

FEDERAL MARITIME COMMISSION
Office of the Administrative Law Judges

SIMPLE FORWARDING, INC., *Claimant*

v.

CHINA UNITED LINES LTD. AND NORTON LILLY
INTERNATIONAL, *Respondents*.

DOCKET NO. 2010(F)

Served: February 6, 2025

ORDER OF: Richard AMBROW, *Administrative Law Judge*.

INITIAL DECISION¹

On May 28, 2024, Claimant Simple Forwarding, Inc. (“Claimant”) initiated this matter seeking reparations from Respondents CULines, later amended to China United Lines, Ltd. (“CULL”), and Norton Lilly International, Inc., due to per diem charges that were allegedly unjustly and unreasonably imposed in violation of 46 U.S.C. § 41102(c). In short, Complainant alleges that while it was acting as a Non-Vehicle Ocean Common Carrier (“NVOCC”) and Shipper, it incurred \$6,825 in detention charges because it was unable to return a container to the Port of Los Angeles from October 14, 2021, through November 3, 2021, due to a lack of available appointments.

After an unsuccessful motion to dismiss, and after Claimant amended its complaint, Respondents filed answers largely contesting Claimant’s right to collect reparations because it did not directly pay the per diem charges to Respondents, and is a commercial stranger to the Respondents.

As discussed below, I find that because Norton Lilly is not a regulated entity, and because Norton Lilly was otherwise acting on behalf of a regulated entity that can be held liable for Norton Lilly’s conduct, Norton Lilly is appropriately **DISMISSED**.

As discussed below, I also find Respondent CULL’s argument that Claimant lacks standing to seek reparations to be unpersuasive. In addition, I find that Claimant carried its burden of proof that the per diem charges from October 14, 2021, through October 19, 2021, were unjust and unreasonable because evidence in the record shows that return appointments were unavailable. Accordingly, Claimant is entitled to reparations in the amount of \$1,950 (\$325

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

per day multiplied by 6 days). I, however, find that because an appointment to return a container was available as of October 19, 2021, Claimant did not demonstrate that it was unjust and unreasonable for Respondent CULL to charge detention to Claimant for the return the container after October 19, 2021.

I. PROCEDURAL HISTORY

Claimant filed a complaint that the Office of the Secretary received on May 28, 2024 (“Complaint”). The Complaint names two respondents: CULines and Norton Lilly International (“Norton Lilly”).

On June 3, 2024, the Secretary of the Federal Maritime Commission issued a Notice of Filing of Small Claims Complaint and Assignment.

On June 27, 2024, Norton Lilly sent an email to the Commission’s Judges@fmc.gov email address, asking to be removed from the case.

On June 28, 2024, CULines filed a Verified First Motion of Specially Appearing Respondent C.U.Lines Limited to Dismiss the Complaint for Lack of Service or Jurisdiction (“Motion to Dismiss”). The specially appearing Respondent argued that “CULines” is a “non-existent entity[.]” and that legal entities, China United Line Limited and C.U. Lines Limited (“CUL”), have not properly been served. (Motion to Dismiss, at pp. 1-3). Moreover, the Commission lacks jurisdiction over the legal entities because neither is currently an ocean common carrier, although CUL was previously. (Motion to Dismiss, at pp. 3-5). The specially appearing Respondent stated in a footnote that “it would not in any event consent to the informal procedures” under Subpart S. (Motion to Dismiss, at p. 3, n.2).

On July 11, 2024, Claimant filed Complainant’s Response in Opposition to Respondent CULines’s Motion to Dismiss.

On July 18, 2024, the specially appearing Respondent filed a Verified Reply in Support of Motion to Dismiss the Complaint for Lack of Service or Jurisdiction (“Reply”), with an exhibit attached (“Ex. A”). Among other things, Ex. A includes a bill of lading. (Reply, at p. 5). The bill of lading appears to have been issued by CUL.

On July 18, 2024, the Small Claims Officer issued an Order Addressing Respondent CULines’ Motion to Dismiss and Respondent Norton Lilly International’s June 27, 2024, Email (the “July 18 Order”). The July 18 Order denied the Motion to Dismiss, and required CULines and Norton Lilly to file responses to the Complaint.

CULines filed a Verified Answer of CULines to Complaint of Simple Forwarding (“Answer”) on July 31, 2024. Respondent reiterated in the Answer that CULines is a non-existent entity, that the legal entities to which Claimant likely refers have not been properly served, and that FMC lacks jurisdiction. Respondent also argued that the Claimant’s claim was meritless because it failed to meet its burden of proof, and because Claimant was not a “direct purchaser.” Finally, the Respondent did not consent to informal procedures.

On August 16, 2024, the Chief Administrative Law Judge issued a Notice of Reassignment to an Administrative Law Judge (“Notice of Reassignment”). The Notice of Reassignment noted that CULines did not consent to informal procedures under Subpart S. Therefore, this case was reassigned to an Administrative Law Judge.

On August 25, 2024, Claimant filed Complainant’s Response to Respondent’s Verified Answer of CULines to [sic] Complaint of Simple Forwarding (“Motion to Strike). In the Motion to Strike, Claimant argued that portions of the Answer were frivolous. (*See* Motion to Strike, at 2-3).

On September 3, 2024, counsel for CULines filed a Notice of Withdrawal of Jeffrey/Fenneman Law & Strategy.

On September 11, 2024, Claimant filed a Motion for Leave to Amend Complaint and Request for Return to Informal Adjudication (“Motion for Leave”), along with a proposed amended complaint (“Amended Complaint”). In the Motion for Leave, Claimant sought to amend the Complaint in several ways. First, Respondent “CULines” is renamed as “China United Lines Ltd aka CULines[.]” Second, Claimant adds the allegation that the Respondents are “persons” involved in oceanborne foreign commerce of the United States. Third, Claimant adds additional information about the basis of its claim. And fourth, Claimant amends its request for relief.

On October 1, 2024, the proceeding was reassigned to the undersigned.

On October 4, 2024, I granted leave to Claimant to file an Amended Complaint, to which an Answer was due by November 4, 2024. Respondents China United Lines Ltd (“CULL”) and Norton Lilly did not file a timely answer or otherwise respond.

On November 14, 2024, I issued an Order Requesting Additional Information and Ordering Respondents to Answer (“November 14 Order”). The November 14 Order required the Respondents to answer the Amended Complaint no later than December 16, 2024. The November 14 Order also requested information pursuant to 46 C.F.R. § 502.314 from the parties, required a response from the parties by December 16, 2024, and permitted replies to the other party’s responses by December 30, 2024.

On December 11, 2024, Respondent CULL filed the Answer of China United Lines Limited and Norton Lilly International to Amended Complainant of Simple Forwarding (“Answer of CULL”). The Answer of CULL purported to be on behalf of both CULL and Norton Lilly, though there was no indication that the individual who signed the Answer of CULL, Ms. Xu, had authority to represent Norton Lilly.

On December 16, 2024, Claimant filed a Motion for Relief from Order Requesting Additional Information and Ordering Respondents to Answer.

On December 17, 2024, I issued an Order Denying Claimant’s Motion for Relief from Order Requesting Additional Information and Ordering Respondents to Answer (“December 17 Order”). The December 17 Order reiterated that the parties are to provide information pursuant

to 46 C.F.R. § 502.314. The December 17 Order, however, extended the deadline to respond and provide information until January 13, 2025, and ordered that the parties may reply to the other party's response by January 27, 2025. In addition, the December 17 Order required Norton Lilly to answer or otherwise respond to the Amended Complaint by January 13, 2025.

On December 22, 2024, Claimant filed its Motion to Strike Respondent CULines' December 16 Response to the Amended Complaint ("Motion to Strike"), arguing that Ms. Xu filed the Answer on behalf of CULL without making a notice of appearance, and that she was unauthorized to represent Norton Lilly.

On January 2, 2025, Claimant filed a Motion for Extension of Time for Complainant to Respond to Respondents['] Response to the Amended Complaint ("Motion to Extend"), essentially seeking additional time to file a reply to the Answer of CULL.

On January 3, 2025, I entered an Order Granting in Part and Denying in Part Claimant's Motion to Strike Respondent CULines's December 16 Response to the Amended Complaint and Order Granting Motion for Extension of Time for Claimant to Respond to Respondents' Response to the Amended Complaint ("January 3 Order"). In the January 3 Order, I ordered that Norton Lilly must indicate how Ms. Xu was authorized to respond on Norton Lilly's behalf, or, in the alternative, file its own response to the Amended Complaint. I also granted Claimant's Motion to Extend, and allowed Claimant to have until January 13, 2025, to respond to the Answer of CULL. The January 3 Order also reiterated that the parties are to respond to my request for documents in the November 14 Order by January 13, 2025, and to reply to the information the other party provided by January 27, 2025.

On January 10, 2025, Norton Lilly filed the Answer of Norton Lilly International to Amended Complainant of Simply Forwarding ("Answer of Norton Lilly").

On January 11, 2025, Claimant filed both Complainant's Response to Respondent CULines' Answer to Amended Complainant of Simple Forwarding and Complainant's Response to Respondent Norton Lilly International's Answer to Amended Complainant of Simple Forwarding.

On January 12, 2025, Claimant filed Complainant's Compliance with the Presiding Officer's Order Requesting Additional Information ("Claimant's Information"). The parties did not make any additional filings, although the schedule permitted them to do so.

II. FINDINGS OF FACT

1. Claimant Simple Forwarding Inc. is a Commission-licensed Ocean Freight Forwarder, NVOCC and Shipper, with a principal place of business in New York. (Amended Complaint, ¶ I).
2. Respondent China United Lines Ltd. ("CULL") is a Chinese entity. I take official notice (46 C.F.R. § 502.226) of the fact that, in other matters before the Commission, CULL represents that it operates as an Ocean Common Carrier through its affiliate, C.U. Lines, Ltd. ("CUL") pursuant to 46 U.S.C. §§ 40102(7) and (18). (*See China*

United Lines, Ltd. v. Amazon.com Services LLC, et al., Dkt. 25-04, Verified Amended Complaint, at ¶¶ 1-2, 11).

3. CUL is identified as an inactive VOCC on the Commission’s website, and had a published tariff. (Inactive Vessel Operating Common Carriers (last visited February 6, 2025)).
4. Respondent Norton Lilly International is incorporated under the laws of the State of Alabama, and is a Commission-licensed NVOCC. (Amended Complaint, ¶ II(B)).
5. Norton Lilly admits it acted as an agent for CUL in 2021. (Answer of Norton Lilly, at 2).
6. Claimant filed a signed statement from the CEO of Unifelix International Limited (“UIL”) dated January 8, 2025. The statement states that UIL, formerly known as Shenzhen Unifelix International Logistics Co., Ltd. (“SUILC”) was Claimant’s agent in China for container no. TWCU8055871. The statement also indicates that Claimant was the managing OTI for the shipment, and paid the ocean freight charges. Finally, the statement indicates that UIL subcontracted with World Trade Shipping Limited (“WTSL”). (Claimant’s Information, at 8²).
7. Claimant filed a signed statement from Abe Orgel dated January 8, 202[5]. The statement states that WTSL issued a house bill of lading naming Claimant as the consignee. In addition, the statement states that the charges in question were coerced from the trucker, New Opportunities Trucking, and that Claimant was unaware of the charges until after they were paid. (Claimant’s Information, at 6-7).
8. The signed statement of Mr. Orgel contains a link to CULL’s bill of lading terms and conditions. (See Claimant’s Information, at 7 (linking to: <https://www.culines.com/uploads/Terms%20and%20conditions%20of%20Bill%20of%20Lading%20Sea%20Waybill&ef&bc&88CHINA%20UNITED%20LINED%20LIMITED&ef&bc&89BE%20EFFECTIVE%20AS%20OF%202024.2.1.pdf>) (“Terms and Conditions”) (last visited February 5, 2025)). Among other things, the Terms and Conditions identify CULL as the “Carrier[,]” indicate that the Carrier has a tariff, discuss the Carrier’s responsibilities for cargo, and set forth the basis of the Carrier’s compensation. (Terms and Conditions, at 1-5)³. The Terms and Conditions also state: “Should a Container not be returned within the time prescribed in the Tariff, the Merchant shall be liable for any detention, loss or expenses which may

² The page references to Claimant’s Information are to the PDF page. Claimant also filed a document entitled Complainant’s Compliance With the Presiding Officer’s Order Requesting Additional Information Page Numbers Addendum (“Addendum”), attempting to give page numbers to the Claimant’s Information pdf. The Addendum, however, is difficult to follow, and contains duplicate numbers (e.g., “Pages 1-6” and “Pages 6-8”). Therefore, I will not reference the pagination in the Addendum.

³ The page references to the Terms and Conditions are to the PDF page.

- arise from such nonreturn.” (Terms and Conditions, at 9). Finally, the Terms and Conditions define a “Merchant” to include and person who “has been or becomes the shipper, consignor, consignee, receiver of the Goods, the Holder of this Bill of lading, any person or entity owning or entitled to the possession of the goods or this Bill of Lading and anyone acting on behalf of any such person or entity.” (Terms and Conditions, at 1).
9. The record contains a document entitled “Combined Transport Bill of Lading,” issued by WTSL that shows SUILC as the shipper, Claimant as the consignee, the container as no. TWCU8055871, which was loaded at Shanghai, China, with the destination of Los Angeles. (Claimant’s Information, at 9).
 10. The record contains a bill of lading. The bill of lading has CUL printed on it, shows the shipper is WTSL, the consignee is AIMPacific Services, Inc., the container as no. TWCU8055871, the shipping agent is Norton Lilly International, Inc., and indicates that China United Lines Ltd. is the Master and owner of the vessel. (Reply, at 5).
 11. The record has an email exchange between an employee of Claimant corresponding with an employee of SUILC regarding the transportation of container no. TWCU8055871 to be shipped on “CUL” from Shanghai to Los Angeles. (Claimant’s Information, at 10-15). SUILC sent an invoice to Claimant in the amount of the ocean freight negotiated. (Claimant’s Information, at 16).
 12. The record shows an arrival notice for container TWCU8055871 with a destination of the Everport Terminal in Los Angeles, and an estimated time of arrival of September 23, 2021. (Claimant’s Information, at 18).
 13. The record contains several wire transfer receipts, presumably for payment of ocean freight and customs, though the amount of the transfer does not match the invoices. (Claimant’s Information, at 16-21).
 14. The record contains a delivery order from Claimant’s employee to an employee at Total Quality Logistics (“TQL”). (Claimant’s Information, at 22-23).
 15. There are documents entitled “Routing Slip” and “Equipment Interchange Receipt.” They were apparently produced by Everport Terminal Services, Inc. They show New Opportunities Trucking Inc., took container TWCU8055871 out full on October 8, 2021, and that the carrier was China United Lines Ltd. (Claimant’s Information, at 36).
 16. There is an email chain between an employee of Claimant and an employee of TQL from September 29, 2021, through November 1, 2021. In short, the email chain shows that the container was dropped off on October 8, 2021. Starting October 14, 2024, the Claimant’s employee asks several times if container no. TWCU8055871 has been returned, and TQL’s employee responds that despite checking for a return appointment daily, it was unable to return the container. (Claimant’s Information, at 24-33).

17. The record contains numerous pages of screenshots for “CUL” returns from October 14, 2021, through October 31, 2021. (Claimant’s Information, at 38-108). Most show a lack of appointment availability. It appears, though, that on October 17, 2021, and October 18, 2021, appointments were available on October 19, 2021, and October 20, 2021. (Claimant’s Information, at 50, 54).
18. The record contains invoice no. 06343720 dated November 7, 2021, to New Opportunities Trucking Inc. for \$6,825 for per diem charges related to container TWCU8055871. The invoice shows that October 8, 2021, through October 13, 2021, were free days, and that per diem was charged at a rate of \$325 per day from October 14, 2021, through November 3, 2021. (Claimant’s Information, at 34).
19. Norton Lilly admits to issuing invoice no. 06343720 to New Opportunities Trucking, Inc., on November 7, 2021 on behalf of C.U.Lines Ltd., in the amount of \$6,825. (Answer of Norton Lilly, at 2).
20. The invoice was paid by New Opportunities Trucking, Inc. (Answer of Norton Lilly, at 2).
21. There is an invoice, no. 18434839R, from TQL to Inxpress dated February 10, 2022, regarding container no. TWCU8055871 in the amount of \$6,825. (Claimant’s Information, at 121).
22. The record contains an email chain between Claimant’s representative and TQL dated August 22, 2024, that included a spreadsheet entitled “Receivable’s Transaction Inquiry” showing \$0 remaining for invoice no. 18434839R. (Complainant’s Information, at 127).
23. The record contains an email chain between an employee of Claimant and an employee of Norton Lilly from January 31, 2023, through April 17, 2023. In short, Claimant’s employee states that Claimant received an invoice for per diem regarding container TWCU8055871, and asks for waiver of the per diem due to unavailability of return appointments. Norton Lilly’s employee conveyed the position that payment of the charges is agreement to the charges. (Claimant’s Information, at 109-120).
24. The record contains an email from Norton Lilly’s employee to Claimant’s representative stating: “Per your backup, I did see appointments were available on 10/19 at LBCT. In lieu of full waiver and refund, are you open to doing a partial refund of 50%?” (Motion to Strike, at 18).

III. ANALYSIS

A. Burden of Proof

To prevail in a proceeding brought to enforce the Shipping Act, “a complainant has the burden of proving by a preponderance of the evidence that the respondent violated the Act. In general, the burden of proof is on the complainant.” (*Port Elizabeth Terminal & Warehouse*

Corp. v. The Port Authority of New York and New Jersey, 1 F.M.C.2d 264, Dkt. No. 17-07, 2019 WL 1376529, at *13 (ALJ Mar. 25, 2019); *see also* 5 U.S.C. § 556(d)).

B. Alleged Violation of 46 U.S.C. § 41102(c)

Claimant alleges that Respondents charged Claimant unjust and unreasonable per diem fees in violation of 46 U.S.C. § 41102(c).

Section 41102(c) of the Shipping Act provides that: “[a] common carrier, marine terminal operator, or ocean transportation intermediary, acting alone or in conjunction with another person, directly or indirectly, may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling storing or delivering property.” (46 U.S.C. § 41102(c)).

By regulation, the Commission identified the following five elements of a claim under § 41102(c):

(a) the respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary; (b) the claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis; (c) the practice or regulation relates to or is connected with receiving, handling, storing or delivering property; (d) the practice or regulation is unjust or unreasonable; and (e) the practice proximately caused the claimed loss.

(46 C.F.R. § 545.4).

I discuss these five elements in turn.

1. CULL is a Regulated Entity; Norton Lilly is Not

The first element is that the respondent must be a regulated entity. I find that it is more likely than not that CULL is a regulated entity, namely an ocean common carrier.

The relevant statute defines an “common carrier” as a person that:

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

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

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

(46 U.S.C. § 40102(7)). An ocean common carrier (“OCC” or “VOCC”) is a common carrier that operates a vessel. (46 U.S.C. § 40102(18)).

In its answer to the Amended Complaint, CULL takes the position that it is not, and never was, an OCC, though CULL acknowledges that CUL was an OCC in the past.

In another matter recently filed before the Commission, however, CULL stated that it:

. . . is an ocean carrier that has provided containership transportation between Asia and the United States. China United conducted business in the United States through its wholly-owned subsidiary C.U. Lines Ltd. (“CUL”). CUL is a vessel operating “ocean common carrier” as that term is defined by 46 U.S.C. § 40102(7) and (18) and at all relevant times has been registered with and subject to regulation by the Federal Maritime Commission (the “FMC” or “Commission”), having FMC Organization No. 029412.

(See *China United Lines, Ltd. v. Amazon.com Services LLC, et al.*, Dkt. 25-04, Verified Amended Complaint, at ¶ 2; see also *id.*, at ¶ 11).⁴

In addition, in the present matter, while the bill of lading has CUL preprinted, the bill of lading also indicates that CULL is the Master and owner of the vessel. (Reply, at 5). The language on the bill of lading’s Terms and Conditions identifies CULL as the “Carrier,” and describes its responsibility regarding cargo, as well as the basis of its compensation. (Terms and Conditions, at 1, 3-5). This language suggests that CULL holds itself out to the general public as providing cargo transportation from a port in the U.S. and a foreign port, assumed responsibility for the transportation, and used a vessel for the transportation. The language in the bill of lading and the Terms and Conditions is also consistent with CULL’s representation in *China United Lines, Ltd. v. Amazon.com Services, LLC*. Therefore, I find it more likely than not that CULL is an OCC.

Regarding Norton Lilly, Claimant alleges that Norton Lilly is an NVOCC. (See Amended Complaint, ¶ II.B). 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 the OCC. (46 U.S.C. § 40102(17)). In turn, a shipper is a cargo owner; the person for whose account the ocean transportation of cargo is provided; the person to whom delivery is to be made; a shippers’ association; or an NVOCC that accepts responsibility for payment of all charges applicable under the tariff or service contract. (46 U.S.C. § 40102(23)).

Norton Lilly neither affirms nor denies the allegation that it is an NVOCC. The bill of lading indicates that Norton Lilly was the shipping agent. (Reply, at 5). In addition, Norton Lilly provided the invoice. (Answer of Norton Lilly, at 2). Without more, however, that alone does not allow me to find that Norton Lilly qualifies as a common carrier, *i.e.*, there is no indication that it holds itself out to the general public to provide water transportation.

In *Hapag-Lloyd, A.G. and Hapag-Lloyd (America) LLC – Possible Violations of 46 U.S.C. § 41102(c)*, Dkt. 21-09, 2022 WL 1239377 (ALJ. Apr. 22, 2022) (settlement approved on appeal) (“*Hapag-Lloyd A.G.*”), which is discussed in more detail below, the ALJ dismissed Hapag-Lloyd (America) LLC (“HLA”). HLA was not operating as a regulated entity. HLA,

⁴ As noted above, I take official notice of this fact. (See 46 C.F.R. § 502.226).

however, operating as an agent of a disclosed principal that would otherwise be liable for HLA's conduct. (*Hapag-Lloyd A.G.*, 2022 WL 1239377 at *5, *21; *see also OJ Commerce v. Hamburg Südamerikanische Dampfschiffahrts-Gesellschaft A/S & C., KG and Hamburg Sud North American, Inc.*, Docket No. 21-11, 2024 WL 4034610, at *1 n.2 (FMC Aug. 27, 2024) (“The ALJ denied all claims against HSNA because it found HSNA not to be a common carrier, instead HSNA was acting as a disclosed agent on behalf of HSDG. I.D. at 37. Neither side challenged this conclusion, and no evidence suggests it should be reviewed. . . .”). Here, it is unclear that Norton Lilly is acting as a regulated entity. But, Norton Lilly admits that it was acting as the agent of a regulated entity, CULL through CUL, that can be held liable. Therefore, it is appropriate to **DISMISS** Norton Lilly.

2. Normal, customary, and continuous basis

The second element of a claim under § 41102(c) is that the claimed acts occur on a normal, customary and continuous basis. Although only one invoice is at issue, I find that it is more likely than not that this element is satisfied.

In *TCW, Inc. v. Evergreen Shipping Agency*, the Commission affirmed the SCO's conclusion that the second element of a § 41102(c) claim was satisfied because the detention charge was imposed pursuant to a contractual term. (*See TCW, Inc. v. Evergreen Shipping Agency*, Dkt. 1966(I), 2022 WL 18068977, at *4-*5 (FMC Dec. 29, 2022) (*vacated and remanded on other grounds sub nom. Evergreen Shipping Agency v. FMC*, 106 F.4th 1113 (D.C. Cir. 2024))).

In this case, the Terms and Conditions permit CULL to impose detention charges per its tariff upon the Merchant for failure to return a container timely. (Terms and Conditions, at 9). A “Merchant” is defined to include the shipper, as well as any person owning the goods, or acting on behalf of such a person. (Terms and Conditions, at 1). Claimant here fits within the definition of “Merchant” because it is acting on behalf of the owner of the goods. It is also identified as the consignee on Combined Transport Bill of Lading. (Claimant's Information, at 9). The charges at issue were the result of a container that was returned late. In sum, the charges were imposed pursuant to the Respondent CULL's bill of lading and its tariff, which permitted CULL to charge a per diem on Claimant for a container returned late. Finally, Respondent CULL does not contest this element. Therefore, I find that the charges at issue were imposed pursuant to Respondent CULL's policy.

3. Related to property

The third element is that the practice or policy at issue has to relate to or be connected with the receiving, handling, storing or delivering of the property at issue. I find that this element is satisfied. The per diem charges at issue are related to the transportation of goods as the charges are imposed upon the late return of shipping containers used to transport the property at issue. Therefore, it is related to the receiving, handling, storing or delivering of property.

4. The Practice is Unjust or Unreasonable

I find that it is more likely than not that the fourth element, that the practice at issue is unjust or unreasonable, is satisfied through October 19, 2021.

In general, “[i]n assessing the reasonableness of demurrage and detention practices and regulations, the Commission will consider the extent to which demurrage and detention are serving their intended primary purposes as financial incentives to promote freight fluidity.” (46 C.F.R. § 545.5(c)(1)). Relevant here are detention charges, which are “fees charged by an ocean carrier for the use of a shipping container outside a marine terminal.” (*Evergreen Shipping Agency v. FMC*, 106 F.4th 1113, 1114 (D.C. Cir. 2024)). Regarding detention charges, the Commission’s interpretive rule provides that: “Absent extenuating circumstances, practices and regulations that provide for imposition of detention when it does not serve its incentivizing purposes, such as when empty containers cannot be returned, are likely to be found unreasonable.” (46 C.F.R. § 545.5(c)(2)(ii)). The rule continues, stating that:

(d) Demurrage and detention policies. The Commission may consider in the reasonableness analysis the existence, accessibility, content, and clarity of policies implementing demurrage and detention practices and regulations, including dispute resolution policies and practices and regulations regarding demurrage and detention billing. In assessing dispute resolution policies, the Commission may further consider the extent to which they contain information about points of contact, timeframes, and corroboration requirements.

(e) Transparent terminology. The Commission may consider in the reasonableness analysis the extent to which regulated entities have clearly defined the terms used in demurrage and detention practices and regulations, the accessibility of definitions, and the extent to which the definitions differ from how the terms are used in other contexts.

(46 C.F.R. §§ 545.5(d)&(e); *see also Bakerly, LLC v. SeaFrigo USA, Inc.*, 2024 WL 4678461, at *21 (FMC Oct. 30, 2024)). The Final Rule promulgating 545.5 provides the following regarding detention:

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

(*Interpretive Rule on Demurrage and Detention Under the Shipping Act*, 85 FED. REG. 29638, 29655).

These rules, which govern the determination of the unreasonableness of detention charges, were applied in *Hapag-Lloyd A.G.* There, the Commission issued an Order of Investigation and Hearing against Respondents, and named the Bureau of Enforcement a party, to determine whether Respondents were in violation of § 41102(c) in assessing detention in relation to eleven containers where return appointments were unavailable during free time, and, if Respondents were presented with evidence of unavailable appointments, if Respondents failed

to waive detention. (*Hapag-Lloyd, A.G.*, 2022 WL 1239377 at *1). In the Initial Decision, the ALJ determined while there were no specific evidentiary requirements, the trucking company that worked at the relevant port provided evidence that it attempted to make appointments to return containers, that it took screenshots of the appointment calendar if appointments were unavailable, that it used evidence from a website that gathered appointment data, and emailed Respondents regarding unavailability. (*Id.* at *21, *27). The ALJ concluded that where documentation was absent, she was unable to make findings. (*Id.* at *27). For example, for one particular container, the last free day was June 8, and there was evidence in the record that appointments were full on June 11, and June 14-16; thus, the ALJ found that the Respondents charged detention for four days when the container was unable to be returned. (*Id.*, at *28). Chief Judge Wirth also concluded that where evidence showed that appointments to return containers were unavailable, detention was inappropriate: “Therefore, [respondents] charged detention for fourteen days when there is evidence that sufficient appointments were not available. This policy and practice is unreasonable because no amount of detention could have incentivized the return of the containers on those fourteen days.” (*Id.*, at *30).

The rules regarding the unreasonableness of detention charges were also discussed in *Evergreen Shipping Agency v. FMC*, 106 F.4th 1113 (D.C. Cir. 2024). There, a trucker was charged detention for failing to return a chassis and container for several days after its free days expired; the trucker contested, however, the detention charges imposed while the port was closed for the Memorial Day weekend. (*Evergreen*, 106 F.4th at 1116). The Commission affirmed the small claims officer’s initial decision finding that the detention charges imposed while the port was closed to be unreasonable as the equipment could not be returned during those days, thus the detention did not encourage freight fluidity. (*Id.*). The Commission also rejected the argument that not charging detention for the holiday weekend would disincentivize the early return of the equipment, reasoning that there was a commercial incentive to return the empty containers. (*Id.*). The D.C. Circuit vacated and remanded the Commission’s decision, reasoning that the Commission treated the incentive principle as a bright-line rule, whereas the relevant inquiry is one based on “reasonableness” in light of the facts of a particular case. (*Id.* at 1117-18).

In this case, Claimant’s main argument is that it was unable to return the container through no fault of its own. For support, Claimant submits an email exchange between its employee and the TQL’s employee regarding returning the container TWCU8055871, where TQL’s employee reports difficulty finding an appointment to return container TWCU8055871. (Claimant’s Information, at 24-33). In addition, Claimant submits numerous screenshots showing no appointments (Claimant’s Information, at 38-108), though screenshots from October 17, 2021, and October 18, 2021, both show appointments available on October 19, 2021, and October 20, 2021. (Claimant’s Information, at 50, 54).

I find that Claimant carried its burden of demonstrating that it was unable to return the container at issue from October 14, 2021, through October 19, 2021. The record contains numerous pages of screenshots for CUL returns from October 14, 2021, through October 19, 2021, all of which show no appointments available for return of the container until October 19, 2021. (Claimant’s Information, at 38-108). This is similar to some of the evidence the ALJ relied on in finding that the containers in *Hapag-Lloyd, A.G.*, were unable to be returned through no fault of the trucking company. (*See Hapag-Lloyd, A.G.*, 2022 WL 1239377, at *21, *27).

Therefore, I find that the Claimant has met its burden of proof from October 14, 2021, through October 18, 2021.

As for October 19, 2021, it appears that the Claimant was charged detention for the day that the container itself was returned. The Claimant was able to return the container November 3, 2021, and was charged for that day. (Claimant's Information, at 34). Thus, had the container been returned October 19, 2021, it is more likely than not that the Claimant would have been charged a per diem fee for October 19, 2021.

I find that Claimant has not carried its burden of proving that the detention charged after October 19, 2021, was unjust and unreasonable. According to Claimant's evidence, it appears that on October 17, 2021, and October 18, 2021, appointments were available on October 19, 2021, and October 20, 2021. (Claimant's Information, at 50, 54). As Claimant could have returned the container on those days, it is just and reasonable for Claimant to pay detention for foregoing the opportunity to return the container. Detention is appropriately charged in order to incentivize Claimant to take prompt advantage of the opportunity to return the container. Therefore, Claimant is entitled to no recovery beginning October 20, 2021.

Claimant acknowledges that Norton Lilly pointed out that appointments were available October 19, 2021, and October 20, 2021. (Motion to Strike, at 18). Claimant responded that a full refund serves justice. (*Id.*). I do not agree with that assertion. It was not unjust and unreasonable for Claimant to be charged with detention for the days after it could have first made a return of the empty container at issue.

I also note that Claimant submitted no evidence regarding November 1, 2021, through November 3, 2021. (*See generally* Claimant's Information, at 38-108). Claimant argues that it is reasonable to assume that the pattern on unavailable appointments continued. (Motion to Strike, at 19-20). I do not accept that assumption. As noted, appointments were available for October 19, 2021, and October 20, 2021. (Claimant's Information, at 50, 54). Regardless, in *Hapag-Lloyd, A.G.*, the ALJ was unable to make findings for days in which evidence was unavailable. (*Hapag-Lloyd, A.G.*, 2022 WL 1239377, at *27-*28). Therefore, I find that even if Claimant could overcome the fact that appointments were available on October 19, 2021, and October 20, 2021, Claimant did not carry its burden of demonstrating that it was charged unjust and unreasonable fees for November 1, 2021, November 2, 2021, or November 3, 2021.

5. Loss Causation

Claimant's standing to receive reparations will be discussed more below, but, for purposes of analyzing the fifth element of a claim under § 41102(c), Claimant has met its burden of proving loss causation. Respondent CULL, through Norton Lilly, charged Claimant for six days of unjust and unreasonable detention, from October 14, 2021, through October 19, 2021, at a rate of \$325 per day. (Claimant's Information, at 34). Multiplying six days by \$325 per day yields a product of \$1,950. Therefore, I find that the Claimant satisfied the fifth element of a claim under § 41102(c) because it appears that Respondent CULL's policy or practice caused \$1,950 of damages.

For these reasons, I find that the elements of a claim under § 41102(c) are met from October 14, 2021, through October 19, 2021.

C. Reparations

The Commission “shall direct the payment of reparations to the complainant for actual injury caused by a violation” of the Shipping Act. (46 U.S.C. § 41305(b)). The term “actual injury” includes “the loss of interest at commercial rates compounded from the date of injury.” (46 U.S.C. § 41305(a)). Claimant bears the burden of proving that it is entitled to reparations. (*MAVL Capital Inc. v. Marine Transport Logistics, Inc.*, Dkt. No. 16-16, 2022 WL 2209421, at *3 (FMC June 10, 2022)). The Commission explained that: “(a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation.” (*MAVL Capital*, 2022 WL 2209421, at *3 (quotations omitted)). Reparations will only be awarded based on actual damages. (*MAVL Capital*, 2022 WL 2209421, at *3) (citations omitted). “Actual damages means ‘compensation for the actual loss or injuries sustained by reason of the wrongdoing’ which complainants must show to a reasonable degree of certainty.” (*MAVL Capital*, 2022 WL 2209421, at *3 (quotations omitted)). “That does not require absolute precision but does require evidence sufficient to reasonably infer the actual loss sustained.” (*MAVL Capital*, 2022 WL 2209421, at *3) (citations omitted).

Respondent CULL argues that only a party that suffered an “actual injury” may be awarded reparations. (46 U.S.C. § 41305(a)). Respondent CULL argues that Claimant did not suffer an actual injury, as Claimant did not have a service contract with Respondent, did not appear as a shipper or consignee on a bill of lading, did not receive an invoice from Respondent or its agent Norton Lilly, and did not directly pay Respondent CULL. (*See Answer of CULL*, at 7). In particular, Respondent CULL argues that Claimant is not a direct purchaser. I find that the direct purchaser rule does not apply.

Respondent primarily relies on *In re: Vehicle Carrier Services* (“VCS”) to argue that Claimant is not a direct purchaser. There, in a matter involving four⁵ consolidated cases, the Commission affirmed the ALJ’s initial decision granting a motion to dismiss regarding three of the four sets of complainants, stating that the Commission has “repeatedly found that a complainant 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.” (*VCS*, Dkts. 16-01, 16-07, 16-10 and 16-11, 2019 WL 5419475, at *6 (FMC Oct. 21, 2019)). Although one of the four sets of complainants alleged that they paid directly for the services at issue, the other three sets of complainants, who included a truck wholesaler, auto dealers, and consumers, alleged that artificially inflated charges were passed along to them. (*Id.*, at *3, *7). The Commission concluded that because these three sets of complainants were not direct purchasers, they lacked standing, even if they could qualify as a “shipper.” (*Id.*, at *6-*7, *12-*15). “Complainants can recover only if they introduce

⁵ A fifth case, brought by the vehicle manufacturer, was also not dismissed by the ALJ, but settled before the Commission issued its decision. *In Re: Vehicle Carrier Services*, 2018 WL 2214682, at *38, 1 F.M.C.2d 45, 83 (ALJ May 7, 2018).

evidence that they actually paid the carrier or received an assignment from someone who did.” (*Id.* at *6).

In its decision in *VCS*, the Commission relied on analogous cases from the antitrust context, particularly *Illinois Brick v. Illinois*, 431 U.S. 720, 726 (1977). (*VCS*, 2019 WL 5419475, at *6). There, in an antitrust case where the consumer sued a brick manufacturer/distributor, the Supreme Court explained that the direct purchaser rule was necessary to prevent multiple judgments by various parties in the distribution chain, to avoid the complex task of apportioning damages to various parties in the distribution chain, and because indirect purchasers were less likely to sue. (*VCS*, 2019 WL 5419475, at *6 (citing *Illinois Brick*, 431 U.S. at 730-33, 737, 745-46)).

Respondent also cites *Government of Guam v. Sea Land Service, Inc.*, Dkt. 89-26, 29 S.R.R. 894 (ALJ Mar. 27, 2022) (exceptions denied, Dkt. No. 89-26, Entry 585, at *45 (FMC July 11, 2005))⁶ (“*Sea-Land III*”). The cited decision followed a remand from the Commission. (*Gov’t of Guam v. Sea Land Serv., Inc.*, Dkt. No. 89-26, 1998 WL 36011848, at *54 (FMC Jun. 1, 1998) (“*Sea Land I*”).⁷ The Commission found that respondent APL (and another respondent not relevant for purposes of this matter) exceeded allowable rates of return, and remanded the matter for determination of reparations. (*Id.*). Following the remand, the respondent APL, in relevant part, moved for summary disposition regarding 155 of the shipments at issue. (*Sea Land III*, 29 S.R.R. at 894-95). In particular, APL argued that APL’s charges were prepaid by mainland shippers, and not the complainant shippers,⁸ including 50 shipments where “complainants provided documentation which they claim indicates that they in fact paid the mainland shipper an amount allegedly attributable to APL’s charges to the mainland shipper.” (*Id.*, at 895). Regarding the other 105 shipments, complainants had no evidence of reimbursing the mainland shippers. (*Id.*). The ALJ dismissed the claims related to all 155 shipments⁹ relying on the direct purchaser rule. (*Id.* at 901-03; *see also id.* at 910).

The ALJ in *Sea Land III* discussed, among other cases, *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 USSBB 308 (1934), “where it was held that injury occurred when the inapplicable charges were paid; that the claim of the payor accrued at once and that the law does

⁶ The Commission’s decision is available at www2.fmc.gov/readingroom/docs/89-26/89-26_0778.pdf (last accessed Feb. 6, 2025).

⁷ For the sake of completeness “*Sea Land I*” would be the first initial decision, located at *Government of Guam v. Sea Land Serv., Inc.*, Dkt. No. 89-26, 1996 WL 296545 (ALJ Jun. 3, 1996).

⁸ The Commission’s decision notes that the complainants included the Government of the Territory of Guam, as well as four private party shippers who allegedly paid unreasonable rates, although one of the four private parties eventually withdrew and was dismissed. (*Sea Land II*, 1998 WL 36011848, at *3, and n.6).

⁹ The ALJ also dismissed claims against APL related to an additional 362 shipments on other grounds. (*Sea Land III*, 29 S.R.R. at 894; 910; *see also* Dkt. No. 89-26, Entry 545, at *16-34 (ALJ Apr. 16, 2002), available at www2.fmc.gov/readingroom/docs/89-26/89-26_0734.pdf (last accessed Feb. 6, 2025).

not inquire into later events” (*Sea Land III*, 29 S.R.R. at 901 (citing *Oakland*, 1 USSBB at 310-11)). The *Sea Land III* decision noted that *Oakland* relied on *Southern Pacific Co. v. Darnell Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918), where Justice Holmes noted that: “‘The general tendency of the law, in regard to damages at least, is not to go beyond the first step. . . .’” (*Sea Land III*, 29 S.R.R. at 901 (quoting *So. Pacific*, 245 U.S. at 534)).

I find that the direct purchaser rule does not apply to this case. Many of the cases applying the direct purchaser rule involve a case where there is no allegation, let alone a fact finding, that the complainant paid the offending charge at all. For example, in *Sanrio v. Maersk Line*, 19 S.R.R. 907-09 (ALJ 1979), which is cited by Respondent CULL in a footnote (*see* Answer of CULL, at 6, n.1), the complaint alleged that the freight charges were pre-paid, presumably by a third party, and the U.S.-based complainant was “‘subject to the payment of rates and charges.’” The ALJ ordered the complainant to show that it had standing to seek reparations as the complainant was required to show that it paid the freight initially or validly succeeded to the claim. (*Sanrio*, 19 S.R.R. at 909). In *Carton-Print, Inc. v. Austasia Container Express*, 20 F.M.C. 31, 34-35 (ALJ 1977), also cited by Respondent in a footnote (*see* Answer of CULL, at 6, n.1), the ALJ granted a motion to dismiss because, among other reasons, the complainant neither paid the charge nor received an assignment. In this case, however, I find that there is evidence that shows that the Claimant paid the detention charge at issue, albeit in the form of reimbursing the trucker who paid the invoice for the detention charge initially. (*See* Answer of Norton Lilly, at 2; Claimant’s Information, at 34, 121, 127).

This case is distinguishable from *Sea Land III*, where the ALJ granted a motion to dismiss claims based on shipments where a third-party shipper prepaid the offending fees. (*Sea Land III*, 29 S.R.R. at 895, 901-03, 910). Here, the party that paid the fee was not a third-party shipper, but, in essence, was Claimant’s agent or courier. The Claimant’s agent picked up the container, delivered the container, looked for appointments to return the container, apparently took screenshots showing appointment availability (or lack of the same), delivered the container, paid the delivery charge, and then passed the invoice along directly to Claimant, apparently with no markup. (*See* Claimant’s Information, at 24-34, 38-108, 121, 127). Just as Norton Lilly was Respondent CULL’s agent and acted on Respondent CULL’s behalf in issuing the invoice, and later corresponding with Claimant’s representative about the invoice (*see* Answer of Norton Lilly, at 2; Motion to Strike, at 18), the trucker, NOTI, was Claimant’s agent in paying the invoice on Claimant’s behalf. Thus, in relation to the container, NOTI was essentially an extension of Claimant, thereby rendering the direct purchaser rule inapplicable to this case.

Respondent CULL’s own document also shows that it considers Claimant to be responsible for the detention charges at issue. The Terms and Conditions of Respondent CULL’s Bill of Lading provides that: “Should a Container not be returned within the time prescribed in the Tariff, the Merchant shall be liable for any detention, loss or expenses which may arise from such nonreturn.” (Terms and Conditions, at 9). As discussed above, Claimant is a “Merchant” because it is acting on behalf of the owner of the goods, and it is also identified as the consignee on Combined Transport Bill of Lading. (Claimant’s Information, at 9). Therefore, Respondent CULL likewise considers Claimant responsible for the detention charges at issue.

Finally, the rationale behind the direct purchaser rule is inapplicable to this case. In *VCS*, the complainants included several downstream purchasers, namely a truck wholesaler, auto

dealers, and consumers, who were several steps removed from the transportation of the vehicles at issue. (*VCS*, 2019 WL 5419475, at *3, *7). Such claims raise concerns about potential multiple inconsistent judgments against the Respondent, as well as potential allocation of damages. (*Id.*, at *6 (citing *Illinois Brick*, 431 U.S. at 730-33, 737, 745-46)). Those concerns do not apply in this case. The Claimant is not several steps removed from the transportation at issue; instead, Claimant was the party trying to return the container, albeit through its agent. Moreover, there is not a concern about multiple inconsistent judgments at issue here; Claimant is the party who was ultimately injured. For these reasons, I find that the direct purchaser rule is inapplicable to this case.

Because I find that Claimant demonstrated that it was unable to return the container from October 14, 2021, through October 19, 2021, and it paid detention for each day it was unable to return the container, for a total of \$1,950, Claimant is entitled to be reimbursed in the amount of \$1,950.

IV. ORDER

It is **HEREBY ORDERED** that Respondent Norton Lilly is **DISMISSED** as a Respondent. It is

FURTHER ORDERED that judgment is granted to Claimant regarding its claim that Respondent CULL violated 46 U.S.C. § 41102(c). It is

FURTHER ORDERED that Claimant is entitled to reparations from Respondent CULL in the amount of \$1,950, with interest running on the reparation award from November 3, 2021.

Richard Ambrow
Administrative Law Judge