

BEFORE THE  
FEDERAL MARITIME COMMISSION

---

DOCKET NO. 22-30

---

SAMSUNG ELECTRONICS

AMERICA, INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**RESPONDENT'S EXCEPTIONS TO INITIAL DECISION**

Wayne R. Rohde  
Christopher Raleigh  
Kathryn Sobotta  
COZEN O'CONNOR  
1200 Nineteenth Street, NW  
Washington, D.C. 20036

Counsel for Respondent, ZIM Integrated Shipping  
Services Ltd.

Dated: May 14, 2025

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION AND SUMMARY OF ARGUMENT .....	2
II. STANDARD OF REVIEW .....	3
III. ZIM’s Use of Cargo Holds to Enforce Its Lien Rights Was Reasonable .....	3
A. A Carrier May Contractually Extend Its Maritime Lien.....	3
B. ZIM’s Maritime Lien Was Properly Extended By Contract to Future Shipments.....	9
C. SEA’s Chronic Delinquency Required ZIM To Employ Cargo Holds .....	10
D. Precluding Contractually Expanded Liens Will Impede Cargo Fluidity .....	12
IV. The Presiding Officer Erred in Awarding \$3.68 Million in Reparations .....	14
A. The Reparations Award Was Arbitrary And Capricious .....	15
B. The Reparations Award Is Unsupported By The Evidence .....	15
V. CONCLUSION.....	18

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Adenariwo v. BDP Int'l, et al.</i> FMC Case No. 1921(I), 2014 FMC LEXIS 46 (FMC Feb. 20, 2014), <i>vacated on other grounds Adenariwo v. Fed. Mar. Comm'n</i> , 808 F.3d 73 (D.C. Cir. 2015).....	6, 7
<i>Bank of British N. Am. v. Freights, etc. of the Hutton</i> , 137 F. 534 (2d Cir. 1905).....	5
<i>Bernard &amp; Weldcraft Welding Equip. v. Supertrans Int'l</i> , Docket No. 02-12, 2003 WL 136313 (ALJ Jan. 8, 2003).....	3, 4, 6
<i>Bird of Paradise</i> , 72 U.S. 545 (1866).....	passim
<i>Corpco Int'l, Inc. v. Straightway, Inc.</i> , Docket No. 97-05, 1998 WL 940257 (FMC June 8, 1998).....	8
<i>Evergreen Shipping Agency (America) Corp. v. FMC</i> , 106 F4th 1113 (D.C. Cir. 2024).....	15
<i>In re World Imports Ltd.</i> , 820 F.3d 576 (3 <sup>rd</sup> Cir. 2016).....	5, 6, 12, 13
<i>Krauss Bros. Lumber Co. v. Dimon S.S. Corp.</i> , 290 U.S. 117, 54 S.Ct. 105, 78 L.Ed. 216 (1933).....	5
<i>N.H. Shipping Corp. v. Freights of the S/S Jackie Hause</i> , 181 F. Supp. 165 (S.D.N.Y. 1960).....	5
<i>Petra Pet Inc. v. Panda Logistics, Ltd.</i> , FMC Case No. 11-14, 2012 FMC LEXIS 33 (ALJ Aug. 14, 2012), <i>aff'd</i> 2013 FMC LEXIS 37 (FMC Oct. 31, 2013).....	6, 7, 8
<i>Tienshan v. Tianjin Hua Feng Transport</i> , Docket No. 08-04, 2011 WL 7144007 (ALJ Mar. 9, 2011).....	8
<i>Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.</i> , 1998 WL 940255 (FMC Dec. 10, 1998).....	9
<b>Statutes</b>	
5 U.S.C. § 556(d).....	3
Shipping Act §41102(c).....	1, 7

U.S. Shipping Act of 1984..... *passim*

**Other Authorities**

46 C.F.R. §502.27 ..... 1

46 C.F.R. § 502.227(a)(6)..... 3, 4

BEFORE THE  
FEDERAL MARITIME COMMISSION

-----  
DOCKET NO. 22-30  
-----

SAMSUNG ELECTRONICS AMERICA, INC.,  
COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

**RESPONDENT’S EXCEPTIONS TO INITIAL DECISION**

Pursuant to 46 C.F.R. §502.27, Respondent ZIM Integrated Shipping Services Ltd. (“ZIM”), through counsel, hereby excepts to certain Findings of Fact<sup>1</sup> and conclusions of law in the Presiding Officer’s April 22, 2025 Initial Decision (“ID”).

As described below, the Presiding Officer held that under “Commission caselaw” a maritime lien cannot be exercised over containers for unpaid charges incurred by other shipments which have already been released by the ocean carrier and that the exercise of a maritime lien under such circumstances is unreasonable under §41102(c) of the Shipping Act.

The Presiding Officer’s legal conclusions with respect to this holding are contrary to established maritime law and are unsupported by evidence in the record. The Presiding Officer’s holding also overlooks the impact on cargo fluidity if the granting of a lien by a shipper, which is broader than that which exists at common law, is held to be unreasonable under the Shipping Act.

---

<sup>1</sup> “FOF #\_\_” is used herein to refer to the Presiding Officers enumerated Findings of Fact, found at pages 9 through 57 of the Initial Decision.

In addition, the damages award to SEA is not supported by the record because the award's calculation is contradicted by the Presiding Officer's findings of fact and other evidence in the record.

The Commission should reverse these holdings and dismiss the Complaint.

## **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

In this proceeding, Complainant Samsung Electronics America, Inc. ("SEA") sought to shift blame to ZIM for costs it incurred largely due to SEA's own acts or omissions by characterizing the imposition of those costs as violations of the U.S. Shipping Act of 1984, as amended ("Shipping Act"). As a result, SEA seeks to recover the entirety of charges it paid to ZIM and third parties. After noting that SEA's numerous citations to evidence did not support its overreaching Proposed Findings of Facts, a tactic which minimized SEA's credibility,<sup>2</sup> the Presiding Officer correctly held that SEA failed to prove its damages with reasonable certainty as required by the Shipping Act and accordingly dismissed the bulk of SEA's claims.

Nevertheless, ZIM is compelled to challenge two findings by the Presiding Officer which warrant the filing of Exceptions.

Because of SEA's chronic delinquency in its payment of invoices and/or terminal fees, a practice which was acknowledged by the Presiding Officer, ZIM was forced to exercise its contractual lien rights by withholding delivery of containers ("Cargo Holds") to encourage SEA to acknowledge ZIM's unpaid claims and pay the charges or negotiate resolutions. Even then, these efforts only resulted in partial payments of seriously overdue receivables that had accrued over months-long periods. Indeed, as noted in the ID, ZIM is still owed approximately \$2 million in charges by SEA. ID at 100. Despite the fact that ZIM was required to employ this

---

<sup>2</sup> "Parties lose credibility when their citations do not support their allegation." ID at 66, referring to evidence cited by SEA which did not support the posited PFF.

procedure to overcome SEA's obstinance and recalcitrance, which the record confirms was only done as a last resort, the Presiding Officer found that ZIM's use of the Cargo Holds was a violation of the Shipping Act, even though each lien exercised by ZIM was reasonably calculated to achieve, and in fact did achieve, two legitimate objectives: partial payment of outstanding sums due ZIM and the flow of SEA's cargo.

## **II. STANDARD OF REVIEW**

Under the Administrative Procedure Act, the ID must be supported by and in accordance with reliable, probative, and substantive evidence. 5 U.S.C. § 556(d). In reviewing the ID the Commission has all the powers which it would have in making the initial decision. 46 C.F.R. § 502.227(a)(6). In other words, the ID is reviewed under a de novo standard.

## **III. ZIM'S USE OF CARGO HOLDS TO ENFORCE ITS LIEN RIGHTS WAS REASONABLE**

ZIM excepts to the Presiding Officer's blanket holding that "...Commission caselaw is clear that containers should not be held for amounts due for other containers. Therefore, the cargo holds were unreasonable..." (ID at 82).

### **A. A Carrier May Contractually Extend Its Maritime Lien**

Under the common law, a carrier has a lien on cargo in its possession for freight charges payable on that cargo. *The Bird of Paradise*, 72 U.S. 545, 554 (1866) ("Ship-owners, unquestionably, as a general rule, have a lien upon the cargo for the freight, and consequently may retain the goods after the arrival of the ship at the port of destination until the payment is made..."). The Presiding Officer agreed with this principle, citing *Bernard & Weldcraft Welding Equip. v. Supertrans Int'l*, Docket No. 02-12, 2003 WL 136313, at \*14 n.14 (ALJ Jan. 8, 2003), admin. final Feb. 12, 2003 ("A carrier can withhold delivery of cargo to compel the shipper to

pay freight money that is *lawfully* owed and has a cargo lien which the carrier can assert if necessary...”)

However, the ID goes on to hold that the lien is lost once a shipment is released:

“Regarding maritime liens, there is clear and consistent precedent that disputes over unrelated shipments, cannot be used by a carrier as justification from refusing to release the cargo.” (*citing, Bernhard & Weldcraft, supra*). ZIM takes exception to this holding and respectfully submits that it is an incorrect statement of the prevailing law on maritime liens.

At the outset, the Supreme Court in *Bird of Paradise, supra*, made clear that parties to a maritime contract are free to contractually extend the scope of a carrier’s lien:

Parties, however, may frame their contract of affreightment as they please, and of course may employ words to affirm the existence of the maritime lien, or to extend or modify it, or they may so frame their contract as to exclude it altogether. They may agree that the goods, when the ship arrives at the port of destination, shall be deposited in the warehouse of the consignee or owner, and that the transfer and deposit shall not be regarded as the waiver of the lien; and where they so agree, the settled rule in this court is, that the law will uphold the agreement and support the lien. 72 U.S. 545, 555 (emphasis supplied)

In *Bird of Paradise*, the ocean carrier sought to extend the retention of its lien on cargo which had been discharged from its ship into a consignee’s warehouse. This contractual extension of the carrier’s lien served the commercial interests of the consignee because the vessel was able to timely discharge its cargo and depart from the consignee’s dock without the latter incurring vessel demurrage; and it benefitted the ocean carrier, because the prompt discharge of its ship enabled the carrier to promptly re-employ its vessel.

The principle articulated in *Bird of Paradise* has been adopted in subsequent cases: “[i]t is familiar doctrine of the admiralty courts that a maritime lien attaches not only to the original subject of the lien, but also to whatever is substituted for it, and that the lienholder may follow

the proceeds wherever he can distinctly trace them.” *Bank of British N. Am. v. Freights, etc. of the Hutton*, 137 F. 534 (2d Cir. 1905). *See also, N.H. Shipping Corp. v. Freights of the S/S Jackie Hause*, 181 F. Supp. 165, 172 (S.D.N.Y. 1960), holding that a shipowner had not waived its cargo lien when its release of the cargo was conditioned on the substitution of freight money, held in escrow, for such cargo.

The rationale articulated in *Bird of Paradise* and its progeny was extended to the movement of containerized shipments in a more recent decision, *In re World Imports Ltd.*, 820 F.3d 576 (3<sup>rd</sup> Cir. 2016), where the Third Circuit Court of Appeals noted that “the persistence of a lien through substitution is not a novel practice” (*id.*, at 585) and held that a lien on goods in the possession of an NVOCC for amounts due on previously-released shipments remained valid and lawful based on a written agreement between the parties.

In *World Imports*, the shipper was an importer of furniture which entered into a credit agreement that, among other terms and conditions, stated that the carrier’s maritime lien “shall survive delivery or release of any specific property of (World Imports).” *Id.* at 580. In light of this contractual undertaking, which was explicitly reviewed and signed by the shipper, the Third Circuit held:

Despite World Imports' contentions, the opinion in *Bird of Paradise* made clear that there is no internal contradiction in recognizing a lien as a creature of maritime law that, once created by operation of law, may be extended or modified by agreement of the parties. In that case, the Court affirmed that a maritime lien “arises from the usages of commerce, independently of the agreement of the parties....” *Bird of Paradise*, 72 U.S. at 555; see also *Osaka*, 260 U.S. at 499–500, 43 S.Ct. 172 (clarifying that “[t]he contract of affreightment itself creates no lien, and this court has consistently declared that the obligation between ship and cargo is mutual and reciprocal and does not attach until the cargo is on board or in the master's custody”); *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117, 121, 54 S.Ct. 105, 78 L.Ed. 216 (1933) (affirming that, while contracts may form the basis of a maritime lien, it is

“[o]nly upon the lading of the vessel or at least when she is ready to receive the cargo” that the lien \*587 arises or attaches). In other words, a traditional maritime lien cannot be created by contract alone, but that does not mean that such liens, once created, are beyond contractual modification. 820 F.3d 576, 586-7 (Emphasis supplied).

The Presiding Officer rejected the *Bird of Paradise* and *World Imports* holdings, stating: “While these cases state that a maritime lien may be extended, modified, or excluded, they do not mention the Shipping Act. These cases do not address or overrule the Commission’s long-standing line of cases holding that cargo cannot be held to extract payment for amounts due on other shipments.” However, this latter holding is an incorrect statement of the Commission’s position on this issue. Presently, as articulated in the *Interpretive Rule on Demurrage and Detention Under the Shipping Act*, and contrary to the Presiding Officer’s holding, the Commission confirms that it considers this issue to remain unsettled *vis-à-vis* the Shipping Act:

The idea that regulated entities should suspend charges pending a dispute or allow cargo to move freely runs up against the long-established lien law. Ocean carriers have maritime liens on cargo they transport. *Petra Pet Inc. v. Panda Logistics, Ltd.*, FMC Case No. 11-14, 2012 FMC LEXIS 33, at \*43-\*44 (ALJ Aug. 14, 2012), *aff’d* 2013 FMC LEXIS 37, at \*17-\*18 (FMC Oct. 31, 2013) (quoting *Bernard & Weldcraft Welding Equip. v. Supertrans Int’l, Inc.*, 29 S.R.R. 1348, 1356 n.14 (ALJ 2003)). A carrier loses the lien if it surrenders the cargo. *Id.* But in any case, the Commission would need to examine precisely the lien at issue. See *Adenariwo v. BDP Int’l*, FMC Case No. 1921(I), 2014 FMC LEXIS 46, at \*3 (FMC Feb. 20, 2014), *vacated on other grounds Adenariwo v. Fed. Mar. Comm’n*, 808 F.3d 73 (D.C. Cir. 2015); *Petra Pet* at \*43-\*44. *Id.*, Footnote 365 (Emphasis supplied).

The Commission’s absence of clarity on this issue is further confirmed by a more careful review of the *Adenariwo* decision in which two of the Commissioners dissented:

While I acknowledge that the evidence presented to the SO may demonstrate a failure by Zim to fulfill its duties and responsibilities pursuant to the law of contracts, without more, Zim’s failure in the case *sub judice* simply does not fit within the plain language or purpose of section 10(d)(1) (Commissioner Khouri dissent) *Id.* at 7.

I dissent from the majority's decisions to uphold the settlement officer's finding that Zim Integrated Shipping violated section 41102(c) of title 46... (Commissioner Dey dissent) *Id.* at 6.

In addition to the fact that two of the Commissioners in that case found that ZIM's assertion of a maritime lien did not violate the Shipping Act, *Adenariwo* is totally inapposite to the present case because it involved the assertion of a general lien clause in the terms and conditions of a bill of lading. 33 S.R.R. at 223. In the present case, the shippers and corporate affiliates of SEA knowingly and freely executed service contracts that granted ZIM a lien that was broader than a common law possessory lien. This distinction is significant and is another reason why *Adenariwo* is inapplicable, and the Presiding Officer's reliance upon *Adenariwo* in support of the holding that is challenged herein is misplaced. Accordingly, ZIM's assertion of its lien rights through the Cargo Holds was neither unreasonable nor a violation of §41102(c) - to the contrary, the Cargo Holds were lawful.

The remaining cases cited by the Presiding Officer in support of the challenged holding, like *Adenariwo*, are off point and completely inapposite to the issue that is at the core of ZIM's Exceptions. Indeed, none of the cases relied upon by the Presiding Officer involved a shipper which negotiated and executed a service contract with the ocean carrier that specifically expanded the latter's maritime lien for unpaid charges related to delivered containers to subsequent shipments.

The ID cites *Petra Pet, Inc. v. Panda Logistics Ltd.*, Docket No. 11-14, 2012 WL 11914703, at \*22 (ALJ Aug. 14, 2012) in support of the "Commission law" that holds "transportation of cargo cannot be aborted or cargo held to coerce payment of debt for other shipments." However a review of the *Petra Pet* decision confirms that it is not instructive with respect to the facts of this case. In *Petra Pet*, RDM Solutions was an NVOCC which arranged

transportation for a large number of Petra Pet's shipments through another ocean transportation intermediary, Panda Logistics. Although RDM received freight money from Petra Pet for the earlier shipments, unbeknownst to Petra Pet, RDM did not transmit those corresponding payments to Panda for the services it rendered. After significant receivables accrued and RDM stopped responding to Panda's urgent inquiries, Panda diverted Petra Pet's shipments that were in transit, withheld their delivery and even refused to provide information as to their location in order to coerce payment from Petra Pet for moneys it already paid to RDM, claiming that the latter was the "agent" of Petra Pet. The ALJ correctly held that Panda's diversion of the shipments, withholding delivery of same pending payment of charges owed by RDM<sup>3</sup> and failing to disclose the shipments' locations violated the Shipping Act. Obviously, the *Petra Pet* decision has no relevance to the facts in this case because SEA and its shippers dealt directly with ZIM and received the benefit of ZIM's services, e.g., storage while containers were in demurrage.

In *Tienshan v. Tianjin Hua Feng Transport*, Docket No. 08-04, 2011 WL 7144007, (ALJ Mar. 9, 2011), admin. final April 12, 2011, the Respondent withheld delivery to coerce payment for freight forwarding services provided with respect to unrelated shipments to the shipper in China, and not Tienshan. Notably, there was no agreement in place which made Tienshan responsible for these unrelated charges.

In *Corpco Int'l, Inc. v. Straightway, Inc.*, Docket No. 97-05, 1998 WL 940257, (FMC June 8, 1998), Straightway contracted with the shipper to transport a crane from the United States to China, via Belgium for a fixed freight rate. When Straightway's subcontractors demanded additional charges to transload the cargo, Straightway withheld issuance of its bill of lading until Corpco paid the subcontractors directly. The Commission correctly held this tactic

---

<sup>3</sup> RDM defaulted and did not appear in or participate in the proceeding.

to be a violation of the Shipping Act while at the same time noting: “It appears possible from the facts presented that Straightway was itself the victim of one or several of its subcontractors, via those parties' apparent refusal to honor an agreed-upon rate... Whether Straightway itself may have a claim against its agents, however, is not an issue before the Commission.” *Id.* at 6 Again, there was no written and signed agreement which expanded the carrier’s common law lien in this case.

*Total Fitness Equipment, Inc. v. Worldlink Logistics, Inc.*, 1998 WL 940255 (FMC Dec. 10, 1998) also involved egregious behavior by a respondent in which there was no written agreement that expanded the carrier’s lien, so the resultant holding is similarly not instructive to the Exceptions raised by ZIM. In that case, Total Fitness paid the agreed upon freight to Worldlink’s agent in Taiwan; but, after the shipment arrived in the U.S., Worldlink refused to deliver the cargo until Total Fitness paid the freight a second time, at a higher rate and without receiving any credit for the payment made to Worldlink’s Taiwanese agent. The Commission held this was a violation of the Shipping Act, but, again, this holding has no bearing on the instant issue before the Commission.

*B. ZIM’s Maritime Lien Was Properly Extended By Contract to Future Shipments*

The service contracts which covered the transport of the cargo consigned to SEA granted ZIM an expanded lien consistent with the foregoing precedent. Specifically, the contracts contained the following provision:

8 – FREIGHT, CHARGES AND INVOICING

The Merchant and all affiliates, subsidiaries, association members and agents acting on Merchant’s behalf, as well as all other parties responsible for freight under the Bill of Lading, and the cargo itself, are jointly and severally obligated to pay, on demand, all freight charges, dues, taxes, per diem, collection fees, or charges and/or other expenses in connection with the goods.

The Carrier, its servants or agents, shall have both a maritime and contractual lien on the goods or any part thereof, and the Carrier or its Agent shall have the right to sell such goods, whether privately or by public auction, upon reasonable notice to the Merchant, for all freight (including additional freight payable as is herein stipulated) primage, deadfreight, demurrage, detention, container demurrage, charges, salvage, average of any kind whatsoever, stamps, duties, fines or penalties. The lien hereby accorded may be exercised by the Carrier, its servants or agents notwithstanding that it or they may have parted with actual or constructive possession of the goods. Nothing in this clause shall prevent the Carrier from recovering from the Merchant the difference between the full amount due, and the net amount realized by the exercise of the rights given to the Carrier under this Clause. (Emphasis supplied).

Thus, the service contracts and the prevailing law cited above entitled ZIM to lawfully employ the Cargo Holds when faced with SEA's obstinance to address its seriously overdue receivables.<sup>4</sup>

*C. SEA's Chronic Delinquency Required ZIM To Employ Cargo Holds*

ZIM's reasonableness in the exercise of its lien rights was validated, and in fact necessitated, by SEA's chronic delinquency in paying ZIM because SEA typically failed to even acknowledge its indebtedness until a Cargo Hold was employed. This is confirmed by the extensive periods of time during which excessively high receivables were outstanding. ID at 18, FoF #54 - showing invoices outstanding for months and some in excess of a year; ID at 25, FoF #78 - outstanding invoices totaling \$857,914.64; ID at 27, FoF #86 - showing past due balance of \$943,708.14; ID at 30, FoF #100 - showing past due balance of \$1.5 million.

Notably, this chronic delinquency was of SEA's own design because, as the Presiding Officer acknowledged, SEA imposed an inefficient approval process which encumbered, if not outright thwarted, the timely payment of invoices. This unwieldy process, which a dispassionate

---

<sup>4</sup> The fact that SEA was not named in service contracts granting the lien is irrelevant. The lien was granted by the contract signatory and the contract terms covered the transportation of the cargo. The issue of who owned the cargo and whether SEA was party to or aware of the contract improperly conflates the contract of sale with the contract of carriage.

observer could reasonably interpret as one designed to derail timely payment, was described in the ID as follows:

The invoice approval process at SEA was complex, starting with ZIM needing to determine whether to send charges for freight to the shipper, or for demurrage and detention charges to either the direct ship team or the inbound team. The SEA direct ship team would not review invoices that did not belong to their team, rather, they would return the invoice to ZIM. Ms. Fernando testified that she would not send an invoice to the SEA team that should be handling it “[b]ecause this is not my task. It should be ZIM’s task to know where to send all the correct invoices.” CX 2442-43. After the correct SEA team verified and validated the amount for approval, then ZIM needed to send the invoice to SEA accounting for payment. CX 2444-45; CX 7208; CX 7218-19; CX 7226- 27; CX 7199 (“Please send all the outstanding invoices to ADCInvoice@sea.samsung.com. Please provide approvals of email threads for the invoices. If you don’t have them, please see the below contacts for obtaining approval. Once you receive the approval from them, please forward that email thread along with the corresponding invoice(s) so I may validate and process.”). SEA’s choice of an inefficient, multi-step process for invoices contributed to delays in payments to ZIM. ID at 68-9 (Emphasis supplied).

Notably, the Presiding Officer observed that SEA could not rely upon the Shipping Act as a justification for the Rube Goldberg system it forced upon ZIM for the processing of invoices: “...SEA does not point to any basis in the service contracts, tariffs, the Shipping Act, or elsewhere to find that ocean common carriers are required ‘to align [their] billing process with the consignee...’ This decision does not need to resolve that question as it is clear that many of the invoices were eventually sent pursuant to SEA’s preferred process.” ID at 69.

Nevertheless, the effect of this system was to derail ZIM’s invoices from a reasonably timely payment track. ZIM’s invoices remained outstanding for many months, and SEA continued to ignore them until ZIM imposed the Cargo Holds. By way of example, the First Cargo Hold included invoices that were up to 1,734 days in arrears (ID at 18, FoF #54); the Third Cargo Hold included invoices that were outstanding for more than 365 days (ID at #29,

FoF #96); and the Fourth Cargo Hold included \$612,875 in arrearages that were characterized as “seriously overdue.” (ID at 36, FoF #111).

The record is clear that Samsung was chronically delinquent in paying ZIM and that, each time ZIM exercised its lien rights, Samsung was hundreds of thousands of dollars in arrears to ZIM. (ID at 76). In light of the sums owed to ZIM by Samsung and the extensive periods of time that these receivables were outstanding, ZIM was compelled to employ its Cargo Holds, which it did so as a last resort, in order to bring SEA around to addressing its seriously delinquent receivables. ZIM released the holds without receiving payment in full and, as previously noted, ZIM still has claims against SEA for approximately \$2 million.

*D. Precluding Contractually Expanded Liens Will Impede Cargo Fluidity*

A carrier’s common law possessory lien arises from the right of the shipowner to retain possession of the goods until freight is paid. *World Imports* at 584, citing *Bird of Paradise*. The Court’s opinion in *World Imports* was insightful because it observed that it would “frustrate commerce to require shipowners to retain their liens only by actual possession of the implicated cargo,” *World Imports* at 584. In issuing its ruling, the Third Circuit Court of Appeals recognized that a contractually expanded lien facilitates the movement of cargo by allowing the carrier to release cargo without payment while still retaining a means to secure payment at a later date should it become necessary to do so. This is precisely what ZIM had done with SEA.

Samsung would never have been in arrears had ZIM insisted on payment for each and every shipment prior to its release. Instead, Samsung would likely have faced severe cargo delays, astronomical demurrage and detention charges, and would have congested ports’ spaces that were already suffering under the strains of the pandemic. By releasing cargo without payment, ZIM was promoting the flow of cargo. It was only when the amounts outstanding

became substantial in size, and SEA was failing to address its seriously outstanding receivables, that ZIM exercised the contractual rights it had been granted in the service contracts.

If the Commission were to find that exercise of a contractual lien broader than the common law possessory lien is unreasonable under the Shipping Act, this would have the adverse impact on freight fluidity that the Third Circuit warned of in *World Imports*. Carriers would be forced to require payment prior to releasing each and every shipment, a development which would lead to higher costs for shippers as well as congestion and delays at ports and marine terminals.<sup>5</sup>

Moreover, ZIM's exercise of its lien rights incentivized the movement of the cargo. A significant portion of the demurrage charges due on cargo was assessed by and payable to marine terminal operators. Rapske Tr., CX\_02198; 26:5-15. The marine terminals would not release the cargo unless those charges were paid. By exercising its lien rights, ZIM incentivized Samsung to make the payments necessary for the cargo to be released.

The Presiding Officer cited the testimony of Yaacoub Yaacoub for the proposition that the exercise of the lien rights did not incentivize cargo movement. ID at 79 However, the testimony of numerous other ZIM witnesses, which the ID ignored, was that the exercise of the lien rights did incentivize cargo movement. Cleva Tr., CX\_04579-80, 50:3-51-8; Rosenberg Tr., CX\_05329-31, 26:12-28:2.

In concluding this discussion, ZIM wishes to emphasize that a holding by the Commission that a carrier is permitted to contractually expand its common law maritime lien, as recognized and permitted in the *World Imports* decision, does not constitute a license for an ocean carrier to employ liens irresponsibly or use them to coerce payments which are not

---

<sup>5</sup> If the common law lien is as sacrosanct as the ID would make it, then the logical corollary of the ruling is that any attempt by a customer to have the carrier waive its lien is also unreasonable and unenforceable.

properly due. The Presiding Officer, when analyzing the four Cargo Holds, identified circumstances which did not validly support the assessment of demurrage/detention. When these issues were brought to ZIM's attention by SEA, they were readily addressed and charges were promptly waived or compromised. This was confirmed by the Presiding Officer:

The evidence shows ZIM waived, refunded, or offered to waive some demurrage and detention charges on SEA shipments. See, e.g., CX 2919-20; CX 3045; RX 838; RX 914; RX 5; CX 3278-79. Indeed, throughout the 2020-2022 timeframe, the parties discussed responsibility for demurrage charges, with SEA sometimes accepting responsibility and ZIM sometimes accepting responsibility. CX 5986-87. And, the cargo holds discussed more below were all released prior to SEA paying the original amount ZIM claimed was due, showing that the parties discussed and resolved their D&D disputes. ID at 66-7

Nevertheless, the Cargo Holds were necessary because, until they were employed, SEA ignored ZIM's invoices and numerous follow-ups for payment: "...while SEA contested charges for many different reasons, SEA does not point to contemporaneous evidence that it disclaimed liability for any D&D charges at all or that it believed it was never responsible for these charges. To the contrary, there were instances when SEA acknowledged that the detention and demurrage charges were its responsibility to pay." ID at 69 (Emphasis supplied)

The stark reality which appears from the record is that (i) a substantial portion of the amounts outstanding at the times ZIM exercised its lien rights were attributable to Samsung, which was responsible for paying them; and (ii) the liens were lifted when Samsung paid an amount that was negotiated between the parties, typically an amount that was less than the full sum that was due and owing. These facts indicate that ZIM had a legitimate basis for enforcing its lien rights and, after it did so, managed them responsibly.

#### **IV. THE PRESIDING OFFICER ERRED IN AWARDING \$3.68 MILLION IN REPARATIONS**

The ALJ erred in awarding SEA \$3.68 million in reparations for the reasons set forth below.

*A. The Reparations Award Was Arbitrary And Capricious*

It is well-established that a logical inconsistency alone renders an agency order arbitrary and capricious. *Evergreen Shipping Agency (America) Corp. v. FMC*, 106 F4th 1113, 1118 (D.C. Cir. 2024)(internal citations omitted). The ID’s award of reparations involves a logical inconsistency and is therefore arbitrary and capricious.

In Finding of Fact #134, the ALJ found that:

The charges reflected in the damages report by SEA’s expert witness, Mr. Smith, include demurrage/detention, prepull, storage and yard storage charges that were attributable to SEA because its facilities were unable to take delivery of the shipments. CX 5931-44; CX 2251.

The ALJ also held that SEA is required to provide a “shipment-by-shipment analysis sufficient to determine why specific containers incurred demurrage and detention charges.” ID at 70.

However, in awarding reparations based on the Cargo Holds, the ID ignored the foregoing Finding of Fact and legal determination and awarded reparations for the full amount of demurrage that SEA’s expert claims is attributable to the Cargo Holds analyzed. In other words, the ID awarded all demurrage charges purportedly attributable to the analyzed Cargo Holds despite having found that Mr. Smith’s figures include amounts that are the responsibility of SEA and without analyzing on a shipment-by-shipment basis the reason charges were incurred.

Awarding reparations based on an analysis that contradicts a Finding of Fact and ignores the legal test established in the decision involves a logical inconsistency that renders it arbitrary and capricious. Accordingly, it should be reversed insofar as reparations are concerned.

*B. The Reparations Award Is Unsupported By The Evidence*

The award of reparations based on Cargo Holds is not only arbitrary and capricious but, for largely the same reasons, unsupported by the evidence.

The estimate of demurrage attributable in whole or in part to the Cargo Holds offered by SEA's expert, Mr. Smith, includes all demurrage charges incurred by the containers during each Cargo Hold and for a period of 30 days after each Cargo Hold. Smith Report, ¶¶ 48 and 51 and Exhibit 10; CX5809-5810 and CX5945.

As an initial matter, the award of reparations with respect to demurrage incurred for a 30-day period after the Cargo Holds were lifted is unsupported by the evidence in the record. The use of a 30-day period appears to be based on a single example. Smith Report, ¶ 50; CX5809-5810. In short, there is insufficient evidence in the record to justify an award of reparations which includes a 30-day period following the lifting of each Cargo Hold. Instead of holding that all charges within a randomly selected time period were unreasonable, the ALJ should have required evidence as to the reason for each demurrage charge incurred after the lifting of the Cargo Hold. Moreover, the post-hold period during which the reasonableness of charges would be considered should be based on the length of the hold, the locations where charges were accrued, and conditions at those locations in terms of port congestion, trucking power, chassis availability, and the like. Failing that, at a minimum a more reasonable time period (such as the amount of free time allowed) should have been used instead of the 30-day period.

Moreover, despite having ruled that the reason for the imposition of a charge must be analyzed on a shipment-by-shipment basis, the ID abandons this requirement and accepts -- without evidence or analysis -- that any demurrage incurred by any shipment within 30 days of the end of a cargo hold is ZIM's responsibility. There is no evidence to support this approach. To the contrary, given the finding that Mr. Smith's figures include charges that were the responsibility of SEA (Finding of Fact #134), and Mr. Smith's own concession that the \$3.68 million includes charges that were caused only in part by the Cargo Holds ("I have utilized SEA

data to estimate the amounts of demurrage that were caused in whole or in part by the cargo holds.” Smith Report, ¶ 48; CX5809), it is more probable than not that some portion of the demurrage incurred in the 30-day period after a hold was lifted is attributable to the inability of SEA or its customer to take delivery in a timely manner. Given this probability, the \$3.68 million in reparations awarded has not been proven with reasonable certainty, and the award should be reversed.

There are additional evidentiary problems with the reparations award. These include:

- At least some of the cargo which accrued demurrage during the cargo holds could not have been delivered even had there been no hold due to the inability of SEA or its customer to accept delivery. Absent a showing that SEA or its customer could have taken timely delivery of the cargo but for the cargo hold, a finding that all of the demurrage charges were unreasonable is unsupported by the record and an award of reparations is inappropriate.
- At least some of the cargo being held was being held for charges due on that cargo. See, e.g., Finding of Fact #96 (showing amounts 1 to 30 days past due); Finding of Fact #111 (showing invoices less than 30 days past due). Even assuming *arguendo* that the ALJ is correct in finding that the common law possessory lien cannot be expanded by contract (ZIM which denies) and that the holds were unreasonable, the amount of reparations should be reduced by the amount of demurrage incurred by cargo in the possession of ZIM that was being held for charges due on that cargo because, with respect to such cargo, the lien was a valid possessory lien.
- The absence of invoices as a basis for finding the cargo holds unreasonable is flawed. As the Commission is aware, demurrage is frequently assessed by and/or collected by

a marine terminal operator. In such instances, an invoice is not issued. Rather, the amount of demurrage due is made known to the consignee or its agent via the marine terminal operator's website and is paid to the marine terminal operator. Thus, there would be no ZIM invoice for such charges.

- The reparations appear to include amounts that ZIM waived, refunded or offered to waive. The ID found that ZIM waived, refunded or offered to waive demurrage when it believed doing so was warranted. See, e.g., FoF #183. For example, CX3045, cited in FoF #183, dates to January 31, 2022, which is during the period of the Fourth Cargo Hold. It discusses discounting and closing past due demurrage of over \$2.5 million, including demurrage for Samsung. Thus, even assuming arguendo that the ALJ is correct in finding that the common law possessory lien cannot be expanded by contract (which ZIM denies) and that the Cargo Holds were unreasonable, the amount of reparations should be reduced by the amount of any invoices that were waived or refunded in whole or in part.

In light of the foregoing factual considerations, the award of reparations should be reversed.

## **V. CONCLUSION**

The ID's holding that ZIM's employment of the Cargo Holds was unreasonable under 41102(c) of the Shipping Act should be reversed and the Complaint dismissed with prejudice. Alternatively, should the Commission decline to dismiss on this grounds, the award should nevertheless be vacated on the grounds that SEA has not proven these damages with reasonable certainty and the Complaint accordingly dismissed.

Respectfully submitted,

COZEN O'CONNOR

By: /s/ Wayne R. Rohde  
Counsel for Respondent,  
ZIM Integrated Shipping Services Ltd.  
Wayne R. Rohde  
Christopher Raleigh  
Kathryn Sobotta  
Cozen O'Connor  
1200 Nineteenth Street, NW  
Washington, D.C. 20036  
wrohde@cozen.com  
craleigh@cozen.com  
ksobotta@cozen.com

Dated: May 14, 2025

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14<sup>th</sup> day of May, 2025, a true and correct copy of Respondent's Exceptions to the Initial Decision were served on counsel for Samsung Electronics America, Inc. in FMC Docket No. 22-30.

/s/ Christopher Raleigh

LEGAL\77536916\1