FEDERAL MARITIME COMMISSION

HANGZHOU QIANWANG DRESS CO., LTD., *Complainant*, v. RDD FREIGHT INTERNATIONAL INC., *Respondent.*	Docket No. 17-02

Served: September 1, 2020

BY THE COMMISSION: Michael A. KHOURI, *Chairman*, Rebecca F. DYE, Louis E. SOLA, and Carl W. BENTZEL, *Commissioners*; Daniel B. MAFFEI, *Commissioner*, dissenting.

Order Affirming Initial Decision on Remand

On November 7, 2019, the Administrative Law Judge (ALJ) issued an Initial Decision on Remand (I.D.R.) dismissing Complainant's complaint, dismissing Respondent's counterclaim, and discontinuing this proceeding. The Commission determined to review this decision, and, for the reasons set forth below, affirms the Initial Decision on Remand.

I. BACKGROUND

A. Factual Background

This case involves a dispute between a garment manufacturer, an ocean transportation intermediary, and a consignee. Complainant Hangzhou Qianwang Dress Co. Ltd. manufactures apparel, such as hats and gloves, and sells it to retailers in the United States. I.D.R. at 8. In May 2016, Complainant entered into an agreement with Respondent RDD Freight International, Inc., under which Respondent would transport Complainant's apparel from China to New York. Complainant's Prop. Finding of Fact (CFF) at 2; I.D.R. at 8. Respondent is a non-vessel-operating common carrier (NVOCC) and ocean freight forwarder licensed by the Commission. I.D.R. at 8. For the three shipments at issue in this case, the purchaser of the apparel and consignee of the shipments was SWAK Kids, Inc. I.D.R. at 8; CFF at 3.[1]

As to the first shipment, the invoice is dated August 22, 2016, the bill of lading is dated August 25, 2016, and the value of the apparel is listed as $57,273. I.D.R. at 8, 9. As to the second shipment, the invoice is dated August 28, 2016, the bill of lading is dated August 31, 2016, and the value of the apparel is listed as $54,137. *Id.* at 9.[2] As to the third shipment, the invoice is dated February 13, 2016, the bill of lading is dated September 15, 2016, and the value of the apparel is listed as $22,797. *Id.*

It appears that the shipments arrived in New York in September and October 2016. Complainant's Remand Br. at 1

[1] According to Complainant, there were several intermediaries between it and the consignee: Complainant – Zhejiang Handsome International Logistics Co. – Eumex Line Ningbo Limited – Respondent – SWAK Kids, Inc. Complainant's Appendix at 21. Due to the nature of the claims, this order focuses on the relationships between Complainant, Respondent, and SWAK Kids.

[2] The ALJ noted that an email listed the value of this apparel as $53,338. I.D.R. at 9.

(noting that three containers "were released three separate times in the month of September and October 2016"). Respondent released the shipments to SWAK Kids without receiving the original bills of lading or permission from Complainant. I.D.R. at 9; CFF at 3; Resp. Prop. Finding of Fact (RFF) at 1-2. At the time of release, SWAK Kids had not yet paid Complainant for the apparel, and Complainant would not have authorized release of the apparel until SWAK Kids paid for it. CFF at 3.

According to Respondent, it mistakenly released the shipments due to assurances from SWAK Kids that it had contacted Complainant, with whom it had a long relationship. Respondent also claimed that SWAK Kids urged Respondent to release the shipments to avoid incurring demurrage:

> Above Cargo was released because Victor of S.W.A.K. Indicated he had spoken with Shipper regarding payment. Victor also mentioned that he had taken care of payment with shipper and has known them for over 15 years and tricked me into thinking and believed that he was trust worthy base on previous shipment never missed payment to us, and he confirmed it will be no problem in releasing cargo. I also threatened force over the phone from him by shouted and yelled to get his cargo released from terminal so they wouldn't have to pay approximately $450 per day in demurrage charges. I released a container on three different occasions based on above. Victor created the problem with his words, and lies that he did contacted and clear with shipper. When I mentioned victor over the phone to clear with his shipper he shout back to me that (this is not your problem just released the cargo because I sent you money already) that's the reason why I released cargo to him. And later I found out he did not get the telex released because he failed to make the payment to shipper.

I.D.R. at 10-11 (quoting Respondent's Appendix. at 16); *see also* RFF at 1-2 (asserting that Respondent was defrauded and misled by SWAK Kids into releasing the shipments).

After learning that the containers should not have been released, Respondent attempted to work with SWAK Kids to ensure that it paid Complainant for the apparel. I.D.R. at 10. Respondent invited Complainant to file a lawsuit against it, with the understanding that Respondent would then hale SWAK Kids into court and make it pay. *Id.* ("We told him we did not mind to let him file the law suit against us and then we can put the consignee into the court as the defendant as well . . .") (quoting Complainant's Appendix at 18). SWAK Kids eventually paid $10,000 for the apparel in the three shipments, leaving an outstanding balance of $123,408. *Id.* at 11.

B. Procedural History

On February 17, 2017, Complainant filed a complaint alleging that Respondent violated 46 U.S.C. § 41102(c). Complainant alleged that it sustained damages of $134,207.70, and it also sought a cease-and-desist order. Respondent denied the allegations and counterclaimed, alleging that Complainant conspired with SWAK Kids to defraud Respondent by failing to alert Respondent to the problems with SWAK Kids and by failing to pursue or collect monies for the apparel from SWAK Kids. Ans. ¶¶ 12-13.

On August 29, 2018, the ALJ issued an Initial Decision finding that Respondent violated § 41102(c) by releasing cargo without a bill of lading or Complainant's permission. *Hangzhou Qianwang Dress Co., Ltd. v. RDD Freight International Inc.*, 1 F.M.C.2d 158, 173 (ALJ 2018). The ALJ rejected Respondent's counterclaim and its argument that Complainant had waived its

claims via a settlement agreement. *Id.* at 169-170, 171-72.[3] The ALJ awarded Complainant reparations of $61,704 and ordered Respondent to cease and desist from releasing cargo without presentation of an original bill of lading. *Id.* at 173.

The Commission determined to review the decision, and, on March 7, 2019, the Commission vacated the Initial Decision and remanded the case for consideration in light of the Commission's revised interpretation of 46 U.S.C. § 41102(c). *Hangzhou Qianwang Dress Co. v. RDD Freight Int'l, Inc.*, 1 F.M.C.2d 262, 263 (FMC 2019). The ALJ subsequently ordered the parties to state whether additional discovery would be required, but neither party requested such discovery.[4] On November 7, 2019, the ALJ issued the Initial Decision on Remand and dismissed the complaint and counterclaim. No exceptions were filed, and the Commission determined to review the decision.

II. DISCUSSION

In the Initial Decision on Remand, the ALJ found that Complainant failed to establish that Respondent's conduct occurred on a normal, customary, and continuous basis for purposes of 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.4. The ALJ also found that

[3] While the Commission case was proceeding, Complainant and intermediary Zhejiang Handsome International Logistics Co. Ltd. filed lawsuits against each other in Ningbo Maritime Court in China. Complainant's claims there, like its Shipping Act claims, resulted from Respondent's release of shipments without the original bills of lading. *See* CFF at 3; Respondent's Appendix Ex. 7; Complainant's Appendix at 22. The cases settled in May 2018 via a settlement agreement that listed Complainant, Respondent, and Zhejiang as parties. I.D.R. at 11; Respondent's Appendix Ex. 7. Because Complainant has not established a § 41102(c) violation, the Commission need not address whether Complainant's claims are barred by the settlement agreement.

[4] The Commission's rules allow parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" using tools such as depositions, interrogatories, document requests, and requests for admission. 46 C.F.R. §§ 502.141(e), 502.143, 502.145, 502.146, 502.147. A party may use subpoenas to obtain evidence from nonparties. 46 C.F.R. § 502.131.

Respondent's counterclaim did not make out a Shipping Act violation. The Commission agrees.

A. Standard of Review and Burden of Proof

Under 46 C.F.R § 502.227(a)(6), the Commission has the same powers on review of an initial decision that it would have in making the initial decision. The Commission thus reviews the Initial Decision on Remand *de novo*.[5] The Complainant has the burden of proof on its claims. 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); 46 C.F.R § 502.203; *Exclusive Tug Franchises – Marine Terminal Operators Serving the Lower Mississippi River*, 29 S.R.R. 718, 719 (ALJ 2001) ("The Commission's rule, consistent with the Administrative Procedure Act (APA), provides quite clearly that 'the burden of proof shall be on the proponent of the rule or order.'") (citation omitted). Respondent bears the burden of establishing its counterclaim. *Maher Terminals, LLC v. The Port Authority of New York and New Jersey*, 33 S.R.R. 821, 855 (FMC 2014).

B. Complainant's § 41102(c) Claim

Section 41102(c) of Title 46 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." To establish a claim for reparations under § 41102(c), a complainant must prove that:

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

[5] The ALJ made 26 findings of fact in the I.D.R. These facts are supported by the record, and the Commission adopts them.

> (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; *see also* Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478 (Dec. 17, 2018); Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367 (Sept. 7, 2018).

The focus of the inquiry on remand was whether Respondent's conduct occurred on a normal, customary, and continuous basis. *Hangzhou*, 1 F.M.C.2d at 262. Complainant contended that releasing three shipments that were transported on three different vessels on three separate occasions without the original bills of lading or its permission was sufficient to satisfy the normal, customary, and continuous element. Complainant's Remand Br. at 1 ("The fact that they released three of our shipments on different dates from different vessels without our knowledge should speak for itself."); *see also id.* ("They were not released together as a group which would indicate 1 action. They were released separately, 3 separate times.").

The ALJ on remand was not persuaded. I.D.R. at 14-15.[6] The ALJ reasoned that:

> As the entity who filed this complaint, Hangzhou Qianwang has the burden to establish that the unjust and unreasonable acts in question occurred on a normal, customary, and continuous basis and thus was a "regulation or practice" by RDD Freight. However, the record does not support a finding that RDD "releases freight without original bills of ladings on a regular basis," as alleged by Hangzhou Qianwang. The evidence shows that Hangzhou Qianwang entered into a contract with RDD Freight calling for RDD Freight to transport cargo to an identified consignee in three separate shipments and that RDD Freight unjustly and unreasonably delivered the cargo to that consignee without obtaining the original bills of lading for the cargo or Hangzhou Qianwang's permission to do so. As such, the evidence solely demonstrates unjust and unreasonable actions by RDD Freight with regard to the delivery of the cargo in these three shipments, not unjust and unreasonable acts on other occasions involving different transportation agreements, shippers, or consignees. Thus, the evidence of unjust and unreasonable acts by RDD does not rise to a level constituting a "regulation and practice" as described by the Commission.

Id.

The ALJ also pointed out that Complainant's speculation that Respondent might have acted similarly regarding "other clients past and present" was insufficient to prove normal, customary, and

[6] Although the ALJ determined that Complainant had not established "normal, customary, and continuous" conduct, the ALJ found that Complainant had proved the other four elements of a § 41102(c) claim for reparations. I.D.R. at 13-17. The Commission affirms the findings on these elements.

continuous conduct. *Id.* The ALJ noted that there was "no evidence of other instances in which cargo was released without the original bill of lading or consent of the shipper." *Id*. Similarly, the ALJ found, there was "no evidence that the practice continued once RDD Freight was alerted to the problem." *Id.* The ALJ ultimately concluded that Complainant had "not established that there was a practice as opposed to an incident limited to these particular shipments between this shipper and this consignee." *Id.*

The ALJ correctly found that the conduct here did not satisfy the "normal, customary, and continuous" element of § 41102(c). Complainant demonstrated that over the course of two months, Respondent released three of Complainant's shipments to the same consignee without obtaining the original bill of lading or Complainant's consent. The conduct occurred over two months (September and October 2016), with respect to three shipments, under one contract, and involved one shipper and one consignee.

The evidence does not establish that it was "normal" for Respondent to release cargo without the original bill of lading or Complainant's consent. Rather, Respondent's employee was induced into releasing the shipments by an employee of SWAK Kids. I.D.R. at 10. Although there is no intent requirement for § 41102(c), *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 281 (1968) ("[T]he question of reasonableness under § 17 does not depend upon unlawful or discriminatory intent."), that Respondent was apparently misled is relevant to whether its conduct was "normal."

Additionally, releasing three shipments of one shipper to one consignee over two months does not appear to be "customary" or "continuous" conduct, at least as those words are typically understood. Nor is there evidence that Respondent's conduct was "often repeated," "systematic," "uniform," and "habitual." *See* Final Rule, 83 Fed. Reg. at 64479. The absence of evidence that Respondent unreasonably released the shipments of other shippers is also significant. *See* 83 Fed. Reg. at 64479 (noting that the

Commission's interpretation of § 41102(c) in the Final Rule "returns the Commission's focus and priorities to the activities of maritime regulated entities that negatively affect the broader shipping public"); *Whitam v. Chicago, R.I. & P.R. Co.*, 66 F. Supp. 1014, 1017 (N.D. Tex. 1946) (finding significant, in interpreting the term "practice," that plaintiff alleged "an individual matter between himself and the defendants");[7] *see also id.* ("As far as plaintiff's pleadings go, no other shipper was mentioned or involved.").[8]

Commission precedent also indicates that the conduct here falls short of violating § 41102(c). In interpreting § 41102(c), the Commission looks to several pre-2010 cases for guidance. 83 Fed. Reg. at 64478-79; 83 Fed. Reg. at 45370 ("In the future, the Commission intends to follow the reasoning in *Intercoastal Investigation*, *Altieri*, *Stockton Elevators*, *European Trade Specialists*, *Deringer*, and *Kamara* which offer precedent as to what properly applies the full meaning and purpose of 'establish, observe, and enforce just and reasonable regulations and practices' under the Shipping Act and a violation of § 41102(c).").

Investigation of Certain Practices of Stockton Elevators, 8 F.M.C. 187 (Examiner 1964) aff'd 8 F.M.C. 181 (FMC 1964) ("*Stockton Elevators*"), is particularly relevant. In that case, Stockton Elevators, a grain elevator that operated terminal facilities, in one instance charged a customer wharfage at less than the tariff rate. 8 F.M.C. at 193. Additionally, with respect to five shipments in the spring and fall of 1961, Stockton Elevators charged the same customer the wharfage as set forth in the tariff but subsequently paid the customer an "allowance," effectively defraying the wharfage. *Id.* at 194-196. This conduct occurred in several months in the spring and fall of 1961, and all the shipments were transported in different voyages. *Id.* at 202.

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[7] The Commission cited *Whitam* with approval in the interpretive rule on § 41102(c). 83 Fed. Reg. 64479 n. 10.

[8] The *Whitam* court also noted that the plaintiff did not allege a "practice" even between himself and the defendants. 66 F. Supp. at 1017.

The Commission not only found that this conduct was not unjust or unreasonable, but it also held that Stockton Elevators had not engaged in a "practice" within the meaning of section 17 of the Shipping Act of 1916, the predecessor of § 41102(c).[9] *Id.* at 200-01 ("The essence of a practice is uniformity. It is something habitually performed and it implies continuity . . . the usual course of conduct."). Rather, these six total instances amounted, in the Commission's view, to an "occasional transaction." *Id.* at 201.

Given that six instances of alleged unreasonable conduct occurring over several months was not uniform or continuous enough to make out a violation in *Stockton Elevators*, it follows that Respondent's conduct, which occurred less frequently and within a shorter time frame, does not either. As the ALJ noted, there is no evidence that Respondent released the containers of other shippers without original bills of lading. And there is no evidence that Respondent continued this conduct once Complainant alerted it to the problem. I.D.R. at 15. Consequently, Complaint has not established that Respondent violated 46 U.S.C. § 41102(c).

As the ALJ noted, 46 C.F.R. § 545.4 describes the elements required to prove "a successful case for reparations" under § 41102(c), but it is silent regarding cease-and-desist relief. I.D.R. at 18. To clarify, regardless of the relief sought, for a regulated entity to have violated § 41102(c), it must have engaged in unjust or unreasonable conduct related to or connected with receiving, handling, storing, or delivering property on a normal, customary, and continuous basis. 83 Fed. Reg. at 64478. In other words, a complainant must establish elements (a)-(d) of 46 C.F.R. § 545.4 to prove a § 41102(c) violation. To obtain reparations, a complainant must also prove that the practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.4(e). Because Complainant failed to establish the "normal, customary, and continuous" element,

[9] Section 41102(c) derives from the second paragraph of section 17 of the Shipping Act of 1916. *See* 83 Fed Reg. at 45368.

it has not proved a violation and thus is not entitled to a cease-and-desist order or reparations.[10]

C. Respondent's Counterclaim

In its counterclaim, Respondent alleged that "Complainant has conspired with its counterparts in a scheme to defraud the Respondent out of monies bonded with the FMC." Answer ¶ 12; Respondent's Br. at 2 ("RDD has counterclaimed that the Complainant had conspired with the said consignee to make RDD pay out of its surety bonds."). As evidence of "collusion," Respondent noted that "Complainant never tried to collect the said sum of money from the Consignee SWAK Kids, nor to even contact them to collect the same." Respondent's Br. at 2. The ALJ dismissed the counterclaim in both the Initial Decision and the Initial Decision on Remand. *Hangzhou*, 1 F.M.C.2d at 169-170; I.D.R. at 18-20.

The ALJ did not err in dismissing the counterclaim. Under 46 C.F.R. § 502.62(b)(4), a counterclaim "must allege and be limited to violations of the Shipping Act." *Cf. Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc.*, Docket No. 09-01, 2011 FMC LEXIS 12, at *33-*34 (FMC Aug. 1, 2011) (holding that the Commission lacked authority to adjudicate crossclaims that did not allege violations of the Shipping Act). Respondent does not allege a Shipping Act violation. Fraud, collusion, and conspiracy claims that are not linked to the Act or a Commission regulation are not within the Commission's purview.

III. CONCLUSION

For the reasons set forth above, the Commission affirms the Initial Decision on Remand.

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[10] Further, there is no evidence that Respondent is continuing to release cargo without obtaining the original bill of lading, making a cease-and-desist order inappropriate. *See* I.D.R. at 18; *In re Vehicle Carrier Servs.*, 1 F.M.C.2d 440, 466 (FMC 2019) (noting that cease-and-desist relief typically requires a showing that unlawful conduct is ongoing or likely to resume).

THEREFORE, IT IS ORDERED that Complainant's complaint be **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that Respondent's counterclaim be **DISMISSED WITH PREJUDICE**.

Finally, **IT IS FURTHER ORDERED** that this proceeding be **DISCONTINUED**.

By the Commission.

Rachel E. Dickon
Secretary

Commissioner MAFFEI, Dissenting:

I agree with the outcome of the Commission's majority opinion, but I follow a different reasoning to reach that outcome. The case should be dismissed with prejudice and discontinued, but not for a failure to state a claim under § 41102(c). The settlement agreement reached by the parties provides a more compelling reason to dismiss this case.

I. Settlement Agreement

During the pendency of this case, the Complainant initiated another case involving these shipments in China which was disposed of through a jointly negotiated settlement that purported to resolve all disputes between Complainant and Respondent over the shipments, but did not specifically mention the Federal Maritime Commission proceeding. By delegating its treatment of the settlement agreement reached by the parties to a footnote, the

majority overlooks what should have been the determinative issue in this case.

The ALJ considered whether the settlement agreement should apply in this proceeding, barring the Complainant from continuing to pursue the case against the Respondent. In both the Initial Decision, and the Initial Decision on Remand, she determined that because the agreement had not been reviewed and approved by the Commission, it was not applicable and did not resolve the case. However, in the Initial Decision, she offset the reparations award by the amount of the Chinese settlement, to avoid resulting in "double damages." 1 F.M.C.2d 158, 172 (ALJ 2018). If there was sufficient evidence to consider the award as a factor when calculating damages, it seems that it should be sufficient to consider it to resolve the case.

The situation is no different than if litigants in federal court settled their claims, included a general release in the settlement agreement, and filed the settlement agreement with the federal court such that the federal court retained jurisdiction to enforce the settlement agreement. In *Baltic Auto Shipping, Inc. v. Hitrinov*, Docket No. 14-15, 2015 FMC LEXIS 26 (ALJ Sept. 15, 2015), the Commission allowed such a settlement to be raised as a defense. There, the complainant filed a complaint in federal district court in New Jersey alleging violation of the Shipping Act and other causes of action. Id. at *4-*6, *9-*17. The case settled shortly thereafter. Id. at *17-*19. The settlement agreement contained a general release and provided that the federal court would retain jurisdiction over it. Id. at *68-*69. In a later Shipping Act proceeding, the ALJ found that by signing the settlement agreement, the complainant released or waived its claim for reparations under the Shipping Act. Id. at *110, *116-*118.

There appears no reason to treat settlement agreements that settle foreign disputes and are filed with a foreign court any differently than their federal court equivalent for purposes of

determining whether a complainant has released or waived its claims via the settlement.

Typically, when parties settle, they move jointly to dismiss the Shipping Act proceeding before the Commission and submit their settlement agreement for approval; and in fact, the Commission's regulations require Commission approval when a complainant moves to dismiss a case based on a settlement agreement. 46 C.F.R. § 502.72(a)(3). The presiding officer considers "whether the settlement appears to violate any law or policy" and ensures it is "free of fraud, duress, undue influence, mistake, or other defects which might make it unapprovable." *Id.*

The case law and regulations do not address what happens when the parties do not jointly seek dismissal of a case, but rather a respondent argues as a defense that a complainant has released its Shipping Act claims in a settlement that has not previously been submitted and approved by the Commission. Failure to submit a settlement for Commission approval does not necessarily render it invalid, unenforceable, or otherwise irrelevant as part of a release or waiver defense in Commission proceedings.

In cases where a respondent raises a release of claims as a defense, the appropriate approach is to first determine whether the settlement agreement or release applies to the complainant's Shipping Act claims. If it does not, the inquiry ends. If the settlement agreement or release covers Shipping Act claims, the Commission can then make the determination it would have made had the parties submitted the settlement under § 502.72: 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. It is true that the latter task is made more difficult when one party argues the settlement is not applicable, but it is not impossible.

In this case, the evidence indicates that the settlement agreement is applicable to the claims brought in the present case, and that it does not violate any law or policy and appears to be free

of fraud, duress, undue influence, mistake, or other defects. Accordingly, the Complainant has waived the Shipping Act claims raised in this case.

Failing to give effect to releases in settlement agreements when parties do not jointly submit the agreement for Commission review gives a complainant the incentive to settle, receive payment, and then renege on the agreement and continue pursuing Shipping Act claims. It is important that the Commission avoid this absurd result and make clear that settlement agreements can be raised as a defense in Commission proceedings. By delegating this issue to a footnote and not reaching the issue, the majority misses an important opportunity to clarify how the Commission will consider settlement agreements in this situation.

II. Interpretive Rule

Because the case can be resolved on the settlement agreement issue, the Commission should not reach the § 41102(c) issue. However, because the majority opinion centers on this issue, I must take this opportunity to address it.

My disagreement with the interpretive rule on unjust and unreasonable regulations and practices is well-documented (particularly in the concurrence I authored in *Gruenberg-Reisner v. Overseas Moving Specialists*, Docket No. 1947(I), 2017 FMC LEXIS 9 (FMC 2017). While I believe the Commission need not revisit the issue of the interpretation of § 41102(c) in this case, it does illustrate some of the practical concerns I have regarding the Commission's current interpretation.

Respondent released cargo without a proper bill of lading or Complainant's permission on three separate instances. These three separate instances could be evidence of unreasonable conduct that is occurring on a normal, customary, and continuous basis in violation of § 41102(c). However, that is not how the ALJ and the majority currently see it. This brings up several questions: If three

separate instances are not enough then how many will be? Is there a requirement (not fulfilled by Complainant in this case) that there be more than one shipment? If so, how many shipments and over how long a duration of time? Is there a requirement that the unreasonable conduct affect more than one of the respondent's customers? Is demonstrating two aggrieved parties enough or is that still not sufficient to show unreasonable conduct is occurring on a normal, customary, and continuous basis? If not two, three?

The point is that, in short order, the burden on a complainant of proving that unreasonable conduct is occurring on "a normal, customary, and continuous basis," becomes excessive. As noted by Complainant, and those in other Commission cases, engaging in discovery to prove a respondent mistreated other parties in a similar way may not be feasible and is often cost- prohibitive. Complainant noted in their remand brief that they have no access to Respondent's books and records to assist in proving the normal, customary, and continuous nature of Respondent's behavior or even to assist in formulating lines of inquiry to pursue through discovery. Similarly, in the recently dismissed small claims case brought by M/S Parsons Overseas, the complainant sought a voluntary dismissal because the expense of continuing to litigate the case in order to prove the unreasonable contact occurred on a normal, customary, and continuous basis was too onerous. *M/S Parsons Overseas v. Seven Seas Shipping USA, Inc.*, Docket No. 1960(I), Order Granting Voluntary Dismissal, slip op., at 2. (ALJ Feb. 26, 2020).

The interpretive rule indicates that the Commission's goal was to return its "focus and priorities to the activities of maritime regulated entities that negatively affect the broader shipping public." Final Rule: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 64478, 64479 (Dec. 17, 2018). I concur with this goal but, at the same time, I am concerned that the normal, customary, and continuous standard, as applied in the majority opinion, creates a substantial deterrent for parties to ever bring a claim under § 41102(c).

While my disagreement with the interpretive rule is well-known, I have voted with the majority when the interpretive rule is applied to a case in order to ensure consistent handling of cases so long as the interpretive rule remains in effect. The challenge in this case, as stated above, is that the interpretive rule gives insufficient guidance as what circumstances constitute an action performed on a "normal, customary, and continuous basis." By determining this case on the basis of whether a claim was stated under § 41102(c), the majority declares that three instances is not enough to be "normal, customary, and continuous basis" but does nothing to clarify what would meet that standard or how a Complainant would ever move forward in discovery to obtain evidence of more instances if they did exist. In my view, this order does not merely apply the interpretive rule, it further narrows the definition of "normal, customary, and continuous basis" in a manner I cannot support and in a manner unnecessary for determining this case.

I urge the Commission to consider changing or clarifying the interpretive rule on § 41102(c) in the near future. In any event, Congress should also consider revising the awkward language contained in § 41102(c) that has led to such confusion about how to interpret it.