

FEDERAL MARITIME COMMISSION

Statement of the Commission *On Retaliation*

Docket No. 21-15

Issued December 28, 2021

To enforce the prohibitions in Title 46, Subtitle IV, of the United States Code, the Commission relies on shippers and others to inform the Commission about potential unlawful conduct and provide evidence in the form of documents and testimony (both written and oral). Shippers play a similar role when filing complaints and commenting on rulemakings. By filing private party actions, shippers not only serve their own interest by seeking reparations (damages), but they also alert the Commission to potential violations, help the Commission clarify the line between lawful and unlawful conduct, facilitate the development of Commission precedent, and deter unfair and unreasonable conduct. Shippers and other industry participants may also bring disputes to the Commission's Office of Consumer Affairs and Dispute Resolution Services (CADRS) to take advantage of the Commission's alternative dispute resolution procedures.¹

For this system to function effectively, shippers and other industry participants must be able to raise claims with and provide information to the Commission without fear of retaliation for having done so. The Commission has, and will continue, to take seriously and investigate thoroughly allegations of carrier retaliation. Additionally, the Commission issues this Policy Statement to clarify that it will interpret 46 U.S.C. § 41104(a)(3) – the anti-retaliation provision – broadly to effectuate Congress's intent that shippers feel free to air their grievances to the Commission, and to address new shipping practices and new forms of retaliation.²

To that end, the Commission confirms that: (1) although § 41104(a)(3) protects “shippers,” that term includes more than just cargo owners; (2) protected activity includes not only filing a complaint with the Commission but also participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS' dispute resolution procedures; and (3) to establish a violation of § 41104(a)(3), a complainant alleging retaliation or other unfair or unjustly discriminatory conduct based on the above grievance-related activity (filing complaints, etc.) does not need to prove that the carrier's conduct was designed to stifle competition of other carriers or that the shipper at issue sought the services of a carrier other than the respondent – cases suggesting otherwise are inapplicable.

¹ See <https://www.fmc.gov/databases-services/consumer-affairs-dispute-resolution-services/>.

² 46 U.S.C. § 41104(a)(3) provides that “[a] common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.”

I. History of Prohibition on Retaliation and Related Conduct

Congressional concern with carrier retaliation predates the Shipping Acts. In 1914, Representative Joshua W. Alexander, the Chairman of the House Committee on the Merchant Marine and Fisheries, presented a report on the Committee's investigation of foreign and domestic shipping lines.³ The preface to the Alexander Report noted that "[w]hile numerous individual shippers voluntarily presented their grievances to the Committee, under promise of confidential treatment, very few were willing (fearing retaliation) to testify openly against the steamship line or lines upon which they were dependent for the movement of their freight."⁴ The report later noted the relationship between carrier market power and shipper fears of retaliation: "Conference lines, through their monopolistic powers, so completely dominate the shippers with whom they deal that these shippers can not afford, for fear of retaliation, to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances."⁵ Committee witnesses and commenters advocated the creation of an authority to review conference and rate agreements, in part to give shippers a venue for filing complaints.⁶ They also proposed that Congress prohibit carriers from "refusing accommodations to any shipper by way of retaliation because he may have shipped by an independent line, or may have filed a complaint charging unfair treatment, or for other unjust reasons."⁷

The Committee accepted those proposals, and recommended, among other things, that Congress: (1) empower the Interstate Commerce Commission to "[a]dopt whatever measures it may deem necessary to protect the complainant against retaliation," and (2) prohibit carriers from "retaliating against any shipper by refusing space accommodations when such are available, or by resorting to other unfair methods of discrimination, because such shipper has patronized an independent line, *or has filed a complaint charging unfair treatment*, or for any other reason."⁸

The Shipping Act of 1916⁹ drew heavily on the recommendations of the Alexander Report.¹⁰ Section 14 of the 1916 Act prohibited deferred rebates, fighting ships, making

³ Report of the Committee on the Merchant Marine and Fisheries on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade Under H. Res. 587 (1914) (Alexander Report).

⁴ Alexander Report at 5.

⁵ Alexander Report at 306; *see also id.* ("The various lines, constituting a conference, have the same interests and their organization is effective. Shippers, on the contrary, live far apart, and because of their different and frequently antagonistic interest can only combine for mutual protection with the greatest difficulty.").

⁶ Alexander Report at 307 ("Conference and rate agreements, and pooling arrangements, should be made with the full knowledge of some legally constituted authority in order (1) to safeguard the interests of shippers and (2) to make it possible for shippers to file complaints without fear of retaliation.").

⁷ Alexander Report at 313.

⁸ Alexander Report at 421 (emphasis added).

⁹ Shipping Act, 1916, Pub. L. No. 64-260.

¹⁰ *See Fed. Mar. Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 490 (1958) ("In passing the Shipping Act of 1916 . . . Congress followed the basic recommendations of the Alexander Committee."); H.R. Rep. No. 65-659 at 27 (1916).

discriminatory shipping contracts and “retaliat[ing] against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.”¹¹ This language was carried forward with little change as section 10(b)(5) in the Shipping Act of 1984 and its codification as 46 U.S.C. § 41104(a)(3).¹²

The Commission has infrequently discussed retaliation aimed at shipper complaints but has condemned the practice. In *Pacific American Fisheries Inc. v. American-Hawaiian Steamship Co.*, carriers eliminated a pier used by a shipper from the carrier’s terminal rate.¹³ The United States Maritime Commission, a predecessor of the Federal Maritime Commission, found that the carrier’s conduct was unjust and unreasonable under section 18 of the 1916 Act and unduly prejudicial under section 16 of the Act.¹⁴ The Commission also noted, however, that there was evidence that the chairman of the carriers’ conference had previously threatened to eliminate the pier from the terminal rate application unless the shipper withdrew a complaint in a related matter. The Commission stressed that “[a]part from the force of such evidence as possible added proof of unreasonableness and undue prejudice, it shows an attitude toward and treatment of shippers by these respondents which is to be condemned, in view of the provision of section 14 (Third) of the Shipping Act, 1916, prohibiting resort by a subject carrier to a discriminating or unfair method because a shipper has filed a complaint.”¹⁵

Most of the caselaw on § 41104(a)(3) and its predecessors, however, is unrelated to shipper grievances and instead concerns conduct such as dual-rate contract systems that impact competition between carriers.¹⁶ The leading case about this type of conduct is *Federal Maritime*

¹¹ Shipping Act, 1916, Pub. L. No. 64-260, § 14.

¹² Shipping Act of 1984, Pub. L. No. 98-237, § 10(b)(5), 98 Stat. 67, 78 (“No common carrier, either alone or in conjunction with any other person, directly or indirectly, may . . . retaliate against any shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.”). Although the 1984 Act lacks a comma after “methods” that was present in the 1916 Act, it does not appear that the change was meaningful. Section 14 Third of the 1916 Act was copied “virtually verbatim into the 1984 Act as section 10(b)(5),” *Int’l Ass’n of NVOCCs v. Atl. Container Line*, Docket No. 81-5, 1990 FMC LEXIS 5, at *88 (ALJ Jan. 25, 1990), and the legislative history of the 1984 Act indicates only that section 10(b)(5) was derived from section 14 Third, *Cal. Shipping Line, Inc. v. Yangming Marine Transp. Corp.*, Docket No. 88-15, 1990 FMC LEXIS 25, at *41 (FMC Oct. 19, 1990). The codification of section 10(b)(5) did not result in meaningful changes.

¹³ 2 U.S.M.C. 270, 275-279 (U.S.M.C. 1940).

¹⁴ *Pac. Am. Fisheries*, 2 U.S.M.C. at 279.

¹⁵ *Pac. Am. Fisheries*, 2 U.S.M.C. at 277.

¹⁶ See *Isbrandtsen.*, 356 U.S. at 482-83 (finding unlawful under section 14 Third of 1916 Act dual rate contract system); *Pac. Coast/Hawaii & Atlantic-Gulf/Hawaii General Increase in Rates*, 7 F.M.C. 260, 280 (finding sugar freighting agreement requiring party to offer cargo to carrier before using party’s own vessel or chartering a vessel did not violate section 14 Third of the 1916 Act because agreement left shipper free to use any other common carrier in the trade); *Isbrandtsen Co. v. States Marine Corp. of Del.*, 6 F.M.B. 422 (Fed. Mar. Bd. 1961) (finding dual rate contract system did not violate section 14 Third of the 1916 Act).

*Board v. Isbrandtsen Co.*¹⁷ There, a non-conference (or “independent”) carrier undercut the relevant conference¹⁸ rates. In response, the conference proposed, and filed with the Federal Maritime Board, a dual rate contract system where a shipper who signed an exclusive patronage contract with the conference would receive a lower freight rate than the conference’s noncontract rates.¹⁹ The Board approved the system, but the United States Court of Appeals for the D.C. Circuit set aside the order, finding the dual rate system violated section 14 Third of the Shipping Act of 1916.²⁰

The Supreme Court affirmed. In interpreting section 14 Third, the Court noted that section 14 of the 1916 Act specifically prohibited three types of conduct that stifles competition between conference and independent carriers: deferred rebates (section 14 First), fighting ships (section 14 Second), and retaliating against shippers by refusing space accommodations because the shipper patronized another carrier, filed a complaint, or for any other reason.²¹ The Court pointed out, however, that section 14 included a fourth category of prohibited conduct: “resort to other discriminating or unfair methods.”²² The Court ruled that the practices “outlawed by the ‘resort to’ clause of § 14 Third take their gloss from the abuses specifically proscribed by the section” and thus “other discriminating or unfair methods” are “confined to practices designed to stifle outside competition.”²³

The Court reasoned that this was consistent with the “revealed congressional purpose in § 14 Third” – “to outlaw practices in addition to those specifically prohibited elsewhere in the section when such practices are used to stifle outside competition of independent carriers.”²⁴ Applying this approach, the Court held that the dual rate contract system at issue was unlawful because the conference implemented it to offset competition from independent carriers.²⁵

¹⁷ *Isbrandtsen*, 356 U.S. at 482.

¹⁸ A conference is an association of ocean common carriers who engage in concerted activity and use a common tariff. 46 U.S.C. § 40102(8).

¹⁹ *Isbrandtsen*, 356 U.S. at 483; *see also States Marine*, 6 F.M.B. at 439-40 (noting that under a dual rate contract system, “shippers are required to sign a contract in advance and to confine all their shipments to conference lines,” and in return, shippers “either receive a discount on freight rates or else lower rates of freight than non-contractors”).

²⁰ *Isbrandtsen*, 356 U.S. at 483.

²¹ *Isbrandtsen*, 356 U.S. at 491.

²² *Isbrandtsen*, 356 U.S. at 492.

²³ *Isbrandtsen*, 356 U.S. at 495; *see also id.* at 493 (“Ties to shippers not designed to have the effect of stifling outside competition are not made unlawful. Whether a particular tie is designed to have the effect of stifling outside competition is a question for the Board in the first instance to determine.”); *id.* at 499 (holding that “§ 14 Third strikes down dual-rate systems only where they are employed as predatory devices”).

²⁴ *Isbrandtsen*, 356 U.S. at 495.

²⁵ *Isbrandtsen*, 356 U.S. at 493. Following *Isbrandtsen*, Congress enacted legislation to suspend the case’s holding regarding dual rate contract systems until Congress could investigate its ramifications. *See* Pub. L. No. 85-626, 72 Stat. 574, 574 (1958); Pub. L. No. 86-542, 74 Stat. 253, 253 (1960); Pub. L. No. 87-75, 75 Stat. 195, 195 (1961). In

The Commission relied on *Isbrandtsen* to further interpret § 41104(a)(3) through the lens of competition among carriers. In *International Association of NVOCCs v. Atlantic Container Line*, although the Commission’s Administrative Law Judge (ALJ) denied a motion to dismiss a claim based on section 10(b)(5) of the Shipping Act of 1984 (the predecessor of § 41104(a)(3)), the ALJ agreed with the respondent ocean carriers that: (1) the law was intended to prohibit predatory practices designed to stifle “outside competition”; and (2) a finding of unlawful discrimination under another section of the law is not sufficient to establish a violation of § 41104(a)(3); rather, a complainant must show that the carrier-respondent had a secondary objective, namely, to stifle outside competition. Otherwise, the ALJ noted, the other prohibitions in the act become surplusage.²⁶

Similarly, the Commission in *California Shipping Line, Inc. v. Yangming Marine Transport Corp.* held that section 10(b)(5) “applies solely to retaliatory acts of a carrier against a shipper who has sought the services of another carrier, including retaliatory practices designed to stifle outside competition.”²⁷ There, the complainant, a non-vessel-operating common carrier (NVOCC), alleged that an ocean carrier failed on three occasions to make available to it the essential terms of three service contracts the carrier had with nonparty shippers. The complainant alleged that not only did the carrier violate then-existing law requiring carriers to provide essential terms of service contracts to similarly situated shippers, but that the carrier also violated section 10(b)(5). The ALJ found that the carrier violated the latter prohibition because of the carrier’s “discriminatory” denial of access to the service contracts.²⁸

The Commission reversed. The Commission cited *Isbrandtsen* and reasoned that if section 10(b)(5) applied to *any* act of discriminatory conduct, it would render other prohibitions superfluous.²⁹ Consequently, the Commission held that a violation requires retaliatory conduct and evidence that the shipper sought the services of another carrier. Additionally, the Commission rejected a complainant-related retaliation theory, which was premised on complainant having filed a complaint against a different carrier. According to the Commission,

1961, Congress amended section 14 the Shipping Act of 1916 to authorize ocean common carriers and conferences to enter into “effective and fair dual rate contracts with shippers and consignees.” Pub. L. No. 87-346, 75 Stat. 762, 762 (1961).

²⁶ *Int’l Ass’n of NVOCCs v. Atl. Container Line*, Docket No. 81-5, 1990 FMC LEXIS 5, at *8-9, *87-97 (ALJ Jan. 25, 1990). There, non-vessel-operating common carriers sued ocean carriers alleging that the ocean carriers refused to make containers, chassis, and other equipment for consolidation and loading of cargo available to NVOCCs at the NVOCCs own premises while at the same time supplying such equipment to other shippers. According to the complainants, the refusal to provide equipment prevented NVOCCs from competing with the ocean carriers for less-than-container-load shippers. *Ariel Mar. Grp. v. N.Y. Shipping Ass’n*, Complaint ¶¶ 1-10 (Dec. 23, 1988). Among other things, the complainants alleged that this amounted to refusing cargo space accommodations when available in violation of section 10(b)(5) of the 1984 Act. *Id.* The ocean carriers moved for dismissal of the claim, arguing that their conduct did not result in the type of predatory conduct covered by the anti-retaliation provision. *Int’l Ass’n of NVOCCs*, 1990 FMC LEXIS 5 at *87-93. The ALJ denied the motion because dismissal at a relatively early stage of the proceedings was inappropriate. *Id.* at *97.

²⁷ Docket No. 88-15, 1990 FMC LEXIS 25, at *44-45 (FMC Oct. 19, 1990).

²⁸ 1990 FMC LEXIS 25 at *3-9.

²⁹ 1990 FMC LEXIS 25 at *44.

“[a]lthough section 10(b)(5) does prohibit retaliation against a shipper because the shipper has filed a complaint, we believe that this provision is limited to situations where the shipper has filed a complaint against the carrier who is allegedly retaliating against it.”³⁰ Subsequent cases cited *International Association of NVOCCs* and *California Shipping Line* as limiting the scope of § 41104(a)(3).³¹

II. Commission Current Interpretation

Section 41104(a)(3) provides that “[a] common carrier, either alone or in conjunction with any other person, directly or indirectly, may not . . . retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.”

Put differently, the provision prohibits a common carrier from:

1. Retaliating against a shipper by refusing, or threatening to refuse, cargo space accommodations when available *because*
 - a. the shipper has patronized another carrier,
 - b. the shipper has filed a complaint, or
 - c. for any other reason;³²

or

2. Resorting to other unfair or unjustly discriminatory methods *because*
 - a. the shipper has patronized another carrier,
 - b. the shipper has filed a complaint, or
 - c. for any other reason.

³⁰ 1990 FMC LEXIS 25 at *45-46.

³¹ In *MAVL Capital, Inc. v. Marine Transport Logistics*, Docket No. 16-16, 2017 FMC LEXIS 4, at *61 (ALJ Jan. 17, 2017), the ALJ relied on *Int’l Ass’n of NVOCCs* in holding that the complainants’ § 41104(a)(3) claims failed because the complainants had not explained how the respondents’ conduct was designed to stifle outside competition. The Commission affirmed the ALJ’s dismissal of these claims because the complainants did not challenge the dismissal in their exceptions. *MAVL*, 2 F.M.C.2d 198, 207 (FMC 2020). See also *Edaf Antillas, Inc. v. Crowley Caribbean Logistics, LLC*, Docket No. 14-04, 2014 FMC LEXIS 29, at *29 (ALJ Nov. 6, 2014), (dismissing § 41104(a)(3) claim because the complainant did not show that retaliation due to patronizing another carrier, citing *California Shipping Lines*); *W. Overseas Trade & Dev. Corp. v. Asia N. Am. Eastbound Rate Agreement*, Docket No. 92-06, 1993 FMC LEXIS 61, at *57 (ALJ Aug. 16, 1993) (noting that the Commission in *California Shipping Lines* “established strict standards” for § 41104(a)(3) claims and stating that a shipper using another carrier was a necessary element of the claim).

³² Although the comma usage in § 41104(a)(3) could be read otherwise, there is reason to believe that the list of protected activity in the provision (i.e., patronizing another carrier, filing a complaint) modifies both the “retaliation” clause and the “resort to” clause. The Court in *Isbrandtsen* indicated that the list of protected activity in the 1916 Act modifies the “retaliation” clause. 356 U.S. at 491. As noted above, it does not appear that subsequent minor amendments to section 14 Third of the 1916 Act, such as deleting the comma after “methods” were intended to change the meaning of the provision.

Although the Alexander Report in 1914 made clear that the Shipping Acts were intended to encourage shippers to bring their grievances against carriers to the government’s attention without fear of retaliation, this purpose has largely been ignored in the caselaw, which has focused almost entirely on predatory practices that inhibit competition among carriers. The language used in this precedent, appropriate in the context in which it developed, runs the risk of unduly narrowing the scope of § 41104(a)(3).

The Commission therefore emphasizes the following.

A. “Shipper” Defined Broadly

Unless amended by Congress, § 41104(a)(3) applies only to prohibited conduct directed at a “shipper.” But this term protects entities other than just the cargo owner. The term “shipper” means 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,³³ or a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.³⁴ In contrast, passengers on a vessel, unless they otherwise fall within the definition of shipper, are not protected entities under § 41104(a)(3).³⁵

B. Protected Activity Extends Beyond Filing a Complaint

Section 41104(a)(3) contains two types of shipper activity that are specifically protected: patronizing another carrier and filing a complaint. Filing a complaint refers to filing a sworn complaint alleging a violation under 46 U.S.C. § 41301(a). The statute also, however, protects shippers from being retaliated against “for any other reason.” The Commission interprets “any other reason” to mean that protected activity under § 41104(a)(3) includes other ways that shippers may bring allegations of unlawful activity to the Commission, such as participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or using CADRS’ dispute resolution procedures. This interpretation is consistent with congressional intent as set forth in the Alexander Report and with the important role shippers serve in assisting the Commission with its mission. Further, providing information to Commission investigators and enforcement attorneys, seeking assistance from CADRS, and commenting on Commission rules and notices fall within same class of conduct as filing a complaint.³⁶

³³ A “shippers’ association” is “a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group to obtain carload, truckload, or other volume rates or service contracts.” 46 U.S.C. § 40102(24).

³⁴ 46 U.S.C. § 40102(23). Although the protected entities under § 41104(a)(3) are shippers, this does not mean one must necessarily be a shipper to file a complaint alleging a violation. Any person may file a complaint alleging a violation of Title 46, Subtitle IV, Part A. *See* 46 U.S.C. § 41301(a); Federal Maritime Commission Statement on Representative Complaints, Docket No. 21-13 (FMC Dec. 28, 2021).

³⁵ *Hepner v. The Peninsular & Oriental Steam Navigation Co.*, 27 F.M.C. 563, 565 (FMC 1984) (finding that applying section 14 Third to shippers but not passengers was consistent with the language of the statute and finding that the terms of a negotiated settlement was not prohibited retaliatory conduct).

³⁶ Under the *ejusdem generis* canon of statutory construction, general words following a list of particular classes of things are construed as applying only to things of the same class as those listed. *Cal. Shipping Line*, 1990 FMC LEXIS 25 at *40 n.19.

C. Section 41104(a)(3) Claims Alleging Complaint-Related Retaliation Do Not Require Proof About Carrier Competition

In addition to setting forth a protected entity and protected activities, § 41104(a)(3) lists two types of prohibited carrier conduct. First, a carrier cannot retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations because the shipper has engaged in protected activity. Second, a carrier cannot resort to other unfair or unjustly discriminatory methods because a shipper has engaged in protected activity.

The “other unfair or unjustly discriminatory” language is a “catchall clause by which Congress meant to prohibit other devices not specifically enumerated but similar in purpose and effect to those barred by § 14 First, Second, and the ‘retaliate’ clause of § 14 Third.”³⁷ The Court in *Isbrandtsen* held that only conduct “designed to stifle outside competition” fell within this catchall.³⁸ But it is not hard to envision situations where a carrier might engage in retaliatory conduct that has nothing to do with competition with other carriers. A carrier might engage in conduct detrimental to a shipper (e.g., refusing to enter into, renew, or amend a service contract) to “get even” with or deter that shipper and other shippers from complaining to the Commission. Under a broad reading of *Isbrandtsen*, this type of carrier conduct would not violate § 41104(a)(3) because it would not involve conduct designed to stifle outside competition.

While the Commission is bound by *Isbrandtsen*, the Commission does not believe it requires such a result and interprets it as not applying where a retaliation claim is based on complaint-related activity (filing a complaint, participating in Commission investigatory or enforcement efforts, commenting on a rulemaking, or bringing a dispute to CADRS). *Isbrandtsen* did not involve allegations that a carrier retaliated against a shipper because it “filed a complaint charging unfair treatment.”³⁹ Rather, at issue was a dual rate contract system designed to protect a conference from an independent carrier.⁴⁰ Consequently, the Court had no reason to address, and did not purport to address, the language in the statute that protects shippers who file a complaint. Further, the Court deemed the purpose of section 14 Third was to outlaw practices used to stifle the competition of independent carriers but did not discuss the portions of the Alexander Report that referred to protecting complaining shippers.

Similarly, the Commission finds *International Association of NVOCCs* and *California Shipping Line* inapplicable to claims of complaint-related retaliation. In other words, the Commission will not apply their competition-focused language to future complaint-related claims.⁴¹ The former did not involve allegations of complaint-related retaliation and the ALJ did

³⁷ *Isbrandtsen*, 356 U.S. at 492.

³⁸ *Isbrandtsen*, 356 U.S. at 495.

³⁹ Shipping Act, 1916, Pub. L. No. 64-260, § 14.

⁴⁰ Although conferences were once a significant force in ocean transportation, there is only one active conference on file with the Commission, and it is only for the carriage of U.S. government cargoes in the Trans-Pacific trade.

⁴¹ The Commission will also not apply similar limiting language in cases relying on *International Association of NVOCCs* and *California Shipping Lines*, such as that in *MAVL Capital, Inc.*, 2017 FMC LEXIS 4 at *61; *Edaf Antillas*, 2014 FMC LEXIS 29 at *29; *W. Overseas Trade & Dev. Corp.*, 1993 FMC LEXIS 61 at *57.

not address that aspect of § 41104(a)(3)'s language. Nor did the ALJ explain why a complainant who alleged carrier retaliation based on filing a complaint would also need to show that the carrier had a "secondary objective" to stifle outside competition. It is enough that a complainant can show that a carrier engaged in unfair or unjustly discriminatory conduct *because* a shipper filed a complaint-related activity.

California Shipping Line was primarily a me-too service contract access case. Requiring a complainant alleging complaint-related retaliation to prove that the shipper "sought the services of another carrier" is inconsistent with the plain language of § 41104(a)(3), which contains no such element, and is inconsistent with Congress's purpose to combat shipper reticence about bringing complaints to the government. Moreover, this extra step simply does not make sense when the allegation is that a carrier engaged in unfair conduct because a shipper filed a complaint.⁴²

That said, the Commission's interpretation in this section of the Policy Statement is only that the statements in the above cases – which limit "unfair or unjustly discriminatory conduct" to conduct implicating carrier competition – do not apply to claims alleging prohibited conduct based on complaint-related activity by shippers. In contrast, the holdings are applicable in the factual contexts in which they arose, e.g., where the alleged unlawful conduct involves "ties" between shippers and carriers.⁴³

The Commission also acknowledges that § 41104(a)(3) should not be read so expansively that it renders other prohibitions in Chapter 411 of Title 46 superfluous. Section 41104 of Title 46, for instance, only prohibits specific types of unfair or unjustly discriminatory conduct.⁴⁴ Section 41104(a)(3) prohibits a common carrier from "resort[ing] to other unfair or unjustly discriminatory methods . . . for any other reason." The latter does not swallow the other prohibitions, however, because it is not a flat prohibition on all unfair or unjustly discriminatory conduct. A complainant must show that a carrier engaged in prohibited conduct (refusing cargo space accommodations or other unfair or unjustly discriminatory methods), with respect to a protected entity (shipper), because the protected entity engaged in protected activity (patronizing other carriers, filing a complaint, or other activities of the same class).

By the Commission.

William Cody
Secretary

⁴² As noted above, the Commission in *California Shipping Line* dismissed a complaint-related retaliation claim because the carrier accused of retaliation was not the carrier against whom the complainant had previously filed a complaint. While the Commission takes no position on that aspect of *California Shipping Line* here, there could be circumstances where a carrier might be motivated to retaliate against a shipper who filed a complaint against another carrier.

⁴³ *Isbrandtsen*, 356 U.S. at 493 ("Ties to shippers not designed to have the effect of stifling outside competition are not made unlawful.").

⁴⁴ See 46 U.S.C. § 41104(a)(4), (5),