix shows that APMT is a location for 40 High Cube containers. BOE Ex. M at BOE 304.

61. When GSL submitted its disputes for the four 40 HC containers, it did not include the June 10 email, or it was submitted and did not support the dispute. BOE Ex. M at BOE 305-322, BOE 358-365.

62. Hapag-Lloyd submitted supplemental exhibits from Blue Cargo for June 14 as of 8:07, which shows appointments at YTI from 9:00-10:00, which is approved, but by 10:10, no appointments are available. BOE Ex. M at BOE 321; HL Supp., Exhibit A at 1-2; HL Supp., Exhibit B at 5.

63. Similarly, as of June 16 at 9:37 am, there were 40 HC appointments for the next day, on June 17 shift 1, 8:00-9:00 and shift 2, 18:00-19:00, which compares with a search on June 17 at 11:17 am, which shows for June 17th, no appointments first shift and 21:00-22:00 for second shift. HL Supp., Exhibit A at 6-7.

64. The supplemental evidence shows no appointments for 40 HC containers at Hapag-Lloyd approved locations for June 11 at 7:52 (ITS not on the return list), June 14, June 15, and June 16. HL Supp., Exhibit B at 4-7; BOE Ex. M at BOE 302, 304, 324-328.

65. Supplemental evidence for the four 40 HC containers show available appointments at terminals on Hapag-Lloyd's return matrix: June 8 at 8:02, June 9 at 7:54, June 10 at 10:17, and June 17 at 11:17. HL Supp., Exhibit B at 1-8.

66. For container three, the evidence shows that appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 (return date). BOE Ex. M at BOE 306-309, 318; Hapag-Lloyd Ex. B, Ex. 2 at HL 37; HL Opposition at 18, HL RPFF 8; Govil Aff. ¶ 21, Hapag-Lloyd Ex. B at HL 12.

67. For container four, the evidence shows that appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 and June 14 (return date). BOE Ex. M at BOE 312-325; Hapag-Lloyd Ex. B, Ex. 2 at HL 37; HL Supp., Exhibit B at 4-7. Therefore, GSL was charged detention for one day (June 11), excluding the return date, when appointments were unavailable.

68. For container five, the evidence shows that appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11, June 14, June 15, and June 16. BOE Ex. M at BOE 312-328; HL Supp., Exhibit B at 4-7; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Therefore, GSL was charged detention for four days (June 11, June 14, June 15, and June 16) when appointments were unavailable.

69. For container eleven, the evidence shows that appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 (return date). BOE Ex. M at BOE 358-365; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

3. 45-Foot Containers 6-10

70. GSL emailed Hapag-Lloyd regarding the sixth container, HLBU1593348, due June 16, returned June 21, showing no available appointments as of June 14 at 10:10, June 15 at 10:21, June 16 at 11:50, and June 18 at 10:48. BOE Ex. M at BOE 331-336; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

71. Hapag-Lloyd states that they waived detention charges for all 45' HC containers for June 14, which is before free time ended for these five 45' containers. Govil Aff. ¶ 22, Hapag-Lloyd Ex. B at HL 12-13.

72. For container six, the evidence shows that appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on June 16 and June 18. BOE Ex. M at BOE 331-336; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Hapag-Lloyd waived one day, therefore, GSL was charged detention for one day when appointments were unavailable.

73. GSL emailed Hapag-Lloyd regarding the seventh container, HLXU9003126, due June 16, returned June 18, showing no available appointments as of June 14 at 10:10, June 15

at 10:21, June 16 at 11:50, and June 18 at 10:48. BOE Ex. M at BOE 331-336; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

74. For container seven, the evidence shows that appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on June 16 and June 18 (return date). BOE Ex. M at BOE 331-336; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Therefore, GSL was charged detention for one day, excluding return date, when appointments were unavailable.

75. GSL emailed Hapag-Lloyd regarding the eighth container, HLBU8048860, due June 18, returned June 21, showing no available appointments as of June 14 at 10:10, June 15 at 10:21, June 16 at 11:50, June 18 at 10:48, and June 21 at 10:46. BOE Ex. M at BOE 339-347; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

76. For container eight, the evidence shows that appointments were full and therefore unavailable on June 14, June 15, and June 16, before free time ended on June 18; and on June 18 and June 21 (return date). BOE Ex. M at BOE 339-347; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Therefore, GSL was charged detention for one day, excluding return date, when appointments were unavailable.

77. GSL emailed Hapag-Lloyd regarding the ninth container HLBU8039554, due June 16, returned June 22, showing no available appointments as of June 14 at 10:10, June 15 at 10:21, June 16 at 11:50, June 18 at 10:48, and June 21 at 10:46. BOE Ex. M at BOE 349-357; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

78. For container nine, the evidence shows that appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on and June 16, June 18, and June 21. BOE Ex. M at BOE 349-357; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Hapag-Lloyd waived detention for one day, therefore, GSL was charged detention for two days when appointments were unavailable.

79. GSL emailed Hapag-Lloyd regarding the tenth container, HLBU8038687, due June 18, returned June 22, showing no available appointments as of June 14 at 10:10, June 15 at 10:21, June 16 at 11:50, June 18 at 10:48, and June 21 at 10:46. BOE Ex. M at BOE 349-357; Hapag-Lloyd Ex. B, Ex. 2 at HL 37.

80. For container ten, the evidence shows that appointments were full and therefore unavailable on June 14, June 15, and June 16, before free time ended on June 18; and on June 18 and June 21. BOE Ex. M at BOE 349-357; Hapag-Lloyd Ex. B, Ex. 2 at HL 37. Hapag-Lloyd waived detention for one day, therefore, GSL was charged detention for one day when appointments were unavailable.

4. Hapag-Lloyd Responses

81. Hapag-Lloyd responded to the May 17, 2021, email stating "Containers are NOT off-hire. Please return per empty return matrix. There are no alternate locations." BOE Ex. M at BOE 288.

82. Hapag-Lloyd responded to the May 26, 2021, email stating "Hello, for returning HLC empties, please refer to the below empty return matrix" and on May 28, 2021, responded "Please follow the empty return matrix. There are no alternate return locations." BOE Ex. M at BOE 306, 308.

83. Hapag-Lloyd responded to the June 8, 2021, email stating "At this time these are the only return locations allowed by terminals. Hopefully more locations and spots will open later for this week." BOE Ex. M at BOE 301.

84. Hapag-Lloyd responded to the June 9, 2021, email stating "Our empty return matrix shows all available return locations. There are never any alternate locations." BOE Ex. M at BOE 302.

85. Hapag-Lloyd responded to the June 10, 2021, email stating "Pls see attached empty return matrix." BOE Ex. M at BOE 304.

86. Hapag-Lloyd responded to the June 14, 2021, email stating "I'm truly sorry but Hapag Lloyd does not regulate nor monitor appointment openings. Please continue to monitor for the next available appointment slots. For returning HLC empties, please refer to the below empty return matrix." BOE Ex. M at BOE 321.

87. Hapag-Lloyd responded to the June 16, 2021, email stating "This is most current matrix, terminals set allocations/appointments." BOE Ex. M at BOE 328.

D. Blue Cargo

88. Blue Cargo is a third-party website that GSL uses to determine appointment availability at the terminals. Cruz Dep., BOE Ex. B at BOE 64, page 40, lines 8-14.

89. Blue Cargo aggregates appointment data directly obtained from marine terminal operator websites and puts it in one place. Cruz Dep., BOE Ex. B at BOE 64, page 40, line 15 – BOE 65, page 41, line 2; HL Opposition at 10, Reply to BOE PFF 28.

90. The Blue Cargo website has a search function, where GSL could search by shipping line, container type, date, and time. The search returns data for seven terminals and shows if there are no appointments for the search criteria (gray) or available appointments (white). HL Supp. Ex. B at 1. The time defaults to a last refresh time of 8:00 am PST. *Id.*

91. Every few minutes, the Blue Cargo system automatically refreshes itself. Cruz Dep., BOE Ex. B at BOE 65, page 41, lines 3-6; BOE 85, page 61, line 20 – BOE 86, page 62, lines 13- 15.

92. Blue Cargo gets the data regarding appointment availability from the terminal's website. Cruz Dep., BOE Ex. B at BOE 64, page 40, lines 15-18.

93. Blue Cargo's data is sometimes inaccurate. Cruz Dep., BOE Ex. B at BOE 65, page 41, lines 3-6; BOE 77, page 53, lines 10-19.

E. Terminals

1. WBCT

94. Guiseppe Napoli is the terminal manager for West Basin Container Terminal ("WBCT"), and supervises the daily operation of all departments at the terminal. Virtual Deposition of Guiseppe Napoli ("Napoli Dep."), BOE Ex. H at BOE 150, page 3, lines 8-17.

95. WBCT discharges imports, loads exports, and empties for Hapag-Lloyd when their vessels call at the terminal. Napoli Dep., BOE Ex. H at BOE 151, page 4, line 20 - BOE 152, page 5, line 2.

96. WBCT uses an appointment system on its website called "Voyager track," that makes appointment information available. Napoli Dep., BOE Ex. H at BOE 152, page 5, line 10 – BOE 153, page 6, line 7.

97. Hapag-Lloyd usually will send emails on a daily basis to WBCT telling WBCT what they would like to do with their empties. Napoli Dep., BOE Ex. H at BOE 157, page 10, lines 5-22.

98. In terms of receiving empties, WBCT offers over 1000 empty appointments per shift and 2000 appointments or more per day. There are two shifts. Most of the time, every appointment available on the first shift is booked, and then on the second shift, which is at night, most of the time about 70% of the empty available appointments are booked. Napoli Dep., BOE Ex. H at BOE 158, page 11, lines 1-17; *see also* BOE 170, page 23, line 15 – BOE 171, page 24, line 9.

99. WBCT posts open appointment slots roughly about 48 hours in advance. Napoli Dep., BOE Ex. H at BOE 159, page 12, lines 3-5.

100. However, equipment return information is only available in real time. By reaching out directly to the steamship line a trucker could find out in advance where its equipment should be dropped off and then make an appointment without waiting for the real time information. The risk to doing this is that the equipment return information could change. Napoli Dep., BOE Ex. H at BOE 169, page 22, line 15 – BOE 170, page 23, line 8.

101. WBCT's appointment system will only allow appointments to be made when WBCT is receiving a particular carrier's empty. Napoli Dep., BOE Ex. H at BOE 159, page 12, line 15 – BOE 160, page 13, line 5.

102. During the 48 hours when appointment slots are posted, the first 24-hour block of two-shift available appointments are typically stable and stay the same, but appointment slots may be cancelled during the latter 24 hours of two-shift periods and would need to be rebooked. WBCT tries to give a 24-hour notice if appointments are going to change. Napoli Dep., BOE Ex. H at BOE 160, page 13, line 6 – BOE 162, page 15, line 16.

2. YTI

103. Gabriel Padilla is employed by the Commission as an Area Representative for the LALB region and in his position has been privy to the daily business operations of the terminals at issue and also had in depth conversations with them about their daily business transactions concerning the return of empty containers. Verified Statement of Gabriel Padilla ("Padilla Aff.") Ex. C, BOE 101 at ¶¶ 1-2; Second Verified Statement of Gabriel Padilla ("Padilla 2nd Aff.") Ex. D, BOE 106 at ¶¶ 1-2.

104. Yusen Terminal LLC ("YTI") and Total Terminal International, LLC ("TTI") receive the VOCC empty containers as directed by the VOCC. Padilla Aff. Ex. C, BOE 101 at ¶ 4; Padilla 2nd Aff. Ex. D, BOE 106 at ¶ 4.

105. At YTI, notice regarding appointments for empty returns is provided to beneficial cargo owners ("BCOs") and the trucking community by posting the Empty Receiving Schedule on YTI's public website up to five days in advance; communication broadcasts to the local industry through eModal; offering appointments for empty returns within YTI's appointment system; and through simultaneous messaging from the VOCCs to BCOs and truckers (returnlocation.com). Padilla Aff. Ex. C, BOE 101 at ¶ 4.

106. YTI uses a third-party appointment platform, which is accessible to all customers, to allocate empty appointments to be received. These appointments are allocated by hour on the third-party appointment platform and based on the VOCCs directions for container size and type. The appointment platform is always live and accessible to customers and can be adjusted to accommodate optimal receiving. If there is a service disruption, eModal broadcasts are sent out to notify customers. Padilla Aff. Ex. C, BOE 102-103, at ¶ 8.

107. At YTI, if an appointment is made for an empty return and the VOCC directs the terminal not to receive the empty, YTI will honor all empty appointments already secured. Once the VOCC shuts off or changes its policy, YTI will no longer make empty return appointments available for booking. Padilla Aff. Ex. C, BOE 102 at ¶ 5.

108. At YTI, appointments are able to be booked three to five days in advance, depending on the category of appointment. For example, import appointments are based on delivery velocity in import areas and export appointments are controlled by the projected cargo loading plan from the VOCC. Padilla Aff. Ex. C, BOE 103 at ¶ 11.

109. YTI offers same day appointments for all categories of cargo. Appointment allocation limits are ultimately controlled by terminal management, but the VOCC controls if and when the terminal can receive their empty equipment. Padilla Aff. Ex. C, BOE 103 at ¶ 13.

110. At YTI, appointments are on a first come, first serve basis, and there are unused appointments daily for import/export appointments. Padilla Aff. Ex. C, BOE 103 at ¶ 10.

3. TTI

111. Notice for appointments at TTI is provided to BCOs and the trucking community directly by the VOCC. Padilla 2nd Aff. Ex. D, BOE 106 at ¶ 5.

112. VOCCs communicate vessel load projections and requests for empty receiving to TTI daily. TTI, in turn, posts the receiving schedule and it's terminal website for all motor carriers and VOCCs. Padilla 2nd Aff. Ex. D, BOE 106 at ¶ 6.

113. TTI uses its own proprietary appointment platform, TNS, which is accessible to customers approved by the VOCC, to book appointments. These appointments are allocated in hourly intervals and updated live. Padilla 2nd Aff. Ex. D, BOE 107 at ¶ 7.

114. TTI does not require an empty appointment when performing a dual transaction, when the terminal is open for VOCC container size/type, or if the import appointment is confirmed. All import deliveries require appointments. Padilla 2nd Aff. Ex. D, BOE 108 at ¶ 12.

F. Waivers

115. GSL does not take a screen shot of the appointments chart each time it looks for appointments. Cruz Dep., BOE Ex. B at BOE 72, page 48, lines 7-12.

116. GSL usually takes screen shots in the morning. Ms. Cruz checks with the dispatch department as to whether containers can be returned and then generates emails and then takes screen shots of everything. Cruz Dep., BOE Ex. B at BOE 72, page 48, line 7 – BOE 74, page 50, line 3.

117. When GSL receives an invoice for detention charges it audits the invoice, checking for accuracy. GSL checks the days that the container was out as well as the day that the container was returned, and then looks for restrictions preventing the container from being timely returned for the days that the detention charges were imposed on the container. GSL then sends a screenshot showing the restrictions preventing a timely return as well as emails documenting that it reached out to the steamship line for help finding alternate locations to return the containers. GSL attaches the emails and the screenshots and sends them to the entities imposing the detention charges as backup for its dispute of the detention charges. Cruz Dep., BOE Ex. B at BOE 87, page 63, lines 1-20; BOE Ex. M at BOE 286-365.

118. Ms. Cruz testified that she disputes roughly ninety percent of invoices received and that at least fifty percent or more are waived, depending on the steamship line. Cruz Dep., BOE Ex. B at BOE 89, page 65, lines 2-14.

119. GSL disputed the detention charges for the eleven containers at issue and asked for a waiver from payment of Hapag-Lloyd's invoice for detention. HL Resp. BOE First RFA, No. 13, BOE Ex. E at BOE 113; BOE Ex. M at BOE 286-365.

120. Hapag-Lloyd admits that they denied GSL's requests for waivers. HL Opposition at 13, Reply to BOE PFF 39.

121. On July 26, 2021, Sally Beteta Saavedra, Hapag-Lloyd Customer Service emailed Kim Cruz of GSL, a series of emails denying GSL's request for a waiver. Hapag-Lloyd Dispute Emails, BOE Ex. A at BOE 2-23.

122. For example, Ms. Saavedra, Hapag-Lloyd Customer Service USA (Hapag-Lloyd America) sent an email to Ms. Cruz (of GSL), dated July 26, 2021, stating:

> Good afternoon. Unfortunately, your dispute has been found invalid. Per our equipment department, as Hapag-Lloyd neither controls nor monitors the terminals appointment system, we are unable to waive these charges. The days where there were truly no appointments available have been exempted from detention. We do not have record of the terminal being shut out during these dates. The invoice remains valid and all owing. Thanks and have a great day!

Hapag-Lloyd Dispute Emails, BOE Ex. A at BOE 7 (Invoice # 2119704796, Container No. TEMU1467361), *see also* BOE 2-23.

123. On September 1, 2021, Kim Cruz of GSL emailed Hapag-Lloyd customer service a series of emails responding to Hapag-Lloyd's refusal to waive the invoices. Hapag-Lloyd Dispute Emails, BOE Ex. A at BOE 3-23; Sally Beteta Saavedra Deposition ("Saavedra Dep."), BOE Ex. I at BOE 206, page 25, lines 2-5.

124. For example, Ms. Cruz (of GSL) emailed Hapag-Lloyd Customer Service USA, dated September 1, 2021, with regard to Invoice # 2119704796 issued for Container No. TEMU1467361, stating:

> Adding the FMC and UIIA
>
> We are not paying this invoice. There were no appointments available and the terminal appointment system is out of our control. There were no appointments. We reached out to HLC daily to ask for help or alternate return locations and HLC **FAILED** to provide help or even respond to our numerous emails. Now we are being held accountable for per diem for your failure. How does any of this make sense?
>
> This is a violation of California Law SB-45. You cannot bill per diem due to events that are out of our control. Lack of appointments at the terminal is out of our control. I showed you back up proof. These are unfair business practices that must be stopped **immediately**.
>
> Confirm once the invoice has been waived. Thank you.

Hapag-Lloyd Dispute Emails, BOE Ex. A at BOE 6 (emphasis in original); *see also* BOE 4-22.

125. GSL did not pay the detention charges on the eleven containers for which Hapag-Lloyd America issued GSL invoices for detention. Cruz Dep., BOE Ex. B at BOE 47, pages 23, line 21 – BOE 48, page 24, line 1.

126. GSL did not bill its customers for the detention charges on the eleven containers for which Hapag-Lloyd America invoiced it for detention charges. Cruz Dep., BOE Ex. B at BOE 48, page 24, lines 2-4.

127. Hapag-Lloyd has not refused to allow GSL to transport Hapag-Lloyd containers based on GSL's failure to pay the detention charges on the eleven containers at issue. Cruz Dep., BOE Ex. B at BOE 48, page 24, lines 5-8.

G. Hapag-Lloyd Waiver Process

128. Sally Beteta Saavedra is a senior import coordinator for Hapag-Lloyd, whose duties involve investigating and resolving disputes. Saavedra Dep., BOE Ex. I at BOE 186, page 5, lines 1- 4; BOE 187, page 6, lines 12-15.

129. Hapag-Lloyd reviews disputes through employees (the Reviewer) who are web-trained and taught how to evaluate disputes via a lecture style and quiz format. HL Opposition at 13, Reply to BOE PFF 40; Saavedra Dep., BOE Ex. I at BOE 191, pages 10, lines 1-17.

130. The training has not been updated or renewed since the publication of the detention and demurrage rule. HL Opposition at 21, HL RPFF 41; Saavedra Dep., BOE Ex. I at BOE 192, page 11, lines 7-10; BOE 209, page 28, line 17-BOE 211, page 30, line 14.

131. Hapag-Lloyd has not communicated any internal policy or written policy to Ms. Saavedra describing how to evaluate disputes. Saavedra Dep., BOE Ex. I at BOE 209, page 28, lines 4-13.

132. When Hapag-Lloyd receives a dispute, the Reviewer goes to Hapag-Lloyd's operating system to see if there any remarks or documents attached to the shipment. If the Reviewer determines that the dispute is valid and that the invoice has not yet been canceled, the Reviewer must request a waiver from a supervisor. If the Reviewer determines that the dispute is not valid, they have autonomy to reject the dispute and hold the invoices as valid. Saavedra Dep., BOE Ex. I at BOE 187, page 6, lines 16-22; BOE 188, page 7, lines 1-15; HL Opposition at 13-14, Reply to BOE PFF 42-45.

133. When reviewing a detention invoice with claims of no appointments, the Reviewer looks at documentation or remarks from their equipment department "to see if Equipment wrote anything saying to waive a certain date" as well as the revenue screen to ensure that the "overdue" calculator, that computes detention fees, has taken relevant shut-out dates into account. Saavedra Dep., BOE Ex. I at BOE 193, page 12, line 4-BOE 194, page 13, line 2; HL Opposition at 14, Reply to BOE PFF 46.

134. In reviewing a dispute, Hapag-Lloyd's Reviewers define the term, "shut-out" to mean that "the terminal had no appointments available at all that day." Saavedra Dep., BOE Ex. I at BOE 194, page 13, lines 3-11; BOE 195, page 14, lines 6-11.

135. According to Hapag-Lloyd's revenue dispute department, the term "shut-out," is used "for a container type at a port as a day on which all terminal operators at that point were not accepting empty returns of that container type during their first shift." HL Resp. to 3rd BOE Interrog., No. 3, BOE Ex. F at BOE 118-119; HL Opposition at 14, Reply to BOE PFF 49.

136. Hapag-Lloyd does not inform the disputing party about other documents consulted and evaluated in reviewing the dispute or the criteria or methods used. Saavedra Dep., BOE Ex. I at BOE 206, page 25, lines 7-10.

137. While the amount of detention charges imposed by Hapag-Lloyd, A.G. have changed since May 18, 2020, the effective date of Rule 545.5, its basic tariff rules governing detention in the U.S. have not changed. Respondents 1st Interrogatory ("Resp. 1st Interrog.") No. 3, BOE Ex. J at BOE 218.

138. Both Hapag-Lloyd and GSL are signatories to the Uniform Intermodal and Facilities Access Agreement ("UIIA"). Cruz Dep., BOE Ex. B at BOE 75, page 51, lines 14-19, BOE 76, page 52, lines 2-3.

139. GSL did not file a dispute under UIIA with respect to the containers at issue. Cruz Dep., BOE Ex. B at BOE 76, page 52, lines 5-8.

140. Hapag-Lloyd was aware of the detention and demurrage rule published in the Federal Register on May 18, 2020, for at least one year before the present controversy occurred in the spring and summer of 2021. HL Opposition at 5, Reply to BOE PFF 4.

141. After the issuance of the interpretive rule, Hapag-Lloyd reviewed its procedures with respect to the assessment and waiver of detention charges, and concluded its existing procedures were in compliance with the interpretive rule. Affidavit of Sandeep Govil ("Govil Aff.") ¶ 5, Hapag-Lloyd Ex. B at HL 9.

142. In line with Hapag-Lloyd's policy and practice to charge detention on an empty container that is not returned to the marine terminal within free time when there is reasonable evidence that it was possible for the motor carrier to return the empty container, Hapag-Lloyd has waived detention charges at LALB between January 1, 2020, and April 21, 2021, when Hapag-Lloyd has received sufficient evidence that in its opinion constitutes reasonable evidence indicating that it was not possible for the motor carrier to return the empty container within free time. Govil Aff. ¶ 6-7, Hapag-Lloyd Ex. B at HL 9.

143. Prior to May 2021, if any size/type of equipment could not be returned, detention was waived on that date for all sizes/types of equipment. Since July 2021, Hapag- Lloyd, A.G. waives detention only for those sizes/types of equipment that could not be returned on a particular day. Govil Aff. ¶ 9, Hapag-Lloyd Ex. B at HL 9.

144. If appointments are unavailable during the daytime shift at the terminals, it is the policy and practice of Hapag-Lloyd, A.G. to waive detention for the entire day, even if appointments were available during the terminals' other shifts. Govil Aff. ¶ 10, Hapag-Lloyd Ex. B at HL 10.

145. Hapag-Lloyd waived one day of detention on three of the containers identified in the Order of Investigation and Hearing and waived two days of detention on one of the containers because the motor carrier was unable to return those containers on the dates for which detention was charged. Govil Aff. ¶ 18, Hapag-Lloyd Ex. B at HL 11; Hapag-Lloyd Ex. 2 at HL 37.

146. On weekdays during May and June of 2021, an average of 110 empty 20-foot containers per day were returned to terminals used by Hapag-Lloyd. Govil Aff. ¶ 21, Hapag-Lloyd Ex. B at HL 12.

147. On weekdays during May and June of 2021, an average of 327 empty 40' HC containers per day were returned to terminals used by Hapag-Lloyd. Govil Aff. ¶ 22, Hapag-Lloyd Ex. B at HL 12.

148. On weekdays during May and June of 2021, an average of 10 empty 45' containers per day were returned to terminals used by Hapag-Lloyd. Govil Aff. ¶ 23, Hapag-Lloyd Ex. B at HL 12-13.

149. GSL returned a total of thirty-six (36) empty Hapag-Lloyd containers to terminals used by Hapag-Lloyd during May and June of 2021. HL Opposition at 19, HL RPFF 18.

150. GSL returned empty Hapag-Lloyd containers not involved in this proceeding to Hapag-Lloyd designated terminals on dates when it was unable to return equipment of the same size at issue here. HL Opposition at 20, HL RPFF 21.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. Preliminary Issues

1. Jurisdiction

The Shipping Act provides that a "person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part." 46 U.S.C. § 41301(a). Pursuant to this provision, the Commission has jurisdiction over a complaint alleging that a respondent committed an act prohibited by the Shipping Act. *See Anchor Shipping Co. v. Aliança Navegação E Logística Ltda.*, Docket No. 02-04, 2006 FMC LEXIS 19, at *33, 30 S.R.R. 991, 997-99 (FMC May 10, 2006); *see also Cargo One, Inc. v. Cosco Container Lines Co.*, Docket No. 99-24, 2000 FMC LEXIS 14, at *34, 28 S.R.R. 1635, 1645 (FMC Oct. 31, 2000). Complainants allege a violation of the Shipping Act within the Commission's jurisdiction.

"It is elementary law that a tribunal should determine its jurisdiction before proceeding to the merits of a controversy." *NPR, Inc. v. Board of Commissioners of the Port of New Orleans*, Docket No. 98-23, 28 S.R.R. 1178 (ALJ Nov. 23, 1999); *see also River Parishes Co. Inc. v .*

Ormet Primary Aluminum Corp., Docket No. 96-06, 28 S.R.R 751, 762 (FMC Feb. 3, 1999) ("As the ALJ correctly held, an agency must reach jurisdictional issues before addressing the merits of a case") (internal citations omitted).

Hapag-Lloyd argue that the Commission lacks personal jurisdiction over Hapag-Lloyd America, asserting that it is not a regulated entity subject to the Shipping Act. HL Opposition at 2. Hapag-Lloyd further assert that BOE stipulated that Hapag-Lloyd America is not a common carrier, marine terminal operator, or an ocean transportation intermediary, and therefore, Hapag-Lloyd America should be dismissed due to lack of personal jurisdiction. HL Opposition at 2.

BOE does not address jurisdiction in its opening brief, although it should do so in future proceedings. In its reply, BOE acknowledges that the stipulation was completed after BOE's brief and "[b]ecause of the timing of these stipulations, Hapag-Lloyd (America) LLC was still included on BOE's Opening Brief. This, however, does not mean the proceeding should be discontinued in its entirety." BOE Reply at 9.

The parties agree that in this proceeding, the appropriate respondent is Hapag-Lloyd, A.G. The parties stipulated that Hapag-Lloyd, A.G. is a vessel-operating common carrier, Hapag-Lloyd America operates as Hapag-Lloyd, A.G.'s "agent in the United States," Hapag-Lloyd, A.G. provided the ocean transportation for these eleven containers, Hapag-Lloyd America issued the detention invoices at issue on behalf of Hapag-Lloyd, A.G., and Hapag-Lloyd America "is not an ocean common carrier, marine terminal operator, or ocean transportation intermediary." JSF at 1-2. There are no allegations that Hapag-Lloyd America, as agent for Hapag-Lloyd, A.G., operated outside the scope of its authority or is otherwise an appropriate respondent in this proceeding.

The evidence supports a finding that Hapag-Lloyd America was operating as the agent of a disclosed principal and that Hapag-Lloyd, A.G. is responsible for the conduct of its agent, Hapag-Lloyd America, with regard to the eleven containers at issue. Moreover, Hapag-Lloyd America was not operating as a regulated entity as required by section 41102(c). Accordingly, Hapag-Lloyd America is dismissed. The case will proceed against Hapag-Lloyd, A.G.

2. Burden of Proof

To prevail in a proceeding to enforce the Shipping Act, the party alleging a violation bears the burden of proving their allegations by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 08-03, 2014 FMC LEXIS 35, at *34 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transport Logistics,* Docket No. 15-04, 2021 FMC LEXIS 125, at *4 (FMC Aug. 18, 2021). It is appropriate to draw inferences from certain facts when direct evidence is not available, and circumstantial evidence alone may even be sufficient; however, such findings may not be drawn from mere speculation. *Waterman Steamship Corp. v. General Foundries Inc.*, Docket No. 93-15, 26 S.R.R. 1173, 1180, 1993 FMC LEXIS 73, at *29-30 (ALJ Dec. 9, 1993), adopted in relevant part, 26 S.R.R. 1424, 1994 FMC LEXIS 19 (FMC June 13, 1994).

3. Prima Facie Case

Hapag-Lloyd assert that the proceeding should be discontinued because BOE has failed to establish a prima facie case. HL Opposition at 2-3. Hapag-Lloyd argue that BOE must "establish that the container or containers on which detention was assessed were in fact empty and available for return to a marine terminal," asserting that "[a]bsent such proof, cargo interests and motor carriers could escape the payment of detention by 'demonstrating' that no appointments were available to return a container that was in fact still sitting loaded at the consignee's facility." HL Opposition at 3.

BOE contends that the standard of proof in administrative proceedings is preponderance of the evidence and summarizes its arguments that it met the five elements required for a section 41102(c) claim. BOE Reply at 10-13.

Hapag-Lloyd do not cite any legal support for their assertion that claimants contesting detention charges must establish that containers were empty and available for return. While these may be relevant factors to consider in determining the reasonableness of charges, the Commission declined to create such a bright line test. There are no specific evidentiary requirements to object to demurrage and detention charges or to claim that such charges are unreasonable and no requirement that BOE present such specific evidence. Moreover, as discussed more below, the record contains contemporaneous evidence of good faith attempts to return these eleven containers well before free time expired and there is no evidence of extraordinary circumstances which would justify imposition of all of these detention fees. Accordingly, the request to dismiss the proceeding for failure to present a prima facie case is denied.

4. Confidential Treatment

The parties filed a joint motion requesting confidential treatment of the following five categories of documents.

1. Marine terminal services agreements of Hapag-Lloyd, A.G., which include "commercially and competitively sensitive information (such as the rates paid for marine terminal services)" of Hapag-Lloyd, A.G. and terminal operators.

2. Demurrage/Detention data produced by Hapag-Lloyd, A.G. that contains "commercially and competitively sensitive" data.

3. Hapag-Lloyd, A.G.'s agency agreement that contains the financial and other terms of the relationship between Hapag-Lloyd, A.G. and its agent.

4. Hapag-Lloyd detention waivers indicating the days on which Hapag-Lloyd has granted waivers from detention charges and is "highly sensitive commercial information" that is competitively sensitive.

5. The demonstrative exhibit explaining the features and operations of a non-party website which is proprietary information of the website operator.

Joint Motion for Confidential Treatment at 1-4.

The District Court for the District of Columbia discussed the strong presumption in favor of public access to judicial proceedings, stating:

> As this Court has explained previously, *see In re McCormick*, 2017 U.S. Dist. LEXIS 90491 [(D.D.C. 2017)] there is a "strong presumption in favor of public access to judicial proceedings." *EEOC v. Nat'l Children's Ctr., Inc.*, 98 F.3d 1406, 1409, 321 U.S. App. D.C. 243 (D.C. Cir. 1996) (quoting *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277, 293 U.S. App. D.C. 1 (D.C. Cir. 1991)). "This right extends to judicial records[;] . . . whether something is a judicial record depends on 'the role it plays in the adjudicatory process.'" *In re Fort Totten Metrorail Cases*, 960 F. Supp. 2d 2, at 6 (D.D.C. 2013) (quoting *United States v. El-Sayegh*, 131 F.3d 158, 163, 327 U.S. App. D.C. 308 (D.C. Cir. 1997)). "A court proceeding . . . is in its entirety and by its very nature a matter of legal significance; all of the documents filed with the court . . . are maintained as the official 'record' of what transpired." *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 906, 319 U.S. App. D.C. 256 (D.C. Cir. 1996). "Indeed, the meaning and legal import of a judicial decision is a function of the record upon which it was rendered." *Id.*

In re McCormick & Co., Pepper Prods. Mktg. & Sales Practices Litig., 316 F. Supp. 3d 455, 463 (D.D.C. 2018). Public access to judicial records is not limitless, however, and may be denied "to protect trade secrets . . . and to minimize the danger of an unfair trial by adverse publicity." *U.S. v. Hubbard*, 650 F.2d 193, 315-16 (D.C. Cir. 1980).

Commission Rule 5 outlines the procedure for filing documents containing confidential information and the initial order in this proceeding provided additional requirements. 46 C.F.R. § 502.5. Rule 5 authorizes confidential treatment for confidential commercial information, such as the information identified by the parties. Although not all of the information in the confidential exhibits constitutes confidential information, the request is sufficiently limited to be permissible. The parties request confidential treatment for only a small number of pages and for specific, commercially-sensitive information. Therefore, the request for confidential treatment is reasonable and is **GRANTED**.

To the extent that BOE wants adjudications to deter or inform non-parties, it may consider limiting reliance on confidential material, where practicable. No confidential information is included in this Initial Decision, although there are citations to confidential exhibits.

B. Relevant Law

1. Section 41102(c)

BOE alleges that Hapag-Lloyd violated section 41102(c) of the Shipping Act, previously section 10(d)(1), which states that a "common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable

regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c).

On December 17, 2018, after notice and comment, the Commission issued Rule 545.4, specifying the elements for a section 41102(c) claim. Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018). Rule 545.4, states:

> 46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:
>
> (a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;
>
> (b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
>
> (c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
>
> (d) The practice or regulation is unjust or unreasonable; and
>
> (e) The practice or regulation is the proximate cause of the claimed loss.

46 C.F.R. § 545.4.

2. Demurrage and Detention

BOE alleges that Hapag-Lloyd's imposition of detention or per diem charges on these containers runs contrary to the Commission's demurrage and detention rule.

In 2014, the Commission held four regional port forums regarding congestion in the international supply system and discussed the "hard feelings felt by those shippers or motor carriers who incur additional congestion-related charges when the cause of that congestion lies outside their control," for example, when terminals refuse to accept empty equipment. *U.S. Container Port Congestion & Related International Supply Chain Issues* at 48 (FMC July 2015), www.fmc.gov/wp-content/uploads/2019/04/PortForumReport_FINALwebAll.pdf. In 2015, the Commission issued a report compiling concerns and potential areas for improvement. *Report, Rules, Rates, and Practices Relating to Detention, Demurrage, and Free Time for Containerized Imports and Exports Moving Through Selected United States Ports* at 3 (April 3, 2015), www.fmc.gov/wp-content/uploads/2019/04/reportdemurrage.pdf.

In 2016, shippers, intermediaries, and truckers petitioned the Commission to adopt a rule specifying when it would be unreasonable to collect demurrage or detention. 85 FR 29639. After receiving numerous comments and holding two days of public hearings, in 2018, the Commission launched a non-adjudicatory fact finding investigation to develop a record on: "(a) comparative commercial conditions and practices in the United States vis-à-vis other maritime nations; (b) tender of cargo; (c) billing practices; (d) practices regarding delays caused by intervening events; and (e) dispute resolution practices." *Conditions and Practices Related to*

Detention, Demurrage, and Free Time in Int'l Oceanborne Commerce, 1 F.M.C.2d 1, 2-3 (FMC 2018) (Order of Investigation), www2.fmc.gov/readingroom/docs/FF%20No.%2028/ff-28_ord2.pdf/.

The Fact Finding Investigation, which lasted 17 months and involved written discovery, field interviews, and group discussions with industry leaders, "revealed a situation marked by: (1) increasing demurrage and detention charges even after controlling for weather and labor events; (2) complexity; and (3) a lack of clarity and consistency regarding demurrage and detention practices, policies, and terminology." *Fact Finding Investigation No. 28 Interim Report* at 5-14 (Sept. 4, 2018), www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF28_int_rpt2.pdf.

On December 3, 2018, the Fact Finding Officer made a number of suggestions, including clear, simplified, and accessible demurrage and detention billing practices and dispute resolution processes as well as explicit guidance regarding the types of evidence relevant to resolving demurrage and detention disputes. Fact Finding Investigation No. 28 Final Report at 32 (Dec. 3, 2018) ("Final Report"), www2.fmc.gov/readingroom/docs/FF%20No.%2028/FF-28_FR.pdf.

On September 6, 2019, the Commission adopted the Fact Finding Officer's recommendations. *Commission Approves Dye's Final Recommendations on Detention and Demurrage* (Sept. 6, 2019), www.fmc.gov/commission-approves-dyes-final-recommendations-on-detention-and-demurrage/. On September 17, 2019, the Commission issued a *Notice of Proposed Rulemaking: Interpretive Rule on Demurrage and Detention under the Shipping Act* ("NPRM"), 84 FR 48850 (Sept. 17, 2019).

On April 28, 2020, after receiving over one hundred comments, the Commission issued the demurrage and detention rule, effective on May 18, 2020, with minor changes from the proposed rule. 85 FR 29638 (May 18, 2020). "The rule followed years of complaints from U.S. importers, exporters, transportation intermediaries, and drayage truckers that ocean carrier and marine terminal operator demurrage and detention practices unfairly penalized shippers, intermediaries, and truckers for circumstances outside their control." 85 FR at 29638. The demurrage and detention rule provides "guidance as to what [the Commission] may consider in assessing whether a demurrage or detention practice is unjust or unreasonable." 85 FR at 29638.

Rule 545.5, provides in pertinent part:

> (a) *Purpose.* The purpose of this rule is to provide guidance about how the Commission will interpret 46 U.S.C. 41102(c) and §545.4(d) in the context of demurrage and detention.
>
> (b) *Applicability and scope.* This rule applies to practices and regulations relating to demurrage and detention for containerized cargo. For purposes of this rule, the terms demurrage and detention encompass any charges, including "per diem," assessed by ocean common carriers, marine terminal operators, or ocean transportation intermediaries ("regulated entities") related to the use of marine terminal space (*e.g.*, land) or shipping containers, not including freight charges.
>
> (c) *Incentive principle*—(1) *General.* In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider

> the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.
>
> (2) *Particular applications of incentive principle*—(i) *Cargo availability.* The Commission may consider in the reasonableness analysis the extent to which demurrage practices and regulations relate demurrage or free time to cargo availability for retrieval.
>
> (ii) *Empty container return.* Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.

46 C.F.R. § 545.5.

In *Evergreen*, the Small Claim Officer addressed the demurrage and detention rule in the context of days when port facilities are closed, such as weekends, holidays, and port closures, finding that it is not appropriate to charge detention or demurrage on those days. *TCW, Inc. v. Evergreen Shipping Agency (America) Corporation, & Evergreen Line Joint Service Agreement*, Docket No. 1966(I), 2021 FMC LEXIS 233, 3 F.M.C.2d 1 (SCO Feb. 19, 2021). That decision is currently on appeal before the Commission. This case explores the demurrage and detention rule in finer detail, focusing on days when port facilities are open but containers cannot be returned because the terminal appointments have been filled, are not accepting containers of that size or type, or are only accepting dual transactions, where one container is dropped off and another is picked up.

C. Section 41102(c) Elements

To establish a violation of section 41102(c), a complainant must demonstrate that the respondent is a regulated entity; the practice or regulation is connected with receiving, handling, storing, or delivering property; the practice or regulation is unjust or unreasonable; the claimed acts or omissions occurred on a normal, customary, and continuous basis; and the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4. Each element is discussed below.

1. Common carrier

Section 41102(c) governs the activities of common carriers, marine terminal operators, and ocean transportation intermediaries. As discussed above, the parties agree that Hapag-Lloyd, A.G. was a vessel-operating common carrier and a regulated entity. 46 U.S.C. § 40102(17); JSF at 1. Accordingly, the first element is met.

2. Connected with Receiving, Handling, Storing, or Delivering Property

BOE asserts that "return of a VOCC's empty containers to a terminal is integral to receiving, handling, storing, and delivering property" and that each "of these containers was involved in ocean transportation of property and shipping containers generally are equipment belonging to a VOCC specifically for this purpose." Brief at 24. Hapag-Lloyd does not

specifically address this element. The disputed charges were imposed for failure to return the shipping container used to deliver cargo to the recipients' facility. The element requiring that the practice be connected with receiving, handling, storing, or delivering property is, thus, also established.

3. Unjust and Unreasonable

BOE asserts that the conduct at issue falls squarely within the prohibitions in the demurrage and detention rule and Commission precedent, arguing that practices should promote freight fluidity and that charges levied must be reasonably related to the services rendered. BOE Brief at 22-24. Hapag-Lloyd contend that they have established a reasonable policy with respect to the return of empty containers, with respect to the waiver of detention, and as applied to these containers. HL Opposition at 25-41.

Section 545.5, provides in pertinent part: "In assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity." 46 C.F.R. § 545.5(c)(1). More specifically, section 545.5 addresses empty container return, stating: "Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable." 46 C.F.R. § 545.5(c)(2)(ii).

The demurrage and detention rule states that section 41102(c) is intended to reflect *inter alia*, the principle that:

> importers, exporters, intermediaries, and truckers should not be penalized by demurrage and detention practices when circumstances are such that they cannot retrieve equipment from or return equipment to marine terminals "because under those circumstances the charges cannot serve their incentive function."

85 FR at 29638. In addition, the Commission noted with regard to return of empty containers:

> The rule states that absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable. The Commission explained that such practices, absent extenuating circumstances, weigh heavily in favor of a finding of unreasonableness, because if an ocean carrier directs a trucker to return a container to a particular terminal, and that terminal refuses to accept the container, no amount of detention can incentivise its return.

85 FR at 29655.

The reasonableness of Hapag-Lloyd's policy will be reviewed with regard to the return of these eleven containers, the return policies, and the waiver policy.

a. Return of these Eleven Containers

For these eleven containers, BOE asserts that "the motor carrier made a concerted effort to return containers but was unable to due to a lack of appointments at the terminal which Respondent directed it to return the containers" and that "Respondent's punitive detention charges serve no additional purpose when a lack of appointments at the Respondent's designated location prevent timely return." BOE Brief at 23-24.

Hapag-Lloyd contend that they had a reasonable policy of charging "detention on an empty container that is not returned to the marine terminal within free time when there is reasonable evidence that it was possible for the motor carrier to return the empty container" and that they provide "at least as much advance notice of empty return locations as the rest of the industry by providing notice of return locations not later than 4 p.m. of the previous day." HL Opposition at 26- 27.

GSL works exclusively in the LALB area, has about 75 drivers, and handles approximately 500 containers a week. BOE 37-40. Ms. Cruz mainly works in equipment control managing empties but the five dispatch employees also make appointments. BOE 41, 53-54. When GSL receives notice from a customer that a container is empty and ready to return, dispatch employees look for an appointment and try to match up loads out of the terminal with empties going in. BOE 51. To make an appointment, GSL needs the chassis number and container type, size, number, and steamship line. BOE 82-83. GSL tries to jump on appointments as soon as they are released but sometimes they don't have a driver to get the empty. BOE 56-57. GSL does not take a screen shot each time it looks for appointments. BOE 72-79. Ms. Cruz usually takes screen shots in the morning, when she and dispatch have been unable to make appointments. BOE 72-74.

The evidence includes emails from GSL with screen shots of appointment calendars showing days when appointments were unavailable. However, these are not *all* the days when detention was charged and BOE did not identify which specific days it believes that detention was improperly charged. It does not appear that witnesses were asked about these specific shipments, for example, whether there were appointments available on the days when there are no emails. The undersigned endeavored to determine, based on the evidence in the record, the specific days for which documentation establishes that appointments were full and empty containers could not be returned. Future proceedings would benefit from a greater focus on the specific shipments. So, for example, rather than just listing invoice numbers, it would be helpful to identify who handled the shipments, the dates free time ended and detention was charged, the amounts invoiced, etc.

GSL provided Hapag-Lloyd with evidence of a lack of appointment availability by using the Blue Cargo website, which aggregates appointment data directly obtained from terminals and refreshes every few minutes. BOE 64-65, 85-86. There is evidence that Blue Cargo data can sometimes be inaccurate. BOE 65, 77. However, Hapag-Lloyd does not point to a more reliable system to determine container return appointment availability and, at times, relies on this evidence itself.

Evidence does not show documentation of attempts to return containers on every day possible, but the evidence shows that not every attempt to find an appointment is documented by GSL. BOE 72, 79. While there is evidence that GSL looked for appointments frequently, there is also evidence that, at times, they could not return containers for other reasons, such as lack of a driver. BOE 56-57. Therefore, the evidence is not sufficient to find that appointments were unavailable on days that are not documented. There may have been additional days when appointments were unavailable for these containers but there is not sufficient evidence in the record to make a finding in this proceeding for those days.

For two of these shipments, it appears that the documented unavailable appointment days were during free time. BOE does not directly address whether detention charges should be waived based on unavailability of appointments prior to free time ending. For other shipments, appointments filled up on the day that the specific container was returned. The evidence does not show whether detention is charged for the day the container is returned. Since there is no evidence on these issues and BOE has the burden of proof, the evidence does not support a finding of a violation based on unavailable appointments prior to free time ending or for the day that containers were returned.

Regarding the two 20-foot containers, the evidence shows that for container one, appointments were full and therefore unavailable on May 11, May 12, and May 17, before free time ended on May 19; as well as on May 19. BOE 286-290. Therefore, GSL was charged detention for one day when appointments were unavailable. For container two, appointments were full and therefore unavailable on May 24, May 25, May 26, May 27, May 28, May 31, and June 3, before free time ended; and on June 4, June 7, June 8, June 9, and June 10 (return date). BOE 291-304; HL 37. Hapag-Lloyd waived two days, therefore, GSL was charged detention for two days when appointments were unavailable.

Regarding the four 40-foot high cube containers, the evidence shows that for container three, appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 (return date). BOE 305-309, 318. For container four, appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 and June 14 (return date). BOE 312-325; HL Supp., Exhibit B at 4-5. Therefore, GSL was charged detention for one day (June 11), when appointments were unavailable. For container five, appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11, June 14, June 15, and June 16. BOE 315-322; HL Supp., Exhibit B at 4-7. Therefore, GSL was charged detention for four days (June 11, June 14, June 15, and June 16) when appointments were unavailable. For container eleven, appointments were full and therefore unavailable on May 26, May 27, May 28, and May 31, before free time ended on June 8; and on June 11 (return date). BOE 358-365.

Regarding the five 45-foot containers, the evidence shows that for container six, appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on June 16 and June 18. BOE 323-336. Hapag-Lloyd waived one day, therefore, GSL was charged detention for one day when appointments were unavailable. For container seven, appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on June 16 and June 18 (return date). BOE 323-336. Therefore, GSL was

charged detention for one day, excluding return date, when appointments were unavailable. For container eight, appointments were full and therefore unavailable on June 14, June 15, and June 16, before free time ended on June 18; and on June 18 and June 21 (return date). BOE 340-347. Therefore, GSL was charged detention for one day, excluding return date, when appointments were unavailable. For container nine, appointments were full and therefore unavailable on June 14 and June 15, before free time ended on June 16; and on June 16, June 18, and June 21. BOE 340-347. Hapag-Lloyd waived detention for one day, therefore, GSL was charged detention for two days when appointments were unavailable. For container ten, appointments were full and therefore unavailable on June 14, June 15, and June 16, before free time ended on June 18; and on and June 18 and June 21. BOE 340-347. Hapag-Lloyd waived detention for one day, therefore, GSL was charged detention for one day when appointments were unavailable.

Hapag-Lloyd argue that GSL failed to fulfill its customary obligations because there is no evidence that GSL attempted to make appointments to return any 40-foot HC containers from June 1-9; GSL had no standard procedure for seeking appointments; and because screenshots taken between 9:30 am and 1 pm do not show that GSL was attempting to make appointments promptly and diligently. HL Opposition at 41-42. BOE responds that GSL attempted to secure appointments, they have a standard procedure, and motor carriers cannot devote their time solely to searching for appointments. BOE Reply at 18.

While failure to comply with customary responsibilities could be a relevant factor, 85 FR at 29647, the evidence does not support the allegation that GSL failed to comply with its customary responsibilities. GSL checked for available appointments throughout the day and emailed Hapag-Lloyd about the inability to return all eleven of these containers prior to the expiration of free time. BOE 52; BOE 330-336 (two days before for containers six and seven); BOE 291-302 (eleven days before for container two). In addition, these emails show that appointments were full by 9:39 am to 12:49 pm. BOE 286-302. Moreover, GSL emailed Hapag-Lloyd on at least twelve days requesting assistance and although Hapag-Lloyd responded eight times, Hapag-Lloyd never provided any alternate return locations or other assistance. BOE 288, 301, 302, 304, 306, 308, 321, 328. The detention and demurrage rule states that extenuating circumstances may include not fulfilling customary obligations. Here, there are no such extenuating circumstances. Rather, the balance of evidence demonstrates a good faith effort to return these containers.

Hapag-Lloyd point to the empty containers that were returned by GSL on the days at issue as evidence that containers could be returned. Hapag-Lloyd is correct that there were some appointments on the days at issue and some containers were returned. However, BOE's argument is not that there were no appointments available, but rather that there were insufficient appointments available. In addition, this evidence undermines the argument that GSL failed its customary obligations as they were often returning containers on a timely basis.

Hapag-Lloyd further claims that other motor carriers were able to return equipment to the terminals to suggest that GSL should have been able to return these eleven containers. HL Opposition at 38-39. Again, BOE's argument is not that there were no appointments available, but rather that there were not sufficient appointments available. The evidence demonstrates that GSL alerted Hapag-Lloyd to its problems finding appointments and attempted to enlist Hapag-Lloyd's help to return the containers. However, Hapag-Lloyd did not suggest other options for

returning the containers and did not identify to GSL locations that had sufficient available appointments. Without more, evidence of other containers being returned on a particular day does not support a finding that were sufficient appointments available when evaluating allegations of an inability to return containers because all appointments have been filled.

Hapag-Lloyd argue that the empty return matrix is not a list of exclusive return locations or instructions to return containers only to the terminals listed on the matrix. HL Opposition at 18. However, Hapag-Lloyd employees told GSL: "There are no alternate locations," "There are never any alternate locations," and "At this time these are the only return locations allowed by terminals. Hopefully more locations and spots will open later for this week." BOE 289, 302, 306, 308. Moreover, there is evidence that return locations are not set until the day before and making an appointment for more than one day ahead may result in the need to rebook. BOE 160-162. In addition, GSL stated that it may be charged a fee for returning a container to a terminal that is not authorized. BOE 61-63, 85, 90. Therefore, the evidence does not support Hapag-Lloyd's argument that truckers knew they could return empty containers to locations not on the empty return broadcast matrix.

Hapag-Lloyd recognizes that the demurrage and detention rule does not require a "first out, first back" policy but asserts that the incentive principle "is served by assessing detention on equipment that a motor carrier does not return because it has chosen instead to return other equipment of the ocean carrier that has been out on delivery for less time." HL Opposition at 37. The return of an empty container has a number of moving parts, including the container, the truck driver, and the chassis. The incentive principle is not met by requiring containers ready to be returned to wait for containers which arrived earlier. Rather, the focus should be on whether there were sufficient appointments available for a container to be returned prior to imposing a detention fee.

The preponderance of the evidence shows that GSL was not able to return empty Hapag-Lloyd containers on nineteen days after free time ended, excluding return dates, and that Hapag-Lloyd waived detention for five days. Therefore, Hapag-Lloyd charged detention for fourteen days when there is evidence that sufficient appointments were not available. This policy and practice is unreasonable because no amount of detention could have incentivized the return of the containers on those fourteen days.

b. Return Policy

BOE asserts that although Hapag-Lloyd admits it was aware of the demurrage and detention rule, it did not train its staff or create any policies to ensure compliance with the rule. BOE Brief at 19.

Hapag-Lloyd contend that under BOE's approach, "there is no consideration of whether the motor carrier was seeking appointments in a timely and responsible matter," the incentive principle is lost if "motor carriers can unilaterally extend free time by waiting until the last minute to seek non-existent appointments," carriers should be able to consider other factors regarding whether containers could be returned during free period, and Hapag-Lloyd has waived a substantial amount of detention charges. HL Opposition at 28-31.

> If a motor carrier can obtain a waiver of detention for any day for which it can produce a screenshot showing no appointments are available, all it has to do is wait until late in the day on the last day of free time (when appointments are likely to be booked), attempt to obtain an appointment it knows is not available, and then produce a screenshot to that effect. If this is what the Act means, then a great deal of the incentive principle of detention has been lost because motor carriers can unilaterally extend free time by waiting until the last minute to seek non-existent appointments.

HL Opposition at 28-29 (footnote omitted).

In reply, BOE asserts that "[m]otor carriers do not seek to keep containers, they want to return containers," and that in this case, the "motor carrier testified that they attempted to secure appointments and that they have a standard procedure of seeking and obtaining appointments." BOE Reply at 17-18.

There is no doubt that the reasonableness inquiry may consider attempts by the motor carrier to return empty containers. However, BOE's broad assertion that motor carriers always want to return containers is not supported by the record. There may be times when a motor carrier is not able to return a container, such as when the recipient has not finished unloading the container or if the trucking company is unable to secure a driver or chassis. BOE 56-57. So, it is also not appropriate to categorically assume that containers are always available for return. Each case must be reviewed on its facts to determine if the imposition of demurrage and detention charges was reasonable.

Hapag-Lloyd set up a straw man, asserting that truckers could wait until late in the day on the last day of free time or wait "until the last minute to seek non-existent appointments" and argues against that scenario. HL Opposition at 29. However, that is not what the facts show here. In this case, there is no evidence that GSL waited until late in the day on the last day of free time or until the last minute. Rather, the evidence shows that for all of the containers, GSL attempted to return them prior to free time ending but appointments were full. Moreover, the evidence shows that GSL employees checked for appointments throughout the day and that GSL contacted Hapag-Lloyd prior to the end of free time about problems returning all eleven containers.

To impose detention for failure to return an empty container after the expiration of free time, Hapag-Lloyd must have a reasonable basis, pursuant to long-standing Commission caselaw as well as the demurrage and detention rule. Hapag-Lloyd imposed detention because the containers were not returned by the expiration of free time. However, GSL notified Hapag-Lloyd of the unavailability of appointments to return these containers both before and after the end of free time. Because there were not sufficient appointments, GSL objected to the detention fee, providing documentation that they were unable to return the containers. Therefore, for these containers on these fourteen days, no amount of fees would incentivize their return.

BOE has the burden of proof to establish that Hapag-Lloyd's practices were unreasonable. That does not necessarily mean that BOE has the burden to show that container return appointments were unavailable. Rather, it means that BOE has the burden to show that Hapag-Lloyd's policies or practices were not reasonable. BOE has established that it was Hapag-

Lloyd's policy and practice to charge detention for empty containers not returned within free time even when there were not sufficient appointments available to return containers and BOE has established that this policy and practice is unreasonable because it fails to meet the incentive principle.

c. Waiver Policy

BOE asserts that Hapag-Lloyd did not provide guidance when rejecting the disputes and that Hapag-Lloyd's policy of only waving detention when a terminal had no appointments at all is not reasonable because if a "terminal has limited appointments, if appointments have been filled by other motor carriers, if a terminal is only able to accept Respondent's containers as part of a dual transaction, or is not receiving Respondent's containers, those factors are not even considered in evaluating whether or not detention charges are valid." BOE Brief at 19-20, 24.

Hapag-Lloyd contend that their waiver policy is reasonable and they charge "detention on an empty container that is not returned to the marine terminal within free time when there is reasonable evidence that it was possible for the motor carrier to return the empty container," primarily based on their shut-out calendar. HL Opposition at 26-27.

The evidence shows that Hapag-Lloyd was aware of the detention and demurrage rule published in the Federal Register on May 18, 2020, for at least one year before the present controversy occurred in the spring and summer of 2021. HL Opposition at 5. After the issuance of the interpretive rule, Hapag-Lloyd reviewed its procedures with respect to the assessment and waiver of detention charges, and concluded its existing procedures were in compliance with the interpretive rule. HL 9. Training for Hapag-Lloyd dispute reviewers has not been updated or renewed since the publication of the detention and demurrage rule. HL Opposition at 13; BOE 192, 209-211. Hapag-Lloyd has not communicated any internal policy or written policy to Ms. Saavedra, who reviewed these disputes, describing how to evaluate disputes. BOE 209.

Hapag-Lloyd dispute reviewers rely on the shut-out calendar prepared by the equipment department. BOE 193-194; HL Opposition at 14. Hapag-Lloyd defines the term shut-out to mean that "the terminal had no appointments available at all that day" or "a day on which all terminal operators at that point were not accepting empty returns of that container type during their first shift." BOE 194-195, 118-119; HL Opposition at 14. The shut-out calendar relied upon by Hapag-Lloyd is too narrow because it only excludes days where it was not possible to return any containers. No amount of detention will incentivize the return of empty containers if all appointments are full. Hapag-Lloyd's waiver process does not waive detention for days when truckers were unable to return containers because all of the appointments were full. Therefore, the policy is unreasonable.

BOE asserts that the similarity of the language used in the emails denying requests for waivers is relevant evidence. However, there is no basis to infer from standardized language that there is a violation. In fact, GSL's emails requesting assistance from the Hapag-Lloyd equipment operators used standardized language. This would seem to be an efficient business practice.

Hapag-Lloyd state that they accept any type of evidence from motor carriers. If Hapag-Lloyd has a preference for types of evidence that they prefer, for example screen shots that show

the date and time, they should make that clear. The Fact Finding 28 report states that "[b]oth cargo interests and ocean transportation intermediaries stated that the only way a trucker could corroborate a lack of available appointments was to take a screenshot with a mobile phone." FF 28 Final Report at 18. Here, GSL emailed Hapag-Lloyd prior to free time expiring and included a copy of the Blue Cargo appointment calendar showing no available appointments. This contemporaneous evidence should have been sufficient for Hapag-Lloyd to waive detention charges for these eleven containers for the days when there were not sufficient appointments available.

The Uniform Intermodal Interchange and Facilities Access Agreement (UIIA) governs relationships between signatory ocean carriers and truckers. "Because not all ocean carriers or truckers participate in the UIIA, and because ocean carrier practices may be contained in their addenda as opposed to the standard UIIA itself, the Commission cannot simply assume that the processes outlined in the UIIA sufficiently address concerns about ocean carrier detention practices vis-à-vis truckers." 85 FR at 29649. As the detention and demurrage rule notes, ocean carrier practices, "whether incorporated in the UIIA or not, are within the Commission's purview." 85 FR at 29649. Parties cannot escape the requirements of the Shipping Act through contracts with other entities. The UIIA provisions are not a defense to this violation.

BOE has established that it was unreasonable for Hapag-Lloyd not to waive detention for the days when there were insufficient appointments. BOE has also established that Hapag-Lloyd failed to revise its policies and sufficiently train its staff after the demurrage and detention rule was issued. In addition, although Hapag-Lloyd permits any evidence to be submitted to support a waiver request, Hapag-Lloyd's waiver policies are not transparent. Accordingly, BOE has established a violation of the Shipping Act because Hapag-Lloyd failed to waive detention charges on days when the evidence shows that appointments filled up and were therefore unavailable. Accordingly, BOE has established this element of a section 41102(c) violation.

Although the waiver policy is discussed separately, the violation is the same, specifically Hapag-Lloyd's policy and practice, absent extenuating circumstances, of imposing and failing to waive detention charges when there are insufficient appointments available to return empty containers.

4. Normal, Customary, and Continuous Basis

BOE asserts that Respondents' practices are normal, customary, and continuous, arguing that ten of the eleven dispute denials used identical language; there was a policy to not consider the unavailability of appointments; and the invoices are still outstanding. Brief at 20-21. Hapag-Lloyd argue that its policies and practices are reasonable and does not appear to contend that this element is not met. HL Opposition at 4-5, 25-30. BOE has the burden to establish that the unjust and unreasonable acts in question occurred on a normal, customary, and continuous basis and thus were a "regulation or practice" by Respondent. In this case, the evidence shows that it is Hapag-Lloyd's normal, customary, and continuous policies and practices regarding imposing detention and waiver of charges that are at issue. Accordingly, this element of a section 41102(c) violation is met.

5. Proximate Cause of Loss

It is not entirely clear how the proximate cause of loss element of Rule 545.4 applies in enforcement cases and the parties do not address this element. However, the detention and demurrage invoices are outstanding and the collection of these fees would impose financial costs on shippers and trucking companies. Accordingly, this element is met.

D. Civil Penalties

1. Relevant Law

Section 13(a) of the Shipping Act provides for civil penalties for violations of the Shipping Act, stating:

> A person that violates this part or a regulation or order of the . . . Commission issued under this part is liable to the United States Government for a civil penalty. Unless otherwise provided in this part, the amount of the penalty may not exceed **[**$12,363**]** for each violation or, if the violation was willfully and knowingly committed, **[**$61,820**]** for each violation.

46 U.S.C. § 41107(a). The Shipping Act originally provided for maximum penalties of $5,000 and $25,000. 61 Fed. Reg. 52704, 52705 (Oct. 8, 1996) (codified at 46 C.F.R. § 506.4(d) (Table) (1996)). These amounts have been adjusted for inflation. In 2021, the Commission increased the amounts to $12,363 and $61,820. 86 Fed. Reg. 2560, 2561 (Jan. 13, 2021) (codified at 46 C.F.R. § 506.4(d) (Table) (2021)).

Section 13(c) of the Act provides that in "determining the amount of a civil penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require." 46 U.S.C. § 41109(b). These factors have been codified in the regulations which state:

> In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

46 C.F.R. § 502.603(b).

Civil penalties are punitive in nature. The main Congressional purpose of imposing civil penalties is to deter future violations of the Shipping Act. *Stallion Cargo, Inc. – Possible Violations of Sections 10(a)(1) and 10(b)(1)*, Docket No. 99-18, 2001 FMC LEXIS 20, 29 S.R.R. 665, 681 (FMC Oct. 18 2001); *Refrigerated Container Carriers Pty. Ltd. – Possible Violations*, Docket No. 98-20, 28 S.R.R. 799, 805 (ALJ April 13, 1999) (Admin. final May 21, 1999).

> To determine a specific amount of civil penalty is a most challenging responsibility. The matter is one for the exercise of sound discretion, essentially requires the weighing and balancing of eight factors set forth in law, and is ultimately subjective and not one governed by science. As was stated in *Cari-Cargo, Int., Inc.*, 23 SRR 1007, 1018 (I.D., F.M.C. administratively final, 1986):
>
> > . . . in fixing the exact amount of penalties, the Commission, which is vested with considerable discretion in such matters, is required to exercise great care to ensure that the penalty is tailored to the particular facts of the case, considers any factors in mitigation as well as in aggravation, and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law. Obviously, "[t]he prescription of fair penalty amounts is not an exact science," and "[t]here is a relatively broad range within which a reasonable penalty might lie."

Universal Logistic Forwarding Co. – Possible Violations of Sections 10(a)(1) and 10(b)(1), Docket No. 00-10, 2001 FMC LEXIS 29, 29 S.R.R. 323, 333 (ALJ Feb. 20, 2001), adopted in relevant part, 29 S.R.R. 474 (2002) (citation omitted). No one statutory factor is to be weighed more heavily than any other. *Refrigerated Container Carriers*, 28 S.R.R. at 805.

BOE has the burden of establishing that a civil penalty should be imposed, and if so, the amount of the civil penalty that should be assessed. In "Commission-instituted proceedings, unlike in private complaint proceedings, it is not necessary that the violation of a statute result in harm to the public for the respondent to be liable." *Stallion Cargo*, 29 S.R.R. at 678-79.

> Although there is no minimum penalty amount for violations found to be knowing and willful, when the Commission has in the past found violations to be knowing and willful, it has generally assessed penalties that exceed the maximum for violations that are not knowing and willful, or $6,000 in this case. *See, e.g., EuroUSA Shipping, Inc., et al. – Possible Violations of Shipping Act*, 31 S.R.R. 1131, 1152 (ALJ 2009, admin. final January 7, 2010) ($30,000 per violation penalty assessed for 13 knowing and willful violations); *Mateo Shipping Corp. – Possible Violations of 1984 Act and Commission Regs.*, 31 S.R.R. 830, 851 (ALJ 2009, admin. final September 29, 2009) ($30,000 per violation penalty assessed for 13 knowing and willful violations); *Hudson Shipping (Hong Kong) Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1381, 1386 (ALJ 2003, admin. final February 6, 2004) ($22,500 per violation assessed for 120 knowing and willful violations); *Green Master Int'l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1319, 1323 (FMC 2003) ($22,500 penalty per knowing and willful violation affirmed) (*Green Master II*); *Green Master Int'l Freight Services Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 1303, 1317-18 (FMC 2003) ($22,500 per violation assessed for 68 knowing and willful violations); *Transglobal Forwarding Co., Ltd. – Possible Violations of the 1984 Act*, 29 S.R.R. 814, 821 (ALJ 2002, admin. final June 17, 2002) ($20,000 per violation assessed for 72 knowing and willful violations); *Stallion Cargo*, 29

> S.R.R. at 682 ($10,000 per violation assessed for 134 knowing and willful violations).

Anderson Int'l Transport – Possible Violations of Sections 8(A) and 19, Docket No. 07-02, 2013 FMC LEXIS 19, *37-38, 32 S.R.R. 1678, 1693-94 (FMC June 25, 2013) (footnote and citations to record omitted).

In *Hudson Shipping*, the Administrative Law Judge imposed a civil penalty of $7,900,000, or $22,500 for each of 120 violations of section 10(a)(1) and $25,000 for each of 208 days (September 4, 2002 to March 31, 2003) that Hudson continued to operate as an OTI/NVOCC without a surety bond in violation of section 19(b)(1) of the Act. *Hudson Shipping (Hong Kong) Ltd. – Possible Violations of the 1984 Act*, Docket No. 02-06, 29 S.R.R. 1381, 1386, 2003 FMC LEXIS 13 (ALJ 2003, admin. final February 6, 2004).

2. Arguments of the Parties

BOE requests civil penalties of at least $16.5 million, asserting that Respondent's violations were knowing and willful, each day of a continuing violation is a separate offense, and "a substantial civil penalty is appropriate and warranted by the facts of this case." BOE Brief at 29. Hapag-Lloyd contend that no violation was committed and that no penalty should be imposed. HL Opposition at 47. However, if a penalty is imposed, Hapag-Lloyd propose that an appropriate penalty would be $144,452, based on the penalty for violations that are not knowing and willful. HL Opposition at 47. To determine the appropriate penalty, the relevant factors will be reviewed.

3. Discussion of Relevant Factors

a. Knowing and Willful

BOE asserts that Hapag-Lloyd acted unreasonably and willfully when Hapag-Lloyd "charged detention fees on motor carriers who were unable to make appointments and return empties, and then after the motor carriers disputed the charge with corroborating evidence, Respondent continues to hold the charges as valid" and that it is "Respondent's disregard for the published Interpretive Rule that makes this violation knowing and willful, to which a higher penalty is applied." BOE Brief at 25-26.

Hapag-Lloyd asserts that this is a novel issue and it "is simply not plausible to claim that there can be a knowing violation in a situation involving novel issues arising under a statutory provision interpreted pursuant to a rule that imposes no specific requirements." HL Opposition at 43. They also assert that they neither ignored guidance provided by the demurrage and detention rule nor is it Hapag-Lloyd's policy to reject disputes. HL Opposition at 44.

The Commission has addressed the knowing and willful factor, stating:

> In order to prove that a person acted "knowingly and willfully," it must be shown that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act,

> or purposeful or obstinate behavior akin to gross negligence. The Commission has further held that a person's "'persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a [person] was acting knowingly and willfully in violation of the Act.'"

Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd., Docket No. 96-05, 29 S.R.R. 119, 164-165 (FMC June 1, 2001) (citations omitted). *See also Pacific Champion Express Co., Ltd – Possible Violations of Section 10(b)(1),* Docket No. 99-02, 28 S.R.R. 1397, 1403 (FMC April 21, 2000) (similar language).

The Commission has been raising concerns about demurrage and detention for many years, has provided multiple opportunities for parties to weigh in on potential resolutions, and provided specific requirements in the demurrage and detention rule regarding charging detention for the return of empty containers. Despite the Commission's efforts, Hapag-Lloyd failed to change its behavior or practices.

The evidence shows that Hapag-Lloyd reviewed, but did not change, its policies in response to the demurrage and detention rule. The rule explicitly addressed the return of empty containers. Hapag-Lloyd's argument that the rule did not apply to these containers is not supported by the demurrage and detention rule, caselaw, or other legal basis. If the rule was unclear, Hapag-Lloyd could have sought guidance from the Commission, but there is no evidence that it did so. Instead, it continued to impose detention charges in violation of the Shipping Act.

The Commission provided extensive notice and opportunity to comment prior to enacting the demurrage and detention rule, which explicitly addressed the standards for imposing detention for the return of empty containers. Here, BOE established that it was unreasonable for Hapag-Lloyd to impose, and not waive, detention charges for the fourteen days when there was documentation that there were insufficient appointments to return these containers. BOE has also established that Hapag-Lloyd failed to revise its policies and sufficiently train its staff after the demurrage and detention rule was issued. The evidence is therefore sufficient to find that this was a knowing and willful violation.

b. Nature, Circumstances, Extent, and Gravity of the Violation

BOE asserts that the nature of this violation is grave and that the extent is significant as Hapag-Lloyd imposed detention fees even when there were not sufficient numbers of appointments available as a matter of course. BOE Brief at 25-26.

Hapag-Lloyd argue that BOE "gravely exaggerates the nature of the alleged violation" and "extent of the alleged violation" because "a portion of the detention charges on the containers covered by the Order" were waived, the containers at issue were all returned shortly after free time expired, the detention charges assessed have not been paid by the motor carrier nor passed to the cargo interests, and the motor carrier has been able to continue transporting containers despite non-payment of the invoices. HL Opposition at 48-49.

Hapag-Lloyd asserts that only $8,125 in detention was assessed for these eleven containers. HL Opposition at 1. The invoiced amounts from Hapag-Lloyd's July 26, 2021,

emails totaled $10,135, although it is not clear if this amount accounts for the waived days. BOE 5-23. The evidence supports a finding that, at most, detention of $10,135 was charged for these eleven containers. The evidence suggests that detention was charged for fourteen days when there is documentation that appointments were full.

In their favor, Hapag-Lloyd did have a policy to waive certain detention days, which met their definition of a shut-out. Although Hapag-Lloyd's definition of unavailable was too limited to comply with the incentive principle, they did waive five days of detention for these containers. In addition, the detention charges of approximately $10,000 were not paid by the motor carrier, not passed on to the motor carrier's customer, and Hapag-Lloyd has continued to carry shipments transported by GSL. There is no evidence of retaliation or other aggravating factors.

While this is not a significant number of containers or days, Hapag-Lloyd has been clear that this was their normal policy and practice. Therefore, it may be presumed that this issue was not isolated to these shipments but that detention was imposed, and not waived, on other empty containers that could not be returned due to insufficient appointments. There is no evidence in the record to determine the extent of the shipments impacted and the civil penalty must be based on the allegations that were established in this proceeding. Therefore, the nature, circumstances, extent, and gravity of the violation weigh toward a high, but not the highest, penalty.

c. Culpability and History of Prior Offenses of the Violator

BOE acknowledges that Hapag-Lloyd, A.G. has not been the subject of an enforcement action since 1990 but is culpable for the actions of its agent. BOE Brief at 27. Hapag-Lloyd state that they have not been the subject of an enforcement action since 1990, and admit that they are responsible for their actions, but maintain that their actions in this context were reasonable and do not warrant a penalty. HL Opposition at 49.

Hapag-Lloyd, A.G. has no history of prior violations since 1990. Hapag-Lloyd took responsibility for its policies and practices and was entitled to argue for its interpretation of the demurrage and detention rule. It is noted that this is BOE's first prosecution under the demurrage and detention rule and that no other Commission cases have addressed the specific issue of detention charges when there are not sufficient appointments to return empty containers. Accordingly, these factors weigh against imposing the highest penalty.

d. Ability to Pay a Civil Penalty

BOE asserts that Respondent is one of the largest ocean carriers in the world, has reported record profits during the period at issue and therefore, is able to "pay a substantial civil penalty, commensurate with its violation." Brief at 27-28. Hapag-Lloyd, A.G. concedes that "it is a substantial company and does not argue for a lower penalty on the basis of the ability to pay." HL Opposition at 50.

There is no basis to lower the penalty based on ability to pay. Indeed, the evidence shows that Hapag-Lloyd could pay a significant penalty from the detention payments it receives. BOE 380.

e. Deterrence and Future Compliance

BOE argues that actions by the Commission, including the demurrage and detention rule, the Commission's many press releases related to the subject, and the filing of this litigation have not deterred Hapag-Lloyd, and furthermore, that Hapag-Lloyd "has not waived the charges at issue, nor changed its practices, nor changed its language in communications to the public." Thus, BOE asserts that a significant penalty is required to both deter Hapag-Lloyd's violative behavior and ensure future compliance. BOE Brief at 28. Hapag-Lloyd argue that "no meaningful purpose would be served by imposition of a significant penalty" because they have been and remain compliant. HL Opposition at 50.

Hapag-Lloyd's policy and practices do not comply with the demurrage and detention rule. Therefore, a significant penalty is required to deter future violations and ensure compliance with the demurrage and detention rule. However, that penalty must be proportional to the violation established, particularly where BOE did not establish a violation for all eleven shipments or for all days of detention. This factor weighs in favor of a higher penalty.

4. Civil Penalty Calculation

BOE calculates the requested penalty using the statutory maximum for a knowing and willful violation in 2022, for eleven containers, for a continuing violation of 228 days until the filing of BOE's brief ($65,666 x 11 x 228=$164,690,328) and argues that ten percent is necessary to deter future violations and therefore requests a civil penalty of $16.5 million. BOE Brief at 29.

Hapag-Lloyd assert that the proposed penalty is excessive, not supported by the facts or the law, and is "arbitrary and capricious on its face." HL Opposition at 1, 42-43, 45. Hapag-Lloyd argue that they have not violated the Shipping Act but that if they are found to have violated the Act, an appropriate penalty would be "$144,452 (11 containers x $13,132, the maximum penalty for a violation of the Act that was not knowing and willful during 2021)." HL Opposition at 47.

BOE asserts that the 2022 penalty amounts should apply, arguing that that the penalty amount adjustments "were made applicable to violations predating the increase." BOE Brief at 29 n.7. Hapag-Lloyd assert that the 2021 penalty amounts should apply, contending that BOE "cites no precedent and no rationale for using the date of its brief as the cutoff date for the alleged violation." HL Opposition at 45. In previous cases, the Commission set the penalty based on the amount at the time of the offense. *OC Int'l Freight, Inc. v. OMJ Int'l Freight, Inc.*, 2014 FMC LEXIS 14, *13 n.14 (FMC July 31, 2014) ("these penalty levels corresponded with the maximum civil penalties available at the time the violations were committed."); *Anderson Int'l Transport*, 2013 FMC LEXIS 19, at *37-38 (assessing violations based on penalty amounts "at the time these violations occurred."); *Sea-Land Service, Inc. – Possible Violations of Sections 10(b)(1), 10()(4) and 19(d) of the Shipping Act of 1984,* Docket No. 98-06, 2003 FMC LEXIS 8 (ALJ Jan. 30, 2003). Therefore, the penalty amount for 2021, at the time of the violations, will be used.

BOE asserts that this is a continuing violation and calculates the penalty by multiplying the number of shipments (11) by the number of days between Hapag-Lloyd's denial of GSL's waiver request to the date of BOE's brief (228). BOE Brief at 29. Hapag-Lloyd maintains that they have "not located a single decision in a Commission enforcement proceeding in which a violation of Section 41102(c) was found to be a continuing violation," BOE "cites no authority to support its contention that the alleged violation in this case is continuing," and that there is no basis to find every day since the denial of the waiver request to be a separate violation. HL Opposition at 43. BOE cites 46 U.S.C. § 41107 to argue in its reply that "[e]ach day of a continuing violation is a separate violation." BOE Reply at 20.

Basing the violation amount on the number of days until BOE filed its brief would make the speed of litigation a central element in determining a penalty amount. There is no basis in the caselaw to do so and it would seem to punish the parties for legitimate use of the legal process. Per day penalties have been imposed against entities which operated without a license or a bond for each day those entities operated in violation of the Shipping Act. It would, therefore, be appropriate to impose a penalty for every day that detention was improperly charged. This ensures that the penalty is proportionate to the violation established and the penalty is inherently lowered by the number of days that Hapag-Lloyd waived detention.

The record shows that appointments to return empty containers were unavailable on nineteen days after the expiration of free time, excluding the date returned, for these eleven containers. Hapag-Lloyd waived five days of detention charges. Therefore, there are fourteen days for which the evidence shows that detention was imposed when documentation shows that sufficient appointments were not available.

It is not clear if detention was charged for the day that containers were returned. As BOE has the burden of proof, and there is not sufficient evidence in the record to resolve this question, those days are excluded from the damages calculation. In addition, the parties did not brief whether detention should be adjusted or waived when there is evidence of attempts to return containers prior to free time expiring. No legal finding is made regarding these scenarios. With regard to the facts in this proceeding, the evidence does not support imposing penalties for the return date or for days when empty containers could not be returned prior to the expiration of free time. Other cases, with a different factual basis and thorough briefing, may warrant a different conclusion.

Giving due consideration to all of the factors, Hapag-Lloyd, A.G. is ordered to pay a civil penalty of $58,730 per violation for fourteen violations equaling a total penalty of $822,220 for violation of section 41102(c) of the Shipping Act.

E. Cease and Desist Order

The Commission has held that the evidence in the record must justify entry of a cease and desist order.

> The imposition of a cease and desist order normally requires a showing that unlawful conduct is ongoing or likely to resume. *See Alex Parsinia d/b/a Pac. Int 'l Shipping and Cargo Express*, 27 SRR 1335, 1342 (ALJ 1997) ("a cease and

> desist order is appropriate when the record shows that there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses"); and *Portman Square Ltd.-Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, 28 SRR 80, 86 (ALJ 1998) ("the general rule is that [cease and desist] orders are appropriate when there is a reasonable likelihood that respondents will resume their unlawful activities"). After proving violations of the Act, in order for Maher to obtain cease and desist relief against PANYNJ, it will have to make that showing.

Maher Terminals, LLC v. Port Authority of New York and New Jersey, Docket No. 08-03, 32 S.R.R. 1185, 1190 n.8 (FMC Jan. 31, 2013).

A cease and desist order must be tailored to the needs and facts of the particular case. *Marcella Shipping Co. Ltd.*, Docket No. 85-13, 23 S.R.R. 857, 871-72 (ALJ Feb. 13, 1986). In addition to protecting the shipping public, a cease and desist order will alert the shipping industry, forestall future violations, and facilitate injunctions against possible unlawful activity in the future. *Pacific Champion*, 28 S.R.R. at 1190-91.

BOE requests that Hapag-Lloyd be ordered to follow the previously published demurrage and detention rule, cease collection of detention charges on the containers at issue and similarly situated containers, and "desist from collecting detention charges from motor carriers when they dispute such charges and provide evidence to Respondent that points to their inability to return containers in a timely manner due to circumstances beyond their control." BOE Brief at 30. In the future, BOE should propose specific language for cease and desist orders. Respondents do not directly address the requested cease and desist order.

A preponderance of the evidence demonstrates that Hapag-Lloyd, A.G. failed to follow the requirements of the demurrage and detention rule, failed to revise its policies or train its staff, and continued to impose detention when the incentive principle was not met. Therefore, there is a reasonable likelihood that Hapag-Lloyd, A.G. would continue to violate the Shipping Act without a cease and desist order. Accordingly, a cease and desist order is entered, prohibiting Hapag-Lloyd, A.G. or its agents, absent extenuating circumstances, from imposing demurrage or detention charges when there are insufficient appointments available, including the fourteen days identified above, and prohibiting Hapag-Lloyd, A.G. and its agents from violating the Shipping Act or Commission regulations, including the demurrage and detention rule.

IV. ORDER

Upon consideration of the record herein, the arguments of the parties, the findings and conclusions set forth above, and the determination that Hapag-Lloyd, A.G. violated the Shipping Act, it is hereby

ORDERED that Hapag-Lloyd (America) LLC be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that Hapag-Lloyd, A.G. is liable to the United States for the sum of $822,220 as a civil penalty for fourteen willful and knowing violations of section 41102(c) of the Shipping Act of 1984. It is

FURTHER ORDERED that Hapag-Lloyd, A.G. and its agents cease and desist, absent extenuating circumstances, from imposing demurrage or detention when there are insufficient appointments available, including the fourteen days identified above. It is

FURTHER ORDERED that Hapag-Lloyd, A.G. and its agents cease and desist from violating the Shipping Act or Commission regulations, including the demurrage and detention rule. It is

FURTHER ORDERED that this claim be **DISCONTINUED.**

Erin M. Wirth
Chief Administrative Law Judge