FEDERAL MARITIME COMMISSION

CMI DISTRIBUTION, INC., *Complainant*, v. SERVICE BY AIR, INC., RADIANT CUSTOMS SERVICES INC. (FORMERLY KNOWN AS SBA CONSOLIDATORS, INC.), AND LAS FREIGHT SYSTEMS LTD., *Respondents.*	Docket No. 17-05

Served: July 26, 2021

BY THE COMMISSION: Daniel B. MAFFEI, *Chairman*, Rebecca F. DYE, Michael A. KHOURI, Louis E. SOLA, Carl W. BENTZEL, *Commissioners*. *Chairman* MAFFEI filed a concurring opinion.

Order Affirming-In-Part and Reversing-In-Part Initial Decision

This case is before the Commission on the parties' exceptions to the Administrative Law Judge's (ALJ) Initial Decision finding that Respondent Service by Air, Inc. (SBA), violated 46 U.S.C. §§ 40501(a), 40901(a), 41102(c), and 41104(a)(2)(A). The

ALJ awarded Complainant reparations of $126,185 for the § 41104(a)(2)(A) violation and directed SBA to cease and desist acting as an unlicensed NVOCC without a published tariff. The ALJ dismissed the claims against Respondents Radiant Customs Services, Inc. (Radiant), and LAS Freight Systems Ltd. (LAS Freight).

For the reasons set forth below, the Commission affirms-in-part and reverses-in-part the Initial Decision. The Commission affirms the findings that SBA violated 46 U.S.C. §§ 40501(a), 40901(a), and 41104(a)(2)(A) and affirms the dismissal of the claims against Radiant and LAS Freight. The Commission declines to adopt, however, the Initial Decision with respect to 46 U.S.C. § 41102(c) because the evidentiary record is unclear on that issue and it has no bearing on Complainant's relief. Regarding that relief, the Commission reverses the Initial Decision as to reparations and instead awards Complainant reparations of $112,902, plus interest of $7181.59, totaling $120,083.59. Finally, the Commission reverses the ALJ's issuance of a cease-and-desist order.

I. BACKGROUND

A. Factual Background

Complainant CMI Distribution, Inc. (CMI) imports plastic packaging materials from China and sells them on the United States wholesale market and has its principal place of business in Wheeling, Illinois. Initial Decision (I.D.) at 29-30.[1] Respondent SBA is certified by the Transportation Security Administration to operate as an indirect air carrier but is not licensed by the Commission as a non-vessel operating common carrier (NVOCC) and does not have a published tariff for ocean freight rates. *Id.* at 30. During the time period relevant to CMI's claims, SBA had a wholly owned subsidiary called SBA Consolidators that was a licensed

[1] The facts recited are based on the ALJ's findings, which the Commission adopts excepted as otherwise noted regarding reparations.

NVOCC. *Id.* In 2017, SBA Consolidators' NVOCC license was transferred to Respondent Radiant. *Id.* Radiant is owned by the same parent company as SBA but operates as a separate entity. *Id.* Respondent LAS Freight is a Taiwanese company and is registered with the Commission as a foreign NVOCC. *Id.* at 30-31.

In 2013 and 2014, CMI used UTi, United States, Inc. (UTi), a licensed NVOCC, to transport goods from China to the United States. *Id.* at 31; CMI's Opening Br. in Supp. of Claims against SBA (CMI Br.) at Ex. A ¶ 6 (Decl. of Maria T. Vega) (Apr. 6, 2018). UTi shipped the goods under a negotiated rate arrangement (NRA) with CMI that specified rates for transporting by water plastic deli bags, paper towels, and rubber gloves from China to U.S. destinations. I.D. at 31; CMI's Notice of Filing (CMI Notice) at Ex. 2 (June 5, 2018).

Beginning in 2014, CMI and SBA engaged in discussions about having SBA transport goods from China to the United States for CMI. I.D. at 30. According to CMI's Financial Controller Maria T. Vega, "SBA represented that it could provide the same type of services that UTi had been providing to CMI." CMI Br. at Ex. A ¶ 9; *see also id.* at Ex. B at 67-68 (Bryan Tincher Dep.);[2] I.D. at 20. Emails between CMI and SBA reflect discussions about ocean freight rates taking place in August 2014. CMI Br. at Ex. A-1.[3] Subsequently, CMI provided SBA with UTi's rates and said that SBA needed to "match or beat" them. *Id.* After reviewing UTi's

[2] The testimony of Mr. Tincher, SBA's International Manager, is equivocal on this point: "Q: Essentially, though, you were saying 'Listen, we provide the same type of service as UTI, right,' right? A: Yes. Q. But that's not accurate is it? A. I wouldn't say that. Q. You provide the same service as UTI? A. I don't know what UTI did. So I can't answer that question. I don't know what exact services they were doing. I mean, there are similarities." CMI Br. at Ex. B at 67-68. Mr. Tincher testified, however, that he did not think it was necessary to make a distinction between SBA's services and UTI's services. *Id.*

[3] The Vega deposition can be found at RX 4-71 and the Jalowiecki declaration can be found at RX 113-15 as exhibits to the Decl. of Steven Block (Block Decl.) (May 2, 2018).

rates, SBA International Manager Bryan Tincher stated that, accounting for a recent GRI (general rate increase), he thought SBA would be competitive. *Id.*; *see also id.* at Ex. B (Tincher Dep. 15:5-19) During these discussions, Mr. Tincher described UTi's NRA as an "ocean tariff." *Id.* at Ex. A-1.

Mr. Tincher also provided CMI with what he described as SBA's "tariff." This document mirrored UTi's rate spreadsheet. CMI Notice at Ex. 2. SBA appears to have copied its rates into the UTi spreadsheet and imposed the SBA letterhead. CMI Br. at Ex. A-2. The document retained references to an "NRA" number, and the bottom of the document refers to UTi and the "Carrier's Rules Tariff" available on UTi's website. *Id.* It purported to be effective from August 27 to September 27, 2014, and the rates quoted in the document are for "Ocean Freight." *Id.*

Based in part on this information, CMI shipped with SBA through June 2015. I.D. at 33, 44-73; CMI Br. at Ex. A (Vega Decl. at ¶ 19). In October 2014, SBA sent CMI a document titled "CMI Packaging and Distribution FOB Tariff." I.D. at 33. This document contains a list of ports of origin, ports of discharge, and destinations, each with a freight rate based on different sizes of containers. *See id.*; CMI Br. at Ex. A-3. The "tariff" states that it does not include demurrage and detention, and that "all rates are subject to SBA Global Terms and Conditions." CMI Br. at Ex. A-3. SBA sent CMI a similar "FOB Tariff" in February 2015. *Id.*

For the shipments at issue, SBA engaged Respondent LAS Freight, a foreign registered NVOCC, to transport them from China to the United States. I.D. at 34. LAS Freight often issued bills of lading naming the Chinese supplier as the shipper and CMI as the consignee. *See, e.g.*, *id.* at 41, 47, 51.[4] LAS Freight would usually then engage with other NVOCCs. *Id.* at 34. These entities also issued bills of lading, with the same port of loading as the LAS

[4] In other instances, LAS Freight's bills of lading named CMI as the shipper and a third party as the consignee. *See, e.g., id.* at 43, 44, 45, 46.

Freight bills of lading, and naming LAS-SWEG Logistics as the shipper and SBA as the consignee and notify party. *See*, *e.g.*, *id.* at 41, 43, 46, 48; Joint App. at JA 191, 200. For inland segments of the route and drayage services, SBA contracted with Freight Tech Cartage, Inc. (Freight Tech) and other companies. I.D. at 34.

Once a vessel with a relevant shipment arrived, the NVOCC who issued the bill of lading naming SBA as the consignee would send SBA an "arrival notice/freight invoice." *E.g.*, I.D. at 17 (citing Joint App. at JA00146); *id.* at 40-41. The arrival notices/invoices, like the bills of lading, listed LAS-SWEG Logistics as the shipper and SBA as the consignee and notify party. *E.g.*, *id.* at 28, 40, 67. SBA would pay the NVOCC and then invoice CMI for ocean freight, usually for a higher amount than the NVOCC listed on its arrival notice/freight invoice. *See generally id.* at 40-73. Freight Tech and other drayage providers invoiced SBA directly for storage and other charges. *Id.* at 71. SBA would then collect these charges from CMI with a markup. *Id.* at 40-73.

For cargo to be released to CMI, CMI had to first pay its Chinese suppliers. These suppliers instructed LAS Freight, who in turn instructed SBA, not to release a shipment to CMI until payment was confirmed by telex release. *Id.* at 3-6, 34-35. Problems arose under this arrangement when CMI began experiencing cash-flow problems that delayed payments to its suppliers, which led to demurrage charges accruing when SBA withheld containers pending receipt of the supplier's telex release. *Id.* at 36. Later in its dealings with CMI, SBA withheld CMI's shipments until it received money it was allegedly owed for demurrage and related charges on past shipments. *Id.* at 26, 36.

B. Procedural History

CMI filed this action in May 2017 seeking reparations for Respondents' alleged Shipping Act violations in arranging transportation for its shipments from China to the United States. Compl. ¶¶ 32-38. CMI alleged that Respondents violated 46 U.S.C.

§ 40901 by acting as OTIs without a license, § 40501 by failing to maintain tariffs showing their rates, and § 41104(a)(2)(A) by charging rates that were not contained in a published tariff. CMI also alleged that Respondents violated 46 U.S.C. § 41102(c) by charging for storage and demurrage without notice or published tariffs, adding markups to demurrage assessed by third parties while representing that the amounts were purely pass-through charges, charging demurrage in situations where no demurrage was properly owed to the underlying third party, and failing to provide CMI with a variety of documents. *Id.* at ¶¶ 32-42.

Following motion practice in which the ALJ dismissed claims involving shipments outside the Commission's purview, the ALJ issued an Initial Decision on May 24, 2019, finding in CMI's favor with respect to 28 shipments. The ALJ ordered SBA to pay CMI reparations of $126,185 based on the § 41104(a)(2)(A) claim and "demurrage" imposed on a subset of the shipments and further ordered SBA to cease and desist acting as an NVOCC without a license or published tariff. The ALJ dismissed with prejudice the claims against Radiant and LAS Freight.[5]

Both SBA and CMI filed timely exceptions challenging the ALJ's Initial Decision. SBA argues that it is not an NVOCC subject to the Shipping Act, and that the ALJ's findings regarding reparations and cease and desist relief were erroneous. CMI asserts that it is entitled to an additional $121,815 in reparations but does not otherwise challenge the ALJ's findings.

II. DISCUSSION

A. Legal Standards

When the Commission reviews exceptions to an ALJ's Initial Decision, it has "all the powers which it would have in

[5] In a separate order issued the same day, the ALJ struck CMI's freight overpayment claim and certain documents as untimely.

making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore reviews the ALJ's findings de novo. *Id.*; *see also Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, FMC Docket No. 12-02, 2015 FMC LEXIS 43, *110-*11 (FMC Dec. 18, 2015). Complainants bear 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, *41 (FMC Dec. 17, 2014). Under the preponderance standard, Complainants must show that their allegations are more probable than not. *Crocus Investments, LLC v. Marine Transp. Logistics, Inc.*, FMC Docket No. 15-04, 2019 FMC LEXIS 44, at *10 (FMC July 16, 2019).

B. SBA Status as Common Carrier and NVOCC

SBA's liability depends on whether it is a regulated entity, in this case, a common carrier or NVOCC, the latter being a type of common carrier. *See* 46 U.S.C. §§ 40501, 40901, 41102(c), 41104. The analysis focuses on SBA's status with respect to the 28 shipments at issue. *See generally MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, FMC Docket No. 16-16, 2020 FMC LEXIS 216, *6 (FMC 2020) (whether § 41102(c) applies depends on whether the respondent was acting as a common carrier for particular cargo); *Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.*, FMC Docket No. 08-04, 2011 FMC LEXIS 9, *39-*40 (ALJ Mar. 9, 2011) (common carrier status depends on handling of particular shipments at issue).

1. SBA as Common Carrier

Common carriers are defined by three traits. They: (1) hold themselves out to the general public as providing transportation by water for passengers or cargo between the United States and a foreign country; (2) assume responsibility for transporting the passengers or cargo from the port or point of receipt to the port or point of destination; and (3) use, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a

United States port and a foreign port. 46 U.S.C. § 40102(7); 46 C.F.R. § 515.2(e); *see also Landstar Express Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 497 (D.C. Cir. 2009) ("[A] person or entity that provides NVOCC services falls within the ambit of [46 U.S.C. § 40901] only when it 'holds itself out to the general public to provide transportation' and 'assumes responsibility for the transportation'"). An NVOCC 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 an ocean common carrier." 46 U.S.C. § 40102(17).

The Commission's methodology for deciding common carrier status, given these criteria, considers the totality of circumstances and "their combined effect." *Worldwide Relocations —Possible Violations of the Shipping Act*, FMC Docket No. 06-01, 2012 FMC LEXIS 23, *14 (FMC Mar. 15, 2012) (quoting *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 65 (FMC 1965) (*Containerships*); *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, FMC Docket No. 96-05, 2001 FMC LEXIS 39, *134 (FMC June 1, 2001) (no single factor determines common carrier status). This fact-intensive inquiry looks "beyond documentary labels" and delves into respondent's conduct regarding shipments at issue, while considering that the respondent may have acted as a common carrier in handling some shipments, but not others. *Worldwide Relocations*, 2012 FMC LEXIS 23, *13 (citing *Containerships*, 9 F.M.C. at 66).

While the Commission's inquiry is fact-driven, it nevertheless relies on "reasonable evidentiary inferences" consistent with the "strong public policy interest in protecting consumers and the shipping public" and ensuring that shippers only entrust their cargo to registered NVOCCs. *Id.* at *2, *14, *23; *Anderson Int'l Transport and Owen Anderson—Possible Violations of Sections 8(A) and 19 of the Shipping Act of 1984*, FMC Docket No. 07-02, 2013 FMC LEXIS 19, *23-*24 (FMC June 25, 2013). In drawing inferences regarding common carrier status, the Commission has relied on Federal Rule of Evidence 406 which

provides that "[e]vidence of a person's habit or an organization's routine practice" is admissible "to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice." Fed. R. Evid. 406. Respondents can rebut these inferences with evidence of their actual conduct or status or other compelling facts. *Id.*

Here, the ALJ found that SBA operated as an NVOCC on the shipments at issue. I.D. at 13. On appeal, SBA argues that it was not a common carrier or NVOCC but rather an "ocean freight forwarder for inbound cargo," a type of entity that would be outside the scope of the prohibitions at issue. SBA asserts that it did not hold itself out as an NVOCC and did not assume responsibility for transportation in the manner of an NVOCC.[6] The record, however, supports the ALJ's determination that SBA was a common carrier within the meaning of 46 U.S.C. § 40102(7).

a. Holding Out

The first question in the common carrier analysis is whether SBA held "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." In finding that SBA did, the ALJ relied on evidence that: (i) SBA charged CMI ocean freight rates rather than fees that an agent or forwarder would use; and (ii) SBA established its freight rates in documents described as "tariffs." I.D. at 14-16. SBA argues that "its pricing was set, per CMI's direction, based on pricing UTi had earlier charged." SBA Exceptions to Initial Decision (SBA Exceptions) at 2, 18, 27 (July 9, 2019). SBA further asserts that neither CMI nor SBA understood that SBA was acting as an NVOCC. *Id.* at 1, 4, 10, 16, 17. SBA also argues that there is no evidence that SBA held itself out to anyone other than

[6] It is undisputed that the relevant shipments were transported by a vessel operating on the high seas between a port in China and a port in the United States, satisfying the third element of the common-carrier definition. I.D. at 13.

CMI to provide transportation and therefore it did not hold itself out to the general public. *Id.* at 4, 15, 20, 27.

SBA's arguments are unpersuasive. The record demonstrates that SBA held itself out to CMI to provide transportation by water of cargo between the United States and a foreign country for compensation. On three separate occasions, SBA provided CMI with its ocean freight rates in documents described as "tariffs." CMI Br. at Ex. A ¶¶ 11-19; *id.* at Exs. A1, A2, A3. In August and October 2014 and February 2015, SBA International Manager Bryan Tincher sent CMI SBA's ocean freight rates from departure points in China to U.S. destinations for containerized cargo of various sizes via emails with the subject line "FCL TARIFF" or "CMI Packaging and Distribution FOB Tariff." *Id.* Emails accompanying the tariffs that SBA sent in October 2014 and February 2015 include the disclaimer that the quoted rates do not include "demurrage and/or detention." Moreover, once shipments arrived in the United States, SBA invoiced CMI for "ocean freight" as well as charges such as import duties and detention. *See e.g.*, Joint App. at JA25. SBA's ocean freight rates were higher than the ocean freight rates that other NVOCCs charged SBA. I.D. at 15-16. Charging ocean freight is indicative of carrier status rather than forwarder or agent status. *Worldwide Relocations*, 2012 FMC LEXIS 23, at *25, *25 n.3 (holding that charging ocean freight is indicative of a carrier rather than an agent or ocean freight forwarder). CMI Br. at Ex. A ¶¶ 11-19 and Ex's A1, A-2, A-3. In other words, by providing CMI with freight rates, and charging CMI for ocean freight, SBA held itself out to CMI as *providing* international ocean transportation rather than acting as CMI's forwarder or agent to obtain such transportation.

SBA argues that it did not "establish" ocean freight rates because it was responding to a request from CMI to match or beat UTi's rates and "priced its services based on UTi's pricing." SBA Exceptions at 18. According to SBA, its "'markups' of NVOCC freight rates are not NVOCC activity. SBA's rates were set at pricing CMI itself directed." *Id.* Regardless of how SBA arrived at

its rates, however, the rates were freight rates set by SBA. That SBA was trying to match or beat the ocean freight rates of a licensed NVOCC further supports that it was holding itself out to provide international ocean transport as a carrier as opposed to an unregulated entity.

SBA also contends that the documents containing rates it sent to CMI in August 2014, October 2014, and February 2015 were not really "tariffs" in the sense meant in the Shipping Act. It further contends that neither CMI nor SBA understood that SBA was representing itself as an NVOCC. As evidence, SBA relies on the testimony of CMI's Financial Controller (Maria Vega) stating that she was unaware of the distinction between an NVOCC and an ocean freight forwarder, did not "get that detailed," and did not know whether CMI agreed to provide NVOCC services. SBA Exceptions at 10 and n. 21 (citing Vega Dep. at RX 11 and RX 27). SBA also relies on the declaration of CMI's former warehouse manager, Justin M. Jalowiecki, who also managed CMI's relationship with SBA. *See id.* at 4, 17. Mr. Jalowiecki averred that "CMI did not understand SBA to be [an NVOCC] and that he knew of "no instance in which SBA held itself out to CMI as an NVOCC." *Id.* at 17 (citing Jalowiecki Decl. ¶ 9). He also stated that he and Mr. Tincher at SBA used the phrase "tariff" to simply mean a price list of SBA services, not a formal NVOCC tariff. *Id.* at 4-5, 17-18 (citing Jalowiecki Decl. ¶ 11). In August 2014, Mr. Jalowiecki also asked SBA to provide SBA's proposed pricing on a table identical to that used by UTi. *Id.* (citing Jalowiecki Decl. at ¶ 12).

CMI's and SBA's beliefs about the legal ramifications of SBA's conduct are of limited relevance. The Commission determines whether a carrier was "holding out" its services based on the carrier's words and actions – not on the shippers' response or interpretation of those actions. *See In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries-Pet. for Declaratory Order* (Pet. for Declaratory Order), FMC Docket No. 06-08, 2008 FMC LEXIS 9, *40 (FMC Feb. 15, 2008); *Containerships*, 9 F.M.C. at 64. Ms.

Vega's lack of understanding of what an NVOCC is says nothing about whether SBA held itself out to provide international ocean transportation. And even if CMI's warehouse manager (Jalowiecki) and SBA's representative (Tincher) did not believe they were using "tariff" in a legal sense or trying to create an NRA by using UTi's rate schedule, SBA nonetheless quoted CMI ocean freight rates – SBA offered to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation.

SBA further maintains that CMI has not shown that SBA held itself out to the *general public* as providing ocean transportation services. SBA Exceptions at 20, 26-27. According to SBA, there is no evidence that it offered the services at issue here to anyone other than CMI. *Id.* at 26-27. There is no evidence, SBA argues, that "SBA's website, advertising materials, letterhead, standard forms, etc., suggest SBA offers or provides NVOCC or other ocean carrier services." *Id.* at 20.

Although it is true that there is no evidence that SBA marketed itself on its website, letterhead, etc. as an NVOCC, SBA's argument places undue emphasis on how broadly SBA marketed its ocean freight services, which is not the sole, or even primary criterion. *Containerships*, 9 F.M.C. at 63 ("But common carrier status is not lost by the carrier's failure to publish sailing schedules or advertise."). The Commission defines "holding out" as a willingness to accept cargo from whoever offers it subject to carrying capacity but does not require the carrier to broadcast that it will accept any commodity from all shippers. *Rose Int'l*, 2001 FMC LEXIS 39, *133-34 (FMC 2001); *Pet. for Declaratory Order*, 2008 FMC LEXIS 9, *32; *EuroUSA Shipping, Inc.--Possible Violations of Section 10 of the Shipping Act of 1984 and the Commission's Regulations*, FMC Docket No. 06-06, 2013 FMC LEXIS 44, *20 (FMC Sept. 10, 2013).

CMI is a member of the general public, so in that sense, SBA held itself out to the general public to provide international ocean

transportation of cargo. *Containerships*, 9 F.M.C. at 65 ("The public does not mean everybody all the time.") (quoting *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252 (1916)). Additionally, SBA's marketing of its services as a logistics provider and indirect air carrier demonstrates its willingness to accept cargo from the public at large in providing those services.[7] Moreover, SBA's Terms and Conditions, which were effective January 1, 2012, have a liability section for "ocean shipments." CMI's Reply Br. (CMI Reply Br.) at Ex. 1 Bates No. CM100151 (June 15, 2018). The Terms and Conditions state that "[i]f all or any part of the shipment tendered to [SBA] is carried by water over any part of said route," SBA's liability will be governed by the Carriage of Goods by Sea Act "and any other pertinent laws applicable to water carriers." *Id.* SBA's Terms and Conditions make clear to the public, then, that it might transport cargo by water, and when it does, it does so as a *carrier*.[8]

Further, it is undisputed that SBA successfully competed for CMI's business against UTi, a licensed non-vessel operating *common carrier*. At CMI's request, SBA listed its ocean freight rates on a UTi document for side-by-side comparison purposes. SBA Exceptions at 4, 17. CMI's Financial Controller believed that SBA essentially stepped into the shoes of UTi and was providing the same services. CMI Br. at Ex. A ¶¶ 9, 15-23; Block Decl. at RX 12 (Vega Dep. 30:2-4) ("Q: Okay, What services did UTi provide CMI? A: The same services we've gotten from, you know, SBA, where they would bring our product . . ."). In her mind, there was no material distinction between the two which is in fact exactly how SBA represented itself in making its sales pitch to CMI. CMI Br. at

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[7] *See* https://comm.sbaglobal.com/Default.aspx. The Commission may take official notice of information SBA publicizes on its corporate website under 46 C.F.R. § 502.226(a) which authorizes taking official notice for "such matters as might be judicially noticed by the courts."

[8] This is not to say that the reference to ocean shipments in SBA's Terms and Conditions would be sufficient on its own to prove that SBA held itself out within the meaning of § 40102(7). Rather, it tips the scales in that direction when considered with the evidence of SBA's conduct.

Ex. A ¶¶ 8-9, Exs. A1, A2. SBA Regional Manager Edward Zasada confirmed that SBA offered CMI "the same type of services that UTi had been providing" and superimposed its proposed ocean freight rates directly onto UTi's tariff displaying its China/U.S. routes so that CMI could easily compare both sets of rates. *Id.* at Ex. C (Zasada Dep.11:17-21). In sum, SBA affirmatively positioned itself as offering similar services as a licensed NVOCC and offered competitive ocean freight rates. Those actions signaled its willingness to arrange ocean transportation and demonstrate that it held itself out to the public as a common carrier. *See Worldwide Relocations*, 2012 FMC LEXIS 23, at *25.

Finally, SBA's argument, if accepted, would allow unlicensed NVOCCs to skirt statutory licensing requirements and Commission oversight so long as they do not advertise their activity widely. Similarly, 46 U.S.C. § 40501's requirement that common carriers publish tariffs would be ineffectual if the failure to publish a tariff is sufficient to take an entity outside the definition of common carrier. As a general matter, the Commission avoids interpretations of the Shipping Act that would hamper the Commission's ability to fulfill its statutory functions. *See Containerships*, 9 F.M.C. at 69 ("In order to effectuate the remedies intended by the enactment of a regulatory statute such as these [the Shipping Act and Intercoastal Act], it is necessary to allow flexible and liberal interpretation of the statute."); *id.* ("To decide that Containerships is not a common carrier would result in giving it an advantage enjoyed by none of its competitors"); *cf. Worldwide Relocations*, 2012 FMC LEXIS 23 at *23 ("When unlicensed entities enter into the transportation transaction, the consumer public is more justly served where a lawful permissive presumption is used to properly bring the more complete array of Commission remedies into play.").

b. Assumption of Responsibility

The second element of the common-carrier definition asks whether SBA "assume[d] responsibility for the transportation from

the port or point of receipt to the port or point of destination." 46 U.S.C. § 40102(7). The ALJ started with the shipping documents in the record, though noting that the Commission "looks beyond documentary labels." I.D. at 16 (quoting *Anderson Int'l*, 2013 FMC LEXIS at *45 n.7). The ALJ found that although the "documents showed ambiguity in the identification of the actual shippers," they nonetheless showed that SBA "was listed either as a shipper, consignee, notify party, the entity to be billed for the charges, or the entity to contact for their delivery. *Id.* at 16-17. The ALJ concluded that "ambiguous identification of party shippers in [the shipping] documents may lead to a finding of NVOCC status." *Id.* at 17 (quoting *Anderson Int'l*, 2013 FMC LEXIS at *28). The ALJ further relied on evidence that: (1) that SBA employees believed SBA assumed responsibility for delivery of CMI's cargo; (2) after engaging SBA, CMI ceased having control over the goods or their transportation; (3) CMI did not choose which steamship line would transport CMI's goods, had no contact with steamship lines, LAS Freight, or other downstream carriers, and looked solely to SBA for services; (4) SBA issued its own bills of lading to CMI along with separate invoices; and (5) SBA assumed responsibility for holding shipments until CMI paid for them. *Id.* at 17-19. The ALJ concluded that this "evidence thus amply demonstrates that [SBA] assumed responsibility for the transportation of the CMI shipments. *Id.* at 18.

SBA's primary argument on appeal is that it did not issue bills of lading to CMI; rather, the documents labeled "air waybill" that SBA supplied to CMI were not "functional" bills of lading but rather backup documentation it provided at CMI's request. SBA Exceptions at 1, 3, 10-15. SBA also contends that it did not assume responsibility "for transportation of cargo" in the manner of an NVOCC, but rather as part of an "agreement to coordinate transportation services." *Id.* at 2, 32-33. Further, SBA asserts that it never agreed to pay CMI's potential cargo claims and never paid any such claims, and that it "did not conceal the identify of actual carriers" or select the steamship line. *Id.* at 2, 5, 19, 20, 31-32.

Contrary to SBA's contentions, the ALJ did not err in finding that SBA assumed responsibility for transportation of CMI's cargo. As the ALJ found, Bryan Tincher, SBA's International Manager, testified that SBA assumed responsibility of the delivery of CMI's goods. CMI Br. at Ex. B (Tincher Dep. at 31, 33); *see also id.* at 33 ("[W]e would take responsibility then from the terminal to their door."). That SBA asserts that it never agreed to pay CMI cargo claims and did not pay any claims is relevant but does not change that the SBA employee who worked with CMI believed SBA took responsibility for transporting the cargo.

Moreover, as the ALJ pointed out, CMI did not have direct contact with NVOCCs, drayage companies, or other companies that transported or handled its cargo. I.D. at 35. SBA was CMI's sole conduit for information about its shipments and the release of its cargo. SBA did not share with CMI the details on the arrangements it made and CMI was not even aware of the fact that SBA did not engage the steamship lines directly but made those transportation arrangements through a foreign NVOCC (usually LAS Freight). CMI Br. at Ex. A (Vega Decl. ¶¶ 29-36). SBA also represented to CMI that it was dealing with or negotiating directly with steamship lines on matters like demurrage and returning containers. CMI Br. at Ex. A-6. Even when confronted with repeated requests from CMI for details on charges and information on the companies "actually providing the underlying services," SBA "consistently refused to provide accurate information and supporting documentation," and what documentation was provided was "varying and often incorrect," according to CMI's Financial Controller. CMI Br. at Ex. A (Vega Decl. ¶¶ 42-44).

SBA does not dispute that CMI dealt with SBA exclusively regarding transportation of the cargo. Rather, SBA asserts that it had no relationship with any VOCC or contact with any VOCC. SBA Exceptions at 2, 31-32. According to SBA's 30(b)(6) deponent, although SBA did not have direct contact with steamship lines,

> Many shippers, including CMI, specifically Maria, do not understand the transportation process and don't understand the terms that we use on that. So if we were talking to her about demurrage charges or something and I were to say "Well, the co-loader has sent an email to Brian saying we need to get that box back," or something like that, she would say "What? What's a co-loader?" She didn't understand all the different parties. So for simplicity she would say "You mean the steamship line?" And I went "Yeah, okay, the steamship line. People with the boats, they want their box back."

CMI Br. at Ex. C (Zasada Dep. at 25-26); *see also id.* at Ex. B (Tincher Dep. at 148-49) (testifying that he referred to communicating with steamship lines for simplicity rather than explaining the various agents and co-loaders in the transportation chain). And SBA further argues it did not conceal the identity of actual carriers, given that CMI has house bills of lading issued by Chinese NVOCCs.

That SBA itself might not have selected or communicated with VOCCs and that CMI might have at some point learned the identity of some NVOCCs in the chain is not particularly relevant. What is important is that CMI did not select any VOCCs, NVOCCs, or any other entity in the process. Rather CMI engaged SBA, who took care of everything. SBA's activities (such as quoting ocean freight rates to CMI, invoicing CMI ocean freight, and paying ocean freight to downstream carriers) weigh in favor of finding that SBA assumed responsibility for the cargo. *EuroUSA*, 2013 FMC LEXIS 44 at *33-*34.

Further, there is no dispute that SBA was responsible for releasing shipments to CMI, and that SBA refused to release certain shipments unless CMI paid SBA for other shipments. SBA enforced the supplier's requirement that cargo only be released after the supplier issued a telex release signifying that it had received

payment for that shipment. *See, e.g.*, I.D. at 44 (FF 13/5). SBA also exercised its authority over the release of the cargo on its own behalf as leverage to collect its fees for services related to that shipment or on occasion to past shipments. I.D. at 35-36 (FF 51-60). Drayage companies holding the shipments (generally Freight Tech) followed SBA's directions on whether the cargo could be released and what terms or preconditions had to be met first. *See, e.g.*, CMI Br. at Ex. A6 (email correspondence negotiating for release of CMI shipments). SBA claims that it did not assert a carrier lien against CMI cargo. Whether or not it exercised a carrier lien, SBA's undisputed ability to control cargo release vis-à-vis CMI is further evidence of its responsibility for the cargo.

The ALJ also did not err in relying on SBA bills of lading as additional evidence that SBA assumed responsibility for the cargo. The ALJ considered and relied in part on evidence that "Service by Air issued its own bills of lading to CMI for the shipments, along with separate invoices." I.D. at 17. SBA argues that it did not issue bills of lading, and that this fact is determinative on assumption of responsibility. According to SBA, the Commission should ignore the bills of lading it generated because they were not true bills of lading. Rather, long after the transportation of a shipment was completed, and in response to CMI's request for documentation supporting SBA's invoices, SBA supplied CMI with documents labeled "air waybills." SBA Exceptions at 1. According to SBA, because it is primarily an air carrier, its software generated the backup documentation in the form of air waybills. *Id.* at 3-4. SBA asserts that neither it nor CMI understood the bills of lading to be "functional" bills of lading. The air waybills were not used in customs documentation; they were not signed; they were marked "SBA's use only;" and they were not issued to Chinese suppliers as "functional" bills of lading would have been. *Id.* at 3-4, 10-10.

The problem for SBA is that while issuing bills of lading is strong evidence that an entity assumed responsibility for transporting cargo, the absence of bills of lading is not determinative of the issue. And the labels that SBA gave its documents do not

override its actions. *See Anderson Int'l*, 2013 FMC LEXIS at *21-22; *Worldwide Relocations*, 2012 FMC LEXIS 23, at *20-21 (an entity's conduct, not the labels it applied, determine NVOCC status). Further, even if the Commission were to accept SBA's argument that the air waybills it generated were not "real" bills of lading and not treated as such by CMI, and instead reflected information supporting SBA's invoices, the documents nonetheless are evidence that SBA assumed responsibility for CMI's cargo. Even if the air waybills were not "functional," they indicate that SBA considered itself a carrier vis-à-vis CMI. Among other things, the documents list SBA as the "issuing carrier's agent," list the Chinese supplier as the shipper, and CMI as the consignee. CMI Br. at Ex. A-4. Moreover, notwithstanding the air waybills, SBA's freight invoices are themselves evidence of assumption of responsibility. *EuroUSA*, 2013 FMC LEXIS *34 (invoicing entities for ocean freight charges and marking up charges incurred constitutes evidence of assuming responsibility for cargo).

Finally, SBA asserts that "[a]ssumption of liability has different meanings and nuances in difference circumstances" and that ocean freight forwarders "'assume responsibility' to certain extents for transportation services as well." SBA Exceptions at 32. According to SBA, "[w]hile circumstances in the parties' dialogue reflect an understanding that SBA would 'assume responsibility' for transportation services related to CMI's cargo, such 'responsibility' without specification that it extended to NVOCC liability does not create an NVOCC out of what the parties understood to be a mere freight agency relationship." *Id.* at 33.

But, as noted above, the SBA's conduct belies the notion that it was acting as CMI's agent. And as the ALJ correctly pointed out, "[a]mbiguous identification of party shippers in [the shipping] documents may lead to a finding of NVOCC status." I.D. at 17 (quoting *Anderson Int'l*, 2013 FMC LEXIS at *28). That is, ambiguity about what type of responsibility SBA was assuming makes it more likely, not less, that the Commission would consider it a common carrier. Although SBA complains that the shipping

documents in this case were issued by other entities and "[a]ny ambiguity in that documentation as to shippers and consignees is not SBA's responsibility," CMI dealt solely with SBA and had even less control over the documentation. Moreover, as a sophisticated logistics provider that wholly owned a licensed NVOCC when it provided services to CMI, SBA's complaint about not being responsible for ambiguous or confusing documentation is unpersuasive.

2. SBA as NVOCC

In addition to arguing that it is not a common carrier, SBA also asserts that it does not fall within the definition of NVOCC. The Shipping Act contemplates two types of common carriers: (1) "ocean common carriers," which are vessel-operating common carriers; and (2) "non-vessel operating common carriers," which are common carriers that do not operate the vessels by which the ocean transportation is provided and are shippers in their relationships with ocean common carriers. 46 U.S.C. § 40102(17), (18). SBA argues that it cannot be an NVOCC because it is not a shipper with respect to the ocean carriers that transported CMI's cargo. According to SBA, there is "[n]o bill of lading or other documentation [that] identifies SBA as a shipper of record." SBA Exceptions at 2, 3. SBA contends that "CMI easily could look to the VOCC bills of lading and/or bills of lading issued by NVOCC LAS Freight or the other Chinese NVOCCs to confirm this." *Id.* at 3. 11, 15-16.

The ALJ did not address this argument, but it misses the mark in any event. First, SBA is a common carrier that does not operate vessels. The only type of common carrier it could be under the Shipping is an NVOCC – nothing in the Act suggests the existence of a third type of common carrier that may operate free from the licensing requirements.

Second, SBA meets the "shipper" element of the NVOCC definition. The definition of "shipper" is broad, and includes not only the cargo owner, but also "the person to whom delivery is to be

made" and "a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract." 46 U.S.C. § 40102(23). Here, the shipping documents listed SBA "either as shipper, consignee, notify party, the entity to be billed for the charges, or the entity to contact for their delivery," roles that fall within the statutory definition of "shipper." I.D. at 16; *see also* Joint App. at JA1128, JA00200, JA00224 (NVOCC bills of lading naming SBA as consignee). Moreover, SBA employee Bryan Tincher testified that SBA "ultimately" paid charges assessed by steamship lines that were passed along to SBA. CMI Br. at Ex. B (Tincher Dep. at 45-46). And there is evidence in the record that SBA dealt directly with ocean common carriers in a shipper capacity. SBA received and paid invoices from "MSC/Mediterranean Shipping Co. (USA) for rework, drayage, storage, and logistics and management fees. Joint App. at JA210, JA381-82.

Further, SBA provides no support for the proposition that an entity must be in contractual privity with an ocean common carrier, or be named a shipper on an ocean common carrier master bill of lading, to be "a shipper in its relationship with an ocean common carrier" under § 40102(17). The Commission permits NVOCCs to act as shippers in relationship to other NVOCCs, who act as carriers, and the Commission has not suggested that the former (the NVOCC-shipper) is not an NVOCC because it does not have a direct contractual relationship with the ocean common carrier. *See, e.g.*, Final Rule: Non-Vessel Operating Common Carrier Service Arrangements, 70 Fed. Reg. 56577, 56579 (Sept. 28, 2005) ("[T]he Commission's regulations have recognized and provided for the sale of ocean transportation services by one NVOCC acting as carrier to another acting as shipper under tariff regulations.").

The Commission also prohibits an NVOCC from entering a negotiated service arrangement (NSA) with an NVOCC that has not met the Commission's bonding and tariff requirements. 46 C.F.R. § 531.6(c)(4). This regulation would not make sense if only entities in contractual privity with ocean common carriers (or appearing in

ocean common carrier bills of lading) qualify as NVOCCs. *See also* 46 C.F.R. § 520.11(c) (regulations addressing co-loading situations where NVOCCs establish shipper-carrier or carrier-carrier relationships with each other). In other words, being an NVOCC does not require that an entity be in privity of contract with an ocean common carrier. Rather, the statute requires that it be in a "shipper relationship" with one. And there is evidence that SBA's relationship with ocean common carriers was as a shipper, not as a carrier.

3. Carrier or Forwarder

In addition to finding that SBA was a common carrier, the ALJ found that SBA performed many of the NVOCC services listed in the Commission's regulations. *See* 46 C.F.R. § 515.2(k). The ALJ found that SBA purchased transportation services from common carriers and resold them to CMI, paid port-to-port multimodal transportation charges, entered affreightment agreements with underlying shippers, issued bills of lading and invoices, arranged for inland transportation and paid inland freight charges on through movements, and entered arrangements with the origin and destination agents regarding delivery of CMI shipments. I.D. at 18-19. SBA asserts that it performed none of these NVOCC services. SBA primarily argues that it did not purchase transportation services or pay multimodal or inland freight charges on its own account but did so as "CMI's disclosed agent." SBA Exceptions at 28-29. It also argues that it did not issue bills of lading or other shipping documents, did not enter affreightment agreements with underlying shippers, and did not enter arrangements with origin or destination agents. *Id.*

The ALJ's determination that SBA performed NVOCC services is supported by findings based on invoices, shipping documents, and emails that trace the transportation services SBA performed, purchased, or charged to CMI. I.D. at 40-73 (FF 3/1-FF 62/11). And the documents show that SBA provided NVOCC services for the shipments at issue. 46 C.F.R. § 515.2(k). Among

other things, SBA arranged and paid for inland transportation services from Freight Tech and other motor carriers, issued shipping documents (in the form of its air waybills and invoices), and collected ocean freight charges from CMI. The regulations do not say that an NVOCC must have done these activities "on its own account." SBA also does not cite evidence that it was acting as CMI's "disclosed agent." Additionally, SBA did enter an affreightment agreement with an underlying shipper – CMI.

Other specific activities and supporting documents are listed throughout the ALJ's findings and incorporated into the discussion on each of the NVOCC services that SBA performed in handling the shipments at issue. *See*, *e.g.*, I.D. at 41-48 (FF 3/3-3/4 (SBA paid Pan Star Express Corp. then billed CMI for the charges); FF 9/5-9/6 (SBA paid Weida Freight System then billed CMI); FF 9/9-9/10 (Freight Tech billed SBA for delivery, demurrage and other charges, and SBA then billed CMI); FF10/7-10/8 (Intermodal Cartage Co. billed SBA for round trip service, then SBA billed CMI for ocean freight, storage and import duty/tax); FF 13/4 (SBA paid Acme Freight Services Corp.); FF 16/4-16/7 (Acme Freight Services Corp. billed SBA (as consignee) for ocean freight which SBA then paid and subsequently billed CMI for ocean freight, import duty/tax and container demurrage); and FF 19/7-19-9 (Freight Tec billed SBA for demurrage, yard storage, and other charges and SBA then billed CMI for ocean freight and container demurrage).

Throughout its brief, SBA emphasizes that it did not appear as a shipper on an NVOCC or vessel-operating common carrier (VOCC) bill of lading. According to SBA, "[t]he clearest indication of whether SBA operated as an NVOCC would have been house bills of lading SBA would have issued to CMI's Chinese suppliers which would be the shippers of record in such shipments. SBA issued no such house bills of lading; CMI produced none; and none are in the record." SBA Exceptions at 2, *see also id.* at 7-8, 11, 15. SBA suggests that LAS Freight was "the documented NVOCC of the transportation at issue." *Id.* at 16.

SBA is partially correct. If it had issued house bills of lading to the Chinese suppliers, this would not be a close case. But the absence of such bills of lading does not mean it was not acting as an NVOCC. SBA assumes that one can *only* act as an NVOCC if it issues a house bill of lading to a shipper and appears as a shipper on bills of lading issued by another NVOCC or a VOCC.[9] That is, SBA suggests that it could only be an NVOCC if it is part of a clear chain of shipper-carrier relationships between the beneficial cargo owner (shipper) and NVOCCs and VOCCs, all evidenced by bills of lading.

That is certainly one way a shipment can move from China to the United States. But it is not the only way. NVOCCs can engaging in co-loading. This co-loading can take the form of a shipper-to-carrier relationship, in which case a house bill of lading would be generated, or it could take the form of a carrier-to-carrier relationship, in which case there would not necessarily be a neat chain of bills of lading. 46 C.F.R. § 520.11(c). And there is evidence that the transportation of CMI's containers involved co-loading. *See* CMI Br. at Ex. B (Tincher Dep. at 51 ("Well, we acted as CMI's agent. The co-loaders."); *id.* at 54 ("LAS Freight worked with the suppliers in China, and they arranged through co-loaders space with the lines."). The point is that the absence of a chain of bills of lading involving SBA might suggest that SBA was not an NVOCC, as SBA insists. But the absence of a chain of bills of lading is also consistent with unlicensed NVOCCs who engage in co-loading and other practices that do not involve an obvious shipper-carrier chain of relationships.

The record indicates that SBA was presented with an

[9] The parties did not identify any VOCC bills of lading in the record. Such master bills of lading would not, however, be particularly useful given that there were several intermediaries in the transportation chain between CMI and SBA and any ocean common carrier, including LAS Freight and intermediaries it engaged with. Moreover, an unlicensed NVOCC would be unlikely to appear on a VOCC bill of lading in any event; the Shipping Act prohibits common carriers from accepting cargo from NVOCCs who lack a tariff. 46 U.S.C. § 41104(a)(11).

opportunity to obtain CMI's business. Although it is primarily an indirect air carrier, it took that opportunity and engaged a foreign registered NVOCC (LAS Freight) to get CMI's goods into the United States. SBA either assumed it did not have to comply with Commission regulations applicable to NVOCCs or ignored them. Had SBA wanted to make clear its relationship with CMI it could have done so. *Cf. Worldwide Relocations*, 2012 FMC LEXIS 23 at *23 ("The dual NVOCC-OFF licensed entity has within its own power the ability to insulate itself from this concern by being clear in its shipping documents as to the status and relationship of all parties to the transportation transaction."). Instead, SBA employees compared SBA's ocean freight rates to that of a licensed NVOCC, referred to documents as "tariffs," informed CMI it was communicating with "steamship lines," and generated documents that had the appearance of bills of lading. This evidence establishes that SBA acted as an NVOCC.

C. Liability

After finding that SBA was an NVOCC, the ALJ determined that SBA violated 46 U.S.C. §§ 40501(a)(1), 40901(a), 41102(c), and 41104(a)(2)(A). The ALJ also dismissed the claims against Radiant and LAS Freight. I.D. at 28, 74. Except for the § 41102(c) claim, the Commission affirms the ALJ's liability and dismissal determinations. SBA raises little defense to the ALJ's liability findings, relying almost entirely on its argument that it is not an NVOCC and thus not subject to the statutory prohibitions. Neither party challenges the dismissal of CMI's claims against Radiant and LAS Freight, which are supported by the record.

1. Section 40901(a) Claim

Section § 40901(a) of Title 46 requires any person in the United States who advertises, holds itself out, as or acts as an NVOCC to obtain a license from the Commission. 46 U.S.C. § 40901(a); 46 C.F.R. § 515.3(a). The ALJ found that SBA violated § 40901(a) by operating as an NVOCC without a license. I.D. at 19.

The ALJ did not, however, award any reparations based on this violation. *Id.* Although SBA disputes that it is an NVOCC or that it provided the NVOCC services described in 46 C.F.R. § 515.2(k), as noted above, the ALJ correctly rejected those arguments. Moreover, it is undisputed that SBA lacks an OTI license. I.D. at 30. And SBA does not argue, and there is no evidence, that it is exempt from the licensing requirements because it was acting as the disclosed agent of an OTI. 46 U.S.C. § 40901(c); 46 C.F.R. § 515.4(b)(1). The Commission therefore affirms the ALJ's finding that SBA violated 46 U.S.C. § 40901(a) in handling the 28 shipments at issue.

2. Section 40501(a) Claim

Under 46 U.S.C. § 40501(a), a common carrier must "keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established." *See also* 46 C.F.R. pt. 520. The ALJ found that in handling CMI's shipments at issue, SBA operated as a common carrier without a published tariff in violation of § 40501(a). I.D. at 19-20. As with § 40901, the ALJ did not award reparations based on the § 40501(a) violation.

It is undisputed that SBA did not publish a tariff. At most, SBA claims that CMI agreed to pay demurrage and other charges imposed under the parties' oral contract and that CMI's concurrence absolves SBA of liability. But even if true, which CMI denies, an oral agreement would not exempt SBA from the § 40501(a) publication requirement.[10] Consequently, the Commission affirms the ALJ's finding that SBA violated 46 U.S.C. § 40501(a).

[10] SBA does not qualify for the NSA and NRA exemptions to the tariff publication requirement because it is not a licensed or registered NVOCC. *See* 46 C.F.R. § § 531.1, 532.3, 531.4, 532.1, 532.2(g), 532.4.

3. Section 41104(a) Claim

Section 41104(a)(2)(A) of Title 46 prohibits common carriers from "provid[ing] service in the liner trade that is not in accordance with the rates, charges . . . and practices contained in a tariff published or a service contract, . . . unless excepted or exempted." The ALJ explained that while SBA could have legally passed demurrage and detention charges imposed by downstream carriers along to CMI with no markup, it could not lawfully add its own charges for detention and demurrage because they were not set forth in a published tariff. I.D. at 20. SBA does not challenge the ALJ's determination that it violated § 41104(a)(2)(A), other than arguing that it was not an NVOCC.

The ALJ correctly found SBA liable under § 41104(a)(2)(A). None of the charges SBA imposed on CMI appeared in a published tariff. Also, SBA does not contend that it qualifies for an exception carved out by § 40501(a)(2) or the Commission's regulations under authority granted in 46 U.S.C. § 40103. And SBA is not eligible to use NSAs and NRAs. Moreover, the "tariffs" that SBA sent to CMI did not specify rates for detention or demurrage, and those "tariffs" were not published in any event. The Commission thus affirms the ALJ's finding that SBA provided service to CMI that was not in accordance with a published tariff in violation of § 41104(a)(2)(A).

The ALJ erred, however, by suggesting that only markups to pass-through charges need to appear in a published tariff. Section 40501(a) requires common carriers to publish all their rates and charges in a tariff, unless subject to an exception or exemption. Although changes in pass-through charges may take effect upon publication under the Commission's tariff regulations, the pass-through charges must still appear in a tariff. *See* 46 C.F.R. § 520.8(b)(4) (making effective upon publication "[c]hanges in charges for terminal services, canal tolls, additional charges, or other provisions not under the control of the common carriers or conferences, which merely acts as a collection agent for such

charges and the agency making such changes does so without notifying the tariff owner"). Similarly, NRAs must provide information about pass-through charges to shippers. 46 C.F.R. § 532.5(d)(2).

4. Section 41102(c) Claim

Under 46 U.S.C. § 41102(c), a common carrier "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." The ALJ found that SBA violated this provision by engaging in a "normal, customary, and continuous practice of refusing to deliver cargo on which all transportation charges had been paid [i]n order to coerce payment of charges due on cargo that had been delivered." I.D. at 26.[11] The ALJ did not, however, award reparations for this violation because CMI did not "clearly articulate any actual injury it suffered from section 41102(c) violations in addition to the overpayments of detention and demurrage resulting from the violations of" § 41104(a)(2)(A). I.D. at 26.[12]

The Commission declines to adopt the ALJ's § 41102(c) analysis because it is not clear whether the conduct at issue occurred on a normal, customary, and continuous basis as required by 46 C.F.R. § 545.4(b) and because this alleged violation has no bearing on Complainant's reparation award given the ALJ's unchallenged finding that CMI did not articulate injury for a § 41102(c) violation. Although the evidence suggests that SBA withheld and delayed some shipments to collect charges based on unrelated cargo, the record is unclear about how long each container was held, when

[11] The ALJ correctly rejected other § 41102(c) claims insofar as they related to conduct prohibited by other Shipping Act provisions, recognizing that § 41102(c) is not meant to be duplicative of other prohibitions. I.D. at 25.

[12] The ALJ appears to have erroneously cited § 40501(a) in this sentence. The only reparations the ALJ awarded were for SBA's violation of § 41104(a)(2)(A). I.D. at 20, 75.

each container was released, and what charges demanded by SBA were related to the withheld container and what charges were related to earlier shipments, all of which are relevant to whether SBA engaged in a regulation or practice of holding cargo hostage.

D. Reparations

1. Basis for Reparations

The ALJ awarded CMI $126,185 in reparations due to SBA's § 41104(a) violation based on the difference between the demurrage charges SBA paid to third parties and the amounts SBA billed to CMI.[13] I.D. at 20. In other words, the reparations represented SBA's markup on the charges that carriers and other third parties charged SBA that it passed on to CMI. The reparations award is based on 17 of the 28 shipments at issue. The ALJ did not award reparations for charges associated with 11 shipments because the documents in the record did not provide sufficient information to calculate actual injury. *See id.*

On appeal, CMI asks the Commission to increase the reparations awarded by $121,815 (for a total award of $248,000) and argues that SBA should not be allowed to retain any of the charges it collected while acting as an unlicensed NVOCC without a published tariff. CMI Exceptions at 1-3. That is, CMI asserts that its reparations should include not just the markup it paid SBA, but also the third-party charges that SBA passed through. CMI argues that the Commission does not have discretionary authority to allow SBA to retain the out-of-pocket expenses it incurred in arranging transportation of CMI's shipments from China, and even if the Commission had such discretion, it should not allow SBA to retain any of charges it collected from CMI as an unlicensed NVOCC that lacked a tariff. CMI Exceptions at 1-2. According to CMI, SBA flagrantly violated licensing and tariff requirements and

[13] The ALJ did not award reparations based on the violations of §§ 40901(a), 40501(a), or 41102(c), I.D. at 19, 26, 74, and neither party challenges this result.

compounded its actions by falsely claiming in this case that it "has never participated in ocean transportation" despite ample evidence to the contrary and by submitting a declaration from Mr. Zasada denying that SBA ever told CMI that it was collecting demurrage charges imposed by a steamship line. *Id.* at 5 (quoting SBA's Mot. to Dismiss).

SBA counters that if it had been operating as an unlicensed NVOCC under an NRA, it would have been entitled to collect pass-through charges under 46 C.F.R. § 532.5(d)(2)(iv). It also cites *Graniteville Co. v. Scarade, Lines*, FMC Informal Dkt. No. 19647(I), 1991 FMC LEXIS 64 (FMC Jan. 24, 1991), for the proposition that reparations should be limited to the markup.

The Commission agrees with the ALJ's decision to limit the reparations to the markups SBA imposed on CMI. Commission caselaw allows shippers to recover reparations for charges paid to NVOCCs operating without a published tariff in violation of § 41104(a) because the NVOCC has collected charges beyond its "actual disbursements." *Graniteville*, 1991 FMC LEXIS 63, at *6. Nonetheless, a shipper in that situation has received something it wanted – "the transportation of its cargo from A to B." *Id.* The shipper's "actual injury" is thus "whatever it paid the NVOCC, less whatever payments were made by the NVOCC that the shipper would otherwise have had to pay." *Id.* at *6. This calculation method is consistent with 46 U.S.C. § 41305(b), which provides that the Commission "shall direct the payment of reparations to the complainant for actual injury caused by violation of this part." Subtracting from the reparations the pass-through charges the NVOCC paid on the shipper's behalf also prevents the shipper from unfairly receiving a windfall. *Graniteville*, 1991 FMC LEXIS 63, *6. This approach is also consistent with the Commission's approach under the Shipping Act of 1916. *See First Int'l Dev. Corp. v. Ship's Overseas Services, Inc.*, FMC Docket No. 77-13, 23 F.M.C. 47, 53 (FMC 1980), *rev'd on other grounds, Ships' Overseas Services, Inc. v. Fed. Mar. Comm'n*, 670 F.2d 304 (D.C. Cir. 1981) (awarding complainant in un-tariffed charges case the "difference

between the amount collected by the [NVOCC] and the cost of the transportation service which [complainant] received").

CMI's arguments fail in light of this precedent. CMI cites several cases for the proposition that "the tariff adherence requirements of the common carrier statutes are so strict that when properly filed, tariffs have the force of law and strict liability is imposed upon carriers thereunder." CMI Exceptions at 6-7. But the issue here is not liability. It is what constitutes "actual injury." And Commission caselaw defines actual injury in the unlicensed NVOCC context as the difference between the charges paid by the shipper to the NVOCC and the transportation benefit they received. *See Graniteville*, 1991 FMC LEXIS 63, *5-*6. And in this case, the ALJ properly excluded the transportation charges SBA incurred from the reparations award because CMI received the benefit of those services—its goods were shipped from China to the United States through arrangements made by SBA.

CMI also argues that the Commission should penalize SBA for alleged misconduct in litigating this case by refusing to allow SBA to retain the fees it collected from CMI. SBA Exceptions at 5-6. CMI contends that SBA purposely misled the Commission through repeated misrepresentations about its activities and status in handling CMI's shipments. *See id.* The Commission rejects this invitation because reparations for "actual injury" do not include what amount to punitive damages. *Cal. Shipping Line, Inc. v. Yangming Marine Transp. Corp.*, FMC Docket No. 88-15, 1990 FMC LEXIS 25, *65 (FMC Oct. 19, 1990) (noting that term "actual damages" does not include punitive damages).

2. Amount of Reparations

As for the amount of reparations, SBA argues that the ALJ miscalculated by $27,346.75 and that the reparation award should be reduced to $98,838.25. SBA asserts that the ALJ failed to deduct service charges that SBA paid to various companies for miscellaneous services, e.g., storage, stripping and cross dock, skids

in and skids out, wait time, logistic and management fees, and per diem fees. SBA Exceptions at 2, 6, 24-25. CMI counters that SBA is not entitled to the reduction it seeks because the ALJ "closely scrutinized" the invoices and concluded, for sound reasons, that SBA is not entitled to retain demurrage charges collected illegally solely because it may have paid third parties for those services. CMI's Reply to SBA Exceptions at 17 (July 31, 2019). CMI also cites SBA's nonspecific billing practices and argues that it "should not be permitted to retain funds collected for nonexistent demurrage charges, simply because unrelated funds were paid to a third party." *Id.*

SBA's argument is based on five containers, which the Initial Decision referred to by the manner in which the documents were organized as Folder 29, Folder 44, Folder 49, and Folder 60-61. In each instance, the ALJ found that SBA charged CMI for demurrage but that there was no evidence that a third-party charged SBA for this amount. The ALJ consequently awarded the entire demurrage amount as reparations. I.D. at 21-23. SBA asserts that the ALJ failed to recognize that the "demurrage" it charged CMI included amounts for which there is evidence. SBA Exceptions at 24-25.

The record shows that the parties understood "demurrage" to represent storage charges. SBA Exceptions at 20-23 (citing Vega Dep. at 92-93 (RX27)). Consequently, evidence that third parties charged SBA storage is evidence that SBA paid "demurrage," and the storage charges should have been deducted from the ALJ's reparations calculations. There is no evidence, however, that the parties understood demurrage to include other types of fees. Consequently, those would not be deducted from the demurrage SBA charged CMI. Applying this understanding to the containers at issue:

Folder 29. SBA charged CMI $6,650 for demurrage. SBA claims this should be reduced by $200 for a charge it paid to Mediterranean Shipping Co. (MSC). The pay stub SBA cites does

not identify what the charge is for, however, and the other documents suggest it was for a "dry run," not storage. It will therefore not be deducted. Joint App. at JA210, JA212.

Folder 44. SBA charged CMI $6,650 for demurrage. SBA claims this should be reduced by $5,501.75 based on several charges imposed on it by Jewels Transportation, Inc. Only three of the charges are clearly identified as storage charges. A June 2015 charge for $852, a May 2015 charge for $852, and an April 2015 charge for $504. Joint App. at JA 336, 340, 341.[14] The other documents do not appear to reflect container storage charges. *Id.* at JA337-339. Consequently, the Commission will deduct $2,208 from the reparations calculated by the ALJ.

Folder 49. SBA charged CMI $2,700 for demurrage. SBA claims this should be reduced by $2,300 based on charges imposed on it by MSC. The record establishes that MSC invoiced SBA $400 for storage, which the Commission will deduct from the reparations calculated by the ALJ. *Id.* at JA381. The remaining $1,900 at issue does not appear to be for storage. The charges are described as "logistics and management fee." *Id.* at JA382.

Folder 60-61. SBA charged CMI $24,800 for demurrage on two containers. SBA claims this should be reduced by $19,345 based on charges imposed on it by Anchor Logistics. The documentary evidence shows storage charges of $5075 and $5600, for a total of $10,675. *Id.* at JA559. The balance claimed by SBA represents "per diem" fees that overlap the period for which storage was assessed. *Id*. at JA560. That SBA incurred storage and per diem for the same time periods indicates that they are different charges. In the absence of any evidence that the "per diem" fees are for container storage, the Commission will deduct $10,675 of storage charges from the reparations calculated by the ALJ but not the per diem fees.

[14] JA335 appears duplicative of the amount in JA340.

In total, the ALJ's reparations award was too high by $2,208 + $400 + $10,675 = $13,283. The Commission therefore reduces the reparations award from $126,185 to $112,902.

E. Cease-and-Desist Order

The ALJ ordered SBA to cease and desist from operating as an NVOCC without a license and from operating without a published tariff. I.D. at 75. The ALJ reasoned that "without a cease and desist order, it is likely that [SBA] will continue to operate as an NVOCC without a Commission license and as a common carrier without a published tariff." *Id.* at 20. SBA argues that the ALJ's determination that it will continue operating in violation of these provisions is unsupported and argues that "no evidence in the record suggests SBA would ever in the future operate improperly as an NVOCC in a transaction with any other entity." SBA Exceptions at 34.

A cease-and-desist order is appropriate if a respondent's unlawful conduct is likely to continue or resume. *In re Vehicle Carrier Servs.*, 1 F.M.C.2d 440, 466 (FMC 2019). The ALJ's finding that SBA is likely to continue operating as an unlicensed NVOCC or without a published tariff is not supported by the record. There is no evidence that SBA acted as an unlicensed NVOCC before 2014, and there is no evidence that SBA continued acting as an unlicensed NVOCC after mid-2015 when it apparently ceased handling CMI's shipments. Given the absence of any indication that SBA has continued or will continue acting as an unlicensed NVOCC without a tariff, there is no basis for ordering it to cease and desist engaging in that activity. The Commission therefore reverses the Initial Decision with respect to the cease-and-desist order.[15]

[15] The Commission denies SBA's request for a hearing because oral argument would not materially aid the Commission's analysis of the parties' exceptions.

III. CONCLUSION

The Commission:

(1) Affirms the ALJ's determination that SBA violated 46 U.S.C. §§ 40501(a), 40901(a), and 41104(a)(2)(A);
(2) Reverses the ALJ's calculation of reparations and orders SBA to pay CMI reparations of $112,902, plus interest of 7,181.59, totaling $120,083.59, for the violation of § 41104(a)(2)(A), which SBA must pay by August 10, 2021.
(3) Reverses the ALJ's issuance of a cease-and-desist order; and
(4) Affirms the ALJ's dismissal of the claims against Radiant and LAS Freight.

By the Commission.

Rachel E. Dickon
Secretary

Chairman MAFFEI, concurring:

I concur in the outcome of the majority, but I must note one area where I think my colleagues have erred in their conclusion.

In the § 41102(c) analysis, the majority indicates there is insufficient clarity to determine whether the alleged conduct by SBA meets the standard for an unreasonable practice. Specifically, they note that while there were "some" shipments withheld and delayed to collect charges based on unrelated cargo,[16] there is not

[16] Majority opinion at 28-29.

enough information to determine how many were involved and to what extent.[17]

In the Initial Decision, the ALJ did not rely on the number of instances of the conduct in making the determination that it was sufficiently normal, customary, and continuous to meet the standard for a violation of § 41102(c). He relied on the statements made by a senior management official to a representative of the company: when the representative asked the COO whether it was permissible to hold containers that were otherwise available for release in order to demand payment for unrelated shipments, he was told it was and directed to do so.[18]

A statement by a senior management official such as a Chief Operating Officer is highly persuasive evidence that a practice is normal, customary, and continuous. It indicates that there is willingness, at the highest levels of a company, to conduct business in an unjust and unreasonable manner that should be a violation of the Shipping Act. In this case, there is no equivocation, no indication it's an isolated act or error.[19] It's not an understandable misfortune.[20] Moreover, the COO gave this instruction to a

[17] In my opinion, one that I have expressed repeatedly, if a company can act unreasonably with intention and then hide behind the idea that they only did so "occasionally," that's a problem. *See, e.g.*, *Gruenberg-Reisner v. Overseas Moving Specialists*, 34 S.R.R. 613, 626-32 (FMC 2016), c*ontra* Notice of Proposed Rulemaking: Interpretive Rule, Shipping Act of 1984, 83 Fed. Reg. 45367, 45369 (Sept. 7, 2018) [*hereinafter* NPRM] (citing *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 187, 200-01 (Examiner 1964)). However, I understand the Commission's current interpretation of § 41102(c) is that repeated behavior or other evidence of a normal, customary, and continuous practice or regulation is a required element, and I do not intend to dispute that interpretation in this opinion.

[18] I.D. at 26.

[19] NPRM, 83 Fed. Reg. at 45369.

[20] *Id.*

representative for the company, increasing the likelihood of it happening in more cases in the future.

This evidence would be highly relevant to the normal, customary, and continuous prong of the § 41102(c) analysis, and might even be sufficient to meet that standard, as the ALJ decided;[21] however, because the § 41102(c) claim has no bearing on the outcome of this case[22] and the majority doesn't reach a conclusion on that violation, there is no reason to disrupt the ultimate outcome of the majority opinion.

[21] *See Chief Cargo Servs. v. Fed. Mar. Comm'n*, No. 13-4256-ag, 2014 U.S. App. LEXIS 18831, at *4 (2d Cir. Oct. 2, 2014). If this is not sufficient evidence to prove conduct is normal, customary, and continuous, it adds further support to my conclusion (and the Second Circuit's) that the language of § 41102(c) is ambiguous as written and should be clarified by Congress.

[22] Majority opinion at 28.