BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 18-06

INTERPRETIVE RULE; SHIPPING ACT OF 1984

COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.

The National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA" or "Association"), submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") published in this docket on September 7, 2018 (83 Fed. Reg. 45367-45373) which proposes to issue an interpretative rule pertaining to the proper application of 46 U.S.C. § 41102(c).

The NCBFAA, together with its over 1,000 members and 28 regional associations, is the national trade association representing the interests of freight forwarders, NVOCCs and customs brokers in the ocean shipping industry. The NCBFAA's members are involved in the transportation and/or logistical arrangements for approximately 90% of the cargo that moves into and out of the United States by ocean. As most of the NCBFAA's members operate as NVOCCs or ocean forwarders, they are accordingly directly affected by the Commission's regulations and policies and, as particularly relevant here, by the interpretation and application of § 41102(c) of the Act.

The NCBFAA supports the FMC's proposed interpretation of §41102(c) and agrees that the proposed interpretive rule will restore the section to its original purpose and function under the Shipping Act of 1984. However, the NCBFAA would like to emphasize that the interpretive rule should not be read or used so broadly as to eliminate the obligation for regulated entities to

establish, observe and enforce just and reasonable practices pertaining to receiving, handling, storing or delivering property. Consequently, as discussed below, while the NCBFAA agrees that this section of the Act should not be used to convert isolated commercial disputes into Shipping Act violations or turn the Commission into a small claims court, this section should remain as an important check on more systemic malpractices.

I. THE NCBFAA SUPPORTS THE COMMISSION'S PROPOSED INTERPRETIVE RULE REGARDING §41102(C) (SECTION 10(D)(1) OF THE SHIPPING ACT OF 1984).

In this NPRM, the Commission is proposing an interpretive rule for §41102(c) so that a regulated entity would need to have engaged in an unjust or unreasonable practice or regulation on a normal, customary, and continuous basis to be found in violation of §41102(c). In essence, the proposal seeks to reverse the precedent set in a series of cases beginning in 2010 holding that a regulated entity can be found in violation of §41102(c) due to alleged issues arising out of the handling of a single shipment. The NCBFAA believes that the proposed interpretative rule is consistent with the purpose, function and legislative history of §41102(c) and should be adopted.

A. Legislative History

As stated in the NPRM, § 10(d)(1) of the Shipping Act, recodified as §41102(c), was promulgated to protect the "flow of commerce."[1] Originating from section 17 of the 1916 Shipping Act, §41102(c) retained much of the original language, which required that no regulated entity "may fail to establish, observe, and enforce just and reasonable regulations relating to or connected with the receiving, handling, storing or delivery of property."[2]

Prior to the Shipping Act of 1916, shipping conferences routinely established collectively agreed rates, regulations, practices, terms and conditions for receiving, handling, storing, and

[1] *See* Commissioner Khouri Dissent in *Kobel v. Hapag-Lloyd*, A.G. 32 S.R.R. 1720, 1747 (FMC 2013).

[2] Pub. L. 64-260 § 17 (1916).

delivering of cargo in the ocean transportation industry. The 1916 Shipping Act was Congress' response to provide federal regulation and oversight to these collective activities. Both an antitrust and a regulatory statute, the Act allowed the Commission's predecessor agency, the United States Shipping Board ("USSB"), to determine if a conference freight rate, regulation or practice was unjust or unreasonable. If an unjust or unreasonable practice was found, the Board had the authority to order a just and reasonable rate, regulation or practice. With Congress' efforts to deregulate the transportation industry, the scope of the Commission's authority changed with the passage of the 1984 Shipping Act.

The 1984 Shipping Act provided more freedom to all regulated entities and removed much of the Commission's regulatory authority, particularly with respect to rates and the process for approving antitrust-immunized agreements. Although several aspects of the Commission regulatory authority were eliminated, the 1984 Act retained the Commission's authority to determine whether a regulation or practice was unjust or unreasonable. The original language from section 17 of the 1916 Act was carried over and moved into section 10(d)(1) of the 1984 Shipping Act, now §41102(c).

As originally drafted, the term "practice" was intended to apply to specific practices adopted by the collective activity of the shipping lines, as these practices had a wide-ranging effect on commerce, rather than mere one-off occurrences involving a single carrier or marine terminal operator. While the shipping industry has evolved considerably over time and Congress has responded to those changes through various amendments to the Shipping Act, there has been no change in the original enactment or intent of what is now §41102(c). To the contrary, this section has retained its original meaning from both the 1916 Act and the 1984 Act, a significant point that was missed when the Commission did an about face and significantly broadened the

coverage of this statute well beyond anything Congress had intended. Simply stated, the legislative history is clear that the prohibition against regulated entities engaging in "unreasonable or unjust" practices was not intended to serve as protection for every imaginable controversy that might exist in ocean shipping.

B. Administrative Precedent from 1935 to 2010

Historically, the decisions of the USSB and FMC construing what is now §41102(c) uniformly required that a regulated entity had to be found to have engaged in an unjust or unreasonable practice or regulation on a normal, customary, and continuous basis to be found to have violated the section. To establish a violation of §41102(c), a complainant had to be able to demonstrate that the alleged violation was a normal practice and not a single alleged error.[3]

This is exemplified in *Intercoastal Investigation, 1935*, where the USSB examined the word "practice" as it was used in the 1916 Act. The agency determined that, "owing to its wide and variable connotation, a practice which unless restricted ordinarily means an often repeated and customary action, is deemed to apply only to acts or things belonging to the class as those meant by the words of law that are associated with it." 1 U.S.S.B. 400, 432 (1935). Therefore, in order in order to have established an unreasonable "practice," it must be a normal or customary practice.

Similarly, in *European Trade Specialists v. Prudential-Grace Lines,*[4] respondents had reclassified complainant's cargo from "abrasive cloth" to "cargo not otherwise specified." Respondents failed to notify complainant of the change and the reclassification resulted in complainant having to pay shipping costs thirteen times higher than expected. The

[3] *Investigation of Certain Practice of Stockton Elevators*, 3 S.R.R. 59 (FMC 1979) (finding that a violation of the Shipping Act did not occur due to the infrequency of the relevant actions).

[4] *European Trade Specialists v. Prudential-Grace Lines*, 19 S.R.R. 59 (FMC 1979).

Administrative Law Judge ("ALJ") determined that respondents' failure to notify complainant after it had reclassified its cargo not to be a violation of the Shipping Act. The ALJ explained that the record indicated that respondents' normal practice was to notify shippers of any problems. That it failed to do so on this occasion, although a departure from its normal practice which was otherwise just and reasonable, did not rise to being a violation of this section of the Act.[5]

Moreover, §41102(c) was not intended to be a universal remedy for every dispute that might exist between a regulated entity, a shipper or other regulated entity. As discussed by the settlement officer in *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.,* an overbroad interpretation of §10(d)(1) would allow complainants to "circumvent COGSA provisions," which would frustrate the Congressional intent of the Shipping Act.[6] The ALJ explained that allowing a complainant to do so could serve to extend the one-year statute of limitations or nullify the $500 per package limitation of liability under COGSA. In other words, had the complainant succeeded, it would have converted what is a contractual claim for loss or damage subject to the terms of the bill of lading into an alleged violation of the Shipping Act, something that Congress never contemplated.

The construction of § 41102(c) established in the above cases was reaffirmed as recently as 2001, in *Kamara v. Honesty Shipping Service*.[7] Here, respondent, an ocean freight forwarder, was hired by complainant to transport one 40-foot container of used clothing form Houston, Texas to Freetown, Sierra Leone. Respondent received payment from complainant in the

[5] *See also J.M. Altieri v. Puerto Rico Ports Authority*, 7 F.M.C. 416 (ALJ 1962) ("If the action of respondent were one of a series of such occurrences, a practice might be spelled out that would invoke the coverage of section 17").

[6] *A.N. Deringer, Inc. v. Marlin Marine Services, Inc.*, 25 S.R.R. 1273, 1277 (S0 1990).

[7] *Kamara v. Honesty Shipping Service*, 29 S.R.R. 321 (ALJ 2001) ("it is not clear that a carrier's simple failure to remit payment to a subcontracting carrier constitutes a Shipping Act violation, although the shipper would certainly have a commercial contractual claim").

amount of $7,060, which was supposed to cover the complete movement. However, respondent later advised complainants that an additional $4,800 would be required to complete the transportation. The additional charges were requested because the respondent initially submitted payment to a now defunct party, who never submitted payment to the performing carrier. The ALJ determined that a carrier's "simple failure" to remit payment to a subcontracting carrier was not a violation of the Shipping Act and that "complainant must demonstrate regulations and practices, as opposed to identifying what might be an isolated error or understandable misfortune."[8] This did not mean that the complainant had no remedy against the respondent for breach of contract or negligence; rather it just meant that the unfortunate situation did not constitute a Shipping Act violation.

In the NCBFAA'S view the principle established in these and other cases, "represents the proper interpretation of the statutory language of the provision that, within the full context of the 1916 Act and the 1984 Act, is consistent with the statutory and legislative history." Docket No. 18-06, *Interpretive Rule; Shipping Act of 1984* (Decision served September 6, 2018 at 4). Certainly, nothing in the Ocean Shipping Reform Act of 1998 or any other maritime legislation has provided a basis to significantly change the letter or spirit of §41102(c). To the contrary, the abrupt expansion of this provision has no legislative basis.

C. The Changed Interpretation

Starting in 2010, a series of Commission decisions inexplicably departed from almost 100 years of consistently understood principles. Prior to 2010, the specific practice being challenged had to be systemically applied to have violated the section.[9] Without any prior

[8] *Id.*

[9] *See Stockton Elevators*, 3 S.R.R. 605, 618 (FMC 1964) ("It cannot be found that the Elevator engaged in a 'practice' within the meaning of Section 17. The essence of a practice is uniformity. It is something habitually

discussion, the majority of the FMC changed a statute intended to address broad, systemic industry malpractices and essentially converted the agency into a small claims court.

The current interpretation of §41102(c) was initially enunciated in *Houben v. World Moving Services*, and expanded in *Kobel v. Hapag-Lloyd A.G.*, resulting in single alleged failures by a regulated entity being held to be a violation of §41102(c). The changed interpretation no longer requires that the challenged practice or regulation be conducted on a normal or customary basis. As a result, a violation of §41102(c) only requires discrete or occasional actions by regulated entities. This applies even in instances where the complainant themselves do not have clean hands.[10]

In *Houben v. World Moving Services, Inc.*,[11] an NVOCC and an unlicensed entity operating as an ocean forwarder were found to be in violation of §41102(c). Respondents were hired by complainant to deliver his furniture and personal items from the United States to Belgium. In order to facilitate the shipment, respondent NVOCC retained a destination agent. However, when the NVOCC failed to pay its destination agent for its services, the agent held complainant's cargo pending payment of its invoices, which resulted in a six-month delay in delivering complainant's cargo. In contrast with *Kamara*, but without explaining the changed interpretation of the statute, the Commission held that an NVOCC's single instance of failure to pay the destination agent was a violation of §41102(c).[12]

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performed, and it implies continuity … the usual course of conduct. It is not an occasional transaction such as here shown.").

[10] *See Kobel v. Hapag-Lloyd A.G.*, 32 S.R.R. 1720 (FMC 2013) (where complainants had failed to pay freight and other charges for three containers shipped to Poland); *see also Petra Pet, Inc. v. Panda Logistics Ltd.*, Docket No. 11-14 (FMC 2013)(where the Commission held that respondents violated §41102(c) for refusing to release shipments due to complainant's debt unrelated to the cargo in respondents' possession).

[11] *Houben v. World Moving Services, Inc.*, 31 S.R.R. 1400 (FMC 2010).

[12] *See also* Docket No. 12-09, *Century Metal Recycling Pvt. Ltd, v. Dacon Logistics, LLC, et al.* (Decision served November 12, 2013) (where respondent NVOCC was also found to have violated §41102(c) because it failed to issue payment to its sub-contractors, which resulted in complainant accruing additional detention charges).

In *Kobel*, respondents were retained to transport a total of five containers to Poland. Two containers were transported without incident. However, the third container was damaged during the loading process. The damaged container was set aside. While in the process of assessing the cost to return the container to complainants, the container was accidentally loaded by the vessel operator and shipped to Poland. The last two containers were transported without incident to Poland. Upon arrival, the final two containers were subject to a hold due to unpaid freight charges by complainants. The two containers and the damaged container remained in storage and were never picked up by complainants. As a result, purporting to exercise a lien, one of the respondents sold the containers to cover the unpaid freight and additional charges. The Commission held that due to respondents' "unlawful" liquidation of the three containers, respondents had violated §41102(c) for this isolated situation, despite the fact that complainants failed to pay the freights.

In both these and subsequent decisions, the Commission has found a violation of §41102(c) for single incident disputes. In *Bimsha International v. Chief Cargo Services Inc.*, where an NVOCC released three shipping containers without requiring presentation of the original bills of lading, the Commission held that failure to require presentation of the original bills of lading prior to delivery was a violation. The Commission reasoned that when an NVOCC fails to fulfill its obligations, through "single or multiple actions or mistakes," a violation of 10(d)(1) can be found with respect to a single shipment.[13] By doing so, the agency converted a classic "misdelivery" civil case into a violation of the Shipping Act.

As a result, under the current construction of this section, a regulated entity can be found liable for virtually any dispute relating to a single shipment, even if its general practices pertaining to the receiving, handling, storing or delivering of cargo are otherwise considered to

[13] *Bimsha Int'l v. Chief Cargo Servs*, 32 S.R.R. 1861, 1865 (FMC 2013).

be reasonable. *See Gruenberg-Reisner v. Overseas Moving Specialist*, 34 S.R.R. 613 (FMC 2016)(respondent was held to have violated §41102(c) for requiring additional payment for accessorial charges and an additional 20-foot container because respondent failed to include these charges in either its initial Shipping Agreement or in its rules tariff); Docket No. 1948(F), *Muzorori v. Canada State Africa Lines, Inc.* (Decision served October 7, 2016) (respondent was found in violation of §41102(c) for failing to deliver complainant's cargo to the agreed upon port of discharge); *Orolugbagbe v. A.T.I., U.S.A., Inc.*, 33 S.R.R. 1300 (FMC 2015)(respondent's failure to transport a second shipment or respond to complainant's phone calls was a violation of §41102(c)); *Smart Garments v. Worldlink Logix Srvs*., 32 S.R.R. 294 (FMC 2013) (respondent delivered two shipments without obtaining the original bills of lading); and Docket No. 08-04, *Tienshan, Inc. v. Tianjin Hua Feng Transport Agency Co., Ltd.* (Decision served March 9, 2011) (where the ALJ found that respondent violated §41102(c) because it refused to give the consignee the original bill of lading even though there unpaid freight charges). But this is not just an academic disagreement about a change of direction.

As such, the NCBFAA agrees with the NPRM that the current administrative precedent is in stark contrast to Commission decisions pre-*Houben* and *Kobel*, as well as the Congressional intent underlying this statute. To the contrary, this new construction poses significant, underserved risks on ocean transportation intermediaries, vessel operators and marine terminal operators ("MTOs").

The Association is not suggesting that shippers or other parties that have commercial disputes with their service providers should have no remedy. Indeed, and for example, if an NVOCC misdelivers cargo by failing to pick up original bills of lading, the aggrieved beneficial cargo owner has ample civil remedies available to seek redress. But the same service providers

should not be subjected to the possibility of being found to have violated the Act just because of the existence of a dispute, thus being subjected to damages and attorney fees awards that would not have been available through the courts.

D. The Proposed Rule Should Not Remove Regulated Entities from Claims due to Systemic Issues

The NCBFAA would like to emphasize that although modifying the application of §41102(c) may limit the ability of future complainants to claim a Shipping Act violation, the revised interpretation of §41102(c) would not absolve regulated entities from claims relating to systemic issues that are peculiarly within the expertise of the agency, unlike single disputes where a civil remedy exists in the courts. For example, the revised interpretation of §41102(c) should not operate as an escape from liability for carriers and ports when there are service meltdowns beyond the control of other parties. If carriers and/or MTOs do not, or cannot, satisfy their obligation to make containers available for pickup, but nonetheless refuse to extend free time, this situation can only be addressed by the Commission. If carriers and MTOs assess demurrage/detention charges in situations where they have not fulfilled their contractual obligation to make containers available for pick-up, those situations are systemic problems, not isolated incidents. Or, if carriers attempt to shift their responsibility for compliance with Coast Guard or IMO requirements to shippers and/or NVOCCs or attempt to limit their liability for completing their obligations as ocean common carriers, these actions could properly be seen as falling within the prohibited acts provisions of § 41102(c).

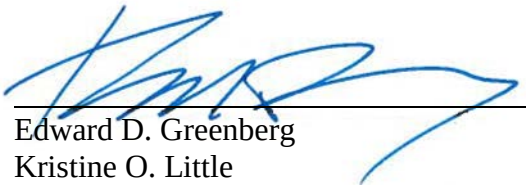
In other words, having the Commission establish a rule that returns the scope of this provision to what Congress intended is not a "get out of jail free" card for regulated entities. Instead, moving forward on the NPRM would serve to refocus the Commission's resources on

issues that affect commerce, rather than converting civil disputes into quasi-criminal violations of the Shipping Act.

II. CONCLUSION

The NCBFAA appreciates the opportunity to submit these comments to this important initiative. The NCBFAA agrees that the revised interpretation of §41102(c) would assist in the Commission's intent to "return the Commission's focus and priorities to the activities of maritime regulated entities that negatively affect the broader shipping public—all as intended by Congress in its enactment of the 1916 Act and the 1984 Act."

Respectfully submitted,



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