FEDERAL MARITIME COMMISSION

MSC MEDITERRANEAN SHIPPING COMPANY S.A. – POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 46 U.S.C. §§ 41102(C), 40501, AND 41104(A)(2)(A)	Docket No. 23-08

Served: January 6, 2026

BY THE COMMISSION: Rebecca F. DYE, Daniel B. MAFFEI, Max M. VEKICH, *Commissioners*.

Order on Initial Decision

In this enforcement matter, the Federal Maritime Commission (Commission or FMC) reviews the Initial Decision (Decision) of an Administrative Law Judge (ALJ) finding that the ocean carrier MSC Mediterranean Shipping Company S.A. (MSC) violated 46 U.S.C. §§ 40501 and 41102(c) in connection with demurrage and detention charges (late fees). The ALJ determined that MSC violated 46 U.S.C. § 41102(c) by billing customs agents as "notify parties" for such fees through the "merchant clause" in MSC's bills of lading during the period 2018-2020, even though such parties had nothing to do with moving cargo. The ALJ also found that MSC knowingly and willfully violated 46 U.S.C. § 40501 by failing to include in its published tariff from 2021-2023 a statement of what such fees were for non-operating reefers (NORs), containers that can carry refrigerated cargo but are not being used for that purpose. However, the ALJ denied the claim by the FMC's Office of Enforcement (OE) that MSC violated 46 U.S.C.

§ 41102(c) by charging such fees for NORs at the higher rate applicable to operating reefers, rather than as dry containers. The ALJ concluded that even though such overcharges had occurred more than 2,600 times in 2021, they were simply errors and so did not constitute a prohibited "practice" of MSC under the statute. MSC and OE each filed exceptions to some of these determinations. As discussed below, we affirm the ALJ's Decision in some respects, while reversing or modifying it in others.

First, the ALJ determined that OE proved MSC had violated section 41102(c) 13 times by billing notify parties for demurrage and detention through the merchant clause during 2018-2020. The ALJ imposed civil penalties of $5,000 for each violation, or $65,000 total, and ordered MSC to cease and desist from such conduct. Neither side objects to the determination of those violations, and neither objects to the cease-and-desist order. OE argues that the record supports a finding that the violations were knowing and willful, calling for a higher penalty. But in light of the general nature of regulation regarding such billing at the relevant time, we affirm the finding of a non-knowing and willful violation and the remedies imposed by the ALJ.

The ALJ also found that MSC had violated 46 U.S.C. § 40501 by failing to include in its published tariff a statement of what its demurrage and detention charges were for NORs. Specifically, from the beginning of 2021 until March 2023, MSC's tariff had no clear statement of its rate or related rules for such late fees, even though MSC maintains that its policy was to bill such charges at the lower dry container rates. That failure continued even after MSC's September 2021 correction of an internal billing system that it said had led to the related overcharges, and even after MSC stated in March 2022 that it would revise its tariff to state what the NOR charges were, in response to FMC concerns. Since that is a continuing violation, each day it occurred was a separate violation under 46 U.S.C. § 41107(a). The ALJ also found that the violations were knowing and willful, given the unexplained delay in correcting the tariff. The ALJ imposed a penalty of $20,000 per violation, for

a total of $15,960,000. We affirm the ALJ's finding of violations, the determination that they were knowing and willful from the time of MSC's March 2022 statement onwards, and the daily penalty imposed for the period March 2022 to March 2023. But we find there is insufficient evidence to support a determination that the violations were knowing and willful prior to MSC's March 2022 statement, reducing the daily penalty for that earlier period to $5,000. These penalty numbers reflect consideration of the nature of the violations, as well as mitigating and aggravating factors, under 46 U.S.C. § 41109(b)(1). The total penalty for these violations is $9,460,000.

The ALJ found that MSC did not violate section 41102(c) by charging demurrage and detention for NORs at the higher rate for operating reefers during 2021 because those overcharges did not constitute a "practice" under the statute. The ALJ concluded that, even though such overcharges appeared to have occurred 2,629 times, constituting only about 23% of MSC's total U.S. demurrage and detention invoices for NORs in the relevant period, the company's policy was to bill NORs as dry containers, and the overcharges were errors caused by the internal billing issue noted above. OE argues persuasively that so many violations in such a limited time must be considered a practice, and prior FMC cases finding no violation because of the infrequency of the activity at issue have involved far more isolated incidents. Indeed, MSC has identified no prior FMC case determining that this high an absolute number or percentage of occurrences did not constitute a practice under the statute. On balance, the Commission finds that these overcharges did violate section 41102(c). Even if mainly an unintentional result of a billing system error, the thousands of overcharges were too numerous and frequent to be considered anything but a practice—they averaged about 10 overcharges per day, every day, for more than eight months—and they were unreasonable charges for NORs, which do not require the enhanced care operating reefers do. However, the record lacks evidence sufficient to support a finding that the violations were knowing and willful. Considering both the seriousness of the violations and the

burdens they placed on MSC's customers, as well as mitigating factors including MSC's voluntary refunds and correction of the billing system error, we assess a penalty of $5,000 per violation, or $13,145,000.

Finally, in its exceptions, MSC also raises two constitutional objections to the imposition of civil penalties here, but neither is persuasive. First, MSC argues that the section 40501 penalty could only be imposed by an Article III court, in accord with the Seventh Amendment's jury trial guarantee, citing the recent decision in *Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109 (2024). Second, MSC argues that the ALJ here lacked authority to impose any penalty because Commission ALJs enjoy protection from removal by the President that is inconsistent with the Take Care clause of Article II. As both MSC and the ALJ indicated, such constitutional claims cannot be resolved by administrative agencies, but we still provide an explanation of why they are insufficient grounds for MSC to obtain any relief here. A section 40501 penalty is properly assessed by a Commission ALJ because an action to enforce that statutory tariff-publication requirement is not in the nature of a common law claim and, in any event, the claim falls within the public rights exception to the rule recognized in *Jarkesy*. In addition, MSC's Article II claim regarding the protection from removal that applies to Commission ALJs cannot justify any relief here, regardless of whether such protection is constitutionally permissible, because MSC has failed to meet the well-established requirement that it show it was harmed by that protection.

In sum, we assess civil penalties against MSC for the three types of violations described above in the total amount of $22,670,000.

I. BACKGROUND

A. Procedural history

In 2023, the Commission issued an Order of Investigation and Hearing (OIH) pursuant to 46 U.S.C. §§ 41302 and 41304 to determine whether MSC, a vessel-operating common carrier, had violated the Shipping Act. *See* Order of Investigation and Hearing (Doc. 1) (Aug. 10, 2023) at 8-13; Decision (Doc. 23) (Feb. 25, 2025) at 1, 5. Specifically, the OIH sought to find whether MSC had: (1) violated 46 U.S.C. § 41102(c) by holding customs agents who had not consented to MSC's bill of lading liable for detention and demurrage or per diem charges, and by misapplying its higher operating reefer rates to NOR shipments; (2) violated 46 U.S.C. § 40501 by failing to publish separate detention and demurrage rates and related rules for NORs in its publicly available tariff; and (3) violated 46 U.S.C. § 41104(a)(2)(A) by providing transportation that was not in accord with its published tariff. *Id*.

The OIH designated the FMC's Bureau of Enforcement, Investigations, and Compliance (BEIC) as a party to the proceeding before the ALJ, and OE, an office within BEIC, entered an appearance. *See* Decision at 1-2. MSC filed an answer in September 2023. Answer of Respondent MSC (Doc. 9) (Sept. 5, 2023). Discovery proceeded in late 2023 and early 2024. *See* Scheduling Order (Doc. 11) (Oct. 2, 2023). MSC had subpoenas issued to the customs agents, and in November 2023, MSC indicated that it would enforce those subpoenas in federal court. Decision at 3. The parties filed joint stipulations of fact in March 2024, and briefing was completed in May 2024. *See id*.; Joint Stipulations of Fact (Doc. 13) (Mar. 4, 2024); Opening Brief of the BEIC (Doc. 15) (April 3, 2024); Reply Brief of Respondent MSC (Doc. 17) (May 3, 2024); Reply Brief of the BEIC (Doc. 18) (May 20, 2024).

The ALJ issued the initial decision in February 2025. *See* Decision. Both parties to the proceedings filed timely exceptions. *See* BEIC Exceptions to Initial Decision (OE Exceptions) (Doc. 24)

(Mar. 19, 2025); MSC's Exceptions to Initial Decision (MSC Exceptions) (Doc. 25) (Mar. 19, 2025); BEIC Reply to Respondent's Exceptions to Initial Decision (OE Reply) (Doc. 26) (Apr. 10, 2025); Respondent MSC's Reply to the Exceptions of the BEIC to the Initial Decision (MSC Reply) (Doc. 27) (Apr. 10, 2025).

B. The ALJ's Initial Decision

The ALJ first briefly summarized the background of the proceedings and the basic arguments of the parties. *See* Decision at 1-5. In particular, the ALJ explained that MSC did not contest that its public tariff had no separate rate for demurrage and detention charges for NORs prior to March 2023, which OE contended violated the tariff publication requirements of 46 U.S.C. § 40501. *See id*. at 3. As a result, the ALJ noted, OE was no longer pursuing a claim under 46 U.S.C. § 41104(a)(2)(A), barring carriers from providing service not in accord with their published tariffs, which had been considered an alternative theory of liability. *See id*. The ALJ went on to make findings of fact, *id*. at 5-22, and conclusions of law, *id*. at 22-50.

1. Findings of fact

The ALJ made detailed findings of fact. *See* Decision at 5-22. In describing the relevant parties, the ALJ noted that MSC, a common carrier under 46 U.S.C. § 40102(7), is a privately held Swiss company. *Id*. at 5. The ALJ also named the three customs agents who had been identified in the OIH as having been billed for demurrage and detention under the merchant clause of MSC's bill of lading as V. Alexander & Co., Inc.; John S. Connor, Inc.; and Welke Customs Brokers USA, Inc. *Id*.

Starting with facts relevant to the merchant clause issues, the ALJ found that MSC's bill of lading had not changed from January 2018 until the time of the Decision. *See* Decision at 5. The term "merchant" was defined in that bill of lading to include "the Shipper,

Consignee, holder of this Bill of Lading, the receiver of the Goods and any Person owing, entitled to or claiming the possession of the Goods or of this Bill of Lading or anyone acting on behalf of this Person." *Id*. MSC's tariff made such "merchants" responsible for demurrage, detention, and per diem charges, and MSC's policy was to bill the "notify party" listed on bills of lading for such fees in certain circumstances. *Id*. at 6. The ALJ described the demurrage and detention invoices issued to the three customs agents identified in the OIH, noting that 13 of the invoices were dated between August 16, 2018, and November 12, 2020 (and so issued less than five years before the start of the FMC's investigation). *See id*. at 7-9. The ALJ also described the contracts the customs agents had with their customers, as well as the interactions the agents had with MSC regarding the invoices at issue, which MSC had sent to the agents as notify parties. *See id*. at 9-18.

The ALJ also made findings of fact related to the NOR overcharges. *See* Decision at 18-22. The ALJ first explained that refrigerated containers (reefers) are insulated containers that have refrigeration units enabling them to carry refrigerated cargo, and that those units require enhanced handling and care. *Id*. at 18. However, such containers can also be used without the refrigeration units running, as NORs, and in that context they can be used like dry containers that do not need enhanced care. *Id*. at 18-19.

In 2021, MSC's published tariff applicable to its United States trade described its demurrage, detention, and per diem terms, listing separate rates for reefers and dry containers, but not for NORs. Decision at 19. MSC generally imposed higher fees and allowed less free time for reefers than dry containers. *Id*. In 2021, MSC imported 20,121 NOR containers into the United States, and charged demurrage and detention fees on 11,480 of these. *Id*. In some cases, MSC charged the NORs at the higher operating reefer rates. *Id*. On February 8, 2022, as part of an audit, the FMC asked MSC to explain why it would charge more for NOR containers than dry ones. *Id*. On March 9, 2022, Fabio Santucci, the president of Mediterranean Shipping Company (USA) Inc., MSC's U.S.

"agent," responded by letter that "by default" MSC charged the same rates for NORs as for dry containers, "except in random billing mistakes which are corrected." *Id*. at 5, 19-20; *see id*. at 20-21 (in that situation, "MSC USA will correct and refund/credit the billed amounts as soon as the mistake becomes known."). Santucci continued:

> This default policy of applying DRY D&D rates to NOR units is not at the moment explicitly laid down in MSC's tariff, but it is our intention to modify our tariff entry to make this more plain.

Id. at 19-20. Marco Sidoti, MSC's Nationwide Demurrage/Detention/Perdiem Director, stated in a later declaration that the "billing practice" to treat NORs as dry containers in this respect "was standard, and all terminals were instructed to bill NORs at the dry rates." *Id*. at 20. However, the ALJ found evidence of "confusion" at MSC regarding this practice, citing examples from the period November 2021 to January 2022 in which MSC customers complained that operating reefer rates and free time had been applied to their NORs but were told by MSC personnel that such charges were correct. *Id*.

In any case, despite MSC's stated policy, it was undisputed that in 2021 MSC charged demurrage or detention on NORs at operating reefer rates 2,629 times. *See* Decision at 21. Customers disputed at least 925 of these charges, resulting in refunds of $1,201,639.80. *Id*. Customers did not dispute at least 1,704 of these charges, resulting in MSC retaining $857,944.57 in additional revenue. *Id*. The ALJ found that it appeared that eventually all the 2021 NOR overcharges were refunded, including to those who did not dispute them, for a total in refunded overcharges of $2,059,584.37. *Id*. at 22.

MSC's Sidoti stated in his declaration that a problem with MSC's internal billing system had led to the 2021 overcharges. *See* Decision at 21. Sidoti said that he became aware on about September

2, 2021, of a problem with the invoicing of NOR charges. *Id*. In particular, he stated, a "clerical error" in an "update" to MSC's internal tariff recording system had caused the removal of a "Yes/No flag" that had previously enabled NOR charges to be directed to the dry container category, rather than the reefer category. *Id*. On September 14, 2021, Sidoti emailed a colleague to note that the billing system had been "updated," asking that it be assessed for proper functioning, and in his later declaration, he stated that the NOR error "was corrected on or about September 16, 2021, and has not been an issue since." *Id*. However, the ALJ found that MSC did issue invoices after that date mischarging NORs as operating reefers "at least on an isolated basis," pointing to examples as well as the staff confusion described above. *Id*. at 22. The ALJ stated that the cause of these later errors was unclear from the record, although it may be worth noting that even the operation of the "Yes/No flag" would presumably require staff to make a correct choice. *See id*.

On March 9, 2023, MSC published separate detention and demurrage rates for NORs in its tariff. *See* Decision at 22.

2. Analysis and conclusions of law

The ALJ's legal analysis was extensive. *See* Decision at 22-50. Addressing preliminary matters, the ALJ noted that MSC did not contest the Commission's statutory jurisdiction, but in any event the agency had jurisdiction to resolve the Shipping Act allegations in the OIH. *Id*. at 22-23. The ALJ also noted that MSC had submitted the Supreme Court's 2024 *Jarkesy* decision as supplemental authority, but without making any argument. *Id*. at 23. The ALJ stated that he would not address the agency's authority in that regard, because it is "generally considered that the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies." *Id*. In addition, the ALJ explained that in this proceeding OE, as the party alleging Shipping Act violations, had the burden of proving them by a preponderance of the evidence. *Id*.

a. Merchant clause violations under 46 U.S.C. § 41102(c)

The first potential violation the ALJ evaluated was whether MSC's use of the merchant clause to bill demurrage and detention charges to customs agents as "notify parties" violated 46 U.S.C. § 41102(c). Decision at 24-38. The essence of a statutory claim here, the ALJ noted, is that an ocean carrier has failed to observe just and reasonable practices relating to the handling of property. 46 U.S.C. § 41102(c). Title 46 C.F.R. § 545.4 specifies five basic elements for a successful section 41102(c) claim: (1) the respondent is an ocean common carrier or other covered entity; (2) the conduct alleged is "occurring on a normal, customary, and continuous basis"; (3) the conduct relates to the receipt, handling, storage, or delivery of property; (4) the conduct is unjust or unreasonable; and (5) the conduct is the proximate cause of the claimed loss. *See* Decision at 24-25.

Applying these standards to the merchant clause claims in the current case, the ALJ noted that the first and third elements of a claim under 46 C.F.R. § 545.4 were not disputed, as MSC was an ocean carrier and the conduct at issue clearly related to invoices as to the handling of property. *See* Decision at 25. In addition, the ALJ explained that the fifth element was not required in Commission-initiated enforcement proceedings like this one, as no showing of harm was necessary to establish a violation. *Id*.

As to the second element, whether the conduct occurred on a "normal, customary, and continuous basis" and so was a "practice" under section 41102(c), the ALJ stressed that this standard did not reach an "isolated error," but instead covered a "pattern of behavior." Decision at 25 (quoting *Kamara v. Honesty Shipping Serv.*, FMC Docket No. 1841(I), 2001 WL 898739, at *2 n.8 (SCO July 26, 2001)). The ALJ reviewed MSC's use of the merchant clause and concluded that the company's "policy" to bill notify parties for demurrage and detention even when they were not involved in moving the cargo at issue, as had occurred with the

customs agents identified in this case, constituted a practice under the statute. *Id*. at 25-26.

As to the fourth element, whether the conduct was unjust or unreasonable, the ALJ considered the proper standards to apply to the MSC billing practice at issue. *See* Decision at 26-36. The ALJ declined to follow either of the case-based tests proposed by the parties, but did refer to the incentive principle, drawn from 46 C.F.R. § 545.5, which provides specific guidance as to whether demurrage and detention charges violate section 41102(c). *See id*. at 26-32. That rule states in part that 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). The ALJ concluded that because the notify parties here had no role in coordinating container movement, billing them for demurrage and detention "could not have incentivized freight fluidity." Decision at 32. Next, the ALJ considered MSC's arguments based on agency and contract principles. *See id*. at 33-36. The ALJ concluded that while the customs agents here were acting as agents of their customers in certain ways, they were not doing so for the purpose of cargo movement, and so those principles did not weigh in favor of a finding that the billing practices at issue were reasonable. *See id*. at 33-34. That was also the case based on contract principles; here, the customs agents had not agreed to be bound by the terms in the bills of lading. *See id*. at 34-36. Finally, the ALJ concluded that five invoices issued in early 2018 were time-barred for purposes of assessing civil penalties, but that the 13 later invoices remained within the applicable five-year limitations period at 46 U.S.C. § 41109(e). *See id*. at 36-38.

b. NOR violations under 46 U.S.C. §§ 40501 and 41102(c)

The ALJ also reviewed the claims that MSC's conduct related to demurrage and detention charges for NORs violated 46 U.S.C. §§ 40501 and 41102(c). *See* Decision at 38-42. First, the ALJ explained that section 40501 requires ocean carriers to make

available for public inspection their rates, charges, and other relevant practices, and in particular to "state separately" each charge "and any rules that in any way change, affect, or determine any part or the total of the rates or charges." *Id*. at 39; 46 U.S.C. § 40501(a)(1), (b)(4). The ALJ determined that MSC had violated these provisions from the start of 2021 until its tariff amendment on March 9, 2023, by failing to specify that NORs would be billed at dry container rates, leading to "confusion and overcharges." Decision at 39-40. The ALJ rejected MSC's claim that the tariff was at worst "ambiguous," noting that the purpose of section 40501 is to provide the shipping public with "accessible and comprehensive" information. *Id*. at 40. An unpublished and apparently unwritten internal policy to bill NORs as dry containers and to provide refunds to overcharged customers "who knew enough to complain" did not suffice. *Id*. The ALJ also rejected MSC's apparent argument based on the 8,851 NORs that were correctly billed as dry containers in 2021, noting that it was irrelevant to whether the tariff publication requirements were met. *Id*. The ALJ concluded that because each day the tariff failed to comply with the law was a separate violation under 46 U.S.C. § 41107(a), MSC had committed 798 violations from January 1, 2021, to March 9, 2023. *Id*.

The ALJ next considered the potential section 41102(c) violations resulting from the NOR overcharges. *See* Decision at 40-41. The ALJ first reviewed the explanation in the Sidoti declaration that the overcharges had resulted from an internal billing system error related to the removal of a "Yes/No flag" to enable the classification of NORs with dry containers rather than reefers, in accord with MSC's billing policy. *See id*. The ALJ noted that this was the only explanation in the record for what happened, and that the error was apparently discovered and corrected in mid-September 2021. *Id*.

The ALJ concluded that the overcharging of NORs as reefers was "a mistake" and not a "practice" under section 41102(c). Decision at 41. The ALJ rejected OE's reliance on the fact that the overbilling had occurred 2,629 times, noting that there was no

bright-line number that would constitute a "practice," and that the overbilling had occurred in only 22.9% of the NOR invoices sent from January to September 2021. *Id*. (It appears that it was actually 22.9% of all NOR invoices in 2021, based on the above findings of fact.) The ALJ also observed that the administrative history of the FMC regulation regarding the general interpretation of section 41102(c), 46 C.F.R. § 545.4, relied on case precedent that characterized a practice as something "often repeated and customary," "habitually performed," or a "pattern," as opposed to occurrences that were "isolated," "occasional," or "a single incident." *Id*. at 41-42 (case citations omitted). Turning to the current case, the ALJ noted that although MSC's NOR overbilling was "often repeated," the fact that it had occurred less than a quarter of the time during a limited period meant it was not "customary." *Id*. at 42. The ALJ emphasized that all of the overbilling appeared to stem from "a single, isolated clerical error," and that there was no "continuity" because the overcharges occurred over that limited period and then largely ended when the error was corrected, with only two examples of overcharging occurring after the September 2021 billing system fix. *Id*. The ALJ pointed to the "isolated nature" of those post-fix errors, contrasting them with the "widespread" NOR overcharges earlier in 2021. *Id*.

c. Remedies

Finally, the ALJ discussed remedies. *See* Decision at 43-50. As to civil penalties, the ALJ explained that although 46 U.S.C. § 41107(a) originally provided for civil penalties of up to $5,000 per violation and $25,000 per knowing and willful violation, the inflation-adjusted 2025 penalty maximums were $14,988 and $74,943. *See id*. at 43; 90 Fed. Reg. 3039, 3040 (Jan. 14, 2025). The ALJ also noted that, in

> determining the amount of a civil penalty assessed[, the] Commission shall take into consideration – (A) the nature, circumstances, extent, and gravity of the violation committed; (B) and, with

> respect to the violator – (i) the degree of culpability; (ii) any history of prior offenses; (iii) the ability to pay; and (iv) such other matters as justice may require.

Decision at 43 (quoting 46 U.S.C. § 41109(b)(1)); *see* 46 C.F.R. § 502.603(b). The ALJ then applied these principles to the two violations the ALJ had found, specifically the merchant clause violations under section 41102(c) and the tariff-publication violations under section 40501.

Starting with the knowing and willful standard, the ALJ noted that it requires a showing that a "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." Decision at 45 (quoting *Rose Int'l, Inc. v. Overseas Moving Network Int'l, Ltd.*, FMC Docket No. 96-05, 2001 WL 865708, at *47 (FMC June 1, 2001) (citations omitted)). The ALJ found that this standard was not met for the merchant clause violations, based on the general nature of the regulatory guidance in place during the relevant period as to properly billed parties and the later rulemaking that led the Commission to issue more specific guidance on the issue. *See id*. at 45-46. However, the ALJ found that MSC's tariff publication violations were knowing and willful. *Id*. at 46. The ALJ pointed to the company's unexplained failure to amend the tariff until March 2023 despite "the thousands of overcharges in [2021], Mr. Sidoti's discovery and correction of the billing error in September 2021, continued internal staff confusion, customer fallout, and inquiries from the Commission in 2022…." *Id*.

Turning to the nature, circumstances, extent, and gravity of the violations, the ALJ found that although the 13 merchant clause violations did not amount to a large total sum of money in violation, they did create a disproportionate "administrative headache" for those affected. *See* Decision at 46. With regard to the NOR tariff violations, the ALJ emphasized the importance of tariff publication

to enable consumers to make informed decisions and hold carriers accountable. *See id*. at 47. The ALJ noted that the lack of clarity in the tariff may have caused many MSC customers not to seek refunds and added to the overall confusion that enabled the overcharges to persist, and that even with eventual refunds, the overcharges burdened customers. *See id*.

The ALJ briefly analyzed the remaining factors to be considered under section 41107(a). *See* Decision at 47-48. With regard to culpability and a history of prior offenses, the ALJ rejected OE's argument that four enforcement actions against MSC between 1989 and 2006 should weigh against MSC here, noting that those actions all ended in settlements, which are not properly considered for this purpose. *See id*. at 47. As to MSC's ability to pay, the ALJ noted that MSC has been one of the largest ocean carrier importers of goods into the U.S., and that its ability to pay would not warrant any reduction in civil penalty. *Id*. at 47-48.

The ALJ then discussed the specific penalties to be imposed. *See* Decision at 48-49. The ALJ agreed with OE that under 46 C.F.R. § 506.5, a current inflation adjustment can apply to penalties for violations that occurred prior to the adjustment, but the ALJ noted that in any case, the penalties to be imposed here would be within the limits existing at the time of the violations. *Id*. at 48. For the 13 merchant clause violations, the ALJ imposed a penalty of $5,000 per violation, or $65,000 total, which the ALJ stated reflected consideration of the factors above "while being proportional to the harm caused by the violations." *Id*. at 49. For the 798 days of NOR tariff-publication violations, the ALJ imposed a penalty of $20,000 per violation, for a total of $15,960,000. *Id*. The ALJ noted that the penalty

> reflects the knowing and willful nature of the violation, MSC's delay in correcting a known problem with its tariff, [and] the importance of maintaining complete and accurate tariffs, and [it] is proportional to the over $2 million in overcharges

> occurring during 2021 until the billing system was corrected in September 2021 – and the concurrent confusion and administrative costs imposed on the shipping public in connection with obtaining refunds.

Id.

Finally, the ALJ evaluated OE's request for a cease-and-desist order as to the merchant clause violations. *See* Decision at 49-50. The ALJ issued an order barring MSC from trying to collect demurrage or detention from "any parties other than shippers, consignees, and persons with a beneficial interest in the cargo or with whom MSC has a direct contractual relationship." *Id*. at 51.

II. DISCUSSION

A. Standards of review

When the Commission reviews exceptions to an ALJ's Initial Decision, it normally has "all the powers which it would have in making the initial decision." 46 C.F.R. § 502.227(a)(6). The Commission therefore generally reviews the ALJ's determinations de novo. *See id*.; *MCS Indus., Inc. v. MSC*, FMC Docket No. 21-05, 2024 WL 3514613, at *9 (FMC July 16, 2024).

As the ALJ noted, the party alleging a Shipping Act violation, in this case OE, bears the burden of proving its allegations by a preponderance of the evidence. *See* Decision at 23; 5 U.S.C. § 556(d); 46 C.F.R. § 502.203; *Rana v. Franklin*, FMC Docket No. 19-03, 2022 WL 1744905, at *4 (FMC May 25, 2022). That means showing that the allegations are more probable than not. *See Crocus Invs., LLC v. Marine Transp. Logistics, Inc.*, FMC Docket No. 15-04, 2021 WL 3732849, at *3 (FMC Aug. 18, 2021). When direct evidence is unavailable, the Commission may rely on circumstantial evidence, but not on mere speculation. *See Waterman Steamship Corp. v. Gen. Foundries, Inc*., FMC Docket No. 93-15, 1993 WL

13975538, at *13 (ALJ Dec. 8, 1993), *adopted in relevant part*, 1994 WL 279898 (FMC June 13, 1994).

B. The ALJ's orders regarding MSC's violation of 46 U.S.C. § 41102(c) by billing demurrage and detention charges to customs agents as "notify parties" are upheld

The ALJ determined that MSC had violated section 41102(c) by invoicing customs agents as "notify parties," in reliance on the merchant clause in its bill of lading, for demurrage and detention charges during 2018-2020. Decision at 24-38. The ALJ imposed a civil penalty of $5,000 for each of the 13 violations that OE proved, or $65,000 total, and the ALJ ordered MSC to cease and desist from such conduct. *Id*. at 49-51. Neither side objects to the determination of those violations, and neither objects to the cease-and-desist order. OE does argue that the violations were knowing and willful, and it therefore contends that larger penalties should be imposed. *See* OE Exceptions at 9-15. However, because OE has not shown that the relevant legal standards were clear and specific enough as applied to these facts to support such a finding during the time period at issue, the Commission upholds the ALJ's determination of non-knowing and willful violations and the corresponding remedies.

As explained above, the ALJ carefully evaluated whether MSC's use of the merchant clause to bill demurrage and detention charges to customs agents as "notify parties" violated 46 U.S.C. § 41102(c). *See* Decision at 24-38. The ALJ found that OE had met the basic statutory standard, showing that MSC had failed to observe just and reasonable practices relating to the handling of property, and that OE had established the required elements under the relevant FMC regulation: (1) MSC is an ocean common carrier; (2) the conduct alleged was "occurring on a normal, customary, and continuous basis"; (3) the conduct related to the handling of property; and (4) the conduct was unjust or unreasonable. *See id*. at 24-25; 46 U.S.C. § 41102(c); 46 C.F.R. § 545.4. As to the second element, the ALJ concluded that MSC's "policy" to bill the notify

party for demurrage and detention even when that party was not involved in moving the cargo at issue constituted a "practice" under the statute. Decision at 25-26. As to the fourth element, the ALJ found MSC's billing practice to be unreasonable. *See id*. at 26-36. The ALJ referred to the incentive principle at 46 C.F.R. § 545.5(c)(1), noting that billing parties that were not involved in coordinating container movement did not promote freight fluidity. *See id*. at 29-32. The ALJ also concluded, after a detailed analysis, that agency and contract principles did not support a finding that the relevant billing practices were reasonable. *See id*. at 32-36. The ALJ found that 13 invoices were within the statute of limitations; assessed civil penalties of $5,000 for each, for a total of $65,000; and imposed a cease-and-desist order. *See id*. at 36-38, 45-51. However, the ALJ rejected OE's request for a finding of knowing and willful violations. *See id*. at 45-46.

The only current objection to the above determinations is OE's argument that the ALJ should have found the violations were knowing and willful. *See* OE Exceptions at 9-15. In the Decision, the ALJ considered OE's arguments, but did not find that MSC had acted with the "plain indifference" to the law that would be required to support a knowing and willful finding. *See* Decision at 45-46. The ALJ emphasized that OE had identified no definitive pronouncement in relevant FMC regulatory or adjudicative activities to provide "fair notice" that billing notify parties in the relevant factual context was unlawful during the 2018-20 time frame. *Id*. at 45. The ALJ pointed out that the FMC's 2020 interpretive rule on demurrage and detention, 46 C.F.R. § 545.5, did not include any specificity about which parties could be billed. *Id*. We note that that rule was not issued until May 18, 2020, after 7 of the 13 MSC invoices at issue here had already been sent. *Id*. at 7-9. The ALJ also stated that the "extensive rulemaking activity" regarding demurrage and detention in recent years showed that standards were not clear enough to support a finding of willful conduct here, even though some participating stakeholders had opposed broad application of merchant clauses. *Id*. at 45-46. The ALJ found that the more recent rulemaking culminating in the 2024

rules on demurrage and detention billing, 46 C.F.R., Part 541, which included a provision regarding which parties could be properly billed, *see* 46 C.F.R. § 541.4 (2024), also indicated that prior guidance was not explicit enough to support a knowing and willful finding here. *Id*. at 46.

OE's current arguments for a knowing and willful finding on the merchant clause violations are substantial but ultimately unavailing. *See* OE Exceptions at 9-15. OE argues that MSC knew only its customers were "proper" parties to invoice, but instead it elected to bill notify parties as a matter of administrative convenience, effectively turning them into collection agents even though they had no role in moving containers. *See id*. at 11-14. OE also recounts some of MSC's billing disputes with the customs agents, and those interactions do show MSC personnel hearing from customs agent representatives that billing them in this situation was unjustified and even, on a few occasions, unlawful as a general matter. *See* Decision at 10-18. While some of those facts are troubling, on balance they do not show that MSC was "plain[ly] indifferen[t]" to sufficiently clear and authoritative legal requirements.

OE argues that the ALJ wrongly required "'clear guidance' from the Commission," and that lack of clarity as to the law's reach is "not relevant" to the knowing and willful standard; indeed, OE seems to argue that such a standard can be met simply by showing knowledge of the conduct at issue. OE Exceptions at 9, 15. But that is the "knowing" part of the standard. "Willful" conduct requires at least some showing of a party's orientation toward what the law requires, even if only "plain indifference," and we understand the ALJ to have been asking simply whether sufficient clarity was available from any source. *See* Decision at 45 (the standard requires that a "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" (quoting *Rose*, FMC Docket No. 96-05, 2001 WL 865708, at *47 (citations omitted) (emphasis added)); *see*

also United States v. Manigault Newman, 594 F.Supp.3d 1, 6 (D.D.C. 2022) ("Generally, in order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful…" (cleaned up)). Again, most of the MSC invoices at issue predated the FMC's general 2020 rule, which did not specifically state who could be billed in any case. And even the later invoices were issued years before the 2024 FMC rule specifically defining who could be billed.

Finally, the ALJ's cease-and-desist order merits a brief discussion. The Commission has the authority to enter such orders under 46 U.S.C. § 41304. *See* OIH at 12-13. Neither party has objected to the order here, and so any such objection would now be forfeited. *See Deppenbrook v. Pension Benefit Guar. Corp.*, 778 F.3d 166, 172 (D.C. Cir. 2015) (failure to raise argument in administrative appeal ordinarily results in forfeiture). We also note that the scope of the order is consistent with the recent decision in *World Shipping Council v. FMC*, 152 F.4th 215 (D.C. Cir. 2025). In that case, the court invalidated 46 C.F.R. § 541.4, the 2024 FMC regulation that had limited demurrage and detention bill recipients to *either* (1) "[t]he person for whose account the billing party provided ocean transportation or storage of cargo and who contracted with the billing party for the ocean transportation or storage of cargo" *or* (2) "[t]he consignee." The court ruled that the regulation was arbitrary and capricious under the Administrative Procedure Act because the FMC had failed to adequately explain its effective prohibition of invoicing truckers that had a contractual relationship with the carrier, in light of the court's view that section 541.4's scope was based on contractual privity. *See* 152 F.4th at 220. The ALJ's cease-and-desist order in this case is consistent with that ruling, because it permits MSC to invoice for relevant charges "shippers, consignees, and persons with a beneficial interest in the cargo or with whom MSC has a direct contractual relationship." Decision at 51. Thus, by its terms, the cease-and-desist order permits the invoicing of truckers that have a contractual relationship with MSC.

C. The ALJ correctly found that MSC violated 46 U.S.C. § 40501 by failing to publish separate demurrage and detention rates for NORs in its tariff from 2021 to early 2023, although the order is modified to reflect that knowing and willful violations occurred only after MSC's March 2022 statement that it would amend the tariff

The ALJ found that MSC had violated 46 U.S.C. § 40501 by failing to include in its published tariff a statement of what its demurrage and detention charges were for NORs from the start of 2021 until March 2023, when MSC finally published a separate rate for NORs, a period of 798 days. Decision at 39-40. The ALJ concluded that because each day the tariff failed to comply was a separate violation under 46 U.S.C. § 41107(a), MSC had committed 798 violations. *Id*. The ALJ found that the violations were knowing and willful, given the delay in correcting the tariff, and imposed a penalty of $20,000 per day for the entire period. *Id*. at 46, 49. MSC objects to the finding of any violation, and objects in particular to the knowing and willful finding and penalty level, arguing that even if the Commission finds a violation, it should not find it to have been knowing and willful prior to MSC's March 2022 statement that it would revise its tariff. *See* MSC Exceptions at 3-13.

As discussed below, the Commission upholds the ALJ's finding of violations, the finding that they were knowing and willful from the March 2022 statement onwards, and the assessment of $20,000 daily penalties from that point onwards. However, we agree with MSC that OE did not show the prior violations were knowing and willful, and so we assess penalties of only $5,000 per day for the period from the start of 2021 until March 2022. The penalties for those two periods add up to a total penalty of $9,460,000.

1. The ALJ correctly found that MSC violated 46 U.S.C. § 40501

MSC objects briefly to the finding of any section 40501 violation, but its arguments are unpersuasive. *See* MSC Exceptions at 3-5. MSC first argues that most of the NOR fees were billed correctly and that the NOR overcharges were caused by the internal billing system error, not the tariff. *Id*. at 3. But a basic section 40501 violation does not require a showing that it reflected any particular intent or caused any particular tangible harm, and MSC provides no authority stating that it does. The statute is a prophylactic one that simply requires charges to be published and "state[d] separately," 46 U.S.C. § 40501(b)(4), in order to protect the shipping public. *See* OE Reply at 4-6 (section 40501 violations do not depend on intent); 46 C.F.R. § 520.1(b) (the tariff publication requirements enable shippers and others to obtain "reliable," "useful," "accurate," and "accessible" information about rates and charges); *CMA CGM S.A. v. AZAP Motors, Inc.*, Civ. No. 14-504, 2015 WL 9601157, at *5 (E.D. Va. Nov. 25, 2015) (section 40501 requires carriers to publish tariffs showing all rates and charges, including demurrage and detention).

MSC also objects to statements of the ALJ suggesting that both the billing system error and the tariff failure caused the NOR overcharges, and MSC argues that the overcharges could not have been caused by both. *See* MSC Exceptions at 3-4. But again, MSC fails to show that section 40501 liability depends on a violation's effects, and even if it did, such effects can plainly have multiple causes. As discussed below, the NOR overcharges appear to have been caused primarily by the billing system error, but exacerbated by the lack of a clear tariff to guide the public and MSC's own staff in evaluating and resolving the ongoing problems.

Finally, MSC argues that ambiguities in tariffs are resolved in favor of shippers and that MSC followed that principle because its policy was to bill NORs at the lower dry-container rate, and thus, no violation occurred. *See* MSC Exceptions at 4. But MSC provides

no support for the idea that this interpretive principle, designed to protect shippers in particular cases, would excuse a carrier's ongoing violations of the general tariff publication requirements of section 40501. And it does not. The ALJ's finding that MSC violated section 40501 is upheld.[1]

[1] In its reply, OE objects strenuously to the declaration of MSC's Sidoti, which describes the billing system error as the cause of the NOR overcharges. *See* OE Reply at 9-11. OE suggests that the declaration is unreliable and a "last-minute attempt to mislead" the Commission, as it was submitted on the last day of the discovery period. *Id*. at 10. But these claims have limited force. As a threshold matter, the claims seem to come too late. The Sidoti declaration was apparently provided on February 2, 2024, the day discovery ended. *See id*. at 9. Yet OE raised no apparent objections along these lines in its briefing to the ALJ later in 2024 or in its own exceptions filed in March 2025 — all of which discuss the declaration — instead waiting until its April 2025 reply to raise the issue. *See* Opening Brief of the BEIC (Doc. 15) (April 3, 2024); Reply Brief of the BEIC (Doc. 18) (May 20, 2024); OE Exceptions; *see also Marine Transp. Logistics, Inc. v. CMA CGM, S.A.*, FMC Docket No. 22-23, Order on Respondent's Motion to Strike, 2024 WL 4678463, at *2 (ALJ Oct. 30, 2024) (arguments not presented in opening brief are normally waived). OE does not claim to have raised the issue earlier or to have sought any related relief, such as to re-open discovery. In addition, OE offers no specific basis or evidence to refute Sidoti's statements that the billing system error was the primary cause of the overcharges, or that they declined drastically after it was fixed. In any event, the cause of the overcharges is not the central issue in the evaluation of the basic section 40501 violations, which depend on what MSC's tariff actually said, as OE itself notes. *See* OE Reply at 9.

2. The record supports a finding that MSC's violations of section 40501 were knowing and willful from the company's March 2022 statement that it would publish a separate NOR charge until the time in March 2023 that it actually did so

MSC objects strongly to the penalties the ALJ imposed for the section 40501 violations, including the finding that all of the violations were knowing and willful. *See* MSC Exceptions at 5-13. On the knowing and willful issue, MSC argues that rather than making a single determination as to all days from January 1, 2021, to March 9, 2023, the ALJ should have evaluated the violations differently in each of three critical subperiods. *See id*. at 8-10. *First*, MSC asserts, during the period January 1, 2021 to September 15, 2021 (the last day before the internal billing system was corrected), MSC was "unaware" of the billing system error until the end of the period, and its senior management did not suspect that the tariff was "potentially ambiguous," so any violations would not be knowing and willful, and a maximum penalty of $5,000 per day would be "appropriate." *Id*. at 9. *Second*, MSC claims, during the period September 16, 2021, to March 8, 2022 (the day before MSC indicated it would revise its tariff), MSC was still unaware that its tariff was "allegedly ambiguous," but the NOR overcharges were "virtually eliminated," so no penalty should be assessed. *Id*. at 9-10. *Third*, MSC argues, from March 9, 2022, to March 8, 2023 (the last day before the tariff was corrected) the NOR overcharges were still "virtually eliminated," but

> by this time, MSC had been advised by the FMC staff that it considered the tariff ambiguous, and MSC had committed to revise the tariff. Accordingly, if there was a violation due to an ambiguity in the tariff (which MSC denies), the violation during this period is the only one which might arguably be treated as knowing and willful.

Id. at 10. Therefore, "MSC suggests that a maximum penalty of $10,000 per day be assessed for this period." *Id*. Applying these suggestions, MSC arrives at a total section 40501 penalty of $4.94 million, subject to reductions on the basis of mitigating factors as discussed below. *See id*. at 10-11.

MSC's arguments as to the knowing and willful assessment of the section 40501 violations are persuasive up to a point. Applying the standards discussed above, there is insufficient evidence that MSC was aware of or "plain[ly] indifferen[t]" to the illegality of its tariff prior to its March 9, 2022, acknowledgement of the FMC's concerns and indication that it would revise the tariff. *See* Decision at 45-46; *Rose*, FMC Docket No. 96-05, 2001 WL 865708, at *47; MSC Exceptions at 10. In support of a knowing and willful finding for the entire period at issue, the ALJ referred to the 2021 overcharges, the September 2021 correction of the billing system error, the continued confusion about the charges, and the 2022 FMC inquiries about the situation. *See* Decision at 46. But the record as to events prior to March 2022 simply does not reflect that MSC had sufficient awareness that the *tariff* was part of the problem, in addition to the billing system error. The record indicates that, after the September 16, 2021, correction of that system, the overcharges did virtually end. *See* Decision at 40-42. Starting on March 9, 2022, however, MSC itself concedes that it "had been advised by the FMC staff that it considered the tariff ambiguous," that MSC "had committed to revise the tariff," and that if there was any violation, it "might arguably be treated as knowing and willful." MSC Exceptions at 10. There is ample support to find that the violation during this long final period was knowing and willful.

OE argues that the knowing and willful finding should be upheld in its entirety, asserting broadly that MSC "had actual knowledge of its duty to publish these rates." OE Reply at 8. But the closest OE seems to come to specifically addressing MSC's mental state is in its argument that MSC's disregard for the Shipping Act is evidenced by its failure to publish a separate NOR charge for more than two years, "even after attesting to the FMC that it would," *id*.

– a tacit acknowledgment that MSC's March 2022 statement raised its level of culpability.

On balance, we find the evidence is not sufficient here to support a knowing and willful finding prior to March 2022. Accordingly, we uphold the ALJ's knowing and willful determination as to the third period MSC identifies (the 365 days from March 9, 2022 to March 8, 2023), but we modify the determination to be a non-knowing and willful one for the preceding period, January 1, 2021, to March 8, 2022.

3. The record supports civil penalties of $5,000 per violation for MSC's violations of section 40501 up until March 2022 and $20,000 per violation for its knowing and willful violations thereafter

The ALJ assessed civil penalties for the section 40501 violations at $20,000 per day from January 1, 2021, to March 9, 2023, when MSC changed its tariff. *See* Decision at 49-51. We affirm those penalties as to the period from March 2022 to March 2023, in accord with the knowing and willful finding discussed above, but we impose penalties of only $5,000 per day, for non-knowing and willful violations, for the prior period starting in January 2021.

As the ALJ noted, Congress has authorized civil penalties for Shipping Act violations, as adjusted for inflation in 2025, of up to $14,988 per violation and $74,943 per knowing and willful violation. *See* Decision at 43, 48; 46 U.S.C. § 41107(a); 46 C.F.R. § 506.5 (inflation-adjusted maximum penalties may be assessed for violations predating the increase); 90 Fed. Reg. 3039, 3040 (Jan. 14, 2025). Thus, the ALJ could have assessed a penalty of $74,943 for each of the 798 days MSC was found to be in violation of section 40501, for a total penalty of more than $59.8 million.

The ALJ also noted that in determining penalty amounts, the Act states that the Commission "shall take into consideration – (A) the nature, circumstances, extent, and gravity of the violation committed; (B) and, with respect to the violator – (i) the degree of culpability; (ii) any history of prior offenses; (iii) the ability to pay; and (iv) such other matters as justice may require." Decision at 43 (quoting 46 U.S.C. § 41109(b)(1)); *see* 46 C.F.R. § 502.603(b). Accordingly, the agency has significant discretion in fashioning civil penalty amounts. *See* Decision at 44; *Universal Logistic Forwarding Co. – Possible Violations of Sections 10(a)(1) and 10(b)(1) of the Shipping Act of 1984,* FMC Docket No. 00-10, 2001 WL 503660, at *11 (ALJ Apr. 11, 2001), *adopted in relevant part*, 2002 WL 207541 (FMC Jan. 18, 2002) (cleaned up).

a. The ALJ evaluated the relevant factors under 46 U.S.C. § 41109(b)(1) and properly assessed $20,000 penalties for each knowing and willful violation of section 40501

The ALJ evaluated the penalty amounts for the section 40501 violations here by reference to the per-violation standards Congress placed in the statute and that the agency has used to compare penalty amounts in the past. *See* Decision at 43-45, 48-49. In particular, the ALJ quoted at length from a Commission decision observing that the agency has generally assessed penalties for knowing and willful violations at amounts that exceed the prevailing maximum for non-knowing and willful violations, describing penalties in seven FMC cases from 2001 to 2010, for unlawful conduct ranging from 13 to 134 violations, in amounts ranging from $10,000 to $30,000 per violation. *See id.* at 44-45; *Anderson Int'l Transport – Possible Violations of Sections 8(A) and 19 of the Shipping Act of 1984*, FMC Docket No. 07-02, 2013 WL 9808666, at *20 (FMC June 25, 2013).

The ALJ proceeded to evaluate the section 40501 violations here under the relevant factors set out in 46 U.S.C. § 41109(b)(1).

See Decision at 46-48. As to the nature and gravity of the violations, the ALJ cited the legislative history of the tariff requirements, which emphasizes the importance of enabling the public to make informed decisions and hold carriers accountable. *See id*. at 47. In this case, the ALJ noted, the lack of a clear and complete tariff may have played a role in the fact that many overcharged MSC customers did not seek refunds; even some MSC staff did not seem aware of the company's stated policy to bill NORs as dry containers; "and it is hard to imagine this level of confusion persisting had MSC's tariff been clear." *Id*.; *see id*. at 20 (describing interactions with customers about overcharges, including MSC staff claiming that the overcharges were correctly billed, even after the billing system had apparently been fixed). There were more than $2 million in such overcharges in 2021, and even though they were ultimately refunded, the situation obviously placed an administrative burden on customers. *Id*. at 47. Turning to MSC's culpability and prior offenses, the ALJ rejected OE's argument that prior settlements should be counted against the company. *Id*. As to ability to pay, the ALJ noted that MSC has been one of the largest carrier importers of goods into the U.S., comparable to a competing public company whose 2023 revenue was about $47 billion, so ability to pay was not a mitigating factor. *See id*. at 47-48.

Finally, as to the specific penalty amounts, the ALJ noted that OE sought penalties of $19,609 per violation from 2021 to March 2023, for a total of more than $15 million, while MSC argued that a more reasonable total penalty (apparently including section 41102(c) penalties) would be $2-3 million. *See* Decision at 48. The ALJ did not dispute MSC's argument that consistency is a relevant factor in considering proposed penalties. *See id*. at 48-49. But the ALJ found MSC's reliance on *Hapag-Lloyd, A.G. – Possible Violations of 46 U.S.C. § 41102(c)*, FMC Docket No. 21-09, 2022 WL 3093193, at *39-40 (ALJ Apr. 22, 2022), unpersuasive as a basis to assess lower penalties than OE sought. *See id*. at 49. That case had involved assessed penalties of *$58,730 per violation* for 14 violations of section 41102(c) for unlawful detention charges, although the case ultimately settled for $2 million. *See id*.

In the end, the ALJ here imposed penalties of $20,000 per section 40501 violation, for a total of $15.96 million, citing "the knowing and willful nature of the violation, MSC's delay in correcting a known problem with its tariff, the importance of maintaining complete and accurate tariffs," proportionality with the more than $2 million in related overcharges, and "the concurrent confusion and administrative costs imposed on the shipping public in connection with obtaining refunds." Decision at 49. Those factors amply support the ALJ's penalty to the extent the violations were knowing and willful, *i.e.*, from March 2022 to March 2023. We note also that $20,000 is only about 27% of the maximum $74,943 per-violation penalty authorized by section 41107(a) for 2025, as well as only about 33% more than the $14,988 maximum for non-knowing and willful penalties for 2025. And as the ALJ's discussion showed, $20,000 is solidly in the middle range of knowing and willful penalties imposed for Shipping Act violations in the 2001-2010 period, without even accounting for the inflation in the intervening years.

b. Contrary to MSC's claims, an analysis of the relevant factors supports the assessment of a $20,000 penalty for each knowing and willful violation and a $5,000 penalty for each non-knowing and willful violation of section 40501

MSC devotes most of its briefing on section 40501 to the penalty amounts, arguing that the total amount assessed, about $16 million, was inconsistent with comparable past cases and that the ALJ failed to give adequate weight to mitigating factors. *See* MSC Exceptions at 5-7, 11-13. But MSC's objections are unavailing.

As a general matter, MSC does not dispute that penalties here should be assessed on a per-violation basis, but it nevertheless argues that for purposes of comparing with prior cases, they should be evaluated on the basis of the resulting *overall* section 40501 penalty amount. *See* MSC Exceptions at 7-8. However, MSC

provides no support for that proposition. MSC's approach is contrary to Congress's and the FMC's clear focus on assessing penalties on a per-violation basis. In addition, MSC's approach would seem to mean that the agency should disregard whether a respondent has violated the law hundreds or even thousands of times, but instead base penalty determinations only on a more general sense of how serious a given type of violation may be. Such an approach does not seem consistent with the basic goals of Shipping Act enforcement. *See* Decision at 43-49. And the ALJ correctly explained why violations of section 40501 *are* serious, stressing the provision's key role in informing the public about critical rates and charges, thereby promoting a fair and efficient ocean transport system, as well as the apparent contributing role the violations here played in the 2021 overcharges. *See id*. at 47.

As to specific past cases, MSC asserts that the total penalty the ALJ assessed for the section 40501 violations is excessive because it is more than any prior overall FMC penalty imposed on a single entity, but that claim does not withstand scrutiny. *See* MSC Exceptions at 5-6. MSC points mainly to a 2003 penalty of about $8 million in FMC Docket No. 02-06 as the highest ever assessed, and a $4 million penalty against Sea-Land in the 1970s as the highest ever actually paid.

MSC's reliance on FMC Docket No. 02-06 is misplaced. The $8 million total penalty in that case was composed of penalties of $22,500 for each of 120 violations of the predecessor to 46 U.S.C. § 41102(a) (barring the obtaining of ocean transport at less than applicable rates) and $25,000 for each of 208 days of violations of the predecessor to 46 U.S.C. § 40902 (requiring ocean transportation intermediaries to have surety bonds) — per-violation penalties that are actually higher than the $20,000 ones assessed by the ALJ here. *See Hudson Shipping (Hong Kong) Ltd. d/b/a Hudson Express Lines – Possible Violations of Section 10(a)(1) of the Shipping Act of 1984*, FMC Docket No. 02-06, 2003 WL 21677927, at *6-8 (ALJ July 10, 2003). And the $8 million total penalty assessed in Docket No. 02-06 in July 2003 would have been about $14 million in

September 2025, adjusted for inflation — also quite comparable to the roughly $16 million total penalty the ALJ assessed here. *See* CPI Inflation Calculator, U.S. Bureau of Labor Statistics, available at https://www.bls.gov/data/inflation_calculator.htm (last visited Dec. 5, 2025).

MSC's reliance on the Sea-Land penalty and others from many years ago is also unavailing. The Sea-Land case apparently involved $19 million in allegedly unlawful rebates, but by MSC's own account (which it supports only with a 1977 newspaper article) the amount paid there was pursuant to a settlement, and so the matter is of limited comparative value in assessing fully contested penalty awards. *See* MSC Exceptions at 6. MSC also asserts that the Commission has assessed smaller overall penalties for "more serious" violations. *See id*. at 6-8. But the cases it cites also appear to have been the result of settlements, and so they too are of limited value here. And MSC offers no real support for its claims that other violations are "more serious" than the section 40501 violations here. In the end, to the extent such prior total penalties may be lower than the one in this case even taking the above factors into account, that is in large part because those cases involved far fewer violations.

MSC also argues that in assessing a penalty for the section 40501 violations the ALJ failed to consider important mitigating factors under 46 C.F.R. § 502.603(b)(1)(ii)(D), which provides for consideration of "such other factors as justice may require," consistent with the statutory provision at 46 U.S.C. § 41109(b)(1)(B)(iv). *See* MSC Exceptions at 11-12. But those catch-all provisions do not require consideration of any particular factors. And in any event, including consideration of the factors MSC raises is still consistent with the moderate $20,000 per violation penalty the ALJ imposed for knowing and willful violations here. MSC points to its voluntary refunds of the more than $2 million in overcharges, its cooperation with the FMC's audit, the fact that the violations occurred during the Covid-19 pandemic, and the fact that MSC tried to negotiate a solution to the current dispute. *See id*. OE responds that MSC deserves no credit for any of these.

See OE Reply at 8. However, it does appear that voluntarily refunding the overcharges and the larger Covid-19 context are mitigating factors, with the latter presumably playing some role in the company's confusion and delay in addressing the tariff issue.

At the same time, however, certain aggravating factors that may also be considered under section 41109(b)(1)(B)(iv) cut the other way. In particular, although the ALJ briefly cited MSC's "delay in correcting a known problem with its tariff," Decision at 49, for a major multinational company with more than 200,000 employees to take *an entire year* to effect a straightforward fix to a published tariff, without any specific explanation, is a significant aggravating factor, *see* MSC, Leader in Shipping and Logistics, available at https://www.msc.com (last visited Nov. 25, 2025). In addition, one key goal in assessing civil penalties for knowing and willful violations is deterrence, and it would be appropriate to impose a higher penalty, within statutory limits, based on the need to be sure the amount was sufficient to have that deterrent impact on MSC and other major ocean carriers. *See Anderson Int'l Transport*, 2013 WL 9808666, at *21 (higher penalties are important to deter knowing and willful violations); *see also* 46 U.S.C. § 41109(b)(1)(B)(iii) (ability to pay is a factor in determining civil penalty amounts). MSC is the largest container shipping company in the world as measured by cargo capacity, fleet size, and market share, with reported 2022 annual revenues in excess of $90 billion and profits in excess of $38 billion. *See* OE Reply at 1 & n.1; Alphaliner Top 100, available at https://alphaliner.axsmarine.com/PublicTop100/ (last visited Nov. 25, 2025); *Italian Media Reports MSC Profit at USD 38 Billion in 2022*, Full Avante News FAN (Oct. 18, 2023), available at https://fullavantenews.com/italian-media-reports-msc-profit-at-usd-38-billion-in-2022/. Based on the $38 billion figure above, even the $16 million total penalty the ALJ assessed is less than one two-thousandth of the company's reported 2022 profits.

Finally, MSC argues that the ALJ overstated the impact of the violations. In particular, MSC claims that there was no support

in the record for what the ALJ described as "the disproportionate administrative burden for MSC's customers." MSC Exceptions at 13 (quoting Decision at 47). But there is record support on that subject. The ALJ described examples of interactions MSC had with its customers about the overcharges in late 2021 and early 2022 — even after the billing system error had apparently been fixed — including multiple statements by MSC staff that NORs had been correctly charged at the reefer rate, which was inconsistent with MSC's own stated policy. *See* Decision at 20; *see also id*. at 47 (describing the role of the tariff violations in the NOR overcharges). It is plainly an "administrative burden" simply to have to challenge an overcharge with a major ocean carrier, much less to confront staff who insist the overcharge is correct, with no clear tariff to point to in response. And the record shows that there were customer disputes as to at least 925 containers in this period. *See id*. at 21. Even if the tariff itself played only a contributing role in the overcharges, the level of burden on customers does not support a reduction in the penalty.

In conclusion, the Commission upholds the $20,000 per-violation penalties the ALJ imposed for knowing and willful violations for the period from MSC's March 9, 2022, statement that it would revise its tariff to the last day before it actually did so, March 8, 2023, a total of 365 days, for a total penalty of $7.3 million. The ALJ also imposed a penalty for March 9, 2023, the date the tariff was changed, but since the record does not appear to reflect what time of day that change occurred, it is appropriate not to assess a penalty for that last day. We note that MSC's own suggested "maximum penalty" in the event a knowing and willful violation is found for that final period is $10,000 per day, consistent with its apparent agreement that any penalties be assessed on a daily, per-violation basis. *See* MSC Exceptions at 10. That $10,000 figure would result in a total penalty of $3.65 million for that period, or half the amount we impose. However, we note that the statute authorizes a maximum penalty of $74,943 per knowing and willful violation, which for 365 violations would result in a total penalty for

this period of more than $27.35 million. A total penalty of $7.3 million for this later period is reasonable.

In addition, it is appropriate to impose a section 40501 violation penalty of $5,000 per violation for the 432 days from the start of 2021 through March 8, 2022, for a total penalty for that earlier period of $2.16 million. The $5,000 figure is only about one third of the maximum $14,988 per day penalty the statute authorizes for a non-knowing and willful violation. That maximum penalty level would, if applied to the full period at issue, total more than $6.47 million. MSC itself concedes that, if a violation is found, a penalty of $5,000 per day would be "appropriate" for the 258-day period from the start of 2021 until September 15, 2021, the day before the internal billing error was fixed. MSC Exceptions at 9. MSC also argues for no penalty for the six-month period between September 16, 2021, and March 8, 2022. *See id*. at 9-10. But none of the factors discussed above call for a lower penalty for that period, certainly not the nature of the violation or MSC's culpability for it, particularly in light of the overcharges and confusion that continued into that period. *See* Decision at 20 (describing specific interactions with MSC customers regarding such overcharges). A total penalty of $2.16 million for this earlier period, from the start of 2021 through March 8, 2022, is reasonable.

Combining the above figures of (1) $2.16 million for the 432 non-knowing and willful violations in the earlier period and (2) $7.3 million for the 365 knowing and willful violations in the later period, we assess a total civil penalty for MSC's 797 section 40501 violations of $9,460,000.

D. The record shows that MSC violated 46 U.S.C. § 41102(c) by failing to observe a reasonable practice when it overcharged customers for demurrage and detention of NORs 2,629 times during a period of about nine months in 2021

OE argued to the ALJ that MSC had also violated 46 U.S.C. § 41102(c) by charging demurrage and detention for NORs at the higher rate for operating reefers, but the ALJ determined that those overcharges did not constitute a practice as required to show a violation under the statute. *See* Decision at 40-42. The ALJ concluded that, even though such overcharges occurred at least 2,629 times, that constituted only about 23% of MSC's U.S. demurrage and detention invoices for NORs in 2021, the company's policy was to bill NORs as dry containers, and the overcharges were errors caused by the internal billing issue noted above, rather than a practice. *See id*. OE now argues that so many overcharges in that period must be considered a practice, regardless of the cause, so the Commission should find violations of section 41102(c) and that those violations were knowing and willful. *See* OE Exceptions at 4-9.

On balance, the Commission finds the NOR overcharges did violate section 41102(c). Even if mainly an unintentional result of a belatedly-discovered billing system error, the thousands of overcharges were too numerous and frequent to be considered anything but an unreasonable practice – or stated another way, MSC failed to observe the reasonable practice of *not* overcharging by doing so 23% of the time. However, the record does not sufficiently support OE's position that the violations were knowing and willful. In particular, the record does not appear to show when, in the flow of invoices, there may have been sufficient awareness on MSC's part that the overcharges were occurring widely enough to constitute a violation of the statute. In light of all relevant considerations, as discussed below, the Commission assesses a penalty of $5,000 per violation, or $13,145,000 for the 2,629 violations.

1. MSC's billing of demurrage and detention for NORs at operating reefer rates violated section 41102(c)

As explained above, the essence of a section 41102(c) violation in this context is that an ocean carrier has failed to observe just and reasonable practices relating to the handling of property. There are five elements of a successful claim: (1) the respondent is an ocean common carrier or other covered entity; (2) the conduct alleged is "occurring on a normal, customary, and continuous basis"; (3) the conduct relates to the receipt, handling, storage, or delivery of property; (4) the conduct is unjust or unreasonable; and (5) the conduct is the proximate cause of the claimed loss. 46 C.F.R. § 545.4; *see* Decision at 24-25. Here, the first and third elements are undisputed, while the fifth need not be established for an agency enforcement claim.

a. MSC's 2,629 overcharges were a "practice" under section 41102(c)

The ALJ focused on the second element, whether MSC's NOR overcharges were a "practice," and concluded that they were not. *See* Decision at 40-42. The ALJ noted that the Sidoti declaration's explanation that the overcharges had resulted from an internal billing system error, leading to overcharges contrary to MSC's billing policy, was the only one in the record. *See id*. at 40-41. The ALJ found that this error, corrected in September 2021, had led to overcharging that was "a mistake" and not a "practice" under section 41102(c). *Id*. The ALJ acknowledged that overbilling had occurred at least 2,629 times, but noted that there was no bright-line number that would constitute a "practice," and stated that the overbilling had only occurred in 22.9% of the NOR invoices sent from January to September 2021. *Id*. The ALJ discussed the "normal, customary, and continuous" standard in the relevant regulation, noting that its administrative history relied on cases characterizing a practice as something "often repeated and customary," "habitually performed," or a "pattern," as compared to

occurrences that were "isolated," "occasional," or "a single incident." *Id*. at 41-42 (case citations omitted). The ALJ concluded that although MSC's NOR overbilling was "often repeated," the fact that it had occurred less than a quarter of the time during a limited period meant it was not "customary." *Id*. at 42. All of the overbilling appeared to stem from "a single, isolated clerical error," the ALJ stressed, and there was no "continuity" because the overcharges occurred over a limited period and then largely ended when the error was corrected. *Id*.

The ALJ's analysis has some appeal, particularly the finding that the NOR overcharges were the result of an error and contrary to MSC policy, but on balance we agree with OE that the thousands of overcharges in this record, which continued for well over eight months, violated section 41102(c). *See* OE Exceptions at 5-9. It appeared to be critical to the ALJ's analysis to characterize the overcharges as the result of a "mistake" rather than a "practice." But as OE argues, there is no intent requirement in the statute, and conduct can be both a mistake and a practice — a mistake can be often repeated, or have a series of effects so extensive that they must be considered to constitute a practice under any reasonable understanding of the term. *See id*. at 5-6. It would be inconsistent with the purpose of section 41102(c) to allow a carrier to escape liability for widespread and enduring unreasonable effects simply because they were caused by an error.

A practice within the meaning of section 41102(c) existed here. Focusing on elements of the administrative history of the relevant FMC regulation, the ALJ acknowledged that the overcharges were "often repeated," but found they were not "customary." Decision at 42. However, 2,629 overcharges in nine months or less — an average of about *10 overcharges per day, every day, for more than 250 consecutive days* — meets a reasonable understanding of "customary," and is also fairly considered a "pattern" of conduct that was "habitually performed." *Id*. at 41-42. Even more, looking at it from the other end of the analysis, it would be difficult to plausibly characterize the conduct at issue as

"isolated," "occasional," or "a single incident." *Id*. No FMC case has been cited in which such a high absolute number or percentage of occurrences at issue has been found to be "isolated" conduct beyond the reach of section 41102(c). Even the ALJ referred to the "isolated nature" of the few overcharges occurring *after* the billing system was fixed, contrasting them with the "widespread" earlier NOR overcharges mainly at issue here — a telling indication that as a whole, MSC's overcharges were not isolated. *Id*. at 42. The ALJ also noted that the billing system error was itself "isolated" and simply caused "widespread" effects through the power of automation, but it is those *effects* that constitute the violations of section 41102(c), not the root cause of the problem. *Id*. Many types of widespread improper conduct can be traced back to a single main cause, but that does not mean the resulting effects are isolated. The ALJ also suggests there was no "continuity" here because the overcharges mostly ended when the billing system was fixed, but as noted above, there was 10-times-per-day continuity for more than 250 consecutive days. *See id*.

It is certainly a relevant data point that, as the ALJ emphasized, only about 23% of the NOR bills in 2021 were overcharges, and so NOR billing was done correctly most of the time. *See* Decision at 40-41. But no case has been cited in which the FMC excused thousands of improper late fees simply because thousands of others were proper. Moreover, even if the overcharges were considered to fall short of a practice because they occurred in only a minority of the relevant cases, MSC would still have violated section 41102(c) in the sense that it "fail[ed]" to "observe" a proper practice by failing to do so 23% of the time, or almost one out of every four times. It is also worth noting that the factual record indicates that the overcharging happened in about 23% of all NOR bills during the *entire* year of 2021, or 2,629 of 11,480 invoices, not just all NOR bills during the period before the September 16 billing system fix. *See* Decision at 19-22, 42. Since it appears that only a few overcharges occurred after that billing system fix, all or virtually all overcharges occurred during the first three quarters of the year. *See id*. Therefore, assuming that NOR bills were issued at

a similar rate throughout the year, only about three quarters of the 11,480 total would have been issued before that fix was made. And so the overcharge rate in that key pre-October period would likely be considerably higher than 23%, even on the order of 30%.

MSC makes some of the arguments rejected above on the "practice" issue, but it frames some points differently. *See* MSC Reply at 2-4. In particular, MSC argues that it could have only one practice with regard to demurrage and detention billing for NORs — either billing them as dry containers was the practice, or billing them as operating reefers was — and so the improper billing could not have been the practice, since it happened only a minority of the time. *Id*. at 3. However, as discussed above, MSC points to no prior FMC case in which such an enormous and enduring stream of improper occurrences was found to be beyond the reach of section 41102(c) merely because many other occurrences were proper. Indeed, MSC's approach would apparently also excuse twice as many overcharges, up to 50% of the company's total 2021 NOR billing of 11,480 charges, or more than 5,700 overcharges. MSC cites no case in which the Commission required that a claimant show that the conduct at issue was happening more than 50% of the time across an entire respondent company in order to be considered a practice under section 41102(c).

MSC also relies on a recent ALJ decision for the proposition that "isolated" mistakes in demurrage and detention billing due to a lack of "systemic controls" merely show "sloppy recordkeeping," not a Shipping Act violation, but that reliance is misplaced. MSC Reply at 7; *see Bakerly, LLC v. Seafrigo USA, Inc.*, FMC Docket No. 22-17, Initial Decision at 47 (ALJ Jan. 3, 2024), *aff'd*, 2024 WL 4678461 (FMC Oct. 30, 2024). MSC cites only the ALJ's description of some of the claims being made, not the ALJ's actual analysis. And while the Commission should not have to search through a lengthy case discussion to understand MSC's argument, presumably MSC would point to the ALJ's conclusion that a practice had not been shown because the complainant had identified only "isolated instances of errors," "a tiny fraction of the charges,"

and "occasional minor mistakes." Initial Decision at 65-66; *see* 2024 WL 4678461, at *22 (the Commission describing evidence showing only "sporadic or isolated errors"). But there is nothing in *Bakerly* like the undisputed evidence of 2,629 improper overcharges that is present here, overcharges that cannot reasonably be termed "sporadic or isolated."

An even more recent FMC decision shows the difference between MSC's conduct here and conduct that has been found too isolated to be considered a practice under section 41102(c). *See Marine Transp. Logistics, Inc. v. CMA CGM S.A.*, FMC Docket No. 22-23, 2025 WL 1828626 (FMC June 27, 2025). In that case, the Commission found that a claimant had failed to show a "normal, customary, and continuous" practice as to alleged misconduct including demurrage charges as to eight containers, where five had been delayed by disruptions related to the war in Ukraine, another bound for Libya had been delayed by a violation of export rules, and the last two involved documentation problems and an admitted carrier error. *Id*. at *1, *5, *9. The Commission upheld the ALJ's finding that those issues, which had occurred over the course of two years, were "unique and isolated events," rather than a practice. *Id*. at *5, *9. By contrast, the current case — with thousands of overcharges in less than a year — presents a clear pattern, not a handful of anomalies.

b. MSC's NOR overcharges were unreasonable under section 41102(c)

The last element required to show a section 41102(c) violation is that the conduct at issue was "unjust or unreasonable." 46 C.F.R. § 545.4(d). Although the ALJ did not reach this issue, having found that the practice requirement discussed above was not met, both MSC and OE included briefing on the issue, and the factual record is adequate for the Commission to decide it. *See* OE Exceptions at 5; MSC Reply at 5-7.

Billing demurrage and detention charges for NORs at the higher rate for operating reefers meets the standard for "unjust or unreasonable" conduct based on the record in this case, as illustrated most immediately by the facts that such billing was contrary to MSC's own stated policy and that MSC voluntarily refunded all such overcharges. *See* Decision at 19-22. And more fundamentally, as OE notes, NORs do not require the "enhanced care" that operating reefers do, but instead are comparable to dry containers, and so billing for them at the higher rates charged for operating reefers would serve no reasonable purpose based on the record here. OE Exceptions at 5; Decision at 18-19.

MSC's arguments that billing for NORs as operating reefers is reasonable here are unpersuasive. *See* MSC Reply at 5-6. MSC does not dispute that its policy is to bill for operating reefers at higher rates than NORs, or that operating reefers require "enhanced handling and care," but it claims OE had to put forward more specific evidence about the relevant costs, suggesting that "it may well be that it is reasonable" to bill the NORs at the higher rates to incentivize freight fluidity. *Id*. However, the Commission must not only look at a narrow application of the incentive principle, but also consider all relevant factors, in a more holistic analysis of the reasonableness of demurrage and detention practices under 46 U.S.C. § 41102(c) and 46 C.F.R. § 545.5. *See Evergreen Shipping Agency (Am.) Corp. v. FMC*, 106 F.4th 1113, 1117-18 (D.C. Cir. 2024). It may be that simply charging higher fees, without limit, would provide some added incentive to move equipment. But such charges must still be reasonable. *See* 46 C.F.R. § 545.5(c) (the incentive principle is a factor the FMC considers "[i]n assessing the reasonableness of demurrage and detention" charges); Interpretive Rule on Demurrage and Detention Under the Shipping Act, 84 Fed. Reg. 48850, 48852 & n.11 (Sept. 17, 2019) (a covered practice must be "tailored to meet its intended purpose" (citation omitted)). And the record here belies MSC's suggestion that it was reasonable to bill NOR late fees at operating reefer rates. On the contrary, the record contains evidence that operating reefers require "the plugging and unplugging of the [refrigeration] units, daily monitoring,

electricity, pre-trip inspections for the units and generator, fuel for the generators, and other care" that NORs do not. Decision at 18-19. It is obvious that these features present significant additional costs to carriers, justifying higher charges. Lastly, MSC suggests that finding the NOR billing practice here unreasonable would be beyond the Commission's authority as a type of "rate regulation," but assessing whether rates and charges are reasonable in different contexts has been a permissible function of the agency for decades. *See*, *e.g.*, 46 U.S.C. § 41104(a)(4) and (a)(5) (requiring the Commission to directly evaluate whether rates charged reflect an "unfair or unjustly discriminatory practice"); 46 C.F.R. § 545.5 (Unjust and unreasonable practices with respect to demurrage and detention).

2. The record does not support a finding that MSC's violations of section 41102(c) through its NOR billing were knowing and willful

OE argues that MSC's violations of section 41102(c) through its NOR overcharges were knowing and willful. *See* OE Exceptions at 16-17. However, although MSC's delay in resolving the overcharge problem is troubling, in the end OE has not presented sufficient evidence to establish a knowing and willful violation.

As explained above, the standard for showing that a violation was knowing and willful is that a "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." *Rose*, 2001 WL 865708, at *47 (citations omitted). Here, OE argues that the thousands of 2021 overcharges meant that MSC knew or should have known what was happening, and that in particular, the disputes about more than 900 charges and more than $1 million in resulting refunds provided notice to MSC, yet it still did not fix the problem until its internal billing system change of September 16, 2021. *See* OE Exceptions at 16-17. OE also argues that the evidence shows

MSC executive Sidoti became aware of the internal billing system issue on September 2, 2021, yet the problem was not fixed until two weeks later on September 16, with that delay apparently indicating willful conduct in OE's view. *Id*.

OE's arguments about MSC's knowledge prior to September 2, 2021 are substantial. We would expect an organization with the resources of MSC to gain an awareness, before the passage of eight months and customer disputes as to hundreds of charges, that there was a serious problem with its billing of demurrage and detention for NORs. But in this case, OE has not presented enough specific evidence that MSC both knew the facts of the violation and acted with plain indifference to the requirements of the law prior to September 2. The record does not indicate such awareness by Sidoti or apparently any other MSC manager prior to that point. And although many of the 2021 billing disputes presumably occurred before that point, the record does not appear to include enough as to the knowledge of specific personnel, nor does OE point to any such specific evidence. *See* Decision at 18-22; OE Exceptions at 16-17. The Commission cannot simply assume that the violations were knowing and willful from the time of the first overcharge. So it would have to choose some later point — or some later overcharge in the mass of 2,629 overcharges — at which MSC would be deemed to have gained the requisite awareness that it was overbilling for NORs at a level sufficient to be a prohibited practice under section 41102(c), since as we have discussed, overbilling in one case or an isolated number of cases would not be sufficient. The record does not show that MSC had that knowledge prior to September 2, 2021.

As for the period between September 2, 2021, and the billing system fix on September 16, 2021, although OE appears to suggest that delay indicates willfulness, two weeks does not sufficiently evidence "plain indifference" in the circumstances of a large institution that presumably had multiple levels of review and consultation to complete in making the change. *See* OE Exceptions at 16. Certainly, that two weeks presents a stark contrast with the 52 weeks it took for the company to change its tariff after the MSC

(USA) president told the FMC that it was planning to do so, after the FMC had already conveyed its concerns on the matter a month earlier. And even if we were to consider as knowing and willful all overcharges sent after September 2, the record does not clearly show how many there were. *See* Decision at 19-22, 42.

3. It is appropriate to assess civil penalties for MSC's violations of section 41102(c) of $5,000 per violation

The Commission assesses civil penalties of $5,000 per violation for MSC's 2,629 violations of 46 U.S.C. § 41102(c) through overcharging for demurrage and detention for NORs, for a total penalty of $13,145,000. This amount reflects the seriousness of the violations and the time MSC took to address the issue, but it is modest in relation to the maximum amount authorized for such non-knowing and willful violations, in recognition of mitigating factors.

As noted above, Congress has authorized civil penalties for Shipping Act violations, as adjusted for inflation in 2025, of up to $14,988 per violation and $74,943 per knowing and willful violation. *See* Decision at 43; 46 U.S.C. § 41107(a); 46 C.F.R. § 506.5; 90 Fed. Reg. 3039, 3040 (Jan. 14, 2025). Thus, the statute would authorize a total maximum penalty for the 2,629 violations at issue, at $14,988 per violation, of more than $39.4 million. In determining penalty amounts, the Commission "shall take into consideration – (A) the nature, circumstances, extent, and gravity of the violation committed; (B) and, with respect to the violator – (i) the degree of culpability; (ii) any history of prior offenses; (iii) the ability to pay; and (iv) such other matters as justice may require." Decision at 43 (quoting 46 U.S.C. § 41109(b)(1)); *see* 46 C.F.R. § 502.603(b).

The $5,000 figure is reasonable in light of all relevant factors under 46 U.S.C. § 41109(b)(1). First, as with the $5,000 per violation penalties assessed for the other two violations discussed above, this penalty is only about one third of the $14,988 maximum

the statute authorizes for a non-knowing and willful violation. MSC has not objected to the $5,000 per violation penalties assessed for its violation of this same statutory provision, section 41102(c), through the use of the merchant clause to bill notify parties. And MSC concedes that, if a violation is found as to the tariff publication rules of section 40501, a penalty of $5,000 per day would be "appropriate" for the early period before the internal billing error was fixed. MSC Exceptions at 9.

A $5,000 penalty amount is justified by the serious nature of the NOR overcharges and MSC's culpability, including the more than eight months it took MSC to address the problem, as well as the burdens on MSC customers who were overcharged and had to seek refunds, a process that continued into early 2022 and included the additional burden of some MSC employees insisting that the charges were correct. *See* Decision at 20 (describing specific interactions with MSC customers). At the same time, that penalty amount reflects mitigating factors. MSC did provide voluntary refunds of the overcharges, which were evidently contrary to the company's policy and mainly the result of a billing system error that MSC voluntarily corrected, and the overcharges occurred at the height of the pandemic when the system was under stress.

MSC argues that even if a violation is found, no penalty should be imposed here. MSC Reply at 8. MSC claims that the penalty the ALJ imposed for the section 40501 violations was "already excessive," and that assessing that penalty and one for the NOR overcharges under section 41102(c) would amount to penalizing the same conduct twice. *Id*. Those claims are incorrect. First, the Commission has reduced the almost $16 million in penalties the ALJ imposed for the section 40501 violations to penalties that total less than $10 million, and that is not excessive in this case. Second, while the unlawful conduct at issue under these two provisions is related, it is clearly distinct conduct in violation of provisions that serve distinct purposes, and there is no basis to reduce the already modest per-violation amounts here on that score. Section 41102(c) requires carriers to observe reasonable practices in

handling cargo, and overbilling for demurrage and detention charges is one way in which carriers can violate that provision. By contrast, section 40501 simply requires carriers to publish tariffs with the important features of their transportation services, including rates and charges, in order to enable the shipping public to make informed choices. These Shipping Act provisions play complementary roles, but they regulate different conduct, and the conduct at issue here is different: sending out excessive bills, on the one hand, and failing to publish a clear public statement of key business terms, on the other.

MSC relies on two cases, but they are easily distinguished. In *World Line Shipping, Inc. – Order to Show Cause*, FMC Docket No. 00-05, 2002 WL 207539 (FMC Jan. 24, 2002), the Commission upheld an ALJ decision not to assess civil penalties for seven violations of prior cease-and-desist orders on top of imposing the then-maximum available penalties of $27,500 for each of 25 violations of a predecessor to 46 U.S.C. § 40903, regarding licensing requirements for ocean transportation intermediaries. The Commission stated that imposing further penalties for essentially the *same underlying violation* "could be considered overreaching" and would exceed the maximum statutory penalty for each violation. *Id*. at *2, *5. But in the current case, MSC has violated entirely distinct requirements of the Shipping Act. And because the violations are distinct, they occurred in different ways and a different number of times: 2,629 NOR overcharges vs. 797 daily tariff publication failures. In addition, even if both sets of per violation penalties here were added together, although that would make little sense since the relevant conduct is so different, they would still fall far short of the maximum applicable limits. Adding a $5,000 section 41102(c) penalty to a $5,000 section 40501 penalty would total $10,000 per violation, well under the current $14,988 maximum for non-knowing and willful penalties. Likewise, adding that $5,000 penalty to a $20,000 knowing-and-willful section 40501 penalty would total $25,000, far short of the combined maximum penalty amounts.

In the other case, *Sea-Land Service, Inc. – Possible Violations of Section 10(b)(1), 10(b)(4) and 19(d) of the Shipping Act of 1984*, FMC Docket No. 98-06, 2006 WL 2007809 (FMC Feb.

8, 2006), the Commission declined to impose penalties for violations of both sections 10(b)(1) and 10(b)(4) of a former version of the Act, where the *same conduct* violated both. *See id*. at *20, *24. There was a substantial overlap between the conduct prohibited by those two provisions, which both focused on persons paying a carrier amounts that were not in accord with the applicable tariffs or service contracts. But in the current case, as explained above, the conduct at issue is plainly *not* the same. MSC's tariff publication failures are not alleged to violate section 41102(c), nor could MSC's NOR overcharges violate section 40501.

In sum, it is appropriate to assess civil penalties of $5,000 per violation for MSC's 2,629 violations of 46 U.S.C. § 41102(c) through overcharging for demurrage and detention for NORs. The total penalty for those violations is $13,145,000.

E. The penalty imposed in this agency enforcement action for MSC's violations of 46 U.S.C. § 40501 is consistent with the Constitution

MSC argues that the penalty the ALJ imposed for the section 40501 violations is unconstitutional, but its claims are incorrect. *See* MSC Exceptions at 13-17. First, MSC argues that the penalty assessed under section 40501 violates the Seventh Amendment because the substantive Shipping Act claim supporting that penalty is in the nature of a common law action, so the penalty could only be imposed by a federal court, relying on the Supreme Court's recent decision in *Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109 (2024). *See id*. at 13-15. Second, MSC argues that the ALJ lacked authority to impose any penalty because FMC ALJs are protected from removal by the President to an extent that is inconsistent with the Take Care clause of Article II. *See id*. at 15-17.

As an initial matter, we note that the ALJ did not evaluate these claims. The ALJ stated that MSC had submitted the Supreme Court's *Jarkesy* decision as supplemental authority, but that MSC had made no argument related to that case. *See* Decision at 23. The

ALJ said that in any event, such constitutional claims are generally considered to be beyond the authority of administrative agencies to resolve. *See id*. We note that MSC's approach gave the ALJ no real opportunity to evaluate its Seventh Amendment claims, and no opportunity at all to evaluate its Article II claims, which the Supreme Court did not reach in *Jarkesy*.

1. The penalty imposed for MSC's section 40501 violations is consistent with the Seventh Amendment

The civil penalty imposed against MSC for violations of the tariff-publication requirements of 46 U.S.C. § 50401 is consistent with the Seventh Amendment. Such claims have no common law analogs, and in any case they fall within the public rights exception to the rule applied in *Jarkesy*, because Congress has permissibly authorized the FMC to adjudicate them pursuant to its plenary power to regulate foreign commerce. MSC raises no constitutional challenge to the penalties imposed for violations of 46 U.S.C. § 41102(c). *See* OE Reply at 11 n.5.

a. The Supreme Court's *Jarkesy* decision

The Seventh Amendment provides that "the right of trial by jury shall be preserved" for "[s]uits at common law, where the value in controversy shall exceed twenty dollars." U.S. Const. amend. VII. The Amendment preserves that right "as it existed in 1791," and it also applies to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts" when the United States was founded. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41-42 (1989).

In *Jarkesy*, a securities fraud action, the Supreme Court determined that when federal agencies initiate enforcement proceedings in certain contexts, respondents are entitled to choose a jury trial under the Seventh Amendment, and that requires that cases

be brought in an Article III court, rather than before agency ALJs. *See* 603 U.S. at 120-36. The Court laid out a two-part analysis to determine if a particular proceeding must be brought in court on that basis.

First, *Jarkesy* stated, a court must ask whether the specific claims at issue "replicate" common law claims; if so, the Seventh Amendment is implicated and there is generally a right to a jury trial. 603 U.S. at 120. The Seventh Amendment guarantees the right of trial by jury for "[s]uits at common law," which the Court distinguished from those brought in "equity, and admiralty, and maritime jurisprudence." *Id*. at 122 (cleaned up). To determine when a suit was one at common law, the Court asked whether it was "legal in nature," with the remedy sought being the more important consideration. *Id*. at 122-23. The Court found that the SEC was seeking civil penalties, a remedy that was punitive rather than compensatory, and so it would traditionally be available only in courts of law. *See id*. at 123-25. The Court stated that this determination "effectively decides" this first part of the analysis, but to confirm that conclusion, it still went on to examine the relation between the securities fraud at issue in *Jarkesy* and common law fraud. *Id*. at 125; *see id*. at 125-26. Although the actions were not identical, the Court found that "[b]oth target the same basic conduct: misrepresenting or concealing material facts," and the Court noted that "[o]ur precedents therefore often consider common law fraud principles when interpreting federal securities law." *Id*. at 125-26 (cleaned up). Therefore, the Court concluded that the securities action was legal in nature and the Seventh Amendment applied. *Id*. at 126.

Second, even if the Seventh Amendment was implicated, *Jarkesy* recognized that the right to a jury trial is not available if the agency's action is subject to the "public rights" exception. *See* 603 U.S. at 120. That exception applies if the case falls "within any of the distinctive areas involving governmental prerogatives where the Court has concluded that a matter may be resolved outside of an Article III court, without a jury." *Id*. The Court did not define the

precise contours of the public rights exception, but it explained that the exception had been extended to a variety of areas including the collection of federal government revenue, the granting of public benefits, the administration of public lands, relations with Indian tribes, and *the regulation of foreign commerce*, as well as the assessment of tariffs on foreign goods. *See id*. at 128-31.

The Court then resolved the public rights issue in the securities fraud case at hand by determining that the case had more in common with *Granfinanciera* than it did with *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). *See Jarkesy*, 603 U.S. at 132-40. In *Granfinanciera* the Court had found that Congress, in assigning a fraudulent conveyance action by a bankruptcy trustee to a bankruptcy court, had "simply reclassified a pre-existing, common-law cause of action," a "purely taxonomic change," rather than creating anything new. 492 U.S. at 60-61 (cleaned up). The *Jarkesy* Court found this similar to the securities fraud situation it was evaluating. *See* 603 U.S. at 132-34. The Court then distinguished *Atlas Roofing*, which had found that certain Occupational Safety and Health Act violations could be administratively adjudicated, because the statute involved there "did not borrow its cause of action from the common law," nor did it "reiterate common law terms of art"; instead, it created a new set of standards that "resembled a detailed building code." *Jarkesy*, 603 U.S. at 136, 137; *see id*. at 138-40.

b. The Seventh Amendment does not appear to apply to the section 40501 claims here because there is no common law analog to the tariff-publication rules

Even under the first part of the *Jarkesy* analysis, MSC's violation of 46 U.S.C. § 40501 here does not appear to implicate the Seventh Amendment. It is true that this case involves civil penalties designed to punish rather than compensate, which the *Jarkesy* Court appeared to find was close to dispositive of this first part of the analysis, meaning the Amendment is likely to apply. However,

because the Court went on to evaluate whether there was a "close relationship" and "enduring link" between the claims at issue and similar claims under the common law in order to confirm its conclusion, that further analysis is appropriate here as well. *Jarkesy*, 63 U.S. at 125.

In contrast to the fraud claims in *Jarkesy*, section 40501's tariff-publication rules do not "replicate" any common law claim. 603 U.S. at 120. Instead, their roots are in Congress's revisions to the Shipping Act, in accord with its assessment of evolving needs in the regulation of foreign maritime commerce. The Shipping Act of 1916, which created the FMC's predecessor the U.S. Shipping Board, did not require that tariffs be filed or made publicly available by ocean carriers engaged in "foreign commerce," although it did so for those engaged in domestic commerce. *See* Shipping Act of 1916 (Sept. 7, 1916), Pub. L. 64-260, 39 Stat. 728, 735, sec. 18; *see also* H.R. Rep. 98-53(I), 1983 WL 25382, at *18-19 (Apr. 12, 1983) (discussing the legislative background of a precursor to the Shipping Act of 1984) (1983 House Report). The 1983 House Report noted that the lack of such filed tariffs hampered efforts by the Shipping Board to enforce anti-discrimination elements of the 1916 statute. *See* 1983 House Report, 1983 WL 25382, at *19. However, 1961 amendments established the FMC and required carriers engaged in foreign commerce to "file with the Commission and keep open to public inspection tariffs" showing rates, charges, and related rules. 1961 Amendments (Oct. 3, 1961), Pub. L. 87-346, 75 Stat. 762, 764-65, sec. 4; *see* 1983 House Report, 1983 WL 25382, at *19. The Shipping Act of 1984 largely adopted this basic rule, requiring all "common carriers" to "file with the Commission, and keep open to public inspection" tariffs with similar categories of information. Shipping Act of 1984 (Mar. 20, 1984), Pub. L. 98-237, 98 Stat. 67, 74, sec. 8(a). Finally, a 1998 revision required that such tariffs be made available to the public through an "automated tariff system" to be established or obtained by the carrier, at the same time eliminating the requirement that the tariffs be filed. Ocean Shipping Reform Act of 1998 (Oct. 14, 1998), Pub. L. 105-258, 112 Stat. 1902, 1905, title I, sec. 106(a); *see* S. Rep. 105-61, 1997 WL

441767, at *22-23 (July 31, 1997) (describing shift to private automated tariff systems in a proposed precursor to the 1998 Act). That is essentially the system that remains in place.

Today, section 40501 sets out a detailed framework requiring the publication, through an "automated tariff system," of key business terms by ocean carriers. These include the "rates, charges, classifications, rules, and practices" described in section 40501(a), with six categories of required information listed in section 40501(b), including stating where cargo is carried, classifications of cargo, and compensation of ocean freight forwarders. Typically, this information is provided in electronic databases available online. MSC's website, for example, states that interested persons can "[a]ccess MSC's public tariff via the Descartes database, which includes all rates and rules that may apply to shipments to or from the United States, in accordance with FMC requirements." MSC Applicable Rates Tool, https://www.msc.com/en/local-information/america/united-states#ApplicableRatesTool (last visited Dec. 1, 2025); *see* Decision at 5. Descartes Systems Group states that it has "the industry's most complete offering of cloud-based logistics and supply-chain management solutions," including "import duty and tariff data covering 175+ countries, with [Harmonized Tariff Schedule] codes, duty rates, tariffs, rulings, [Free Trade Agreements], and regulations." Descartes, https://www.descartes.com/home; Duty and Tariff Data Solutions, available at https://www.descartes.com/solutions/global-trade-intelligence/duty-and-tariff-data (last visited Dec. 1, 2025).

In sum, this complex, steadily evolving system of tariff disclosure rules reflects no "close relationship" or "enduring link" with any 18th-century common law claim. *Jarkesy*, 63 U.S. at 125. Thus, even though civil penalties are at issue in this case, the situation is distinguishable from the one in *Jarkesy* and the Seventh Amendment would not appear to apply.

MSC cites no specific common law analogs, but it argues that section 40501's requirements are based on "the obligation of common carriers at common law to serve the shipping public in a non-discriminatory fashion." MSC Exceptions at 15. However, section 40501 requires that certain specific information be made public by certain entities engaged in foreign commerce. Showing that these particularized statutory requirements relate to or share an underlying policy goal with a general common law duty does not show that they "replicate" a common law claim. We are aware of no common law claim to obtain publication of the types of highly detailed shipping information from ocean carriers described above, certainly not one in existence at the founding of the United States. MSC relies generally on the discussion in the 1983 House Report discussed above, but that report says nothing about what the common law required, focusing instead on tariff filing and publication requirements in prior statutes, which if anything underlines how much a creature of those statutes the tariff provisions are. *See* 1983 House Report, 1983 WL 25382, at *18-19. MSC also relies on 46 U.S.C. § 41104(a)(4) and (a)(8), which prohibit certain discriminatory practices for service pursuant to a tariff. But again, that does not provide a sufficient link between an identifiable common law claim and the tariff-publication requirements of section 40501.

Finally, MSC relies on a limited amount of domestic railroad case law, but that reliance is misplaced. *See* MSC Exceptions at 15. MSC cites a 1940 state case brought by a fruit vendor against a railroad alleging unreasonable discrimination in the transport of goods. *Id*. (citing *Hewitt v. N.Y., N.H. & H.R. Co.,* 284 N.Y. 117, 123 (1940)). In *Hewitt*, the court stated that "[a]t common law, railroad carriers are under a duty to serve all persons without unjust or unreasonable advantage to any," 284 N.Y. at 122, and the court quoted a prior case's statement that the Interstate Commerce Act's prohibition of such conduct was "merely declaratory of the common law," *id*. at 123 (quoting *Lowry v. Chicago, B. & Q. R. Co.*, 46 F. 83, 85 (Circ. Ct., D. Neb. 1891)). The *Hewitt* court found that the Interstate Commerce Act did not displace this common law damages

claim. *Id*. However, the court was careful to distinguish Congress's conferral on the Interstate Commerce Commission (ICC) of the power to require carriers "to make reasonable schedules of rates and to adopt reasonable rules and general administrative practices which must be uniformly observed." *Id*. at 123-25. The court stressed that a court hearing a common law damages claim could not pass judgment on such a statutorily-required rate schedule or related rules; only the ICC could decide such issues, which were not a part of the common law action. *See id*. Thus, *Hewitt*'s vague references to a common law obligation by railroads not to discriminate in domestic transport do not support the claim that there is a common law analog to this ocean-carrier tariff-publication enforcement action.

c. Even if the Seventh Amendment did apply to section 40501 claims, they would be subject to the public rights exception recognized in *Jarkesy*

Even if the Seventh Amendment did apply to claims alleging a violation of the tariff-publication requirements of section 40501, such claims would not be subject to a jury-trial requirement because they fall well within the public rights exception recognized in *Jarkesy*. Indeed, those statutory requirements are quintessential examples of "public rights." They are part of a unique structure of foreign maritime commercial regulation, established by Congress to serve the sovereign interests of the nation, rather than reproducing any basic common law rule that has governed relations between private parties for centuries. Indeed, the nature of section 40501 is evident even in its core requirement that ocean carriers keep the specified tariff information continually available for "*public* inspection." 46 U.S.C. § 40501(a)(1) (emphasis added).

Although the Supreme Court has evaluated the application of the Seventh Amendment in this context mainly on the basis of the specific claim at issue, the larger regulatory context is relevant. The Shipping Act is one of the "distinctive areas involving governmental prerogatives" where matters may be resolved outside of an Article

III court, without a jury. *Jarkesy*, 603 U.S. at 120; *see id*. at 128-31. The Act regulates "the foreign commerce of the United States" in order to promote an efficient, competitive, and economical ocean transportation system. 46 U.S.C. § 40101 (Purposes); *see* 46 U.S.C., Chapter 411 (Prohibitions and Penalties), Chapter 413 (Enforcement). Indeed, the phrase "foreign commerce of the United States" would have no meaning in the context of common law claims "ordinarily decided in English law courts" at the time the United States was founded. *Granfinanciera*, 492 U.S. at 41-42. Although common law principles may at times inform the analysis of some claims under the Act, the statute was created not to reproduce English common law claims, but to advance the interests of the growing United States in foreign maritime commerce since the early part of the 20th century. *See* Decision at 23 (the FMC must address alleged Shipping Act violations, as no common law remedy exists for them (citing *Cargo One, Inc. v. COSCO Container Lines Co.*, FMC Docket No. 99-24, 2000 WL 1648961, at *15 (FMC Oct. 31, 2000))).

Jarkesy explicitly recognized the public nature of foreign maritime commerce regulation in its discussion of the public rights exception. In particular, the Court carefully distinguished Congress's plenary power to regulate *foreign* commerce, including ocean commerce, from the domestic fraud context the case addressed. *See* 603 U.S. at 129-30 & n.1. In doing so, the Court discussed *Ocean Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909), a challenge to a monetary penalty imposed on a steamship company, emphasizing that that case "expressly confines its analysis to the exercise of Congress's power over *foreign* commerce," which is "so total" that no party has a vested right to import anything, and which includes the "plenary power in respect to the exclusion of merchandise brought from *foreign* countries." *Id*. (last quote from *Oceanic Steam*, 214 U.S. at 334, in turn quoting *Buttfield v. Stranahan*, 192 U.S. 470, 492 (1904); emphases in *Jarkesy*); *see Buttfield*, 192 U.S. at 492-93 (discussing the scope of the "complete power of Congress over foreign commerce," which includes the

power to enact embargoes, tariffs, exclusions, and import standards for various goods).

The Constitution itself makes clear that the Framers sought national uniformity in the future regulation of maritime commerce — for example in the Port Preference Clause — underlining that such uniformity was not a well-recognized feature of the pre-existing common law. *See* U.S. Const. Art. I, Sec. 9, Clause 6 (barring preferences between ports because of their location in different states); The Federalist Papers (C. Rossiter ed. 1961), No. 22 (Hamilton) at 144 (the lack of national authority over commerce had harmed efforts to gain favorable foreign commercial relations and would "continue to do so as long as the same obstacles to a uniformity of measures continue to exist"); *FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 767-68 (2002) ("the Federal Government undoubtedly possesses an important interest in regulating maritime commerce").

The Commission's current enforcement of the Shipping Act serves these vital public interests. The Supreme Court has long recognized that the agency is "the expert body established by Congress for safeguarding this specialized aspect of the national interest." *California v. United States,* 320 U.S. 577, 584 (1944) (referring to the U.S. Maritime Commission, a predecessor of the FMC); *S.C. State Ports*, 535 U.S. at 767-68 (to serve the national interest in regulating maritime commerce, the FMC can initiate enforcement proceedings "to investigate alleged violations of the Shipping Act").

Turning to the specific section 40501 tariff-publication claims at issue here, it is evident that they qualify for the public rights exception under the analytical framework in *Jarkesy* because they closely resemble the claims in *Atlas Roofing*. *See Jarkesy*, 603 U.S. at 132-40. In *Atlas Roofing*, the relevant occupational safety and health statute "did not borrow its cause of action from the common law," and the specific rules at issue "resembled a detailed building code." *Jarkesy*, 603 U.S. at 136, 137. Here, there is

similarly no common law claim that an ocean carrier has failed to properly publish tariffs in accord with rules like those in section 40501. The tariff-publication requirements constitute a detailed framework of prophylactic rules designed, as explained above, to serve a need that Congress determined was not being met. *See Atlas Roofing*, 430 U.S. at 444-45 (Congress determined that existing common law and statutory remedies were inadequate). Indeed, the basic concept of an automated tariff system is "unknown to the common law." *Jarkesy*, 603 U.S. at 137 (quoting *Atlas Roofing*, 430 U.S. at 461). And section 40501's lists of required elements and exceptions have no common law analogs. *See* 46 U.S.C. § 40501(a)(1) (tariffs must show all "rates, charges, classifications, rules, and practices" on covered routes); *id*. § 40501(a)(2) (paragraph (a)(1) does not apply to "bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste"); *id*. § 40501(b) (tariffs must state places between which cargo will be carried; list cargo classifications; state compensation levels of ocean freight forwarders; state separately terminals and facilities under the control of carriers and any rules that affect rates or charges; include samples of documents evidencing transportation agreements; and include copies of any loyalty contract). Of course, the Commission has provided even more detail in its regulations. *See* 46 U.S.C. § 40501(g) (requiring the FMC to issue regulations); 46 C.F.R. Part 520 (Carrier Automated Tariffs). And the complex way electronic publication of tariffs actually works today, as described above, underlines the extent to which these rules are examples of modern statutory policy-making. Indeed, section 40501 is public in nature partly because it requires carriers to affirmatively and continually make available to the public a detailed framework of information.

Section 40501's requirements are easily distinguished from the type of regulation at issue in *Jarkesy* and *Granfinanciera*. In particular, the tariff-publication rules cannot be said to "target the same basic conduct," "employ the same terms of art," or "operate pursuant to similar legal principles" as any common law claim, unlike the fraud claims in *Jarkesy*. 603 U.S. at 134. Nor does section

40501 amount to the simple "reclassifying" of a "pre-existing, common-law" claim or a "purely taxonomic change," as with the fraudulent conveyance claim in *Granfinanciera*. 492 U.S. at 60-61. MSC tries to collapse section 40501's detailed publication rules with broad anti-discrimination claims, but while such claims may have some overlapping purposes, they are clearly distinct in terms of their basic scope and operation. *See* MSC Exceptions at 15.

Two recent Third Circuit decisions provide an instructive contrast similar to the one *Jarkesy* identified in *Atlas Roofing* and *Granfinanciera*, and together they strongly support the application of the public rights exception here. In *Axalta Coating Systems v. Federal Aviation Administration*, 144 F.4th 467 (3d Cir. 2025), the court evaluated an enforcement action the FAA had brought against a company for failing to package a can of flammable paint in accord with the agency's hazardous materials regulations. *See id*. at 471-72. After a careful analysis, the court found that the FAA action was like the one in *Atlas Roofing*, not *Jarkesy*, because the rules at issue were not based on any common law claim, but instead "consist[ed] of technical prescriptions for engaging in the regulated activity." *Id*. at 476; *see id*. at 473-76. The court rejected claims that the relevant statute's use of common law terms in a definition of when a person violates it "knowingly" meant that an effort to enforce the regulations was basically a common law negligence action; those terms did not "define the circumstances under which a person violates" the regulations, but merely when that occurred "knowingly." *Id*. at 477 (cleaned up).

In this case, although section 40501 is less quantitatively precise than some of the FAA regulations in *Axalta*, its provisions likewise create technical tariff-publication standards that are "unknown to the common law." 144 F.4th at 477 (cleaned up). And MSC's effort to drag those standards into the common law tradition by arguing that they relate to or advance broad common law anti-discrimination goals is similar to the common-law-by-association argument the *Axalta* court rejected. No common law anti-

discrimination principle "define[s] the circumstances" under which a party violates section 40501. *Id*.

In *Sun Valley Orchards, LLC v. United States Department of Labor*, 148 F.4th 121 (3d Cir. 2025), a different panel of the Third Circuit reached the opposite result. That court found that the U.S. Department of Labor (DOL) could not administratively impose civil penalties for violations of regulatory labor standards, even though those standards were established under the H2-A nonimmigrant visa program, because the standards had been incorporated into what amounted to a "work contract." *Id*. at 124. Following the framework of *Jarkesy*, the court first determined that the DOL action was in the nature of a common law suit because the agency's claims were embodied in a job order that was effectively a contract, with references to the employer's "contractual obligations" in both the regulatory language and DOL communications about the enforcement action. *Id*. at 128-29. The fact that the DOL had sought civil penalties confirmed that its action was in the nature of a common law claim. *See id*. at 129. Turning to the second part of the *Jarkesy* analysis, the court rejected the DOL's argument that the public rights exception applied because the case was really about immigration. *See id*. The court acknowledged that adjudication outside of court was available for some immigration-related matters, but it determined that the case at hand did not qualify because the specific claims at issue were really about domestic labor standards. *Id*. at 129-31.

The claims in *Sun Valley* are not like the section 40501 claims in this case. The *Sun Valley* claims were *explicitly* brought under common law standards for breach of contract, based on the employer's "contractual obligations," in clear contrast to the tariff-publication rules at issue here. And that court rejected efforts to characterize the case as an immigration one simply because the standards at issue were related to immigration law. MSC's similar efforts to recast this matter as one that is about common law anti-discrimination standards simply because the tariff-publication rules serve broad anti-discrimination goals must also fail.

An even more recent Fifth Circuit decision also supports the conclusion that the section 40501 claims at issue here fall within the public rights exception. *See Ortega v. Off. of the Comptroller of the Currency*, 155 F.4th 394 (5th Cir. 2025), *pet. for reh'g en banc filed*, No. 23-60617 (Oct. 21, 2025). In *Ortega*, the court rejected claims that civil penalties awarded by an ALJ in an action by the Office of the Comptroller of the Currency (OCC) to enforce provisions of federal banking statutes against former officers and directors of a failed community bank violated the Seventh Amendment. *See id*. at 402-07. In distinguishing *Jarkesy*, the Fifth Circuit first noted that Congress had always required that the OCC bring any such enforcement actions within the agency, whereas the SEC had long been required to bring its enforcement actions for fraud in court, only receiving the option to do so "in-house" in 2010, as *Jarkesy* had highlighted in its public rights analysis. *Id*. at 403-04. In this respect the OCC's situation is like that of the FMC, which has never been authorized to bring actions to enforce section 40501 in court; the type of administrative action involved in the current case under 46 U.S.C. §§ 41302 and 41304 is the only option. The *Ortega* court also distinguished *Jarkesy* on the basis that the OCC action was not an instance of an agency regulating transactions between private parties, but instead was an action to "vindicate [the] safety [of] the banking system at large," as historical analysis showed. *Id*. at 404; *see id*. at 404-07. Similarly, this section 40501 action is an effort to ensure compliance with broad tariff-publication requirements that benefit the public by promoting the integrity of ocean maritime commerce as a whole.

In sum, the section 40501 claims under review qualify for the public rights exception by virtue of their specific nature, in the context of the Act's overall framework of foreign maritime commerce regulation. As a result, MSC's claim that the civil penalties imposed for violations of that provision should be set aside on the basis of the Seventh Amendment is incorrect.

2. MSC has failed to show any harm from the removal protection applicable to ALJs, and so its Article II claim is no basis to set aside any agency action in this case

MSC argues that the removal protection applicable to Commission ALJs violates the Take Care clause of Article II, but there is no basis to set aside any agency action here, because MSC has failed to show any harm. *See* MSC Exceptions at 15-17. MSC argues that because ALJs perform executive functions in managing adjudications, they must be subject to removal by the President under Article II, yet they have "multiple tiers of job protection," since they can be removed only for "good cause," as determined by the Merit Systems Protection Board, whose members can themselves only be removed for poor performance or misconduct. *Id*.; 5 U.S.C. § 7521(a) (ALJs are removable for "good cause"); 5 U.S.C. § 1202(d) (the President may remove MSPB members for "inefficiency, neglect of duty, or malfeasance in office"). MSC relies on the Fifth Circuit's decision in *Jarkesy*, which MSC argues concluded that similar restrictions on the removal of the SEC's ALJs were unconstitutional, although the Supreme Court did not reach that issue in its *Jarkesy* decision. *See Jarkesy v. SEC*, 34 F.4th 446, 463-64 (5th Cir. 2022), *aff'd on other grounds*, 603 U.S. 109. But the removal protection that ALJs have is no basis to set aside any remedy imposed here, even apart from the constitutionality of the relevant statutes, because MSC has shown no harm caused by such protection, as it must in order to prevail.

Congress created the positions now known as administrative law judges to serve as "semi-independent subordinate hearing officers" within agencies. *Ramspeck v. Fed. Trial Examiners Conf.*, 345 U.S. 128, 132 (1953) (cleaned up). ALJs were afforded a "qualified right of decisional independence," *Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980), designed to rebut allegations that they might be "mere tools of the agency," *Ramspeck*, 345 U.S. at 131. To that end, Congress has directed that an agency like the FMC may

remove an ALJ "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a). That "good cause" standard mirrors other longstanding statutory removal restrictions for adjudicators who are not afforded the protections of Article III judges. *See, e.g.*, Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (Court of Claims); Act of June 17, 1930, ch. 497, §§ 518, 646, 46 Stat. 590, 737-39, 762 (Customs Court and Court of Customs and Patent Appeals). Of course, as this case shows, agencies like the FMC have plenary power to review, reverse, and otherwise modify ALJ decisions. *See* 5 U.S.C. § 557(b); 46 C.F.R. § 501.3(e) (FMC's Office of Administrative Law Judges); 46 C.F.R., Part 502 (FMC's Rules of Practice and Procedure), Subpart M (Decisions; Appeals; Exceptions).

In any event, MSC has failed to show that it has suffered compensable harm warranting relief as a result of the ALJ removal protection at 5 U.S.C. § 7521, as it must to have any agency action set aside on that basis. *See Collins v. Yellen*, 594 U.S. 220 (2021). In *Collins*, the Supreme Court determined that even though the removal protections applicable to the Director of the Federal Housing Finance Agency were unconstitutional, that was insufficient to have the Director's actions set aside; to obtain that remedy, a claimant had to demonstrate harm *caused by the removal protection*. *Id*. at 257-60.

Relying on *Collins*, appellate courts in at least nine Circuits have refused to enjoin or reverse agency action based on removal-protection challenges where, as here, there was no evidence that the removal protections had actually harmed the claimant. In *Axalta*, for example, the court concluded that the claimant challenging the decision of the FAA's ALJ had not shown the requisite harm merely based on "the fact of having been made to appear before an ALJ who benefited from allegedly unconstitutional removal protections." 144 F.4th at 480. *See NLRB v. Starbucks Corp.*, 125 F.4th 78, 86-89 (3d Cir. 2024) (denying relief in a challenge to ALJ removal restrictions in part because the petitioner lacked standing, as it could show no

harm from the alleged constitutional violation beyond "speculation" that the outcome might have differed if the ALJ were removable at will); *Rodriguez v. Soc. Sec. Admin.*, 118 F.4th 1302, 1314-15 (11th Cir. 2024) (claimant was entitled to no relief where he failed to show harm caused by unconstitutional removal protections for SSA officials); *Leachco, Inc. v. Consumer Prod. Safety Comm'n*, 103 F.4th 748, 755-58 (10th Cir. 2024) (plaintiff was not entitled to relief in challenges to removal protections for agency commissioners and ALJs because it failed to show those protections affected the proceedings against it); *Bhatti v. Fed. Hous. Fin. Agency*, 97 F.4th 556, 559-62 (8th Cir. 2024) (claimant entitled to no relief in challenge to FHFA director's removal protection because he failed to show harm); *K&R Contractors, LLC v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023); *Consumer Fin. Prot. Bureau v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 179-81 (2d Cir. 2023); *Community Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 631-33 (5th Cir. 2022), *rev'd on other grounds*, 601 U.S. 416 (2024); *Calcutt v. FDIC*, 37 F.4th 293, 317-20 (6th Cir. 2022); *Kaufmann v. Kijakazi*, 32 F.4th 843, 848-50 (9th Cir. 2022).

The above precedent plainly forecloses MSC's request for relief based on its claim that the statutory restrictions on the removal of Commission ALJs are unconstitutional. MSC has alleged no specific harm from having its case decided initially by an ALJ with removal protections. And it has made no effort to show that the Commission would have declined to pursue the case or done anything differently had the ALJ been removable at will. In fact, MSC's argument on the issue says nothing at all about what the ALJ did in this case. *See* MSC Exceptions at 15-17. Indeed, in the absence of any showing or even allegation of harm from the applicable removal protections, MSC would appear to lack standing even to pursue its Article II claim. Therefore, that claim must fail.

III. CONCLUSION

In response to the Exceptions filed by MSC and OE on March 19, 2025, the Commission affirms in part and modifies in part the Initial Decision issued on February 25, 2025. Specifically, the Commission:

> **AFFIRMS** the ALJ's determination that MSC violated 46 U.S.C. § 41102(c) in 2018-2020 through the use of its "merchant clause" to bill notify parties for demurrage and detention charges and the ALJ's assessment of civil penalties for those violations in the total amount of $65,000, and **AFFIRMS** the ALJ's cease-and-desist order prohibiting that practice;
>
> **AFFIRMS** the ALJ's determination that MSC violated 46 U.S.C. § 40501 from 2021 to early 2023 by failing to include in its published tariff a statement of what its demurrage and detention charges were for NORs and the ALJ's assessment of civil penalties for those violations, but **MODIFIES** the decision to reflect knowing and willful violations starting only from the point of MSC's March 2022 statement to the Commission that it would modify its tariff, resulting in civil penalties for those violations totaling $9,460,000;
>
> **REVERSES** the ALJ's determination that MSC did not violate 46 U.S.C. § 41102(c) by overcharging demurrage and detention fees for NORs, **FINDS** that MSC did violate that provision by charging such fees at the higher rate for operating reefers at least 2,629 times in 2021, and **ASSESSES** civil penalties for those violations totaling $13,145,000; and thus
>
> **ASSESSES** a total civil penalty, reflecting the sum of the three penalties described above, of $22,670,000.

By the Commission.

David Eng
Secretary