BEFORE THE

FEDERAL MARITIME COMMISSION

DOCKET NO. 22-30

SAMSUNG ELECTRONICS AMERICA,

INC.,

COMPLAINANT,

v.

ZIM INTEGRATED SHIPPING SERVICES LTD.,

RESPONDENT.

COMPLAINANT'S EXCEPTIONS
TO THE INITIAL DECISION

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I. INTRODUCTION

The Presiding Officer's April 22, 2025, Initial Decision ("ID"), correctly determined that the policies and practices of ZIM Integrated Shipping Services Ltd. ("ZIM"), were unreasonable and in violation of the Shipping Act in two key respects: (i) charging demurrage and detention ("D&D") fees on store door moves solely based on the use of customer nominated truckers ("CNT") for inland transportation was unreasonable; and (ii) imposing cargo holds to collect outstanding D&D invoices on unrelated containers was unreasonable. ID at 63-82. These findings of fact, analyses, and conclusions of law, well supported by evidence in the record, should have resulted in Samsung Electronics America, Inc. ("SEA") recovering **over ten million dollars** in D&D charges it was forced to **pay in full** in order to have its cargo released. Instead, it was awarded only $3.68 million in cargo hold demurrage, less than even the $5.2 million ZIM **admitted** collecting through the cargo holds.

Complainant SEA, through its counsel, respectfully submits exceptions to *certain* findings of fact and conclusions of law of the Presiding Officer are warranted and merit reversal under 46 C.F.R. §502.27. Once the Presiding Officer found ZIM engaged in multiple Shipping Act violations, it was reversible error to award no damages whatsoever for the store door CNT violations and less than half of its damages on the cargo hold violations.

The Commission should be concerned with the message sent to the shipping industry when ZIM, under the ID, would retain the majority of its ill-begotten gains and profit from these D&D charges except for $3.68 million in cargo hold demurrage charges plus interest, despite:

- The May 18, 2020 Final Rule warning ZIM and all carriers "the Commission has concerns … especially [about] charging shippers demurrage on carrier haulage moves, under Section 41102(c), and will closely scrutinize them in an appropriate case." Final Rule

Comment O, at 29665.[1] **This** is the "appropriate" case the Commission must "closely scrutinize" as **SEA paid $7.998 million in demurrage charges** on ZIM store door moves**.**[2]

- The carrier haulage "concerns" are well justified here with SEA, a consignee that had no ability to move cargo by way of operations and trucking infrastructure and was entirely dependent on ZIM to deliver cargo to inland destinations, was forced to pay nearly 10,000 D&D charges on roughly 3,000 ZIM container moves. ID at 1.

- For ZIM's billing practices to SEA, there was an evidentiary finding of "substantial billing problems" by ZIM, with "many errors" found in the findings of fact (ID at 85), but inexplicably did not result in a third unreasonable violation of the Shipping Act and no damages awarded.

- Despite finding ZIM in violation of the Shipping Act for unlawfully holding SEA's cargo where SEA disputed certain D&D charges, the ID gave ZIM a pass on an unreasonable dispute resolution practices violation. ID at 87.

- On damages, finding the "SEA data is more reliable than the ZIM data" and crediting SEA's damages expert for its work and yet not awarding the full D&D charges reparations. ID at 98.

These findings should have resulted in a substantial reparations recovery, especially considering the Commission has recognized the prevalence of the inverted incentive D&D structure and the proliferation of carriers treating D&D charges as an enhanced revenue center during the COVID-19 pandemic, to the detriment of both importing and exporting shippers.[3]

SEA filed a private party action and invested considerable time and money to scrutinize the ZIM practices that led to these millions and millions of dollars in D&D charges. The Presiding Officer issued findings of fact in the ID that addressed the serious concerns about the unreasonable way a consignee like SEA was treated. But the Presiding Officer did not follow the legal framework that should have resulted in a more fulsome damages recovery, as recently articulated by the

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[1] Interpretive Rule on Demurrage and Detention Under the Shipping Act, Dkt. No. 19-05, 85 Fed. Reg. 29638 (May 18, 2020) (Final Rule) (the "Interpretive Rulemaking"). The Interpretive Rulemaking promulgated the regulation, Interpretation of Shipping Act of 1984—Unjust and unreasonable practices with respect to demurrage and detention, codified at 46 C.F.R. § 545.5. (the "D&D Interpretive Rule").

[2] Greg Smith, SEA Expert Report, Ex. 2 ($7,458,145 in demurrage and $540,606 in rail storage). CX_05816-05930.

[3] *See Detention and Demurrage*, FMC, https://www.fmc.gov/detention-and-demurrage/.

Commission in *TCW, Inc. v. Evergreen Shipping Agency (America) Corp*, Dkt. No. 1966(I), 2025 WL 516256, *7 (FMC Feb. 13, 2025) ("*TCW Order on Remand*"). Once the complainant makes a sufficient *prima facie* showing that the charging practice is unreasonable, the burden shifts to the respondent to put forth evidence, if it can, of "justifications for its charges" establishing reasonableness. A respondent thus has the opportunity to show that the practice (or resulting individual charge) was otherwise justified, but if it fails to do so the inquiry is at an end and fulsome damages should be awarded. *Id.* at *7-11. Here, the additional onus placed on SEA to also show for every charge resulting from the unlawful practices that SEA could not have been responsible and that ZIM was responsible, is improper and unreasonable.

The concept of proximate cause is a critical one in the consideration of damages. But the result of the ID is that despite finding ZIM's charging practices unlawful, **even if ZIM provided no other justification at all**, **SEA recovers nothing** unless SEA makes a further showing of the "fault" for each charge. It should matter that in store door situations, ZIM is responsible for the inland transportation and controlled the circumstances causing or contributing to delays leading to D&D charges, *unless* the consignee was actually responsible for delays, such as inability to unload cargo. There is exceptionally little evidence of that here. For example, the Presiding Officer issued 183 Findings of Fact and, in those, it credited instances where SEA was responsible for charges in only four Findings of Fact. ID FF ¶¶131, 139, 159, 165.

After exchanging over two hundred thousand pages of documents, taking the depositions of over a dozen witnesses, and multiple expert witnesses (ID at 2), the 101-page ID improperly delves into considerations of fault and allocations of responsibility not grounded in the Shipping Act, the Interpretive Rule, the Incentive Principle, or the proper burden-shifting framework and should be corrected by the Commission. When the Commission applies the proper framework, the record evidence is more than sufficient to show a *prima facie* case on each of the key violations alleged,

including that: (i) charging D&D when the ocean carrier was responsible for not moving the cargo due to alleged cargo holds does not incentivize freight fluidity; (ii) charging D&D on a party that is not responsible for moving the cargo does not incentivize freight fluidity; and (iii) charging a consignee D&D on the basis that the ocean carrier's inland trucker was recommended by a shipper or consignee does not incentivize freight fluidity.

Similarly, when the Commission properly allocates the burden of production on ZIM to rebut or provide evidence of reasonableness, if it can, to justify its practices, the record evidence is manifestly inadequate for ZIM to meet that burden. Finally, with respect to reparations, the record will show that SEA has more than adequately demonstrated proximate cause.

SEA respectfully requests that the Commission correct the exceptions raised herein and award the proper amount of damages. The Presiding Officer should have found that the application of the unlawful ZIM practice proximately caused the charges incurred and awarded SEA **$10,807,038.08**[4] for the charges it was forced to pay on ZIM moves *except* charges where ZIM provided a reasonable justification for a charge. And, based on SEA's calculations, the quantum for these reasonably justified charges, as found by the Presiding Officer, equates to **no more than $43,804.74**. In sum, SEA requests the Commission award it **$10,763.223.34**. Or, if there is *any* question as to the calculation of damages, an inquest under 46 C.F.R. §502.251 can be ordered.

II. FACTUAL BACKGROUND

A. The Complainant.

Complainant, SEA, is a leading consumer electronic products company incorporated and organized under the laws of New York State, with its principal place of business in New Jersey. SEA PFF ¶10 (admitted); CX_00001, Compl. ¶1; CX_00020, Answer ¶1. SEA provides its consumer

[4] Smith Report, Ex. 1 pg. 115 CX_05816-05930; Ex. 2 CX_05931 (addressing total of all D&D charges paid by SEA); *see also* fn. 10, *infra*, for full net calculation explanation.

goods to the American public online through Samsung.com; retailers like Best Buy, The Home Depot, and Lowe's; and through distributors. CX_00003, Compl. ¶9; CX_00021, Answer ¶9; CX_02205, Rapske (SEA) Dep. Tr. 33:6-7. Based on anticipated consumer demand for home appliance products, SEA places orders with overseas factories for the manufacturing and production of said products. SEA PFF ¶18 (admitted); CX_02205, Rapske Dep. Tr. 33:8-22; CX_02354, Fernando (SEA) Dep. Tr. 34:18-22.

SEA does not contract with ocean carriers like ZIM for the transportation of its products, and is not a signatory to their service contracts. ID FF ¶18; SEA PFF ¶20; ZIM RPFF ¶20. The service contracts were entered between ZIM on the one hand, and Samsung Data Systems ("SDS") or Samsung Electronics Logitech Co., Ltd. ("Logitech") on the other. ID ¶FF 10; CX_02205, Rapske Dep. Tr. 33:8-22; see also CX_05293, Shpitzer (ZIM) Dep. Ex. 6. SEA, SDS and Logitech are distinct corporate entities. *Id*. SEA is not named as an "Affiliate" in any of the above service contracts with ZIM. ID FF ¶19; RX 1807-08; RX 1836; RX 1871-72; RX 1900-01; RX 1939-41. SDS or Logitech (not SEA) arranged for the transportation of cargo from foreign ports to inland US destinations with ocean carriers such as ZIM. SEA PFF ¶¶20, 22.

B. The Respondent.

ZIM is an ocean common carrier which conducts business in the U.S. through ZIM American Integrated Shipping Services Company Co. LLC. ID FF ¶¶5-6; CX_00001-CX_00002, Compl. ¶2; CX_00020, Answer ¶2. ZIM is an FMC-regulated vessel-operating ocean common carrier and is subject to FMC regulation. SEA PFF ¶13 (admitted); CX_00020, Answer ¶2.

C. ZIM Adopts Unreasonable Practices During the Pandemic.

It is undisputed that ZIM transported the SEA shipments relevant to this proceeding under through bills of lading from the overseas originating locations, through U.S. ports, and then on to designated U.S. inland locations. ID FF ¶¶21, 24; CX_00006, Compl. ¶28; CX_00028, Answer ¶28.

Under those terms, as is standard for through bills of lading, ZIM was responsible for the ocean carriage of the SEA containers to a U.S. port **<u>and the inland carriage</u>** of the SEA containers to U.S. inland locations, generally SEA warehouses or SEA customer locations. ID FF ¶22, 24; CX_00006, Compl. ¶¶29-30; CX_00023, Answer ¶¶29-30; ZIM PFF ¶42. Shipments subject to through bills of lading are commonly referred to as "store door," "door-to-door," or "carrier haulage" service, as recognized in the Final Rule, Section O. SEA was designated as the consignee for the shipments at issue in this proceeding. ID FF ¶7; CX_00006, Compl. ¶27; CX_00023, Answer ¶27.

ZIM's website offered a full range of services from arrangements overseas to the final destination at SEA distribution centers and customers inland, otherwise known as inland transportation or "store door" delivery.[5] CX_00003, Compl. ¶¶10-15. SEA relied entirely on ZIM to move cargo to inland destinations and did not have operations capabilities for the handling of inland moves. CX_02123, Choi (SEA) Dep. Tr. 74:16-24. SEA did not have a trucking dispatch operation, nor any agreements with rail or trucking companies to handle inland transportation from the US marine terminals to inland destinations. CX_02111, CX_02115, CX_02118-CX_02119, Choi Dep. Tr. 62:15-23; 66:18-23; 69:20-70:3. Instead SEA relied on the services marketed to the public by ZIM. ZIM arranged for truckers and chassis, rail transportation to inland railheads, scheduled pickup at marine and rail terminals, and returned chassis and containers following delivery. CX_02123-CX_02124, Choi Dep. Tr. 74:16-75:14; CX_00003, Compl. ¶10.

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[5] The Presiding Officer chided SEA (ID at 66) for citing to CX_05288 because that citation does "not support the statements made." ID at 66. The Presiding Officer is completely correct; the appendix citation here does not fully represent the evidence that SEA meant to highlight. CX_05288 is the first page of a long email chain used as Exhibit 6 to ZIM corporate rep Moshe Shpitzer's deposition. The correct appendix cite *should have been* to CX_05292, which is page 6 of the exhibit email chain, because it includes a chart which outlines CY-Door Service on Super-All-In Rates. The Shpitzer deposition discusses this page at appendix cite CX_05251, Shpitzer Dep. Tr. 165:12-16 where Shpitzer was asked what "super all in" means, and Shpitzer describes it as follows: "Super all-in means that includes all the surcharges, including the manifested and the local surcharges."

SEA nominated CNTs for ZIM's inland movement of SEA's containers. ID FF ¶ 126. CNTs were nominated because they had experience on designated routes and were familiar with SEA's warehouses and customer facilities. PFF ¶ 36; ID FF ¶ 127. Once nominated, ZIM made the decision to approve and use any CNT. PFF ¶ 34. CNTs were vetted and approved by ZIM—ZIM reviewed the trucker's safety records, good standing, and if it participation in the Uniform Intermodal Interchange and Facilities Access Agreement ("UIIA"). PFF ¶¶ 36-37; RPFF ¶¶ 36-37. ZIM had the authority to reject a CNT and did not always accept SEA's CNTs. ID FF ¶ 136. ZIM contracted with CNTs to perform ZIM's inland trucking services and SEA did not have contracts with CNTs. PFF ¶¶ 36-37; RPFF ¶¶ 36-37 (ZIM acknowledging rate agreements with CNTs; conceding without rebuttal that SEA did not contract with CNTs). If a CNT did not have the capacity to handle a move, ZIM had the responsibility to procure another trucker, **not SEA**. PFF ¶ 40; RPFF ¶ 40 (admitted).

Pre-pandemic, as ZIM was the party responsible for inland transport of SEA's goods, **ZIM** handled the goods transport and settlement of any D&D charges they (or their subcontractors) incurred during the shipment process. CX_02127-CX_02128, Choi Dep. Tr. 78:15-79:19.

During the pandemic, however, ZIM unilaterally stopped performing significant aspects of its inland transportation duties, including settling D&D charges and coordinating inland logistics. ZIM began requiring SEA to pay demurrage for ZIM to continue to move the cargo. And when SEA did not pay D&D charges due to reasons such as lacking the operations or facility to make direct payments to marine terminals, not having complete information about the charges, or disputing the charges, ZIM imposed cargo holds that halted all inland movements, including on **other**, non-disputed shipments. CX_02214-CX_02215, Rapske Dep. Tr. 42:20-43:5. The cargo holds held SEA's shipments hostage until **SEA** made the D&D payments for which **ZIM** was responsible. ID FF ¶48; SEA PFF ¶140 (admitted); CX_03125, Yaacoub (ZIM) Dep. Tr. 68:22-24.

The result of this shift? ZIM profited handsomely, reaching approximately $4.6 billion of net income in the years 2021 to 2022. SEA PFF ¶¶238-247. During that period, ZIM saw an increase of $242.9 million in income **from demurrage alone**. SEA PFF ¶246. ZIM's use of cargo holds shows how this staggering increase was possible on the backs of consignees of cargo like SEA.

Between 2020 and 2022, ZIM implemented blanket cargo holds on shipments that had not accrued any D&D charges effectively freezing the movement of numerous of SEA containers in the U.S. containerized cargo ecosystem. SEA PFF ¶211; CX_02218-CX_02219, Rapske Dep. Tr. 46:17-47:8; CX_02285-CX_02307, Rapske Dep. Ex. 5; CX_03006, Speight (ZIM) Dep. Tr. 207:17-24. Relevant to this proceeding, there were four separate cargo hold periods against SEA between (1) August 5 and mid-August 2020; (2) May 27 and June 30, 2021; (3) September 27 and October 16, 2021; and (4) January 11 and March 17, 2022. The last cargo hold lasted **<u>nine weeks</u>**. ID FF ¶51; CX_01570, ZIM0085708. During these cargo hold periods, **<u>by ZIM's own admission</u>**, the financial impact on SEA was approximately $3.8 million in demurrage, $900,000 in detention, and $500,000 in rail storage, totaling $5.2 million. CX_01570, ZIM0085708 (ZIM's U.S. Director of Finance, Mr. Yaacoub Yaacoub). This admission was *not* acknowledged by the Presiding Officer in the ID.

In light of ZIM's refusal to perform its store door duties and settle D&D, SEA was forced to step in. SEA not only paid all the D&D charges for which ZIM was responsible to maintain the flow of goods, but in 2022, SEA also invested significant resources to build out capabilities to manage the inland transport of its shipments itself. SEA PFF ¶29; CX_02214, Rapske Dep. Tr. 42:1-4. At that point, ZIM's cargo movements effectively shifted to container yard or "CY" freight service. CX_04589-CX_04590, Cleva (ZIM) Dep. Tr. 60:18-61:9; CX_003054-03056, Speight Dep. Ex. 6; CX_05211, Shpitzer Dep. Tr. 125:3-12. Under "container yard," "CY" or "port-to-port" terms, commonly described as "merchant haulage," the shipper or consignee is responsible for the inland movement from the port to the final inland destination. ID FF ¶26; CX_00007, Compl. ¶31;

CX_00023, Answer ¶31. SEA simply could no longer rely on ZIM to handle the inland transport of its shipments without risking massive D&D charges and cargo holds.

After SEA filed this action ZIM concocted an excuse for its failure to perform, arguing that SEA's nomination of CNTs under the alleged shipping agreements somehow relieved ZIM of its responsibilities under through bills of lading. CX_04589-CX_04590, Cleva (ZIM) Dep. Tr. 60:18-61:9; CX_03054-CX_03056, Speight (ZIM) Dep. Ex. 6; CX_05211, Shpitzer (ZIM) Dep. Tr. 125:3-12. That *post hoc* justification aligns with neither the law, the alleged agreements' provisions, nor the contemporaneous events. In support of its affirmative defenses, looking at SEA conduct for its justifications for failing to perform and issuing D&D charges, ZIM's evidence, equated to no greater than $43,804.74 in charges for which SEA was responsible. *See* discussion *infra* at pg. 27 fn.10.

D. SEA Files Claims Against ZIM for Violation of the Shipping Act.

On October 25, 2022, pursuant to 46 U.S.C. § 41301, SEA filed its Verified Complaint against ZIM. SEA alleged five separate counts in violation of the Shipping Act, including allegations of (1) ZIM's unreasonable practices in violation of Section 41102(c); (2) ZIM's retaliatory practices against SEA in violation of Section 41104(a)(3); (3) ZIM's unreasonable refusal to deal in violation of Section 41104(a)(10); (4) ZIM's issuance of invoices without sufficient information in violation of Section 41104(a)(15); and (5) ZIM's unreasonable charges in violation of Section 41104(a)(14).[6]

E. The Initial Decision, Exceptions on Appeal, and Reparations Sought by SEA.

The ID correctly determined that ZIM's policies and practices were unreasonable in connection with (i) store door moves involving CNTs and (ii) ZIM's repeated practice of holding cargo destined for SEA-- including cargo not in demurrage and resulting in new demurrage on

[6] SEA does not raise exceptions to the Presiding Officer's rulings as to the 41104(a)(10) refusal to deal claim or the 41104(a)(14) and (15) OSRA claims.

demurrage --to coerce payment of D&D charges violated the Shipping Act. ID at 63-82. Despite reaching the correct result on these central issues, the ID erred in several critical aspects:

First, at a minimum, the ID incorrectly reduced the quantum of reparations for ZIM's retaliatory cargo holds to $3,680,339 million (ID at 96-100) —despite ZIM's admissions and other evidence that cargo hold-based reparations should have been $5.2 million. Both parties' damages experts, as well as admissions from ZIM's Director of Finance, show that ZIM collected the higher amount. The ID omitted one uncontested period of the cargo holds addressed by SEA, and improperly omitted rail storage and detention charges arising from those cargo holds, based on factual errors.

Second, the ID erred in concluding SEA did not sufficiently prove a violation of the Shipping Act with respect to ZIM's practice of charging D&D on the party that is not responsible for moving the cargo. ID at 70. The ID failed to first consider properly whether or how the practice alleged was reasonable under the Incentive Principle, *i.e.,* **how can charging the party not moving the cargo, or charging that party for delays caused by the ocean carriers or its sub-contractors, possibly incentivize that party to move cargo it cannot move, for reasons that it does not control?**

The ID concludes that it cannot find the practice unreasonable under the Incentive Principle because ZIM's service contacts may have permitted some charges if beyond ZIM's control. However, unlike the store door practice analysis, the ID concluded that the service contract's CNT contract provisions were not a defense to finding a violation. Putting aside for now that the Shipping Act requires all contract provisions be reasonable, and that the ID does not evaluate the reasonableness of charging the party that cannot move the cargo for all delays beyond ZIM's control, the ID should have treated ZIM's contract argument as the Commission treated the contract argument in *TCW*—**as an alleged justification or other factor where ZIM (and not SEA) has the burden of production.** Zim did not meet this burden.

<u>Third</u>, the ID improperly placed ZIM's burden to justify its unreasonable practices on SEA. In so doing, the ID does not properly consider SEA's *prima facie* showing of a violation. ID at 70. And because of that, the ID does not shift any burden of production on ZIM to proffer, if it can, alleged justifications or other factors demonstrating reasonableness of either the practice, or its application of charges. This materially prejudiced the subsequent reparations analysis and resulted in the ID erroneously concluding that SEA is not entitled to any reparations for ZIM's unlawful CNT D&D charging practices because some of the CNT demurrage charges *may* have been otherwise justified. The ID concluded that SEA would have to prove which charges were not otherwise justified to recover reparations. As a result, *no reparations* were awarded. That turns the applicable burden of production on its head.

A proper reparations accounting should have found that the application of the unlawful ZIM practice proximately caused the charges incurred and awarded SEA **$10,807,038.08** for the charges it was forced to pay on ZIM moves *except* for the D&D charges where ZIM provided a reasonable justification for a charge. ZIM offered and the Presiding Officer accepted only four such charges instances. Based on SEA's calculations, the quantum for these reasonably justified charges, as found by the Presiding Officer, equates to **no more than $43,804.74**. In sum, the award by the Commission should have been **$10,763.223.34**. This was a clear error. Likewise, the Presiding Officer had no evidentiary or legal basis to extrapolate the four charges identified by ZIM to deny SEA reparations.

Moreover, rather than determining if additional evidence review was warranted, the Presiding Officer instead awarded no reparations for the CNT violations whatsoever. The Presiding Officer, when issuing no reparations in light of damages evidence questions, failed to evaluate reparations in accordance with 46 C.F.R. § 502.251. In the event the Commission determines that additional review of damages evidence is warranted, it should remand the proceeding pursuant to Rule 251.

<u>Fourth</u>, the ID failed to appropriately evaluate evidence establishing SEA's reparations,

including ZIM's own admission of the financial impact of the cargo holds to SEA. ID at 100-101; CX_01570, ZIM0085708 (ZIM's US Director of Finance, Mr. Yaacoub Yaacoub).The ID also erred in relying heavily on language contained in service contracts and RFQs (ID at 9-15), which ZIM **failed to authenticate** or verify as contracts relevant to this proceeding, and which SEA did not negotiate or have in their possession.

Fifth, despite the fact that billing practices are also specifically addressed in the Interpretive Rule, the ID incorrectly concluded that ZIM did not have a "practice" of unreasonable billing, despite acknowledging that ZIM's billing practices were undoubtedly substandard and systematic. The Presiding Officer went so far as to warn ZIM that it "risks violating OSRA if this level of inaccurate billing continues," acknowledging "substantial billing problems" including issuing incorrect invoices, invoicing the wrong entities, issuing invoices late, and more. ID at 96.

Sixth, the ID also incorrectly concluded that ZIM's dispute resolution process did not violate the Shipping Act. The Presiding Officer acknowledged that "the evidence shows that ZIM could improve its dispute resolution process," yet inexplicably stopped short of finding that ZIM failed to establish and maintain an effective dispute resolution practice. ID at 87. It is illogical to conclude that ZIM maintained an unreasonable practice of issuing cargo holds on SEA's cargo to coerce payment of disputed invoices, and still hold that ZIM did not have unreasonable dispute resolution practices. If ZIM has reasonable dispute resolution practices, it would not have used punitive cargo holds to pressure SEA to pay its outstanding and often disputed invoices.

Seventh, the ID briefly dismissed SEA's retaliation count ID at 90-92. The Commission should find relief exists in this nascent area of FMC jurisprudence.

Reparations Sought: Following the consideration of the exceptions herein, the Commission should award SEA **$10,763,233.34** in reparations for the D&D charges incurred as a result of ZIM's unreasonable practices. *See* discussion *infra* at pg. 27 fn. 10. In the alternative, a minimum of

$5,213,270 in reparations should be granted on the basis of ZIM's own admissions as to the injury caused by ZIM's unreasonable cargo hold practices. *See* discussion *infra* at section V.B.2. Should there be any uncertainty as to the quantum of reparations owed, an inquest pursuant to Rule 251.

III. THE STANDARD OF REVIEW APPLICABLE TO THESE EXCEPTIONS

An initial decision by a Presiding Officer must provide a reasoned decision "on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. § 557(c)(3)(A); 46 C.F.R. § 502.223 (initial decision must "include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all the material issues presented on the record"). When the Commission reviews exceptions to an ID, the Commission has all the powers which it would have in making the ID. 46 C.F.R. § 502.227(a)(6). The Commission review of an initial decision is *de novo*. *Id.*; *see also Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.*, Dkt. No. 12-02, 2015 WL 9426189, *110-11 (FMC Dec. 18, 2015). Thus, while the Commission may adopt the findings of fact, application of law, and conclusions set forth in IDs, it may do so only where the Commission determined that, in light of the exceptions, those findings of fact, application of law, and conclusions "are well-reasoned and supported by evidence in the record." *United Logistics (LAX) Inc. – Possible Violations of Sections 10(A)(1) and 10(B)(2)(A) of the Shipping Act of 1984*, Dkt. No. 13-01, 2014 WL 5316339, *1 (FMC Feb. 6, 2014).

IV. THE LAW APPLICABLE TO SEA'S CLAIMS

A. The Critical Role of the Burden of Proof

A complainant asserting violations of the Shipping Act has the ultimate burden of proving its claims by a preponderance of the evidence. 5 U.S.C. § 556(d); 46 C.F.R. § 502.155; *Maher Terminals, LLC v. Port Auth. of N.Y. & N.J.,* Dkt. No. 08-03, 2014 WL 9966245, *14 (FMC Dec. 17, 2014). Under the preponderance standard, a complainant must establish through evidence that

their allegations are more probable than not. *Crocus Inv., LLC v. Marine Transp. Logistics,* Dkt. No. 15-04, 2021 WL 3732849, at *3 (FMC Aug. 18, 2021).

B. Section 41102(c) Unreasonable Practices and the Burden of Proof

Section 41102(c) of the Shipping Act (previously Section 10(d)(1) of the 1984 Act, and Section 17 of the 1916 Act) provides that a "common carrier, marine terminal operator, or ocean transportation intermediary 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). A successful claim for unreasonable practices under Section 41102(c) requires establishing the five elements, as set forth in the ID. ID at 60.

The Commission's Interpretive Rule on unreasonable demurrage and detention practices provides additional guidance for determinations of unreasonable practices and regulations under Section 41102(c) and 46 C.F.R. § 545.5 relating to demurrage and detention for containerized cargo. 46 C.F.R. § 545.5. The D&D Interpretive Rule establishes the Commission's "Incentive Principle" that: "In 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).

In the Final Rulemaking promulgating the D&D Interpretive Rule, the Commission explained that "the rule's primary focus is situations where demurrage and detention do not work because cargo cannot move." Final Interpretive Rule on Demurrage and Detention, Docket No. 19-05, 85 Fed. Reg. 29638, 29658 (May 18, 2020); *see also id.* at 29658 ("when shippers cannot retrieve cargo from a terminal, it is hard to see how demurrage or detention serve their primary incentive purpose."); *id.* at 29654 ("if a free time practice is not tailored so as to provide a shipper a reasonable opportunity to retrieve its cargo, it is not likely to be reasonable"); *id.* at 29658 (charging "when a trucker arrives at a marine terminal to retrieve a container but cannot do so because it is in a closed area or the port is

shutdown, might not be reasonable"); *id.* at 29655 (charging detention "when empty containers cannot be returned" is likely to be found unreasonable because "no amount of detention can incentivize" return of a container if there is no available return location).

These examples address when a "shipper" or a "trucker" cannot retrieve, move, or return containers because, in the context of a "merchant haulage arrangement, also known as CY or port-to-port transportation, the shipper makes the trucking arrangements." *Id*. at 29664. In contrast, the Commission explained that "[i]n a carrier haulage arrangement, also referred to as 'store door' delivery or a 'door move' or 'door-to-door' transportation, the ocean carrier is responsible for arranging transport of a container from the terminal to another location, such as a consignee warehouse. In other words, the ocean carrier provides drayage trucking." *Id*. Because shippers and/or consignees in store door moves are not responsible for retrieving, moving or returning containers, it is even harder to see how charging a consignee demurrage or detention can possibly serve as an incentive to move a container that the ocean carrier is responsible to move. Accordingly, the Commission explained in Final Rule it had specific concerns about such store door charges, "especially charging shippers demurrage on carrier haulage moves, under section 41102(c) and will closely scrutinize them in an appropriate case." *Id*. at 29665.

The Commission evaluates whether an alleged practice is unreasonable under Section 41102(c) (specifically, the "unreasonable practice" element of the cause of action codified in the regulation at 46 C.F.R. § 545.4(d)) following the well-established burden-shifting framework: the complainant has an initial burden of persuasion to make a *prima facie* showing that the alleged practice is unreasonable. If that burden is met, the burden of production shifts to the respondent to refute that showing, if it can. *See New Orleans Steamship Ass'n v. Plaquemines Port, Harbor & Terminal District,* Dkt. No. 83-2, 1985 WL 148970, *20-22 (ALJ Dec. 30, 1985) (after establishing a *prima facie* unreasonable practice under Section 17, "the respondent has the burden to and must

actually justify the exemptions, however reasonable one might otherwise assume them to be. Unfortunately, on the record made here, we cannot hold that the burden has been met."); *Petchem, Inc. v. Canaveral Port Auth.,* Dkt. No. 84-28, 1986 WL 170038, *13 (FMC March 28, 1986) (finding an exclusive arrangement *prima facie* unreasonable under Section 10(d)(1) of the 1984 Act and Section 17 of the 1916 Act "obligates Respondents to justify the arrangement."); *Ceres Marine Terminal, Inc. v. Maryland Port Admin*., Dkt. No. 94-01, 1997 WL 35281266, *38-39 (FMC Oct. 10, 1997) (finding first that Ceres met its *prima facie* burden of proving MPA's practice was unreasonable, and finding that MPA failed to show that the practice was justified"); *Exclusive Tug Arrangements in Port Canaveral, Fla.,* Dkt. No. 02-03, 29 S.R.R. 1199, 1222, 2003 WL 1017732, *31 (ALJ Mar. 4, 2003) ("BOE has the burden of persuading the Commission that CPA's practice of perpetuating [the] exclusive tug franchise was unreasonable. If BOE succeeds in that regard, the burden of proving justification for the exclusive system shifts to CPA").

In *TCW*, the Commission reasserted the application of the burden-shifting framework to Section 41102(c) unreasonable demurrage and detention practices. 2025 WL 516256 at *7 ("[W]here a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted." (citations omitted)). The Commission again affirmed the initial decision's finding that the practice of charging detention when equipment could not be returned because the terminal was closed established a *prima facie* violation, holding that "both broadly and specifically, the Commission finds that Evergreen's charges over scheduled Port Closures on May 23-25, 2020 did not incentivize freight fluidity. Thus, the detention charges are likely unreasonable absent 'extenuating circumstances' or other 'factors, arguments, and evidence that can establish reasonableness.'" *Id.* at *7 (citations omitted). It then analyzed "several 'extenuating circumstances' and justifications" advanced by respondent, *id.* at *8-11, ultimately concluding that "[n]one of Respondent's justifications, either individually or

collectively, are sufficient to establish that Respondent's charges were reasonable." *Id*. at *11.

V. EXCEPTIONS AND ARGUMENT

A. ZIM's Practice of Charging D&D on a Party that Does Not Move the Cargo Violates 46 U.S.C. § 41102(c)

1. SEA Made an Initial Showing that ZIM Violated 46 U.S.C. § 41102(c) by Charging D&D on SEA when ZIM was Responsible to Move the Cargo

SEA satisfied its initial burden of demonstrating that ZIM's practice—assessing D&D charges on store door movements on a consignee (SEA) when the carrier (ZIM) is responsible for moving the cargo—did not incentivize freight fluidity. No amount of demurrage and detention charges could incentivize SEA to move store door containers within free time, because SEA did not control the movement of containers, ZIM did. The undisputed evidence is that SEA relied entirely on ZIM to move cargo and did not have agreements with truckers or dispatch operations. CX_02115, CX_02124, Choi Dep. Tr. , 66:18-23, 75:2-14; CX_00003, Compl. ¶ 10; SEA Initial Br. at ¶26. SEA established that ZIM carried the SEA shipments on store door terms under through bills of lading. ID FF ¶21; SEA PFF ¶319; CX_05799, Smith Expert Report ¶28; SEA Initial Br. at 14. Though there was frequent citation to the "majority" of shipments moving under store door terms, ZIM's own evidence shows that **virtually all** shipments at issue moved under store door terms. SEA PFF ¶319; CX_05799, Smith Expert Report ¶28 ("demurrage and detention charges paid by SEA prepared by ZIM shows that **only 0.0% and 0.2%** of charges were related to shipments for which ZIM's responsibility ended at the marine terminal/container yard") (emphasis added).

Under the store door through bills of lading, ZIM was responsible for both the ocean carriage of the SEA containers to a United States port and the inland carriage of the SEA containers through to the United States inland locations. ID FF ¶¶21-24, SEA Initial Br. at 14; SEA PFF ¶21, 333; CX_02212, Rapske Dep. Tr.40:20-24; CX_06565, CX_06567, CX_06713-CX_06714, Zayas (ZIM) Dep. Tr. 43:7-22, 45:14-24, 191:2-10, 191:15-192:8. ZIM was responsible for the inland movement

of the SEA shipments, including picking up and movement via rail and/or truck drayage to the named delivery place, and including providing chassis to move the SEA containers. ID FF ¶¶21-24; CX_06565, Zayas Dep. Tr. 43:7-22. And SEA established that the D&D payments made by SEA, and expenses incurred by SEA, were assessed and incurred during and in connection with ZIM's inland transportation of SEA shipments. SEA PFF ¶319; CX_05799, Smith Expert Report ¶28.

Specifically regarding the marine terminal demurrage and inland terminal/rail storage charges paid by SEA at issue in this proceeding, SEA was assessed and incurred those charges because **ZIM's practice** required that SEA pay marine terminal demurrage and inland rail terminal storage charges directly to ZIM's subcontracted terminals on all store door moves before ZIM would arrange to pick up and perform further inland movements. CX_02214-CX_02215, CX_02234, Rapske Dep. Tr. 42:20-43:5, 62:7-11. This was done by ZIM regardless of the cause of the delay in moving containers. Specifically regarding detention, per diem, equipment and other handling charges paid by SEA at issue in this proceeding, SEA was assessed and incurred those charges because **ZIM's practice** was to charge SEA on door moves without first evaluating potential causes for the underlying delays. CX_03908-CX_03909, Michalski (ZIM) Dep. Tr. 112:15-113:1; SEA Initial Br. at 15. Taken together, **ZIM's practice** assessed D&D under door moves on the consignee, SEA, which was not responsible for the inland movement of cargo.

The record evidence is more than sufficient to show that SEA established a *prima facie* case that on a normal, customary, and continuous basis, ZIM assessed D&D charges on a store door move on the consignee, SEA, when SEA was not responsible for moving the containers, because ZIM was. SEA was entirely dependent upon ZIM for inland transportation after containers were offloaded from ZIM container ships at U.S. marine terminals, because SEA did not have operations capabilities or resources for handling inland moves. CX_02115, CX_02124, Choi Dep. Tr. 66:18-23, 75:2-14; CX_00003, Compl. ¶ 10; SEA Initial Br. at ¶26. It is apparent that the practice of charging a

consignee not responsible for moving cargo in a store move does not function as a financial incentive to promote freight fluidity because the consignee cannot move the cargo. As the Commission observed in the Interpretive Rulemaking, when the party charged "cannot retrieve cargo from a terminal, it is hard to see how demurrage or detention serve their primary incentive purpose." Interpretive Rulemaking, 85 Fed. Reg. at 29658. Here, the corollary is equally plausible: *not charging* the party that *can move* the cargo cannot function as a financial incentive to promote freight fluidity because that party has no financial incentive. ZIM's collection of D&D charges, which accrues when ZIM does not timely move SEA cargo, is a **dis-incentive** to freight fluidity.

Moreover, consistent with the Final Rule and *TCW*, a practice benefiting a carrier despite its own non-performance or negligence, as ZIM's practice does here, is not reasonable under the Shipping Act generally, nor is it reasonable under the Incentive Principle specifically, absent Respondent demonstrating, if it can, other "factors, arguments, and evidence" can establish reasonableness on the basis of record evidence. *TCW on Remand*, 2025 WL 516256 at *7.

2. The ID's Treatment of ZIM's Unreasonable Store Door Charging Practice Failed to Apply Any of the Applicable Standards for Evaluation and Instead Pursued an Erroneous Comparative Fault Evaluation

a) Failure to Analyze ZIM's Unreasonable Store Door Charging Practice Under the Incentive Principle

When assessing the reasonableness of D&D practices, the Commission has made plain that it "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). The Presiding Officer did not follow the Commission's direction.

In response to SEA's core store door unreasonable practice argument, that "charging the consignee of cargo under a through bill of lading...for inland D&D charges violates the Incentive Principle because the party being charged is not responsible for the inland movement," the ID merely

acknowledged that "[c]ertainly, ZIM should be incentivized to move cargo." ID at 70, citing Br. at 26. That is neither the appropriate Incentive Principle question nor analysis.

It is beyond challenge that ZIM, as the common carrier responsible for the inland movement of cargo under store door moves, *should be incentivized* to move cargo it is responsible to move. Indeed, having acknowledged ZIM as the party that should be incentivized by D&D charges in store door moves, it is not apparent how charging the consignee incentivizes ZIM to move cargo. The appropriate question—whether charging the consignee under store door moves primarily functions as a financial incentive on SEA to move cargo—is not addressed in the ID.

The ID speculates that if ZIM had other reasons to legitimately charge a consignee in a store door move, such as "SEA customers' inability to accept the cargo," then in "those situations the charges would incentivize SEA and its customers to accept the cargo, which would incentivize the flow of cargo." ID at 70. This incentive analysis is flawed. The practice challenged here is charging a party not responsible for moving the cargo and not charging D&D only when ZIM had evidence that SEA or a customer could not accept cargo. There is **no** evidence in the record, nor any finding in the ID, that ZIM's practice was only charging SEA when its customers could not accept cargo. The ID instead attempts to evaluate the practice-based inapposite considerations of contractual responsibility and fault. *See, e.g.,* ID at 64 ("The question addressed below is who was responsible for detention and demurrage charges for store-door delivery"); ID at 69 (asserting "[t]he incentive principle is not violated when the parties make a reasonable attempt to allocate D&D charges to the entity responsible for a delay"); and ID at 70 (concluding "[g]iven that at least some of the D&D charges were the fault, and therefore responsibility, of SEA, it cannot be categorically found that all D&D charges on door/carrier haulage shipments should have been paid by ZIM.").

In addition to not actually applying the Incentive Principle analysis to the practice at issue, the findings on contractual responsibility and fault concepts are not a substitute for an Incentive

Principle analysis. In the Interpretive Rulemaking, the Commission specifically evaluated and rejected comments that contractual risk allocation should override the Incentive Principle. *See* Interpretive Rulemaking, 85 Fed. Reg. at 29654 (rejecting criticism that the Interpretive Rule should not prevent or override contractual allocation of risk and responsibility for charges, including in "no fault situations"); *id.* at 29654 n.243 (rejecting criticisms that the Interpretive Rule would override or prevent allocation of "risk of events beyond either's control"). For similar reasons, the Commission declined to adopt a bright line rule that the Interpretive Rule should defer to contractual allocations of responsibility, including in cases of when a "no-fault event occurs during demurrage" under "once-in-demurrage-always-in-demurrage." *Id.* at 29653. The Commission concluded that the Interpretive Rule would apply without deference to such fault principles, but instead would be evaluated under the Incentive Principle. *Id.* at 29653 (rejecting the bright line rule of "once in demurrage, always in demurrage" because it may subject to charges even if a "no-fault event" occurs, instead reiterating that the Commission will review the extent that D&D charges are serving their "primary purposes as financial incentives to promote freight fluidity").

Thus, the Commission has made clear that the analysis of unreasonable D&D practices under the Incentive Principle applies independently from responsibility or fault considerations.[7] As a result, the ID's application of responsibility and fault concepts in reviewing ZIM's D&D charges substantially fails to comport with the Incentive Principle and is reversible error.

b) Failure to Apply the Burden-Shifting Framework For Determining the Unreasonable Practice Element in Sections 41102(c) & 545.4(d)

The ID does not consider or discuss the applicable burden-shifting framework for evaluation of the Section 41102(c) and Section 545.4(d) unjust or unreasonable practice element; it errs in

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[7] The Interpretive Rule can consider other factors, arguments and evidence, just as respondents can attempt to refute unreasonable practice allegations with evidence of other justifications. *TCW on Remand*, 2025 WL 516256 at *7-11.

placing ZIM's burden of justifying its unreasonable practices on SEA. A proper application of the burden-shifting framework, mandated by Commission precedent, would have required the ID to first consider SEA's initial burden of persuasion to show a *prima facie* case that the store door practice is unreasonable before considering ZIM's purported justifications. Consequently, the ID does not consider or discuss shifting the burden of production to ZIM for the purpose of attempting to refute SEA's showing and/or substantiating justifications that the practice is otherwise reasonable. *See, e.g.*, *New Orleans Steamship Ass'n, 1985 WL 148970 at* *20-22 (Section 17 *prima facie* burden-shifting); *Ceres Marine Terminal, Inc.,* 1997 WL 35281266 at *38-39 (finding that Ceres met its *prima facie* burden to show practice was unreasonable, and that respondent failed to make the showing that the practice was justified).

Applying the burden-shifting framework is critical here, where evaluation of the ID's findings on the unreasonable conduct element requires allocation of SEA's burden of persuasion to show unreasonable practices, and ZIM's burden of production to refute or justify its practices. *See TCW on Remand*, 2025 WL 516256 at *7 ("[W]here a party having the burden of proceeding has come forward with a prima facie and substantial case, he will prevail unless his evidence is discredited or rebutted." (citations omitted)).

Indeed, the relevance (and the absence) of the burden-shifting framework is immediately evident at the outset of the discussion of the store door unreasonable practices element starting on Page 63 of the ID. The first paragraph generally sets out ZIM's unreasonable practices, which as addressed in section V.A.1, s*upra*, establishes the *prima facie* case to which ZIM should respond. ID at 63, SEA Initial Br. at 23-32. The second paragraph generally sets out ZIM's response. ID at 63. But instead of analyzing the *prima face* case and ZIM's responses and justifications, if any, the ID instead delves into the first of many evidentiary inquiries for the remaining seven pages. The ID does not analyze the unreasonable store door practice challenged by SEA under the Incentive

Principle, *see* section V.A.1., *supra*, nor did the ID ever actually evaluate the elements or support for the unreasonable store door practice challenged by SEA. Instead, the ID raises issues about tariff responsibility and fault not germane to establishing the unreasonable practices alleged, and ultimately improperly denying the relief sought.

The first such issue raised in the ID concerns ZIM's service contracts. ID at 63-64. Yet the service contracts are irrelevant to SEA claims. These instruments lack basic evidentiary foundation, and should never have been admitted as evidence as their use in the ID is wrong and prejudicial. They should be struck from the record, or in the alternative, given no weight. It is not contested, and indeed the ID finds, that SEA had no service contracts with ZIM; SEA was a consignee of cargo carried by ZIM. ID FF ¶18. SEA did not contract with ZIM, and SEA was a not signatory to service contracts with ZIM. ID FF ¶¶7, 18; SEA PFF ¶20; ZIM RPFF ¶20. SEA was not named as an "Affiliate" in any of the above service contracts proffered by ZIM. ID FF ¶19; RX 1807-08; RX 1836; RX 1871-72; RX 1900-01; RX 1939-41.

SEA did not rely on the provisions of any service contract as an element of, or in support of, any claims in its *prima facie* case. Service contracts do not appear in the underlying complaint as this is not a breach of contract action, and SEA strenuously objected to ZIM's attempts to introduce service contracts into the record.[8] The documents at issue are unsigned, and ZIM has made no effort to provide any other indicia of the finality of these documents as the final form of the Service Contracts proffered. Nor did ZIM authenticate any purported service contracts in discovery. ZIM also failed to identify: (1) the applicable service contracts or the applicable service contract numbers;

[8] SEA Initial Br.at 10 fn. 9 ("No third-party discovery was conducted concerning these two foreign entities and neither entity had any involvement in paying the dispute D&D charges. SEA solely paid D&D charges on ZIM moves. The foreign entities have no bearing on this proceeding, and SEA has continued to oppose ZIM's reliance on the purported service contracts. …").

(2) whether the service contracts were applicable to the shipments at issue; or (3) the parties to the service contracts. ID at 63; SEA RPFF ¶¶41, 46, 52; SEA Reply Br. at 10, n. 9, 11-12.

To the extent that any ZIM service contract is used in the ID or this proceeding, it is ZIM's use in its defense or purported justifications for arguments that its practices were otherwise reasonable. The burden of production must be on ZIM to first authenticate any service contracts, and then to substantiate use of those authenticated service contracts, in its defense or as evidence of any justification that its practices were otherwise reasonable. *See Pac. Champion Express Co., Ltd.*, 28 S.R.R. 1102, 1105 (ALJ 1999), *citing to Port Auth. of N.Y. v. N.Y. Shipping Ass'n*, 22 S.R.R. 1217, 1219-20 (ALJ 1984) ("the harm does not lie in admitting what may be unreliable evidence initially but in basing a decision on such evidence, i.e., in failing to sift out such evidence from reliable evidence when reaching a decision."). Despite the foregoing, the ID wrongly found that "SEA has the burden of proof and should be able to provide the service contracts or agreements under which the cargo moved – especially as SEA's claim rests, in part, on the argument that the cargo moved under store door terms. Even though SEA was a consignee and not a signatory to the agreements, there was extensive discovery and the cargo was shipped by a related entity." ID at 63.

SEA does not have any burden to prove or provide the ZIM service contracts. SEA's claims do not rest, even in part, on service contracts. The extent to which SEA cited to the service contract language, it was in rebuttal to ZIM's reliance upon them. The store door terms of the transportation relevant to SEA's claims is established by the shipments under store door bills of lading covering the ocean carriage through to the inland delivery destination, a fact that is also uncontested. ID FF ¶¶21-24. The extent of discovery in this proceeding is irrelevant; it is uncontested that SEA did not sign, negotiate, or have copies of the service contracts. SEA PFF ¶20; ZIM RPFF ¶20.

The ID nevertheless finds, on the basis of what appears to be an unfounded negative evidentiary inference, that "SEA's failure to provide any other controlling service contracts suggests

that more likely than not, the service contracts provided by ZIM were utilized for these shipments." ID at 63. Concluding that SEA failed to provide or produce ZIM service contracts is directly contradicted by the uncontested evidence in the record cited above. SEA did not have the service contracts. The fact that SEA did not provide service contracts is consistent with the uncontested fact that SEA is a consignee that did not have the service contracts. And it is illogical and prejudicial to conclude that SEA not having service contracts makes it "more likely than not" that the incomplete, unsigned, and unauthenticated documents that ZIM provided, which ZIM failed to tie to the shipments at issue, should be "utilized for these shipments" by the ID.[9]

c) Error in Concluding that ZIM's Inland Transportation Practices were Not Unreasonable and/or were Justified

The ID Erred in concluding that ZIM's practice of charging D&D on a consignee not responsible for moving the cargo was "not unreasonable." ID at 70.

First, in addition to failing to evaluate the challenged practice under the Incentive Principle, it appears that the practice found "not unreasonable" was different than the practice challenged in a material respect. In the ID, the practice is described: "ZIM charging demurrage and detention on store door delivery with carrier haulage was an unreasonable practice." ID 70. Despite being conceptually similar, the practice challenged below is "[c]harging the consignee of cargo under a though bill of lading, i.e., store door move, for inland D&D charges violates the Incentive Principle because the party being charged is not responsible for the inland movement." SEA Initial Br. at 26. The substantive difference pertains to the language in the ID version that does not refer to absence of responsibility or control.

[9] The ID asserts as a fallback that "Even if the service contracts were not considered, the case would be decided based on ZIM's tariff and other evidence in the record, leading to the same outcome." ID at 63. The assertion that the service contracts are superfluous to the analysis further supports not admitting them.

Second, the ID erroneously concluded that the possibility that SEA was responsible for some D&D charges on door moves precluded finding that ZIM's practice of charging SEA D&D on all door moves was unreasonable. ID at 70 ("[g]iven that at least some of the D&D charges were the fault, and therefore responsibility, of SEA, it cannot be categorically found that all D&D charges on door/carrier haulage shipments should have been paid by ZIM."). That is error. Even if fully crediting the evidence that some charges may have been SEA's responsibility, that does not justify ZIM's practice of charging for everything else and provides no basis to deny SEA's entire claim.

There are numerous problems with this conclusion. The conclusion that partial SEA responsibility for D&D charges *must* result in SEA waiving claims for *all* charges, is not a valid basis for finding ZIM's practices not unreasonable. Similarly, the reasoning that either: categorical proof of all claims (or a shipment-by-shipment analysis with reasons for each charge) is required in order for SEA to maintain any claims is also not a valid basis for denying or waiving other claims. A party with Shipping Act harm (and entitlement to reparations) has the right to file a complaint and seek reparations. The existence of other potential claims or charges is neither relevant nor a limitation on its entitlement to seek relief for one or more other claims.

Third, the ID's observations on fault and responsibility are materially flawed and not a reliable basis for the conclusion. The ID states that "[t]he question addressed below is who was responsible for detention and demurrage charges for store-door delivery." ID at 64. Based on a review of service contract and tariff language, the ID concludes that: "Thus, ZIM's publicly available tariff does not suggest that it is responsible for all demurrage charges, but rather, that charges incurred 'under circumstances beyond the control of the carrier' are passed on to the cargo." ID at 65. However, to the extent that tariff provisions may purport to allocate liability for D&D charges, tariff rules do not determine responsibility for the purposes of either an unreasonable practice analysis or the Incentive Principle. It is well settled that "[o]cean carriers and marine terminal operators (and

ocean transportation intermediaries) **do not have an unbounded right to contract for whatever they want**. They are limited by the prohibitions of the Shipping Act, one of which is section 41102(c)." Interpretive Rulemaking 85 Fed. Reg. at *29648 (emphasis added). Thus the tariff language does not absolve ZIM of practices that violate the Shipping Act. *Id*. ("Suffice it to say, ocean carriers and marine terminal operators do not have an inviolate right to contract with their customers free from government scrutiny, and there is reason to question whether demurrage and detention practices are normally the subject of arms-length negotiation between parties with remotely equal bargaining power"). A similar argument was rejected by the Commission in *TCW* as an insufficient justification for the unreasonable practices of imposing D&D where the charges did not promote the fluid movement of cargo in violation of the Incentive Principle. 2025 WL 516256 at *8.

As to the tariff rule itself, the ID's focus is merely that the general tariff does not categorically allocate all responsibility to the carrier, and hence, it indicates the possibility that SEA could have been responsible for a D&D charge. But that is practically a *non-sequitur*. The issue in this proceeding is not about charges that ZIM might have a legitimate justification to assess; it is about wrongful charges and costs that were neither legitimate nor lawful under the Shipping Act and Incentive Principle. Moreover, if ZIM sought to rely on the tariff in its defense, the burden of production to substantiate justifications is on ZIM, and we know it has not been met here. It has already been established that ZIM's actual charging practices were not limited only to "under circumstances beyond the control of the carrier." ZIM's practice included charging merely when a CNT was involved (which is essentially every move) and charging millions in D&D due to ZIM's cargo holds. See ID at 75, 82. As to satisfying that burden otherwise, in SEA's review of the record, the evidence ZIM proffered on charges beyond (i.e., SEA's responsibility) at most was four charges totaling up to $43,804.74.[10] The calculations supporting this total are set forth in fn. 10 below.

[10] SEA reviewed the evidence cited in the ID as ZIM evidence of SEA responsibility for D&D

Fourth, the ID states, "[i]t is helpful to look at the parties' course of conduct to fully understand how these provisions were understood and applied." ID at 65. But there is no citation to the record or other source supporting the ID claim that the "course of conduct" is appropriate for understanding how the general tariff rule "provisions were understood" or how they were "applied." The records actually shows SEA contesting charges, ZIM's coercive cargo holds, attempts to obtain cargo delayed at ports and terminals, and ZIM forcing SEA to pay contested D&D. ID at 67-69.

Finally, the ID draws materially unsubstantiated and unwarranted conclusions from documents, suggesting that ongoing disputes over D&D charges show SEA "accepting responsibly" (ID at 67), or that last free day requests and efforts to get cargo out of terminals were indicative of ZIM "evaluating and allocating fault" (ID at 69). These characterizations and assumptions, to name a few, were used as foundation for the conclusory decision on the Incentive Principle: "The incentive principle is not violated when the parties make a reasonable attempt to allocate D&D charges to the entity responsible for a delay." ID at 69. But none of the "evidence" cited and relied upon is *actual* evidence of a reasonable attempt to allocate responsibility for the charges. This is reversible error.

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charges. To the best of SEA's knowledge, there are only four findings of fact in the ID which purport to show evidence that SEA was responsible for some charges at issue in this proceeding: FF 131 (citing to RX 1582, RX 1530-31, CX_02250-51), FF 139 (citing to RX 1023-25, RX 1097-1100, RX 1963-68, RX 1688-1714, RX 1532-37), FF 159, (citing to RX 1576-82 regarding warehouse issues, with the remaining citations not showing SEA responsibility), and FF 165 (citing to CX 2248-51, CX 02247).). **The total amount of charges potentially providing evidence of SEA responsibility, and that were included in SEA's damage claims in this case, is $43,804.74** (as validated against the respective charges listed). This $43,804.74 is validated against the charges listed in Exhibit 1 to the Smith Expert Report (which contains each and every D&D charge, over 115 pages, SEA was forced to pay on ZIM store door moves). Smith Expert Report, Ex. 1 CX_05816-05930. Accordingly, even applying the purported evidence of SEA responsibility so frequently highlighted by ZIM and cited in the ID as evidence of responsibility and/or as potentially substantiating a justification for charging SEA despite ZIM's other unlawful charging practices, **SEA would be entitled to a reparations award for D&D charges in the amount of $10,763,233.34 ($10,807,038.08 [total D&D charges paid at Smith Ex. 1] less the $43,804.74 [the four FF referenced (FF 131, 139, 159, and 165), herein]).**

B. The Initial Decision Failed to Properly Quantify the Damages Owed to SEA for the Cargo Hold Violations.

In **Section A** of these exceptions, SEA supports its finding that reparations for D&D charges should have been awarded in the amount of **$10,763,233.34** following the proper finding of liability for store door movements of SEA cargo. Separately, and alternatively, SEA submits that the awarding of only $3.68 million in charges associated with ZIM cargo hold violations was clearly erroneous and should have instead resulted in a minimum award of **$5.2 million**. *See* "Damages Sought" in Section II.E, *supra*, confirming the basis for this relief.

1. SEA Established Damages to a Reasonable Degree of Certainty

The ID correctly held that ZIM violated the Shipping Act by placing cargo holds on SEA's shipments. ID at 99. The ID did not, however, award SEA the appropriate reparations amount because it did not properly evaluate the damages evidence.

It is a well-established legal axiom that once liability has been established, the wrongdoer should "bear the risk of the uncertainty which his own wrong has created." *Bigelow v. R.K.O. Pictures, Inc.*, 327 U.S. 251, 265 (1946); *Cal. Shipping Line, Inc. v. Yangming Marine Transp. Corp.*, 25 S.R.R. 1213, 1230 (1990) (citing *Bigelow*). SEA's burden under the Shipping Act is to establish a pattern of conduct or practice that violates the statute and caused it harm. The prevailing authorities under the Shipping Act **do not** require that the complainant establish damages on a container-by-container basis through unassailable evidence. *See, e.g, DSW Int'l v. Commonwealth Shipping, Inc.,* Dkt. No. 1898(F), 2011 WL 7144019 at *18 (ALJ Mar. 29, 2011) ("the fact of injury must be shown with reasonable certainty" but "the amount can be based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences"); *see also MAVL Capital Inc. v. Marine Transp. Logistics, Inc., Dkt. No. 16-16*, 2022 WL 2209421, *3 (FMC June 10, 2022) (quoting *Cal. Shipping Line, Inc. v. Yangming*, Dkt. No. 88-15, 1990 WL 427466, at *23 (FMC Oct. 19, 1990)) ("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."); *see also Tractors & Farm Equip. Ltd. v. Cosmos Shipping Co.,* Dkt. No. 81-57, 26 S.R.R. 788, 798-99 (ALJ Nov. 23, 1992) (the reasonable certainty standard is met by "reasonable approximation supported by evidence and by reasonable inferences").

Further, when the party that maintains the evidence of D&D charges justifications (*i.e.*, ZIM) fails to offer such evidence to the Presiding Officer (either because there was none or it did not have it or retain in) -- as was the case here -- inferences may be drawn from certain facts, and circumstantial evidence may be sufficient so long as the fact finder does not rely on mere speculation. *Id*. at 798-99; *see also Waterman S.S. Corp v. Gen. Foundries, Inc*., 26 S.R.R. 1173, 1180 (ALJ Dec. 9, 1993) adopted in relevant part, 26 S.R.R. 1424, 1994 WL 279898 (FMC June 13, 1994); *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd*, Dkt. No. 96-05, 2001 WL 865708 at *76 (FMC Jun. 7, 2001).

2. *The Undisputed Evidence Supports SEA Recovering $5.2 Million in Reparations for ZIM's Cargo Hold Violations.*

While the ID acknowledges that damages may be established through summary evidence, the Presiding Officer did not actually apply that evidentiary standard in its analysis here. *See* ID at 99; *DSW Int'l*, 2011 WL 7144019 at *18 (claimant's burden of establishing reparations requires showing "the fact of injury . . . with reasonable certainty" and an amount "based on something less than precision but something based on a reasonable approximation supported by evidence and by reasonable inferences"). The ID declined to award **$5,213,270** to SEA for ZIM's cargo holds even though the Parties **do not dispute** that ZIM's holds of SEA cargo cost SEA $5.2 million. *Id*. The amount was rejected simply because ZIM did not provide a detailed analysis of *how* it reached that number. *Id*. The ID also found that SEA's Expert's calculations were more credible or accurate than

ZIM's own Finance Director without any basis. ID at 98. The record evidence was clear and **ZIM's own accounting** of the cargo hold damages comports with the calculations by both parties' experts.[11]

ZIM conducted its **own** accounting of the unreasonable charges accrued during each of ZIM's four cargo holds for use in SEA FMC proceeding, based on ZIM's records and data. CX_01570, ZIM0085708. Mr. Yaacoub, ZIM's Director of Finance, relied on ZIM's accounting **during** his deposition testimony, **and the notes he relied on during his deposition**—in the form of a summary chart of each category of damages specifically related to the cargo hold violations—were disclosed to SEA only **after** that deposition. CX_03083, Yaacoub Dep. Tr. at 26:1-5 (when asked whether he had any notes he was relying on when providing testimony about damages arising from ZIM's cargo holds, Mr. Yaacoub admitted he had in front of him a "schedule out of when we [ZIM] did the whole – when we did the balances, the past due balances"); SEA PFF ¶¶155, 157.

Beginning Date	End Date	Demurrage	Rail Storage	Detention and Handling	Total	Overdue Balance when Hold was Initiated	Amount paid to remove the HOLD	Payment received from
08/05/2020	Mid-August 2020	$705	$0	$19,295	$20,000	143,225.26	36,710.00	ACH SENDER: SAMSUNG ELECTRON
05/27/2021	06/30/2021	$1,323,654	$502,331	$181,161	$2,007,147	857,914.64	510,975.00	ACH SENDER: SAMSUNG ELECTRON
09/27/2021	10/16/2021	$190,998	$0	$27,917	$218,915	943,708.14	638,870.00	ACH SENDER: SAMSUNG ELECTRON
01/11/2022	03/17/2022	$2,287,561	$0	$668,646	$2,967,207	1,538,200.64	119,615.00	ACH SENDER: SAMSUNG ELECTRON
Totals:		$3,802,918	$502,331	$897,019	**$5,213,270**			

[11] Notably, ZIM's damages expert did not actually conduct a separate analysis of ZIM's method for computing damages as set forth in CX_01570. ZIM's "damages" expert was really a second liability expert as his opinion was focused entirely on arguing that ZIM did not cause the underlying D&D charges.

The financial impact of the cargo holds in the chart totals show $3,802,918 million in demurrage; $897,019 in detention; $502,231 in rail storage; with the sixth column of the chart, under TOTALS, showing a grand total of **$5,213,270**. This is an **admission against interest** and must be treated as a baseline for recovery of these cargo hold-related damages. *Almirante Steamship Corp. vs. U.S.*, 1930 WL 61250, at *1 (S.D.N.Y. Oct. 30, 1930), *aff'd sub nom*; *The Hisko*, 54 F.2d 540 (2d Cir. 1931) (permitting admission of books and records of owner of ship as admissions against interest).

It is inexplicable why the ID discounted this admission by ZIM. There was **no** objection by ZIM to admitting CX_01570 into evidence. CX_01570 is a summary chart[12] prepared by ZIM based on ZIM data, authenticated by a ZIM witness who laid the foundation explaining how the chart was prepared, and relied on by that witness as the basis for his sworn deposition testimony under penalty of perjury on the same issue. ZIM is also a publicly traded company on the New York Stock Exchange subject to United States securities laws and presumably has accurate financial records. The ID's failure to consider this substantive evidence is clear error. *See*, *e.g.*, *Rose v. Comm'r of Social Sec.*, 202 F. Supp. 3d 231, 243 (E.D.N.Y. 2016) (remanding to Commissioner where ALJ failed to consider material documentary evidence bearing on amount of payment at issue in proceeding).

Regardless, SEA's expert Greg Smith independently vetted the available data and confirmed his agreement with ZIM's calculation of damages arising from the cargo holds for the later three cargo hold periods. CX_06246, Smith Expert Report, at Ex. 11. It should be noted that SEA's expert calculated damages arising from the cargo holds to equal less than $5.2 million based on data pulled from SEA's system. However, as explained by SEA's expert, the discrepancy is traceable to ZIM capturing different data elements for demurrage charges that were invoiced through third parties, such as port terminations, than for charges ZIM invoiced itself. CX_05806-CX_05807, Smith Expert Report at ¶42. The discrepancy is also traceable to the fact that SEA's SAP system did not have

[12] Of course, evidentiary rules permit parties to rely on summary exhibits. Fed. R. Evid. 1006.

sufficient data from ZIM to allow SEA to associate all charges to ZIM shipments. *Id*. at ¶43. Of course, ZIM, as the originator of the charges, had the necessary data to conduct a proper accounting, but failed to provide such information to SEA—as held by the ID in determining that ZIM's billing practices were severely lacking. *Id*. at ¶44. SEA's recovery should not be discounted because **ZIM** failed to provide proper billing information to SEA.

As such, the fact that Mr. Smith's analysis of SEA data ultimately arrived at a lower number than $5.2 million is not dispositive,[13] and the ID erred in not considering the reason why the parties' damages calculations differed. Ultimately, ZIM admitted that there were four cargo holds placed on SEA shipments and ZIM admitted the total damages caused by these cargo hold periods amounted to **$5,213,270**. SEA PFF ¶158; CX_01570, ZIM 0085708.

3. *Alternatively, ZIM's Data Establishes at Least $4.93 Million in Cargo Hold Damages.*

Even if the ID properly rejected ZIM's admission that its cargo holds resulted in **$5,213,270** of damage to SEA (the ID did not), the ID should have at least concluded that ZIM's detailed data supported an undisputed finding of $4.93 million in damages. *See* ID at 96-99; *see also* CX_05811, Smith Expert Report ¶54; *see also* CX_06246, Smith Expert Report, Ex. 11. Exhibit 11 to the Smith Expert Report analyzes damages based on **ZIM's** own data. *See* CX_06246, Smith Expert Report,

[13] The ID made another critical error in the analysis of the Smith Expert Report. The Smith Report did not discount the amount owed to SEA for all four cargo hold periods to $3,680,339 million. In analyzing the available SEA data, Smith computed "the impact of the **three** shown cargo holds at $3.7 million." CX_05810, Smith Expert Report ¶53. However, **this was not the only figure produced in Smith's report on the damages caused by cargo holds.** In the very next paragraph, Smith analyzed the ZIM data that was produced to SEA with respect to the damages owed for cargo holds and found a much higher number: "utilizing the data produced by ZIM yields a higher amount of demurrage charges related to the cargo holds at **$4.9 million**." CX_05811, Smith Expert Report ¶54. Smith reconciled the difference in data sets. It is logical that ZIM, the entity issuing the invoices and receiving payment pursuant to those invoices, has the more complete data set. ZIM's data was the basis for the $4.9 million reparations amount assessed by Smith, and should have been the basis for the Presiding Officer's award of reparations.

Ex. 11 (citing ZIM's data at ZIM0024082). Like CX_01570, Exhibit 11 to the Smith Expert Report relies on ZIM's data. The difference between SEA's expert's calculation of **$4,930,360** million and ZIM's calculation of **$5,213,270** is a result of ZIM's failure to produce data related to damages accrued during the first of ZIM's four cargo holds at the time that Mr. Smith prepared Exhibit 11. CX_05806-CX_05807, Smith Expert Report ¶42.

As explained above V.1. *supra*, ZIM -- a publicly-traded company subject to the U.S. Securities and Exchange Commission requirements regarding financial accuracy -- was responsible for D&D, processed the charges as they were incurred and invoiced by third parties, and issued invoices to SEA. Given the foregoing, ZIM clearly had the most accurate data to calculate the cargo hold damages inflicted upon SEA. By using ZIM's own data to calculate the damages attributable to cargo holds, SEA did establish its reparations to a reasonable degree of certainty. The ID should have found that (1) SEA's expert's reliance on ZIM's data was sufficient and found that (2) SEA incurred at least **$4,930,360** in cargo hold damages for the later three cargo hold periods. CX_01570, ZIM0085708. Indeed, ZIM does not dispute the accuracy of these numbers. CX6500-7146, Zayas Expert Report. ZIM only disputed liability, which the ID correctly found.

The exclusive reliance on the expert reports to verify the cargo hold reparations owed is not representative of SEA's efforts during discovery and briefing. SEA's Proposed Findings of Fact show it looked beyond the expert reports to verify its reparations analysis, corroborating the cargo hold data contained in the ZIM chart used by Mr. Yaacoub Yaacoub, ZIM's Director of Finance, in his deposition and admitted into evidence with testimony from ZIM's U.S. CFO Ms. Ilana Rosenberg —evidence which ZIM notably does not contest. *See* SEA PFF ¶¶161-163, 170-171, 181-182, 193-194 (corroborating the dates and dollar amounts presented in the Yaacoub chart with testimony of ZIM's U.S. CFO Ms. Rosenberg for each cargo hold period); ZIM RPFF ¶¶161-163, 170-171, 181-

182, 193-194 (admitting that the evidence is corroborated by the two ZIM witnesses, and only denying as to the "finance hold" language used and other immaterial objections).

4. SEA's Entitlement to Rail Demurrage and Detention Caused by the Cargo Holds Violation was Proven to a Reasonable Degree of Certainty.

The ID found that "[t]he cargo holds did not prevent SEA from returning containers, so detention is not awarded." ID at 99. This denial of SEA's recovery of cargo hold-based rail storage and detention charges is clearly erroneous as it is unsupported by the preponderance of the evidence.

First, with a proper finding on liability, the ZIM admission chart, CX_01570, above includes detention and handling charges within ZIM's admitted damages assessment and should have been awarded. Indeed, SEA's Smith Expert Report independently confirmed that it is likely ZIM cargo holds led to increased rail demurrage and detention charges. CX_05809, Smith Expert Report, n.88 (quoting "[a]lthough it is likely that the cargo holds also led to increased rail storage and detention charges, I have not included any such charges in this demurrage analysis.").

Second, and as discussed in detail in Section C below, it is undisputed that SEA was not responsible for returning containers under door moves; ZIM was. *See* CX_06661, CX_06663, Zayas Dep. Tr. 139:17-25; 141:1-14. As such, detention charges—whether or not incurred during cargo holds periods—were always ZIM's responsibility. Thus, if ZIM froze the movement of SEA cargo, detention incurred by SEA on delayed returns would be ZIM's responsibility. Likewise, if ZIM froze SEA containers in rail terminals, the rail storage charges would be harm to SEA caused by ZIM.

Third, it is undisputed that SEA was not responsible for rail movements and had no relationship with the rail carriers; ZIM was responsible for the rail move. SEA PFF ¶26; ID FF ¶24.

As such, the awarding of only $3.68 million for cargo hold violations, with no rail or detention recovery, was incorrect.

5. ZIM's "Repeat Offender" Status Weighs Against Any Equitable Reductions of the Reparations and The Presiding Officer Should Have Considered Civil Penalties Against ZIM After its "Repeat Offender" Finding.

The ID found that ZIM was a "repeat offender" for its unlawful cargo holds. ID at 78. Under Section 41305(c), as amended by the Ocean Shipping Reform Act of 2022 ("OSRA"), the Commission is authorized to award additional damages for injury caused by violations of Section 41102(c) up to twice the amount of actual injury. Claimants showing injury caused by Section 41102(c) violations, like SEA here, have been awarded additional damages.[14] *See Way Interglobal Network, LLC v. Shenzhen Unifelix Scm Ltd.*, Dkt. No. 22-28, 2024 WL 1741944, *42 (Apr. 19, 2025) (awarding double damages for Respondent's violation of Section 41102(c)).

In *Way Interglobal*, the Presiding Officer applied a knowing and willful standard in determining whether to double reparations under Section 41305(c). 2024 WL 1741944 at *42 (applying the knowing and willful standard for additional damages, as applied in *OJ Commerce v. Hamburg Sunamerikanische Sampfschiffahrts-Gesellschaft A/S & Co.,* Dkt. No. 21-22, 2024 WL 4034610 (FMC Aug. 27, 2024)). ZIM's violations are precisely the type for which the Commission intended "additional amounts" to be assessed.

Under this standard, "to prove that a person acted 'knowingly and willfully,' it must be shown that the person has knowledge of the facts of the violation and intentionally violates or acts with reckless disregard or plain indifference to the Shipping Act, or purposeful or obstinate behavior akin to gross negligence." *Id*. at *43. (citing *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, Dkt. No. 96-05, 2001 WL 865708, at *47 (FMC June 1, 2001) (citations omitted)). In *Way Interglobal*, the Commission found the respondent had repeatedly refused to release containers to obtain payment

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[14] As a threshold matter, while SEA does not specifically refer to double damages in the Complaint, it described the factual basis of the violation and seeks "reparations for the unlawful conduct described above…as described in 46 U.S.C. § 41305" and "such other and further relief that the FMC deems is just and proper." CX_00017-CX_00018, Compl. pp. 17-18. Federal Rule of Civil Procedure 54(c) states that except in default, "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c). The Commission's award of double reparations pursuant to Section 41305 under the assertion of damages in a Complaint and Federal Rule of Civil Procedure 54(c) in *Way Interglobal Network, LLC*, is demonstrative of this point. 2024 WL 1741944 at *42.

for other containers and negotiated the release thereof in bad faith, warranting doubling of the reparations under § 41305(c). *Way Interglobal*, 2024 WL 1741944 at *43.

The *Way Interglobal* Presiding Officer also analogized doubling of reparations in Section 41102(c) claims to the penalties assessed in the *OJ Commerce* case, which imposed double damages under the previous codification for retaliation violations. 2024 WL 1741944 at *42. On appeal, the Commission also considered the factors applicable to the imposition of civil penalties in BOE investigations, as well as the violator's "degree of culpability," "history of prior offenses," and "ability to pay." *OJ Commerce*, 2024 WL 4034610 at *24 (citing 46 C.F.R. § 502.603(b)).

ZIM's violations in this case warrant double reparations because they were knowing and willful violations, and ZIM was on notice of its cargo hold practices as a "repeat offender" before the Commission. ID at 78; *see Adebisi A. Adenariwo v. BDP Int'l, ZIM Integrated Shipping, Ltd. and its agent (Lansal) et. al.*, Informal Dkt. Nos. 1920(1) and 1921(1) (2015); *see also* SEA Initial Br. at 8 (citing *Adenariwo*). There is no accounting whatsoever for ZIM, a decade later, learning no lessons on the weaponization of cargo holds after the Commission's admonitions. ZIM's flagrant, knowing and willful conduct is precisely the type intended for § 41305(c) to cover.

Evidence of ZIM's willful activity in this proceeding is noteworthy. ZIM held SEA's cargo a total of roughly **132 days** across the four cargo holds, at least 132 violations under Section § 41305(c). And it did so gleefully, as expressed in internal finance staff emails, exclaiming "Hold their Cargo!!! 😊 😊". SEA Initial Br. at 6; SEA PFF ¶207. Using cargo holds to extract unwarranted payments from shippers permeated ZIM culture so much that its Finance staff were openly celebrating the practice. And ZIM's finance leadership knew that cargo holds resulting in more D&D charges did not incentivize cargo movement. ID at 79 (citing CX 3204 and CX 5482).

Also concerning, ZIM's own evidence presented in this proceeding shows that SEA was not the only victim of ZIM's predatory cargo holds. **Internal ZIM emails show numerous other**

customers subjected to similar cargo holds, as part of ZIM's calculated strategy to "speed up" and "push" collections. CX_04773-CX_04781, Cleva Dep. Ex. 10. ZIM not only failed to learn from the *Adenariwo* ruling, but it also escalated its unreasonable practices over the past decade, cementing its status as a "repeat offender", as recognized in the ID (ID at 78).

Finally, Section 41305(c) should apply here. This case includes violations and injury after OSRA 2022, and as such, the Commission's Section 41305 authority is applicable in this case. Second, the interests of equity support a brad calculation of additional damages. There is no benefit to formalistically limiting additional damages only to shipments predating OSRA 2022 and to do so "would work a 'manifest injustice'" against SEA and shipping industry's customers – which, after all, is the "primary objective of the shipping laws administered by the Commission…" *Crocus Invs., LLC v. FMC*, No. 21-1199, 2022 WL 3012275, at *1, 3-4 (D.C. Cir. July 29, 2022) (quoting *N.Y. Shipping Ass'n v. FMC*, 854 F.2d 1338, 1374 (D.C. Cir. 1988)) (permitting respondent to escape liability for even one instance of overcharging would not be in the best interests of the shippers.). Here, SEA urges a different approach but similar principle to that adopted in *Crocus Investments*. That is, Section 41305(c) and the calculation of additional damages should be applied broadly to ensure the Commission fulfills its objective of protecting shippers.

C. The Initial Decision Failed to Properly Quantify the Damages Owed to SEA for ZIM's CNT Violations.

Despite correctly concluding that ZIM violated Section 41102(c) by charging D&D to SEA every time a CNT was used, the ID did not award *any* reparations to SEA arising from this violation. The ID's failure to award reparations arising from the CNT violation: (i) is grounded on a misapplication of the law with respect to **ZIM's** burden to provide justifications, if any, for the charges at issue; and (ii) again incorrectly calls for a container-by-container analysis of damages. ZIM's practice of charging D&D because a CNT was involved was applied generally and broadly to all of the charges at issue in this case. If for some reason ZIM did not assess a charge, or waived a

charge, that possibility would not factor into a proximate cause analysis for the charges that were actually assessed. As to the possibility that ZIM might have had reasons to reasonably and legally charge--*i.e.*, if ZIM had justifications--if the ID had properly applied the burden of production to substantiate any potential justifications as to any charges, then such justifications could potentially constitute superseding causes impacting the proximate cause analysis. In the absence of such a showing SEA established proximate case by establishing the general application of the policy and the payment of the charges. The ID's errors are problematic, as courts have universally recognized "[I]t would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." *Story Parchment Co. v. Paterson Parchment Paper Co*., 282 U.S. 555, 563 (1931); *Perry's Crane Serv.,* 16 S.R.R. 1459, 1490 (ALJ Sept. 28, 1976) (holding that, where the complainant established a violation of the Shipping Act, "[i]t would be unconscionable, in my opinion, to leave complainant without some degree of pecuniary restitution for his troubles" and because the record was not clearly developed, following Rule 251 to remand and develop further evidence on damages), *aff'd* 19 F.M.C. 548, 551 (FMC Feb. 25, 1977) ("affirming the ID's finding that "Complainant is entitled to some degree of monetary restitution for losses occasioned by the unlawful practices").

1. The ID Erroneously Heightened the Standard Required for SEA to Show Proximate Cause.

There is no dispute that SEA satisfied its burden of proving that ZIM employed an unreasonable *practice* of charging SEA D&D whenever a shipment was carried inland by a CNT. But after assessing liability, in the damages phase, the Presiding Officer, however, placed the onus on SEA to prove on a container-by-container basis that each and every D&D charge related to the CNT violation was **not** caused by another justified reason.

To prove proximate cause, "a party must show that it is entitled to a specific reparation, *i.e.,* that it sustained actual loss or injury and that the violation of law was the proximate cause of that

loss or injury with 'reasonable certainty.'" *Rose Int'l, Inc.*, 2001 WL 865708 at *80 n.75; *see also William R. Adair v. Penn-Nordic Lines, Inc*., Dkt. No. 1695(F), 26 S.R.R. 11, 1991 WL 383091 at *23, (ALJ Sept. 24, 1991) ("proof of injury or damages must rest on reliable evidence that shows that the violation of law was the proximate cause of the damages"). Generally, in the case of charges, Commission precedent has held that the fact that D&D charges were assessed and paid is sufficient to establish proximate cause. *Hapag-Lloyd, A.G. & Hapag Lloyd (Am.) -- Possible Violations of 46 U.S.C. § 41102(c)*, Dkt. No. 21-09, 2022 WL 1239377, *34 (ALJ Apr. 22, 2022) ("detention and demurrage invoices are outstanding and the collection of these fees would impose financial costs on shippers and trucking companies. Accordingly, th[e proximate cause] element is met"); *A Customs Brokerage, Inc. v. Cargocare Logistics USA, Inc*., Dkt. No. 1987(I), 2023 WL 11645622 at *13 (ALJ July 17, 2023) (Claimant "demonstrates that it incurred damages in the amount of $20,970 (FF 36), the amount it seeks as reparations, because of the double payments it was forced to make to obtain its shipments due to Respondents' conduct").

After finding that ZIM employed a practice that violated the Shipping Act (which the Presiding Officer did find), the record evidence is applicable. ZIM's admissions that it imposed D&D charges on SEA any time a CNT was nominated provides sufficient evidence of causation. Here, there is no dispute that SEA issued through bills of lading to ZIM. CX_00006, Compl. ¶¶27-28; CX_00023, Answer ¶¶27-28. CNTs were nominated on the inland transit on SEA shipments with ZIM. SEA Interrogatory Response No. 1. ZIM assessed all D&D charges for any CNT-carried shipment to SEA. *see* ZIM Br. at 19 ("All ZIM is saying is that to the extent problems were caused by sub-contractors selected by and imposed on it by Samsung, those problems and the consequences thereof are lawfully and properly the responsibility of Samsung"). ZIM's through bills of lading included rail movements and rail storage charges. ID FF ¶24. The undisputed fact that D&D charges were assessed to SEA as a result of ZIM's CNT violations satisfies the proximate cause inquiry under

Hapag-Lloyd; see also ID at 89 ("The other unreasonable practice regarding preferred truckers **proximately caused some of the demurrage and detention in the record**") (emphasis added).

Following *Hapag-Lloyd*, ZIM's concession that it impose D&D charges every time a CNT was nominated satisfies SEA's *prima facie* case and shifts the burden to ZIM. If ZIM had evidence to refute the established pattern of behavior with discrete examples of when its D&D charges were justified, it should have done so. *See New Orleans Steamship Ass'n*, 1985 WL 148970 at *22 ("[T]he **burden for justifying exemption is on the respondent and it is not necessary for the complainant to show harm or suggest alternatives for it to prevail**") (emphasis added). Instead, the ID reflects only four instances where SEA was responsible for charges.

Similarly, in *Corpco International Inc. v. Straightway, Inc*., the initial decision found the NVOCC respondent was responsible for transshipment costs and its failure to pay those costs was the proximate cause of additional expenses occurred at destination. Dkt. No. 97-05, 1998 WL 940257, *4 (FMC Jun 8, 1998). The Presiding Officer determined the NVOCC's failure to pay the transshipment costs was a failure to observe and enforce just and reasonable regulations and practices under the Shipping Act and therefore the complainant had shown an actual injury in being forced to pay the fee. *Id*. The ALJ further held that the violation "was the proximate cause of Corpco's further injuries, to wit, the additional port fees, and that Corpco is therefore entitled to a reparations award of $37,300 plus interest." *Id.*

When affirming the ID's findings, the Commission found that the NVOCC was "strictly liable for its agent's acts" and the complainant was entitled to reparations including the original transshipment costs due and the additional charges which arose from the unreasonable practice. *Id.* at *6. The Commission confirmed the NVOCC's liability by stating "the Commission has in the past held principals responsible for the acts of their agents … [w]e have concluded that this is the correct rule." *Id*. Here, ZIM has made no attempt to deny that it charged SEA D&D when a CNT—its

subcontracted agent—failed to perform. As the Commission stated in *Hellenic Lines Ltd. – Possible Violations of Sections 16 (First) and 17*, "[a] carrier may not evade its responsibilities to the public [under the Shipping Act] by pleading ignorance of its agent's activities." Dkt. No. 936, 7 F.M.C. 673, 675 (FMC 1964). Yet, ZIM's practice of charging SEA all D&D charges simply because a CNT was involved is just a different attempt to evade responsibly for its agents. As explained in *Hellenic Lines*, "[u]nder [this] theory, however, it could immunize itself from the common carrier responsibilities placed upon it by the Act simply by dissociating itself from any of its agents' activities which are brought into question." *Id*. at 676. **This would undermine the entire purpose of the protections contained in the Shipping Act**.

The Presiding Officer also erred in implying that the onus was on SEA to contemporaneously check and contest each charge in the first instance. ID at 97. ("for many of the improper charges, especially the ones which should have been billed to a different entity, SEA was able to check and contest those charges, so many of them did not end up being paid."). The Presiding Officer erred as a matter of applying the Incentive Principle and as a matter of reviewing the evidentiary record.

First, **<u>ZIM</u>** is the party responsible for coordinating and executing the inland moves. That information, received in real time, is determinative of whether charges were appropriate or not.

Second, requiring SEA to review the accuracy of D&D charges at the same time SEA was being threatened with cargo holds unless it immediately paid the D&D charges is an unreasonable burden that could trigger delay and thus serious economic consequences. The ID does not explain how that would advance the Incentive Principle—which, of course, it cannot. The OSRA and billing rule regulatory protections that mitigate scenarios like this were not in place at the time—which is an example of why those protections were enacted.

Third, the ID misinterpreted record evidence and incorrectly ruled that SEA should not recover reparations here because "so many of [the charges] did not end up being paid" is flat out

wrong. ID at 97. There is no citation to the record to support this assertion. And SEA's expert's **unrefuted** analysis demonstrated that **every charge** in the **$10,807,038.08** reparations list of charges related to CNT violations **<u>was actually paid by SEA</u>**. CX_05803, Smith Expert Report, ¶32; CX_05816, Smith Expert Report, Ex. 1; *see also* RPFF ¶ 349 (ZIM acknowledging that Mr. Smith's report reflected "charges posted (recorded) by SEA to its SAP system during the period" and that "SEA paid on cargo carried by ZIM.").[15]

SEA is mindful that a recent line of initial decisions issued by the Administrative Law Judges of the FMC have trended toward requiring container-by-container evidence. *See Hapag-Lloyd,* 2022 WL 1239377 at *1.; *TZ SSE Buyer, LLC v. Yang Ming Marine Transp. Corp*., Dkt No., 24-10, 2025 WL 1083815, at *19- 23 (ALJ Mar. 24, 2025); *Simple Forwarding Inc. v. China United Lines Ltd*., Dkt. No. 2010(F) (ALJ Feb. 6, 2025) (notice not to review March 11, 2025); *Visual Comfort & Co. v. COSCO Shipping Lines Co., Ltd.*, Dkt. No. 24-01 (ALJ April 28, 2025). **All of these cases moved on merchant haulage**, **or "container yard" terms, where the inland transportation of cargo was the cargo interest's responsibility**. Therefore, the only time that a charge would not incentivize the inland movement of cargo is when the movement is out of the cargo interest's control (no return appointments available, there were no chassis to move the containers, etc.). In order to determine whether the charges at issue were imposed in violation of the Shipping Act, *i.e.*, did not serve the Incentive Principle, the presiding officers needed to determine, on a container-by-container basis, whether appointments in fact were unavailable, or whether chassis were in fact unavailable. Under these facts, undergoing a container-by-container analysis may be appropriate.

By contrast here, the allegedly unreasonable practice established by the record is ZIM charging D&D on a party which, by the nature of the agreed-upon terms of carriage, cannot be

[15] There is a reference in the ID to ZIM being owed $2 million in charges by SEA, but, as noted, that is "unsubstantiated" and the ID state it did not impact the reparations analysis. ID at 100.

incentivized by the imposition of those charges because it does not control the inland movement of the containers. This unreasonable practice has allegedly been applied to thousands of containers and invoices. Under these circumstances, the container-by-container analysis is inappropriate. Here, the practice's reasonableness does not hinge on whether appointments were available on a specific day or for a specific container as it did in all four cases outlined above. The cargo was never available for SEA to pick up, because it was available to ZIM on store door terms. The practice's reasonableness is based on which party controls the movement of cargo, which was the same for all shipments in this proceeding: ZIM. This practice is, by its nature, unreasonable.

Where the carrier is the party responsible for coordinating inland moves and is the one that should be incentivized to carry out its responsibilities expeditiously, it is only logical that the carrier should be responsible for establishing that as its practice. Because that is the only circumstance under the Incentive Principle that would justify holding a shipper responsible for the D&D. It is wholly illogical to require the inverse—when the shipper is not responsible for the inland moves, processing the D&D charges, or maintaining information about the D&D charges, the shipper is in the worst position to be able to determine which D&D charges are justifiable and which are not.

The Commission's recent pronouncements on class actions in the FMC is instructive here as it shows the mandated case-by-case analysis is a dubious trend. On January 2, 2025, the Commission issued a policy statement on Class Action Complaints confirming that the Commission is an appropriate forum for class actions to be brought. *See* Statement of the Commission on Class Action Complaints, Dkt. No. 24-29 (Jan 2, 2025). In support of the statement, the Commission cites to the Administrative Conference of the United States, which found that a benefit of aggregating claims in a class action includes "securing the kind of expert assistance high volume adjudication attracts." *Id.* at 2. Requiring any class representative to prove liability on a shipment-by-shipment basis, rather than establishing liability by showing the respondent's conduct was unreasonable in relation to a

class of cargo interests, would be in direct contravention of the Commission's recent policy statement which by necessity allow damages to be proved on a class basis.

Finally, here, there is no dispute as to the quantum or method for calculating SEA's damages. As with the analysis of damages arising from the cargo hold violations, SEA also relied on ZIM data to calculate the damages arising from the CNT violations. CX_06246, Smith Expert Report, Ex. 11.

ZIM does not dispute that the method used by Mr. Smith to calculate damages was appropriate, nor does ZIM dispute that, if SEA is not responsible for delays resulting in any particular D&D charge, SEA is entitled to recover that assessment of D&D, *i.e.*, **$10,807,038.08** in inland destination charges imposed on SEA by ZIM, CX_05816, Smith Expert Report, Ex. 1, **$5,213,270** of which is specifically allocable to the imposition of cargo holds, CX_01570, ZIM0085708, less **$43,804.74** of charges which the ID purported to assign as SEA's responsibility, for a total reparations award for D&D charges of **$10,763,233**.

As reflected in the Smith Expert Report at Exhibit 1 (which reflects all D&D charges paid, with container numbers, bill of lading numbers, invoice amounts, etc.), SEA established that the contested charges caused by ZIM's unreasonable practices were actually paid by SEA. CX_05816, Smith Expert Report, Ex. 1; CX_05803, Smith Expert Report, ¶32. The evidence presented by ZIM does not contest this point, but in fact supports that the damages incurred were the proximate cause of SEA's injury. ZIM's own damages expert does not contest that SEA paid each and every charge, and in fact confirms that SEA paid *more* charges than even SEA's damages expert concluded with the data he had available. CX_06571, Zayas Dep. Tr. 49:4-9. SEA therefore sufficiently proved that the charges incurred were proximately caused by SEA's unreasonable CNT policy.

2. If the Presiding Officer Was Concerned with Awarding Reparations on the Current Evidentiary Record Outside of Cargo Holds, A Rule 251 Inquest Should Have Been Ordered.

SEA carried its burden of proving the fact of injury and therefore entitlement to reparations for ZIM's unreasonable practice of charging SEA on the basis of using CNTs. The ID's conclusion that no reparations could be awarded was therefore error. And yet despite a conclusive finding of a violation, the Presiding Officer appeared dissatisfied with the evidence supporting an award of damages. *See* ID at 97-98 (the evidence "is unclear which [charges] were due to ZIM's unreasonable practices regarding preferred truckers"); ID at 89 ("proximate cause is met for some of the charges, but it is not possible to determine for which ones or how many"). Even if, the Presiding Officer correctly identified concerns with the evidence on the quantum and calculation of reparations owing to SEA, FMC Rule 251 provides the formal procedure for parties to address this on remand.

SEA's Reply Brief referenced Rule 251 in the event any damages question arose, after assessing ZIM's each-container analysis in its opposition brief.[16] If the Commission believes further development of the damages evidentiary record is necessary, SEA requests a Rule 251 remand.

D. The Initial Decision Acknowledged Significant Problems with ZIM's Invoicing Practices Yet Inexplicably Did Not Find a Violation of the Shipping Act.

ZIM's unreasonable D&D practices are further magnified when viewed in the context of its deeply flawed invoicing policy. The evidentiary record is replete with examples of ZIM's failure to timely issue invoices (SEA Initial Br. at 50; SEA PFF ¶¶94-107; CX_05435, Rosenberg (ZIM) Dep.

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[16] SEA Reply Br. at 62 ("If ZIM insists on a shipment-by-shipment review of the quantum of damages after the Presiding Officer has found liability, and it is ready to pay the attorney fees and costs with the undertaking, that option is available under the FMC's Rules. But ZIM's attempt to avoid damages altogether based on the argument that a shipment-by shipment analysis is essential, is not a defense to ZIM's liability.") (citing Rule 251); *see also Perry's Crane Serv.* 16 S.R.R. 1459, 1490 (ALJ Sept. 28, 1976) (holding that, where the complainant established a violation of the Shipping Act, "[i]t would be unconscionable, in my opinion, to leave complainant without some degree of pecuniary restitution for his troubles" and because the record was not clearly developed, following Rule 251 to remand and develop further evidence on damages); *Ceres Marine Terminal,* 1997 WL 35281266 at *41-42 ("The Rules contemplate a further proceeding to determine the measure of damages and moreover, a further proceeding is particularly important in a case such as this **where the violations are continuing in nature and the injury is suffered over a period of time**.") (emphasis added).

Tr. 132:1-6; CX_04638, Cleva Dep. Tr. 109:11-21); issuing invoices using defective billing systems known to produce errors (SEA Initial Br. at 50-51; SEA PFF ¶¶111-118; CX_05654, Rosenberg Dep. Ex. 13 at 1); issuing SEA invoices to unrelated or incorrect entities (SEA Initial Br. at 51; SEA PFF ¶¶211-224; CX_05723, Rosenberg Dep. Ex. 26 at 1; CX_05734-CX_05735, Rosenberg Dep. Ex. 27 at 4-5; CX_05762, Rosenberg Dep. Ex. 29 at 1; CX_05779, Rosenberg Dep. Ex. 30 at 1); and issuing invoices "in a manner that did not consider (meaningfully or at all) whether such charges (sic) and their collection of D&D was consistent with the FMC's Incentive Principle." SEA Initial Br. at 49.

The Presiding Officer agreed that "[t]he evidence shows **significant problems** with ZIM's invoicing and dispute resolution practices because of billing the wrong party, delays in sending invoices, and inaccuracies or missing information." ID at 83 (emphasis added). However, it excused these systemic issues by holding that "there is not sufficient evidence here to find that the problems rise to the level of an unreasonable practice" because ZIM was "working to remedy their billing issues" and "struggled to manage customer-specific invoice requirements and procedures during a very busy period." ID at 83-85. By not finding ZIM's invoicing and dispute resolution policies were Shipping Act violations, it contradicts these Commission and Congress statements.

Though OSRA 2022 was passed after these invoices were issued, the Commission and Congress were, throughout the timeframe relevant this SEA's claims here, increasing regulatory oversight of carriers' unreasonable invoicing and dispute resolution policies in light of the clear evidence that carrier invoicing practices during COVID were routinely unreasonable. *See* discussions at 168 Cong. Rec. S1887-02 (March 31, 2022) and 168 Cong. Rec. H5460-02 (June 13, 2022). Even before OSRA 2022 was passed, the FMC regulated D&D invoicing and dispute resolution practices under the Interpretive Rule pursuant to Part 545.5(d). 46 C.F.R. § 545.5(d), guiding the Commission to consider such things as "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." Accordingly, the Presiding Officer's conclusion that ZIM's practices were significantly lacking, yet somehow insufficient to constitute an unreasonable practice under Section 41102(c), runs contrary to the regulatory scheme.

E. The ID Found Cargo Holds Violated the Shipping Act Yet Gave ZIM a Free Pass on Its Dispute Resolution Practices

The ID found that "[t]he evidence shows that ZIM could improve its dispute resolution process" and identified specific deficiencies. ID at 87. The ID concluded that "ZIM imposed cargo holds when a significant number of the overdue amounts were contested, for example because they were for a different entity" and that "[t]his was a recurring problem, with ZIM billing SEA for significant amounts of charges that should have been billed to a different entity." ID at 87.

It is a clear error for the ID to conclude that ZIM violated the Shipping Act with its punitive cargo hold practices but find that the evidence does not support a finding that ZIM's dispute resolution process is unreasonable. If ZIM's dispute resolution process did not prevent ZIM from imposing a cargo hold for overdue amounts in dispute, including when the amounts in dispute were billed to the wrong party, the dispute resolution process is unreasonable. The ID found ZIM held SEA's cargo for overdue, disputed amounts where ZIM had improperly billed SEA for "significant amounts of charges that should have been billed to a different entity" – a reasonable dispute resolution practice would ensure this did not occur. ID at 87. Thus. it was clear error for the ID to find no violation for ZIM's dispute resolution process, another independent Shipping Act violation.

F. The Cargo Holds Constituted Retaliation in Violation of Section 41104(a)(3)

Although the Presiding Officer found that ZIM had engaged in a prohibited activity with its repeat offender cargo hold actions, it denied SEA's retaliation claim on the basis that "SEA provides no legal support for finding that disputing a charge with a carrier is sufficient to establish retaliation under the Shipping Act." ID at 92. The Commission's Policy Statement on Retaliation ("Policy Statement") acknowledges that the scope of retaliation authority remains underdeveloped. *Policy*

Statement, Dkt No. 21-14, 2021 WL 6202673, at *2 (Dec. 28, 2021) ("Most of the caselaw on § 41104(a)(3) and its predecessors, however, is unrelated to shipper grievances"). The Commission has further explained that it intends to interpret "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***." *Id.* at *1 (emphasis added).

The Commission's development of retaliation precedent is still in its formative stages, with the intention of interpreting retaliation broadly and actively considering new forms of retaliation. To establish a retaliation claim a complainant must "show that a carrier engaged in prohibited conduct." ID at 92. Moreover, "[c]ommon carriers are prohibited from retaliating against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, ***or resorting to other unfair or unjustly discriminatory methods***, because: the shipper has patronized another carrier, the shipper has filed a complaint, or ***for any other reason***." ID at 91 (citations omitted).

SEA is not suggesting that merely "disputing a charge with a carrier is sufficient to establish retaliation." ID at 92. Here, SEA has *established* that ZIM committed prohibited activity, repeatedly, by unilaterally holding cargo to coerce payment of *disputed* charges. ZIM resorted to cargo holds because SEA challenged and disputed FMC regulated charges. Disputing FMC regulated charges is the first step in protecting SEA's rights against unlawful activity. Under the facts and circumstances here, the Commission can find, and SEA submits should find, that ZIM's repeated weaponization of cargo via cargo holds, when SEA disputed charges in the face of ZIM's unlawful activity, is an "any other reason" within the Commission's interpretation of protected activity under § 41104(a)(3).

The Commission's goal is to safeguard shippers from retaliatory actions that could undermine fair competition and hinder protecting against unlawful activity in the shipping industry. Allowing carriers to retaliate against shippers for disputing charges (particularly erroneous charges as was the case here) would deter shippers from exercising their rights and ultimately skewing the competitive

landscape in favor of carriers who engage in such practices. Therefore, it is crucial that the Commission recognizes and enforces protections against all forms of retaliation, including those that occur when shippers dispute charges directly with carriers resulting in pernicious cargo holds.

VI. CONCLUSION

SEA requests that the Commission enter an order affirming the ID's finding of a violation with respect to ZIM's unreasonable cargo holds and CNT practices, but respectfully requests that the Commission make an affirmative finding that ZIM violated the Shipping Act by imposing D&D charges on store door moves, and increase the reparations award to the full amount of **$10,763,233**.

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Respectfully Submitted,

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