FEDERAL MARITIME COMMISSION

TCW, Inc., *Claimant* , v. EVERGREEN SHIPPING AGENCY (AM.) CORP. & EVERGREEN LINE JOINT SERVICE AGREEMENT *Respondents.*	Docket No. 1966(I)

Served: December 29, 2022

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

Order Affirming the Initial Decision

On February 19, 2021, the Small Claims Officer ("SCO") issued an Initial Decision ("I.D.") finding that Respondents Evergreen Shipping Agency Corp.'s and Evergreen Line Joint Service Agreement's (collectively, "Respondent") charges were unjust and unreasonable, but that Respondent's invoicing practices were not. Doc. 1. The SCO ordered Respondent to pay TCW ("Claimant") the requested reparations ($510) and to cease-and-

desist from imposing per diem charges when such changes do not serve their incentivizing purposes, such as when empty equipment cannot be returned on weekends, holidays, and port closures. Five days later, the Commission determined to review the SCO decision, and subsequently requested additional briefing on certain issues. The Commission received briefings from both Claimant and Respondent, as well as four amicus briefs.

Having reviewed the supplemental briefings and amicus filings, the Commission now affirms and herein adopts the initial decision of the SCO in its entirety.

I. BACKGROUND

A. Factual Background

On March 14, 2020, Evergreen Line Joint Service Agreement, an ocean common carrier, issued Yamaha Motor Company, Ltd. ("Yamaha"), an importer and BCO, a non-negotiable sea waybill to deliver a shipment from the Port of Shimizu, Japan to Yamaha's facility in Newnan, Georgia. Resp. Ex. 10. As part of the transportation arrangement for the shipment, Yamaha designated Claimant as its "preferred trucker" and thereby authorized Claimant to transport the shipment from the Port of Savannah to Yamaha's facility. *Id.*

Yamaha, Claimant, and Evergreen Shipping Agency, a New Jersey corporation that acts as a North American agent for Evergreen Line Joint Service Agreement, signed a Preferred Trucker Agreement ("PTA") in which Respondent agreed to the designation of Claimant as the preferred trucker for Yamaha's import and export cargoes. Resp. Ex. 9. Per the PTA, Claimant (as the motor carrier) is required to be a signatory to the Uniform Interchange and Facilities Access Agreement ("UIIA") and Evergreen Shipping Agency's individual addendum to the UIIA ("Evergreen Addendum"). *Id.* The UIIA is a contract between motor carriers and equipment providers and regulates the motor carrier's access and use of the containers and chassis. Resp. Ex. 1. The

Evergreen Addendum supplements the general provisions of the UIIA and includes details specific to Respondent regarding free time, per diem, and dispute resolution procedures. Resp. Ex. No. 4. According to the contract, the PTA's terms and conditions control in the event of a conflict. Resp. Ex. 9.

Per the shipping agreement, Yamaha, and, therefore, Claimant, were entitled to receive twenty-one days of free time for the container and four days of free time for use of the chassis. Cl. Ex. F. The free time calculation did not include weekends or holidays. Resp. Ex. 4. Respondent would also provide Claimant a free chassis for use in transporting the Yamaha shipment. *Id.* Additionally, Claimant was required to pay per diem charges for any unreturned equipment after the expiration of the free time, including on weekends and holidays. *Id.*

On April 28, 2020, the cargo arrived at the Port of Savannah and was reterieved by Claimant. Cl. Ex. F. Per the terms of the agreements, the free time expired for the chassis on May 4, 2020, and on May 19, 2020 for the container. *Id.* Claimant returned both on May 26, 2020. *Id.* Per the terms of the Evergreen Addendum, Respondent invoiced Claimant for per diem charges for the equipment in the amount of $1,050 for 7 days of per diem for the container (May 19-25, 2020), and $440.00 for 22 days of per diem for the chassis (May 4-25, 2020) for a total of $1,490. *Id.*

Claimant, in turn, disputed three days of charges corresponding to when the port was closed. Respondent declined to waive the charges. Cl. Ex. G. Claimant then paid in full and later invoiced Yamaha $1788.00 for the per diem charges, which Yamaha subsequently paid.[1] Cl. Resp. to Aug. 2020 Order for Suppl. Info.

On June 18, 2020, Claimant filed this small claims action against Respondent alleging that Respondent violated 46 U.S.C. §

[1] Claimant up charged Yamaha $298 for the per diem charges, and invoiced Yamaha $1,260.00 for 7 days of per diem for the container and $528.00 for 22 days of per diem for the chassis. *Id.* On August 21, 2020, Yamaha paid claimant $1,788.00 for the per diem charges. *Id.* There is no dispute before the Commission between Claimant and Yamaha.

41102 by: (1) invoicing per diem on weekends, holidays and during temporary port closures, when Claimant had no ability to return empty containers; (2) invoicing Claimant (the motor carrier) for per diem, instead of the BCO, even though the charges and free time were negotiated with the BCO; and (3) invoicing Claimant for chassis fees at a fixed rate, which is also negotiated directly with the BCO. Am. Cl. at 2. As relief, Claimant requested an order: (1) directing Respondent to reimburse it $510.00 in per diem charges; (2) forbidding Respondent from imposing per diem charges on days when a motor carrier has no ability to return equipment due to a port closure; and (3) directing Respondent and all marine lines to bill per diem charges directly to the BCO instead of the motor carrier. *Id.* at 3-4.

B. Procedural History

On February 19, 2021, the SCO issued an I.D. finding that it was unjust and unreasonable under § 41102(c) for Respondent to have charged Claimant per diem when the Port of Savannah was closed. *Id.* at 32. The SCO, therefore, ordered Respondent to pay Claimant reparations, and to cease and desist from imposing per diem when equipment cannot be returned on weekends, holidays, and port closures. *Id.* at 33. The SCO denied, however, Claimant's request to order Respondent to invoice per diem to BCOs rather than Claimant. *Id.*

On February 24, 2021, a Commissioner requested review and the Secretary issued the corresponding Notice, rendering the I.D. inoperative. To aid in its review of the I.D., the Commission subsequently afforded the parties the opportunity to provide additional briefing. The Commission received briefs from both Claimant and Respondent. The Commission additionally received amicus briefs from the National Association of Waterfront Employers ("NAWE"), a trade association representing marine terminal operators ("MTOs"), the World Shipping Council, a trade organization representing ocean carriers, Ports America, Inc. and SSA Marine Terminals, LLC, major U.S. MTOs, and the American

Pyrotechnics Association, a safety and trade association for the fireworks industry.

II. DISCUSSION

A. Standard of Review

When the Commission reviews an SCO's Initial Decision pursuant to 46 C.F.R. § 502.304(g), it has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore reviews the SCO'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, at *110-*11 (FMC Dec. 18, 2015).

B. The Commission has jurisdiction

Respondent raised as an affirmative defense the Commission's lack of jurisdiction. Resp. to Am. Cl. at 6. Specifically, Respondent argues that Evergreen Shipping Agency is merely an agent for Evergreen Line Joint Service Agreement and is not itself a regulated entity subject to the provisions of 46 C.F.R. § 545.5(b).

As explained in the I.D., the claim against Evergreen Shipping Agency arises "out of a common nucleus of operative facts" with the claim against Evergreen Line Joint Service Agreement, over which the Commission has jurisdiction as a VOCC. Doc. 1 at 15. Here, the principle was the VOCC for the transportation at issue and the agent imposed the disputed per diem charges in connection with a port to door transportation from Japan to Newnan, Georgia. The Commission thus has jurisdiction to adjudicate this matter.

Respondent further alleges that the Commission does not have the authority to adjudicate this action because the UIIA, the Evergreen Addendum, and the PTA are private contracts, and the "just and reasonable" requirement of § 41102(c) applies only to

"regulations and practices" not to private contracts. Evergreen Br. at 3-4. The per diem charges at issue, Respondent maintains, are not regulations or practices but merely "contractual provisions in the [PTA] that Claimant freely signed." Resp. Reply Brief at 8; *see also* Resp. Suppl. Brief at 10.

The SCO correctly concluded that the Commission can adjudicate this action. I.D. at 14-18. The Commission can adjudicate allegations that contract terms are violative of the Shipping Act. *See* Final Rule: Interpretive Rule on Demurrage and Detention, Docket No. 19-05, 85 Fed. Reg. 29638 at 29648 (May 18, 2020) ("Ocean carriers and marine terminal operators (and ocean transportation intermediaries) do not have an unbounded right to contract for whatever they want. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c)."); *see also Cargo One, Inc. v. COSCO Container Lines Company, Ltd.*, 28 S.R.R. 1635, 1645; 2000 FMC LEXIS 14, *32 (FMC 2000) (the test for the Commission's jurisdiction is whether a Claimant's allegations "also involve elements peculiar to the Shipping Act").

C. **Respondent Charging Per Diem on Weekends, Holidays, and Temporary Closures Was Unjust and Unreasonable Under § 41102(c)**

A successful claim for reparations under §41102(c), must demonstrate five necessary elements. 46 C.F.R. § 545.4.

(1) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary
(2) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;
(3) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;
(4) The practice or regulation is unjust or unreasonable; and
(5) The practice or regulation is the proximate cause of the claimed loss.

For the reasons set forth by the SCO, and reiterated below, the Commission finds that Respondent's charging of per diem over a Saturday to Monday period from May 23-25, 2020, during which the Port of Savannah was closed, was unjust and unreasonable in violation of § 41102(c) and runs contrary to the Commission's rule in 46 C.F.R. § 545.5(d).

1. Respondent is a regulated entity

As explained by the SCO, and *supra*, Respondent, Evergreen Joint Service Agreement is an ocean common carrier and thus undeniably subject to the requirements of section 41102(c). Evergreen Shipping Agency imposed the per diem charges at issue on the ocean common carrier's behalf, thereby acting as its agent. The SCO ruled that because the practice at issue occurred during the through transportation of international oceanborne shipping provided by a VOCC, the Commission has jurisdiction to adjudicate whether the charges imposed by the agent during the inland portion of the through transportation, which it then passed on to the VOCC, violate the Shipping Act. Doc. 1 at 15. Further, the SCO reasoned that "the claim against Evergreen-Agent arises "out of a common nucleus of operative facts" with the claim against Evergreen-Principal, over which the Commission has jurisdiction as a VOCC." *Id*.; *see also, Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F. 3d 1174, 1180 (9th Cir. 2004) ("A court may assert pendent personal jurisdiction over a defendant with respect to a claim for which there is no independent basis of personal jurisdiction so long as it arises out of a common nucleus of operative facts with a claim in the same suit over which the court does have personal jurisdiction"). The Commission concurs with the SCO's reasoning. Claimant thus demonstrates the first element to prove its section 41102(c) claim for reparations.

2. The act occurred on a normal, customary, and continuous basis

46 C.F.R. § 545.4(b) requires that the acts or omissions occur on a normal, customary, and continuous basis. The SCO concluded that the claimed acts occurred on a normal, customary, and continuous basis because of their inclusion in the Evergreen UIIA Addendum and because Respondent specifically states in its brief, "Respondent's only intent is to bill per diem allowed by the PTA that Claimant agreed to, which includes the PTA's requirement to be a signatory to the UIIA addendum which mandates the alleged unreasonable conduct." Resp. Reply Brief at 2. The SCO concluded that the evidence thus establishes that imposition of the disputed per diem charged by Respondents is "occurring on a normal, customary, and continuous" basis and is a part of Respondents' normal business practices. Doc. 1 at 22.

In their supplemental briefing, Respondent argues Claimant has only one factual showing of the alleged act and instead relies on the UIIA addendum and Respondent's admission to establish this element. Respondent argues that the requirement in section 545.4 is that the act or omissions "are occurring" on a normal customary and continuous basis not merely "possible" or "contemplated." Doc. 3 at 4. NAWE presents a similar argument in its amicus brief, stating, "the fact that ports are normally closed on weekends, and that the UIIA Addendum permits charging demurrage after free time, does not constitute evidence that Respondents' charge demurrage on a normal, customary, and continuous basis in all situations when a port is closed." Doc. 5 at 5.

First, NAWE's argument is not based in the language of the UIIA addendum. The addendum does not "permit charging." The addendum states, "[t]he Motor Carrier shall pay…". Resp. Ex. 4 at 4. This is not a situation where carriers have the option to charge if they choose, instead the language of the addendum mandates when the trucker must pay per diem. Further the addendum does not only discuss charging demurrage after free time, it also specifically says it will be charged on days when the port is closed. Thus, a more accurate representation of the content of the UIIA addendum is that

it mandates the payment of per diem on days when the port is closed and in doing so establishes that this practice is occurring a normal, customary, and continuous basis.

Thus, the SCO properly found that the evidence establishes that imposition of the disputed per diem charged by Respondents is occurring on a normal, customary, and continuous basis. Accordingly, this element has also been demonstrated.

Although not determinative in this analysis, the Commission notes that in this case, the Respondent, in its brief, admits that this is the policy to which it will adhere, further supporting the SCO decision. Resp. Reply Brief at 2.

3. Respondent Charging Per Diem on Weekends, Holidays, and Temporary Closures Was Unreasonable

To find a violation, 46 C.F.R. § 545.4(d) requires that the practice be unjust and unreasonable. In § 545.5 the Commission further explains how it will assess the reasonableness of demurrage and detention charges and states that in general the Commission will consider the extent to which they are serving their intended primary incentivizing purpose. 46 C.F.R. § 545.5(c)(1). Additionally, the interpretive rule provides specific clarity with respect to the return of empty containers: "[a]bsent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable." *Id*. § 545.5(c)(2)(ii).

As explained in the I.D., during the rulemaking the Commission was clear that no amount of detention can incentivize the return of a container when the terminal cannot accept the container. Doc. 1 at 25; *see also* 85 Fed. Reg. 29638, 29655. In this case there was nothing Claimant could have done to return the container between May 23-25, 2020 because the port was not receiving empty containers. The SCO correctly found that the per diem charges were unreasonable because "they could not have incentivized cargo movement given that the port was closed on those

days, making it impossible for Claimant to return the equipment." Doc. 1 at 26.

The Commission also rejects the argument raised in amicus filings that not charging during the May 23-25, 2020 closure would have disincentivized the return of the container before the closure. *See* Doc 7 at 15, Doc. 9 at 3. These arguments were previously raised and similarly dismissed during the rulemaking process. 85 Fed. Reg. at 29652. First this disincentivizing argument neglects the commercial incentives to returning empty containers and one could easily argue the contrary position, namely that the ability to collect per diem, even if it is impossible for a truck to return equipment might disincentivize ocean carriers and marine terminal operators from acting efficiently. *Id*. at 29653.

Respondent, NAWE, and WSC also claim that the SCO failed to consider 46 C.F.R. § 545.5(f). Section 545.5(f) states that nothing precludes the Commission "from considering factors, arguments, and evidence in addition to those specifically listed in this rule." 46 C.F.R. § 545.5(f). The "other factor" most frequently cited by the amicus briefs and Respondent is the fact that Claimant could have returned the container prior to the May 23-25, 2020 closure and that the container was already in per diem when the closures took place. Doc. 4 at 5-7, Doc. 6 at 9-11, Doc. 7 at 10 ("[i]f the party responsible for returning the equipment on time (i.e., either the shipper or trucker) can avoid the charge by taking some action prior to the expiration of allotted free time, the charge will be considered reasonable.").

This notion was discussed at length during the rulemaking process and is frequently referred to as "once-in-demurrage, always-in-demurrage." Under this principle, the shipper bears the risk of anything after free time has ended. As discussed in the rule, "once free time ends, it would not be unreasonable to impose demurrage on a shipper even if the shipper is unable to retrieve the container due to circumstances outside the shippers, or anyone's, control." 85 Fed. Reg. at 29652.

The SCO correctly addressed and dismissed these arguments during in the I.D. Doc. 1 at 27. During the rulemaking process the Commission received comments from ocean carriers and marine

terminal operators urging the Commission to reaffirm the principle of "once-in-demurrage, always-in-demurrage." 85 Fed. Reg. at 29652. Conversely other commenters requested that the Commission expressly overrule the "once-in-demurrage, always-in-demurrage" principle. The Commission did neither, stating that it "does not agree with some commenters' arguments that it is always a reasonable practice to charge detention and demurrage after free time regardless of cargo availability or the ability to return equipment." *Id*. at 29653.

Just because a container is in a state of per diem, it does not automatically mean that charges can continue to accrue regardless of circumstance. Rather, the interpretive rule continues to apply, and the practice must be evaluated under that lens. In this case, for the reasons discussed in the I.D., such an evaluation leads the Commission to conclude that the charging of per diem on this container during the May 23-25, 2020 closure when it was not possible to return the container was unjust and unreasonable under § 41102(c).

4. The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

46 C.F.R. § 545.4(c) requires that the practice relates to or is connected with receiving, handling, storing, or delivering property. As discussed in the I.D., the parties do not dispute that the per diem charges at issue relate to or are connected with receiving, handling, storing, or delivering property. Doc. 1 at 22. Respondent, nevertheless, raised an argument, that because the Claimant is a motor carrier the claim was outside Commission jurisdiction. *Id*. The SCO dismissed this argument, stating that during the rulemaking process the Commission made clear that truckers were one of the entities meant to be protected under § 41102(c). *Id*. The SCO ultimately concluded that the requirements of § 545.4(c) were established. *Id*. The Commission concurs with the SCO's conclusion.

5. Respondent's Practice is the Proximate Cause Of The Claimed Loss

46 C.F.R. § 545.4(e) requires that the practice be the proximate cause of the loss. Respondent argues that Claimant was not injured, or that the per diem did not proximately cause any injury, because Claimant passed on the per diem with markup to Yamaha. Doc. 4 at 13-14, Doc. 5 at 11-12 (similar arguments were raised by NAWE). The SCO rejected that argument as a defense to liability under § 41102(c), but nevertheless ordered Claimant to return the per diem with markup to Yamaha so that Claimant did not receive a double recovery – i.e., reparations plus retention of the per diem/markup it received from the BCO. Doc. 1 at 29.

In re Vehicle Carrier Services, 1 F.M.C.2d 440, 446 (FMC 2019) the Commission stated that a respondent cannot rely on a claimant pass-on theory to avoid liability for reparations. This is a corollary to the direct purchaser rule in overcharge cases. Under the direct purchaser rule, only the party who actually paid the carrier can sue for reparations for an overcharge, not indirect purchasers further down the chain. *Id*. By the same token, a respondent cannot rely on the fact that a claimant passed on charges as a defense to an overcharge claim. *Id*.

Under the direct purchaser rule, "parties suing for alleged overcharges can only recover reparations if they actually paid the carrier or received an assignment from the direct purchaser." *Gov't. of Guam v. Sea-Land Serv., Inc.*, 29 S.R.R. 894, 902, 2002 FMC LEXIS 16, *4 (ALJ 2002), *admin. final*, 2002 FMC LEXIS 25 (FMC 2002). As explained in the recent Commission case, *In Re Vehicle Carrier Services*, "[t]he basis for this rule first arose in 1934, when the Commission's predecessor, the United States Shipping Board Bureau, held that the entity that paid the illegal overcharges was the person 'directly damaged' by the illegal rates and '[h]is claim accrued at once' and the law 'does not inquire into later events.'" *See In Re Vehicle Carrier Services*, 1 F.M.C.2d 440, 445 (2019) (citations omitted). The Commission continued, "In the 80 years since the Shipping Board held that a respondent could not rely on a pass-on theory to avoid liability to a Claimant for reparations,

the Commission has repeatedly found that a Claimant cannot rely on a pass-on theory to recover reparations for overcharges. In numerous decisions, the Commission has ruled that only the party who actually paid the carrier (or the valid assignee of the payor) can sue for reparations." *Id*. at 446.

The Commission's rule is consistent with the Supreme Court's direct purchaser rule developed in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977). There, the Supreme Court explained that this rule was necessary to avoid the complex task of accurately apportioning damages among various parties along the distribution chain. *Id*. at 730-37. The Court recognized that "these difficulties and uncertainties will be less substantial in some contexts than in others," but chose not to carve out exceptions. *Id*. at 743-44.

In the instant matter there is no question that Respondent was paid by the Claimant. Thus, under the Commission's Direct Purchaser Rule, the Claimant has the ability to collect damages and Respondent cannot avoid responsibility by claiming Claimant was later reimbursed.

D. **Claimant's Requested Relief**

In addition to finding that Respondent's actions in this case were unreasonable and ordering reparations, the SCO also ordered Respondent to, "cease-and-desist from imposing per diem charges when imposition of per diem charges does not serve its incentivizing purposes, such as when empty equipment cannot be returned on weekends, holidays, and port closures." Doc. 1 at 33. This injunctive language mirrors 46 C.F.R. § 545.5(c)(2)(ii): "Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable."

The SCO correctly determined that it was appropriate to issue a cease-and-desist order. Doc. 1 at 29-30. Respondents were found to have violated section 41102(c). *Id*. at 20. Under Commission precedent, a cease-and-desist order may be issued where there is a violation of the Shipping Act. *See, e.*g., *Bimsha Int'l*

v. Chief Cargo Svcs. Inc., 32 S.R.R. 1861, 1864, 2013 FMC LEXIS 32 at *22-*23 (FMC 2013).

The order followed Commission precedent regarding the language used in cease-and-desist orders. *See Universal Logistic Forwarding Co. Ltd.,-- Possible Violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 SRR 474, 476 (FMC 2002)(The Commission advised "the language used in cease-and-desist orders generally mirrors the violations committed coupled with the statutory language").

The Commission has issued a variety of cease-and-desist orders, some warranting broader language, some more specific language. *See, e.g., United Logistics (lax) Inc. - Possible Violations of Sections 10(a)(1) and 10(b)(2)(a) of the Shipping Act of 1984*, 2014 WL 5316339 (FMC 2014) (Respondent ordered to cease and desist from operating as an OTI without a license); *Saeid B. Maralan, et. al. - Possible Violations of Sections 8(a)(1), 10(b)(1), 19(a) and 23(a) of the Shipping Act of 1984*, 1999 WL 1294893 (FMC 1999) (Respondent ordered to cease and desist from charging rates other than those filed in tariffs); *but see, Commonwealth Shipping Ltd., Cargo Carriers Ltd., Martyn C. Merritt And Mary Anne Merritt - Submission Of Materially False Or Misleading Statements to the Federal Maritime Commission and false representation of Common Carrier Vessel Operations* 2003 WL 21371703 (FMC 2003) (Respondent ordered to "cease and desist from committing any further violations of the Shipping Act.").

The Commission has also issued cease-and-desist orders to advance compliance more broadly. In *Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335, 1342, 1997 FMC LEXIS 46, *26 (ALJ 1997), the Respondent was not currently engaged in transportation activities, nevertheless, a cease-and-desist order was still deemed appropriate to "alert the shipping industry, serve to forestall future violations, and facilitate injunctions against possible future unlawful activity." *See also Geo Machinery FZE v. Watercraft Mix, Inc*, 32 S.R.R. 1673, 1677 (SCO May 21, 2013), *aff'd*, 33 S.R.R. 329 (FMC 2014) (Order Affirming Settlement Officer's Decision) (the small claims officer issued a cease-and-desist order to "alert the shipping industry, serve to forestall future

violations, and facilitate injunctions against possible future unlawful activity."); *Stallion Cargo, Inc. Possible violations of Section 10(a)(1) and 10(b)(1) of the Shipping Act of 1984*, 29 S.R.R. 205, 218 (ALJ 2001) (despite no evidence that Respondent had continued to violate the Shipping Act, cessation of unlawful practices, and argument that it had taken measures to prevent future violations, a cease and desist order was still appropriate because the Respondent intended to stay in business, and had previously persisted in committing numerous violations.).

The Commission has previously expressed that "cease-and-desist orders are usually issued when there is a reasonable expectation that respondents will continue or resume illegal activities." *See Alex Parsinia d/b/a Pacific Int'l Shipping and Cargo Express*, 27 S.R.R. 1335 at 1342-1343. Evergreen acknowledged in its filings that it intended to continue charging while the port was closed. Resp. Reply Brief at 2.

Finally, for the reasons discussed in the I.D., the Commission also denies Claimants request that Respondents and "all marine lines" be directed to bill per diem charges directly to their customers. Amended Cl. Pg. 2. First, as noted by the SCO, judgments issued in this decision can only apply to Respondent because Claimant did not include any other marine line as a respondent in this proceeding. Doc. 1 at 31. Further, the fact that Claimant agreed to be billed for the per diem charges and appears to have profited from the billing arrangement, does not support its argument that the billing arrangement poses a hardship and a burden to it. *Id*. at 32.

III. CONCLUSION

For the reasons explained in the I.D. and reiterated above, the Commission finds that Claimant has met its burden of proof in demonstrating that Respondent's actions were unjust and unreasonable under § 41102(c), as interpreted following 46 C.F.R. § 545.5.

Accordingly, the Commission **AFFIRMS** the Initial Decision. It is hereby **ORDERED** that Respondent shall pay reparations to Claimant by January 13, 2023, in the amount of $510.00 with interest ($11.62) running on the reparation award from June 6, 2020, totaling $521.62.

FURTHER ORDERED, that absent extenuating circumstances Evergreen Shipping Agency (America) Corporation and Evergreen Line Joint Service Agreement cease and desist from imposing per diem charges when imposition of per diem charges does not serve its incentivizing purposes, such as when empty equipment cannot be returned on weekends, holidays, and port closures. It is

FURTHER ORDERED, that TCW Inc.'s request for an order requiring Evergreen Shipping Agency (America) Corporation and Evergreen Line Joint Service Agreement to invoice per diem directly to beneficial cargo owners is **DENIED**.

By the Commission.

William Cody
Secretary

Commissioner Bentzel, dissenting:

I disagree with the SCO's finding that Evergreen's conduct was unjust or unreasonable under § 41102(c). Accordingly, I disagree with the above Order and recommend that the Commission affirm the SCO's decision with respect to the issues of invoicing TCW instead of the BCO and reverse the SCO's decision with respect to the per diem charges.

I. LEGAL STANDARDS

The Commission reviews an I.D. de novo. 46 C.F.R. § 502.227(a)(6) (when the Commission reviews an I.D., it has "all the powers which it would have in making the initial decision"). 46 U.S.C. § 41102(c) prohibits common carriers, marine terminal operators, and ocean transportation intermediaries from failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property. 46 C.F.R. § 545.4 further requires § 41102(c) claimants seeking reparations to prove that the claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis, and that the complained-of practice or regulation is the proximate cause of the claimed loss. 46 C.F.R. § 545.5 informs § 41102(c) claimants (and others) that in assessing the reasonableness of any charges, including "per diem," assessed by regulated entities on containerized cargo, the Commission "will consider the extent to which demurrage and detention are serving their intended primary purpose as financial incentives to promote freight fluidity" (the "incentive principle"). 46 C.F.R. § 545.5(c)(1).

It is my view that terms such as "incentive principle" do not replace "reasonableness" which is the underpinning of the Shipping Act. In this case, my concern is that we are at risk of overstating the manufactured principle at the peril of usurping reasonableness. Further, it is my view that the Respondents, Evergreen Shipping, charged detention consistent with the "incentive principle" and the need to promote fluidity of movement.

Specifically, in this case, the container and chassis were already exceeding limits of free time before implementation of the per diem penalties and the claimants well apprised of and cognizant of the standards for implementation of per diem detention penalties. In this case it is clear to me that the claimants knew when the Port of Savannah was open to business, and when they were supposed to re-deliver cargo equipment; there were no issues that were beyond

or outside of the control of the shipper justifying the denial of detention penalties. In essence, the shipper knew when the facility was closed and failed to timely re-deliver it before the stipulated time.

II. INTERPRETIVE RULE

Unfortunately, the industry has been forced to rely on a series of *ad hoc* determinations and general guidance that neither affirms proper context for enforcing an adequate process in which detention and demurrage charges can be assessed nor outlines the improper implementation of penalties aimed at increasing cargo fluidity in movement. Compounding the challenge of establishing the reasonableness of shipping practices, is the challenge of defining "reasonableness."

While I generally agree with the proposition that detention and demurrage for circumstances outside of the shipper's control, in instances where a shipper/trucker is unaware of unscheduled or unannounced policy changes that are made to provide access for the pick-up or return of containers or intermodal equipment, I do not believe that the incentive principle should be construed to provide an interpretation that prohibits the assessment of penalties for days that a terminal is closed for business, or on holiday.

Penalty charges for detention and demurrage are intended to facilitate the movement of cargo from the port complex and the re-delivery of intermodal cargo equipment back to the port complex. As such there should be a balance of expectation in performance. The carrier/terminal operator should provide a reasonable amount of free time before imposition of the demurrage penalty, and a reasonable period for the re-delivery of intermodal cargo equipment. The primary mechanism driving the incentive principle is not that we intend to immunize shippers for charges when terminal factifies are closed, but rather that we have clear communications on the expectation of pick-up of cargo and re-delivery of intermodal cargo equipment. The incentive is the notification of operating

requirements governing access into and out of the complex, and deadlines for performance on both ends. The shipper must be aware of and prepared to pick up cargo and return equipment within the required free time or pay penalties for the delay.

The majority opinion in my view is overly concerned with the methodology of assessing detention and demurrage, rather than focusing on whether in this instance it reasonably achieved the objective of providing fluidity of movement of cargo. The terms of detention and demurrage are set by the ocean carriers by contract, or in some instances by their tariff, and marine terminals set detention and demurrage requirements by the terms of publicly available schedules. They make their own decisions on what is necessary and appropriate in the implementation of potential penalties. As such, they could choose to define detention and demurrage differently: either to define operations days to include days off and holidays or to shorten or expand the duration of detention and demurrage to reflect the time frame they seek to have covered. Effectively, this decision will have no value governing whether carriers or terminals alter policies on billing detention and demurrage because they are authorized to define the terms for the imposition of the penalty.

Reviewing the facts in this particular case, and not focusing on whether their assessment methodology included assessments for a day off each week and a holiday, claimant had 21 days of total free time. An amount of time that, even excluding the days off, seems to be a more than a reasonable amount of time to make a port run, and return intermodal cargo equipment to the terminal. Instead of returning the equipment three weeks, two weeks or even one week ahead of time, before falling into demurrage, the equipment was held on to and effectively taken out of the supply chain. When the claimant did decide to return the equipment, it was on a holiday weekend. The Port of Savannah was closed the Monday of Memorial Day and it was also closed on Saturdays during the COVID crisis. The Port of Savanah confirmed that the port was in fact closed on Saturdays from mid-March 2020 to mid-June 2020, but these closures were communicated widely, and in my view the

claimants were well positioned to know when they could pick-up cargo and return intermodal cargo equipment.

For example, a month before a Saturday closure, the Port's email system routinely notifies 1,400 trucking companies and the Port's Everbridge text system reaches over 8,000 truck drivers who are alerted of operational closures or changes in schedule. In practice, the shipper would have received communication on the port's operation schedule throughout the 21 days of free time.

What makes the legal claim contesting assessment of detention about the port being closed on the weekend and holidays even more concerning is that it was a time when port and supply chain operations were widely acknowledged as suffering as a result well known operational disruptions throughout the supply chain. Throughout the system there were carriers waiting outside ports to berth, congestion at terminals, equipment dislocation for chassis and empty containers. Anyone moving cargo should and would have been on high alert.

In the absence, of information on *ad hoc* closures restricting access to the Port of Savannah, I believe the provision of 21 days of total free time for pick-up of cargo and re-delivery of intermodal cargo equipment was a reasonable time allotment even with reductions due to Saturday closures and the Memorial Day holiday, and I believe that the claimants were provided more than adequate notification of the operational policies restricting access to the terminal. Accordingly, I disagree with the SCO's finding that Evergreen's conduct was unjust or unreasonable under § 41102(c). Also, I disagree with the above Order and recommend that the Commission affirm the SCO's decision with respect to the issues of invoicing TCW instead of the BCO and reverse the SCO's decision with respect to the per diem charges.