NO. _____

IN THE
Supreme Court of the United States

STEPHEN K. WALTON, SR.,
Petitioner,

v.

VIRGINIA INTERNATIONAL TERMINALS, LLC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

APPENDIX

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Counsel of Record
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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 11th day of September, 2020.

Stephen K. Walton, Sr., Appellant,

against Record No. 200275
Circuit Court No. CL19-2417

Virginia International Terminals, LLC, Appellee.

From the Circuit Court of the City of Norfolk

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By: Deputy Clerk

FOURTH JUDICIAL CIRCUIT OF VIRGINIA
CIRCUIT COURT OF THE CITY OF NORFOLK

MICHELLE J. ATKINS
JUDGE

150 ST. PAUL'S BOULEVARD
NORFOLK, VIRGINIA 23510

November 12, 2019

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Re: Stephen K. Walton, Sr. v. Virginia International Terminals, LLC, *et al.*
Civil Docket No.: CL19-2417

Dear Counsel:

Today the Court rules on Virginia International Terminals' ("VIT") Motion for Summary Judgment on its Plea in Bar. This case was last before the Court on October 8, 2019, when it was scheduled for a hearing (the "Hearing") on motions and responsive pleadings filed by both parties whereupon the Court took the instant Motion under advisement.

The specific issue before the Court is whether VIT's Schedule of Rates ("SOR") is a valid and enforceable contract. Because the Court finds that the SOR is an implied contract pursuant to 46 U.S.C. § 40501(f) with an enforceable time bar provision pursuant to VA Code § 8.01-243(A) the Court **GRANTS** VIT's Plea in bar. Consequently, the court also finds that there are no material facts at issue and **GRANTS** VIT's Motion for Summary Judgment on its plea in bar.

Background

On March 15, 2017, Plaintiff, Stephen K. Walton Sr, ("Walton") was performing work as a reefer mechanic and container repair mechanic at Norfolk International Terminals ("NIT"), within his employment as a longshoreman for Marine Repair Services, Inc. ("MRS"). (Pl.'s Amend. Compl. ¶ 4, 8.) At all pertinent times, Defendant Virginia International Terminals ("VIT") operated, occupied, and maintained the NIT premises. (*Id.* ¶ 9–10.) Several business entities operated at NIT on a daily basis including Walton's employer MRS and defendants VIT, Ceres, and CP&O. (*Id.* ¶ 14.) MRS performed all of the container maintenance and repair work at NIT. (*Id.* ¶ 18.) Specifically, MRS employees, like Walton, were in charge of disconnecting

reefer containers stored at "reefer row" to prepare the reefers for transportation away from NIT. (*Id.*) VIT typically stored its equipment, including its forklifts, at the VIT maintenance facility next to reefer row, and no other entities were permitted to park or store equipment at the maintenance facility. (*Id.* ¶ 25.) At all relevant times, VIT's forklifts at the NIT facility were used by three entities: VIT, Ceres, and CP&O. (*Id.* ¶ 27.) VIT marked their forklifts with a VIT sticker. (*Id.*)

On the day in question, VIT maintained exclusive control over the VIT maintenance facility, including the lighting and all available forklifts, permitting only VIT employees to drive equipment on to the VIT maintenance facility. (*Id.* ¶ 30,49.) Moreover, VIT occupied, controlled, and maintained a walkway that ran along the south side of the N4 row ("the walkway"), where Walton was injured. (*Id.* ¶ 31.) After Walton finished disconnecting reefer units in the walkway, he proceeded a short distance down the walkway when he tripped over the blade of a VIT forklift projected out into the walkway from the VIT maintenance area, causing him to fall and be injured. (*Id.* ¶ 40.) The blade of the forklift was obscured by shadows in the walkway. (*Id.* ¶ 41.) On previous occasions, VIT usually stored and placed its forklifts at the northern border of the maintenance facility, either facing away from the walkway or with the blades removed. (*Id.* ¶ 42.)

On March 11, 2019, Walton, filed the initial complaint for an action by a longshoreman for personal injuries that occurred at a marine terminal in Norfolk, Virginia. (Pl.'s. Compl.) On May 20, 2019, Defendants responded with a demurrer. (Def.'s Dem.) Defendants also filed a Motion Craving Oyer on May 20, 2019, the Court entered an Order on July 3, 2019, upon consent of the parties on the Motion Craving Oyer. The Order granted Walton leave to amend the complaint and stayed Defendant's Motion Craving Oyer. (Order 7/3/19.) On July 12, 2019, Walton filed an Amended Complaint. (Pl.'s Am. Compl.) Defendants filed a Plea in Bar and Demurrer (Def. Plea in Bar & Dem.), and a Motion for Summary Judgment on its Plea in Bar, (Mot. Sum. J on Plea in Bar). Both parties have filed briefs in support and opposition of the aforementioned motions and VIT has filed a reply brief addressing Walton's opposition brief. The parties also presented arguments before this Court at a hearing for VIT's Motion for summary judgment on its plea in bar on October 8, 2019. (Hearing Transcript, Oct. 8, 2019.)

Party Positions

VIT's Position

At all relevant times, VIT maintained a Schedule of Rates ("SOR") governing rates, regulations, and practices at marine terminals operated by VIT, including NIT. (VIT's Brief in Supp of Plea in Bar & Dem. & Mot. Sum. J. on Plea in Bar, 3.) VIT made their SOR available to the public via VIT's website in accordance with FMC regulations. (*Id.* at 7.) VIT argues that it's SOR is enforceable, even without proof that Plaintiff had actual knowledge of its provisions. (*Id.* at 6.) VIT argues that 46 U.S.C. § 40501(f), permits marine terminal operators to publish a schedule of rates, which may include limited liability provisions. (*Id.*) VIT further argues that where a SOR is made public, it is enforceable as an implied contract without proof of actual knowledge of its contents. (*Id.* at 7.) Accordingly, VIT argues that Walton, in his capacity as a

longshoreman using the NIT premises, is considered a "USER" under the terms of the SOR and so agreed to the terms and provision of the SOR via implied contract, despite his lack of actual knowledge. (*Id.* at 8.) To the extent that VIT's SOR is enforceable as an implied contract, VIT argues enforceability and implied consent extend to the entirety of the SOR, not just selected provisions. (*Id.*)

VIT specifically argues that its SOR provisions requiring notice of injury and limiting time to bring suit are enforceable and bar Walton's claim. (*Id.* at 10.) VIT's SOR contains a specific provision that requires Users to notify VIT, in writing, of any occurrence of loss, injury, or damage to person or property caused by VIT within thirty days of the occurrence, and the injured party must bring suit within one year of the occurrence. (*Id.*) Under VIT's SOR, if notice is not given or suit is not brought within one year, the claim is time-barred. (*Id.*) VIT argues that contractual provisions like the SOR time-bar provision are permissible and not contrary to public policy. (*Id.*) In fact, VIT argues it assists the public policy behind the statute of limitations: preventing stale claims. (*Id.*) VIT further alleges that Virginia has permitted contractual limitations period shorter than the relevant statute of limitations period, as long as, the agreed time is not unreasonably short. (*Id.*) Moreover, VIT alleges that notice requirements and time-bar provisions are a recognized aspect of general maritime law, limited only by the reasonableness of the provision. (*Id.* at 11.) VIT argues that the SOR provision and the time frame are reasonable because it investigates all claims of loss, injury, or damage occurring on the marine terminals it operates. (*Id.* at 13.) Accordingly, VIT defends its thirty-day notice provision by noting that there is a pressing need to acquire security footage and that time is of the essence in its investigations because security footage is not held indefinitely. (*Id.*)

VIT also notes that Walton is not a party to any actual contract that may nullify the SOR's enforceability as an implied contract. (VIT's Reply Brief in Supp. of Mot. for Sum. J. on Plea in Bar & Dem., 3–4.) Alternatively, VIT argues that even if the actual contract between VIT and MRS nullified the SOR as an implied contract, the terms of the actual contract validly incorporate the entire SOR by reference. (*Id.* at 4–5.) Moreover, VIT argues that even if Walton were a party to the actual contract, the location of his injury was outside of the specified area covered by that contract. (*Id.* at 5.) As such, the SOR was the only contract capable of governing his conduct and presence at the terminal. (*Id.*)

VIT also argues in the alternative, that paragraph 60 of the Amended Complaint, which lists multiple defendants that may have breached a duty owed to Plaintiff, is deficient and should be dismissed with prejudice via demurrer. (VIT's Brief in Supp of Plea in Bar & Dem. & Mot. for Sum. J. on Plea in Bar at 15.) VIT argues that Virginia does not permit plaintiffs to join two or more defendants in the alternative where the facts pleaded indicate that only one of the defendants may be liable. (*Id.* at 16.) VIT argues that by joining the defendants in the alternative, Plaintiff fails to inform VIT and the other defendants of the true nature of the cause of action. (*Id.* at 16.)

Walton's Position

Walton asserts that VIT's Motion for Summary Judgment should be denied and its Demurrer overruled. (Pl's brief in Opp'n to Def. Mot for Sum. J. on Plea in Bar & Opp'n to Def. Dem., 1.) First, Walton argues, as a matter of law, the act upon which VIT relies to support the

enforceability of the SOR's notice and time bar provision, is contrary to Virginia law. (*Id.* at 4.) Accordingly, Walton argues that Virginia law applies, that he is not subject to the SOR's pre-suit notice requirement, and his claim is not time barred under the two-year statute of limitations for Virginia personal injury claims. (*Id.* at 4–5.) Walton argues that the Shipping Act of 1984, 46 U.S.C. §40101, is the sole basis for VIT's argument that its SOR applies instead of Virginia personal injury law. (*Id.* at 6.) Walton argues that VIT's reliance on the Shipping Act is flawed because the purpose and language of the Act make it clear that it does not pre-empt applicable Virginia Law. (*Id.* at 6–8.) Moreover, Walton points out that VIT never addresses the issue of pre-emption, and simply asserts the authority of its SOR. (*Id.* at 6.) Walton also attempts to distinguish the cases VIT cited in support of its SOR and notes that all of the maritime cases cited did not apply Virginia law, moreover, all of the non-maritime cases involved limitations imposed by an actual written contract, unlike the SORs in place in this case. (*Id.* at 9.)

Walton argues that there is no actual contractual relationship between VIT and himself. (*Id.* at 10.) Walton also argues that VIT's SORs and time limitations cannot be enforced against him as an implied contract because there were separate, actual contracts with his employer MRS, that governed his terminal use. (*Id.* at 11–12.) Additionally, Plaintiff bolsters its argument by asserting that the SOR does not apply because of the multi-party Collective Bargaining Agreement between VIT, MRS, and ILA Union Local 1970. (*Id.* at 14–15.) The collective bargaining agreement specifically address the use of the kind of maintenance Walton was to perform on waterfront facilities like NIT. (*Id.* at 15.) Walton argues that the Collective Bargaining Agreement was the actual contract in place leaving no room for an implied contract via VIT's SOR. (*Id.* at 15.)

Walton also argues that VIT's SOR is not enforceable as an implied in fact contract, because he was not aware of it and he personally never agreed to it. (*Id.*; Trans. 34–36.) Walton notes that VIT has the burden of proving an implied in fact contract, which requires a mutuality of assent. (*Id.* at 16.) Plaintiff argues that VIT has failed to meet that burden as it applies to VIT's SOR. (*Id.*) Plaintiff also argues that VIT's SOR is not enforceable under the equitable remedy as an implied-in-law contract because time-barring a personal injury claim through an implied-in-law contract is impermissible as a matter of equity and good conscience. (*Id.* at 18.)

Finally, Walton argues that the demurrer should be overruled because Virginia law permits a plaintiff to sue alternative parties where the allegation of liability arises from the same transaction or occurrence. (*Id.* at 19.) Plaintiff clarifies that he is alleging liability of each defendant named in the amended complaint based on their role in the same transaction and occurrence. (*Id.*)

Discussion

Legal Standard

A plea in bar presents a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery, and the moving party has the burden of proof on that issue. *Hilton v. Martin*, 275 Va. 176, 177, 654 S.E.2d 572 (2008). The function of a plea in bar is to narrow the litigation by resolving an issue that will determine whether a plaintiff may proceed to trial on

a particular cause of action. *Hawthorne v. VanMarter*, 279 Va. 566, 578, 692 S.E.2d 226 (2010). The issue raised by a plea in bar may be submitted to the circuit court for decision based on a discrete body of facts identified by the parties through their pleadings, or developed through the presentation of evidence supporting or opposing the plea. *Id.* at 577.

If the facts underlying a plea in bar are contested, a party may demand that a jury decide the factual issues raised by the plea. *Hawthorne*, 279 Va. at 577. However, according to *Kohn v. Marquis*, 288 Va. 142, 146, 762 S.E.2d 755, 757, there is "no constitutional right to a jury trial if the case can be determined as a matter of law based upon material facts not genuinely in dispute." Conversely, if the facts are disputed and no demand for a jury is made, the "whole matter of law and fact" may be decided by the court. *Id.* at 578. In addition, a trial court may take evidence when considering a plea in bar. *See, e.g., Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594–95, 537 S.E.2d 580, 590 (2000) (acknowledging that the trial court heard evidence pertaining to a plea in bar); *Broad Run Vill., L.C. v. Loudoun County Bd. of Supervisors*, 59 Va. Cir. 96, 96 (Loudon 2002) ("To the extent the parties have sought to introduce evidence outside the four corners of the pleadings in support of their positions, such evidence will only be considered in relationship to the plea in bar.").

> Any party may make a motion for summary judgment at any time after the parties are at issue . . . . If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in that party's favor. . . . Summary judgment shall not be entered if any material fact is genuinely in dispute.

Va. Sup. Ct. R. 3:20.

A trial court considering a motion for summary judgment must "accept as true those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason." *Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 88 (2009) (citing *Dickerson v. Fatehi*, 253 Va. 324, 327 (1997); *Carson v. LeBlanc*, 245 Va. 135, 139–40 (1993)). While summary judgment is available in certain circumstances, it is well settled that it "is a drastic remedy, available only when there are no material facts genuinely in dispute." *Id.* (citing *Stockbridge v. Gemini Air Cargo, Inc.*, 269 Va. 609, 618 (2005); *Smith v. Smith*, 254 Va. 99, 103 (1997); *Slone v. General Motors Corp.*, 249 Va. 520, 522 (1995)). "[I]f the evidence is conflicting on a material point or if reasonable persons may draw different conclusions from the evidence, summary judgment is not appropriate." *Id.* (citing *Jenkins v. Pyles*, 269 Va. 383 (2005)).

A. Demurrer

A demurrer tests the legal sufficiency of the claims stated in the pleading challenged. *Dray v. New Mkt. Poultry Prods., Inc.*, 258 Va. 187, 189, 518 S.E.2d 312, 312 (1999). On demurrer, the court must admit the truth of all material facts properly pleaded, facts that are impliedly alleged, and facts that may be fairly and justly inferred from the alleged facts. *Cox Cable Hampton Rds., Inc. v. City of Norfolk*, 242 Va. 394, 397, 410 S.E.2d 652, 653 (1991). A

demurrer does not admit the correctness of any conclusions of law. *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997). The only question for the court to decide is whether the facts are legally sufficient to state a cause of action against the defendant. *Thompson v. Skate Am., Inc.*, 261 Va. 121, 128, 540 S.E.2d 123, 126–27 (2001).

Even if imperfect, a complaint drafted such that a defendant cannot mistake the true nature of the claim should withstand demurrer. *Catercorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993). The court will not consider any factual assertions outside the pleadings for purposes of a demurrer. *See Va. Code Ann.* § 8.01-273.

Virginia Courts have recognized,

> [a] party asserting either a claim, counterclaim, cross-claim, or third-party claim . . . may plead alternative facts and theories of recovery against alternative parties . . . provided that such claims . . . so joined arise out of the same transaction or occurrence.

VA Code § 8.01-281(A).

In their brief in support of Demurrer, VIT relies on *Baker v. Doe*, to prove that a plaintiff in a personal injury case may not join multiple defendants in the alternative. *Baker* is both factually and legally distinguishable from the facts in this case. Legally, the aforementioned governing statute and its relevant language incorporating the suit of alternative parties was enacted in 1974. Notably, the statutory language was enacted after the cited authority, *Baker v. Doe*, which VIT relies on in support of its argument that Plaintiff impermissibly joined alternative parties, in its amended complaint. 211 Va. 158 (1970). While there is no case law expressly overruling *Baker*, there is case law that expressly overrules *Norfolk Union Bus Term. v. Sheldon*, 188 Va. 288, 296, 49. S.E.2d 338, 341, the case upon which Baker relies for its interpretation of alternative joinder.

> The defendants rely primarily upon *Norfolk Bus Term. v. Sheldon* . . . *Norfolk Bus Term.*, however, it was decided . . . before the 1974 enactment of Code §8.01-281. . . . the foregoing statutes and rule represent a radical departure from the common-law pleading rule stated in *Norfolk Bus Term.*

Fox v. Deese, 234 Va. 412, 423, 362 S.E.2d 699, 705. Accordingly, the statutory language governs and permits the naming of defendants in the alternative, so long as, the nature of the joinder arises out of the same transaction or occurrence.

Moreover, the *Baker* court specifies that defendants may not be named in the alternative unless "their interests were joint . . . In the case of tort feasors, they could be joined as party defendants only if their acts concurred to produce a single injury to the plaintiff." *Baker* at 160, 176 S.E.2d at 427.

Factually, *Baker* is distinguishable as the party Plaintiff's sought to join in the alternative was unknown. Here, Plaintiff is aware of everyone who had access and control of the forklift and

walkway where he was injured, and he has named them as defendants in the alternative; pursuant to § 8.01-281(A), alleging that they breached a duty owed to him.

Amended Complaint ¶ 60 states that "the defendant VIT…and/or the defendant Ceres . . . and/or the defendant CP&O" breached a duty owed to the Plaintiff. The specific duty owed references the negligent placement of the forklift that ultimately lead to the Plaintiff's injuries. The placement and resulting injury are the transaction and occurrence at issue. Furthermore, all three of the named defendants may properly be considered alternative parties under §8.01-281(A), because the plaintiff is alleging liability based on their respective involvement. The naming of the alternative defendants does not render the amended complaint deficient, nor is there any other alleged grounds to find the complaint deficient, warranting a demurrer. Therefore, VIT's Demurrer is **OVERRULED**.

B. VIT's Schedule of Rates is an Implied Contract

Virginia Code § 8.01-243(A) states in part, "Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery . . . shall be brought within two years after the cause of action accrues." However, "parties to a contract may agree that any action to enforce the contract must be filed within a shorter period of time than that established by an otherwise applicable statute of limitations." *Massie v. Blue Cross & Blue Shield*, 256 Va. 161, 164, 500 S.E.2d 509, 509 (1998). Accordingly, VIT's SOR states,

> USERS must notify VIT in writing of the occurrence of loss, injury, or damage to person or property caused by VIT immediately upon discovery, and in no event more that thirty (30) days from occurrence, or all claims based on the loss, injury, or damage shall be time-barred. If suit . . . based on the occurrence is not filed within one (1) year after the occurrence, the claim shall be time-barred.

(SOR No. 207, Notification of Loss, Injury, or damage; time limits; jurisdiction and venue; applicable law) (emphasis in original). The Schedule of Rates defines a "USER" as "(i) each VESSEL and CARRIER, (ii) stevedore, (iii) shipper, consignee, and beneficial cargo owner, (iv) contractor, subcontractors and vendor of VIT, VPA, HRCP II, or another USER, (v) licensee and permittee, and (vi) and every other person or entity using, coming onto, or berthing at a Terminal." (Schedule of Rates, Section XI)

The Court finds that VIT's SOR meets all of the requirements of an effective contract. Specifically, the SOR functions as an implied contract pursuant to 46 U.S.C. § 40501. "A marine terminal operator may make available to the public a schedule of rates, regulations . . . . Any such schedule made available to the public is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions." 46 U.S.C. § 40501(f). Walton, in his capacity as a refrigerator mechanic for MRS, fell within the anticipated category of a USER pursuant to SOR Section XI. Walton may reasonably be considered either a licensee and permittee of VIT or a person coming onto a VIT Terminal, both of whom are subject to the SOR as parties to the implied contract.

The Court accepts as true the inferences from Walton's brief, affidavit, and testimony at the October 8, 2019, hearing. Specifically, the Court accepts Walton's representation that he was not made aware of the SOR or any changes to the SOR. The Court also accepts Walton's representation that he was familiar with the customs and practices of NIT and VIT based on his time working at the facility and his role on the local union, ILA Local 1970. However, Walton's knowledge, or lack thereof, does not nullify his status as a USER and the enforceability of the SOR as an implied contract. Walton may have been misinformed as to what his reporting responsibility was after the injury, but he was still a USER under the SOR obligated to comply with all of its notice requirements.

C. Pre-suit Notice and Time Bar Requirements

The two relevant provisions at issue are the pre-suit notice requirement and time bar provision. Here, Walton argues that those provisions are not enforceable, and he is not a party to the SOR. Walton specifically alleges that the existence of an actual contract between MRS and VIT nullify the enforceability of the SOR, he was not a signed party to any of the contracts in place, and he lacked notice of the relevant SOR requirements. None of these arguments are persuasive and the two relevant provisions are enforceable.

The SOR's time bar provision provides a maximum of thirty days to notify VIT of any injury on the premises and one year to file suit for any such injury. Walton violated both requirements. Walton did not provide notice of the injury to VIT at all. Furthermore, VIT was not notified of the injury until Walton filed suit two years later.

Walton's argument that the existence of an actual contract nullifies the implied contractual nature of the SOR is moot. The actual contract between VIT and MRS incorporates the entirety of the SOR, preserving any enforceability that would have otherwise been nullified by the existence of an actual contract. VIT correctly argued in their brief and at the hearing that Walton manifest his assent to the terms of the SOR, despite his lack of notice, by entering VIT's premises. Both parties agree that Walton entered VIT's premises as a Reefer mechanic for MRS. By entering the premises, Walton immediately qualified as a USER under the SOR and assented to the terms required by every person on VIT property. It makes no difference that Walton was not made aware of the requirements in his individual capacity. Put simply, the enforceability of the SOR is not contingent upon an individual user's failure to read its terms.

The SOR in this case anticipates that anyone on VIT premises may develop a claim against VIT. Accordingly, the SOR specifically lays out definitional categories for its users and procedural requirements for notifying VIT of any injury or claim developed on the premises. VIT alleged in their brief and proffered at the hearing that the time bar provision is reasonable because time is of the essence after any injury on the terminal. The purpose of these requirements is not merely to limit liability and litigation, instead these requirements are in place to ensure that VIT has adequate time to investigate and collect security footage of the injury. Walton, a USER by the terms of VIT's SOR, failed to adhere to these requirements and does not present an adequate justification for why he should be exempt from the SOR's requirements.

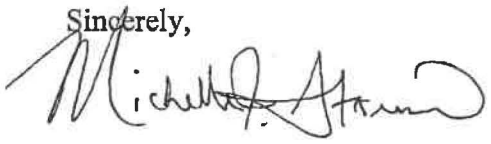
The Court finds that the SOR is an enforceable implied contract between VIT and all USERS of VIT's premises, including Walton. Therefore, the court **GRANTS** the Plea in Bar finding that the SOR's time bar provision applies to Walton as a USER and bars his right to recovery against VIT. Accordingly, there are no material facts genuinely in dispute, so the court also **GRANTS** VIT's motion for summary judgment.

Conclusion

In accordance with the analysis set forth in this opinion, the Court **GRANTS** VIT's Plea in Bar and Motion for Summary Judgment on its Plea in Bar.

The attorney for the Defendant (VIT) is directed to prepare an Order consistent with this ruling within seven (7) days and forward same to the Court after counsel for the Plaintiff has signed the Order and noted any objections.

Sincerely,



Michelle J. Atkins
Judge

MJA/wmp

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

STEPHEN K. WALTON, SR.,	*	
	*	
Plaintiff,	*	
	*	**Case No. CL 19-2417**
v.	*	
	*	
VIRGINIA INTERNATIONAL TERMINALS, LLC, et al.	*	
	*	
	*	
Defendants.	*	
	*	

ORDER ON DEFENDANT'S DEMURRER, PLEA IN BAR, AND MOTION FOR SUMMARY JUDGMENT ON ITS PLEA IN BAR

On October 8, 2019, the parties appeared, by counsel, upon the Demurrer and the Motion for Summary Judgment on its Plea in Bar filed by Defendant Virginia International Terminals, LLC ("VIT"). Upon due consideration of the parties' briefs and oral arguments, and for the reasons set forth in detail in the Court's Opinion Letter dated November 12, 2019, the Court hereby ORDERS that:

1. Defendant VIT's Demurrer is OVERRULED;

2. Defendant VIT's Plea in Bar and Motion for Summary Judgment on its Plea in Bar are GRANTED; and

3. Plaintiff's Amended Complaint and all claims therein are hereby DISMISSED WITH PREJUDICE as to Defendant VIT.

It is so ORDERED.

ENTERED: _____/_____/2019

Michelle J. Atkins, Judge
November 25, 2019

Michelle J. Atkins, Judge

The Foregoing Document Copy Teste:
George E. Schaefer, Clerk
Norfolk Circuit Court
BY Bmonsanto
Bernadette Monsanto, Deputy Clerk
Authorized to sign on behalf
of George E. Schaefer, Clerk
Date: November 25, 2019

SEEN AND AGREED TO with respect to the ruling on VIT's Plea in Bar and Motion for Summary Judgment on its Plea in Bar and OBJECTED TO with respect to the ruling on VIT's Demurrer for the reasons set forth on brief and in oral argument

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Counsel for Defendant Virginia International Terminals, LLC

SEEN AND OBJECTED TO with respect to the ruling on VIT's Plea in Bar and Motion for Summary Judgment for reasons stated in the Plaintiff's Brief in Opposition to Defendant VIT's Motion for Summary Judgment on Plea in Bar and in Opposition to Defendant VIT's Demurrer, filed on September 13, 2019, and for the reasons set forth in oral argument on October 8, 2019; and SEEN AND AGREED TO with respect to the ruling on VIT's Demurrer.

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Counsel for Plaintiff

§ 40101. Purposes

The purposes of this part are to—

(1) establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;

(2) provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices;

(3) encourage the development of an economically sound and efficient liner fleet of vessels of the United States capable of meeting national security needs; and

(4) promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1523.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
40101	46 App.:1701.	Pub. L. 98–237, §2, Mar. 20, 1984, 98 Stat. 67; Pub. L. 105–258, title I, §101, Oct. 14, 1998, 112 Stat. 1902.

EFFECTS ON CERTAIN AGREEMENTS AND CONTRACTS

Pub. L. 98–237, §20(d), Mar. 20, 1984, 98 Stat. 90; Pub. L. 105–258, title I, §117(1), Oct. 14, 1998, 112 Stat. 1914, provided that: "All agreements, contracts, modifications, licenses, and exemptions previously issued, approved, or effective under the Shipping Act, 1916 [former 46 U.S.C. App. 801 et seq., see Disposition Table preceding section 101 of this title], or the Shipping Act of 1984 [former 46 U.S.C. App. 1701 et seq., see Disposition Table preceding section 101 of this title], shall continue in force and effect as if issued or effective under this Act, as amended by the Ocean Shipping Reform Act of 1998 [Pub. L. 105–258, Oct. 14, 1998, 112 Stat. 1902], and all new agreements, contracts, and modifications to existing, pending, or new contracts or agreements shall be considered under this Act, as amended by the Ocean Shipping Reform Act of 1998."

§ 40102. Definitions

In this part:

(1) AGREEMENT.—The term "agreement"—

(A) means a written or oral understanding, arrangement, or association, and any modification or cancellation thereof; but

(B) does not include a maritime labor agreement.

(2) ANTITRUST LAWS.—The term "antitrust laws" means—

(A) the Sherman Act (15 U.S.C. 1 et seq.);

(B) sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8, 9);

(C) the Clayton Act (15 U.S.C. 12 et seq.);

(D) the Act of June 19, 1936 (15 U.S.C. 13, 13a, 13b, 21a);

(E) the Federal Trade Commission Act (15 U.S.C. 41 et seq.);

(F) the Antitrust Civil Process Act (15 U.S.C. 1311 et seq.); and

(G) Acts supplementary to those Acts.

(3) ASSESSMENT AGREEMENT.—The term "assessment agreement" means an agreement, whether part of a collective bargaining agreement or negotiated separately, to the extent the agreement provides for the funding of collectively bargained fringe-benefit obligations on other than a uniform worker-hour basis, regardless of the cargo handled or type of vessel or equipment used.

(4) BULK CARGO.—The term "bulk cargo" means cargo that is loaded and carried in bulk without mark or count.

(5) CHEMICAL PARCEL-TANKER.—The term "chemical parcel-tanker" means a vessel that has—

(A) a cargo-carrying capability consisting of individual cargo tanks for bulk chemicals that—

(i) are a permanent part of the vessel; and

(ii) have segregation capability with piping systems to permit simultaneous carriage of several bulk chemical cargoes with minimum risk of cross-contamination; and

(B) a valid certificate of fitness under the International Maritime Organization Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk.

(6) COMMON CARRIER.—The term "common carrier"—

(A) means a person that—

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

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

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

(B) does not include a carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker, or by vessel when primarily engaged in the carriage of perishable agricultural commodities—

(i) if the carrier and the owner of those commodities are wholly-owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities; and

(ii) only with respect to the carriage of those commodities.

(7) CONFERENCE.—The term "conference"—

(A) means an association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to use a common tariff; but

(B) does not include a joint service, consortium, pooling, sailing, or transshipment agreement.

(8) CONTROLLED CARRIER.—The term "controlled carrier" means an ocean common car-

sponse to a request under section 40304(a)(2) of title 46, United States Code; or

"(3) to limit the authority of the Commission to request information under section 40304(d) of title 46, United States Code."

§ 40305. Assessment agreements

(a) FILING REQUIREMENT.—An assessment agreement shall be filed with the Federal Maritime Commission and is effective on filing.

(b) COMPLAINTS.—If a complaint is filed with the Commission within 2 years after the date of an assessment agreement, the Commission shall disapprove, cancel, or modify the agreement, or an assessment or charge pursuant to the agreement, that the Commission finds, after notice and opportunity for a hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports. The Commission shall issue its final decision in the proceeding within one year after the date the complaint is filed.

(c) ADJUSTMENTS OF ASSESSMENTS AND CHARGES.—To the extent that the Commission finds under subsection (b) that an assessment or charge is unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall adjust the assessment or charge for the period between the filing of the complaint and the final decision by awarding prospective credits or debits to future assessments and charges. However, if the complainant has ceased activities subject to the assessment or charge, the Commission may award reparations.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1531.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
40305	46 App.:1704(e) (less last sentence).	Pub. L. 98–237, §5(e) (less last sentence), Mar. 20, 1984, 98 Stat. 70; Pub. L. 105–258, title I, §104(a)(2), (b)(1), Oct. 14, 1998, 112 Stat. 1904, 1905.

§ 40306. Nondisclosure of information

Information and documents (other than an agreement) filed with the Federal Maritime Commission under this chapter are exempt from disclosure under section 552 of title 5 and may not be made public except as may be relevant to an administrative or judicial proceeding. This section does not prevent disclosure to either House of Congress or to a duly authorized committee or subcommittee of Congress.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1531.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
40306	46 App.:1705(j).	Pub. L. 98–237, §6(j), Mar. 20, 1984, 98 Stat. 73.

The words "judicial proceeding" are substituted for "judicial action or proceeding" to eliminate unnecessary words.

§ 40307. Exemption from antitrust laws

(a) IN GENERAL.—The antitrust laws do not apply to—

(1) an agreement (including an assessment agreement) that has been filed and is effective under this chapter;

(2) an agreement that is exempt under section 40103 of this title from any requirement of this part;

(3) an agreement or activity within the scope of this part, whether permitted under or prohibited by this part, undertaken or entered into with a reasonable basis to conclude that it is—

(A) pursuant to an agreement on file with the Federal Maritime Commission and in effect when the activity takes place; or

(B) exempt under section 40103 of this title from any filing or publication requirement of this part;

(4) an agreement or activity relating to transportation services within or between foreign countries, whether or not via the United States, unless the agreement or activity has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States;

(5) an agreement or activity relating to the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade;

(6) an agreement or activity to provide wharfage, dock, warehouse, or other terminal facilities outside the United States; or

(7) an agreement, modification, or cancellation approved before June 18, 1984, by the Commission under section 15 of the Shipping Act, 1916, or permitted under section 14b of that Act, and any properly published tariff, rate, fare, or charge, or classification, rule, or regulation explanatory thereof implementing that agreement, modification, or cancellation.

(b) EXCEPTIONS.—This part does not extend antitrust immunity to—

(1) an agreement with or among air carriers, rail carriers, motor carriers, tug operators, or common carriers by water not subject to this part relating to transportation within the United States;

(2) a discussion or agreement among common carriers subject to this part relating to the inland divisions (as opposed to the inland portions) of through rates within the United States;

(3) an agreement among common carriers subject to this part to establish, operate, or maintain a marine terminal in the United States; or

(4) a loyalty contract.

(c) RETROACTIVE EFFECT OF DETERMINATIONS.—A determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws under subsection (a) does not remove or alter the antitrust immunity for the period before the determination.

(d) RELIEF UNDER CLAYTON ACT.—A person may not recover damages under section 4 of the Clayton Act (15 U.S.C. 15), or obtain injunctive relief under section 16 of that Act (15 U.S.C. 26), for conduct prohibited by this part.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1531; Pub. L. 115–282, title VII, §709(c), Dec. 4, 2018, 132 Stat. 4297.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
40307	46 App.:1706.	Pub. L. 98–237, §7, Mar. 20, 1984, 98 Stat. 73; Pub. L. 105–258, title I, §105, Oct. 14, 1998, 112 Stat. 1905.

Subsection (a)(1) is substituted for "any agreement that has been filed under section 1704 of this Appendix and is effective under section 1704(d) [redesignated as (e)] or section 1705 of this Appendix" for clarity and to eliminate unnecessary words.

Subsection (a)(2) is substituted for "any agreement that . . . is exempt under section 1715 of this Appendix from any requirement of this chapter" in 46 App. U.S.C. 1706(a)(1) for clarity.

In subsection (a)(7), the words "subject to section 1719(e)(2) of this Appendix" are omitted as obsolete.

REFERENCES IN TEXT

Section 15 of the Shipping Act, 1916, referred to in subsec. (a)(7), which was classified to section 814 of the former Appendix to this title, was repealed by Pub. L. 104–88, title III, §335(b)(3), Dec. 29, 1996, 109 Stat. 954.

Section 14b of the Shipping Act, 1916, referred to in subsec. (a)(7), which was classified to section 813a of former Title 46, Shipping, was repealed by Pub. L. 98–237, §20(a), Mar. 20, 1984, 98 Stat. 88.

AMENDMENTS

2018—Subsec. (b)(1). Pub. L. 115–282 inserted "tug operators," after "motor carriers,".

CHAPTER 405—TARIFFS, SERVICE CONTRACTS, REFUNDS, AND WAIVERS

§ 40501. General rate and tariff requirements

(a) AUTOMATED TARIFF SYSTEM.—

(1) IN GENERAL.—Each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, a common carrier is not required to state separately or otherwise reveal in tariffs the inland divisions of a through rate.

(2) EXCEPTIONS.—Paragraph (1) does not apply with respect to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste.

(b) CONTENTS OF TARIFFS.—A tariff under subsection (a) shall—

(1) state the places between which cargo will be carried;

(2) list each classification of cargo in use;

(3) state the level of compensation, if any, of any ocean freight forwarder by a carrier or conference;

(4) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part or the total of the rates or charges;

(5) include sample copies of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement; and

(6) include copies of any loyalty contract, omitting the shipper's name.

(c) ELECTRONIC ACCESS.—A tariff under subsection (a) shall be made available electronically to any person, without time, quantity, or other limitation, through appropriate access from remote locations. A reasonable fee may be charged for such access, except that no fee may be charged for access by a Federal agency.

(d) TIME-VOLUME RATES.—A rate contained in a tariff under subsection (a) may vary with the volume of cargo offered over a specified period of time.

(e) EFFECTIVE DATES.—

(1) INCREASES.—A new or initial rate or change in an existing rate that results in an increased cost to a shipper may not become effective earlier than 30 days after publication. However, for good cause, the Federal Maritime Commission may allow the rate to become effective sooner.

(2) DECREASES.—A change in an existing rate that results in a decreased cost to a shipper may become effective on publication.

(f) MARINE TERMINAL OPERATOR SCHEDULES.—A marine terminal operator may make available to the public a schedule of rates, regulations, and practices, including limitations of liability for cargo loss or damage, pertaining to receiving, delivering, handling, or storing property at its marine terminal. Any such schedule made available to the public is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions.

(g) REGULATIONS.—

(1) IN GENERAL.—The Commission shall by regulation prescribe the requirements for the accessibility and accuracy of automated tariff systems established under this section. The Commission, after periodic review, may prohibit the use of any automated tariff system that fails to meet the requirements established under this section.

(2) REMOTE TERMINALS.—The Commission may not require a common carrier to provide a remote terminal for electronic access under subsection (c).

(3) MARINE TERMINAL OPERATOR SCHEDULES.—The Commission shall by regulation prescribe the form and manner in which marine terminal operator schedules authorized by this section shall be published.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1532.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
40501(a)	46 App.:1707(a)(1) (1st, 2d sentences).	Pub. L. 98–237, §8(a), (b), (d), (f), (g), Mar. 20, 1984, 98 Stat. 74; Pub. L. 105–258, title I, §106(a), (c), (e), (f), Oct. 14, 1998, 112 Stat. 1905, 1907.
40501(b)	46 App.:1707(a)(1) (last sentence).	
40501(c)	46 App.:1707(a)(2).	
40501(d)	46 App.:1707(b).	
40501(e)	46 App.:1707(d).	
40501(f)	46 App.:1707(f).	
40501(g)	46 App.:1707(g).	

In subsection (b)(3), the words "ocean freight forwarder" are substituted for "ocean transportation intermediary, as defined in section 1702(17)(A) of this

relief under section 16 of that Act (15 U.S.C. 26), for conduct prohibited by this part.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1531.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
40307	46 App.:1706.	Pub. L. 98–237, §7, Mar. 20, 1984, 98 Stat. 73; Pub. L. 105–258, title I, §105, Oct. 14, 1998, 112 Stat. 1905.

Subsection (a)(1) is substituted for "any agreement that has been filed under section 1704 of this Appendix and is effective under section 1704(d) [redesignated as (e)] or section 1705 of this Appendix" for clarity and to eliminate unnecessary words.

Subsection (a)(2) is substituted for "any agreement that . . . is exempt under section 1715 of this Appendix from any requirement of this chapter" in 46 App. U.S.C. 1706(a)(1) for clarity.

In subsection (a)(7), the words "subject to section 1719(e)(2) of this Appendix" are omitted as obsolete.

REFERENCES IN TEXT

Section 15 of the Shipping Act, 1916, referred to in subsec. (a)(7), which was classified to section 814 of the former Appendix to this title, was repealed by Pub. L. 104–88, title III, §335(b)(3), Dec. 29, 1996, 109 Stat. 954.

Section 14b of the Shipping Act, 1916, referred to in subsec. (a)(7), which was classified to section 813a of former Title 46, Shipping, was repealed by Pub. L. 98–237, §20(a), Mar. 20, 1984, 98 Stat. 88.

CHAPTER 405—TARIFFS, SERVICE CONTRACTS, REFUNDS, AND WAIVERS

§ 40501. General rate and tariff requirements

(a) AUTOMATED TARIFF SYSTEM.—

(1) IN GENERAL.—Each common carrier and conference shall keep open to public inspection in an automated tariff system, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, a common carrier is not required to state separately or otherwise reveal in tariffs the inland divisions of a through rate.

(2) EXCEPTIONS.—Paragraph (1) does not apply with respect to bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste.

(b) CONTENTS OF TARIFFS.—A tariff under subsection (a) shall—

(1) state the places between which cargo will be carried;

(2) list each classification of cargo in use;

(3) state the level of compensation, if any, of any ocean freight forwarder by a carrier or conference;

(4) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules that in any way change, affect, or determine any part or the total of the rates or charges;

(5) include sample copies of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement; and

(6) include copies of any loyalty contract, omitting the shipper's name.

(c) ELECTRONIC ACCESS.—A tariff under subsection (a) shall be made available electronically to any person, without time, quantity, or other limitation, through appropriate access from remote locations. A reasonable fee may be charged for such access, except that no fee may be charged for access by a Federal agency.

(d) TIME-VOLUME RATES.—A rate contained in a tariff under subsection (a) may vary with the volume of cargo offered over a specified period of time.

(e) EFFECTIVE DATES.—

(1) INCREASES.—A new or initial rate or change in an existing rate that results in an increased cost to a shipper may not become effective earlier than 30 days after publication. However, for good cause, the Federal Maritime Commission may allow the rate to become effective sooner.

(2) DECREASES.—A change in an existing rate that results in a decreased cost to a shipper may become effective on publication.

(f) MARINE TERMINAL OPERATOR SCHEDULES.—A marine terminal operator may make available to the public a schedule of rates, regulations, and practices, including limitations of liability for cargo loss or damage, pertaining to receiving, delivering, handling, or storing property at its marine terminal. Any such schedule made available to the public is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions.

(g) REGULATIONS.—

(1) IN GENERAL.—The Commission shall by regulation prescribe the requirements for the accessibility and accuracy of automated tariff systems established under this section. The Commission, after periodic review, may prohibit the use of any automated tariff system that fails to meet the requirements established under this section.

(2) REMOTE TERMINALS.—The Commission may not require a common carrier to provide a remote terminal for electronic access under subsection (c).

(3) MARINE TERMINAL OPERATOR SCHEDULES.—The Commission shall by regulation prescribe the form and manner in which marine terminal operator schedules authorized by this section shall be published.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1532.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
40501(a)	46 App.:1707(a)(1) (1st, 2d sentences).	Pub. L. 98–237, §8(a), (b), (d), (f), (g), Mar. 20, 1984, 98 Stat. 74; Pub. L. 105–258, title I, §106(a), (c), (e), (f), Oct. 14, 1998, 112 Stat. 1905, 1907.
40501(b)	46 App.:1707(a)(1) (last sentence).	
40501(c)	46 App.:1707(a)(2).	
40501(d)	46 App.:1707(b).	
40501(e)	46 App.:1707(d).	
40501(f)	46 App.:1707(f).	
40501(g)	46 App.:1707(g).	

In subsection (b)(3), the words "ocean freight forwarder" are substituted for "ocean transportation intermediary, as defined in section 1702(17)(A) of this

Appendix" because the definition of "ocean transportation intermediary" in section 1702(17)(A) contains a definition of "ocean freight forwarder" which is restated as a separate definition.

In subsection (e), the word "calendar" is omitted as unnecessary.

In subsection (f)(1), the words "subject to section 1709(d) of this Appendix" are omitted as unnecessary.

§ 40502. Service contracts

(a) IN GENERAL.—An individual ocean common carrier or an agreement between or among ocean common carriers may enter into a service contract with one or more shippers subject to the requirements of this part.

(b) FILING REQUIREMENTS.—

(1) IN GENERAL.—Each service contract entered into under this section by an individual ocean common carrier or an agreement shall be filed confidentially with the Federal Maritime Commission.

(2) EXCEPTIONS.—Paragraph (1) does not apply to contracts regarding bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste.

(c) ESSENTIAL TERMS.—Each service contract shall include—

(1) the origin and destination port ranges;

(2) the origin and destination geographic areas in the case of through intermodal movements;

(3) the commodities involved;

(4) the minimum volume or portion;

(5) the line-haul rate;

(6) the duration;

(7) service commitments; and

(8) the liquidated damages for nonperformance, if any.

(d) PUBLICATION OF CERTAIN TERMS.—When a service contract is filed confidentially with the Commission, a concise statement of the essential terms specified in paragraphs (1), (3), (4), and (6) of subsection (c) shall be published and made available to the general public in tariff format.

(e) DISCLOSURE OF CERTAIN TERMS.—

(1) DEFINITIONS.—In this subsection, the terms "dock area" and "within the port area" have the same meaning and scope as in the applicable collective bargaining agreement between the requesting labor organization and the carrier.

(2) DISCLOSURE.—An ocean common carrier that is a party to or is otherwise subject to a collective bargaining agreement with a labor organization shall, in response to a written request by the labor organization, state whether it is responsible for the following work at a dock area or within a port area in the United States with respect to cargo transportation under a service contract:

(A) The movement of the shipper's cargo on a dock area or within the port area or to or from railroad cars on a dock area or within the port area.

(B) The assignment of intraport carriage of the shipper's cargo between areas on a dock or within the port area.

(C) The assignment of the carriage of the shipper's cargo between a container yard on a dock area or within the port area and a rail yard adjacent to the container yard.

(D) The assignment of container freight station work and container maintenance and repair work performed at a dock area or within the port area.

(3) WITHIN REASONABLE TIME.—The common carrier shall provide the information described in paragraph (2) to the requesting labor organization within a reasonable period of time.

(4) EXISTENCE OF COLLECTIVE BARGAINING AGREEMENT.—This subsection does not require the disclosure of information by an ocean common carrier unless there exists an applicable and otherwise lawful collective bargaining agreement pertaining to that carrier. A disclosure by an ocean common carrier may not be deemed an admission or an agreement that any work is covered by a collective bargaining agreement. A dispute about whether any work is covered by a collective bargaining agreement and the responsibility of an ocean common carrier under a collective bargaining agreement shall be resolved solely in accordance with the dispute resolution procedures contained in the collective bargaining agreement and the National Labor Relations Act (29 U.S.C. 151 et seq.), and without reference to this subsection.

(5) EFFECT UNDER OTHER LAWS.—This subsection does not affect the lawfulness or unlawfulness under this part or any other Federal or State law of any collective bargaining agreement or element thereof, including any element that constitutes an essential term of a service contract.

(f) REMEDY FOR BREACH.—Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court. The contract dispute resolution forum may not be controlled by or in any way affiliated with a controlled carrier or by the government that owns or controls the carrier.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1533.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
40502(a)	46 App.:1707(c)(1) (1st sentence).	Pub. L. 98–237, §8(c), Mar. 20, 1984, 98 Stat. 75; restated Pub. L. 105–258, title I, §106(b), Oct. 14, 1998, 112 Stat. 1905.
40502(b)	46 App.:1707(c)(2) (1st sentence).	
40502(c)	46 App.:1707(c)(2) (last sentence).	
40502(d)	46 App.:1707(c)(3).	
40502(e)	46 App.:1707(c)(4).	
40502(f)	46 App.:1707(c)(1) (2d, last sentences).	

In subsection (e)(5), the words "the National Labor Relations Act [29 U.S.C. 151 et seq.], the Taft-Hartley Act [29 U.S.C. 141 et seq.], the Federal Trade Commission Act [15 U.S.C. 41 et seq.], the antitrust laws" are omitted as unnecessary because of the reference to "any other Federal or State law".

REFERENCES IN TEXT

The National Labor Relations Act, referred to in subsec. (e)(4), is act July 5, 1935, ch. 372, 49 Stat. 449, which is classified generally to subchapter II (§151 et seq.) of chapter 7 of Title 29, Labor. For complete classification of this Act to the Code, see section 167 of Title 29 and Tables.

the definition of "ocean transportation intermediary" in section 1702(17)(A) contains a definition of "ocean freight forwarder" which is restated as a separate definition.

In subsection (d)(1), the word "calendar" is omitted as unnecessary.

CHAPTER 411—PROHIBITIONS AND PENALTIES

§ 41101. Joint ventures and consortiums

In this chapter, a joint venture or consortium of two or more common carriers operating as a single entity is deemed to be a single common carrier.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1540.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
41101	46 App.:1709(e).	Pub. L. 98–237, §10(e), Mar. 20, 1984, 98 Stat. 80.

§ 41102. General prohibitions

(a) OBTAINING TRANSPORTATION AT LESS THAN APPLICABLE RATES.—A person may not knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or any other unjust or unfair device or means, obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise apply.

(b) OPERATING CONTRARY TO AGREEMENT.—A person may not operate under an agreement required to be filed under section 40302 or 40305 of this title if—

(1) the agreement has not become effective under section 40304 of this title or has been rejected, disapproved, or canceled; or

(2) the operation is not in accordance with the terms of the agreement or any modifications to the agreement made by the Federal Maritime Commission.

(c) PRACTICES IN HANDLING PROPERTY.—A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1540.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
41102(a)	46 App.:1709(a)(1).	Pub. L. 98–237, §10(a), Mar. 20, 1984, 98 Stat. 77.
41102(b)	46 App.:1709(a)(2), (3).	

HISTORICAL AND REVISION NOTES—CONTINUED

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
41102(c)	46 App.:1709(d)(1).	Pub. L. 98–237, §10(d)(1), Mar. 20, 1984, 98 Stat. 77; Pub. L. 105–258, title I, §109(c)(2), Oct. 14, 1998, 112 Stat. 1909.

§ 41103. Disclosure of information

(a) PROHIBITION.—A common carrier, marine terminal operator, or ocean freight forwarder, either alone or in conjunction with any other person, directly or indirectly, may not knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier, without the consent of the shipper or consignee, if the information—

(1) may be used to the detriment or prejudice of the shipper, the consignee, or any common carrier; or

(2) may improperly disclose its business transaction to a competitor.

(b) EXCEPTIONS.—Subsection (a) does not prevent providing the information—

(1) in response to legal process;

(2) to the Federal Maritime Commission or an agency of the United States Government; or

(3) to an independent neutral body operating within the scope of its authority to fulfill the policing obligations of the parties to an agreement effective under this part.

(c) DISCLOSURE FOR DETERMINING BREACH OR COMPILING STATISTICS.—An ocean common carrier that is a party to a conference agreement approved under this part, a receiver, trustee, lessee, agent, or employee of the carrier, or any other person authorized by the carrier to receive information—

(1) may give information to the conference or any person or agency designated by the conference, for the purpose of—

(A) determining whether a shipper or consignee has breached an agreement with the conference or its member lines;

(B) determining whether a member of the conference has breached the conference agreement; or

(C) compiling statistics of cargo movement; and

(2) may not prevent the conference or its designee from soliciting or receiving information for any of those purposes.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1540.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
41103(a)	46 App.:1709(b)(13), (d)(3) (related to (b)(13)), (5).	Pub. L. 98–237, §10(b)(13), (words after cl. (13)), (d)(3) (related to (b)(13)), (5), Mar. 20, 1984, 98 Stat. 79, 80; Pub. L. 101–595, title VII, §710(c)(1), (2), Nov. 16, 1990, 104 Stat. 2997; Pub. L. 105–258, title I, §109(a)(10), (11), (16), (17), (c)(3), Oct. 14, 1998, 112 Stat. 1910, 1911.

quired for a vessel operated by the carrier, and when so requested, the Secretary shall refuse or revoke the clearance.

(2) DEFENSE BASED ON FOREIGN LAW.—If, in defense of its failure to comply with a subpoena or discovery order, a common carrier alleges that information or documents located in a foreign country cannot be produced because of the laws of that country, the Commission shall immediately notify the Secretary of State of the failure to comply and of the allegation relating to foreign laws. On receiving the notification, the Secretary of State shall promptly consult with the government of the nation within which the information or documents are alleged to be located for the purpose of assisting the Commission in obtaining the information or documents.

(d) IMPAIRING ACCESS TO FOREIGN TRADE.—If the Commission finds, after notice and opportunity for a hearing, that the action of a common carrier, acting alone or in concert with another person, or a foreign government has unduly impaired access of a vessel documented under the laws of the United States to ocean trade between foreign ports, the Commission shall take action that it finds appropriate, including imposing any of the penalties authorized by this section. The Commission also may take any of the actions authorized by sections 42304 and 42305 of this title.

(e) SUBMISSION OF ORDER TO PRESIDENT.—Before an order under this section becomes effective, it shall be submitted immediately to the President. The President, within 10 days after receiving it, may disapprove it if the President finds that disapproval is required for reasons of national defense or foreign policy.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1543.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
41108(a)	46 App.:1712(b)(1).	Pub. L. 98–237, §13(b), Mar. 20, 1984, 98 Stat. 82; Pub. L. 105–258, title I, §112(b), Oct. 14, 1998, 112 Stat. 1911.
41108(b)	46 App.:1712(b)(3).	
41108(c)	46 App.:1712(b)(2), (4), (5).	
41108(d)	46 App.:1712(b)(6).	
	46 App.:1710a(h) (related to 1712(b)(6)).	Pub. L. 100–418, title X, §10002(h) (related to §13(b)(6)), Aug. 23, 1988, 102 Stat. 1572; Pub. L. 105–258, title I, §111(7), Oct. 14, 1998, 112 Stat. 1911.
41108(e)	46 App.:1712(b)(7).	

In subsection (c)(1)(B), the words "Secretary of Homeland Security" are substituted for "Secretary of the Treasury" because the functions of the Secretary of the Treasury relating to the Customs Service were transferred to the Secretary of Homeland Security by section 403(1) of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2178).

§ 41109. Assessment of penalties

(a) GENERAL AUTHORITY.—Until a matter is referred to the Attorney General, the Federal Maritime Commission may, after notice and opportunity for a hearing, assess a civil penalty provided for in this part. The Commission may compromise, modify, or remit, with or without conditions, a civil penalty.

(b) FACTORS IN DETERMINING AMOUNT.—In determining the amount of a civil penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and other matters justice may require.

(c) EXCEPTION.—A civil penalty may not be imposed for conspiracy to violate section 41102(a) or 41104(1) or (2) of this title or to defraud the Commission by concealing such a violation.

(d) PROHIBITED BASIS OF PENALTY.—The Commission or a court may not order a person to pay the difference between the amount billed and agreed upon in writing with a common carrier or its agent and the amount set forth in a tariff or service contract by that common carrier for the transportation service provided.

(e) TIME LIMIT.—A proceeding to assess a civil penalty under this section must be commenced within 5 years after the date of the violation.

(f) REVIEW OF CIVIL PENALTY.—A person against whom a civil penalty is assessed under this section may obtain review under chapter 158 of title 28.

(g) CIVIL ACTIONS TO COLLECT.—If a person does not pay an assessment of a civil penalty after it has become final or after the appropriate court has entered final judgment in favor of the Commission, the Attorney General at the request of the Commission may seek to collect the amount assessed in an appropriate district court of the United States. The court shall enforce the order of the Commission unless it finds that the order was not regularly made and duly issued.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1544.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
41109(a)	46 App.:1712(c) (1st, last sentences).	Pub. L. 98–237, §13(c)–(f), Mar. 20, 1984, 98 Stat. 82; Pub. L. 105–258, title I, §112(c), Oct. 14, 1998, 112 Stat. 1912.
41109(b)	46 App.:1712(c) (2d sentence).	
41109(c)	46 App.:1712(f)(1) (1st sentence).	
41109(d)	46 App.:1712(f)(1) (last sentence).	
41109(e)	46 App.:1712(f)(2).	
41109(f)	46 App.:1712(d).	
41109(g)	46 App.:1712(e).	

CHAPTER 413—ENFORCEMENT

Sec.
41301. Complaints.
41302. Investigations.
41303. Discovery and subpoenas.
41304. Hearings and orders.
41305. Award of reparations.
41306. Injunctive relief sought by complainants.
41307. Injunctive relief sought by the Commission.
41308. Enforcement of subpoenas and orders.
41309. Enforcement of reparation orders.

§ 41301. Complaints

(a) IN GENERAL.—A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

(b) NOTICE AND RESPONSE.—The Commission shall provide a copy of the complaint to the person named in the complaint. Within a reasonable time specified by the Commission, the person shall satisfy the complaint or answer it in writing.

(c) IF COMPLAINT NOT SATISFIED.—If the complaint is not satisfied, the Commission shall investigate the complaint in an appropriate manner and make an appropriate order.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1545.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
41301(a)	46 App.:1710(a), (g) (related to time limit).	Pub. L. 98–237, §11(a), (b), (g) (related to time limit), Mar. 20, 1984, 98 Stat. 80; Pub. L. 98–595, §3(b)(2), Oct. 30, 1984, 98 Stat. 3132; Pub. L. 105–258, title I, §110, Oct. 14, 1998, 112 Stat. 1911.
41301(b)	46 App.:1710(b) (1st sentence).	
41301(c)	46 App.:1710(b) (last sentence).	

In subsection (a), the words "If the complaint is filed within 3 years after the claim accrues" are substituted for "For any complaint filed within 3 years after the cause of action accrued" in 46 App. U.S.C. 1710(g) to alert the reader to that time limitation.

§ 41302. Investigations

(a) IN GENERAL.—The Federal Maritime Commission, on complaint or its own motion, may investigate any conduct or agreement that the Commission believes may be in violation of this part. The Commission may by order disapprove, cancel, or modify any agreement that operates in violation of this part.

(b) EFFECTIVENESS OF AGREEMENT DURING INVESTIGATION.—Unless an injunction is issued under section 41306 or 41307 of this title, an agreement under investigation by the Commission remains in effect until the Commission issues its order.

(c) DATE FOR DECISION.—Within 10 days after the initiation of a proceeding under this section or section 41301 of this title, the Commission shall set a date by which it will issue its final decision. The Commission by order may extend the date for good cause.

(d) SANCTIONS FOR DELAY.—If, within the period for final decision under subsection (c), the Commission determines that it is unable to issue a final decision because of undue delay caused by a party to the proceeding, the Commission may impose sanctions, including issuing a decision adverse to the delaying party.

(e) REPORT.—The Commission shall make a written report of every investigation under this part in which a hearing was held, stating its conclusions, decisions, findings of fact, and order. The Commission shall provide a copy of the report to all parties and publish the report for public information. A published report is competent evidence in a court of the United States.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1545.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
41302(a)	46 App.:1710(c) (1st, 3d sentences).	Pub. L. 98–237, §11(c)–(f), Mar. 20, 1984, 98 Stat. 80.
41302(b)	46 App.:1710(c) (2d sentence).	
41302(c)	46 App.:1710(d).	
41302(d)	46 App.:1710(e).	
41302(e)	46 App.:1710(f).	

§ 41303. Discovery and subpoenas

(a) IN GENERAL.—In an investigation or adjudicatory proceeding under this part—

(1) the Federal Maritime Commission may subpoena witnesses and evidence; and

(2) a party may use depositions, written interrogatories, and discovery procedures under regulations prescribed by the Commission that, to the extent practicable, shall conform to the Federal Rules of Civil Procedure (28 App. U.S.C.).

(b) WITNESS FEES.—Unless otherwise prohibited by law, a witness is entitled to the same fees and mileage as in the courts of the United States.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1545.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
41303	46 App.:1711.	Pub. L. 98–237, §12, Mar. 20, 1984, 98 Stat. 81.

In subsection (a)(1), the words "may subpoena witnesses and evidence" are substituted for "may by subpena compel the attendance of witnesses and the production of books, papers, documents, and other evidence" to eliminate unnecessary words.

In subsection (a)(2), the words "shall conform to the Federal Rules of Civil Procedure (28 App. U.S.C.)" are substituted for "shall be in conformity with the rules applicable in civil proceedings in the district courts of the United States" for clarity.

§ 41304. Hearings and orders

(a) OPPORTUNITY FOR HEARING.—The Federal Maritime Commission shall provide an opportunity for a hearing before issuing an order relating to a violation of this part or a regulation prescribed under this part.

(b) MODIFICATION OF ORDER.—The Commission may reverse, suspend, or modify any of its orders.

(c) REHEARING.—On application of a party to a proceeding, the Commission may grant a rehearing of the same or any matter determined in the proceeding. Except by order of the Commission, a rehearing does not operate as a stay of an order.

(d) PERIOD OF EFFECTIVENESS.—An order of the Commission remains in effect for the period specified in the order or until suspended, modified, or set aside by the Commission or a court of competent jurisdiction.

(Pub. L. 109–304, §7, Oct. 6, 2006, 120 Stat. 1546.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
41304(a)	46 App.:1713(a) (1st sentence).	Pub. L. 98–237, §14(a), (b), Mar. 20, 1984, 98 Stat. 83.

ARTICLE 1.

COMMON LAW AND ACTS OF PARLIAMENT.

§ 1-200. The common law.

The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.

that the limitation may be extended by recordation of a certificate within the twenty-year period in the manner set forth in § 8.01-241. No credit line deed of trust described in § 55-58.2 in which no date is fixed for the maturity of the debt secured thereby shall be enforced after forty years from the date of the credit line deed of trust; provided that the period of one year from the death of any party in interest shall be excluded from the computation of time.

History.
Code 1950, § 8-12; 1977, c. 617; 1994, c. 547; 1999, c. 788.

Law Review.
For survey article on judicial decisions in real estate law from June 1, 2002 through June 1, 2003, see 38 U. Rich. L. Rev. 223 (2003).

Michie's Jurisprudence.
For related discussion, see 13A M.J. Mortgages and Deeds of Trust, § 166.

CASE NOTES

Junior lienor was a party in interest. — Junior lienor, who was the mortgagor of the property which was the subject of the foreclosure and the holder of a second deed of trust which secured his note, was a necessary party, as well as a party in interest to foreclosure suit for the purposes of this section; therefore, his death extended the statute of limitations by one year, as provided in this section. Allen v. Chapman, 242 Va. 94, 406 S.E.2d 186 (1991).

Federal agency's immunity did not apply to private trustee. — Although § 8.01-242 could not bar a federal agency, such as the United States Small Business Administration, from initiating foreclosure proceedings on real property, a private entity (a trustee) to which the Administration assigned a deed of trust did not, merely by virtue of that assignment, enjoy the same immunity from the statute of limitation. Long, Long & Kellerman, P.C. v. Wheeler, 264 Va. 531, 570 S.E.2d 822, 2002 Va. LEXIS 152 (2002).

Foreclosure action was time-barred. — Where a deed of trust contained no maturity date, the 20-year statute of limitation set forth in § 8.01-242 applied and barred a trustee's action to foreclose on the deed of trust where the foreclosure action was initiated more than 20 years after the date of the deed of trust. Long, Long & Kellerman, P.C. v. Wheeler, 264 Va. 531, 570 S.E.2d 822, 2002 Va. LEXIS 152 (2002).

ARTICLE 3.
PERSONAL ACTIONS GENERALLY.

§ 8.01-243. Personal action for injury to person or property generally; extension in actions for malpractice against health care provider.

A. Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

B. Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years after the cause of action accrues. An infant's claim for medical expenses pursuant to subsection B of § 8.01-36 accruing on or after July 1, 2013, shall be governed by the applicable statute of limitations that applies to the infant's cause of action.

C. The two-year limitations period specified in subsection A shall be extended in actions for malpractice against a health care provider as follows:

1. In cases arising out of a foreign object having no therapeutic or diagnostic effect being left in a patient's body, for a period of one year from the date the object is discovered or reasonably should have been discovered;

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Counselors at law

March 11, 2019

VIA HAND DELIVERY
The Honorable George E. Schaefer, III, Clerk
Norfolk Circuit Court-Civil Division
7th Floor
150 St. Paul's Boulevard

Re: Stephen K. Walton, Sr. v. Virginia International Terminals, LLC, Ceres Marine Terminals, Inc., and CP&O, LLC
Norfolk Circuit Court, Case No.

Dear Mr. Schaefer:

Enclosed is an original Complaint, civil action cover sheet, and a check in the amount of $354.00 to cover the cost of filing. Please file the Complaint. Jury trial is demanded. I expect this case will take three (3) days to try. Please have this case assigned to a judge.

Also enclosed is a copy of the Complaint. Please prepare a summons for the defendant named below for service of process at the following address:

Virginia International Terminals, LLC
c/o Sarah Jayne McCoy, Esq., registered agent
600 World Trade Center
Norfolk, VA 23510

I AM HAVING PROCESS SERVED THROUGH THE MARSTON AGENCY.

Please call me if you have any questions. My direct no. is 757-739-4227. Thanking you for your help in this matter, I am

Very truly yours,

Lance A. Jackson

Enclosures
cc:
Stephen K. Walton, Sr. (via first class mail)(w/encl.)
Donita Malloy, Marston Agency (via email dmalloy@mai-va.com)(w/out encl.)

COVER SHEET FOR FILING CIVIL ACTIONS

COMMONWEALTH OF VIRGINIA

Case No. ..... (CLERK'S OFFICE USE ONLY)

Norfolk ..... Circuit Court

Stephen K. Walton, Sr. ..... v./*In re:* Virginia International Terminals, LLC, ...

PLAINTIFF(S) DEFENDANT(S)

..... Ceres Marine Terminals, Inc., and CP&O, LLC .....

I, the undersigned [ ] plaintiff [ ] defendant [x] attorney for [x] plaintiff [ ] defendant hereby notify the Clerk of Court that I am filing the following civil action. (Please indicate by checking box that most closely identifies the claim being asserted or relief sought.)

GENERAL CIVIL

Subsequent Actions

- [ ] Claim Impleading Third Party Defendant
  - [ ] Monetary Damages
  - [ ] No Monetary Damages
- [ ] Counterclaim
  - [ ] Monetary Damages
  - [ ] No Monetary Damages
- [ ] Cross Claim
- [ ] Interpleader
- [ ] Reinstatement (other than divorce or driving privileges)
- [ ] Removal of Case to Federal Court

Business & Contract

- [ ] Attachment
- [ ] Confessed Judgment
- [ ] Contract Action
- [ ] Contract Specific Performance
- [ ] Detinue
- [ ] Garnishment

Property

- [ ] Annexation
- [ ] Condemnation
- [ ] Ejectment
- [ ] Encumber/Sell Real Estate
- [ ] Enforce Vendor's Lien
- [ ] Escheatment
- [ ] Establish Boundaries
- [ ] Landlord/Tenant
  - [ ] Unlawful Detainer
- [ ] Mechanics Lien
- [ ] Partition
- [ ] Quiet Title
- [ ] Termination of Mineral Rights

Tort

- [ ] Asbestos Litigation
- [ ] Compromise Settlement
- [ ] Intentional Tort
- [ ] Medical Malpractice
- [ ] Motor Vehicle Tort
- [ ] Product Liability
- [ ] Wrongful Death
- [x] Other General Tort Liability

ADMINISTRATIVE LAW

- [ ] Appeal/Judicial Review of Decision of (select one)
  - [ ] ABC Board
  - [ ] Board of Zoning
  - [ ] Compensation Board
  - [ ] DMV License Suspension
  - [ ] Employee Grievance Decision
  - [ ] Employment Commission
  - [ ] Local Government
  - [ ] Marine Resources Commission
  - [ ] School Board
  - [ ] Voter Registration
  - [ ] Other Administrative Appeal

DOMESTIC/FAMILY

- [ ] Adoption
  - [ ] Adoption – Foreign
- [ ] Adult Protection
- [ ] Annulment
  - [ ] Annulment – Counterclaim/Responsive Pleading
- [ ] Child Abuse and Neglect – Unfounded Complaint
- [ ] Civil Contempt
- [ ] Divorce (select one)
  - [ ] Complaint – Contested*
  - [ ] Complaint – Uncontested*
  - [ ] Counterclaim/Responsive Pleading
  - [ ] Reinstatement – Custody/Visitation/Support/Equitable Distribution
- [ ] Separate Maintenance
  - [ ] Separate Maintenance Counterclaim

WRITS

- [ ] Certiorari
- [ ] Habeas Corpus
- [ ] Mandamus
- [ ] Prohibition
- [ ] Quo Warranto

PROBATE/WILLS AND TRUSTS

- [ ] Accounting
- [ ] Aid and Guidance
- [ ] Appointment (select one)
  - [ ] Guardian/Conservator
  - [ ] Standby Guardian/Conservator
  - [ ] Custodian/Successor Custodian (UTMA)
- [ ] Trust (select one)
  - [ ] Impress/Declare/Create
  - [ ] Reformation
- [ ] Will (select one)
  - [ ] Construe
  - [ ] Contested

MISCELLANEOUS

- [ ] Amend Death Certificate
- [ ] Appointment (select one)
  - [ ] Church Trustee
  - [ ] Conservator of Peace
  - [ ] Marriage Celebrant
- [ ] Approval of Transfer of Structured Settlement
- [ ] Bond Forfeiture Appeal
- [ ] Declaratory Judgment
- [ ] Declare Death
- [ ] Driving Privileges (select one)
  - [ ] Reinstatement pursuant to § 46.2-427
  - [ ] Restoration – Habitual Offender or 3rd Offense
- [ ] Expungement
- [ ] Firearms Rights – Restoration
- [ ] Forfeiture of Property or Money
- [ ] Freedom of Information
- [ ] Injunction
- [ ] Interdiction
- [ ] Interrogatory
- [ ] Judgment Lien-Bill to Enforce
- [ ] Law Enforcement/Public Official Petition
- [ ] Name Change
- [ ] Referendum Elections
- [ ] Sever Order
- [ ] Taxes (select one)
  - [ ] Correct Erroneous State/Local
  - [ ] Delinquent
- [ ] Vehicle Confiscation
- [ ] Voting Rights – Restoration
- [ ] Other (please specify)

[x] Damages in the amount of $ 5,000,000.00 are claimed.

03/11/2019 .....
DATE

[ ] PLAINTIFF [ ] DEFENDANT [x] ATTORNEY FOR [x] PLAINTIFF [ ] DEFENDANT

Lance A. Jackson, MONTAGNA KLEIN CAMDEN, L.L.P.
PRINT NAME

425 Monticello Avenue, Norfolk, VA 23510
ADDRESS/TELEPHONE NUMBER OF SIGNATOR

757-622-8100

ljackson@montagnalaw.com
EMAIL ADDRESS OF SIGNATOR (OPTIONAL)

*"Contested" divorce means any of the following matters are in dispute: grounds of divorce, spousal support and maintenance, child custody and/or visitation, child support, property distribution or debt allocation. An "Uncontested" divorce is filed on no fault grounds and none of the above issues are in dispute.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

STEPHEN K. WALTON, SR.,

Plaintiff,

v.

Case No.
PLAINTIFF DEMANDS TRIAL BY JURY

VIRGINIA INTERNATIONAL
TERMINALS, LLC,

Serve: Virginia International Terminals, LLC
c/o Sarah Jayne McCoy, Esq., registered agent
Virginia Port Authority
600 World Trade Center
Norfolk, VA 23510

CERES MARINE TERMINALS, INC.,

and

CP&O, LLC,

Defendants.

COMPLAINT

The plaintiff, Stephen K. Walton, Sr., by counsel, for his Complaint against the defendants Virginia International Terminals, LLC, Ceres Marine Terminals, Inc., and CP&O, LLC, states as follows:

1. This is an action by a longshoreman for personal injuries that occurred at a marine terminal in the City of Norfolk, Virginia, on or about March 15, 2017, and is being brought pursuant to the laws of the Commonwealth of Virginia and Section 933 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

2. Venue for this action lies in the Circuit Court of the City of Norfolk, pursuant to Virginia Code §8.01-262, because the cause of action herein arose within the City of Norfolk.

3. The plaintiff Stephen K. Walton, Sr., is a citizen of the United States of America who is domiciled in the Commonwealth of Virginia, in the City of Portsmouth.

4. The defendant Virginia International Terminals, LLC, (hereinafter referred to as "VIT") is a Virginia limited liability company, which converted from being the corporation known as Virginia International Terminals, Inc., to a limited liability company, on or about August 17, 2013.

5. The defendant Ceres Marine Terminals, Inc., (hereinafter referred to as "Ceres") is a corporation formed pursuant to the laws of the State of Maryland, and it maintains its principal place of business in the State of New Jersey.

6. The defendant CP&O, LLC, (hereinafter referred to as "CP&O") is a Virginia limited liability company which was formed in October, 2004.

7. Norfolk International Terminals is a marine terminal located within the City of Norfolk, on the Elizabeth River and the Lafayette River, both of which are navigable waters of the United States. Hereinafter, this marine terminal will be referred to as "the terminal" and/or "NIT."

8. At all times pertinent herein, including March 15, 2017, the defendant VIT owned and/or leased and/or occupied and/or maintained the premises at the NIT terminal, including a maintenance and repair facility, an adjacent area used for the temporary storage of refrigerated cargo containers known as "reefers," and a walkway or roadway that runs between the maintenance and repair facility and the container storage area.

9. At all times pertinent herein, including March 15, 2017, the plaintiff Stephen K. Walton, Sr., was a longshoreman working as a reefer mechanic and container repair mechanic at the NIT marine terminal, and he was employed by Marine Repair Services, Inc.

10. The plaintiff Stephen K. Walton, Sr., was not an employee of the defendant VIT, on March 15, 2017, nor was he an employee of VIT at any other time pertinent herein.

11. The plaintiff Stephen K. Walton, Sr., was not an employee of the defendant Ceres on March 15, 2017, nor was he an employee of Ceres at any other time pertinent herein.

12. The plaintiff Stephen K. Walton, Sr., was not an employee of the defendant CP&O on March 15, 2017, nor was he an employee of CP&O at any other time pertinent herein.

13. At all times pertinent herein, including March 15, 2017, the marine terminal at NIT was not open to members of the general public.

14. At all times pertinent herein, including March 15, 2017, the defendant VIT, in cooperation with the Virginia Port Authority, controlled who entered the premises of NIT.

15. At all times pertinent herein, including March 15, 2017, there was an agreement in place between the defendant VIT and the plaintiff's employer Marine Repair Services, under which employees of Marine Repair Services were authorized to perform work on cargo containers at NIT, including checking the condition of reefers temporarily stored at NIT and unplugging reefers so that they can be loaded onto cargo vessels calling at the terminal.

16. At all times pertinent herein, including March 15, 2017, the plaintiff Stephen K. Walton, Sr., was a business invitee of the defendant VIT on the aforesaid premises at NIT, including the aforesaid container storage area and the walkway or roadway running between the container storage area and VIT's maintenance and repair facility.

17. At all times pertinent herein, including March 15, 2017, electrical boxes were installed at intervals along the aforesaid walkway or roadway, close to or adjacent to VIT's maintenance and repair facility. The electrical boxes were used to supply power to refrigerated cargo containers which were in the aforesaid container storage area.

18. At all times pertinent herein, including March 15, 2017, business invitees of the defendant VIT, including employees of Marine Repair Services, regularly visited the aforesaid container storage area and the aforesaid walkway or roadway at NIT to perform their work on the premises, at all hours of the day and night; and the defendant VIT, through its agents and employees, knew, or in the exercise of reasonable care should have known, this fact.

19. At all times pertinent herein, including March 15, 2017, container repair mechanics, including employees of Marine Repair Services, regularly visited the aforesaid container storage area and the aforesaid walkway or roadway to check on the condition of reefer units, and to unplug reefer units so that they could be moved, at all hours of the day and night; and the defendant VIT, through its agents and employees, knew or in the exercise of reasonable care should have known, this fact.

20. On information and belief, at all times pertinent herein, including March 15, 2017, the defendant VIT, through its agents and employees, maintained exclusive control over its maintenance and repair facility at NIT, including control over how and where forklifts and other equipment were parked and/or stored at the facility.

21. On information and belief, at all times pertinent herein, including March 15, 2017, the defendant VIT, through its agents and employees, controlled the location of and maintained the artificial lighting on its premises at NIT, including the lighting for the container storage area and the adjacent walkway or roadway.

22. On or about March 15, 2017, during the nighttime, the plaintiff Stephen K. Walton, Sr., was performing his work-related duties at the aforesaid container storage area and the aforesaid walkway or roadway at NIT.

23. The area which the plaintiff was using was a walkway that was regularly used by employees of Marine Repair Services, Inc., and others, and it was an area that the defendant VIT knew and expected, or in the exercise of reasonable care under the circumstances, should have known and expected that its invitees would use while performing their work on the premises at night.

24. At the aforesaid time and place, the plaintiff Stephen K. Walton, Sr., was unplugging reefer units so that they could be moved from the container storage area and loaded onto a cargo ship calling at the terminal.

25. As the plaintiff Stephen K. Walton, Sr., was performing his work, he was walking along the aforesaid walkway or roadway when he tripped over the blade of a forklift projecting out into the walkway, causing him to fall and be injured.

26. At the aforesaid time and place, the blade of the forklift over which the plaintiff tripped and fell was obscured by a shadow or shadows caused by cargo containers blocking the artificial light in the area and/or by the otherwise poor lighting conditions present in the area, such that the lighting was insufficient to illuminate the trip-and-fall hazard.

27. On March 15, 2017, and for months or years beforehand, the defendant VIT, through its agents and employees, knew or in the exercise of reasonable care should have known, that the lighting in the aforesaid walkway or roadway was poor and unsafe for persons doing their work on the premises.

28. At the aforesaid time and place, the blade of the forklift over which the plaintiff tripped and fell was not open and obvious.

29. Before the aforesaid incident in which the plaintiff was injured, the defendant VIT, through its agents and employees, and/or the defendant Ceres, through its agents and employees, and/or the defendant CP&O, through its agents and employees, placed the forklift in its dangerous position, with the blades of the forklift projecting into the aforesaid walkway.

30. Before the aforesaid incident in which the plaintiff was injured, the defendant VIT, through its agents and employees, and/or the defendant Ceres, through its agents and employees, and/or the defendant CP&O, through its agents and employees, knew or in the exercise of reasonable care under the circumstances should have known, that the forklift had been placed in a position so as to make it a trip-and-fall hazard to persons using the walkway at night.

31. The aforesaid injury which the plaintiff Stephen K. Walton, Sr., suffered on or about March 15, 2017, was an injury for which there was jurisdiction under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., so that, pursuant to Virginia Code § 65.2-101, the plaintiff was not an "employee" within the purview of the Virginia Workers' Compensation Act, Virginia Code § 65.2-101 et seq., and the Virginia Workers' Compensation Act does not apply to his injury herein.

32. At all times relevant herein, including March 15, 2017, the defendant VIT had a duty to exercise reasonable care for the safety of its invitees, including the plaintiff, with respect to the premises at NIT, including the duties of prevision, preparation, and lookout.

33. At all times relevant herein, including March 15, 2017, the defendant Ceres had a duty to exercise reasonable care to avoid causing injury to others who were lawfully on the NIT

premises, including the plaintiff.

34. At all times relevant herein, including March 15, 2017, the defendant CP&O had a duty to exercise reasonable care to avoid causing injury to others who were lawfully on the NIT premises, including the plaintiff.

35. Notwithstanding the foregoing, the defendant VIT, through its agents and employees, and/or the defendant Ceres, through its agents and employees, and/or the defendant CP&O, through its agents and employees, breached its/their duty to the plaintiff by its/their affirmative conduct in placing or storing a forklift on the NIT premises with its blades sticking out into the walkway next to the container storage area, creating a trip-and-fall hazard.

36. Notwithstanding the foregoing and furthermore, the defendant VIT, through its agents and employees, negligently breached its aforesaid duties in that it negligently maintained its premises; negligently failed to supply sufficient lighting for its invitees to work at night; negligently failed to keep its premises free of the aforesaid trip-and-fall hazard in an area where its invitees could be expected to walk; and/or negligently failed to warn the plaintiff of the aforesaid trip-and-fall hazard; and/or negligently failed to rope off, barricade, or otherwise bar entry to the area where it was unsafe to walk; and/or in other particulars to be supplied at trial.

37. As a direct and proximate result of the negligence of the defendant VIT and the negligence of its employees and/or agents, and/or as a direct and proximate result of the negligence of the defendant Ceres and the negligence of its employees and/or agents, and/or as a direct and proximate result of the negligence of the defendant CP&O and the negligence of its employees and/or agents, the plaintiff Stephen K. Walton, Sr., suffered physical injuries to his neck and other parts of his body; has undergone and continues to undergo physical pain, mental anguish, and inconvenience; has been unable to work at his occupation; has lost income; has lost

all or part of his capacity to earn income; and has incurred and continues to incur substantial medical expenses for the care and treatment of his injuries.

WHEREFORE the plaintiff Stephen K. Walton, Sr., by counsel, asks for entry of a judgment and award in his favor against the defendants Virginia International Terminals, LLC, Ceres Marine Terminals, Inc., and CP&O, LLC, jointly and severally, in the amount of FIVE MILLION DOLLARS ($5,000,000.00), plus prejudgment interest, post judgment interest, and legal costs incurred.

THE PLAINTIFF DEMANDS TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

STEPHEN K. WALTON, SR.

By: _____
Of Counsel

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

STEPHEN K. WALTON, SR.,

Plaintiff,

v.

Case No. CL19-2417
THE PLAINTIFF DEMANDS TRIAL BY JURY

VIRGINIA INTERNATIONAL TERMINALS, LLC,

Serve: Virginia International Terminals, LLC
c/o Sarah Jayne McCoy, Esq., registered agent
Virginia Port Authority
600 World Trade Center
Norfolk, VA 23510

CERES MARINE TERMINALS, INC.,

and

CP&O, LLC,

Defendants.

AMENDED COMPLAINT

The plaintiff, Stephen K. Walton, Sr., by counsel, for his Amended Complaint against the defendants Virginia International Terminals, LLC, Ceres Marine Terminals, Inc., and CP&O, LLC, states as follows:

1. This is an action by a longshoreman for personal injuries that occurred at a marine terminal in the City of Norfolk, Virginia, on or about March 15, 2017, and is being brought pursuant to the laws of the Commonwealth of Virginia and Section 933 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq.

2. Venue for this action lies in the Circuit Court of the City of Norfolk, pursuant to Virginia Code §8.01-262, because the cause of action arose within the City of Norfolk.

3. The plaintiff Steven K. Walton, Sr., is a citizen of the United States of America who is domiciled in the Commonwealth of Virginia, in the City of Portsmouth.

4. At all times pertinent herein, including March 15, 2017, the plaintiff Steven K. Walton, Sr., was employed as a longshoreman, by Marine Repair Services, Inc. (hereinafter referred to as "MRS"), performing work as a reefer mechanic and container repair mechanic.

5. The defendant Virginia International Terminals, LLC (hereinafter referred to as "VIT") is a Virginia limited liability company, which converted from being the corporation known as Virginia International Terminals, Inc., to a limited liability company, on or about August 17, 2013.

6. The defendant Ceres Marine Terminals, Inc. (hereinafter referred to as "Ceres") is a corporation formed pursuant to the laws of the State of Maryland, and it maintains its principal place of business in the State of New Jersey.

7. The defendant CP&O, LLC (hereinafter referred to as "CP&O") is a Virginia limited liability company which was formed in October 2004.

8. Norfolk International Terminals is a marine terminal located within the City of Norfolk, on the Elizabeth River and the Lafayette River, both of which are navigable waters of the United States. Hereinafter, this marine terminal will be referred to as "the terminal" and/or "NIT."

9. At all times pertinent herein, including March 15, 2017, the defendant VIT operated, managed, occupied, and/or maintained the NIT premises.

10. At all times pertinent herein, including March 15, 2017, the defendant VIT was in the business of facilitating the transfer of cargo at the NIT terminal, including containerized cargo, between sea-based modes of cargo transportation, including cargo ships and barges, and

land-based modes of cargo transportation, including railroad and over-the-road trucks.

11. At all times pertinent herein, a significant portion of the containerized cargo which was transferred through the NIT terminal was refrigerated. The refrigerated cargo was stowed in refrigerated containers known as "reefers."

12. Reefers require an electrical power source in order to keep the cargo stowed therein refrigerated. Reefers stowed aboard a cargo ship receive their electrical power from the ship, transmitted through power cords. Reefers temporarily stored at a terminal, such as NIT, receive their electrical power from the terminal transmitted through high-voltage power cords connected to electrical boxes. Reefers which are not attached to a fixed source of electrical power such as a ship or a terminal are powered by a generator installed onto the reefer container. Such generators are referred to as "gen-sets."

13. At all times pertinent herein, including March 15, 2017, cargo ships regularly called at the NIT terminal, where they underwent loading and unloading of containerized cargo, including reefers. Containerized cargo, including reefers, that was loaded onto these cargo ships was regularly transported into the NIT terminal by rail and/or by over-the-road trucks. Containerized cargo, including reefers, that was discharged from these cargo ships at the NIT terminal was regularly transported out of the NIT terminal by rail and/or by over-the-road trucks. On a regular basis, containerized cargo which was not immediately transferred from one mode of transportation to another at the terminal was stored temporarily at the NIT terminal.

14. At all times pertinent herein, including March 15, 2017, several business entities operated at NIT on a daily basis, performing various jobs necessary and beneficial to the defendant VIT's business at NIT. These entities included defendant VIT, the plaintiff's employer MRS, and defendants Ceres and CP&O. The defendant VIT was the marine terminal operator.

MRS performed maintenance and repair of cargo containers. The defendants Ceres and CP&O performed stevedoring work. The work of each of these entities is more fully described below.

15. At all times pertinent herein, including March 15, 2017, the defendant VIT, through its employees, performed many but not all services necessary for NIT to function as a marine terminal, including but not limited to the following: VIT employees worked as linehandlers to facilitate mooring and unmooring of cargo vessels calling at the terminal. VIT employees maintained the berths at the terminal where the cargo ships called. VIT employees operated and maintained the cranes at the terminal docks used to load and unload containerized cargo, including reefers, to and from cargo ships calling at the terminal. VIT owned and, through its employees, maintained straddle carriers, which are vehicles used to transport cargo containers from container storage places to points of loading or unloading within the terminal. VIT, through its employees, controlled rail operations within the NIT terminal, including transportation of cargo containers, dry and refrigerated, in and out of the terminal. VIT employees, kept track of all cargo entering and leaving the NIT terminal. VIT, in cooperation with the Virginia Port Authority, controlled who entered the premises at NIT. VIT determined whether other business entities, including the plaintiff's employer MRS, would perform their work on the NIT premises. VIT, through its employees, maintained a cargo container storage yard at NIT, where reefers were temporarily kept before they were transported out of the terminal by rail, truck, or ship. VIT, through its employees, operated a maintenance and repair facility at NIT, near the cargo container storage yard. VIT, through its employees, controlled and maintained the entire NIT terminal premises.

16. At all times pertinent herein, including March 15, 2017, the defendant VIT did not, through its employees, perform some of the work at the NIT terminal which was

necessary and beneficial to VIT's business at the terminal. This work included stevedoring operations, and the maintenance and repair of cargo containers.

17. The aforementioned stevedoring operations at NIT, including the loading and discharging of containerized cargo onto and off ships calling at the terminal, and the transportation of such cargo, including reefers, between temporary storage facilities on the terminal and the docks, were performed by defendants CP&O and Ceres.

18. All of the aforementioned container maintenance and repair work at NIT which the plaintiff's employer MRS performed, was necessary and beneficial to both MRS and to defendant VIT, as the operator of the marine terminal. This work, which MRS performed at NIT through its employees, is more particularly described as follows: At all times pertinent herein, including March 15, 2017, MRS employees boarded cargo ships calling at the NIT terminal, where they connected loaded reefers to the ships' power sources, disconnected reefers about to be unloaded from the ships' power sources, and performed container repairs. MRS employees repaired damaged cargo containers at the NIT terminal to facilitate their transfer out of the terminal. MRS employees mounted generator sets ("gen-sets") onto reefer containers and dismounted gen-sets from reefer containers as needed. MRS employees monitored the refrigeration temperature of reefer containers kept at the NIT terminal. MRS employees connected reefer containers being stored at defendant VIT's container storage facility at NIT, more particularly described below as "reefer row," to power boxes at the facility. MRS employees disconnected reefer containers stored at "reefer row" to prepare the reefers for transportation away from NIT by cargo ship, rail, or over-the-road trucks.

19. At all times pertinent herein, including March 15, 2017, the defendant VIT controlled the entry of all visitors, including the plaintiff Stephen K. Walton, Sr., onto the NIT

premises. The perimeters of NIT were fenced and gated. VIT opened its NIT premises only to entities having business to perform on its premises, including the plaintiff's employer MRS and its employees, and defendants Ceres and CP&O.

20. At all times pertinent herein, including March 15, 2017, the defendant VIT occupied and/or controlled and/or maintained a yard in the northern part of NIT premises for the temporary storage of reefers. This area is referred to herein as "reefer row."

21. The aforementioned reefer row was located to the north and east of a large retention pond on the NIT premises, to the west of a straddle carrier repair shop at NIT, and next to and north of an area that the defendant VIT reserved for its own use as a maintenance and repair area.

22. The aforementioned reefer row was not located at 4th Street and Railroad Avenue at NIT, nor was reefer row on 6th Street at NIT.

23. At all times pertinent herein, including March 15, 2017, the aforementioned reefer row consisted of several parallel rows, including the N6, N5, and N4 rows. Reefers were temporarily stored in each of these rows. The N4 row was on the southern side of reefer row.

24. At all times pertinent herein, including March 15, 2017, the defendant VIT occupied, controlled, and maintained a maintenance and repair facility adjacent to the N4 row of the aforementioned "reefer row" area at NIT. This facility will be referred to herein as the "VIT maintenance facility."

25. At all times pertinent herein, including March 15, 2017, the defendant VIT stored its equipment, including its forklifts, at the VIT maintenance facility adjacent to reefer row. The defendant VIT used this facility solely for its equipment. The defendant VIT did not permit other entities to park or store their equipment at the facility.

26. At all times pertinent herein, including March 15, 2017, VIT owned forklifts which were used at NIT. Older VIT-owned forklifts were orange. Newer VIT-owned forklifts were blue.

27. At all times pertinent herein, including March 15, 2017, VIT-owned forklifts at NIT were used by three entities: VIT, Ceres, and CP&O. Defendants Ceres and CP&O leased VIT-owned forklifts. The defendant VIT marked its ownership of each such forklift with a VIT sticker.

28. Upon information and belief, at all times pertinent herein, including March 15, 2017, the defendant VIT did not lease its forklifts at NIT to any entities other than Ceres and CP&O.

29. At all times pertinent herein, including March 15, 2017, neither Ceres nor CP&O performed any work in reefer row with forklifts.

30. At all times pertinent herein, including March 15, 2017, the defendant VIT maintained exclusive control over the VIT maintenance facility, including control over how and where forklifts and other equipment were parked and/or stored at the VIT maintenance facility. The defendant VIT prohibited non-VIT employees from driving any equipment, including forklifts, onto the VIT maintenance facility. Only VIT employees drove equipment, including forklifts, onto the VIT maintenance facility.

31. At all times pertinent herein, including March 15, 2017, the defendant VIT occupied and/or controlled and/or maintained a walkway that ran along the south side of the N4 row of reefer row and adjacent to the VIT maintenance facility. This walkway will be referred to as the "walkway."

32. At all times pertinent herein, including March 15, 2017, the defendant VIT opened and kept open, at all hours of night and day, the reefer row area and aforementioned walkway to MRS to perform its work on the premises.

33. At all times pertinent herein, including March 15, 2017, electrical boxes were mounted on raised concrete slabs, which were situated at intervals along the aforesaid walkway at NIT, close to or adjacent to the northern border of VIT's aforesaid maintenance facility. These electrical boxes were used to supply electrical power to reefers that were on the N4 row, next to the VIT maintenance facility.

34. The aforesaid raised concrete slabs and electrical boxes on the walkway referred to herein made the walkway inaccessible to forklift use and travel.

35. At all times pertinent herein, including March 15, 2017, VIT had in place moveable barriers (sometimes referred to as "Jersey barriers") between the walkway and the northern border of VIT's maintenance facility. Only VIT personnel were authorized to move these barriers.

36. On March 15, 2017, at approximately 12:30 a.m., the plaintiff Stephen K. Walton, Sr., was working at NIT in reefer row as a longshoreman in the employment of MRS, performing his job as a reefer mechanic and container repair mechanic.

37. At the aforesaid time and place, the plaintiff was at the reefer row premises at the express or implied invitation of the defendant VIT, which opened its premises to the plaintiff, so that he could perform work on the premises, and his work was beneficial to VIT's business as the operator of the NIT marine terminal. At no such time or place was the plaintiff on the NIT premises for his own pleasure or convenience, nor was he on the premises because of the defendant VIT's passive acquiescence.

38. At no time pertinent herein, including March 15, 2017, was the plaintiff Stephen K. Walton, Sr., an employee of the defendant VIT, nor was he an employee of defendant CP&O, nor was he an employee of defendant Ceres.

39. At the aforesaid time and place, the plaintiff was unplugging reefer units so that they could be moved from reefer row and transported off the NIT terminal. Upon information and belief, the reefers which the plaintiff was unplugging were to be loaded onto a cargo ship calling at the terminal. All of the work which the plaintiff was performing was beneficial to MRS and to the defendant VIT.

40. At the aforesaid time and place, as the plaintiff was performing his work, he stepped off a raised concrete slab in the walkway and walked a short distance in a westerly direction, when he tripped over the blade of a forklift projecting out into the walkway from the VIT maintenance area, causing him to fall and be injured. A photograph of the walkway and the forklift, depicting where the plaintiff was injured, is attached hereto as Exhibit 1. In the background of the photograph, an electrical box mounted on a raised concrete slab in the walkway, and moveable barriers, which VIT used to demarcate the northern boundary of VIT's maintenance facility, are visible.

41. At the aforesaid time and place, the blade of the forklift which caused the plaintiff to trip and fall was obscured by a shadow or shadows.

42. On previous occasions, the defendant VIT had stored or placed its forklifts at the northern border of its maintenance facility, near the aforesaid walkway. On such occasions, the forklifts were either facing away from the walkway, or the blades were removed.

43. At the aforesaid time and place, the blade of the forklift over which the plaintiff tripped and fell was not open and obvious.

44. In the area where the plaintiff was injured, there was no warning sign posted concerning the aforesaid trip-and-fall hazard, nor was the area roped off, taped off, or otherwise marked as unsafe to visit.

45. The forklift which caused the plaintiff to be injured had a VIT sticker on it and was owned by the defendant VIT.

46. Because the forklift which caused the plaintiff to be injured was owned by the defendant VIT, the forklift would have been operated by employees of the defendant VIT, or by the employees of defendant Ceres or defendant CP&O. No other entities operated such forklifts at NIT at the aforesaid time. Furthermore, neither Ceres nor CP&O operated or used forklifts in the reefer row area at any time pertinent herein, including March 15, 2017.

47. In the walkway where the aforementioned injury occurred, there were raised concrete slabs with electrical boxes to the west of where the plaintiff tripped and fell, and there were raised concrete slabs with electrical boxes to the east of the where the plaintiff tripped and fell. These concrete slabs and electrical boxes made the walkway inaccessible to forklift use or travel.

48. Most of the aforesaid forklift was on VIT's maintenance area, as depicted in Exhibit 1, and, at all times pertinent herein and on March 15, 2017, the defendant VIT controlled that area exclusively.

49. At all times pertinent herein, including March 15, 2019, the defendant VIT controlled the location of and maintained the artificial lighting on its premises at NIT, including the lighting for reefer row and the aforesaid walkway where the plaintiff was injured.

50. At all times pertinent herein, including March 15, 2017, the defendant VIT opened its reefer row premises, at all hours of the day and night, to entities, including MRS, and

defendants CP&O and Ceres, having business to perform on the premises, including stevedoring and container maintenance and repair.

51. At all times pertinent herein, including March 15, 2017, the defendant VIT, through its agents and employees, knew, or in the exercise of reasonable care under the circumstances should have known, that MRS employees regularly visited the reefer row premises, including the walkway, at all hours of the day and night, to perform their work there. Such work included monitoring the condition of reefer units, plugging in reefer units transported to reefer row, and unplugging reefer units to prepare them for transportation away from reefer row.

52. At all times pertinent herein, including March 15, 2017, the defendant Ceres, through its agents and employees, knew, or in the exercise of reasonable care under the circumstances should have known, that MRS employees regularly visited the reefer row premises, including the walkway, at all hours of the day and night, to perform their work there.

53. At all times pertinent herein, including March 15, 2017, the defendant CP&O, through its agents and employees, knew, or in the exercise of reasonable care under the circumstances should have known, that MRS employees regularly visited the reefer row premises, including the walkway, at all hours of the day and night, to perform their work there.

54. At all times pertinent herein, including March 15, 2017, the defendant VIT, through its agents and employees, knew, or in the exercise of reasonable care under the circumstances, that the lighting in the aforesaid walkway was insufficient to provide proper illumination of the walkway for persons to work safely in the walkway.

55. Before the plaintiff was injured as described above, the defendant VIT, through its agents and employees, and/or the defendant Ceres, through its agents and employees, and/or the

defendant CP&O, through its agents and employees, placed the aforementioned forklift in its dangerous position, as depicted in the photograph attached hereto as Exhibit 1.

56. At all times pertinent herein, including March 15, 2017, the defendant VIT, through its agents and employees, and/or the defendant Ceres, through its agents and employees, and/or the defendant CP&O, through its agents and employees, knew or in the exercise of reasonable care under the circumstances should have known, that the aforementioned forklift was a trip-and-fall hazard to persons using the walkway.

57. The aforesaid injury which the plaintiff Stephen K. Walton, Sr., suffered on March 15, 2017, was an injury for which there was and is jurisdiction under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., so that, pursuant to Virginia Code § 65.2-101, et seq., the plaintiff was not an "employee" within the purview of the Virginia Workers' Compensation Act, Virginia Code § 65.2-101, et seq., and the Virginia Workers' Compensation Act, including Code § 65.2-307, does not apply to him or his injury herein.

58. At all times relevant herein, including March 15, 2017, and at the time and place where the plaintiff was injured, the plaintiff was an invitee of the defendant VIT, and the defendant VIT owed to the plaintiff the duty to exercise reasonable care for his safety, and to have its premises, including the walkway, in a reasonably safe condition for his visit, including duties of prevision, preparation, and lookout.

59. At all times relevant herein, including March 15, 2017, and at the time and place where the plaintiff was injured, the defendant Ceres and the defendant CP&O each had a duty to exercise reasonable care to avoid causing injury to the plaintiff.

60. Notwithstanding the foregoing, the defendant VIT, through its agents and employees, and/or the defendant Ceres, through its agents and employees, and/or the defendant

CP&O, through its agents and employees, negligently breached its duty and/or their duties to the plaintiff by its/their affirmative conduct in storing or placing the forklift on the premises so as to create a trip-and-fall hazard in the walkway.

61. Notwithstanding and furthermore, the defendant VIT, through its agents and employees, negligently breached its aforesaid duties to the plaintiff in that it failed to maintain its walkway in reasonably safe condition; and/or failed to supply sufficient lighting for its invitees to work in the walkway at night; and/or failed to maintain its premises free of the aforesaid trip-and-fall hazard in the walkway; and/or failed to warn the plaintiff of the aforesaid trip-and-fall hazard; and/or failed to rope off, barricade, or otherwise bar entry to the walkway; and/or in other particulars that may disclosed during the course of discovery or supplied at trial.

62. As a direct and proximate result of the negligence of the defendant VIT and the negligence of its agents or employees, and/or as a direct and proximate result of the negligence of the defendant Ceres and the negligence of its agents or employees, and/or as a direct and proximate result of the negligence of the defendant CP&O and the negligence of its agents or employees, the plaintiff Stephen K. Walton, Sr., suffered physical injuries to his neck and other parts of his body; has undergone and continues to undergo physical pain, mental suffering, and inconvenience; has been unable to work at his occupation because of his injuries; has lost income because of his injuries; has lost all or part of his capacity to earn income because of his injuries; and he has incurred and he continues to incur substantial medical expenses for the care and treatment of his injuries.

WHEREFORE the plaintiff Stephen K. Walton, Sr., by counsel, asks for entry of a judgment and award in his favor against the defendants, Virginia International Terminals, LLC, Ceres Marine Terminals, Inc., and CP&O, LLC, jointly and severally, in the amount of FIVE

MILLION DOLLARS ($5,000,000.00), plus prejudgment interest, post judgment interest, and legal costs incurred.

THE PLAINTIFF DEMANDS TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

STEPHEN K. WALTON, SR.

By: _____
Lance A. Jackson

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CERTIFICATE OF SERVICE

I the undersigned hereby certify that on July 12, 2019, a true copy of the foregoing pleading was served via first class mail and email transmission on all counsel of record:

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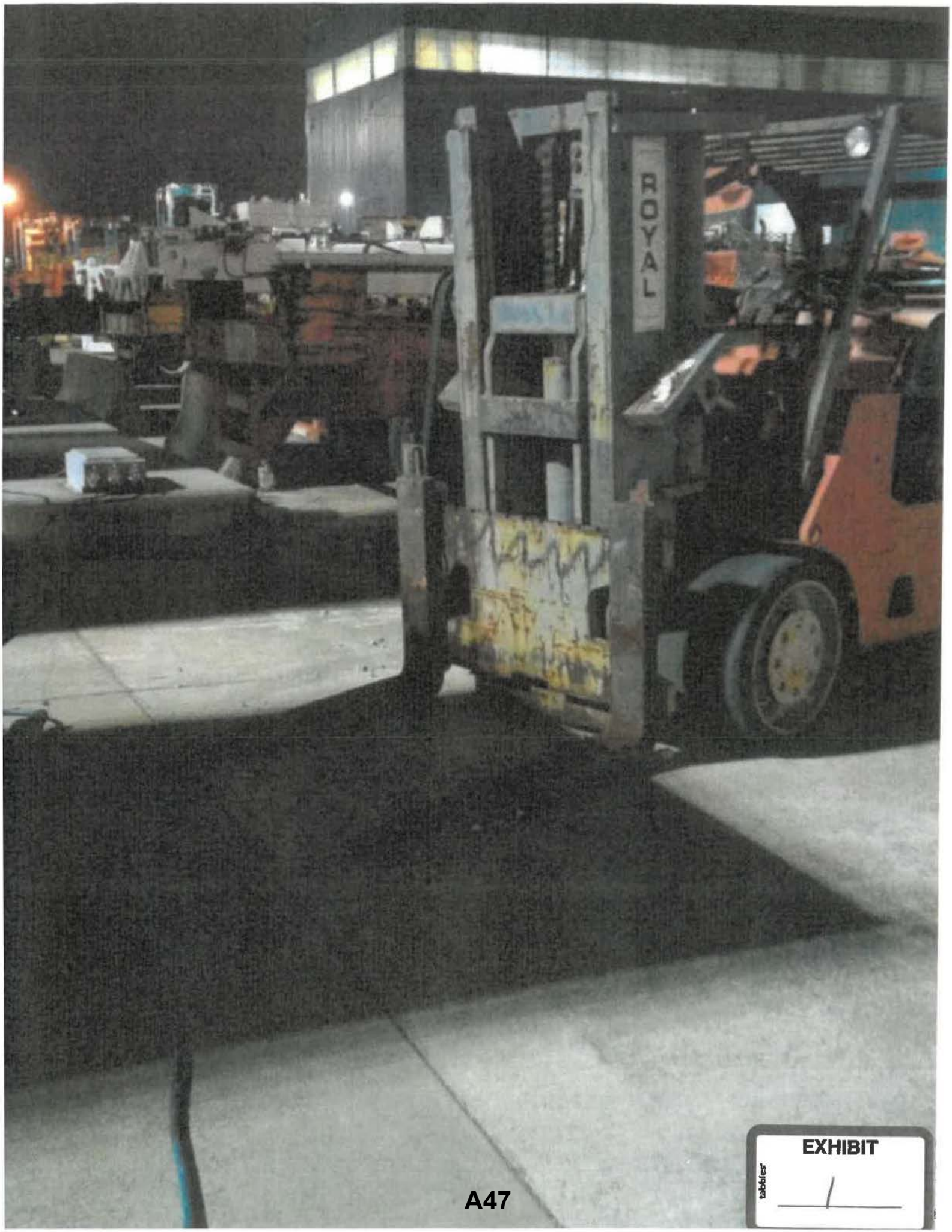

EXHIBIT

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NORFOLK

STEPHEN K. WALTON, SR.,	*	
	*	
Plaintiff,	*	
	*	**Case No. CL 19-2417**
v.	*	
	*	
VIRGINIA INTERNATIONAL TERMINALS, LLC, et al.	*	
	*	
Defendants.	*	
	*	

VIRGINIA INTERNATIONAL TERMINALS, LLC'S BRIEF IN SUPPORT OF ITS PLEA IN BAR AND DEMURRER AND ITS MOTION FOR SUMMARY JUDGMENT ON ITS PLEA IN BAR

COMES NOW, Defendant Virginia International Terminals, LLC ("VIT"), by counsel, and submits its Brief in Support of its Plea in Bar and Demurrer as to the Amended Complaint filed by Plaintiff Stephen K. Walton, Sr. ("Plaintiff") and its Motion for Summary Judgment on its Plea in Bar, and states as follows:

I. SUMMARY

The Plaintiff alleges he was injured while working as a longshoreman at Norfolk International Terminals on or about March 15, 2017 when he tripped over the blade of a forklift. VIT is a marine terminal operator that manages Norfolk International Terminals and other terminals in Virginia. Plaintiff filed this suit on March 11, 2019, alleging that VIT (or one of the other two defendants in this case) negligently placed a forklift owned by VIT in a walkway creating a trip-and-fall hazard that caused his injury. He also asserts an apparent premises liability claim against VIT relating to the same incident.

As a marine terminal operator, VIT maintains a Schedule of Rates governing rates, regulations, and practices at the marine terminals operated by VIT. By federal statute, VIT's

Schedule of Rates is automatically binding and enforceable as an implied contract without proof of actual knowledge of its provisions. Use of a terminal constitutes an agreement to the terms and conditions of the Schedule of Rates, including a provision requiring every person coming onto or using the terminal to notify VIT in writing of any injury caused by VIT within 30 days and to bring suit within one year. If written notice is not given within 30 days, or if suit is not brought within one year, all claims based on the injury are time-barred. These time frames are reasonable and enforceable under Virginia law and general maritime law, and they are necessary to allow VIT to investigate claims and preserve evidence on the busy terminals it operates.

By coming onto and using Norfolk International Terminals, Plaintiff agreed to and became bound by VIT's Schedule of Rates, including its limitation periods for written notice and bringing suit. Though he appears to have immediately prepared for an injury claim against VIT by obtaining a photograph of the forklift and walkway he alleges were involved in his injury, Plaintiff did not notify VIT of his injury until he filed suit almost two years later. This not only materially prejudiced VIT's ability to investigate Plaintiff's claims but also violated his agreement with VIT. Because he failed to notify VIT in writing of his injuries within 30 days, and (independently) because he failed to bring suit within one year, Plaintiff's claims are now time-barred and should be dismissed with prejudice by this Court.

In the alternative, Plaintiff's allegation that one of three parties negligently stored or placed a forklift in an inappropriate position is deficient as a matter of law. Because it fails to allege who placed or stored the forklift this way, Plaintiff's claim runs counter to the rule that a complaint must clearly inform the opposite party of the true nature of the cause of action asserted against it. The Supreme Court of Virginia has, therefore, held that joining defendants in this

manner is not permitted. To the extent it survives VIT's Plea in Bar, Plaintiff's "negligent placement" claim should be dismissed with prejudice by this Court pursuant to VIT's Demurrer.

II. UNDISPUTED FACTS[1]

1. Plaintiff alleges that he was injured at Norfolk International Terminals ("NIT") on or about March 15, 2017, when he tripped over the blade of a forklift. (Amended Compl. ¶¶ 36 & 40). This lawsuit was filed on March 11, 2019.

2. Plaintiff alleges that although the forklift was owned by VIT (Amended Compl. ¶¶ 45 & 62), "the defendant VIT … and/or the defendant Ceres … and/or the defendant CP&O … placed the aforementioned forklift in its dangerous position." (Amended Compl. ¶ 55).

3. NIT is a marine terminal located within the City of Norfolk, on the Elizabeth River and the Lafayette River, both of which are navigable waters of the United States. (Amended Compl. ¶ 8).

4. At all times pertinent to this case, VIT was the marine terminal operator. (Amended Compl. ¶ 14).

5. At all times pertinent to this case, VIT, in its capacity as marine terminal operator, made available to the public a Schedule of Rates governing rates, regulations, and practices at marine terminals operated by VIT, including NIT. The Schedule of Rates was available to the public during normal business hours and in electronic form and was accessible to the public via VIT's website. The VIT Schedule of Rates in effect on or about March 15, 2017 (hereinafter the "Schedule of Rates" or "SOR") was attached as Exhibit A to VIT's Plea in Bar and Demurrer

[1] VIT cites to the allegations set forth in the Amended Complaint solely for the purpose of its Plea in Bar and Demurrer and Motion for Summary Judgment on its Plea in Bar, as Plaintiff cannot dispute his own allegations. VIT does not concede that these allegations are true. If any claims survive, VIT reserves the right to challenge these allegations.

and is attached hereto as **Exhibit A** for the Court's convenience. (*See* Plaintiff's Responses to Defendant VIT's First Set of Requests for Admission (attached hereto as **Exhibit B**), ¶¶ 1-3).

6. Item 100 of the Schedule of Rates reads, in relevant part:

> **100 GENERAL APPLICATION**
>
> A. This SOR applies to the provision of TERMINAL SERVICES by VIT at the TERMINALS, including without limitation NIT, VIG, PMT, NNMT, VIP, and RMT (effective November 1, 2016). This SOR also applies to USAGE of the TERMINALS, and to all other use or occupancy of the TERMINALS. *The parties covered by this SOR are all USERS.* If VIT has an actual contract with a party covering the services rendered by VIT, then this SOR shall not apply to those services, except to the extent this SOR is incorporated in the actual contract. Use of the TERMINALS shall constitute an agreement to the terms and conditions of this SOR including without limitation payment of all applicable charges.
>
> . . .

(SOR, Item 100) (emphasis added).

7. Item 207 of the Schedule of Rates, in pertinent part, reads as follows:

> **207 NOTIFICATION OF LOSS, INJURY, OR DAMAGE; TIME LIMITS; JURISDICTION AND VENUE; APPLICABLE LAW**
>
> A. *USERS must notify VIT in writing of the occurrence of loss, injury, or damage to person or property caused by VIT immediately upon discovery, and in no event more than thirty (30) days from occurrence, or all claims based on the loss, injury, or damage shall be time-barred. If suit (or notice of arbitration if applicable) based on the occurrence is not filed within one (1) year after the occurrence, the claim shall be time-barred.* If notice of loss, injury, or damage is given, or if a claim is made, VIT must be given the opportunity to investigate the claim, including without limitation all evidence, at the earliest practical opportunity. *Time is material and of the essence.*
>
> . . .
>
> C. The laws of the Commonwealth of Virginia without reference to its choice of law rules and, to the extent not in conflict with the law of

> Virginia, the general maritime laws and statutes of the United States, shall apply to all disputes arising from or related to this SOR.

(SOR, Item 207) (emphasis added).

8. Section XI of the Schedule of Rates defines "TERMINALS" as "the ocean marine TERMINALS, inland TERMINALS, and ancillary facilities operated by VIT. 'TERMINAL' means one of the TERMINALS. . . ." The "TERMINALS" include NIT. (SOR, Section XI).

9. Section XI of the Schedule of Rates defines "USER" as follows:

> **USER** shall mean each (i) each VESSEL and CARRIER, (ii) stevedore, (iii) shipper, consignee, and beneficial cargo owner, (iv) contractor, subcontractors and vendor of VIT, VPA, HRCP II, or another USER, (v) licensee and permittee, and (vi) *and every other person or entity using, coming onto, or berthing at a Terminal.*

(SOR, Section XI) (emphasis added).

10. Plaintiff claims that, at the time of his injury, he was on the NIT premises working as a longshoreman in the employment of Marine Repair Services, Inc. He states this was a business purpose that benefitted all parties and that "[a]t no such time was [he] on the NIT premises for his own pleasure or convenience." (Amended Compl. ¶¶ 36-39).

11. Plaintiff did not notify VIT of his injury in writing or otherwise except by filing the present suit. (Exhibit B, ¶¶ 4-5). He filed suit against VIT on March 11, 2019, almost two years after the injury he alleges.

III. SUPPORT OF PLEA IN BAR AND MOTION FOR SUMMARY JUDGMENT

A. STANDARD OF REVIEW

"'A plea in bar asserts a single issue [of fact], which, if proved, creates a bar to a plaintiff's recovery.'" *Cole v. Norfolk S. Ry. Co.*, 294 Va. 92, 104, 803 S.E.2d 346, 353 (2017) (quoting *Hawthorne v. VanMarter*, 279 Va. 566, 577, 692 S.E.2d 226, 233 (2010)). The party asserting a plea in bar bears the burden of proof on the issue presented. *Hawthorne*, 279 Va. at

577, 692 S.E.2d at 233. "The issue raised by a plea in bar may be submitted to the circuit court for decision based on a discrete body of facts identified by the parties through their pleadings, or developed through the presentation of evidence supporting or opposing the plea." *Id.*

Summary judgment may be entered on a plea in bar. *Kohn v. Marquis*, 288 Va. 142, 762 S.E.2d 755 (2014) (affirming summary judgment on a plea in bar). Summary judgment "provide[s] trial courts with authority to bring litigation to an end at an early stage, when it clearly appears that one of the parties is entitled to judgment." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 5, 82 S.E.2d 588, 590 (1954). In reviewing a motion for summary judgment, a trial court must "accept as true those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason." *Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 88, 677 S.E.2d 272, 274 (2009). Summary judgment is "available only when there are no material facts genuinely in dispute." *Id.* However, "[i]f it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, that the moving party is entitled to judgment, the court shall grant the motion." Va. Sup. Ct. R. 3:20.

B. ARGUMENT

1. Pursuant to federal statute, VIT's Schedule of Rates is enforceable without proof that Plaintiff had actual knowledge of its provisions

As a terminal schedule made available to the public by a marine terminal operator, VIT's SOR is automatically binding and enforceable as an implied contract. Under the Shipping Act of 1984 (the "1984 Act"), as amended by the Ocean Shipping Reform Act of 1998 ("OSRA"), "[a] marine terminal operator may make available to the public a schedule of rates, regulations, and practices, including limitations of liability for cargo loss or damage, pertaining to receiving, delivering, handling, or storing property at its marine terminal." 46 U.S.C. § 40501(f). If a

marine terminal operator chooses to make such a schedule available to the public, "[a]ny such schedule . . . is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions." *Id.*

The Federal Maritime Commission ("FMC"), pursuant to authority granted under 46 U.S.C. § 40501(g)(3), has promulgated regulations on the availability of marine terminal operator schedules. *See* 46 C.F.R. § 525.3 (2019). The regulations provide that "[a]ny terminal schedule that is made available to the public shall be available during normal business hours and in electronic form." *Id.* § 525.3(a)(2). They further provide methods through which "[m]arine terminal operators shall provide access to their terminal schedules via a personal computer (PC)," including web browser-based access through the Internet. *Id.* § 525.3(b)(2)(i).

VIT is a marine terminal operator. (Amended Compl. ¶ 14). At all pertinent times, VIT maintained a Schedule of Rates governing rates, regulations, and practices at marine terminals operated by VIT, including NIT (the "Schedule of Rates" or "SOR"). The SOR is available to the public via VIT's website in accordance with FMC regulations and was so available at the time of Plaintiff's alleged accident. (*See* Exhibit B, ¶¶ 1-3). By its terms, the SOR applies "to all . . . use or occupancy of the TERMINALS," and it provides that "[u]se of the TERMINALS shall constitute an agreement to the terms and conditions of th[e] SOR . . . ." (SOR, Item 100). "The parties covered by th[e] SOR are all USERS," which include each and every "person or entity using, coming onto, or berthing at a Terminal." (SOR, Item 100 & Section XI).

Plaintiff claims he was injured on the NIT premises while working as a longshoreman in the employment of Marine Repair Services, Inc. (Amended Compl. ¶¶ 37 & 40). He has plainly asserted that he was at NIT for a business purpose and that "[a]t no such time was [he] on the NIT premises for his own pleasure or convenience." (Amended Compl. ¶ 37). By coming onto

and using the NIT premises, Plaintiff is a "USER" under the SOR and agreed to its terms and conditions. Because VIT made the SOR available to the public in accordance with FMC regulations, federal statute provides that it is enforceable by this Court as an implied contract between VIT and Plaintiff whether or not Plaintiff had actual knowledge of the SOR.

2. *Enforceability extends to the entirety of the Schedule of Rates, not just select provisions*

Courts have long held that "[a] party who makes use of the facilities or services offered and rendered by another under the terms of a validly promulgated tariff impliedly consents to be bound by the tariff's terms." *Atl. & Gulf Stevedores, Inc. v. Alter Co.*, 617 F.2d 397, 401 n.16 (5th Cir. 1980). This implied consent extended to those terms of which a person had actual or constructive notice. S*ee, e.g.*, *Southern Pacific Co. v. United States*, 272 U.S. 445 (1926).

Prior to the 1984 Act, terminal schedules were governed by the Shipping Act of 1916 (the "1916 Act"). Under the 1916 Act and its associated regulations, marine terminal operators were required to file a schedule showing all its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities with the FMC and to make the schedule available for public inspection. 46 C.F.R. § 533.3 (1983) (amended and redesignated 1984). Case law interpreting the 1916 Act and its associated regulations held that "the filing of a tariff [gave] constructive notice only of those terms which [were] required by law to be filed." *La Salle Mach. Tool, Inc. v. Maher Terminals, Inc.*, 611 F.2d 56, 60 (4th Cir. 1979). Because "[n]othing in the Shipping Act of 1916 . . . or in the applicable regulations . . . require[d] a terminal operator to file provisions limiting its liability," courts held that filing of a tariff did not provide constructive notice of such terms and, therefore, that such terms were not binding without actual knowledge. *Id.*; accord *Fed. Commerce & Navigation Co. v. Calumet Harbor Terminals, Inc.*, 542 F.2d 437, 441 (7th Cir.

1976) (no constructive notice of limitation of liability or time bar); *New Zealand Kiwifruit Mktg. Bd. v. Wilmington*, 806 F. Supp. 501, 503 (D. Del. 1992) (no constructive notice of time bar).

The provisions governing terminal schedules in the 1916 Act were substantially overhauled by the 1984 Act, as amended in 1998 by OSRA. These revisions comprehensively negate the reasoning underlying *La Salle* and related cases. First, terms limiting liability are now expressly permitted, with the 1984 Act, as amended, clarifying that "rates, regulations, and practices" include limitations of liability. *See* 46 U.S.C. § 40501(f). Second, the 1984 Act, as amended, and its associated regulations include no requirement to file a terminal schedule or any of its terms with the FMC. Instead, a marine terminal operator may make a terminal schedule available to the public if it wishes and must maintain a complete set of its terminal schedules for five years to be available to FMC upon request. *Id.*; 46 C.F.R. § 525.3 (2019). Rather than leaving it to the courts to decide the effects of these changes on constructive notice, Congress expressly provided that the *schedule* is enforceable as an implied contract, not just select terms from the schedule. *See* 46 U.S.C. § 40501(f). Virginia courts have ascribed to this reasoning, with the Virginia Supreme Court stating: "The Schedule of Rates prescribes certain conditions that must be met by those doing business at any VIT facility. By using the facility, [the users] agreed to those conditions." *Hudson v. Jarrett*, 269 Va. 24, 31, 606 S.E.2d 827, 830 (2005).

As a terminal schedule made available to the public by a marine terminal operator, federal law now provides that the entirety of VIT's SOR is enforceable as an implied contract without proof of actual knowledge of its provisions. This extends to limitations of liability and time bars in the SOR.

3. *The Schedule of Rates provisions requiring notice of injury and limiting time to bring suit are enforceable against Plaintiff and time bar his claim*

The SOR includes time bars for injury claims. It requires that "USERS must notify VIT in writing of the occurrence of loss, injury, or damage to person or property caused by VIT" within 30 days of the occurrence and must bring suit within one year of the occurrence. (SOR, Item 207(A)). It also clearly states that "[t]ime is material and of the essence." (*Id.*). If written notice is not given within 30 days, or if suit is not brought within one year, all claims based on the loss, injury, or damage are time-barred pursuant to the SOR. (*Id.*). These time frames are reasonable and enforceable under Virginia law and the general maritime law, and they time bar Plaintiff's claims in this case.

In general, courts hold that "parties can, by agreement in advance, limit the bringing of suit upon a contract to a shorter period than that fixed by the otherwise applicable statute of limitations. To do so is not contrary to public policy but rather assists the public policy behind statutes of limitations: preventing stale claims." 15 Corbin on Contracts § 83.8 (2019). Courts require that the period not be so short as to be unreasonable. *Id.* The SOR provides that "[t]he laws of the Commonwealth of Virginia without reference to its choice of law rules and, to the extent not in conflict with the law of Virginia, the general maritime laws and statutes of the United States, shall apply to all disputes arising from or related to this SOR." (SOR, Item 207(C)). Both Virginia and the general maritime law broadly follow the general rule.

In Virginia, a contractual limitations period shorter than otherwise applicable statute of limitations is enforceable "if the contractual provision is not against public policy and if the agreed time is not unreasonably short. These are questions of law to be determined by the court." *Board of Supervisors v. Sampson*, 235 Va. 516, 520-21, 369 S.E.2d 178, 180 (1988) (upholding a one-month limitation period); *see Liquid Carbonic Co. v. Norfolk & W. Ry.*, 107 Va. 323, 326-

30, 58 S.E. 569, 570-72 (1907). The Virginia Supreme Court has upheld provisions analogous to those in VIT's Schedule of Rates. In *Massie v. Blue Cross & Blue Shield*, the court upheld a one-year limitation period without tolling in the context of a medical insurance claim. 256 Va. 161, 166, 500 S.E.2d 509, 512 (1998). Noting that the General Assembly has legislatively established that one year constitutes a reasonable contractual limitation period for insurance contracts, the court affirmed the trial court's decision that the plaintiffs' action for payment of medical bills was time barred by the one-year contractual limitation period. *Id.* In *Liquid Carbonic*, a provision in a bill of lading requiring written notice of claims within 30 days was at issue. 107 Va. at 324, 58 S.E. at 570. Finding that "[a] great number of cases hold that a provision identical in terms, or in some cases less favorable to the shipper, than the one under consideration, is reasonable, and should be enforced," the court held the term to be decisive and affirmed the trial court's instruction to that effect. *Id.* at 326 & 330, 58 S.E. at 571 & 572. The court noted that there is no hardship in requiring a claimant who has knowledge of his claim to give notice within a reasonable time, but there is great hardship in requiring a carrier to account for a loss "'when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible, to ascertain the actual facts.'" *Id.* at 330, 58 S.E. at 572 (quoting *Express Co. v. Caldwell*, 88 U.S. (21 Wall.) 264, 268 (1874)). Further, in the context of workers' compensation, the General Assembly has itself endorsed a requirement for written notice of injury within 30 days—with limited exception, no compensation or medical benefits are payable unless "written notice is given within thirty days after the occurrence of the accident or death." *See* Va. Code Ann. § 65.2-600(D).

Under the general maritime law, contractual requirements to notify of injuries and bring suit within a specified period that is shorter than the applicable statute of limitations have long

been enforced even in the context of passengers on seagoing vessels, who are traditionally afforded significant protections. *See, e.g.*, *Murray v. Cunard S.S. Co.*, 235 N.Y. 162, 139 N.E. 226 (1923) (Cardozo, J.) (upholding requirement on passenger ticket for written notice of injuries within 40 days and dismissing plaintiff's claim even though he spent most of the 40-day period in the hospital for the injury incurred on board). Congress has endorsed the enforcement of such time bars against passengers and has legislatively established what constitute reasonable time limits for notice and suit in that context: at least six months to give notice and at least one year to bring suit. *See* 46 U.S.C. § 30508. These provisions have recently been applied in the case of *Sobel v. Inst. for Shipboard Educ.*, 2017 U.S. Dist. LEXIS 10621 (W.D. Va. Jan. 26, 2017), *appeal dismissed*, 2017 U.S. App. LEXIS 16976 (4th Cir. June 2, 2017).

In *Sobel*, the plaintiff was a participant in the Semester at Sea program who sued the program alleging sexual battery by a tour guide on a program-sponsored onshore field trip. *Id.* at *5. In seeking admission to the program, the plaintiff had completed an online application, and in the process, she agreed to a "ticket contract" that included a term shortening the limitations period to sue for bodily injury to one year. *Id.* at *2-4. Though it was not clear whether the plaintiff had read the ticket contract, the court found that she had agreed to electronic delivery and that the ticket contract was accessible to her through the program's website for over a year. *Id.* at *3. Finding that the one-year limitation provision was reasonably communicated to the plaintiff and was fundamentally fair, the court concluded the provision was valid and enforceable. *Id.* at *12-18. Because the plaintiff filed suit almost two years after the sexual assault occurred, the court held that her claims against the program were time-barred by the one-year limitation provision and awarded summary judgment to the program. *Id.* at *25.

Beyond the reasonableness requirement, the FMC regulations provide that "terminal schedules cannot contain provisions that exculpate or relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence." 46 C.F.R. § 525.2(a)(1). The same is reflected in Item 106(A) of VIT's SOR. However, this limitation is not applicable in this case. The United States Supreme Court and the Virginia Supreme Court have both held that such time bars are not exculpatory. *See Gooch v. Or. S. L. R. Co.*, 258 U.S. 22, 24, 42 S. Ct. 192, 193 (1922) ("a stipulation for written notice within a reasonable time stands on a different footing [than exoneration from liability for negligence], and of this there is no doubt"), *Liquid Carbonic*, 107 Va. at 329, 58 S.E. at 571-72 (quoting *Express Co.*, 88 U.S. (21 Wall.) at 268) (an agreement that a claim shall be made by within a reasonable period "contravenes no public policy," "excuses no negligence," and "is perfectly consistent with holding [a common] carrier to the fullest measure of good faith, of diligence and of capacity, which the strictest rules of the common law ever required") (internal quotation marks omitted).

By coming onto and using the NIT premises in the capacity of a "USER," Plaintiff agreed to notify VIT in writing of injuries caused by VIT within 30 days of the occurrence and to bring suit within one year of the occurrence pursuant to Item 207(A) of the SOR. VIT has included these time frames in its SOR because VIT investigates claims of loss, injury, or damage occurring on the marine terminal it operates. On these large and busy terminals, time is material and of the essence in investigations. In fact, many areas of the terminals are under video surveillance, but recordings cannot be retained indefinitely. If timely notified of a claim in accordance with the SOR, relevant video evidence can be preserved. Without timely notice, the actual facts and circumstances of the loss, injury, or damage may be difficult, if not impossible,

to ascertain—video evidence may no longer be available, environmental factors may be substantially changed, and any equipment involved may be moved, modified, or unavailable for inspection. A witness's memory days after an incident is far more reliable than it is two years later. The time frames are reasonable under Virginia law and the general maritime law and do not exculpate VIT from liability for its own negligence.

Plaintiff alleges that he was injured on the NIT premises as "a direct and proximate result of the negligence of defendant VIT" by a forklift that "had a VIT sticker on it and was owned by the defendant VIT." (Amended Compl. ¶¶ 40, 45, & 62). In fact, Plaintiff apparently took "[a] photograph of the walkway and the forklift" he alleges were involved in his injury, which he has now attached to his Amended Complaint. (Amended Compl., Exhibit 1). While Plaintiff immediately began preparing for an injury claim against VIT, he simultaneously deprived VIT of an opportunity to investigate. Despite alleging that VIT caused his injury, Plaintiff "personally did not notify VIT or any representative, agent or employee of VIT, in writing or orally, of the incident or his injuries" until two years later when he filed this suit. (Exhibit B, ¶ 5). At this point, VIT has no way to determine who owned the forklift, who operated the forklift, or even whether any forklift was involved in the incident. Plaintiff's failure to give notice both materially prejudiced VIT's ability to investigate his claims and violated the SOR. Plaintiff's claims are now time-barred and should be dismissed with prejudice by this Court.

Plaintiff has demanded a trial by jury on the Plea in Bar. However, "[a] party does not have a constitutional right to a jury trial if the case can be determined as a matter of law based upon material facts not genuinely in dispute." *Kohn*, 288 Va. at 146, 762 S.E.2d at 757 (finding no material facts genuinely in dispute and affirming summary judgment on a plea in bar). All relevant facts have either been alleged by Plaintiff in his Amended Complaint or admitted by

Plaintiff in response to VIT's First Set of Requests for Admission. Because all facts relevant to VIT's Plea in Bar are undisputed, summary judgment is appropriate in this case.

IV. SUPPORT OF DEMURRER

A. STANDARD OF REVIEW

"'A demurrer tests the legal sufficiency of a [complaint] and admits the truth of all material facts that are properly pleaded.'" *Robinson v. Nordquist*, No. 180631, 2019 Va. LEXIS 82, at *14 (July 18, 2019) (quoting *Harris v. Kreutzer*, 271 Va. 188, 195, 624 S.E.2d 24 (2006)). "The trial court is not permitted on demurrer to evaluate and decide the merits of the allegations set forth in a [complaint], but only may determine whether the factual allegations of the [complaint] are sufficient to state a cause of action." *Harris*, 271 Va. at 195, 624 S.E.2d at 28. "A demurrer is properly sustained when the pleading to which it is directed fails to allege facts sufficient to state a cause of action. *Francis v. Nat'l Accrediting Comm'n of Career Arts & Scis., Inc.*, 293 Va. 167, 171, 796 S.E.2d 188, 190 (2017).

B. ARGUMENT

To the extent it survives VIT's Plea in Bar, Plaintiff's claim in Paragraph 60 of his Amended Complaint that "the defendant VIT … and/or the defendant Ceres … and/or the defendant CP&O" breached a duty to Plaintiff through "affirmative conduct in storing or placing the forklift on the premises so as to create a trip-and-fall hazard in the walkway" is deficient and should be dismissed with prejudice by this Court. The Virginia Supreme Court has held that Virginia law "cannot be strained to permit the joinder of two or more defendants alternatively where, upon the single set of facts pleaded, only one of the defendants might be liable." *Baker v. Doe*, 211 Va. 158, 160, 176 S.E.2d 436, 438 (1970). Instead, the Rules of the Supreme Court of Virginia require a complaint to clearly inform the opposite party of the true nature of the

plaintiff's claim. Va. Sup. Ct. R. 1:4(d). This is not satisfied by an allegation that one of multiple defendants is liable to the plaintiff. *Baker*, 211 Va. at 160, 176 S.E.2d at 438.

In *Baker*, the plaintiff filed a motion for judgment against two defendants alleging that one or the other was operating an automobile that forced her off the highway and caused her to collide with a brick wall. *Id.* at 159, 176 S.E.2d at 437. One of the defendants filed a demurrer, it was sustained by the trial court, and that defendant was dismissed from the action. *Id.* Affirming the judgment of the trial court, the Supreme Court of Virginia held that such a joinder in the alternative runs counter to the rule that a motion for judgment must clearly inform the opposite party of the true nature of the cause of action asserted against it and, therefore, is not permitted. *Id.* at 161, 176 S.E.2d at 438.

In the case at hand, Plaintiff fails to allege who stored or placed the forklift in the allegedly inappropriate position, instead claiming that it was one of three parties. (Amended Compl. ¶¶ 55, 60, & 62). This allegation fails to inform VIT or the other defendants of the true nature of the cause of action Plaintiff asserts against them and, therefore, fails to state a legally viable claim. In fact, proof at trial of Plaintiff's claim that "the defendant VIT … and/or the defendant Ceres … and/or the defendant CP&O" was negligent would fail as a matter of law because it leaves unanswered the basic question of which defendant is liable. *See Baker*, 211 Va. at 160-61, 176 S.E.2d at 438. Because joining defendants in this manner is not permitted, VIT's Demurrer should be sustained and Plaintiff's claim should be dismissed with prejudice.

V. CONCLUSION

WHEREFORE, for reasons set forth in its Plea in Bar and Demurrer, its Motion for Summary Judgment on its Plea in Bar, and this Brief in Support, VIT respectfully requests that the Court grant its Plea in Bar and enter an Order dismissing Plaintiff's suit against VIT with

prejudice, and in the alternative, grant its Demurrer and dismiss with prejudice Plaintiff's claims arising from his allegation that one of three entities negligently parked the forklift in an inappropriate location, and grant VIT such other relief as the Court finds equitable and just.

Dated: September 3, 2019

Respectfully submitted,

VIRGINIA INTERNATIONAL TERMINALS, LLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2019, a true and exact copy of the foregoing was sent via electronic mail and First-Class Mail to the following counsel of record:

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VIRGINIA INTERNATIONAL TERMINALS, LLC
SCHEDULE OF RATES NO. 1

GOVERNING RATES, REGULATIONS, AND PRACTICES AT MARINE TERMINALS OPERATED BY VIRGINIA INTERNATIONAL TERMINALS, LLC ("VIT") AT THE FOLLOWING MARINE TERMINALS AND THE VIRGINIA INLAND PORT:

Virginia International Gateway ("VIG")
(Formerly known as "APM Terminals" or "APMT")
1000 Virginia International Gateway Blvd.
Portsmouth, VA 23703

Norfolk International Terminals ("NIT")
7737 Hampton Blvd.
Norfolk, VA 23505
Phone (757) 440-7000

Portsmouth Marine Terminal ("PMT")
2,000 Seaboard Ave.
Portsmouth, VA 23707

Newport News Marine Terminal ("NNMT")
25th St. & Warwick Blvd.
Newport News, VA 23607

Virginia Inland Port ("VIP")
7685 Winchester Road
Front Royal, VA 22630

Richmond Marine Terminal ("RMT")
(Effective November 1, 2016)
5000 Deepwater Terminal Road
Richmond, Virginia 23234

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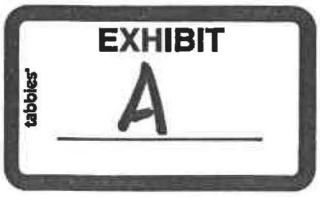
This Schedule is effective October 1, 2016. This Schedule shall remain in effect until replaced. It may be amended from time to time. When elements of this Schedule are amended, the effective date of the amendment(s) will be stated.

Direct rate and pricing inquiries for all facilities to VIT Pricing and Quotes
Phone (757)-391-6103
Email vitrates@vit.org



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SECTION I
APPLICATION

100 GENERAL APPLICATION

A. This SOR applies to the provision of TERMINAL SERVICES by VIT at the TERMINALS, including without limitation NIT, VIG, PMT, NNMT, VIP, and RMT (effective November 1, 2016). This SOR also applies to USAGE of the TERMINALS, and to all other use or occupancy of the TERMINALS. The parties covered by this SOR are all USERS. If VIT has an actual contract with a party covering the services rendered by VIT, then this SOR shall not apply to those services, except to the extent this SOR is incorporated in the actual contract. Use of the TERMINALS shall constitute an agreement to the terms and conditions of this SOR including without limitation payment of all applicable charges.

B. Any provision in this SOR notwithstanding, this SOR shall not apply to any OCEAN CARRIER which uses a TERMINAL but whose cargo is neither loaded on nor discharged at a TERMINAL. Such OCEAN CARRIER shall be permitted to use a TERMINAL only pursuant to a negotiated contract with VIT.

C. Charges published in this SOR may be assessed and collected by VIT on cargo delivered to or received from any USER and shall be in addition to rates for transportation to or from the TERMINALS.

D. This SOR shall apply on and after the stated effective date of this SOR. VIT typically updates the entire SOR as of October 1 of each year. Amendments and supplements to the SOR may be issued prior to the October 1 updates and shall be effective as of the stated effective date(s) of such amendments and supplements.

SECTION II
GENERAL RULES

200 DEFINITIONS. Capitalized terms in this SOR not otherwise defined in the body hereof shall have the meanings given to them in Section XI below.

201 APPLICATION OF SECTION II. The terms contained in this Section II will apply in the absence of specific rules in other sections of this SOR.

204 OPERATOR OF TERMINALS

A. VIT reserves the absolute right to control the use of the TERMINALS, and permission for the use thereof must be obtained from VIT. VIT reserves the right to control and perform the LOADING, UNLOADING, HANDLING, recoopering, reconditioning, fumigating, weighing and sampling of all freight and cargo on the TERMINALS.

B. Cargo, including loaded CONTAINERS, held on the TERMINALS in excess of FREE TIME provided for in this SOR is subject to DEMURRAGE. Cargo, particularly cargo subject to pilferage or deterioration, may, at the option of VIT, be sent to a commercial warehouse at the expense and risk of the owner. For cargo moved to commercial storage, a charge will be assessed in addition to the normal storage charges. Rates will be quoted upon request.

C. VIT is not the consignee of any CONTAINER or cargo unless VIT expressly agrees in writing that it is the consignee.

206 RESPONSIBILITY FOR DAMAGES; TERMINALS HELD HARMLESS; LIMITATION OF LIABILITY.

A. Notwithstanding anything in this SOR to the contrary, nothing in this SOR shall be construed to exculpate or relieve VIT from liability for its own negligence, or to impose upon others the obligation to indemnify or hold-harmless VIT from liability for its own negligence.

B. Notwithstanding anything in this SOR to the contrary, no party subject to this SOR shall be responsible for special or consequential damages except to the extent included in claims made by third parties.

C. Each USER, jointly and severally, agrees to defend, indemnify and save harmless the VIT PARTIES from and against all LOSSES suffered or incurred by VIT arising from personal injury or death, or damage or destruction of property, incident to or resulting from (i) operations on the TERMINALS and/or the use of the TERMINALS' equipment and facilities by such USER(s), their employees, agents, or contractors, (ii) breach of, or failure to comply with any requirement of, this SOR by such USER, its employees, agents, or contractors, and/or (iii) incorrect information being provided by such USER, its employees, agents, or contractors in connection with cargo or CONTAINERS handled on the TERMINALS, such as without limitation, incorrect weights.

D. USERS of the TERMINALS, including without limitation CARRIERS and VESSELS, their owners, agents and operators, shall be responsible for all damage and injury to person or property resulting from the use of the TERMINALS. The VIT PARTIES reserve the right to repair, replace, or contract for the same, or otherwise cause to be replaced or repaired, any and all damages to the TERMINAL FACILITIES including damages to docks, piers, bulkheads, wharves, warehouses, transit sheds, cargo, CONTAINERS, and their contents if loaded; equipment, rail, shop facilities, utilities. The VIT PARTIES may detain any vehicle, VESSEL, water craft, etc., that may be responsible for any damage to the TERMINALS until sufficient security has been given to cover all LOSSES suffered or incurred by the VIT PARTIES.

E. Except with respect to VIT's own negligence, VIT assumes no liability for loss or damage to equipment, freight, or cargo handled, stored, or transshipped at VIT, including but not limited to loss or damage caused by strikes, fire, water, action of the elements, theft, TERRORISM or other causes. VIT is not and shall not be deemed to be the bailee of any equipment, freight, or cargo handled, stored, or transshipped at VIT. Acceptance for use of an open pier by a USER is a recognition of the fact that cargo landed on such dock is at the risk and expense of the USER.

F. VIT, for the services performed under this Schedule of Rates, assumes no liability for loss or damage to equipment, freight, or cargo handled or transshipped through VIT, including but not limited to loss or damage caused by strikes, fire, water, action of the elements, theft, TERRORISM or other causes. VIT in any event shall be liable only for damage resulting from its failure to exercise due and proper care in performing the services and affording the facilities provided for herein. In no case shall VIT be liable for sum in excess of 500.00 per package or non-packaged objects unless the shipper, or other USER, declares a higher value and pays to VIT, in addition to the other charges for such services as herein set forth, a premium computed at one percent (1%) of the declared value of each package or non-packaged object, and in such event VIT shall be liable for the full declared value of each such package or non-packaged object up to available insurance coverage limits, for damage resulting from VIT's failure to exercise due and proper care in performing the services or affording the facilities provided for herein. The word "package" shall include any van, CONTAINER or other form of cargo unitization.

G. VIT will not be responsible for damage sustained by CONTAINERS or cargo because of weather conditions, including but not limited to wind or flooding, or damage to CONTAINERS not caused by VIT's negligence. VIT accepts no responsibility for loss sustained by CONTAINERS or cargo in the pier area or in the stacks at any time. VIT accepts no responsibility for injuries or death, damages or delays caused by cargo handling equipment, including but not limited to cranes, CONTAINERS, straddle carriers, or hustlers and/or the operators of said equipment where the equipment is leased by VIT to a VESSEL owner or operator or their agent/stevedore and the equipment is in the custody and control or supervision of the said VESSEL, owner or operator or its agent/stevedore.

H. Each CARRIER warrants to VIT that all of CARRIER'S Bills of Lading for CONTAINERS and cargo handled pursuant to this SOR shall contain a provision which makes paramount and applicable to VIT and all other of VIT's servants, agents, or persons performing the contract of carriage, all rights, protections, defenses, limitations of actions, and limitations of liability available to the CARRIER under the Carriage of Goods by Sea Act of the United States ("COGSA", formerly published at 46 USCS Appx. §§ 1300 et seq.), including, but not limited to, the Five Hundred US Dollars (500) package limitation, as the same may be increased by law from time to time. The CARRIER warrants that the Bills of Lading for CONTAINERS and cargo handled pursuant to this Agreement shall contain a proper "Custody Clause" (Period of Responsibility Clause) that protects both the CARRIER and the VIT by applying COGSA from the time the goods are received until delivered to the consignee.

I. VIT shall not be liable for damage or injury caused to USERS or the property of USERS as a result of direct or indirect acts of TERRORISM or CYBER ATTACK.

207 NOTIFICATION OF LOSS, INJURY, OR DAMAGE; TIME LIMITS; JURISDICTION AND VENUE; APPLICABLE LAW

A. USERS must notify VIT in writing of the occurrence of loss, injury, or damage to person or property caused by VIT immediately upon discovery, and in no event more than thirty (30) days from occurrence, or all claims based on the loss, injury, or damage shall be time-barred. If suit (or notice of arbitration if applicable) based on the occurrence is not filed within one (1) year after the occurrence, the claim shall be time-barred. If notice of loss, injury, or damage is given, or if a claim is made, VIT must be given the opportunity to investigate the claim, including without limitation all evidence, at the earliest practical opportunity. Time is material and of the essence.

B. Jurisdiction for any action against any VIT PARTY, arising from services rendered by VIT, whether in law or equity, whether sounding in contract or in tort, lies exclusively in the Federal or State Courts located in Norfolk, Virginia, and in no other forum. Use of a TERMINAL further constitutes consent to jurisdiction in accordance with this Item, and constitutes waiver of jurisdiction or venue in any other location or forum.

C. The laws of the Commonwealth of Virginia without reference to its choice of law rules and, to the extent not in conflict with the law of Virginia, the general maritime laws and statutes of the United States, shall apply to all disputes arising from or related to this SOR.

208 TERMINAL RIGHTS

A. The berths and piers operated by VIT must be kept open and fluid. VIT does not obligate itself to provide TERMINAL SERVICES beyond the reasonable capacity of the TERMINALS as determined by VIT in its business judgment.

B. Cargo will not be received or delivered unless proper documents are furnished and credit has been established.

212 SHIPBOARD WELDING/BURNING Shipboard welding and/or burning of any type is strictly prohibited while VESSELS are berthed at a TERMINAL without the prior express written authorization from the TERMINAL manager.

214 HANDLING OF HEAVY, FRAGILE OR BULKY ARTICLES Charges published in this SOR do not cover HEAVY LIFT, fragile, or bulky articles. Such articles, pieces, or packages weighing more than 80,000 lbs., must be loaded or unloaded at the option of VIT at rates agreed upon between VIT and the owners or their agents prior to arrival of cargo at the TERMINAL. Such cargo will be handled only at the owner's risk. This item does not apply to CONTAINERS.

216 REMOVAL OF OBJECTIONABLE CARGO VIT reserves the right to move freight or other material, which in VIT'S judgment is likely to damage other property, to another location at the risk and expense of the owner.

218 DISPOSITION OF ABANDONED, UNCLAIMED, OR REFUSED CONTAINERS, CARGO OR EQUIPMENT

A. No USER may abandon CONTAINERS, cargo, equipment, or other property on a TERMINAL. Any USER, which delivers, or causes to be delivered, CONTAINERS, cargo, equipment, or other property on a TERMINAL is responsible for the property until it is removed from the TERMINAL.

B. VIT may sell for accrued charges any cargo, CONTAINERS, equipment, or other property, which is unclaimed, refused, or abandoned after notice has been delivered or mailed to interested parties. Cargo or Equipment shall be deemed unclaimed or abandoned if it remains on a TERMINAL more than thirty (30) days. VIT shall comply with the notice requirements of Virginia Code Sections 8.7-206 and 8.7-210. If notice is sent by registered or certified mail to the last address provided to VIT, such notice shall be deemed delivered on the date of receipt or three days after the postmark thereon, whichever is earlier.

C. If no response acceptable to VIT in its reasonable discretion is received by VIT within ten (10) days after such notice, or if the party declares abandonment of the cargo or equipment, VIT may sell the cargo or equipment to recover accrued charges, or may otherwise dispose of the property in its discretion. With respect to import CONTAINERS, the CARRIER delivering the CONTAINER and the consignee of the CONTAINER shall remain jointly and severally liable to VIT for all accrued charges, including continuing storage charges, and all costs and expenses of selling or appropriately disposing of the property less any sales proceeds received. With respect to import CONTAINERS, the shipper and the Freight Forwarder of Broker shall remain jointly and severally liable for such costs and expenses. With respect to equipment, the CARRIER responsible for the equipment shall be liable for such costs and expenses.

D. VIT may bring a court action to require removal of abandoned property from the TERMINALS.

220 CREDIT AND PAYMENT OF INVOICES

A. VIT may assess charges against and to submit invoices to all USERS of the TERMINALS, their agents, and/or servants, including without limitation OCEAN CARRIERS and VESSELS.

B. Without limiting the foregoing, (i) with respect to break-bulk cargo on or moving over VIT facilities, VIT will initially bill, and the primary responsibility for payment of TERMINAL charges shall be with, those who perform the forwarding functions on such shipments unless other arrangements have been made, and (ii) the primary responsibility for TERMINAL charges pertinent to the VESSEL such as line handling, WHARFAGE, DOCKAGE, and water shall rest with the agent of the VESSEL and the VESSEL's owners and charterers unless other arrangements have been made.

C. VESSELS, their owners and agents, and other USERS shall be required to permit access to manifests, LOADING, or discharge lists, rail or motor CARRIER freight bills or other pertinent documents for the purpose of audit to determine the correctness of reports filed or for securing necessary data to permit correct billing of charges.

D. Invoices for services rendered are due within thirty (30) days of the invoice. Failure to pay within thirty (30) days may cause the name of the responsible party to be placed on a delinquent list and such party may be denied further use of the facilities until all outstanding charges have been paid. Invoices not paid within thirty (30) days are subject to a one and one-half percent (1.5%) service charge per month, as well as the commencement of legal action. VIT reserves the right to estimate and collect in advance all charges which may accrue against cargo or VESSELS if credit has not been established with VIT or if parties representing such cargo or VESSELS have habitually been on the delinquent list. Use of the TERMINALS may be denied until such charges have been paid. VIT reserves the right to apply any payment received against the oldest outstanding invoices.

E. VIT may extend credit to any USER upon application for credit and demonstration of financial responsibility. Credit worthiness may be established through current financial statements (certified by an independent certified public accountant) or other acceptable evidence of financial responsibility and by furnishing at least three (3) satisfactory credit references, including a bank reference. Extension and continuation of existing lines of credit shall be conditioned upon the prompt payment of bills as specified above.

F. For OCEAN CARRIERS or those USERS not granted credit, VIT may extend credit to those USERS who will post and maintain a Letter of Credit or Indemnity Bond in the form and content, and with a company acceptable to VIT in an amount equal to the maximum liability for a period of time determined by VIT.

G. Letters of Credit and Indemnity Bonds may be required to insure VIT against the loss of funds and indemnify VIT in full payment of bills that accrue for the use of the TERMINAL FACILITIES or services rendered by VIT.

H. In any litigation to enforce this SOR, the prevailing party shall be entitled to an award of its reasonable costs and attorney's fees.

I. If an account receivable is past due, then VIT may with or without notice apply all credits, discounts, subsidies, incentives, and/or other amounts due from VIT to the delinquent receivables, whether or not related to the outstanding receivables, until such time as all receivables for the account are rendered current. Delinquent invoice amounts plus service charges that are determined to be payable may be deducted by VIT from any credits, discounts, incentives, other payments received, etc., due to the debtor by VIT.

J. At no time shall invoices or related payments be reduced or offset by any monetary amount for loss, damage or other claim or alleged amount owed by VIT in any form whatsoever, except for invoices disputed pursuant to the terms of this SOR.

K. If and when a USER is entitled to a credit from VIT, VIT may specify how and when that credit will be applied to the USER's account. If a credit memo is issued with a certain or calculable expiration date, VIT will, immediately prior to expiration, apply such credit against the oldest outstanding invoices.

L. VIT may in its discretion and for ease of administration charge the BASIC CONTAINER UNIT RATE in lieu of billing each individual charge included in the BASIC CONTAINER UNIT RATE.

M. VIT may in its discretion agree to allocate certain costs among OCEAN CARRIERS according to a VSA. If VIT agrees to bill for certain costs according to a VSA, (i) such billing shall be subject to the written agreement of members of the VSA to accept such charges, (ii) the VESSEL shall not be relieved of liability for such charges, (iii) VIT may terminate its undertaking to bill costs according to the VSA at any time, (iv) VIT may impose a reasonable charge for such services by amendment to this SOR and notice the members of the SOR, and (v) VIT shall be held harmless with respect to any disputes among the VSA members.

221 NOTIFICATION OF DISPUTED INVOICES

A. Disputes posed in good faith regarding the validity of individual charges on invoices must be submitted in writing to VIT within thirty (30) days after the presentation of the invoice. Charges not disputed in good faith within this thirty (30) day period will be considered valid. VIT will only negotiate disputed charges on invoices with the bill-to party.

B. In order to facilitate the timely acknowledgement, recording and resolution of good faith disputes, all disputes must be directed in writing to VIT's Billing department as noticed on the applicable invoice. Disputes submitted via email may be sent to invoicedisputes@vit.org with the invoice number in the subject line and the specifics of the dispute in the body of the message. Specifics of the dispute must include, at a minimum, reference to the invoice number, the specific charge and amount disputed, and a statement of facts that supports the dispute.

C. When a charge(s) on an invoice is in dispute, any portion which is not part of the amount disputed in good faith shall be paid within the 30 day period or other terms as may be applicable. VIT will not issue revised invoices to separate disputed and undisputed portions.

222 SHIPPER'S REQUESTS AND COMPLAINTS Requests, complaints, and inquiries on matters relating to rates, rules and regulations in this SOR should be addressed to VIT

223 LIEN Any and all TERMINAL SERVICES, including but not limited to CONTAINER related services, shall give rise to a lien in favor of VIT against the VESSEL, CONTAINER, chassis, or any other tangible property whatsoever.

224 REGULAR WORKING HOURS The recognized regular working hours of VIT are from 8:00 a.m. until noon and from 1:00 p.m. until 5:00 p.m., Monday through Friday, except HOLIDAYS. Refer to Item 230 for operating procedures.

226 OVERTIME AND HOLIDAY WORKING HOURS When VIT renders TERMINAL SERVICES at other than regular working hours for the convenience of the USER, the applicable charges under this SOR shall be applied, plus additional labor charges including overtime, double time, and holiday rates.

228 NOTIFICATION OF USE OF HEAVY LIFT EQUIPMENT Equipment with a lifting capacity in excess of 30,000 pounds will not be permitted to operate on a TERMINAL unless written permission has been granted by VIT.

229 WAIVER OF SOVEREIGN IMMUNITY All USERS waive any defense of sovereign immunity to charges, fees or damages sought to be recovered by VIT.

230 TRUCK SERVICE SCHEDULING

A. BREAKBULK
   a. NIT-No appointment required except for the pick-up and delivery of boats which require an appointment. Trucks must register in person by 3:00 p.m. and will be worked as time permits. Any LOADING or UNLOADING beyond 5:00 p.m., whether to complete or start a new job, may be performed on an approved overtime basis
   b. PMT- Tuesday and Thursday service only with appointment.
   c. NNMT – No appointment required. Trucks must register in person by 3:00 p.m. and will be worked as time permits. Any LOADING or UNLOADING beyond 4:00 p.m., whether to complete or start a new job, may be performed on an approved overtime basis.
   d. VIG – Appointments are required with 24-hour minimum notice.

B. CARGO TO BE STUFFED In order to guarantee shipline assigned VESSEL cutoff
   a. Cargo must arrive four (4) working days prior to VESSEL cutoff.
   b. Stuffing orders must be in place when cargo arrives.
   c. Shipline equipment must be mounted and available when the cargo arrives.
   d. Cargo not meeting the aforementioned criteria will require Overtime Authorization to guarantee meeting assigned VESSEL cutoff.

C. OUT OF GAUGE (OOG)- FLATRACKS AND OPEN TOPS
   a. Appointments required with a 24-hour minimum notice at all facilities.
   b. To schedule an appointment for break bulk service or OOG, please contact the following:
      i. NIT- Breakbulk 757-440-7080; OOG: NITOCC@vit.org
      ii. NNMT – Breakbulk – 757-928-1207
      iii. PMT – Breakbulk and OOG – 757-391-6123
      iv. VIG – Breakbulk and OOG – 757-686-6019

D. CONTAINERS
   a. Marine TERMINALS and Empty Yards
      i. All TERMINALS will, receive, weigh, and dispatch CONTAINERS from 8:00 a.m. until 5:00 p.m.
      ii. Inbound portals close one hour prior to stop time; Reefers must be through inbound portal one and half hours prior to stop time.
      iii. Gate house may be adjusted to maintain the fluidity and efficiency of the facilities.
      iv. Please visit www.portofvirginia.com for up-to-date gate hours.
      v. Late arrivals will be processed by appointment only and on an overtime basis. On late arrivals, phone NIT (757) 440-7080, NNMT (757) 928-1204, VIG (757) 686-6135.
   b. Drivers delivering or picking up CONTAINERS that involve mounting or demounting the CARRIER's own equipment must make prior arrangements with VIT and be present at the LOADING site before 4:00 p.m. Drivers who do not make prior arrangements will be serviced after all others. VIT, in either case, shall not be required to perform mounting or demounting after 5:00 p.m. unless an appointment for overtime has been arranged prior to 4:00 p.m.

231 DELIVERY AND ACCEPTANCE OF EXPORT CONTAINERS VIT may establish limits on the number of days an export CONTAINER may be delivered to and accepted by a TERMINAL ahead of the scheduled arrival of the VESSEL on which the CONTAINER is to be loaded. Different limits may apply depending on the mode of delivery of the CONTAINER, the TERMINAL at which the CONTAINER is delivered, and whether the CONTAINER is loaded. The limit(s) may change from time to time based on available space on a TERMINAL and other factors and will be posted on the Port of Virginia website, www.PortofVirginia.com under the link http://www.portofvirginia.com/category/operations-alerts/.

232 DELIVERY AND ACCEPTANCE OF NON-CONTAINERIZED EXPORT CARGO

A. Non-containerized EXPORT CARGO will not be received by VIT unless the EXPORT CARGO has consignment to a VESSEL with an announced date of arrival within the FREE TIME allowed by this SOR. All cargo received under these conditions and accruing DEMURRAGE due to late arrival of VESSEL, shut-out cargo, or VESSEL cancellation will accrue DEMURRAGE as published in this SOR for account of the OCEAN CARRIER or agent. Announced date of arrival will be governed by the first date furnished by the OCEAN CARRIER or agent on or after the shipper's bill-of-lading date.

B. Non-containerized EXPORT CARGO consigned to a VESSEL with an announced date of arrival and arriving prior to the FREE TIME period allowed by this SOR or arriving without a consignment to a VESSEL with an announced date of arrival will not be received until storage arrangements have been completed between shipper or agent and VIT.

234 VESSELS REQUIRED TO USE TUG ASSISTANCE VESSELS docking or undocking at TERMINALS will be required to use tug assistance unless other arrangements have been made with VIT prior to docking or undocking. Failure to comply with this requirement could result in denial of a berth.

235 VESSEL TO VACATE BERTHS

A. VIT may order any VESSEL to vacate any berth when it is deemed that the continued presence of such a VESSEL at such berth would be a potential hazard to the VESSEL, the berth, the facilities or the rights or property or safety of others. Such situations include, but are not limited to potential natural disasters such as hurricanes, tornadoes, earthquakes or flooding and such events as strikes, acts of TERRORISM or war.

B. VIT shall provide written notice (administrative message, facsimile transmission, etc.) to the OCEAN CARRIER, Ship's Agent, or party arranging for berthing of the VESSEL advising of the requirements to vacate and referring to this SOR item in the communication. The notice shall state the time that the berth must be vacated and shall be presented at least four hours prior to said time.

C. If the VESSEL fails to promptly vacate as ordered, it shall be responsible for any damage or expense which may be incurred by the VIT PARTIES VESSEL or others as a result of such failure to vacate. VIT shall have the option, but not the duty, of moving the VESSEL to another location at the risk and expense of the VESSEL. If such movement occurs, the VESSEL shall hold VIT harmless for all LOSSES that may occur as a result of such movement. Failure to comply with an order to vacate will result in a charge to the VESSEL of 1,606.00 per hour for each hour, or fraction thereof, of non-compliance. This charge shall not constitute a waiver by VIT of any greater actual damages, it may sustain as a result of the VESSEL's failure or refusal to vacate. Refusal to vacate may result in denial of future berthing privileges.

236 IMPROPERLY LOADED RAILCARS Railcars, which in the judgment of VIT are improperly loaded, will not be handled at regular SOR rates. The rail CARRIER will be contacted and agreement reached to cover the cost of UNLOADING such cars. Trash, fastening, dunnage, paper and refuse will not be cleaned from cars except by special agreement.

239 DISCHARGING OF OILS, NOXIOUS LIQUID SUBSTANCES AND GARBAGE; LEAKING CONTAINERS

A. The discharging of ballast, bilge, oil, contaminated water, noxious liquid substances, sewage, garbage or any debris into slips or in channels or within a TERMINAL is strictly prohibited. Violators will be subject to charges, penalties and fines.

B. Leaking tanks/CONTAINERS will be placed on a spill pad or spill containment cassette, subject to the following daily use charges while the spill pad or cassette is occupied:

   a. Day 1 - 54.00
   b. Day 2 - 81.00
   c. Day 3 or more - 107.00 per day
   d. Daily rates per 24 hours or fraction thereof

C. The clean-up of leaking CONTAINERS/tanks must be initiated within forty-eight (48) hours of notice from VIT. USERS must complete the cleanup with their own materials or use an approved contractor, subject to the final inspection of the spill site by VIT Management.

D. All VIT provided services or materials required to contain a spill/leak or assist with the clean-up will be invoiced to the CARRIER controlling the equipment/cargo unless other payment arrangements are approved in advance by VIT. This includes the spill pad USAGE charge.

E. If the leaking substance is a HAZARDOUS MATERIAL or DANGEROUS CARGO, or if it presents an immediate hazardous or environmental danger, VIT may at its option make arrangements and correct the problem. All clean up and disposal costs will be for the account of the CARRIER.

F. For any leak or spill that requires the employment of a contractor that specializes in recovery and disposal of the particular material, the cost of containment, cleanup and disposal will be billed at the rate charged to VIT plus 15%. The cost of cleanup materials may be billed separately and shall include the cost of materials plus 15%. VIT will also invoice for the time required by VIT management personnel to control and recover the spill, conduct regulatory assessment and reporting, coordinate disposal, and replace materials used to contain the spill. The rate to perform these services is 100.00 per man hour.

G. The clean-up of the spill pad or cassette is the responsibility of the party arranging clean-up. The daily spill pad charge will continue until the spill pad clean-up is completed.

H. If the CONTAINER is on hold by U. S. Customs and Border Protection, the shipper shall immediately obtain approval to open the CONTAINER for clean-up.

242 SAFETY AND SECURITY

A. USERS, including without limitation stevedores, shall comply with all municipal, state and federal codes or regulations, including but not limited to those of OSHA, USCG, EPA, Department of Homeland Security (including Customs and Border Protection ("Customs")), the U.S. Department of Transportation, and the Virginia Department of Transportation, and will be liable for their noncompliance with same. Without limiting the generality of the foregoing, except with respect to CONTAINERS leaving the TERMINALS via truck or rail interchanges conducted and controlled by VIT, all parties on or using VIT's facilities (i) have an independent duty to comply with all messages, directives, holds, and/or permits from Customs relating to the examination, lading, unlading, delivery, and release of cargo and CONTAINERS, and (ii) shall not rely on VIT, its employees, agents, or information systems with respect to any such messages, directives, holds and/or permits.

B. CYBER SECURITY. USERS may be provided access to certain parts of VIT'S TERMINAL operating computer system ("TOS") to provide electronic data interchange and/or to view information. USERs of the TERMINALS agree that their employees, agents, and contractors will not (i) use any device, software or technique to interfere with or attempt to interfere with the TOS or data in the TOS; (ii) attempt by any means to gain unauthorized access to the TOS, including, but not limited to, access to other accounts not legally registered to the USER; (iii) pass USER IDs or passwords to any third party without the prior written consent of the VIT; or (iv) use any robot, spider or other automatic device, process or means to access the TOS, or use any manual process to monitor or copy content from the TOS not relating to the authorized USER, or for any other unauthorized purpose. In no event shall VIT be liable for a CYBER ATTACK.

244 INSURANCE Charges published in this SOR do not include any expense of fire, storm, or other cargo insurance covering the owner's interest in the cargo nor will such insurance be provided by VIT under its policies.

246 NO SMOKING Smoking in the warehouses, piers, bulkheads, docks or on VESSELS handling flammable cargo or fueling is strictly prohibited.

248 PROJECT OR PLANT MOVEMENT OF 200 TONS OR MORE On project or plant movements of 200 TONS or more, from one consignor to one consignee, LOADING, UNLOADING or DEMURRAGE charges and FREE TIME specified elsewhere will not apply when shippers or consignees have made prior arrangements with VIT.

250 CHARITABLE AND MILITARY CARGO OR VESSELS VIT may for charitable purposes adjust FREE TIME or negotiate special rates. Special arrangements may be made for the handling of military cargo or VESSELS by VIT.

252 VESSELS REQUIRED TO COMPLETE LOADING/DISCHARGING To alleviate current or prospective congestion, VIT may require any VESSEL already in berth, or about to berth, to work continuously to completion of LOADING/discharging at the VESSEL's expense. If the continuous LOADING/discharging requirement is refused, when the agents and/or owners of the VESSEL are so requested, the VESSEL shall vacate the berth. Reassignment to a berth for completion of LOADING/discharging will be at VIT's convenience. Any VESSEL refusing to vacate the berth after being so notified, may be subject to removal by VIT at the VESSEL's risk and expense including any damage, except that caused by VIT's own negligence. VIT may assess DOCKAGE of 1,606.00 per hour, or fraction thereof, commencing two (2) hours after notice to vacate is given, and will be assessed in addition to DOCKAGE charges published elsewhere in this SOR.

256 BERTH ASSIGNMENTS On request for a berth, VIT will designate the particular berth at which the VESSEL shall dock. VIT does not guarantee to furnish docking facilities. Arrangement must be made in advance of arrival of VESSEL in order to assure docking facilities. If a VESSEL docks without requesting a berth or without approved prior arrangements, DOCKAGE charges published elsewhere in this SOR, plus damages of 1,606.00 per hour, will be assessed.

258 MOVEMENT OF VESSELS VESSELS moored alongside VESSELS which are docked at piers or bulkheads for the purpose of delivering to or taking cargo or supplies from such VESSEL must, at the request of VIT, temporarily move, if they, in the judgment of the operator, are blocking the ingress or egress of a VESSEL ready to be docked or undocked. When VESSELS have finished discharging or taking on cargo, their right ceases to the use of the dock, pier, or bulkhead and such VESSELS must, at the request of VIT, surrender the berth.

260 FURNISHING OF BILLING INFORMATION

A. VESSELS, their owners or agents, shall permit VIT access to manifests, LOADING and discharge lists, tonnage license, rail and motor CARRIER freight bills or any other pertinent documents for the purpose of obtaining necessary information for correct billing of charges. VESSELS, their owners or agents, are responsible for data electronically transmitted to VIT or manually updated by the VESSEL, their owners or agents, in VIT's Operations System.

B. VESSELS, their owners or agents shall, within seven (7) calendar days after a VESSEL sails, update information on VESSEL discharge hold CONTAINERS in VIT's Operations System. VESSELS, their owners or agents shall, within seven (7) calendar days after a VESSEL sails, furnish VIT with tonnage/CONTAINER reports on all cargo loaded and discharged as well as any other information which might be required for accurate billing of cargo, CONTAINER, and VESSEL charges.

C. If VESSELS, their owners or agents, fail to update information in VIT's Terminal Operations System for CONTAINERS listed on the VESSEL Discharge Hold Report, then CONTAINERS will be billed to the OCEAN CARRIER. If a VESSEL fails to submit tonnage/CONTAINER reports to VIT's Billing Division, then VIT's data will be used to prepare invoices and for historical records.

D. For CONTAINERS interchanged between VESSELS, the rules under Item 450 apply.

E. VIT reserves the right to audit all documents and use such audits as a basis for charges. Note Item 800 for rebilling invoices.

262 RECEIPT OF EXPORT CARGO/CONTAINERS The following information in duplicate is required for acceptance of EXPORT CARGO/CONTAINERS by VIT:

Special Services	Measurement	Freight Forwarder
Exporter/Shipper	Identification marks	Booking number
Commodity	Exporting CARRIER/VESSEL	Port of discharge
Number of pieces	Hazardous certificate when required	
Weight	Party responsible for TERMINAL charges; see Item 411 regarding weights for export CONTAINERS	

263 RAIL TRANSPORT TO AND FROM VIRGINIA INLAND PORT

A. In connection with VIT's arranging for rail service for CONTAINERS bound for and from the Virginia Inland Port in Front Royal, Virginia, the CARRIER/OCEAN CARRIER must provide VIT with the correct weight of all such CONTAINERS. The CARRIER shall use only CONTAINERS in suitable condition and shall assure that the cargo does not exceed the CONTAINER manufacturer's posted cargo weight limitation.

B. In arranging for movement of CONTAINERS by rail, VIT is acting solely in an agency capacity and shall have no liability whatsoever for the transport of CONTAINERS by rail, or the acts or omissions of the CARRIER, Norfolk Southern Rail Road Company ("NS"). Such carriage shall be governed by applicable law and NS's terms of transportation.

C. In no event shall VIT's liability with respect to such carriage of CONTAINERS by rail exceed 500 per package or non-packaged object.

267 HAZARDOUS MATERIALS AND DANGEROUS CARGO

A. The CARRIER must notify VIT at least ten (10) days prior to arrival of HAZARDOUS MATERIALS or DANGEROUS CARGO at a TERMINAL. If the cargo is radioactive then at least thirty (30) days advance notice is required. Notification shall be made to the VIT Safety Manager, vitsafety@vit.org, 757.635.4544. Notification shall be made to the VIT Safety Manager to the following email, vitsafety@vit.org, and by phone 757.635.4544. The notification shall include an exact description of the nature and quantity of the HAZARDOUS MATERIALS or DANGEROUS CARGO, as the case may be.

B. VIT also reserves the right in its discretion to refuse to allow HAZARDOUS MATERIALS or DANGEROUS CARGO on the TERMINALS. If VIT allows HAZARDOUS MATERIALS or DANGEROUS CARGO on the TERMINALS, then VIT may impose such requirements as it deems necessary to comply with laws, rules and regulations which apply to the handling, storage, and/or transportation of such HAZARDOUS MATERIALS or DANGEROUS CARGO. The CARRIER shall pay the additional cost of such HANDLING, storage, and/or transportation as determined by VIT in its discretion.

C. VESSELS carrying EXPLOSIVES may berth at the TERMINALS but may not discharge such cargo or have such cargo relocated onboard while on berth.

D. CONTAINERS loaded with HAZARDOUS MATERIALS or DANGEROUS CARGO may not be transshipped without the prior written consent the manager of the applicable TERMINAL.

E. All USERS shall ensure that CONTAINERS and breakbulk cargo received at a TERMINAL containing HAZARDOUS MATERIALS or DANGEROUS CARGO are packaged, marked, placarded, handled, and shipped in strict compliance with all HAZARDOUS MATERIALS LAWS.

F. If cargo or CONTAINERS received at a TERMINAL contain HAZARDOUS MATERIALS or DANGEROUS CARGO causes personal injury, death, or damage to property or the environment, the CARRIER, its owners and operators and the shippers/owners of the cargo shall be liable for and will defend and hold harmless VIT from any and all LOSSES incurred or suffered by VIT as a result of injury, death, or damage.

G. The CARRIER shall indemnify and hold VIT harmless from and against all LOSSES suffered or incurred resulting from failure of VESSELS, cargo or CONTAINERS containing HAZARDOUS MATERIALS or DANGEROUS CARGO to be in compliance with HAZARDOUS MATERIALS LAWS or DANGEROUS CARGO LAWS, as applicable, result in or cause loss, damage, death,

personal injury, pollution, natural resource damages, environmental damage and/or violations of Federal, State, or Local Law, the CARRIER, its owner(s) and operators, and the cargo and its shippers, owners, and agents shall be liable for, defend, and hold harmless VIT, its parent, affiliates, officers, employees, and agents from any and all "LOSSES" listed in subsection (d) resulting from such loss, damage, death, personal injury, pollution, natural resource damages, environmental damage and/or violations of Federal, State, or Local Law.

H. See SOR Item 239-Discharging of Oils, Noxious Liquid Substances and Garbage; Leaking CONTAINERS

269 FORCE MAJEURE VIT and USERs shall be relieved of their obligations under this SOR in the event of FORCE MAJEURE to the extent performance is impaired by the event of FORCE MAJEURE.

272 ACCEPTANCE OF CARGO OR COMMODITY FOR HANDLING OR STORAGE When any cargo or commodity is accepted for HANDLING or storage, the beneficial owner of the cargo or commodity shall be liable for all LOSSES incurred by VIT attributable to or because of infestation or inherent vice of the cargo or commodity in question.

274 STRIKES, LABOR DISPUTES

A. In the event of a strike or other labor disturbances involving a VESSEL at berth or one waiting for berth (whether it involves the VESSEL's crew or otherwise) which will, in the sole judgment of VIT, interfere with, disturb, or impede operations of the TERMINAL, VIT may cancel such VESSEL's right to take berth or VIT may refuse to accept her at the berth, and if such VESSEL has taken berth, VIT may order such VESSEL out of berth. Should any VESSEL berth or interfere with other VESSELS' ingress to or egress from the berth after being informed of the inability of VIT to accept the VESSEL, or should the VESSEL refuse to vacate after being berthed, said VESSEL, her owners, agents and operators shall be liable for damages as hereinafter set forth.

B. If any VESSEL fails or refuses to move or to vacate the berth when ordered to do so, a charge of 1,606.00 per hour after notice has been given the VESSEL, her owners, operators, agents, master or mate will be assessed as damages. It is understood, however, and the parties agree, that this amount represents a minimum estimate of the damages to VIT because of the failure or refusal of the VESSEL to move or to vacate the berth, and that this charge shall not constitute a waiver by VIT to assess and collect the greater actual damages plus all interest, costs and attorneys' fees as VIT may sustain as the result of the VESSEL's failure or refusal to move or to vacate the berth.

C. Furthermore, the failure or refusal of the VESSEL to move or to vacate the berth shall constitute a trespass entitling the owner and/or VIT to compel removal of the VESSEL from the area in which she may be then located or from the berth and the VESSEL, her owners, agents, and operators shall be liable for all damages together with interest, costs and attorneys' fees that may be incurred in having the VESSEL removed.

276 LIEN ON GENERAL ORDER MERCHANDISE VIT will place a lien on cargo which is ordered by United States Customs to be placed into a General Order warehouse. Any and all TERMINAL costs incurred in connection with the cargo shall constitute the amount of the lien.

277 DAMAGED CARGO If a USER requests that VIT move damaged CONTAINERS or cargo, the USER shall submit a written request to VIT describing the cargo or CONTAINER it wishes VIT to move and stating that the party requesting the move agrees to accept any and all responsibility for the costs of the move and any and all damage that results from said movement and the cost of subsequent storage of the CONTAINER or cargo pending repair or transshipment.

278 DAMAGED, ABANDONED OR UNIDENTIFIED EQUIPMENT DISPOSITION VIT will not receive or permit storage of damaged, abandoned, misdelivered, or unidentified equipment on a TERMINAL. The OCEAN CARRIER shall be notified as follows:

A. Damaged Empty CONTAINERS

a. By notification via interchange (TIR), OCEAN CARRIERS have fifteen (15) calendar days FREE TIME in order to repair or remove a damaged empty CONTAINER from a TERMINAL.

b. After 45 days all damaged CONTAINERS will be moved from the TERMINAL by VIT to an off TERMINAL vendor(s) yard and a charge of 312.00 will be invoiced to the OCEAN CARRIER. Off terminal yard vendor(s) will invoice shipline directly for off terminal yard services.

c. Damaged CONTAINERS on wheels will be stacked in a designated area after ten (10) calendar days. All REHANDLINGS required to place CONTAINER to/from the stack will be invoiced in accordance with SOR Item 465-6(2)

B. All Other Equipment

a. By written notification, from VIT, shiplines, tenants and vendors have forty-five (45) calendar days to repair or remove damaged equipment not covered above in paragraph (a) from the TERMINAL.

b. After such forty-five (45) days of storage, damaged equipment will be moved from the TERMINAL by VIT at the rate of 312.00 to an off TERMINAL vendor(s) yard and invoiced to the owner of the equipment by said Vendor for their services.

279 FOREST PRODUCTS Please contact VIT at vitrates@vit.org for rates, charges, DEMURRAGE, FREE TIME and other services on the HANDLING of FOREST PRODUCTS.

280 METRIC CONVERSION TABLE The following table is published for convenience and as a guide for measurement conversion when necessary.

To Find	Given	Multiply
Metric TONS	Short TONS	Short TONS by 0.907
Short TONS	Metric TONS	Metric TONS by 1.102
Metric TONS	Long TONS	Long TONS by 1.016
Long TONS	Metric TONS	Metric TONS by 0.984
Kilos	Pounds	Pounds by 0.4536
Pounds	Kilos	Kilos by 2.2046
Cubic Meters	Measurement TONS (40 cu.ft.)	Measurement TONS by 1.133
Measurement TONS (40 cu.ft.)	Cubic Meters	Cubic Meters by 0.883
Cubic Meters	MFBM's (Ft. B.M. in thousands)	MFBM's by 2.36
MFBM's (Ft. B.M. in thousands)	Cubic Meters	Cubic Meters by 0.424

Metric Equivalents

1 Kilo - 2.2046 Pounds
1 Metric TON - 1,000 Kilos
1 Pound - 0.4536 Kilos
1 CWT (US - 100 Pounds) - 45.359 Kilos or 0.04536 Metric TONS
1 CWT (British - 112 Pounds) - 50.802 Kilos or 0.0508 Metric TONS
1 Bushel Grain (US) - 60 Pounds - 27.216 Kilos
1 Cubic Meter - 35.315 Cubic Feet
1 Cubic Foot - 0.0283 Cubic Meters
1,000 Ft. B.M. - 83.33 Cubic Feet
1 Cubic Meter - 423.792 Ft. B.M.
1 Barrel (US - 42 Gallons) - 158.987 Liters
1 Meter - 39.37 Inches
12 Inches - 30.48 Centimeters

SECTION III
DOCKAGE, WHARFAGE, EQUIPMENT RENTAL, MISCELLANEOUS VESSEL RULES AND CHARGES

300 DOCKAGE CHARGES

		Per Lineal Foot
VESSELS	0 to 600'	11.21
	601' and greater	11.99
Barges		7.53
Berth Charges		
(1) VESSELS		3.59
Minimum Charge	per VESSEL (covers the 1st 24 hours)	691.75
(2) Barges – Minimum Charge	per VESSEL (covers the 1st 24 hours)	691.75

Note 1 - Unless otherwise shown, all charges will be based on a per hour basis excluding downtime for VIT equipment.

Note 2 - DOCKAGE will be assessed to the VESSEL on overall length published in the current "Lloyds Register of Ships." If length is not shown in this publication, the length shown in the VESSEL's Certificate of Registry will be accepted.

Note 3 - The period of time for which DOCKAGE charges shall be assessed against a VESSEL shall commence when such VESSEL is made fast to the pier or dock and continue until such VESSEL has vacated the berth.

Note 4 - Lay berths may be arranged with VIT.

305 CANCELLATION OF PIER DOCKING When it is desired to cancel or postpone pier docking, advance notice of twenty-four (24) hours shall be given to VIT to preclude any loss of DOCKAGE charges. Otherwise, VIT will bill against the Master, VESSEL, ship owners or agents, a DOCKAGE charge of 312.05, and will use the pier for other purposes.

310 LINE HANDLING

	Each Movement		Additional Standby Time	
	Straight Time	Overtime	Straight Time	Overtime
VESSELS not otherwise shown	907.80	1,012.15	453.90	511.45
Passenger VESSELS, VESSELS 600' and over, and VESSELS SHIFTING	1,152.80	1,361.70	576.25	671.90

Above rates include two (2) hours standby time. Additional standby time will be assessed at additional standby time hourly rates shown above.

311 LINE HANDLING - RESTRICTED HOLIDAYS Differential on double the Straight Time rate will apply per man hour which will be in addition to the Line Handling charges published in Item 310.

315 WHARFAGE CHARGES

A. Cargo not otherwise shown.	per 2,000 pounds	4.77
B. Loaded ISO CONTAINERS. (Note 1)	per 2,000 pounds	4.45
C. Breakbulk cargo interchanged between water CARRIERs or direct discharge/load of breakbulk cargo to/from water and not handled over piers, wharves or bulkheads of TERMINAL.	per 2,000 pounds	3.26
E. Self-propelled automobiles and trucks on wheels, unboxed, not exceeding 5000 pounds per vehicle.	per vehicle	6.08
F. Transshipped CONTAINERS, loaded or empty, interchanged between VESSELS and handled over piers, wharves or bulkheads of TERMINAL. See Item 450 for charges.		
G. Loaded ISO CONTAINERS, not loaded to or discharged from VESSEL.	per CONTAINER	63.45

Note 1 - Charge to be based on weight of cargo only. Tare weight of CONTAINER is excluded. WHARFAGE charges are for the account of the OCEAN CARRIER or agent.

Note 2 - Failure to submit billing information within seven (7) calendar days as required by this SOR will result in withdrawal of credit privileges and issuance of a final invoice for WHARFAGE will be based on the net registered tonnage of the VESSEL according to Lloyd's Register of Shipping.

320 EQUIPMENT RENTAL GENERAL CONDITIONS Parties renting equipment agree to operate it within its rated capacity.

325 EQUIPMENT RENTAL CHARGES (Notes)

	TERMINAL	Per hour or fraction thereof	Minimum Billing	Notes
CONTAINER Cranes	NIT, PMT, NNMT, VIG	1,168.85	1 hour	1,2,3,4,5,7
Other than CONTAINER operation	NIT, PMT, NNMT, VIG	1,168.85	1 hour	1,3,4,5,6
CONTAINER/Breakbulk Handling Equipment	NIT, PMT, NNMT, VIG	229.95	1 hour	1,3,4,5,6
Gantry Crane, 110 TON capacity	PMT	1,168.85	1 hour	1,3,4,5,6
Forklift 6000#	NIT, PMT, NNMT, VIG	20.30	See Notes	1,5,7,8
Forklift 8000#	NIT, PMT, NNMT, VIG	20.30	See Notes	1,5,7,8
Forklift 15000#	NIT, PMT, NNMT, VIG	34.05	See Notes	1,5,7,8

Forklift 36000#	NIT, PMT, NNMT, VIG	91.80	See Notes	1,5,7,8
Forklift 45000#	NIT, PMT, NNMT, VIG	147.20	See Notes	1,5,7,8
Forklift 52,000#	NIT, PMT, NNMT, VIG	147.20	See Notes	1,5,7,8
Yard Hustler	NIT, PMT, NNMT, VIG	60.25	See Notes	1,5,7,8
Dual Tandem Hustler	NIT, PMT, NNMT, VIG	87.70	See Notes	1,5,7,8
Trackmobile	NIT, PMT, NNMT, VIG	74.15	1 Hour	1,5,7
Low Boy/Mafi (First 24 hour period)	NIT, PMT, NNMT, VIG	327.50	24 hour period	
Low Boy/Mafi (50T, 80T or 100T) After 1st period	NIT, PMT, NNMT, VIG	54.25	24 hour period	
Transtrailer	NIT, PMT, NNMT, VIG	15.75	1 hour	7
Chassis	NIT, PMT, NNMT, VIG	20.35	24 hour period	
Genset for Refrigerated CONTAINER	NIT, PMT, NNMT, VIG	294.55	24 hour period	9

Note 1 - Rates do not include operators (See Note 5).

Note 2 - Operators will be available 1/2 hour prior to VESSEL starting time upon request at no additional cost.

Note 3 - Billing for crane time will be computed as follows: Total time for crane billing will be calculated beginning with the time crane is ordered until dismissed with boom in upright position. Total time for CONTAINER handling equipment billing will be calculated beginning with the time CONTAINER handling equipment is ordered until dismissed. For CONTAINER operations, billing increment shall not be less than 1/2 hour.

Note 4 - Equipment rental and labor charges for time delays due to non-arrival of VESSEL shall be calculated and billed at (i) 25% of the applicable equipment rental and (ii) 100% of the prevailing labor rate (including without limitation taxes, benefits, and other costs). Labor charges for time delays due to inclement weather shall be calculated and billed at 100% of the prevailing labor rate (including without limitation taxes, benefits, and other costs). Time delays caused by mechanical failures of VIT's equipment shall be calculated and no charges will be billed for this time.

Note 5 - VIT will charge the prevailing labor rate (including without limitation taxes, benefits, and other costs) in conjunction with the minimum hourly guarantee required by the International Longshoremen's Association contract for equipment operators.

Note 6 - Individual lifts over 80,000 lbs., excluding ISO CONTAINER and machinery, as specifically described in Item 560, are subject to the following charges in addition to the hourly rates specified above. If more than one lift is made during the same period of use of the same necessary equipment, the heaviest piece will be assessed charges based on the chart shown below and other lifts will be assessed charges based on one-half of the charges on the chart.

	Per 2,000 lbs.
80,001 to 140,000 lbs.	5.66
140,001 to 200,000 lbs.	7.52
200,001 to 250,000 lbs.	18.76
250,001 to 300,000 lbs.	24.39
300,001 to 350,000 lbs.	30.04
350,001 to 400,000 lbs.	35.65

Note 7 - Minimum Billing, ¼ hour when used with extra labor

Note 8- Outside Rental rates will be quoted upon request by VIT Rates. Prior to equipment use, USER must have on file with VIT, a signed form to indemnify VIT against liabilities arising from use of equipment without VIT operator. One hour minimum.

Note 9- Fuel, mounting or dismounting extra

330 VESSEL OVERTIME CHARGES VESSELS working overtime hours will be assessed 298.70 per hour, or any fraction thereof. Saturday, Sundays, and HOLIDAYS are subject to a minimum of four (4) hours. Meal hours for the delivery clerks will be billed in addition at either the overtime rate or the premium meal hour rate as appropriate (See Item 805).

Note 1 - Delivery clerks will work through a meal hour only at the request of the OCEAN CARRIER, or their agent.

Note 2 - Upon completion of a VESSEL working, if a delivery clerk is required to receipt for cargo (signing up) during an overtime period, billing will be at the overtime rate or the premium meal hour rate as appropriate. (See Item 805).

Note 3 - Late start - if VESSEL does not start work until after call time, the billing period will begin at the normal starting time originally established by the agent.

335 FRESH WATER

A. VIT will furnish FRESH WATER to VESSELS at the following rates:
   a. 17.33 per 1000 gallons during regular hours.
   b. 18.65 per 1000 gallons during other than regular hours.
B. Subject to minimum of 203.45 if watering is commenced and completed during regular hours. For service rendered at other than regular hours, the minimum will be 672.55 except on weekends or HOLIDAYS when the minimum will be 927.70.

SECTION IV
CONTAINER RULES AND CHARGES

401 EFFICIENT STOWAGE/RESTOWS

If a VESSEL call requires RESTOWS and SHIFTS in excess of ten percent (10%) of the number of CONTAINERS loaded and discharged from the VESSEL, then the VESSEL shall pay VIT 20.00 per RESTOW and SHIFT in excess of this threshold.

402 EQUIPMENT INTERCHANGE RECEIPT (EIR) CUSTODY

A. VIT will not retain a paper copy of the computer printed Equipment Interchange Receipt (EIR).

B. NIT, PMT, and NNMT – Copies of EIR's can be reprinted from at www.vit.org

C. VIG – Copies of EIR's are provided via email. Send email request to Tickets@apmtva.com putting the unit number in subject line.

411 WEIGHING LOADED EXPORT CONTAINERS

A. When a CONTAINER arrives at a terminal by truck, the gross weight of the truck power unit ("tractor"), CONTAINER, and intermodal chassis may be obtained using scales calibrated in accordance with any applicable state requirements. When a CONTAINER arrives at a terminal by rail, the CONTAINER is loaded onto a chassis or trailer, and the gross weight of the tractor, CONTAINER, and chassis/trailer may be obtained using scales calibrated in accordance with any applicable state requirements.

B. VIT will calculate the actual gross weight of the CONTAINER by subtracting the chassis/trailer weight and tractor weight from the gross weight obtained via the method described above. The chassis/trailer weight and tractor weight may be derived from (i) standard, average weights for the tractor and chassis; (ii) weights previously registered in the terminal system; (iii) weights provided at the gate by the truck driver; or (iv) weights stenciled or placarded on the equipment. VIT will make the actual gross weight of the CONTAINER available electronically directly to the VESSEL operator.

C. Unless the VESSEL operator chooses the alternative stated below, VIT shall enter the actual gross weight of the CONTAINER determined by VIT as described above into VIT's TOS as the VGM. Pursuant to the U.S. Coast Guard's Maritime Safety Information Bulletin ("MSIB") 009/16, the VESSEL operator may use the weight provided by VIT as the equivalent of VGM to comply with SOLAS Regulation VI/2.

D. Alternatively, the VESSEL operator may instruct VIT not to use the actual gross weight calculated by VIT as the VGM, in which case the VESSEL operator must send the VGM to VIT on behalf of the shipper. Under this alternative, the VESSEL operator must send the VGM of the CONTAINER to VIT electronically via VERMAS electronic data interchange at least twenty-four (24) hours prior to the LOADING of the CONTAINER on the VESSEL. The VESSEL operator is responsible for resolving all discrepancies between weights it receives from VIT, the shipper, or other sources prior to submitting the VGM to VIT. The shipper shall not sign any document or electronic message accompanying the weight sent from the VESSEL operator to VIT. If VIT does not receive the VGM from the VESSEL operator within the required time, then the CONTAINER may not be loaded, and the OCEAN CARRIER and other responsible parties shall be liable to VIT for DEMURRAGE (Item 461) with no FREE TIME (Item 456), roll, REHANDLING (Item 465), and other applicable charges. VIT is not responsible for the weight received as the VGM from the VESSEL operator.

E. All shippers using the TERMINALS authorize the use of such actual gross weight(s) determined by VIT in the manner as described above to satisfy the SOLAS obligations on shippers to provide VGM.

F. VIT's confirmation of the LOADING event to the OCEAN CARRIER(s) shall refer to the VGM received or used as provided above.

G. The VESSEL operator should call VIT's Customer Service at 757-440-7160 or email VIT at POVCustomerService@vit.org for instructions for the electronic data interchange of weight information described above.

420 RECEIVING/DELIVERING CHASSIS, FRAMES OR BOGIES The term RECEIVING/DELIVERING CHASSIS, FRAMES OR BOGIES refers to receiving chassis, frames, or bogies from or delivering to an inland CARRIER. Prior arrangements must be made with VIT for this service which includes necessary clerical work to perform the interchange.

425 REHANDLING CONTAINER

A. On Own Wheels. The term REHANDLING CONTAINER ON OWN WHEELS refers to the moving or towing with a TERMINAL tractor ("hustler") and operator of a CONTAINER on its own chassis and wheels (same to be furnished by owner or agent), between POINT OF REST and designated point on the TERMINAL.
B. Into/From Stack. The term REHANDLING CONTAINER INTO/FROM STACK refers to the placing of a CONTAINER in the stack or removing a CONTAINER from the stack to its own chassis, frame, bogie or wheels with TERMINAL labor and equipment. These operations are in addition to the original move provided for in the basic CONTAINER RECEIVING charge.
C. Chassis Change. Once a WHEELED CONTAINER is received by VIT at a POINT OF REST, any subsequent change of the CONTAINER to other wheels, including flatbeds, will be performed by request only, and charges per Item 465 will apply.

426 REHANDLING BARE CHASSIS ON WHEELS The term REHANDLING BARE CHASSIS ON WHEELS refers to the moving or towing with a TERMINAL tractor or operator of a bare chassis on wheels (same to be furnished by owner or agent) between POINT OF REST and designated point on the TERMINAL.

430 RECEIVING CONTAINER - GROUNDED OR STACKED OPERATION

CONTAINERS will be handled in the following manner:

A. A CONTAINER brought to a TERMINAL by an inland motor or rail CARRIER will be removed from its wheels, bogies, chassis, frame, or flatbed trailer or car by VIT with its own labor and mechanical equipment. In turn, the CONTAINER will be grounded or stacked by VIT in the CONTAINER YARD at a POINT OF REST awaiting movement to the VESSEL. When requested, VIT will inform the VESSEL and/or (its agent) as to the exact location of the CONTAINER. The VESSEL's stevedore will in turn remove the CONTAINER from the POINT OF REST in the CONTAINER YARD and transport the CONTAINER to the VESSEL.
B. A CONTAINER will be received by VIT from the VESSEL and/or (its agent) at a POINT OF REST in the CONTAINER YARD for delivery to an inland motor or rail CARRIER (or its agent). The VESSEL's stevedore will ground or stack the CONTAINER in the CONTAINER YARD at a POINT OF REST designated by VIT. When so requested by the inland motor or rail CARRIER (or its agent), VIT, with its labor and mechanical equipment, will remove the CONTAINER from its POINT OF REST and place the CONTAINER on wheels, bogies, chassis, frames, or flatbed trailer for carriage by the inland motor or rail CARRIER.
C. VIT will perform the necessary clerical work to effect physical exchange of the CONTAINER between the motor CARRIER or rail CARRIER (or its agent) or VESSEL and VIT. Not included is any repair to the CONTAINER or its equipment.
D. VIT will weigh loaded export CONTAINERS as provided in this SOR.

435 RECEIVING CONTAINER - WHEELED OPERATION

A. The term RECEIVING CONTAINER - WHEELED OPERATION refers to acceptance of a WHEELED CONTAINER, empty or loaded, by VIT in an OPEN STORAGE OR PARKING AREA from the inland CARRIER, so as to facilitate physical exchange of the WHEELED CONTAINER with a VESSEL. VIT may accept a WHEELED CONTAINER in an OPEN STORAGE OR PARKING AREA from a VESSEL to facilitate physical exchange with an inland CARRIER.

B. CONTAINERS will be handled in the following manner:

1. VIT will designate and provide the necessary OPEN STORAGE OR PARKING AREA on which to park the WHEELED CONTAINER.

2. VIT will perform the necessary clerical work to effect physical exchange of the WHEELED CONTAINER between the motor CARRIER or rail CARRIER (or its agent) or water CARRIER and VIT. Not included is any repair to the CONTAINER or its equipment.

3. VIT will weigh loaded export CONTAINERS as provided in this SOR.

4. Unless prior arrangements are made with VIT, the TERMINAL will not use its tractors, mechanical equipment, or personnel to dray or move WHEELED CONTAINERS to/from or within the OPEN STORAGE OR PARKING AREA.

436 DUAL RECEIVING CONTAINER CHARGE

A. VIT will assess the following charges in DUAL RECEIVING situations:

1. If an empty CONTAINER arrives by rail and departs by rail, then the rail operator shall be charged two (2) rail ramp charges.

2. If a loaded CONTAINER arrives by rail and departs by rail, then the rail operator shall be charged two (2) rail ramp charges, and the OCEAN CARRIER shall be charged two (2) Receiving/Delivery CONTAINER charges in addition to WHARFAGE and M&R inspection charges (Items 445, 315-H & 465-9).

3. If an empty CONTAINER arrives by rail and departs by gate, then the rail operator shall be charged one (1) rail ramp charge, unless the CONTAINER arrived from the VIP, in which case there shall be no charge.

4. If a loaded CONTAINER arrives by rail and departs by gate, then the rail operator shall be charged one (1) rail ramp charge, and the OCEAN CARRIER shall be charged two (2) Receiving/Delivery CONTAINER charges in addition to WHARFAGE and M&R inspection charges (Items 445, 315-H & 465-9).

5. If an empty CONTAINER arrives by gate and departs by rail, then the rail operator shall be charged one (1) rail ramp charge.

6. If a loaded CONTAINER arrives by gate and departs by gate, then the OCEAN CARRIER shall be charged two (2) Receiving/Delivery CONTAINER charges in addition to WHARFAGE and M&R inspection charges (Items 445, 315-H & 465-9).

7. If a loaded CONTAINER arrives by gate and departs by rail, then the OCEAN CARRIER shall be charged two (2) Receiving/Delivery CONTAINER charges in addition to WHARFAGE and M&R inspection charges (Items 445, 315-H & 465-9), and the rail operator shall be charged one (1) rail ramp charge.

8. If a loaded CONTAINER which arrived by truck or rail departs by gate for the purpose of a mandatory governmental inspection, the OCEAN CARRIER shall be charged two (2) Receiving/Delivery CONTAINER charges in addition to WHARFAGE and M&R inspection charges (Items 445, 315-H & 465-9).

B. These charges shall not apply to gate moves performed for VIT's convenience. No free-time (Item 456) shall be allowed for CONTAINERS in DUAL RECEIVING situations. These charges are in addition to other applicable charges in this SOR that may apply, such as without limitation security surcharges, empty storage charges, and DEMURRAGE.

440 RECEIVING CONTAINER CHARGES - EXPEDITED HANDLING If in the interest of efficient operations a CONTAINER cannot be carried to the POINT OF REST or to the OPEN STORAGE OR PARKING AREA, the applicable RECEIVING charge will be assessed in any event. Prior approval is not required to allow a CONTAINER to bypass POINT OF REST and OPEN STORAGE OR PARKING AREA to permit expedited HANDLING.

445 RECEIVING CONTAINER CHARGES Wheeled, grounded, or stacked operation 109.45 (Applicable under conditions described in Items 430 and 435).

450 CONTAINERS INTERCHANGED BETWEEN VESSELS (TRANSHIPMENT) (Notes 1 through 5) Loaded and empty CONTAINERS interchanged between VESSELS and moved over piers, wharves or bulkheads within ten (10) days (Note 1) will be assessed 60.75 per CONTAINER against the inbound water CARRIER (Note 2). This charge will apply if the CONTAINER is received and delivered by the same TERMINAL and upon 24 hour prior notification to VIT (Note 3).

Note 1 - CONTAINERS departing via a VESSEL after ten (10) days will be assessed 48.75 per CONTAINER against the outbound CARRIER.

Note 2 - Should an OCEAN CARRIER have multiple services at the same TERMINAL, the OCEAN CARRIER'S rate will be assessed upon departure.

Note 3 - If VIT does not receive notification, electronically transmitted or manually updated in VIT's Operations System, then the normal RECEIVING CONTAINER charge (Item 445) will apply.

Note 4 - CONTAINERS departing gate/rail will be assessed 48.75 at time of departure.

Note 5 - If POINT OF REST changes, charges according to Item 465-6 will apply.

451 BASIC CONTAINER UNIT RATE The BASIC CONTAINER UNIT RATE is 400.00. The BASIC CONTAINER UNIT RATE includes the following SOR Items, and only these Items:

DOCKAGE – One (1) Twenty- Four (24) hour period per VESSEL – Item 300(A) (B)
Linehandling – One (1) period (2 hours) for docking and one (1) period (2 hours) for undocking - Item 310
WHARFAGE – CONTAINERS - Item 315(B)
DUAL RECEIVING CONTAINER Charge – (Empties only; parties other than the OCEAN CARRIER may be billed) - Item 436
RECEIVING CONTAINER Charges - Item 445
Transshipment and Water to Water CONTAINERS (Additional charges in the Notes in SOR are NOT included in the BASIC CONTAINER UNIT RATE) - Item 450
Receiving Chassis - Item 465(1)
REHANDLING CONTAINERS Into/From Stack (REHANDLINGS identified in SOR Items 430 and 436 only) - Item 465(6) (A-2)
Chassis Change (From a damaged chassis to an undamaged chassis only) - Item 465(7)
CONTAINER/Chassis Inspection - Item 465(9)

452 CONTAINERS INTERCHANGED BETWEEN OCEAN CARRIERS ON TERMINAL When a CONTAINER is on TERMINAL and the booking is changed to another VESSEL and OCEAN CARRIER, an additional HANDLING charge will be billed to the OCEAN CARRIER ultimately taking the cargo. A RECEIVING charge will be assessed.

453 ROLLED CONTAINER CHARGE The OCEAN CARRIER shall pay a charge of 48.00 for each time a ROLLED CONTAINER is booked to another VESSEL, VESSEL call, or a different port of destination.

456 FREE TIME LOADED CONTAINERS This item applies only to loaded CONTAINERS.

A. EXPORTS

a. NON-REFRIGERATED GATE TO VESSEL AT A VIT MARINE TERMINAL (VIG, NIT, NNMT, PMT) – Seven (7) consecutive days FREE TIME beginning with the first 8:00 A.M. after placement on the TERMINAL and ending with the VESSEL sail date. If the VESSEL sails between the hours of 12:00 A.M. and 3:00 A.M., the end date will be the prior day.

b. NON-REFRIGERATED RAIL TO VESSEL AT A VIT MARINE TERMINAL (VIG, NIT, NNMT, PMT) – Ten (10) consecutive days FREE TIME beginning with the first 8:00 A.M. after placement on the TERMINAL and ending with the VESSEL sail date. If the VESSEL sails between the hours of 12:00 A.M. and 3:00 A.M., the end date will be the prior day.

c. NON-REFRIGERATED TRANSSHIPPED CONTAINERS – Ten (10) consecutive days FREE TIME beginning with the first 8:00 A.M. after the inbound VESSEL sail date and ending with the outbound VESSEL sail date. If the outbound VESSEL sails between the hours of 12:00 A.M. and 3:00 A.M., the end date will be the prior day.

d. REFRIGERATED CONTAINERS – Five (5) consecutive days FREE TIME beginning with the first 8:00 A.M. after placement on the TERMINAL and ending with the VESSEL sail date. If the VESSEL sails between the hours of 12:00 A.M. and 3:00 A.M., the end date will be the prior day.

e. VIT is not obligated to receive loaded CONTAINERS onto a TERMINAL for the full amount of the FREE TIME prior to the VESSEL's departure from the TERMINAL; see SOR Item 231.

f. FREE TIME does not reset if a CONTAINER is moved from one TERMINAL to another, and time spent in inter-TERMINAL transit shall count against FREE TIME. This rule shall not apply if the movement is

solely for VIT's convenience; when the movement is for VIT's convenience, FREE TIME shall reset upon delivery of the CONTAINER to the new TERMINAL.

g. No FREE TIME shall be allowed for CONTAINERS in DUAL RECEIVING situations (Item 436). Except for containers that arrive by rail and depart via truck needing fumigation will be provided 4 days free time with the first 8:00 A.M. after placement on the terminal until departure.

h. HREW containers that depart a VIT facility and return to the terminal will be provided a total of ten (10) days free time. The free time will be allotted in two increments – the first transaction of the container will be provided 4 days free time with the first 8:00 A.M. after placement on the terminal or the inbound Vessel sail date through departure or the vessel sail date. The second transaction will be given 6 days free time until 8:00 A.M. after placement on the terminal until departure or the vessel sail date.

B. IMPORTS AND ALL OTHER CONTAINERS

a. NON-REFRIGERATED CONTAINERS – Seven (7) consecutive days FREE TIME beginning with the first 8:00 A.M. after the inbound VESSEL sail date and ending upon departure of the CONTAINER from the TERMINAL.

b. REFRIGERATED CONTAINERS – Five (5) consecutive days FREE TIME beginning with the first 8:00 A.M. after the inbound VESSEL sail date and ending upon departure of the CONTAINER from the TERMINAL.

c. FREE TIME applies only to the OCEAN CARRIER. DEMURRAGE charges (Item 461) will apply upon expiration of FREE TIME.

d. Import coffee shipments in CONTAINERS- Seven (7) consecutive days FREE TIME beginning with the first 8:00 A.M. after the inbound VESSEL sail date and ending upon departure of the CONTAINER from the terminal.

e. No FREE TIME shall be allowed for CONTAINERS in DUAL RECEIVING situations (Item 436). Except for containers that arrive by rail and depart via truck needing fumigation will be provided 4 days free time with the first 8:00 A.M. after placement on the terminal until departure.

f. HREW containers that depart a VIT facility and return to the terminal will be provided a total of ten (10) days free time. The free time will be allotted in two increments – the first transaction of the container will be provided 4 days free time with the first 8:00 A.M. after placement on the terminal or the inbound Vessel sail date through departure or the vessel sail date. The second transaction will be given 6 days free time until 8:00 A.M. after placement on the terminal until departure or the vessel sail date.

460 STORAGE OF EMPTY CONTAINERS

A. For the purposes of this Section:

a. "Empty Benchmark" means the number which is ten percent (10%) of the number of CARRIER's CONTAINER Movements in a month times the number of days in the month.

b. "Daily Empty Storage-days" means the number of empty CONTAINERS stored on the TERMINALS (including without limitation all damaged empty CONTAINERS) by CARRIER on each day (or partial day) of the month.

c. "Excess Empty Storage-day(s)" means the total number of Daily Empty Storage-days accumulated in the month in excess of the Empty Benchmark.

B. At the end of each month, VIT shall bill, and CARRIER shall pay, the daily per-CONTAINER storage charge provided in the SOR (currently SOR Item 460) for each Excess Empty Storage-day in the month.

C. If VIT notifies CARRIER that VIT projects that CARRIER's Daily Empty Storage-days will exceed the Empty Benchmark in any month, then upon notice from VIT via email, CARRIER shall implement an evacuation plan to reduce empty CONTAINERS on the TERMINALS within thirty (30) days to a level consistent with the Empty Benchmark. Additionally, VIT reserves the right to adjust the Empty Benchmark upon at least thirty (30) days' notice via email to CARRIER if in VIT's discretion the number of empty CONTAINERS on the TERMINALS materially interferes with the efficient operation of the TERMINALS.

D. FOR EXAMPLE, if CARRIER has 2,000 CONTAINER Movements in the month of January. The Empty Benchmark would be 200 (i.e., 10% of 2,000) times 31 days = 6,200. Assume that CARRIER had a total of 7,750 Daily Empty Storage-days in the month. At the end of January, CARRIER would be billed for 1,550 Excess Empty Storage-days, i.e., 7,750 total Daily Empty Storage-days minus the Benchmark of 6,200.

E. Daily Storage Charge - 2.55 per container, per day

461 TERMINAL DEMURRAGE CHARGE- LOADED CONTAINER

A. Non-Refrigerated CONTAINERS exceeding FREE TIME will be assessed DEMURRAGE charges as follows:

a. Days one (1) through three (3) - 16.00 per TEU, per day, for the account of the OCEAN CARRIER.

b. Days four (4) through seven (7) - 27.00 per TEU, per day, for the account of the OCEAN CARRIER.

c. Days eight (8) and greater - 38.00 per TEU, per day, for the account of the OCEAN CARRIER.

B. Refrigerated CONTAINERS exceeding FREE TIME will be assessed DEMURRAGE charges as follows:

a. Days one (1) through four (4) - 80.00 per day, per CONTAINER, for the account of the OCEAN CARRIER.

b. Days five (5) and greater - 158.00 per day, per CONTAINER, for the account of the OCEAN CARRIER.

462 CHASSIS After five (5) days notification, non-HRCP II bare chassis will be removed from the TERMINAL by VIT. Bundling, drayage, and the off terminal inbound interchange will be charged to the owner or operator of the chassis. All off terminal charges are for the account of the owner or operator of the chassis.

463 STORAGE OF EQUIPMENT UPON BANKRUPTCY Equipment including but not limited to a CONTAINER or a chassis remaining on the TERMINAL 30 days after its owner or lessee has ceased operations due to bankruptcy or has gone out of business will be charged a Storage charge on equipment. A charge of 39.96 unit, per day will be assessed against the equipment from the date of the ceased operations and must be paid prior to release of the equipment. The amount due will be from the party requesting the release of the equipment.

465 MISCELLANEOUS SERVICES AND CHARGES

1. Receiving Chassis, Frames, Bogies, or Bolsters	per chassis, frame, bogie, or bolster	21.45
2. Weighing - CONTAINERS on Wheels (Does not include HANDLING)	per weighing	30.00
3. Applying Placarding/Sealing When required by applicable law, any government agency, OCEAN CARRIER, or others requesting the service, VIT will provide, prepare and affix placards and/or seal CONTAINER	per placard	26.50
	per seal	13.75
4. M&R Services		
A. Remove Placards	per CONTAINER	39.30
B. Apply Tape Patch	per patch	11.40
5. (A) Electrical Service to Refrigerated CONTAINER	Per 24 hours or fraction thereof per CONTAINER	51.90
(B)Temperature Monitoring of Refrigerated CONTAINERS If requested, VIT will provide temperature monitoring service on the "SPECIAL SERVICES" basis published in Item 805.		
(C)Connect and Disconnect Refrigerated CONTAINERS	includes both connect and disconnect	63.65
6. REHANDLING CONTAINERS, Bare Chassis and Terminal Equipment. (A) REHANDLING CONTAINERS		
1. On own wheels	each operation	54.75
2. Into/from stack	each operation	109.45
(B) REHANDLING bare chassis/terminal equipment, on wheels	each operation	54.75
(C) SHIFTING CONTAINERS from a stack location to another stack location for the purpose of inspection	per CONTAINER, per SHIFT	25.10
7. Chassis Change Removing CONTAINERS from chassis, flatbed, frame or bogie and placing on another mobile unit		109.70
8. Covered Storage Covered storage for CONTAINERS may be available from the terminal with prior arrangements.	per CONTAINER per day	12.05
9. CONTAINER/Chassis Inspection (No repairs included)	per CONTAINER or empty chassis	17.00
10. Tailgate CONTAINER Inspections for Governmental Agencies	Straight Time	181.00

Inspection by U. S. Customs on CONTAINERS using Vacis X-Ray machine or radiation screening equipment (Out gate RPM inspections excluded).	per CONTAINER	322.00
Shipside VACIS Inspection performed as part of VESSEL operation. Inspection by U. S. Customs on CONTAINERS using Vacis X-Ray machine or radiation screening equipment (Out gate RPM inspections excluded).	per CONTAINER	161.00
11. (A) Receiving/Delivering "Out of Gauge" CONTAINERS	Each CONTAINER, each operation	120.45
(B) Rigging Charge	Each CONTAINER, each operation	484.05
Securing or Restowage - to be billed at EXTRA LABOR RATES in addition to any required materials that may be required by the Coast Guard Inspector. These rates will be for the account of the cargo.		

470 RECEIVING OTHER THAN STANDARD SIZE CONTAINERS Prior arrangements must be made with VIT by the authorized agents of the VESSEL and the inland CARRIER before CONTAINERS having dimensional lengths other than 20, 40, or 45-feet will be accepted by VIT.

475 RECEIVING CONTAINERS WITH DAMAGE OR VARIANCES CONTAINERS having damage or variances which may impede normal movement with the TERMINAL's mechanical equipment will not be RECEIVED unless arrangements have been made with VIT.

476 CONTAINERS WITH "OUT OF GAUGE" CARGO

A. "Out of Gauge" CONTAINERS are those received or delivered with over width or over high cargo which protrudes outside the standard frame and cannot be handled by normal use of a CONTAINER spreader bar and includes without limitation flatracks, platforms, and opentops.

B. VIT will "Receive or Deliver" these CONTAINERS and the charge assessed for this service is published in Item 465-11(A), which will be in addition to the RECEIVING CONTAINER charges published in Item 445 and/or the Chassis Change charge published in Item 465-7. Should the HANDLING of these CONTAINERS require the use of additional rigging gear other than a speed bar, the Rigging charge in Item 465-11(B) will also apply.

477 CONTAINERS WITH "OUT OF GAUGE" CARGO – VESSEL

A. It is the responsibility of the VESSEL owners and operators to select the proper equipment to handle overweight or out of gauge CONTAINERS or cargo and to deliver them to their designated POINT OF REST. Overweight or out of gauge CONTAINERS or cargo that is left, parked or abandoned by the owners or operators or their agents/stevedores short of their designated POINT OF REST will not be the responsibility of VIT and any movement of the cargo or CONTAINERS to clear pier space or for other TERMINAL purposes shall be for the account and at the risk of the VESSEL owner/operator or its representative and the VESSEL owner/operator and its representative/stevedore accepts any and all liability arising out of the TERMINAL's movement of the CONTAINER/cargo to its designated POINT OF REST.

B. Import "Out of Gauge" CONTAINERS landed to TERMINAL equipment (mafi, cassette, or lowboy) from a VESSEL are subject to TERMINAL equipment rental charges for the account of the representative/stevedore or VESSEL owner/operator beginning at time of VESSEL sailing.

C. Export "Out of Gauge" CONTAINERS received for VESSEL LOADING and placed on TERMINAL equipment (mafi, cassette, or lowboy) for the convenience of the TERMINAL will receive ten (10) consecutive calendar days equipment use at no charge. After ten (10) free days, TERMINAL equipment rental charges will be assessed to the shipline until TERMINAL equipment is cleared.

D. VIT will receive these CONTAINERS at rates published in Item 805.

480 CONTAINERS LOADED IN EXCESS OF RATED CAPACITY The rates, rules, regulations and charges published in this section of the SOR are not applicable to Standard Seagoing CONTAINERS loaded in excess of their rated capacity. VIT will not permit its mechanical equipment (designed for movement or carriage of CONTAINER) or its CONTAINER cranes to be used in any way to lift, move or transport a CONTAINER which is loaded in excess of the CONTAINER's rated capacity. If the TERMINAL's equipment or crane is used to lift, move, or transport a CONTAINER which is loaded in excess of the rated capacity, the party or parties causing such unauthorized use shall be held liable for all LOSSES, claims, demands, and suits for damages, including death and personal injury, and including court costs and attorney's fees, incident to or resulting from such unauthorized use.

485 CONTAINER REPAIR, SERVICING, AND/OR CLEANING VIT will license up to six (6) CONTAINER/chassis M&R companies to operate facilities on its TERMINALS. Said licenses will be issued pursuant to requirements as follows. Each such M&R operator shall:

1. Each M&R operator shall execute a License Agreement with VIT. The License Agreement shall set out the responsibilities and duties required of each M&R operator to work on the TERMINALS. The License Agreement may contain one or more of the following requirements, which shall apply regardless of the terms of the License Agreement.

2. No less than 3 business days before an M&R operator is to perform work at the TERMINALS, each M&R operator shall submit a Certificate of Insurance (COI) to VPA's Risk Management Department by electronically scanning the COI and attaching it in PDF format to an email addressed to riskmanagementstaff@vit.org evidencing that the M&R operator has the following insurance policies: a) **Commercial General Liability** insurance with liability limits in an amount not less than Five-Million Dollars (5,000,000,000), combined single limit, per occurrence; b) **Commercial Auto Liability** insurance in an amount not less than Five-Million Dollars (5,000,000,000), combined single limit, per occurrence; c) **Workers' Compensation** insurance in compliance with the laws of the Commonwealth of Virginia, and, if required by law, an endorsement providing workers' compensation benefits under the federal Longshore and Harbor Workers' Compensation Act; d) **Employer's Liability** Insurance in an amount not less than Five-Million Dollars (5,000,000,000) combined single limit, per occurrence; and e) **Pollution Liability** insurance with liability limits not less than Five-Million Dollars (5,000,000,000) combined single limit, per occurrence. The VIT PARTIES shall be named as additional insured on each such policy.

3. Mark and identify their equipment and maintain them in a good condition.

4. Agree that all equipment not needed for current operations shall be removed promptly from the TERMINAL premises. No equipment or material owned, leased, or rented by the M&R operator shall be abandoned or discarded on the TERMINAL premises.

5. Agree that all operations shall be conducted in accordance with TERMINAL rules and regulations, U.S. Coast Guard regulations, OSHA regulations, this SOR, the master and local ILA collective bargaining agreements, and all federal, state and municipal laws and ordinances.

6. Agree that work shall be performed only in areas designated by VIT. Each M&R operator further agrees to prohibit its employees from entering into or performing work in areas designated as "prohibited" unless prior written permission given by VIT or designee. VIT must be notified of any movements of equipment before the equipment is moved, and provided with information as to the new location of equipment.

7. Deposit 500.00 with VIT or present a bond in this amount. Refund or balance thereof shall be returned to M&R operator within thirty (30) days following cessation of its activities on the TERMINAL and after settlement of account with VIT.

8. Pay in advance to VIT a fee of 180.00 for each six (6) months period or part thereof, for each and every truck, van, CONTAINER or other type of vehicle used in its operation on the TERMINAL. This is subject to a minimum payment of 610.00 for each six (6) months or part thereof, except for M&R operators that have continuously operated on the TERMINAL since July 1, 1973. Payments shall be paid on July 1 and January 1 of each calendar year.

9. Comply with all security requirements as specified for all vendors on the TERMINAL premises, including but not limited to the periodic review of employee personnel files, the inspection of vehicles, etc.

10. Operate with hours and procedures consistent with TERMINAL operations.

11. Items 6 and 7 shall not apply to OCEAN CARRIERS that have leased terminal space for performing maintenance of CONTAINERS.
12. Upon approval of a permit application, VIT shall issue a decal for each piece of equipment permitted to operate on the TERMINALS. The decal shall be prominently displayed immediately below the corporate name on the left side of the vehicle. Failure to comply with all the requirements above will result in termination in accordance with provisions of the License Agreement.

490 CHASSIS BANDING AND/OR STACKING

Two chassis high	per stack	333.35
Three chassis high	per stack	588.15
Four chassis high	per stack	828.05
Five chassis high	per stack	1,080.60

491 CHASSIS - LOADING TO OR UNLOADING FROM FLATBED TRAILERS

Per lift	167.85

492 CHASSIS - BREAKING DOWN

Per stack	271.10

493 STACK FLATS AND MAFIS

Per stack	190.00

494 LOADING/UNLOADING BUNDLED MAFIS ON FLATBED TRAILERS

Per handling	216.50

495 DELIVERING/RECEIVING CONTAINERS DURING OVERTIME HOURS

	Per Hour	Per Meal Hour
Delivering/Receiving Containers at the Marine Terminals - per hour, per lane	809.15	1,012.05
Delivering/Receiving Containers at the Marine Terminals ES Lot - per hour, per gang	756.05	949.50
Delivering/Receiving Containers at the Empty Container Yards - per hour, per gang	636.75	796.70
Transfer Zone/Live Gate at the Marine Terminals - per hour, per gang	2,273.10	2,841.70

Gate Hours:

VIG – Regular hours of operation are Monday – Friday 8:00 a.m. – 5:00 p.m.

NIT – Regular hours of operation are Monday – Friday 8:00 a.m. – 5:00 p.m.

NNMT – Regular hours of operation are Monday – Friday 8:00 a.m. – 5:00 p.m.

Empty CONTAINER YARDS – Regular hours of operation are Monday – Friday 8:00 a.m. – 5:00 p.m.

Contact Terminal Management for overtime orders and minimum hours of operation.

Gate Services	(VIG)	(757) 686-6135	Virginia.Gate@safe.vit.org
Gate Services	(NIT)	(757) 440-7078	GateServices-Admin@vit.org
Terminal Manager	(NNMT)	(757) 928-1204	NNMTOpsStaff@vit.org

496 HOT CONTAINER CHARGE The REHANDLING of CONTAINERS must be pre-planned. When an unscheduled CONTAINER movement is not ordered before 2:00 p.m. of the previous workday, the party requesting the service will be charged.

A. Regular hours	per container	349.65
B. Overtime hours	per container	524.60

499 RAIL LIFT/RAMP RATE

The per CONTAINER lift rate is 59.88. This charge includes the following:

A. Export CONTAINERS (DERAMP), VIT will remove CONTAINER from the railcar and place at a POINT OF REST on the TERMINAL.

B. Import CONTAINERS (RAMP), VIT will move CONTAINER from the POINT OF REST in the CONTAINER YARD and place CONTAINER on a railcar according to applicable laws and VIT's stowage policies.

C. Service includes one (1) spot and one (1) pull of the railcar between the rail area and another on-TERMINAL location if required by VIT.

D. This charge does not include any other charge stated in this SOR.

SECTION V
ALL OTHER CARGO RULES AND CHARGES

500 FREE TIME AND DEMURRAGE – NON-CONTAINERIZED CARGO

A. Non-containerized EXPORT, IMPORT, INTERCOSTAL and COASTWISE CARGO held on the TERMINALS will be granted ten (10) consecutive calendar days FREE TIME. FREE TIME will begin with the first 8:00 a.m. after receipt of cargo. Upon expiration of FREE TIME, if any, DEMURRAGE charges will be assessed. Non-containerized EXPORT CARGO DEMURRAGE ceases when VESSEL commences LOADING.

B. FREE TIME accorded under the provisions and exceptions of this item is subject to the availability of suitable storage space at VIT facilities. VIT reserves the right to deny or restrict FREE TIME on all cargo received at the TERMINALS. Non-containerized EXPORT CARGO in storage will be released to "FREE TIME" status only when VIT receives consignment instructions from shipper or agent pursuant to Item 232A above.

1. Exception 1: No FREE TIME will be allowed on BULK or refrigerated cargo.

2. Exception 2:

    a. CRUDE RUBBER
        i. Breakbulk - FREE TIME of thirty (30) calendar days beginning with the first 8:00 a.m. after receipt of cargo from the VESSEL.
        ii. Containerized - FREE TIME of thirty (30) calendar days beginning with the first 8:00 a.m. after the last CONTAINER of rubber per bill of lading is stripped.
        iii. Lash barges - FREE TIME of thirty (30) calendar days beginning with the first 8:00 a.m. after receipt of each bill of lading from barge or barges.

    b. IRON or STEEL Articles, as described in Item 550, when suitable for outside storage, will be allowed fifteen (15) calendar days FREE TIME beginning with the first 8:00 a.m. after receipt of cargo.

    c. MACHINERY for export, when suitable for outside storage, will be allowed fifteen (15) calendar days FREE TIME.

3. Exception 4 - FREE TIME on imported automobiles and trucks, unboxed, and not exceeding 5,000 pounds per vehicle, required prior arrangements be made with VIT because of limited space. Whether or not VIT will grant FREE TIME is within its sole discretion.

502 FREE TIME DURING LONGSHOREMEN'S LABOR DISPUTE

Cargo on FREE TIME at the commencement of any longshore strike will be afforded additional FREE TIME for the duration of the strike. Upon termination of the strike, FREE TIME will continue to run for the unexpired number of days generally allowed on cargo.

Cargo which is on first period DEMURRAGE at the commencement of the strike will continue on first period DEMURRAGE for the duration of the strike. At the conclusion of the strike, the remaining days of the first period DEMURRAGE will be allowed.

Cargo in second period DEMURRAGE at the commencement of the strike will be assessed charges at the first period DEMURRAGE rates for the duration of the strike. At the conclusion of the strike, cargoes in this category will revert immediately to the period of DEMURRAGE applicable at the commencement of the strike period.

505 DEMURRAGE – NON-CONTAINERIZED CARGO

A. Articles not otherwise specified:		
First five (5) calendar days or fraction thereof	per 2,000 pounds	6.17
Each succeeding five (5) calendar day period or fraction thereof	per 2,000 pounds	13.61
B. Rubber, crude, specifically described in Item 576:		
First five (5) calendar day period or fraction thereof	per 2,000 pounds	3.26
Second five (5) calendar day period or fraction thereof	per 2,000 pounds	6.57
Each succeeding five (5) calendar day period or fraction thereof	per 2,000 pounds	9.71
C. Iron and Steel		
First ten (10) calendar days or fraction thereof	per 2,000 pounds	3.52
Each succeeding ten (10) calendar day period or fraction thereof	per 2,000 pounds	7.05
D. Vehicles specifically described in Item 594.		
1. Covered area	per day per vehicle	6.37
2. Open area	per day per vehicle	6.37
E. Vehicles specifically described in Item 560, 596 and Item 598.		
Open area	Per day, per unit	6.37
F. Minimum charges (Not subject to Items 592 and 825.)	per shipment per period	19.10

Note 1.

See Item 232 regarding acceptance of EXPORT CARGO.

Note 2.

1. On IMPORT CARGO, FREE TIME commences with the first 8:00 a.m. after receipt of cargo. See Item 500 for exceptions.
2. On EXPORT CARGO, wharf demurrage ceases when VESSEL commences loading.

DEMURRAGE accruing on IMPORT CARGO will be billed against the importer of record unless other arrangements have been made with VIT.

506 STORAGE – NON-CONTAINERIZED CARGO

If a USER requests that CARGO be stored, the following rates shall apply, in addition to charges at Extra Labor Rates, and for materials and equipment rental pursuant to Item 805 below. Cargo must be ordered into storage prior to the end of FREE TIME or DEMURRAGE rates in Item 505 will apply.

ITEM	Rates in this section are for each period of thirty (30) days or fraction thereof. Prices are per 2,000 pounds, if not otherwise specified	
A) GENERAL	Covered Storage	16.34
	Outside Storage	6.86
	Reissue of Warehouse Receipts	24.25
B) CRUDE RUBBER	Baled Rubber - storage	8.03
	Palletized Rubber - storage	6.64
C) IRON AND STEEL	Iron and Steel, NOS - outside storage	2.73
D) MACHINERY	Outside Storage (Construction/Farm Machinery)	4.54
E) LUMBER AND RELATED PRODUCTS	1)Lumber, Flitches or Timber - In bundles/Inside Storage	5.40
	2)Logs, Piling or Poles (other than Bamboo)-OPEN AREAS	2.01
	3)Plywood, Veneer, Corestock, Wood Mouldings Or Jambs-In bundles/Inside Storage	6.46
	4) Fiberboard, Hardboard or Particleboard – Inside Storage	5.03
F) PAPER AND RELATED PRODUCTS	1) Linerboard, Pulpboard, Paperboard. Printing or Wrapping Paper – Inside Storage	5.17
G) MINIMUM CHARGES	Minimum Storage Charge - monthly	22.85

507 BREAKBULK COMMODITIES NOT OTHERWISE SPECIFICALLY PROVIDED FOR ELSEWHERE IN SECTION V OF THIS SOR

The following charges cover only physical acceptance of a commodity by VIT either from the inland CARRIER, to facilitate physical exchange of a commodity at "POINT OF REST" with a water CARRIER, or physical acceptance by VIT of a commodity at "POINT OF REST" from a water CARRIER to facilitate physical exchange with an inland CARRIER.

Loose	Per 2,000 pounds	40.80
If the commodity is secured on pallets or skids, or otherwise self-contained	Per 2,000 pounds	32.15

520 BOATS

The following charges cover only physical acceptance of a boat by VIT either from the inland CARRIER, to facilitate physical exchange of the boat at "POINT OF REST" with a water CARRIER, or physical acceptance by VIT of a boat at "POINT OF REST" from a water CARRIER to facilitate physical exchange with an inland CARRIER.

A. Receiving or delivering boats on trailers, regardless of length at POINT OF REST and on which no physical HANDLING is performed by TERMINAL personnel. Not exceeding 40 feet in length	per boat	80.00
Exceeding 40 feet in length	Per boat	160.00
B. To or from open trucks. Rate based on length of boat. Rate includes boat, trailer and/or cradle when handled with same lift.		
Not Over 26'	per boat	275.01
Over 26' but not over 31'	per boat	320.84
Over 31' but not over 40'	per boat	366.67
Over 40'	per lineal foot	25.18
C. When lifting more than one boat to/from the same trailer	Minimum charge per boat	350.00
D. Arches, cradles, flying bridges, keels, mast or trailers not lifted with boat	per unit	180.00

Note 1 – Above rates do not apply with receiving from/delivering to water and require prior arrangements. For arrangements and rates contact VIT Pricing and Quotes at VITRates@vit.org

Note 2 - Rates include boat trailer and/cradle when handled with the same lift. Rate includes use of crane, if required. Rate will apply only if the lift is made with TERMINAL equipment.

Note 3 - Length of boat must be stated on dock receipt. If no length provided, boat will be measured and that length will be used to determine billing rate.

534 NON- FERROUS METALS, VIZ ALUMINUM, BRASS, BRONZE, COPPER, TIN, ZINC

The following charges cover only physical acceptance of the cargo by VIT either from the inland CARRIER, to facilitate physical exchange of the cargo at "POINT OF REST" with a water CARRIER, or physical acceptance by VIT of cargo at "POINT OF REST" from a water CARRIER to facilitate physical exchange with an inland CARRIER.

Billets, Coils, Plates, Sheets, Ingots, and Pigs Palletized, skidded or unitized In a condition suitable for machine HANDLING		Per 2,000 pounds	6.13
Wire or Cable on reels	Not Exceeding 45,000lbs	Per 2,000 pounds	9.20
	Exceeding 45,000lbs	Per 2,000 pounds	19.40
Pipe or Poles	Loose	Per 2,000 pounds	36.00
	Palletized or Skidded	Per 2,000 pounds	28.80

Note 1 - Cargo will qualify for rates published herein when bundled, skidded, palletized or packaged in such manner as to allow LOADING or UNLOADING by machinery normally available on TERMINAL, without further packaging or consolidation.
Note 2 - Blocking, bracing, chocking, removing and replacing lids from open-top railcars, if necessary, will be in addition to rates in this item and will be billed in accordance with Item 805 in this SOR.

550 IRON OR STEEL, VIZ:

The following charges cover only physical acceptance of the cargo by VIT either from the inland CARRIER, to facilitate physical exchange of the cargo at "POINT OF REST" with a water CARRIER, or physical acceptance by VIT of cargo at "POINT OF REST" from a water CARRIER to facilitate physical exchange with an inland CARRIER.

Bands, Banding, Barbed wire, Bolts, Chains, Hardware nails, Nuts, Screws, Spikes, Staples, Strapping, Valves and Washers		per 2,000 pounds	16.03
Anchors, Angles, Bars, Beams, Billets, Blooms, Cable channels, Castings, Flanges, Flats, Girders, Ingots, Joists, Molds, Pigs, Piling, Pipe, Plates, Rails, Rings, Rods, Rounds, Scrap (other than bulk), Sheet, Slabs, Strip, Tin plate, and Tubing		per 2,000 pounds	12.22
Cable, Rope, Wire, Wire Strand in rolls, coils, or reels	Not Exceeding 45,000lbs	per 2,000 pounds	9.20
	Exceeding 45,000lbs	per 2,000 pounds	19.40
Cast Iron Unmachined Industrial Fittings, i.e. Manhole covers, Grates, Rings, Pipe fitting, Meter boxes, and Integral parts - pre-palletized or skidded.		per 2,000 pounds	13.78

Note - Rates in this item apply when cargo is loaded to or unloaded from open or flatbed equipment by TERMINAL personnel.

Note 2- Rates for LOADING or UNLOADING to closed vans or trailers will be quoted upon request.
Notes 3- Blocking, bracing, chocking, removing and replacing lids from open-top railcars, if necessary, will be in addition to rates in this item and will be billed in accordance with Item 805 of this SOR.

558- LUMBER AND RELATED ARTICLES

The following charges cover only physical acceptance of the cargo by VIT either from the inland CARRIER, to facilitate physical exchange of the cargo at "POINT OF REST" with a water CARRIER, or physical acceptance by VIT of cargo at "POINT OF REST" from a water CARRIER to facilitate physical exchange with an inland CARRIER. These rates are applicable only to/from flatbed trucks; otherwise Item 805 applies.

Lumber, Flitches or Timber	In bundles	per 2,000 pounds	15.23
Fiberboard, Hardboard, or Particleboard	In Packages	per 2,000 pounds	16.15
Veneer	In Packages	per 2,000 pounds	28.41
	Palletized or skidded	per 2,000 pounds	15.91
Corestock, Wood Mouldings or Jambs	Palletized or skidded	per 2,000 pounds	15.91
Plywood	In Packages	per 2,000 pounds	18.58
	Palletized or skidded	per 2,000 pounds	13.57
Logs Pilings, Poles	In Strapped Bundles	per 2,000 pounds	14.00
	Loose, OPEN AREA	per 2,000 pounds	20.00

560 MACHINERY, MACHINES OR PARTS, FARM TRACTORS

The following charges cover only physical acceptance of the cargo by VIT either from the inland CARRIER, to facilitate physical exchange of the cargo at "POINT OF REST" with a water CARRIER, or physical acceptance by VIT of cargo at "POINT OF REST" from a water CARRIER to facilitate physical exchange with an inland CARRIER.

(1) Boxed or unboxed, lifted or towed, on or off railcar, truck, or barge. If TERMINAL owned crane is utilized to make lift, then crane rental (with operator) will be assessed in addition to rates below.
(2) Advance arrangements must be made with VIT Customer Service at VITRates@vit.org for charges relating to fragile, bulky, or over-dimensional items or lifts greater than 80,000 lbs. Refer to Item 214.

Box, package, or piece weighing:

0 to 80,000 lbs.	per 2,000 pounds	16.20
80,001 to 100,000 lbs.	per 2,000 pounds	20.70
100,001 to 120,000 lbs.	per 2,000 pounds	21.73
120,001 to 140,000 lbs.	per 2,000 pounds	22.68
140,001 to 200,000 lbs.	per 2,000 pounds	23.68
200,001 to 250,000 lbs.	per 2,000 pounds	38.23
250,001 to 300,000 lbs.	per 2,000 pounds	44.18

300,001 to 350,000 lbs.	per 2,000 pounds	50.14
350,001 to 400,000 lbs.	per 2,000 pounds	56.10
Greater than 400,001 lbs.		Contact VITRates@vit.org for charges
(2) Machinery, self-propelled received at/delivered to POINT OF REST.	per unit	133.56

Note 1: The HANDLING of lifts in excess of 80,000 lbs. shall be limited to the capacity of lifting equipment at a specific TERMINAL.
Note 2- Rates above will only apply when terminal owned equipment can be used to make the lift.
Note 3- If customer makes separate arrangements for outside crane vendor to perform lift, the applied rate charged will be 50% of the charges shown above.

576 RUBBER, CRUDE, VIZ: ARTIFICIAL, GUAYULE, NATURAL, NEOPRENE OR SYNTHETIC

The following charges cover only physical acceptance of the cargo by VIT either from the inland CARRIER, to facilitate physical exchange of the cargo at "POINT OF REST" with a water CARRIER, or physical acceptance by VIT of cargo at "POINT OF REST" from a water CARRIER to facilitate physical exchange with an inland CARRIER.

Non-Palletized	Truck/Barge	per 2,000 pounds	22.47
Pre-palletized or skidded	Truck/Barge	per pallet	21.28

577- PAPER AND RELATED ARTICLES

The following charges cover only physical acceptance of the cargo by VIT either from the inland CARRIER, to facilitate physical exchange of the cargo at "POINT OF REST" with a water CARRIER, or physical acceptance by VIT of cargo at "POINT OF REST" from a water CARRIER to facilitate physical exchange with an inland CARRIER.

Newsprint, Wrapping, or Printing Paper	Truck	In Rolls	Contact VITRates@vit.org for charges
Woodpulp	Truck	In Packages	Contact VITRates@vit.org for charges

Note 1 – Rates are applicable to lifting to/from flatbed trucks

586 U.S. GOVERNMENT P.L. 480 CARGO, BAGGED Rates may be quoted upon request by VIT Customer Service (VITRates@vit.org), if VIT has the ability to handle this cargo. In the absence of agreement, Item 805 shall apply.

592 MINIMUM CHARGE Except as otherwise noted, a minimum charge applies to all single shipments (Per Booking Number or Bill of Lading), regardless of LOADING order. Payment in advance will be required for those shippers which have not established prior credit.

Per Shipment	61.45

594 VEHICLES, SELF-PROPELLED, UNBOXED, VIZ: AUTOMOBILES, BUSES, TRUCKS, MOTOR HOMES SETUP OR NOT OTHERWISE SPECIFIED. NOT REQUIRING LIFTING OR TOWING.

The following charges cover only physical acceptance of the cargo by VIT either from the inland CARRIER, to facilitate physical exchange of the cargo at "POINT OF REST" with a water CARRIER, or physical acceptance by VIT of cargo at "POINT OF REST" from a water CARRIER to facilitate physical exchange with an inland CARRIER.

Receiving or delivering and processing- Not exceeding 10,000 pounds each	per unit	61.45
Receiving or delivering and processing- Exceeding 10,000 pounds each	per unit	109.30

598 MOBILE HOMES/TRAILERS

Mobile Homes/Trailers setup and on wheels received or delivered at POINT OF REST and on which no physical HANDLING is performed by TERMINAL personnel.		Per unit	109.80
Set up and not on wheels or requires lifting or towing to be performed by TERMINAL personnel.	Towed	Per 2,000 pounds	175.00
	Lifted	Per 2,000 pounds	82.11

SECTION VI
VIRGINIA PORT AUTHORITY SECURITY SURCHARGE

650 VIRGINIA PORT AUTHORITY SECURITY SURCHARGE

RESOLUTION AUTHORIZING THE IMPLEMENTATION OF SECURITY SURCHARGE PURSUANT TO VIRGINIA CODE §62.1-132.16

IT IS RESOLVED by the Board of Commissioners (the "Board") of the Virginia Port Authority (the "Authority"), as follows:

Section 1. Findings and Determinations

A. Pursuant to Section 62.1-132.16 of the Code of Virginia of 1950, as amended (the "Virginia Code"), the Authority is authorized to fix, alter, charge, and collect tolls, fees, rentals, and any other charges for the use of, or for services rendered by, any Authority facility. The Authority may impose, levy, and collect such other fees and charges as may assist in defraying the expenses of administration, maintenance, development, or improvement of the ports of the Commonwealth, their cargo handling facilities, and harbors.

B. As a means to finance the additional security measures mandated by the Maritime Transportation Security Act (MTSA) 2002, as set forth in 33 CFR Part 105 – Facility Security, the Authority has proposed that it would implement a security surcharge (the "Surcharge") to be effective August 1, 2005, in the amounts and for the categories as set forth in this Resolution.

C. The Authority proposes to amend the Surcharge to include a security surcharge for bulk cargo to be effective September 1, 2012 in the amount as set forth in this Resolution.

D. The security surcharge will be administered by VIT, clearly billed as a security fee, and all such fees collected are to be passed directly to the Virginia Port Authority.

E. The Board has determined that, by enhancing security at the port facilities, implementation of the Surcharge will foster and stimulate the commerce of the ports of the Commonwealth; promote the shipment of goods and cargoes through the ports; and develop, improve or increase the commerce, both foreign and domestic, of the ports of the Commonwealth, all pursuant to Section 62.1-132.3 of the Virginia Code.

Section 2. Authorization of Surcharge. (a) Implementation of the amended Surcharge is hereby authorized. The Surcharge shall initially be established in the amounts and for the categories as set forth below. The Executive Director is authorized in his discretion to adjust the amounts of the Surcharge and the categories to which it applies, and to further adjust the Surcharge from facility to facility. In making such adjustments to the Surcharge, the Executive Director will consider at least the following factors: changes to security requirements; current market conditions; effect on demand for use of the Authority's facilities; and the amount of such fees charged by competitive ports.

Surcharge Rates
Fully Cellular VESSELS: 6.50 per CONTAINER for the account of the OCEAN CARRIER

Breakbulk from Fully Cellular VESSELS: 0.25 per short TON for the account of the OCEAN CARRIER

Non-CONTAINER VESSELS and All others including barges: 3.09 per linear foot

Section 3. Further Action. The officers and staff of the Authority are hereby authorized to take such actions, and deliver such additional documents and certificates, as they may, in their discretion, deem necessary or useful in connection with the implementation of the Surcharge.

Section 4. Effective Date. This Resolution shall take effect on September 1, 2012 or immediately upon its adoption, whichever is later.

CONTAINER surcharge rates will be assessed as follows:

(1) CONTAINERS not declared water to water will be billed one surcharge for every loaded/empty CONTAINER on/off a VESSEL.
(2) CONTAINERS declared water to water will be billed one surcharge against the inbound CARRIER.
(3) Loaded DUAL CONTAINERS (in/out gate/rail) will be billed one surcharge upon departure of CONTAINER.

SECTION VII
STEVEDORING

700 STEVEDORING GENERAL

a. VIT provides stevedoring directly at PMT and NNMT. VIT may provide stevedoring indirectly through subcontractors at VIG and NIT. Currently, only Ceres Marine Terminals, Inc. and CP&O, LLC are permitted to provide stevedoring services at VIG and NIT. Stevedoring by VIT is subject to all of the terms and conditions of this SOR.

b. Stevedoring by parties other than VIT at all TERMINALS is by permission from VIT. Accordingly, USERS should not assume that parties other than VIT may stevedore at a TERMINAL.

c. VIT will provide quotes for stevedoring upon request. Rates will depend on, among other factors, the cost of labor, the type and volume of cargo, the type of VESSEL, the TERMINAL, length of the commitment, anticipated productivity, and the inclusion/exclusion of detentions and other cost items. For a rate quote, please contact Tom Capozzi, Chief Sales Officer, at 757-440-7200 or tcapozzi@vit.org

705 STEVEDORING RATES If no written agreement as to rates is in place, then VIT's charge for stevedoring shall be as follows.

Type of Lift	Rate Per Move
Normal Lift for Standard ISO CONTAINERS	66.40
SHIFTING CONTAINERS within same bay	66.40
RESTOW CONTAINERS VESSEL-dock-VESSEL	66.40
CONTAINERS other than 20' and 40' using speed bar or O/HT gear/wires	EXTRA LABOR RATES for stevedoring stated below
Breakbulk	EXTRA LABOR RATES stated below
Passenger cars, per vehicle (contact VIT for a quote on other vehicles)	25.54

1. EXTRA LABOR RATES for labor not included in the stated rate for the stevedoring services are as follows:

Standby/detention-all types – and excluded guaranty time, per hour (billed in 6 minute increments)	1,736.55
Extra labor gang – per hour	Straight time 1,123.65 Overtime: 1,735.53 Double Overtime 2,298.38
Overtime Differential	670.10
Double-time Differential	1,276.88

2. Items included in the stated rates for stevedoring, and certain items that are excluded from the stated rates for stevedoring and for which CARRIER will be charged separately, are listed below. For avoidance of doubt, if an item is "Excluded", it is not included in the lift rates provided above and will be billed at the stated EXTRA LABOR RATES.

Personnel	**Included**	**Excluded**
Straight-time longshore labor, fringes, and insurance	X	
Straight-time Clerks/Checkers	X	
Overtime costs		X
Supervision	X	
Rain pay	X	
Pre-stow, bay list, stowage plan, and other documentation	X	
CONTAINER Royalties and non-man-hour assessments		X
Equipment		
All necessary equipment	X	
Standbys and Detentions	**Included**	**Excluded**
Standby for VESSEL – this is excluded		
Standby for Weather		X
Standby for Terminal Operator's Equipment Down	X	
Standby for VESSEL Gear		X
Standby for Health & Safety/Labor Disputes	X	
Standby for Safety Talk	X	
Stand-by Awaiting Cargo Availability		X
Standby Gantry Crane Repair		X
Pre & Post Operations Guarantee Charges		X
Cone (i.e.: Gear) Box Moves		X
Standby for Minimum Manning/Gang to Fill	X	
Standby Change in Stow		X
ILA Guarantee Time - up to 1 hour per gang included, otherwise excluded		
Standby – Delays due to frozen cones or locking cones or lashing equipment improperly installed by load port		X
Boom Ups	X	
Activities	**Included**	**Excluded**
Discharge/Load and Lash/Unlash standard 20' and 40' I.S.O. CONTAINERS to/from place of rest on dock or VESSEL, straight-time	X	
Normal CONTAINER Lashing	X	
Overheight/Overwidth CONTAINERS		X
Reefer CONTAINERS – plug/unplug		X
Break Bulk Cargo		X
Damaged CONTAINERS or Cargo		X
Loose Cargo from Damaged CONTAINERS Onboard		X
Emergency Gear CONTAINER moves		X
Rehandled CONTAINERS		X
Opening and Closing Hatches.	X	
VACIS/Government inspections during VESSEL ops		X
Extra Mounting of CONTAINERS at CARRIER's Request		X

SECTION VIII
MISCELLANEOUS SERVICES AND CHARGES

800 MISCELLANEOUS CHARGES The following services will be performed by VIT at the charges shown below: (Not subject to Item 825.)

Rebilling Invoices	each	61.45

805 SPECIAL SERVICES; EXTRA LABOR RATES. Upon request and with advance arrangements, VIT will provide SPECIAL SERVICES not listed in this SOR. Charges for these services will be billed at the following EXTRA LABOR RATES, cost of materials plus thirty percent (30%), and equipment rental. Requested services are performed by ILA Shortshoremen or ILA Longshoremen as applicable. VIT will inform customers of labor classifications to be used. All ILA contract guarantees and Guaranteed Annual Income special assessment will be charged when applicable.

LONGSHOREMEN	**Extra Labor & Detention at Regular Rate**			**Overtime Differential**		
	ST	**OT**	**PMH**	**OT**	**PMH**	
Longshoreman	85.75	117.40	148.95	31.55	63.20	
Operators (NOTE 1)	90.00	123.65	157.35	33.75	67.40	
M & R	91.05	125.30	159.55	34.15	68.45	
	Extra Labor at Double Regular Rate			**Overtime Differential Double Regular Rate**		
	ST	**OT**	**PMH**	**ST**	**OT**	**PMH**
Longshoreman	149.00	212.10	275.30	63.15	126.30	189.55
Operators (NOTE 1)	157.35	224.85	292.10	67.35	134.80	202.20
M & R	159.55	227.90	296.35	68.45	136.95	205.30

NOTE 1 - For the operation of Portainer, Straddle Carrier, Gantry, Toploader, Reachstacker

SHORTSHOREMEN	**Extra Labor & Detention at Regular Rate**			**Overtime Differential**		
	ST	**OT**	**PMH**	**OT**	**PMH**	
Freighthandler	64.35	91.15	117.85	26.75	53.50	
	Extra Labor at Double Regular Rate			**Overtime Differential Double Regular Rate**		
	ST	**OT**	**PMH**	**ST**	**OT**	**PMH**
Freighthandler	117.85	171.40	225.00	52.30	106.95	160.40

TERMINAL PERSONNEL	Extra Labor & Detention at Regular Rate		Overtime Differential
	ST	OT	OT
Supervisor	82.90	124.30	41.40
Administrator	64.35	96.60	32.25
Mechanic	74.50	111.75	37.25

806 REMOVING AND/OR REPLACING TARPS ON OPEN-TOP CONTAINERS

Per CONTAINER lace or unlace	Each operation	125.00
Per CONTAINER rear only	Each operation	81.23

807 MOUNTING AND DISMOUNTING GENSETS

Per genset	Each operation	105.46

810 SEGREGATION AND SORTING If, after cargo has been sorted, graded and stowed and/or assembled on the TERMINAL awaiting delivery as per bill of lading, the consignee, thereafter, desires additional sorting, grading and/or specific selection of said cargo in connection with the subsequent LOADING thereof, a written request detailing the nature of the SPECIAL SERVICES desired must be submitted, in advance of LOADING, to VIT.

815 USAGE CHARGES When a TERMINAL is used by others for the purposes for which a charge is not otherwise specified, VIT will assess a USAGE CHARGE. If USER and VIT have not agreed on a charge in advance of services being performed, then VIT may impose a non-discriminatory USAGE CHARGE determined by VIT in its reasonable discretion.

825 MINIMUM BILLING All charges published in this SOR, and not otherwise excepted, will be subject to a minimum charge of 61.45 per billing.

840 VIG - GANGWAY GUARD Gangway Guard 48.02 per hour, 4 hour minimum.

845 VIG – ESCORT FEE

A. 48.02 per hour, per person in the event that Virginia International Gateway Virginia is required to escort individuals who do not hold a valid TWIC card.

B. For contractors who do not hold a valid TWIC and are escorted to/from a VESSEL, a flat rate of 48.02 per person round trip will apply.

850 BARGE CONTAINER MOVEMENT

A. 259.00 per loaded CONTAINER, one way, northbound or southbound between RMT and any TERMINAL.

B. 31.00 per empty CONTAINER, one way, northbound or southbound between RMT and any TERMINAL.

C. In arranging for movement of CONTAINERS by barge to and from RMT and other TERMINALS, VIT is acting solely in an agency capacity and shall have no liability whatsoever for the transport of CONTAINERS by barge, or the acts or omissions of the VESSEL operator/CARRIER, James River Barge Line, Ltd. ("JRBL"). Such carriage shall be governed by JRBL's Terms and Conditions of Transport posted on the internet at www.JRBLtermsoftransport.com. Portable document format (.pdf) and paper copies of these Terms and Conditions of Transport are available upon request. VIT has no liability for such carriage or the acts or omissions of such CARRIER. In no event shall VIT's liability with respect to such carriage of CONTAINERS by barge exceed 500 per package or non-packaged object.

D. Movement of CONTAINERS by barge between TERMINALS other than in connection with carriage between TERMINALS and RMT is subject to the limitation liability stated in Item 206 of this SOR.

851 SECURE FLATS FOR RAIL MOVEMENT On SPECIAL SERVICES basis; see Item 805.

852 EMPTY YARD SERVICES

Steam cleaning	101.47 per CONTAINER
Empty CONTAINER grounding for government regulatory Inspections and return to stack	84.53 per CONTAINER
Smoke testing	67.14 per CONTAINER
Tie back installation	19.89 per CONTAINER

SECTION IX
VIRGINIA INLAND PORT SERVICES AND CHARGES

900 APPLICATION OF SECTION IX. The rates and terms of service in this Section IX apply only to services at VIP. For avoidance of doubt, all other Items in this SOR apply (except Section X) except to the extent inconsistent with this Section IX.

902 FREE TIME CONTAINERS TO/FROM VIP VIA RAIL

A. NORTHBOUND. CONTAINERS, loaded or empty, with or without wheels held in an area designated by VIT will be granted one period of ten (10) consecutive days FREE TIME beginning with the first 08:00 a.m. after DERAMPING at a TERMINAL awaiting departure to any other TERMINAL.

B. SOUTHBOUND. Loaded CONTAINERS, with or without wheels held in an area designated by VIT will be granted one period of ten (10) consecutive days FREE TIME beginning with the first 08:00 a.m. after placement at VIP for departure to any other TERMINAL.

C. Empty CONTAINERS, with or without wheels held in an area designated by VIT will be granted one period of fifteen (15) consecutive days FREE TIME beginning with the first 08:00 a.m. after placement at VIP for departure at any VIT Terminal.

D. FREE TIME applies to the OCEAN CARRIER only and all storage/DEMURRAGE charges are for account of the OCEAN CARRIER.

904 HOLIDAYS

The Terminal will be closed for receiving and delivering CONTAINERS and U.S. Customs services unless prior arrangement for overtime is made. In the event a holiday occurs on either Saturday or Sunday, either the preceding Friday or the following Monday will be observed as the holiday. HOLIDAYS are as follows:

New Year's Day	January 1
Lee-Jackson-King Day	Third Monday in January
George Washington's Birthday	Third Monday in February
Memorial Day	Last Monday in May
Independence Day	July 4
Labor Day	First Monday in September
Columbus Day	Second Monday in October
Veterans Day	November 11
Thanksgiving Day	Fourth Thursday in November
Christmas Day	December 25

906 RAIL CONTAINER MOVEMENT

A. NORTHBOUND. The term NORTHBOUND CONTAINER refers to a CONTAINER used to transport a shipment from a foreign or domestic offshore port to VIP. NORTHBOUND CONTAINERS will be handled in the following manner:

   a. If applicable, CONTAINER will be drayed to NIT or VIG. VIT will arrange and pay for the drayage of CONTAINERS from NNMT or PMT.

   b. CONTAINERS will be ramped from the chassis or from the stack at NIT or VIG and transported via rail to VIP. Charges incurred at NIT or VIG will be billed in accordance with this SOR or any applicable separate agreement.

   c. CONTAINER will be deramped at VIP to a chassis provided by the OCEAN CARRIER and placed in a designated PARKING AREA or to the stack. If a leased chassis is utilized, then a chassis leasing charge (Item 942) will be assessed.

   d. VIT will perform the necessary clerical work to effect the physical exchange of the CONTAINER between VIT and the motor CARRIER. VIT will perform a visual M&R inspection at the gate.

B. SOUTHBOUND. The term SOUTHBOUND CONTAINER refers to a CONTAINER used to transport a shipment from a domestic point. SOUTHBOUND CONTAINERS will be handled in the following manner:

   a. VIT will perform the necessary clerical work to effect the physical exchange of the CONTAINER between the motor CARRIER and VIT. VIT will weigh the CONTAINER and perform a visual M&R inspection at the gate.

   b. CONTAINER will be parked in a designated PARKING AREA by the motor CARRIER or CONTAINER will be stacked.

   c. CONTAINER will be ramped from the chassis or from the stack at VIP and transported via rail to NIT or VIG.

d. CONTAINER will be deramped at NIT or VIG to (1) an OCEAN CARRIER's chassis, (2) a lease chassis, or (3) to the stack. Charges incurred at NIT or VIG will be billed in accordance with this SOR.

e. If applicable, the CONTAINER will be drayed from NIT or VIG. VIT will arrange and pay for the drayage of CONTAINERS to NNMT or PMT. If a leased chassis is utilized to dray CONTAINER, the CONTAINER may remain on the leased chassis at the OCEAN CARRIER's expense if proper arrangements are made with the leasing company and VIT. The chassis leasing charge will be for the account of the OCEAN CARRIER.

Note: CONTAINERS received from or delivered to a non-VIT facility will be assessed a RAMPING or DERAMPING charge at NIT or VIG.

C. WEIGHT. In connection with VIT's providing rail service to NORTHBOUND CONTAINERS on railcars, the CARRIER/steamship line must provide VIT with the correct weight of all such CONTAINERS by method acceptable to VIT. The CARRIER/steamship line shall use only CONTAINERS in suitable condition and shall assure that the cargo does not exceed the CONTAINER manufacturer's posted cargo weight limitation. The CARRIER/steamship line shall defend, indemnify, and hold VIT, its affiliates, officers, employees, and agents from and against all LOSSES, claims, liability, demands, fines, penalties, suits, actions, damages, costs and reasonable attorney's fees, including without limitation those arising from personal injury or death, or damage or destruction of property, incident to or resulting from a breach of the foregoing requirements. Nothing in the foregoing shall be construed to exculpate VIT from its own negligence or to impose an obligation to indemnify or hold harmless VIT for its own negligence.

908 RECEIVING CONTAINERS WITH DAMAGE OR VARIANCES [SEE SIMILAR SOR 278] CONTAINERS having damage or variances which may impede normal movement with the Terminal's mechanical equipment will not be received unless arrangements have been made with the Terminal.

Damaged CONTAINERS not repaired or removed from VIP within thirty (30) calendar days will be charged the damaged CONTAINER storage fee.

910 RECEIVING OR DELIVERING CONTAINERS OR CHASSIS BY TRUCK DURING OVERTIME The term RECEIVING OR DELIVERING CONTAINERS OR CHASSIS BY TRUCK DURING OVERTIME refers to the charge (Item 930) for keeping the gate open for the motor CARRIER either prior to or after the regular straight time hours. This charge is in addition to other charges listed under this tariff.

912 SLING The term SLING refers to the requirement to utilize slings or a method other than the normal procedure for REHANDLING, RAMPING or DERAMPING a CONTAINER.

914 TRAIN SCHEDULE

Day of the Week	Ramp NIT	Deramp NIT	Ramp VIP	Deramp VIP
Monday	X	X	X	X
Tuesday	X	X	X	X
Wednesday	X	X	X	X
Thursday	X	X	X	X
Friday	X	X	X	X
Saturday	X	X		
Sunday				

X - Function occurs on day indicated
Train LOADING cut-off
VIP 3:00 p. m. daily *
NIT 10:30 a. m. daily *
* - Exceptions can be coordinated with Terminal Manager
- Train arrives next day, p.m. available.

916 DAMAGED, ABANDONED OR UNIDENTIFIED EQUIPMENT DISPOSITION VIT will not receive or permit storage of damaged, abandoned, misdelivered, or unidentified equipment on a TERMINAL. The OCEAN CARRIER shall be notified as follows:

A. Damaged Empty CONTAINERS

a. By notification via interchange (TIR), OCEAN CARRIERS have fifteen (15) calendar days FREE TIME in order to repair or remove a damaged empty CONTAINER from a TERMINAL.

b. After 45 days all damaged CONTAINERS will be moved from the TERMINAL by VIT to an off TERMINAL vendor(s) yard and a charge of 22.50 will be invoiced to the OCEAN CARRIER. Off terminal yard vendor(s) will invoice shipline directly for off terminal yard services.

c. Damaged CONTAINERS on wheels will be stacked in a designated area after ten (10) calendar days. All REHANDLINGS required to place CONTAINER to/from the stack will be invoiced in accordance with SOR Item 465-6(2)

B. All Other Equipment

a. By written notification, from VIT, shiplines, tenants and vendors have forty-five (45) calendar days to repair or remove damaged equipment not covered above in paragraph (a) from the TERMINAL.

b. After such forty-five (45) days of storage, damaged equipment will be moved from the TERMINAL by VIT at the rate of 30.80 to an off TERMINAL vendor(s) yard and invoiced to the owner of the equipment by said Vendor for their services.

RATES - VIP

918 RAIL CONTAINER MOVEMENT - Per CONTAINER

Northbound or Southbound.
*Fuel Surcharge not included in rate.

	COFC
(LOAD)	353.00
(EMPTY)	266.00*

920 REHANDLING CONTAINERS

WHEELED CONTAINER	22.15
Stacked CONTAINER	36.10
Chassis Change	45.75
Sling CONTAINER	61.05

922 CONTAINER STORAGE - Per day

Under 27 Feet	0.68
Over 27 Feet	1.37

924 RECEIVING OR DELIVERING CHASSIS

Per Chassis	6.25

926 RECEIVING OR DELIVERING CONTAINERS 49.95

928 RECEIVING OR DELIVERING CONTAINERS OR CHASSIS BY TRUCK DURING OVERTIME

Per CONTAINER	91.55

930 DEVANNING FOR U.S. CUSTOMS INSPECTION

Tailgate Inspection	
Straight Time	76.25
Overtime	131.65
Additional Package	10.40
Maximum per CONTAINER	458.10
Intensive Examination:	
Straight Time	450.65
Overtime	637.80

932 CHASSIS LOADING/UNLOADING FROM A FLATBED TRAILER 54.07

934 CHASSIS RAIL MOVEMENT

Bare chassis 20'/40'	232.45

936 CHASSIS

Chassis will be provided by HRCP II subject to its prevailing rates, terms and conditions of use, and interchange agreement. The OCEAN CARRIER is responsible for HRCP II's charges for chassis until the CONTAINER departs VIP.

938 CHASSIS STACKING/BANDING

Two chassis high - per stack	152.50
Three chassis high - per stack	277.25
Four chassis high - per stack	391.00
Five chassis high - per stack	513.05

940 CHASSIS BREAKING DOWN BUNDLES

Three chassis high - per stack	121.95
Four chassis high - per stack	149.70
Five chassis high - per stack	185.73

942 DAMAGED CONTAINER OR CHASSIS STORAGE

Per unit - per day	30.80

944 ATMOSPHERIC FUMIGATION OF CARGO OR CHOCKING MATERIAL IN CONTAINER

Per CONTAINER	151.20

946 REFRIGERATED CONTAINER SERVICES

Diesel Fueling (per generator unit)	Refer to Item 985
Nitrogen Fueling (per unit)	Refer to Item 985
Temperature monitoring, upon request	Refer to Item 985
Upon request, VIT will furnish generator set, fuel and other attendant services (per rail trip)	264.95 *
Electrical service or fraction thereof per CONTAINER	36.75 *
Electrically connect and test operation of ship-line belly-mount genset	13.80 *

* Charges are for the account of the steamship line.

948 WEIGHING WHEELED CONTAINER

Per CONTAINER	9.50

950 PLACARDING

Per placard [DIFFERS FROM SOR 465]	9.50

952 SEALING

Per seal [DIFFERS FROM SOR 465]	6.25

954 SPECIAL SERVICES - VIP

Upon request and with advance arrangements VIT will provide SPECIAL SERVICES not listed in this SOR. Charges for these services will be based on the cost of materials plus thirty percent (30%), equipment rental, and labor billed at the following EXTRA LABOR RATES:

Equipment Rental and Labor Rates	Per Hour Straight Time	Per Hour Overtime
Labor	68.65	104.65
Clerical	48.90	74.60
Forklift	18.10	
Straddle carrier	205.25	
Hustler	53.85	

956 REHANDLE CONTAINERS TO/FROM OVERNIGHT DROP

LOT - Per move	37.65

SECTION X
RICHMOND MARINE TERMINAL SERVICES AND CHARGES
EFFECTIVE NOVEMBER 1, 2016

1000 APPLICATION OF SECTION X. The rates and terms of service in this Section X apply only to services at RMT. For avoidance of doubt, all other Items in this SOR (except Section IX) apply except to the extent inconsistent with this Section X.

1005 HOLIDAYS: The terminal will be closed for receiving and delivering CONTAINERS, and other services unless prior arrangements for overtime are made. In the event a holiday falls on either a Saturday or a Sunday, either the preceding Friday or the following Monday will be observed as the Holiday. HOLIDAYS are as follows:

New Year's Day
Martin Luther King Jr. Day
Good Friday
Memorial Day
Independence Day
Labor Day
Columbus Day
Thanksgiving Day
Friday after Thanksgiving
Christmas Day

1010 WORKING HOURS

A. The recognized working hours of RMT are from 8:00 am until noon, and from 1:00 until 4:10 p.m., Monday through Friday. Except HOLIDAYS. Trucks (including CONTAINER CARRIERs), who are in line or inside the gate by 1530hrs will be handled at straight time rates. All others must make overtime arrangements with VIT by 1430hrs.

B. When VIT performs work at other than regular working hours for the convenience of cargo interests, the applicable overtime charges shall be applied. Late Gate charges will apply for transactions after 1630 hrs.

1030 STEVEDORING

Stevedoring is charged pursuant to Item 805.

1035 REEFER SERVICES

RMT will perform the following reefer services: Reefer Plug/Unplug, Electricity use, Monitoring and Genset Fueling, and Genset mount/dismount - receive and dispatch.

Pre-trips, repairs to reefer equipment, or shipline gensets will be contracted and performed through third party vendor and arranged by the shipline.

1040 FREE TIME

A. A total of twenty-one (21) days FREE TIME will be allowed for containerized cargo.

B. A total of ten (10) days FREE TIME will be allowed for the delivery of breakbulk cargo, inbound by water, from the wharves or transit shed, after which storage charges will be assessed as provided in this schedule. FREE TIME will begin the first 0800 am after VESSEL finished discharging the cargo. Saturdays, Sunday and HOLIDAYS will not be counted when computing FREE TIME.

C. For the purpose of assembling outbound waterborne breakbulk cargo, a total of seventeen (17) days F R E E T I M E will be allowed, including Saturdays, Sundays and HOLIDAYS. This applies only to cargo unloaded from railcars and trucks. Time starts on arrival of the freight at RMT and includes time held in cars until DEMURRAGE rules.

D. On cargo suitable for ground storage, and for BULK CARGO, for which arrangements have been made in advance, a total of thirty (30) days FREE TIME will be allowed.

E. Any cargo remaining beyond the above specified FREE TIME, without agreement to extend FREE TIME or commencement of delivery to a VESSEL or inland CARRIER, shall be subject to storage charges, as per the storage rate schedule herein.

TERMINAL SERVICES AND COMMODITY RATES

1045 CONTAINER CHARGES

ITEM	RATE	PER
TIR Loaded Container	46.80	Unit
TIR Empty Container	46.80	Unit
Tie Bare Chassis	17.95	Unit
Intra-Terminal Drayage	27.50	Dray
Rehandling From Drop Lot (Dray Only)	35.30	Dray
Chassis Change	91.60	Lift
Mount/Ground	91.45	Lift
Receiving or Delivering Containers	31.00	Unit
Container Free Time	21 DAYS	
20' Container Terminal Demurrage Per Day		Referenced in Item 461
40' Container Terminal Demurrage Per Day		Referenced in Item 461
Bare Chassis Storage Per Day	0.50	

1050 MISCELLANEOUS CHARGES

ITEM	RATE	PER
Scaling	5.00	
Connect and Disconnect Refrigerated CONTAINERS	63.65	CONTAINER
Electrical Service to Refrigerated CONTAINERS, includes monitoring	51.90	24 hours or fraction thereof; per CONTAINER
Genset Mount or Dismount	45.00	OPERATION
Genset Fueling	26.00	OPERATION, plus fuel
Genset Rental *Subject to availability	70.00	24 hours or fraction thereof

1055 DOCKAGE

ITEM	RATE	PER
Barge Dockage	0.75	Linear Foot Per Day
Vessel Dockage 1st 24-Hours	1.50	Linear Foot Of Load
Vessel Dockage Additional 12-Hour Periods	0.75	Linear Foot Of Load
Minimum Charge	200.00	Day

1060 WHARFAGE

ITEM	RATE	PER
Loaded Containers	1.59	ST
General Cargo N.O.S.	1.89	ST
Steel	1.00	ST
All Other Cargo Call For Quote		

1065 CUSTOMS EXAM

ITEM	RATE	PER
TAILGATE	151.70	CONTAINER
20' Container Intensive, Palletized Cargo	732.45	CONTAINER
20' Container Intensive, Loose Cargo	943.45	CONTAINER
40' Container Intensive, Palletized Cargo	886.10	CONTAINER
40' Container Intensive, Loose Cargo	1,107.65	CONTAINER

The charges for Customs exams will be assessed to the importer of record or authorized representative, and will include the cost of intra terminal drayage. Rate provided herein are applicable during straight time hours only. Rates in this section are for a four-hour block of time. Additional four- h o u r periods are billable at 750.00 per period. Rate for tailgate inspection includes removal of one (1) package.

1070 COMMODITIES Rates quoted upon request by VIT Pricing and Quotes; otherwise Extra Labor Rates plus materials and equipment rental.

1075 DELIVERING/RECEIVING DURING OVERTIME HOURS

	Per Hour, 2hr minimum	Per Additional Hour over 2 Hours
1 checker, 1 top-loader operator, and use of 1 top-loader	300.00	150.00
1 checker, 2 top-loader operators, and use of 2 top-loaders	500.00	250.00

SECTION XI
DEFINITIONS

BASIC CONTAINER UNIT RATE means a rate which includes charges for SOR Items which typically apply to the handling of all CONTAINERS at the TERMINALS. The BASIC CONTAINER UNIT RATE shall not exceed the aggregate of the SOR charges included in the unit rate.

BULK CARGO means cargo that is loaded and carried in bulk without mark or count, in a loose unpackaged form, having homogenous characteristics. BULK CARGO loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and is, therefore, subject to this SOR.

CARRIER means an OCEAN CARRIER, barge or VESSEL operator, motor carrier, or rail carrier/operator which brings cargo to a TERMINAL to be loaded or discharged.

CHECKING means the service of counting and checking cargo against appropriate documents for the account of the cargo or the VESSEL, or other person requesting same.

COASTWISE means cargo moving by any single mode or combinations of modes of transportation between the Port of Hampton Roads and any other port in the United States on the Atlantic Coast or on the Gulf of Mexico.

CONTAINER means a standard ISO 20-foot, 40-foot, or 45-foot seagoing, intermodal CONTAINER having approximately the following basic dimensions with any height:

	20-foot	40-foot	45-foot
Overall Length	19' 10-1/2"	40' 0"	45' 0"
Overall Width	8' 0"	8' 0"	8' 0"

A CONTAINER when used for the transport of dry, liquid or refrigerated cargo, may be of metal, fiberglass, plastic or wooden construction; however, the CONTAINER must confine and protect its contents from loss or damage from the elements and must be susceptible to being handled in transit as a unit.

Oversized or over-height CONTAINERS are any CONTAINER where the cargo extends beyond the length, width or height of the CONTAINER. A CONTAINER with dimensions in excess of the following will not be accepted due to railroad restrictions:

a) Overall height in excess of 13 feet 6 inches
b) Overall length in excess of 48 feet
c) Overall width in excess of 102 inches
d) Measurement from center line of CONTAINER to outermost lateral point, in excess of 51 inches

For the purpose of this SOR, trailers on wheels which moves onto or off of a vessel by means of a ramp and flats measuring 10', 15' and 20' x 8' not requiring inside storage shall be deemed to be a CONTAINER. "Vans" used in connection with the shipments of household goods are not included within this definition.

CONTAINER YARD means the area(s) on a TERMINAL designated by VIT where loaded or empty CONTAINERS can be put at a POINT OF REST.

CYBER ATTACK means an attempt to damage, disrupt, or gain unauthorized access to a computer, computer system, or electronic communications network.

DANGEROUS CARGO means: (i) cargo regulated under applicable law as being dangerous under 33 CFR Part 126, including without limitation "dangerous cargo" and "cargo of a particular hazard" as defined therein, (ii) "Certain Dangerous Cargo (CDC)" as defined in 33 CFR Part 160, and (iii) and all other cargo of unknown nature or value or which may be dangerous to human health or the environment. This term includes EXPLOSIVES.

DANGEROUS CARGO LAWS means international and U.S. laws, rules, treaties, and regulations governing the handling, transportation, and storage of DANGEROUS CARGO, including but not limited to 33 CFR Parts 100-185 (U.S. Coast Guard), 49 CFR 100-185 (U.S. Department of Transportation), as they may be amended, supplemented, and/or renumbers, and all regulations published in accordance therewith.

DEMURRAGE means a charge assessed against cargo remaining in or on TERMINAL facilities after the expiration of FREE TIME, if any, unless arrangements have been made for storage.

DOCKAGE means a charge assessed against a vessel for berthing at a wharf, pier, bulkhead structure or bank.

DUAL RECEIVING means a CONTAINER is received by the TERMINAL from an inland carrier (truck or rail) and the CONTAINER departs by truck or rail rather than departing via a VESSEL.

EXTRA LABOR RATES means the rates for labor for special services for which a rate is not stated in this SOR. RMT and VIP'S EXTRA LABOR RATES are different from those of the other TERMINALS. All ILA contract guarantees and Guaranteed Annual Income special assessment will be charged for labor when applicable.

EXPLOSIVES means any substance or article, including a device, which is designed to function by explosion (i.e., an extremely rapid release of gas and heat) or which, by chemical reaction within itself, is able to function in a similar manner even if not designed to function by explosion, that have (i) a mass explosion hazard; a mass explosion is one which affects almost the entire load instantaneously explosives; (ii) a projection hazard but not a mass explosion hazard, and (iii) a fire hazard and either a minor blast hazard or a minor projection hazard or both, but not a mass explosion hazard. The term includes a pyrotechnic substance or article.

EXPORT CARGO means cargo received at a Terminal for loading into a vessel for shipment to a foreign or domestic offshore port or destination.

FORCE MAJEURE means damage or destruction to one or more of the TERMINALS by fire, radiation, hurricane, flood, riot, earthquake, volcanic eruption, tidal wave, windstorm, hail, explosion, power loss, act of God, public enemy or other casualty, or if they are seized, or utilization or operation thereof be suspended, abated, prevented or impaired by reason of war, warlike operations, acts of TERRORISM, CYBER ATTACK, contamination, governmental decree, strikes, slowdowns, or other labor disputes, lockouts or other work stoppage or by reason of any other condition beyond the control of VIT, so as to render one or more of the TERMINALS or the equipment thereon wholly or partially inoperable, inaccessible, or unfit for use, or so as to make it impossible or impractical for VIT to meet its obligations.

FOREST PRODUCTS means forest products including, but not limited to, lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper and paper board in rolls or in pallet or skid-sized sheets, liquid or granular by-products derived from pulping and papermaking, and engineered wood products.

FREE TIME means a period in this SOR during which cargo, including in-transit cargo, may occupy space assigned to it on Terminal property, including off-dock facilities, free of DEMURRAGE charges immediately prior to the loading or subsequent to the discharge of such cargo on or off the vessel.

HANDLING means the service of physically moving cargo between point of rest and any place on the terminal facility, other than the end of ship's tackle.

HAZARDOUS MATERIALS means materials and substances that the U.S. Department of Transportation, Department of Homeland Security, or any other state or federal agency has regulated as posing an unreasonable risk to health, safety, and property when transported. HAZARDOUS MATERIALS includes without limitation materials and substances designated or regulated as hazardous under 49 U.S.C. §5103 et. seq., 49 CFR 172.101, and 49 CFR Part 173, and all successor and replacement laws and all regulations published in accordance therewith.

HAZARDOUS MATERIALS LAWS means international and U.S. laws, rules, treaties, and regulations governing the HANDLING, transportation, and storage of HAZARDOUS MATERIALS, including but not limited to 49 U.S.C. §5103 *et seq.* 49 CFR Parts 100-185, the Maritime Transportation Security Act of 2002, and all regulations published in accordance therewith.

HEAVY LIFT means the service of providing heavy lift cranes and equipment for lifting cargo.

HOLIDAYS
The TERMINALS will be closed for all operations on the following HOLIDAYS:

New Year's Day
Independence Day
Labor Day
Thanksgiving Day
Christmas Eve
Christmas Day

The TERMINALS will be open for limited operations on the following HOLIDAYS:

Martin Luther King's Birthday
Robert E. Lee's Birthday
George Washington's Birthday
Thomas W. Gleason's Birthday
Memorial Day
Jefferson Davis' Birthday
Columbus Day
Veterans Day

VIT may change Terminal operating times from time to time based on weather or other factors. Details available on the VIT web site at www.portofvirginia.com.

HRCP II means HRCP II, L.L.C., which operates the chassis pool on the TERMINALS.

IMPORT CARGO means cargo, including in-transit cargo, received at a TERMINAL from a VESSEL from a foreign or domestic offshore port or origin for loading to a domestic motor, rail or water CARRIER.

INTERCOASTAL when applied to cargo means cargo originating at or destined to points on the Pacific Coast of the United States.

LOADING OR UNLOADING means loading or unloading cargo between any place on the TERMINAL and railroad cars, trucks, VESSELS, or any other means of conveyance to or from a TERMINAL. LOADING OR UNLOADING does not include special stowage, blocking or bracing, sorting or grading, stripping or stuffing CONTAINERS, or otherwise selecting the cargo for the convenience of CARRIER or consignee.

LOSSES means all (i) fines and penalties, (ii) actual and statutory damages, (iii) removal, response, and remediation costs, (iv) investigation and testing costs, (v) engineering and consultant costs, (vi)fumigation costs, and (vii) reasonable costs and attorneys' fees.

M&R refers to the maintenance and repair functions performed on CONTAINERS and intermodal chassis.

POINT OF REST means a point within a Terminal where VIT designates that a CONTAINER, cargo, or equipment be placed for movement to or from a VESSEL.

OCEAN CARRIER means a vessel operating steamship line maintaining regular advertised sailings from any United States port or ports to named ports.

OPEN AND/OR PARKING AREA refers to the designated open storage or parking area on a TERMINAL where CONTAINERS, when on own wheels or bogies or frames or chassis may be held on instructions by the owner or agent of said CONTAINER.

PRE-PALLETIZED OR SKIDDED CARGO means cargo which is pre-palletized or skidded to the satisfaction of VIT and is eligible for reduced LOADING OR UNLOADING rates. It must be situated on the pier or on the truck or railcar so that it can be loaded into a truck or railcar or unloaded from a truck or railcar by the insertion of the terminal's forklift truck blades. If it is necessary to shift cargo prior to such insertion, the full LOADING OR UNLOADING rate will apply.

Note 1 - Subject to minimum 500 pounds gross weight per unit.
Note 2 - Should PRE-PALLETIZED or SKIDDED CARGO become disassembled prior to or during HANDLING by VIT, the cost of recoopering will be charged against the cargo.
Note 3 - To qualify for discounts available under provisions of this item, commodity descriptions on all billing documents, such as Bill of Lading, Waybill, Carriers Pro or Delivery Order, must clearly indicate commodity is pre-palletized or skidded.

RAMPING means LOADING a CONTAINER onto a railcar. **DERAMPING** means UNLOADING a CONTAINER from a railcar.

RECEIVING CONTAINER means physical acceptance of a CONTAINER by VIT either from the inland CARRIER, to facilitate physical exchange of the CONTAINER at "POINT OF REST" with a water CARRIER, or physical acceptance by VIT of a CONTAINER at "POINT OF REST" from a water CARRIER to facilitate physical exchange with an inland CARRIER.

REHANDLING means the service of physically moving Cargo or equipment any place on a Terminal not involving LOADING or UNLOADING.

RESTOW means the movement of a CONTAINER or other item of cargo from vessel to wharf to vessel necessary to discharge or load CONTAINERS or other item of cargo to/from the vessel. See SHIFT.

ROLLED CONTAINER means a CONTAINER which is assigned a booking number to depart a TERMINAL on a specific vessel call but is not loaded on that vessel call or when the port of destination of the CONTAINER is changed.

SHIFT means the movement of a CONTAINER or other item of cargo from one bay or compartment of a vessel to another bay or compartment on the vessel necessary to discharge or load CONTAINERS or other item of cargo to/from the vessel. See RESTOW.

SOR means this Schedule of Rates.

SPECIAL SERVICES means services performed for which there is not a published charge.

TERMINALS means the ocean marine TERMINALS, inland TERMINALS, and ancillary facilities operated by VIT. "TERMINAL" means one of the TERMINALS. The TERMINALS include PMT, VIG, NIT, NNMT, RMT (effective November 1, 2016), VIP, and the Pinners Point Container Yard. "TERMINALS" includes without limitation **"TERMINAL FACILITIES"** which means one or more structures at the TERMINALS comprising a terminal unit, which include, but are not limited to, wharves, warehouses, covered and/or open storage spaces, cold storage plants, cranes, grain elevators and/or BULK CARGO loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo, CONTAINERS and/or passengers in the interchange of same between land and water CARRIERs or between two water CARRIERs.

TERMINAL SERVICES includes checking, dockage, handling, heavy lift, loading and unloading, terminal storage, wharfage, and additional services offered by VIT per this SOR.

TERMINAL STORAGE means the service of providing warehouse or other terminal facilities for the storage of inbound or outbound cargo after the expiration of FREE TIME, including wharf storage, shipside storage, closed or covered storage, open or ground storage, bonded storage, and refrigerated storage, if provided.

TON except as otherwise provided in individual items, TON as used in this SOR, has reference to a TON of 2,000 pounds.

TERRORISM and TERRORIST ACTS mean activities against persons or property of any nature involving the preparation to use, the use or the threat to use force or violence of any nature that injures, damages, interferes with, disrupts or contaminates persons or property, including intangible property, communication, electronic, information or mechanical systems where the purpose or result of such activities is to damage, intimidate, or coerce a government, its economy, the military arm of a government or its civilian population and its apparent purpose is to further political, ideological, religious, social or economic objectives or to express opposition to political, ideological, religious or social systems. The term "damage" and the corollary terms included therewith shall include damage caused incidentally through the efforts of legitimate government to oppose, prevent and contain TERRORISM.

USAGE means the use of a Terminal by any CARRIER, shipper or consignee, its agents, servants, and/or employees, when it performs its own car, lighter or truck loading or unloading, or the use of said facilities for any other gainful purpose for which a charge is not otherwise specified in this SOR.

USER shall mean each (i) each VESSEL and CARRIER, (ii) stevedore, (iii) shipper, consignee, and beneficial cargo owner, (iv) contractor, subcontractors and vendor of VIT, VPA, HRCP II, or another USER, (v) licensee and permittee, and (vi) and every other person or entity using, coming onto, or berthing at a Terminal.

VESSEL means a ship, barge, or other floating craft of any description.

VGM means "verified gross mass" required by the International Convention for the Safety at Life at Sea ("SOLAS") Regulation VI/2.

VIT PARTIES means VIT, its parent, affiliates, subsidiary(ies) officers, and employees.

VSA means vessel sharing agreement between OCEAN CARRIERS.

WHARFAGE means a charge against the cargo or VESSEL for use of the wharves, pier or bulkheads by all cargo passing or conveyed over, onto, or under wharves or between VESSELS when berthed at wharf or when moored in slip adjacent to wharf. Cargo placed in piers or at shipside or on the apron shall be considered to have earned WHARFAGE which will be collected whether or not the cargo eventually is loaded aboard a VESSEL. WHARFAGE is solely the charge for use of wharves, piers or bulkheads and does not include charges for any other service.

WHEELED CONTAINER means a CONTAINER, loaded or empty, on own wheels, bogies, frames, chassis or flatbed trailer, furnished by owner or agent.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

STEPHEN K. WALTON, SR.,

Plaintiff,

v. Case No. CL19-2417

VIRGINIA INTERNATIONAL TERMINALS, LLC, et al.,

Defendants.

PLAINTIFF'S RESPONSES TO DEFENDANT VIT'S FIRST SET OF REQUESTS FOR ADMISSION

The plaintiff Stephen K. Walton, Sr., by counsel, for his Responses to the Defendant VIT's First Set of Requests for Admission, states as follows:

1. VIT maintains a Schedule of Rates governing rates, regulations and practices at marine terminals operated by VIT.

RESPONSE:

Admitted.

2. VIT's Schedule of Rates is available to the public during normal business hours and in electronic form and is accessible to the public via Internet by personal computer.

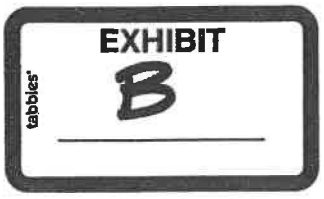
RESPONSE:

Admitted.

3. The document attached hereto as Exhibit A is a true and correct copy of VIT's Schedule of Rates available to the public via the Internet on March 15, 2017.

RESPONSE:

Based on information currently available to the plaintiff, including a recent review of materials published on Virginia Port Authority's website, admitted.



4. From the date you allege the incident occurred until the date you filed your Complaint in this case, you did not notify VIT, or any representative, agent or employee of VIT, in writing of the incident or the injuries you allege you sustained.

RESPONSE:

The plaintiff admits that from the date of the incident until the he filed his complaint, he personally did not notify VIT or any representative, agent or employee of VIT, in writing of the incident or of his injuries. The plaintiff reported the incident and his injuries to his employer MRS. The plaintiff has insufficient information to admit or deny whether someone from MRS provided VIT with notification of the incident and/or injuries.

5. From the date you allege the incident occurred until the date you filed your Complaint in this case, you did not notify VIT, or any representative, agent, or employee of VIT, through any means (written, oral, or otherwise) of the incident or the injuries you allege you sustained.

RESPONSE:

The plaintiff admits that from the date of the incident until the he filed his complaint, he personally did not notify VIT or any representative, agent or employee of VIT, in writing or orally, of the incident or of his injuries. The plaintiff reported the incident and his injuries to his employer MRS. The plaintiff has insufficient information to admit or deny whether someone from MRS provided VIT with notification of the incident and/or injuries, orally or in writing.

STEPHEN K. WALTON, SR.

By: _____
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on August 5, 2019, a copy of the foregoing pleading was served via first class mail and email transmission on all counsel of record:

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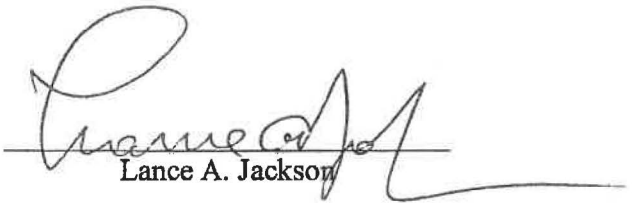

Lance A. Jackson

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

STEPHEN K. WALTON, SR.,

Plaintiff,

v. Case No. CL19-2417

VIRGINIA INTERNATIONAL TERMINALS, LLC, et al.,

Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT VIT'S MOTION FOR SUMMARY JUDGMENT ON PLEA IN BAR AND IN OPPOSITION TO DEFENDANT VIT'S DEMURRER

The plaintiff respectfully submits that VIT's Motion for Summary Judgment should be denied, its Plea in Bar should be overruled, and its Demurrer overruled, for the reasons stated in Parts I-VI of the Argument below. Under controlling Virginia law, Mr. Walton was not required to file a notice of claim or injury with VIT before filing suit, nor was he required to file suit against VIT within one year. His suit was timely filed within the two-year period prescribed by the Virginia General Assembly. VIT's argument that Walton is time-barred because of its Schedule of Rates (SOR) fails because (1) the Shipping Act does not pre-empt applicable Virginia law, under which Walton's state tort action is timely filed; (2) VIT's SOR is not enforceable as an implied contract against Walton (the only way it could be enforced) because of one or more actual contracts covering Walton's use of the terminal when he was injured; (3) VIT's SOR is not enforceable against Walton as an implied-in-fact contract, because he did not agree to the terms of the SOR; (4) VIT's SOR is not enforceable against Walton as an implied-in-law contract, because Virginia law, which controls, does not afford barring personal injury actions as a remedy on an implied-in-law contract; and (5) the SOR is not enforceable as an

implied-in-law contract to bar Walton's tort action, because that is not what in equity and good conscience should be done under the circumstances of this case. VIT's Demurrer should be overruled because Virginia law clearly permits the plaintiff to sue alternative defendants.

FACTS

At this stage of the litigation, no depositions have been taken, and VIT has not answered the plaintiff's Interrogatories and Requests for Production. Material facts developed in the record to this point and related to the issues controlling resolution of VIT's Motion for Summary Judgment, Plea in Bar, and Demurrer, are stated in the Plaintiff's Amended Complaint; the License Agreement between VIT and MRS, Mr. Walton's employer (copy attached hereto as Exhibit B); VIT's Schedule of Rates attached as Exhibit A to its Brief; the Declaration of Stephen K. Walton, Sr., attached hereto as Exhibit A; and the collective bargaining agreement to which VIT, MRS, and Mr. Walton's union, ILA Union Local 1970 are parties, attached to Walton's Declaration as Exhibit 1. These facts are discussed as they relate to each part of the Argument below.

STANDARD OF REVIEW

Summary judgment may be granted when no genuine issue of material fact remains in dispute on a controlling issue or issues **and** the moving party is entitled to judgment as a matter of law. Mount Aldie, LLC v. Land Trust of Va., Inc., 293 Va. 190, 196, 796 S.E.2d 549, 553 (2017). The Virginia Supreme Court has repeatedly admonished that summary judgment is a "drastic remedy," Fultz v. Delhaize Am., Inc., 278 Va. 84, 88, 677 S.E.2d 272, 274 (2009); Slone v. Gen. Motors Corp., 249 Va. 520, 520, 457 S.E.2d 51, 51 (1995); and that granting summary judgment is only appropriate when "no trial is necessary because no evidence could affect the

result." Shevel's Inc.-Chesterfield v. Southeastern Assoc., 228 Va. 175, 181, 320 S.E.2d 339, 342-43 (1984). The policy underlying Virginia's summary judgment procedure is to "assure that the parties' rights are determined upon a full development of the facts, not just upon pleadings and 'selected excerpts' from discovery materials." Commercial Bus. Sys. V. Halifax Corp., 253 Va. 292, 297, 484 S.E.2d 892, 894 (1997)(emphasis added). Thus a trial judge considering a motion for summary judgment should deny the motion when the evidence in the record has not been sufficiently developed to justify entering judgment as a matter of law. Renner v. Stafford, 245 Va. 351, 354-55, 429 S.E.2d 218, 220-21 (1993); Marion v. Terry, 212 Va. 401, 402, 184 S.E.2d 761, 762 (1971).

Although affidavits and depositions may not be used to support a motion for summary judgment, they may be used to oppose a motion for summary judgment. Lloyd v. Kime, 275 Va. 98, 107, 654 S.E.2d 563, 568 (2008)(deposition); Tri-Port Terminals, Inc. v. Hitch S. Branch Terminal, LLC, 87 Va. Cir. 314 (Chesapeake Cir. Ct. 2013).

A demurrer tests whether a complaint states a cause of action upon which relief may be granted, Kaltman v. All American Pest Control, Inc., 281 Va. 488-89, 706 S.E.2d 864, 867 (2011), with all facts expressly pleaded, facts impliedly alleged, and all reasonable inferences, accepted as true for the plaintiff. Assurance Data, Inc. v. Malyevas, 286 Va. 137, 143, 747 S.E.2d 804, 807 (2013).

ARGUMENT

I. THE MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED AND THE PLEA OVERRULED, BECAUSE THE SHIPPING ACT DOES NOT PRE-EMPT APPLICABLE VIRGINIA TORT LAW.

Without bothering to address the issue of federal pre-emption of Virginia law, VIT asserts that, because of a federal statute, the 30 day notice of claim provision and one-year time limitation to sue in Section 207 of its Schedule of Rates bar Mr. Walton's common law tort claim. (VIT's Brief, p. 6). As will be shown in more detail below, as a matter of law, the Shipping Act of 1984 on which VIT relies does not pre-empt Virginia law. Under Virginia common law, notice of a tort claim is not a prerequisite to maintaining a tort action. Under Virginia Code Section 8.01-243, the limitation period for filing a common law personal injury action is two years, not one year. Because the Shipping Act does not pre-empt applicable Virginia law, Mr. Walton's tort action against VIT is not time-barred by VIT's Schedule of Rates.

A. **Walton's negligence claim is brought under Virginia tort law.**

It is well-settled that state tort law, not federal law, applies to personal injury actions arising from accidents occurring on a marine terminal. Gardner v. Old Dominion Stevedoring Corp., 225 Va. 599, 603, 303 S.E.2d 914, 916 (1983)(holding longshoreman's accident occurring at NIT is "controlled by state law"). The plaintiff has alleged in his Amended Complaint that he was injured at the NIT terminal by the negligence of marine terminal operator VIT. His land-based claim is brought pursuant to Virginia tort law, not federal law.

B. **Virginia law does not require Walton to provide notice of claim before filing suit.**

Under the common law, a tort victim is free of any requirement to notify a tortfeasor of an accident or claim before filing suit. In this case, the common law trumps any notice requirement found in VIT's Schedule of Rates, because the common law is the rule of decision. Virginia Code Section 1-200 provides:

> The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly.

Occasionally, the General Assembly has made an exception to the common law rule, imposing statutory notice of claim requirements on tort victims. For example, Virginia Code Section 15.2-209, requires that a written notice of claim be sent for injuries caused by the negligence of a city. Such statutory notice of claim requirements are in derogation of the common law. Breeding by Breeding v. Hensley, 258 Va. 207, 215, 519 S.E.2d 369, 373 (1999)(trial court erred in applying notice of claim requirement to tort suits against city employees); Ray v. INOVA Health Sys. Hosps., 35 Va. Cir. 1, 3 (Fairfax Co. Cir. Ct. 1994). No Virginia statutory notice of claim requirement applies to this case. The Virginia common law rule that no pre-suit notice of claim is required continues in full force and is the rule of decision, unless federal law pre-empts it.

C. **Under Virginia law, Walton's suit was timely filed within the two year limit.**

Virginia Code Section 8.01-243(A) provides:

> Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery… shall be brought within two years after the cause of action accrues.

Because Walton's suit under Virginia tort law was filed within the two year period prescribed by Virginia law, his suit was timely filed, unless the Virginia statute is pre-empted by federal law.

D. The Shipping Act of 1984 does not pre-empt applicable Virginia common law or statutory law.

Do the notice of claim requirement and one-year time limit to sue for personal injury stated in Section 207 of VIT's SOR nullify Virginia's common law rule that a tort victim is free from any pre-suit notice of claim requirement, and nullify Virginia Code §8.01-243's two year period for bringing a Virginia tort action, in this case? The short answer is No. The sole basis for VIT's argument that it is not subject to these Virginia laws and that Walton's tort suit is time-barred is the Shipping Act of 1984, 46 U.S.C. §40101, et seq. VIT's argument is fatally flawed, because the Shipping Act does not pre-empt the applicable Virginia law. The fact that VIT does not even mention pre-emption in its brief is telling.

"The pre-emption of state laws represents 'a serious intrusion into state sovereignty.'" Va. Uranium, Inc. v. Warren, 139 S.Ct. 1894, 1904, 204 L.Ed.2d 377 (2019); Alwan v. Alwan, 70 Va. App. 599, 606, 830 S.E.2d 45, 48 (2019). A federal statute does not pre-empt state law, unless Congress has explicitly stated that state law is pre-empted, unless state law actually conflicts with federal law, unless compliance with both state and federal regulation is a physical impossibility, or unless the state law stands as an obstacle to the accomplishment and execution of Congress' objectives. Maretta v. Hillman, 283 Va. 34, 40, 722 S.E.2d 32, 34 (2012).

To prevail on a claim that federal law pre-empts state law, VIT "must establish more than that [the federal law] 'touch[es] upon or 'relate[s] to' that subject matter." CSX Transp. v. Easterwood, 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993). There

is a presumption that a state's historic police power is **not** superseded by a federal act, unless that was the clear and manifest purpose of Congress. Wyeth v. Levine, 555 U.S. 555, 565, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009). A state's police power includes its power to protect the lives and health of its people, Kelly v. Washington, 302 U.S. 1, 13, 58 S.Ct. 87, 82 L.Ed. 3 (1937). "State tort laws … plainly intend to regulate public safety," Va. Uranium, Inc., 139 S.Ct. at 1905, and states have traditionally had the authority to prescribe tort remedies for their citizens. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). Furthermore, the Supreme Court has admonished that any federal statute in derogation of the common law must be strictly construed, because no such 'statute is to construed as altering the common law farther than its words express.' Robert C. Herd & Co. v. Krawill, 359 U.S. 297, 304-05, 79 S.Ct. 766, 3 L.Ed.2d 820 (1959).

The language of the Shipping Act and Congress' purpose in passing the Act make clear that the Shipping Act does not pre-empt the Virginia laws which VIT seeks to supplant with its Schedule.

The primary purpose of the Shipping Act of 1984 is to eliminate discriminatory practices of shippers and carriers. Waterfront Comm'n of N.Y. Harbor v. Elizabeth-Newark Shipping, Inc., 199 F.3d 177, 185 (3d Cir. 1998). The Shipping Act of 1984 expanded the limited antitrust immunity that existed under the previous Act. United States v. Gosselin World Wide Moving, N.V., 411 F.3d 502, 509-10 (4th Cir. 2005). The regulations issued by the Federal Maritime Commission to administer 46 U.S.C. §40501(f), the provision of the Shipping Act of 1984 on which VIT bases its Motion for Summary Judgment and Plea in Bar, were promulgated to "identif[y] and prevent unreasonable preference or prejudice and unjust discrimination." 46

CFR § 525.1(a).

The Shipping Act is not safety legislation. It is legislation designed to regulate shipping practices. The Shipping Act of 1984 does not mention personal injury actions, such as Mr. Walton's brought under state law. The Act does not provide Mr. Walton any remedy against VIT for his injuries. This is a factor which militates against pre-emption of a state law tort claim. Krantz v. International Air Line Pilots Ass'n, 245 Va. 202, 209, 427 S.E.2d 326, 330 (1993). It was not the "clear and manifest purpose of Congress" to regulate state personal injury tort law through the Shipping Act.

Nevertheless, VIT relies on 46 U.S.C. §40501(f) as its authority for barring Walton's action. Pursuant to that section, a marine terminal operator may issue:

> [A] schedule of rates, regulations, and practices, including limitations of liability for cargo loss or damage, pertaining to receiving, delivering, handling, or storing property at its marine terminal.

46 U.S.C. §40501(f) is very similar to a parallel provision of the Shipping Act of 1916, which authorized terminal facilities to keep open to the public a

> schedule or tariff, showing all its rates, charges, rules, and regulations, relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities.

46 U.S.C. § 841a, *quoted in* Federal Commerce & Navigation Co. v. Calumet Harbor Terminals, Inc., 542 F.2d 437, 439 (7th Cir. 1976). While the 1984 Act and its predecessor both authorized marine terminals to issue a schedule of rates or tariff concerning rates, charges, rules and regulations, neither 46 U.S.C. §40501(f), nor any other provision of the 1984 Act, requires or even mentions that a marine terminal can impose through its tariff time limitations on state law claims

brought by personal injury tort victims.

VIT cites no cases holding that 46 U.S.C. §40501(f) supports its position. VIT's failure to cite any cases holding that 46 U.S.C. §40501(f), or any other provision of the statute, authorizes a marine terminal's tariff to impose a notice of claim requirement or shorter time for filing suit on a personal injury tort victim bringing a state law tort claim also militates against a finding of pre-emption of Virginia law. Krantz v. International Air Line Pilots Ass'n, 245 Va. 202, 208, 427 S.E.2d 326, 329 (1993).

Courts analyzing whether the above-quoted statutory predecessor to 46 U.S.C. §40501(f) authorized a marine terminal to impose time limits on a claim, through its tariff, have held that the Act contains no provision authorizing the limitation of time for the presentation of claims. Federal Commerce & Navigation Co. v. Calumet Harbor Terminals, Inc., 542 F.2d 437, 441 (7th Cir. 1976); Pacific S.S. Co. v. Cackette, 8 F.2d 259, 260 (9th Cir. 1925). The fact that the Shipping Act does not require or even mention such time limitations is fatal to VIT's argument. "It is a basic principle of tariff law that extraneous matter injected into a tariff does not have the force of law, in contrast to the matters that are required to be filed in the tariffs." Burlington Northern Railroad Company v. M.C. Terminals, Inc., 1992 FMC LEXIS 27, *80 (Federal Maritime Commission 1992)(emphasis added).

The cases which VIT cites in support of its Motion for Summary Judgment and Plea in Bar are easily distinguishable from the present case. **None of them deal with pre-emption**. The maritime cases cited do not apply Virginia tort law. All of the non-maritime cases cited by VIT deal with limitations stated in an actual written contract between the parties. Those cases do not help VIT, because a marine terminal schedule of rates is not an actual contract. Rafinasi v. Coastal

Cargo Co., 552 Fed. Appx. 394, 400 (5th Cir. 2014). A marine terminal schedule of rates is a "unilateral promulgation, not a product of bargaining." Pate Stevedore Co. v. Alabama State Docks Department, 1988 FMC LEXIS 21, *13 (Federal Maritime Commission 1988).

VIT has produced no actual contract between it and Mr. Walton, because there is none. It is true that, under Virginia law, "parties to a contract **may agree** that any action to enforce the contract must be filed within a shorter period of time than that established by an otherwise applicable statute of limitations," Massie v. Blue Cross Blue Shield, 256 Va. 161, 164, 500 S.E.2d 509, 511 (1998)(emphasis added). On the other hand, a person who is not a party to a contract imposing a shorter time limitation for presenting claims is **not** bound by that limitation. Commercial Constr. Specialties, Inc. v. ACM Constr. Management Corp., 242 Va. 102, 106, 405 S.E.2d 852, 854 (1991). Virginia law upholds contractual time limitations only as to (1) parties to an actual contract, (2) who agreed to those limitations. Because Mr. Walton is not a party to an contract with VIT which has contractual time limitations, Virginia common law and Virginia statutory law, as discussed above, apply, and Walton's claim is not time-barred.

The case of Gooch v. Oregon S.L.R. Co., 258 U.S. 22, 42 S.Ct. 192, 66 L.Ed. 443 (1922), cited by VIT, does not support its argument. There, the plaintiff businessman, in order to obtain a drover's pass to ride with his cattle on the railroad, **agreed** before the trip that he would give the railroad notice of any claim of injury to himself within thirty days after the injury. Unlike the drover in Gooch, *supra*, Mr. Walton did not agree to the terms of VIT's Schedule of Rates; nor was he was told about VIT's time limitation in its Schedule in advance of his injury. (See Declaration of Stephen Walton, Sr., Exhibit A, ¶s 7-16). In the case of Liquid Carbonic Co. v. Norfolk & W. R. Co., 107 Va. 323, 58 S.E. 569 (1907), the Court upheld a time limitation

appearing on a contract of shipment---i.e., a bill of lading---against a party to the contract. Unlike Mr. Walton, the plaintiff who was time-barred by the contract in Liquid Carbonic, *supra*, assented to the contract, was given the time limitation, and was a party to the contract.

VIT's argument that the Shipping Act authorizes it to assert time limitations in its Schedule of Rates to bar Walton's Virginia tort action fails. In order for VIT's argument to succeed, it must show that the Shipping Act pre-empts applicable Virginia law, but VIT does not even address pre-emption. VIT points to no law justifying a serious intrusion into Virginia's sovereignty to nullify Mr. Walton's rights under Virginia law. Under Virginia common law and statutory law, Mr. Walton's state tort claim is timely filed. Nothing in the federal statute expressly or impliedly conflicts with that Virginia law. VIT has failed to meet its burden to overcome the presumption that Virginia's common law and statutory law respecting Mr. Walton's state tort claim is not pre-empted. For those reasons, as a matter of law, VIT's Motion for Summary Judgement should be denied, and its Plea in Bar overruled.

II. VIT'S TIME LIMITATIONS ARE NOT ENFORCEABLE AGAINST WALTON, BECAUSE THERE WAS AN ACTUAL CONTRACT AND A PARTY FOR WALTON'S TERMINAL USE.

In addition to VIT's failure to demonstrate federal pre-emption of Virginia law concerning Mr. Walton's tort action, a second ground for denying VIT's Motion for Summary Judgment and overruling it Plea in Bar, as a matter of law, is that VIT's Schedule of Rates is not enforceable against Walton as an implied contract. The sole reason that VIT gives for enforcing the time limitations in its Schedule of Rates (SOR) against Mr. Walton is that the SOR is enforceable as an **implied contract**. (VIT Brief, p. 8). As will be shown below, because there are one or more actual contracts between VIT and a party covering Mr. Walton's use of the terminal, the SOR and

its time limitations are not enforceable as an implied contract.

A. The Schedule of Rates does not apply to Walton because of the actual contract between VIT and Walton's employer MRS.

As VIT's argument goes, Mr. Walton was a user of its facility, which means that Mr. Walton was receiving VIT's services when he was hurt, so VIT can enforce its SOR time limitations against him as an implied contract. VIT's theory ignores the fact that an actual contract covering Walton's use of the terminal makes its SOR unenforceable.

Shipping Act regulation 46 CFR §525.2(a) limits enforcement of a marine terminal's schedule of rates to specific conditions:

> (2) Enforcement of terminal schedules. Any schedule … shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving the services rendered by the marine terminal operator….
>
> (3) Contracts for terminal services. If the marine terminal operator has an actual contract with a party covering services rendered by the marine terminal operator to that party, an existing terminal schedule covering those same services shall not be enforceable as an implied contract.

Under the plain language of the regulation, if there was an actual contract between VIT and "a party" covering the services mentioned in Schedule, the Schedule is not enforceable as an implied contract. (Of course, since a marine terminal SOR is not an actual contract, Rafinasi, *supra*, VIT's SOR is not enforceable, by itself, as an actual contract either.)

46 CFR §525.1(b)(19) defines "terminal services" to include "usage," which in turn includes "use of said facilities for any other gainful purpose for which a charge is not otherwise specified." 46 CFR §525.1(b)(21). If Mr. Walton was "receiving services" from VIT when he was hurt because he was using the terminal, as VIT insists he was, then VIT's Schedule of Rates is not

enforceable against him as an implied contract, because there was an actual contract between VIT and MRS, Walton's employer, that covered Walton's use of the terminal.

VIT has put into the record, through its reply brief filed on June 28, 2019, a copy of its contract with Marine Repair Service, Inc. (MRS). (See License Agreement, attached to VIT's Brief as Exhibit A. For the Court's ready reference, a copy of the License Agreement is attached hereto as Exhibit B.) The License Agreement covers MRS' use of licensed premises, but it also covers MRS' use of the terminal in general. Section 30 of the contract provides that VIT's Schedule of Rates "is incorporated into this Agreement by reference and shall apply to **all of LICENSEE'S operations and activities on the Terminals**." Walton has alleged in his Amended Complaint that, at the time he was injured, he was on the terminal employed by MRS as a reefer mechanic and container repair mechanic. (Amended Complaint, ¶s 4, 36, 39, and 40). His work in NIT's reefer row area was part of MRS' "operations and activities on the Terminals," as described in Paragraph 18 of the Amended Complaint.

Section 100 A, of VIT's SOR provides in pertinent part:

> This SOR applies to the provision of TERMINAL SERVICES by VIT at the TERMINALS, including without limitation NIT… (effective November 1, 2016).
>
> * * *
>
> If VIT has an actual contract with a party covering the services rendered by VIT, then this SOR shall not apply to those services, except to the extent this SOR is incorporated in the actual contract.

(A copy of VIT's November 1, 2016, SOR is attached to VIT's Brief as Exhibit A; Section 100A is at page 3). VIT's SOR states that it is controlled by Virginia law. Section 207(C) of VIT's

Schedule provides:

> The laws of the Commonwealth of Virginia without reference to its choice of law rules and, to the extent not in conflict with the law of Virginia, the general maritime laws and statutes of the United States, shall apply to all disputes arising from or related to this SOR.

(See VIT SOR, p. 6).

"Unambiguous tariff terms are enforced according to their plain terms, and ambiguous terms are strictly construed against the drafter." Verizon Va., LLC v. XO Communs., LLC, 144 F.Supp.3d 850, 858 (E.D. Va. 2015).

Under the plain language of 46 CFR § 525(a)(3), and Section 100(A) of VIT's SOR, the SOR is not enforceable as an implied contract, because there is an "actual contract" between VIT and MRS, "a party, covering the services rendered by VIT." Because VIT's SOR is incorporated into the contract between VIT and MRS, the SOR and its time limitations apply to MRS as a party to the contract. Virginia law permits this under Massie, *supra*, and Virginia law applies, pursuant to Section 207(C) of the SOR. On the other hand, pursuant to Virginia law, Mr. Walton is not bound by the provisions of the SOR and its time limitations, because he is not a party to the contract between VIT and MRS. Commercial Constr. Specialties, Inc. v. ACM Constr. Management Corp., 242 Va. 102, 106, 405 S.E.2d 852, 854 (1991). For these reasons, as a matter of law, VIT's Motion for Summary Judgment should be denied, and its Plea in Bar overruled.

B. The Schedule of Rates does not apply to Walton because of the multi-party collective bargaining agreement between VIT, MRS, and ILA Local 1970.

The plaintiff submits that, in addition to the actual contract between VIT and MRS, there is a second actual contract covering terminal use by Mr. Walton: the collective bargaining agreement to which VIT, MRS, and the union local of which Mr. Walton is a member, ILA

Local 1970, are parties. See Declaration of Steven K. Walton, Sr., Exhibit A, ¶s 3 and 4, and a copy of the collective bargaining agreement attached thereto as Exhibit 1.

The collective bargaining agreement (CBA) deals with the work which Mr. Walton was performing when he was hurt at NIT, container maintenance and repair at a marine terminal in the Port of Hampton Roads. The CBA addresses use of waterfront facilities, which include all waterfront terminals in the Port of Hampton Roads. (CBA, Section 6). Under the CBA, only union representatives and authorized personnel are permitted on a terminal jobsite. (CBA, Section 6). The CBA provides that "all work related to refrigeration, including but not limited to, hooking up or unhooking refrigeration units … shall be performed by refrigeration mechanics." (CBA, Memorandum of Agreement, p. 5).

For the reasons stated above, and in Part A of this argument, VIT's SOR is not enforceable against Mr. Walton, because the collective bargaining to which VIT, MRS, and ILA Union Local 1970 are parties is an actual contract which covers Walton's use of VIT's terminal facilities.

III. VIT'S SCHEDULE OF RATES IS NOT ENFORCEABLE AGAINST WALTON AS A CONTRACT IMPLIED IN FACT, BECAUSE HE NEVER AGREED TO THE SCHEDULE.

In addition to the grounds for denying VIT's Motion for Summary Judgment and overruling its Plea in Bar advanced in Parts I and II above, the fact that Mr. Walton never agreed to VIT's Schedule of Rates makes it unenforceable as an implied contract in fact.

As mentioned in Part II of the Argument, Section 207(C) of VIT's SOR states that Virginia law applies to the SOR, to the extent not in conflict with maritime law and statutes of the United States. Here, the dispute is a land-based state law tort action. No federal statute or

maritime law invalidates VIT's choice that Virginia law applies to its SOR.

Under Virginia law, VIT has the burden of proving an implied contract in fact. Virginia Canners Exch. v. Scheidt, 137 Va. 452, 458-59, 119 S.E. 56, 58-59 (1923). "Like an express contract, an implied-in-fact contract is created only when the typical requirements to form a contract are present, such as consideration and **mutuality of assent**." Spectra-4, LLP v. Uniwest Commer. Realty, Inc., 290 Va. 36, 45, 772 S.E.2d 290, 295 (2015). Virginia law requiring mutuality of assent is consistent with law developed by the Federal Maritime Commission "that a provision in a terminal tariff stating that persons using the terminal facilities consent to the terms and provisions of the tariff has no legal effect under tariff law." Burlington Northern Railroad Company v. M.C. Terminals, Inc., 1992 FMC LEXIS 27, *81-82 (Federal Maritime Commission 1992).

Mr. Walton did not agree to VIT's SOR; he did not agree to any notice of claim or injury time limit; and he did not agree to any time limitation on filing suit against VIT. (See Walton Declaration, Exhibit A, ¶s 13-16.) Because Mr. Walton alleges that he never agreed to VIT's SOR and its time limitations, there is at least a genuine issue of material fact as to whether there is an implied contract-in-fact between VIT and him. Summary judgment should not be granted against Walton on the basis of implied contract-in-fact.

IV. VIT'S SCHEDULE OF RATES IS NOT ENFORCEABLE AS AN IMPLIED CONTRACT-IN-LAW TO BAR WALTON'S CLAIM.

In addition to the grounds for denying VIT's Motion for Summary Judgment and overruling its Plea in Bar advanced in Parts I, II, and III of the Argument above, the plaintiff respectfully submits that VIT's Schedule of Rates cannot be enforced as a contract implied-in-

law to bar Walton's state law personal injury claim, because Virginia law does not recognize barring a tort action for personal injury as a remedy under an contract implied-in-law.

As mentioned above, Section 207(C) of VIT's SOR provides that Virginia law controls application of the SOR. The following is an accurate statement of Virginia law on contracts implied-in-law:

> As opposed to the inferred from ('implied in fact') contract, the 'implied-in-law' quasi-contract is no contract at all, but a form of the remedy of restitution.

Restatement (2d) of Contracts, § 4, Comment b. A contract implied in law rests upon the principle of preventing unjust enrichment, requiring someone who has benefited and accepted the services of another to pay reasonable compensation for those services. Po River Water & Sewer Co. v. Indian Acres Club, 255 Va. 108, 114, 495 S.E.2d 478, 482 (1998). When a person receives goods, money or services from another party for which the defendant should in good conscience pay, the law implies a promise to pay. Kern v. Freed Co, 224 Va. 678, 680-81, 299 S.E.2d 363, 364-65 (1983); Baltimore & O. R. Co. v. Burke & Herbert, 102 Va. 643, 646-47, 47 S.E. 824, 825-26 (1904). The only remedy recognized by Virginia law under a contract implied-in-law theory is restitution. In this case, Walton's employer MRS already paid VIT for use of the terminal, pursuant its contract with VIT (or at least that is a reasonable inference from the evidence in the record). There is no other reasonable compensation to be paid for Walton's use of VIT's dangerous premises. Virginia law has never recognized barring a tort victim's personal injury lawsuit as a remedy for a contract implied-in-law. For these reasons, VIT's Schedule of Rates cannot be enforced as a contract implied-in-law to bar Walton's state law personal injury claim.

V. VIT'S SCHEDULE OF RATES IS NOT ENFORCEABLE AGAINST WALTON AS AN IMPLIED CONTRACT-IN-LAW, BECAUSE EQUITY AND GOOD CONSCIENCE DO NOT PERMIT IT.

In addition to the grounds for denying VIT's Motion for Summary Judgment and overruling its Plea in Bar advanced in Parts I, II, III, and IV of the Argument above, the plaintiff respectfully submits that VIT's SOR and its time limitations cannot be enforced against Mr. Walton as a contract implied-in-law, because equity and good conscience do not permit it. Under Virginia law, the fiction of an implied-in-law contract will not be indulged except where the law deems that the contract should exist, in equity and good conscience. Spectra-4, LLP v. Uniwest Commer. Realty, Inc., 290 Va. 36, 43 n.2, 772 S.E.2d 290, 294 n.2 (2015). To impose VIT's time limitations to bar Mr. Walton's personal injury tort action would be inequitable and unconscionable.

As a result of the accident in suit, Mr. Walton has sustained serious, permanent physical injuries. At no time before suit was filed herein did Mr. Walton know about any restrictions on suing VIT that VIT is now seeking to impose through its SOR. This is understandable under the circumstances. Although VIT published a tariff or schedule of rates on the internet for years before Walton's accident, VIT did not amend its SOR to include notice of claim and time to sue provisions until October 1, 2016. When VIT made these changes, it did not tell the longshoremen about them. VIT did not inform Walton's union, ILA Local 1970. VIT did not inform longshore representatives about these changes at meetings of the Contract Board, nor did VIT inform longshore representatives about these changes at meetings of the Safety Committee. See Walton Declaration, Exhibit A, ¶s 7-14. Mr. Walton is not a carrier, shipper, railroad, stevedore, or other commercial entity with reason to apply VIT's SOR to his business. These are all genuine issues

of material fact which should preclude entry of summary judgment.

VI. VIT'S DEMURRER SHOULD BE OVERRULED, BECAUSE VIRGINIA LAW PERMITS WALTON TO SUE ALTERNATIVE PARTIES.

Based on a Virginia rule of procedure which was abolished in **1974**, VIT erroneously insists its Demurrer should be sustained, because the plaintiff has sued alternate parties defendant for the same accident in suit. (VIT's Brief, p. 15). Virginia Code §8.01-281(A), provides in part:

> A party asserting either a claim, counterclaim, cross-claim, or third-party claim ... may plead alternative facts and theories of recovery **against alternative parties** ... provided that such claims ... so joined arise out of the same transaction or occurrence.

(Emphasis added). Rule of Court 1:4(k) repeats the statutory rule verbatim. Virginia Code §8.01-281 was enacted in 1974, changing the common law pleading rule referred to in Baker v. Doe, 211 Va. 158, 160, 176 S.E.2d 436, 437-38 (1970), which held that naming defendants in the alternative was not permitted. See Fox v. Deese, 234 Va. 412, 422, 362 S.E.2d 699, 705 (1987). The Amended Complaint filed herein names alternative defendants, but the plaintiff is alleging liability of each defendant arising out of the same transaction or occurrence. For these reasons, the Demurrer should be overruled.

CONCLUSION AND RELIEF SOUGHT

For all the reasons stated above, VIT's Motion for Summary Judgment should be denied; its Plea in Bar should be overruled; and its Demurrer should be overruled.

STEPHEN K. WALTON, SR.

By: _____
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on September 13, 2019, a copy of the foregoing pleading was served via first class mail and email transmission on all counsel of record:

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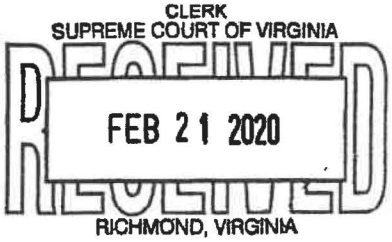
SUPREME COURT OF VIRGINIA



RECORD NO. _____

STEPHEN K. WALTON, SR.,

Appellant,

v.

VIRGINIA INTERNATIONAL TERMINALS, LLC,

Appellee.

PETITION FOR APPEAL

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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. _____

STEPHEN K. WALTON, SR.,

Petitioner-Appellant,

v.

VIRGINIA INTERNATIONAL TERMINALS, LLC,

Defendant-Appellee.

PETITION FOR APPEAL

ASSIGNMENTS OF ERROR

1. The trial court erred in granting Virginia International Terminal's (VIT's) motion for summary judgment and sustaining its plea in bar, based on an erroneous holding that, pursuant to the Shipping Act of 1984, 46 U.S.C. § 40501(f), VIT's Schedule of Rates imposed an enforceable notice of claim or injury provision on plaintiff-appellant Walton's land-based Virginia personal injury tort claim, in contravention of Virginia common law, and imposed a shortened time limit to sue VIT, notwithstanding the two-

year limitation period in Virginia Code § 8.01-243(A), when the Shipping Act does not pre-empt Virginia common law that the plaintiff is not required to provide notice of claim or injury prior to suit, nor does it pre-empt or supplant the two-year limitation period in Virginia Code § 8.01-243(A). (Error preserved in Order entered on November 25, 2019; in Final Order entered on December 17, 2019; and in Plaintiff's Brief in Opposition to Defendant VIT's Motion for Summary Judgment on Plea in Bar, pp. 1, 5, 6, 7,11).

2. The trial court erred in granting Virginia International Terminal's (VIT's) motion for summary judgment and sustaining its plea in bar, based on an erroneous holding that, pursuant to the Shipping Act of 1984, 46 U.S.C. § 40501(f), VIT's Schedule of Rates imposed an enforceable notice of claim or injury provision on Walton's land-based Virginia personal injury tort claim, in contravention of Virginia common law, and imposed a shortened time limit to sue VIT, notwithstanding the two-year limit in Virginia Code § 8.01-243(A), as an implied contract, because Virginia law upholds contractual time limitations only with respect to a party to an actual contract who agrees to such limitations, but the Schedule of Rates is not an actual contract, Walton was not a party to an actual contract imposing such limitations, and Walton did not agree to the time limit provisions of VIT's

Schedule of Rates. (Error preserved in Order entered on November 25, 2019; in Final Order entered on December 17, 2019; and in Plaintiff's Brief in Opposition to Defendant VIT's Motion for Summary Judgment on Plea in Bar, pp. 1, 5, 9-11, 14-16).

3. The trial court erred in granting VIT's Motion for Summary Judgment on Plea in Bar, because, at the very least, material issues of fact existed as to whether Walton knew of or agreed to the Schedule of Rates. (Error preserved in Order entered on November 25, 2019; in Final Order entered on December 17, 2019; and in Plaintiff's Brief in Opposition to Defendant VIT's Motion for Summary Judgment on Plea in Bar, pp. 9-11, 15-16).

4. The trial court erred in granting Virginia International Terminal's (VIT's) motion for summary judgment and sustaining its plea in bar, based on an erroneous finding that, pursuant to the Shipping Act of 1984, 46 U.S.C. § 40501(f), VIT's Schedule of Rates imposed an enforceable notice of claim or injury provision on Walton's claim, and a one year limitation on filing suit, as an implied contract, because there was an actual contract for terminal usage between Walton's employer and VIT, so that the Schedule of Rates was not enforceable against Walton as an implied contract, by virtue of Shipping Act regulation 46 CFR § 525.2(a)(3). (Error preserved in

Order entered on November 25, 2019; in Final Order entered on December 17, 2019; and in Plaintiff's Brief in Opposition to Defendant VIT's Motion for Summary Judgment on Plea in Bar, pp. 1, 12-14).

5. The trial court erred in holding that the notice of claim or injury and shortened time limit to sue provisions in VIT's Schedule of Rates were enforceable against Walton, based on a finding that the actual contract between Walton's employer and VIT incorporated the Schedule of Rates, and that the actual contract was enforceable against Walton, because Walton was not a party to the contract. (Error preserved in Order entered on November 25, 2019; in Final Order entered on December 17, 2019; and in Plaintiff's Brief in Opposition to Defendant VIT's Motion for Summary Judgment on Plea in Bar, pp. 10, 14).

6. The trial court erred in holding that that that the notice of claim or injury and shortened time limit to sue provisions in VIT's Schedule of Rates were enforceable as an implied contract against Walton, finding erroneously that Walton's mere use of the terminal premises, without his knowledge of or assent to the Schedule of Rates, was sufficient evidence of assent to find an implied contract. (Error preserved in Order entered on November 25, 2019; in Final Order entered on December 17, 2019; and in Plaintiff's Brief in Opposition to Defendant VIT's Motion for Summary

Judgment on Plea in Bar, pp. 1, 15-16).

7. To the extent that the trial court held that the notice of claim or injury and shortened time limit to sue provisions in VIT Schedule of Rates were enforceable as a contract implied-in-law against Walton, the trial court erred, because the only remedy recognized under Virginia law under a contract implied-in-law theory is restitution, not a time bar. (Error preserved in Order entered on November 25, 2019; in Final Order entered on December 17, 2019; and in Plaintiff's Brief in Opposition to Defendant VIT's Motion for Summary Judgment on Plea in Bar, pp. 1,16-17).

8. To the extent that the trial court held that the notice of claim or injury and shortened time limit to sue provisions in VIT Schedule of Rates were enforceable as a contract implied-in-law against Walton, the trial court erred, because such contracts are enforceable only as equity and good conscience permit, and neither equity nor good conscience permitted time-barring Walton's land-based personal injury suit, timely filed within the two-year limitation period of Virginia Code § 8.01-243, when Walton neither knew of nor agreed to such provisions. (Error preserved in Order entered on November 25, 2019; in Final Order entered on December 17, 2019; and in Plaintiff's Brief in Opposition to Defendant VIT's Motion for Summary Judgment on Plea in Bar, pp. 1, 2, 18).

STATEMENT OF THE CASE

This action for personal injuries was filed in the Norfolk Circuit Court on March 11, 2019, by the Appellant Stephen K. Walton, Sr., (Walton) against Appellee Virginia International Terminals, LLC, (VIT) and co-defendants Ceres Marine Terminals, Inc., and CP&O, LLC, for injuries that Walton suffered while working as a longshoreman on VIT's marine terminal in the City of Norfolk, Norfolk International Terminals, on March 15, 2017. The suit alleged that VIT negligently maintained its property, causing a trip-and-fall hazard to be present that injured Walton, a business invitee, while he was working for his employer Marine Repair Services (MRS) on VIT's property at night.

In response to the Complaint, VIT filed a Demurrer and Motion Craving Oyer, which the plaintiff opposed with a Memorandum in Opposition. VIT, in its Reply Memorandum filed on June 28, 2019, attached a copy of a contract entitled "License Agreement" between VIT and Walton's employer MRS, which dealt with terminal usage.

After Walton filed an Amended Complaint and Bill of Particulars, VIT filed a Plea in Bar and Demurrer on August 2, 2019. The Plea in Bar was based on notice of claim or injury and time-to-sue provisions in VIT's Schedule of Rates. A copy of the Schedule of Rates was attached to the

Plea in Bar. On August 15, 2019, VIT filed a Motion for Summary Judgment on its Plea in Bar. On September 3, 2019, VIT filed a Brief in Support of its Plea in Bar. On September 13, 2019, Walton filed his Brief in Opposition to Defendant VIT's Motion for Summary Judgment on Plea in Bar.

On October 8, 2019, the parties appeared before the Honorable Michelle J. Atkins on VIT's Motion for Summary Judgment on its Plea in Bar. At the hearing, the trial court heard testimony from Mr. Walton. A copy of the hearing transcript was filed on December 23, 2019.

On November 12, 2019, the trial court issued a written opinion, granting VIT's motion for summary judgment on its Plea in Bar, holding that, pursuant to 46 U.S.C. § 40501(f) of the Shipping Act of 1984, VIT's Schedule of Rates was an implied contract with an enforceable time bar provision pursuant to Virginia Code § 8.01-243(A). (Opinion letter, p. 1). The opinion letter directed defense counsel to prepare an order consistent with the opinion.

On November 25, 2019, the trial court entered an order granting VIT's Motion for Summary Judgment on its Plea in Bar and dismissing VIT with prejudice. Defendants Ceres Marine Terminals, Inc., and CP&O, LLC, remained in the case at that time. The order of November 25, 2019, was not labeled expressly as a "Partial Final Judgment," nor did it contain other

language required by Rule 1:2 of the Rules of the Supreme Court of Virginia to be a final judgment. On December 17, 2019, the trial court entered an order nonsuiting the remaining defendants, and, finding there to be nothing further to be done by the court, ordered the action removed from the court's trial docket.

On December 18, 2019, Walton filed his Notice of Appeal.

STATEMENT OF FACTS

The record before the trial court consisted of the pleadings of the parties; documents attached as exhibits to the parties' memoranda; and the testimony of one witness, Walton, at the hearing on October 8, 2019. The facts are essentially undisputed and may be summarized as follows:

The Accident

On March 15, 2017, at about 12:30 a.m., Walton was working for his employer Marine Repair Services, Inc., (MRS) at VIT's marine terminal in the City of Norfolk, Norfolk International Terminals, in an area that VIT maintained for the temporary storage of refrigerated cargo containers, known as "reefers." (Amended Complaint, ¶s 4, 11, 15, 20, 36). The area where Walton was working was a yard on the terminal known as "reefer row," next to an area that VIT reserved for maintenance and repair of its equipment. (Amended Complaint, ¶s 20, 21, 24, 36). As Walton was

unplugging reefers from their power sources, he tripped over the blade of a forklift projecting from the adjacent VIT maintenance area, and suffered disabling injuries to his neck. (Amended Complaint, ¶s 39, 40, 62).

VIT's Schedule of Rates

As of October 1, 2016, VIT published on its website a Schedule of Rates, which included (within its 66 pages) provisions requiring all users of a VIT terminal (1) to notify VIT in writing within thirty (30) days of loss, damage, or injury caused by VIT; and (2) to file suit against VIT not later than one year after the occurrence. According to the Schedule, if the user failed comply with these provisions, "the claim shall be time-barred." Schedule of Rates, Section 207(A).

VIT'S Schedule of Rates Provides that Virginia Law Controls and that Federal Law Applies only if it does not Conflict with Virginia Law.

Section 207(C) of VIT's Schedule of Rates provides:

> The laws of the Commonwealth without reference to its choice of laws rules and, to the extent not in conflict with the law of Virginia, the general maritime laws and statutes of the United States, shall apply to all disputes arising from or related to this SOR.

There was no actual contract between VIT and Walton.

There was no evidence in the record before the trial court that there was any actual contract between VIT and Walton. VIT conceded that there

was no actual contract between and it and Walton. (VIT Reply Brief filed October 2, 2019, p. 4).

There was a contract between VIT and Walton's employer MRS.

In its reply brief filed on June 28, 2019, VIT attached a "License Agreement" between VIT and Walton's employer MRS, which VIT represented was in effect on the date of Walton's accident on March 15, 2019. The License Agreement describes several discrete premises licensed to MRS at the Norfolk terminal. (Agreement, p. 1). (The Amended Complaint pleaded that Walton's accident did not occur on any of these premises described as licensed.) (Amended Complaint, ¶s 21, 22). More importantly, the License Agreement also covers MRS' use of the terminal beyond these licensed areas, extending to the entire terminal. Section 30 of the contract provides that VIT's Schedule of Rates "is incorporated into this Agreement by reference and shall apply to **all of LICENSEE'S operations and activities on the Terminals."** (Agreement, p. 7).

Walton was not a party to the contract between VIT and MRS.

Walton is not named as a party to the contract between VIT and MRS. Walton alleged in his Brief in Opposition that he was not a party to the contract between VIT and MRS. (Brief in Opposition, p. 14). VIT conceded this fact in its Reply Brief. (VIT Reply Brief filed October 2, 2019,

p. 4). There was no evidence before the trial court that Walton was a party to the contract between VIT and MRS.

Walton did not know about the time limit provisions of VIT's Schedule of Rates, nor did he agree to them.

At the hearing on October 8, 2019, Walton testified that, before his lawsuit was filed, he never read VIT's Schedule of Rates. (October 8, 2019, transcript, pp. 39, 41). Before his lawsuit was filed, Walton did not know of any requirement to give notice to VIT of any claim or injury, nor did he know of any requirement to file suit against VIT within one year. (TR 39, 40). He was not aware that a Schedule of Rates existed. (TR 41). He never agreed to any notice provision or time for filing suit. (TR 40). The trial court accepted this testimony as true. (Opinion, p. 8).

SUMMARY OF ARGUMENT

The plaintiff respectfully submits that the trial court erred in granting VIT's Motion for Summary Judgment on its Plea in Bar, for several reasons: First, VIT's Schedule of Rates does not, pursuant to the federal Shipping Act, supplant Virginia common law and statutory law concerning notice of claim or injury and limitations periods for suing on a land-based personal injury action, because the Shipping Act does not pre-empt Virginia law in that area. Second, the Schedule of Rates notice of claim or injury and shortened time

limit to sue provisions are not enforceable against Walton as an implied contract, because Virginia law upholds contractual time limitations only with respect to a party to an actual contract who agrees to such limitations, but the Schedule of Rates is not an actual contract, Walton was not a party to an actual contract imposing such limitations, and Walton did not agree to the time limit provisions of VIT's Schedule of Rates. Third, the Schedule of Rates is not enforceable against Walton as an implied contract, pursuant to 46 CFR § 525.2(a), because there is an actual contract between VIT and Walton's employer for terminal usage. Fourth, the actual contract incorporating the Schedule of Rates between VIT and Walton's employer is not enforceable against Walton, because he was not a party to the contract. Fifth, the Schedule of Rates is not enforceable against Walton as an implied contract, because he did not know about the Schedule or agree to it, so the necessary element of mutuality of assent is missing. Sixth, to the extent the trial court held that the notice of claim or injury and shortened time limit provisions in the Schedule of Rates are enforceable as an implied contract-in-law, Virginia law does not enforce such contracts as a time bar to personal injury suits. Seventh, to the extent that the trial court held that the notice of claim or injury and shortened time limit provision of the Schedule of Rates are enforceable as an implied contract-in-law, equity and good conscience do not permit

application of those provisions to bar Walton's suit.

AUTHORITIES AND ARGUMENT

Standard of Review

Summary judgment may be granted when no genuine issue of fact remains in dispute on a controlling issue or issues and the moving party is entitled to judgment as a matter of law. Mount Aldi, LLC, v. Land Trust of Va., Inc., 293 Va. 190, 196, 796 S.E.2d 549, 553 (2017).

When the facts in the record are essentially undisputed, this Court is presented with a question of law regarding the trial court's application of law to those facts, and the *de novo* standard of review applies. Scott-Watson v. Commonwealth, 835 S.E.2d 902, 904 (Va. 2019); Rodriguez v. Leesburg Bus. Park, LLC, 287 Va. 187, 193, 754 S.E.2d 275, 278 (2014). The trial court's interpretation of written documents, including contracts and the Schedule of Rates, is a question of law which this Court reviews *de novo*. Brizzolara v. Sherwood Memorial Park, Inc., 274 Va. 164, 180, 645 S.E.2d 508, 515 (2007). Interpretation of statutory law, including the federal Shipping Act and the federal regulations thereunder, is a question of law, which this Court reviews *de novo*. Miller & Rhoads Bldg., L.L.C., v. City of Richmond, 292 Va. 537, 541, 790 S.E.2d 484, 486 (2016).

Analysis

WALTON'S PERSONAL INJURY ACTION AGAINST VIT WAS NOT TIME-BARRED BY VIT'S SCHEDULE OF RATES.

A. VIT'S Schedule of Rates does not, pursuant to the federal Shipping Act, supersede Virginia common law and statutory law concerning notice of claim or injury and limitations periods for suing on a land-based personal injury action, because the Act does not pre-empt Virginia law in that area. (Assignment of Error No. 1).

VIT erroneously argued, and the trial court apparently accepted the argument, that, pursuant to a federal statute, the Shipping Act of 1984, its Schedule of Rates notice of claim or injury and time to sue provisions, which conflict with Virginia law, applied to bar Walton's otherwise timely lawsuit as untimely. VIT's argument was essentially:

> the Federal Act allows us to issue a schedule of rates with regulations for the terminal;
>
> the notice and time to sue provisions in our Schedule of Rates are regulations, and Walton did not comply with them;
>
> the Schedule of Rates is enforceable against Walton as an implied contract;
>
> therefore Walton's claim is time-barred.

This argument is erroneous, because the federal act upon which VIT bases its authority does not pre-empt applicable Virginia law, under which Walton's suit was timely.

Virginia law applies to Mr. Walton's land-based personal injury tort action against VIT. Gardner v. Old Dominion Stevedoring Corp., 225 Va. 599, 603, 303 S.E.2d 914, 916 (1983). Pursuant to Virginia Code § 1-200, the common law of England remains the law of Virginia, insofar as it is not repugnant to the Bill of Rights and the Virginia Constitution, except as altered by the Virginia General Assembly. (VIT did not rely on, nor did the trial court cite, any Virginia legislation that enabled VIT to issue a schedule of rates that superseded other Virginia law.)

At common law, a tort victim is not required to provide a tortfeasor a pre-suit notice of a claim or injury in writing. Breeding ex re. Breeding v. Hensley, 258 Va. 207, 215, 519 S.E.2d 369, 373 (1999)(holding statutes requiring notice as a condition to making a claim against a municipality are in derogation of the common law). See also Yates v. Pitman Mfg., Inc., 257 Va. 601, 605, 514 S.E.2d 605, 606 (1999) holding that the non-purchaser of a product is not required to provide notice of a claim in order to maintain a tort action under Virginia law, because no statute requires such notice. If the opposite were true, any business in Virginia could post notice of claim and time limitation provisions like VIT's on its website, and bar by fiat premises liability lawsuits brought by unwitting visitors. In this case, no Virginia statute imposed a pre-suit notice of claim or injury condition on

Walton's suit against VIT. Virginia Code § 8.01-243(A) provides that, unless otherwise provided by that code section or by other statute, every action for personal injuries shall be brought within two years after the cause of action accrues. In this case, no other Virginia statute imposed a shorter limitations period on Walton's action against VIT.

There is no question but that, if VIT's Schedule of Rates does not have the legal authority to bar Walton's suit as untimely, then Walton's suit is not time-barred under Virginia law. Under Virginia common law, a tort victim is not required to give the tortfeasor a notice of claim or injury before filing suit. Walton filed suit within the two year period set by Virginia Code §8.01-243. While VIT touted the authority of the federal Shipping Act as enabling it to supersede Walton's rights under Virginia law, VIT did not argue that the Act pre-empted those rights. Yet it is obvious that the notice and shortened time limit to sue provisions of the Schedule of Rates, whose legal authority derives solely from the federal act, conflict with Walton's rights under Virginia law, i.e., no pre-suit notice of claim or injury required at common law, and two years in which to file suit.

VIT's claim that pre-emption is not an issue, and the trial court's failure to address pre-emption, does not mean that pre-emption was not a critical issue to address. When there may be a conflict between federal

law and state law, courts conduct a pre-emption analysis, to decide whether Congress intended for the federal law to supersede the otherwise controlling state law. See, e.g., Altria Group v. Good, 555 U.S. 70, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008). In this case, Walton's tort suit, and his rights under Virginia law that apply to that suit, are regulated by Virginia's historic police powers. If the Shipping Act does not pre-empt that Virginia law, VIT's argument falls like a house of cards, and the trial court committed reversible error.

A state's police power includes its power to protect the lives and health of its people. Kelly v. Washington, 302 U.S. 1, 13, 58 S.Ct. 87, 82 L.Ed. 3 (1937). State tort law is part of a State's historic police power. See Cipollone v. Liggett Group, 505 U.S. 504, 518-19, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984). "The pre-emption of state laws represents a serious intrusion into state sovereignty." Va. Uranium, Inc. v. Warren, 139 S.Ct. 1894, 1904, 204 L.Ed.2d 377 (2019). Courts are admonished that **'the historic police powers of the States are not to be superseded by the Federal Act, unless it is the clear and manifest purpose of Congress.'** Altria Group, 555 U.S. at 77. (Emphasis added). Furthermore, the Court has held that any federal statute in derogation of

the common law must be strictly construed, because no such 'statute is to be construed as altering the common law farther than its words express.' Robert C. Herd & Co. v. Krawill, 359 U.S. 297, 304-05, 79 S.Ct. 766, 3 L.Ed.2d 820 (1959).

In the present case, there is no pre-emption clause in the Shipping Act. Second, no part of the Shipping Act expressly conflicts with the Virginia rules of law discussed above. Third, nothing indicates that it was Congress' "clear and manifest purpose" through the Act to enable marine terminal operators through a schedule of rates to pre-empt the States' historic police power to regulate state law personal injury actions.

The primary purpose of the Shipping Act of 1984 was to eliminate discriminatory practices of terminals, shippers and carriers. Waterfront Comm'n of N.Y. Harbor and Elizabeth-Newark Shipping, Inc., 199 F.3d 177, 185 (3d Cir. 1998); Placquemines Port Harbor and Terminal Dist. v. Federal Maritime Comm'n, 838 F.2d 536, 543 (D.C. Cir. 1988). The regulations issued by the Federal Maritime Commission to administer 46 U.S.C. § 40501(f), the provision of the Shipping Act on which VIT based its Plea in Bar, were promulgated to "identif[y] and prevent unreasonable preference or prejudice or unjust discrimination." 46 CFR § 525.1(a).

The Shipping Act is designed to regulate shipping practices. It is not safety or personal injury tort legislation. Neither the Shipping Act nor its regulations mention personal injury actions, such as Walton's. Neither the Shipping Act nor its regulations prescribe any pre-suit notice or time limit in which to bring a state law personal injury claim against a marine terminal operator. The Act does not provide a federal remedy for any person injured on a marine terminal. This Court has recognized that lack of a federal remedy is a factor which militates against a finding that the federal act supersedes a person's rights under state tort law. Krantz v. International Air Line Pilots Ass'n, 245 Va. 202, 209, 427 S.E.2d 326, 330 (1993).

Pursuant to the section of the Shipping Act upon which VIT's argument hinges, 46 U.S.C. § 40501(f), a marine terminal operator may issue:

> a schedule of rates, regulations, and practices, including limitations of liability for cargo loss or damage, pertaining to receiving, delivering, handling, or storing property at its marine terminal.

While the Act authorizes limitations of liability for **cargo loss or damage**, it is silent with respect to personal injury claims. 46 U.S.C. § 40501(f) is very similar to a parallel provision of the Shipping Act of 1916, which authorized terminal facilities to keep open to the public a

> schedule or tariff, showing all its rates, charges, rules, and regulations, relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities.

46 U.S.C. § 841a, *quoted in* Federal Commerce & Navigation Co. v. Calumet Harbor Terminals, Inc., 542 F.2d 437, 439 (7th Cir. 1976). While the 1984 Act and its predecessor both authorized marine terminals to issue a schedule of rates concerning rates, charges, rules, and regulations, neither 46 U.S.C. § 40501(f), nor any other provision of the Act, requires or even mentions that a marine terminal can impose through its schedule of rates pre-suit notice or time limitations on state law personal injury claims. It is simply not the clear and manifest purpose of Congress to authorize or require marine terminals to impose such constraints on state law personal injury claims through a schedule of rates.

There is no reported case law analyzing whether 46 U.S.C. § 40501(f) authorizes or requires marine terminals to impose such limitations on state law personal injury claims. However, courts analyzing the above-quoted predecessor to 46 U.S.C. § 40501(f) have held that marine terminal operators were not authorized to impose time limits on a claim, through a tariff or schedule, because the federal statute did not authorize time limits for presentation of claims. Federal Commerce, 542 F.2d at 441; Pacific S.S. Co. v. Cackette, 8 F.2d 259, 260 (9th Cir. 1925).

In the case of Burlington Northern Railroad Company v. M.C. Terminals, 1992 FMC LEXIS 27, *80 (Federal Maritime Commission), the Commission explained:

> It is a basic principle of tariff law that extraneous matter injected into a tariff does not have the force of law, in contrast to the matters that are **required** to be filed in the tariffs.

(Emphasis added). The plain language of 46 U.S.C. § 40501(f) does not require VIT's Schedule of Rates to impose pre-suit notice or shortened time to sue limitations on state law personal injury claims.

For all the reasons stated above, 46 U.S.C. § 40501(f) of the Shipping Act does not authorize or require VIT's Schedule of Rates to impose notice of claim or injury, or time limits to sue, for personal injury that conflict with Virginia common law and/or prescribe a different limitation period than the two year period prescribed by Virginia Code § 8.01-243. In the absence of federal pre-emption, Virginia law controls, and Walton's suit is not time-barred.

B. The Schedule of Rates time provisions are not enforceable against Walton as an implied contract, because Virginia law upholds contractual time limitations only with respect to a party to an actual contract, but the Schedule of Rates is not an actual contract, Walton was not a party to an actual contract imposing such limitations, and Walton did not agree to any such limitations. (Assignments of Error Nos. 2, 3, 5, and 6).

Notwithstanding the fact that the federal act which enables terminal operators to issue a schedule of rates does not pre-empt the Virginia law which makes Walton's suit timely, the trial court misapplied Virginia law to hold that the VIT's Schedule of Rates notice and time limit to sue provisions were enforceable against Walton as an implied contract to time bar his claim.

VIT's Schedule of Rates has following choice of law provision:

> The laws of the Commonwealth of Virginia without reference to its choice of law rules and, to the extent not in conflict with the law of Virginia, the general maritime laws and statutes of the United States, shall apply to all disputes arising from or related to this SOR.

(VIT Schedule of Rates, Section 207(C)). As the drafter of its Schedule, VIT is subject to the rule that "unambiguous tariffs are enforced according to their plain terms, and ambiguous terms are strictly construed against the drafter." Verizon Va. LLC v. XO Communs., LLC, 144 F.Supp.3d 850, 858

(E.D. Va. 2015). By virtue of Section 207(C), Virginia law applies to VIT's Schedule; federal law applies only "to the extent **not** in conflict with the law of Virginia." (Emphasis added).

Relying on the case of Massie v. Blue Cross & Blue Shield, 256 Va. 161, 500 S.E.2d 509 (1998), the trial court held that, since, under Virginia law, parties to a contract can agree to a shorter period of time than set forth in the statute of limitations to bring a claim, the Schedule of Rates was an effective implied contract to bar Walton's claim. (Opinion, p. 7). This holding was erroneous for the reasons stated below.

Virginia law upholds contractual time limitations only as to **parties** to an **actual contract** who **agree** to those limitations. It is well-settled that **parties may agree** that a claim under an actual contract must be enforced within a shorter time limit than is fixed by statute. Massie, 256 Va. at 164, 500 S.E.2d at 511 (insurance policy) ; Board of Supervisors v. Sampson, 235 Va. 516, 520, 369 S.E.2d 178,180 (1988)(written contract); Liquid Carbonic Co. v. Norfolk & W. R. Co., 107 Va. 323, 58 S.E. 569 (1907)(bill of lading). Each of the cases cited above involved an actual, not implied, contract, to which the plaintiff was a party.

A marine terminal schedule of rates is not an actual contract. Rafinasi v. Coastal Cargo Co., 552 Fed. Appx. 394, 400 (5th Cir. 2014). A marine

terminal schedule of rates is a "unilateral promulgation, not a product of bargaining." Pate Stevedore Co. v. Alabama State Docks Department, 1988 FMC LEXIS 21, *13 (Federal Maritime Commission 1988).

Walton's employer MRS did have an actual contract with VIT which fully incorporated the Schedule of Rates. Because of that actual contract, to which MRS agreed, MRS was subject to the time limitations in the Schedule. Walton, however, was not a party to that contract. Under Virginia law, a person who is not a party to a contract is not subject to the contract, including its time limitations. Commercial Constr. Specialties, Inc. v. ACM Constr. Management Corp., 242 Va. 102, 106, 405 S.E.2d 852, 854 (1991). Walton was not bound to the contract between VIT and MRS, nor to the Schedule of Rates pre-suit notice or time to sue provisions incorporated therein, because he was not a party to the contract.

Even if the Court should decide that the rule involving contractually shorter time limits applies to implied contracts as well as actual contracts, the Schedule of Rates time limit provisions are not enforceable against Walton, because he never knew of or agreed to them. Virginia law requires **mutuality of assent**---a meeting of the minds---between parties, before an implied or actual contract is enforceable. Spectra-4, LLP v.Uniwest Commer. Realty, Inc., 290 Va. 36, 45, 772 S.E.2d 290, 295 (2015). In the

case of Progressive Constr. Co. v. Thumm, 209 Va. 24, 30, 161 S.E.2d 687, 691(1968), the Court explained what mutuality of assent means:

> In order that there may an agreement, the parties must have a **distinct intention common to both** and without doubt or difference. **Until all understand alike, there can be no assent**.... (Emphasis added).

VIT will no doubt argue that no mutuality of assent was necessary here, because 46 U.S.C. § 40501(f) provides that provides that marine terminal schedules are "enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions." The trial court agreed with VIT, holding that Walton's use of the VIT premises, with no knowledge of the Schedule or agreement to its terms, was sufficient as assent, notwithstanding that mere use was no assent at all. (Opinion, p. 8).

VIT's choice of law language in its Schedule of Rates supplies a ready answer to VIT's argument and shows why the trial court erred in making this holding. Pursuant to Section 207(C) of the Schedule, Virginia law controls, and federal law applies only "to the extent **not** in conflict with the law of Virginia." (Emphasis added). VIT cannot ask the Court to redraw its Schedule of Rates for it. Because Virginia law requires mutuality of assent in express and implied contracts, and there is no evidence that Walton knew of or agreed to the Schedule of Rates, the pre-suit notice and time to sue limitations in the Schedule are not enforceable against him.

C. The Schedule of Rates time provisions are not enforceable against Walton, because there was an actual contract for terminal usage between Walton's employer and VIT, so that the Schedule is not enforceable as an implied contract, by virtue of 46 CFR § 525.2(a)(3). Because Walton was not a party to the actual contract, it was not enforceable against him. (Assignments of Error Nos. 4 and 5).

The Schedule of Rates time provisions were not enforceable against Walton, because there was an actual contract for terminal usage between Walton's employer and VIT. Shipping Act regulation 46 CFR § 525.2(a)(3) provides:

> Contracts for terminal services. If the marine terminal operator has an actual contract with a party covering services rendered by the marine terminal operator rendered to that party, an existing terminal schedule covering those same services shall not be enforceable as an implied contract.

Under the plain language of the regulation, if there was an actual contract between VIT and "a party," covering the services mentioned in the Schedule, the Schedule is not enforceable as an implied contract.

In fact, there was an "actual contract" for the "same services"---terminal usage by MRS and its employees---between VIT and "a party"--- Walton's employer, MRS. 46 CFR § 525.1(b)(19) defines "terminal services" to include "usage." It is undisputed that Walton was using the terminal when he was hurt, doing work for his employer MRS. The License Agreement between VIT

and MRS also covers MRS' use of the terminal beyond licensed areas, extending to the entire terminal, and the Amended Complaint alleged that Walton was working on the terminal in an area outside of the licensed areas listed in the contract. (Amended Complaint ¶s 21, 22). Section 30 of the contract provides that VIT's Schedule of Rates "is incorporated into this Agreement by reference and shall apply to **all of [MRS'] operations and activities on the Terminals.**" (Agreement, p. 7)(emphasis added).

Because there was an actual contract between MRS and VIT for terminal usage, the Schedule of Rates was not enforceable as an implied contract against Walton, pursuant to 46 CFR § 525.2(a)(3). Notwithstanding this fact, the trial court held that, because the actual contract between MRS and VIT incorporated the Schedule of Rates, the actual contract "preserv[ed] any enforceability that would have otherwise been nullified by the existence of an actual contract." (Opinion, p. 8). Here the trial court erred in holding that the contract between MRS and VIT was enforceable against Walton, because Walton was not a party to that contract.

As mentioned above, VIT's choice of law provision in its Schedule of Rates states that Virginia law applies to all disputes arising from or related to its Schedule. Federal law applies only to the extent **not** in conflict with

Virginia law. (Schedule, Section 207(C)). Under controlling Virginia law, Walton was not bound to the contract between VIT and MRS, including the Schedule of Rates incorporated therein and its time provisions, because he was not a party to the contract. Commercial Constr. Specialties, Inc. v. ACM Constr. Management Corp., 242 Va. 102, 106, 405 S.E.2d 852, 854 (1991).

D. To the extent that the trial court held that the Schedule of Rates was enforceable against Walton as a contract implied-in law, the trial court erred in holding that the Schedule time-barred Walton's claim, because Virginia law does not recognize such a time-bar as a remedy for contracts implied-in-law. (Assignment of Error No. 7).

Neither VIT nor the trial court in its opinion specified whether the Schedule of Rates was a contract implied in fact or an contract implied in law. For that reason, enforceability of the Schedule as a contract implied in law will be addressed in Parts D and E of the Argument, in addition to the federal pre-emption issue addressed in Part A, and the fact that the Schedule is not enforceable as an implied contract of any type, because of the actual contract between VIT and MRS, pursuant to 46 CFR § 525.2(a)(3), addressed in Part C of the Argument.

As mentioned above, pursuant to Section 207(C) of VIT's Schedule of Rates, Virginia law applies. A contract implied-in-law is "no contract at all,

but a form of remedy of restitution." Restatement (2d) of Contracts, §4, comment b. A contract implied-in-law rests upon the principle of preventing unjust enrichment, requiring someone who has benefited and accepted the services to pay reasonable compensation for those services. Po River Water & Sewer Co. v. Indian Acres Club, 255 Va. 108, 114, 495 S.E.2d 478, 482 (1998). Because the purpose of a contract implied-in-law is to prevent unjust enrichment, the sole remedy for a contract implied-in-law is restitution. The remedy which VIT sought against Walton was not restitution but a time-bar of his personal injury claim. Because such a remedy is not recognized under Virginia law for a contract implied-in-law, Walton's claim cannot be time-barred by a Schedule of Rates enforceable as a contract implied-in-law.

E. To the extent that the trial court held that the Schedule of Rates was enforceable against Walton as a contract implied-in-law, the trial court erred in holding that the Schedule time-barred Walton's claim, because equity and good conscience did not permit such a result, when Walton timely filed his suit within the two-year statutory limitations period, and he neither knew or agreed to the time provisions in the Schedule. (Assignment of Error No. 8).

In addition to the reasons stated above, the notice and shortened time to sue provisions in VIT's Schedule of Rates cannot be enforced as a

contract implied-in-law to time-bar Walton's claim, because, under Virginia law, contracts implied-in-law can be enforced only as equity and good conscience permit. Spectra-4, LLP v. Uniwest Commer. Realty, Inc., 290 Va. 36, 42 n. 2, 772 S.E.2d 290, 294 n. 2 (2015). Under the circumstances of this case, equity and good conscience do not permit application of VIT's Schedule to bar Walton's claim.

The evidence before the trial court was undisputed that, before he filed his action against VIT, Walton was not aware that a Schedule of Rates existed. (October 8, 2019, transcript, p. 41). He had never read VIT's Schedule of Rates. (TR 39, 41). This is understandable, because Walton's Employer MRS never told him that the Schedule of Rates applied to him. (TR 38-39). Before his lawsuit was filed, Walton did not know of any requirement to give notice to VIT of any claim or injury, nor did he know of any requirement to file suit against VIT within one year. (TR 39-40). He never agreed to any notice provision or time for filing suit. (TR 40). In addition to this evidence, Walton testified that, although from 2015 until the date of his injury, he served on a contract board, which consists of longshoremen and management representatives, including VIT representatives, VIT never notified members of the contract board of a notice requirement or shortened time limit to sue. (TR 35-36).

Furthermore, Walton testified that, from 2015 until the date of his injury, he also served on a safety committee, which included union officials and VIT representatives. (TR 37). At the safety committee meetings, VIT never notified anyone of a notice requirement or shortened time limit to sue. (TR 37-38).

There was no evidence before the trial court that VIT published its notice or shortened time to sue provisions anywhere at its terminal. The only "notice" that VIT gave was by inserting these provisions into its 66 page Schedule of Rates on its website.

For all these reasons, Walton respectfully submits that enforcement of the notice and shortened time to sue provisions against him as a contract-implied-law to time-bar his claim was not permitted under Virginia law. Equity and good conscience do not permit barring his claim on such grounds.

CONCLUSION AND RELIEF SOUGHT

For all the reasons stated above, the plaintiff-appellant Stephen K. Walton, Sr., by counsel, respectfully requests that this Court grant his Petition for Appeal, reverse the decision of the Circuit Court of the City of Norfolk dismissing with prejudice his action against Virginia International Terminals, LLC, and remand the case to the Circuit Court for further

proceedings.

Respectfully submitted,

STEPHEN K. WALTON, SR.

By _____
Of Counsel

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CERTIFICATE

Pursuant to Rule 5:17 of the Rules of the Supreme Court of Virginia, Lance A. Jackson, the undersigned counsel for the plaintiff/appellant certifies as follows:

1. The appellant is Stephen K. Walton, Sr., and is represented by Lance A. Jackson, Esq. (VSB No. 26035), MONTAGNA KLEIN CAMDEN, L.L.P., 425 Monticello Avenue, Norfolk, VA 23510, Telephone no. (757) 622-8100, Facsimile no. (757) 622-8180, email: ljackson@montagnalaw.com.

2. The appellee is Virginia International Terminals, LLC, and is represented by John E. Holloway, Esq., (VSB No. 28145), Daniel T. Berger, Esq., (VSB No. 81861), and Ryan T. Gibson, Esq. (VSB No. 83183), TROUTMAN SANDERS, LLP, 222 Central Park Avenue, Suite 2000, Virginia Beach, VA 23462, Telephone no. (757) 687-7724, email: john.holloway@troutman.com, daniel.berger@troutman.com, and ryan.gibson@troutman.com.

3. On this 21st day of February 2020, seven copies of the foregoing Petition for Appeal were hand-filed with the Clerk of the Supreme Court of Virginia, and a copy of the Petition for Appeal was mailed via U.S. Mail, postage pre-paid, to all opposing counsel and all parties not represented by counsel.

4. Further, counsel for the appellant requests that he be permitted to state orally, in person, to a panel of this Court the reasons why this Petition for Appeal should be granted, and he wishes to do so in person.

Lance A. Jackson, Esq. (VSB No. 26035)
Counsel for Plaintiff/Appellant Stephen K. Walton, Sr.

Calendar 144

105TH CONGRESS *1st Session*	SENATE	REPORT 105–61

OCEAN SHIPPING REFORM ACT

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 414

JULY 31, 1997.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
39–010 WASHINGTON : 1997

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FIFTH CONGRESS
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Calendar No. 144

105TH CONGRESS *1st Session* | SENATE | REPORT 105–61

OCEAN SHIPPING REFORM ACT

JULY 31, 1997.—Ordered to be printed

Mr. MCCAIN, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 414]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 414) "A Bill to amend the Shipping Act of 1984 to encourage competition in international shipping and growth of United States imports and exports, and for other purposes", having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

S. 414, the Ocean Shipping Reform Bill of 1997, would amend the Shipping Act of 1984 (46 U.S.C. App. 1701 et seq.), and other related U.S. shipping laws to encourage competition in international shipping, growth in United States exports, and the increased use of United States ports for international trade, and for other purposes.

BACKGROUND AND NEEDS

Ocean liner shipping is an international industry involving trade between sovereign nations, and the industry is subject to multinational regulation. The international nature of the industry has been characterized by chronic conditions of carrier overcapacity. The primary cause of liner shipping overcapacity is the presence of international policies designed to promote national-flag carriers and also to ensure strong shipbuilding capacity in the interests of national security and employment. These policies include subsidies to purchase ships and operate ships, tax advantages to lower costs, cargo reservation schemes, and national control of shipyards and

shipping companies and have resulted in an industry which is not completely driven by economic objectives.

Expansion of the liner shipping industry has increased every year since the utilization of containerization in the late 1960's, and in the 1990's, container port handling has risen at nearly 10% per annum. According to a Drewry shipping report on Global Container Markets—Prospect and Profitability in a High Growth Era (1996): "Global ocean and intermodal container freight revenue is around $80–90 billion per annum, and while this is rising annually with the expansion of world container trade, unit revenues are, and have been consistently falling. For instance, in the transpacific trade, average unit revenues were 60% less in real terms in 1994 than in 1976. The transatlantic market presents a broadly similar picture, and average westbound earnings in 1994 (post-Trans-Atlantic Agreement and Trans-Atlantic Conference Agreement rate restoration) were just 46% of 1978's level in real terms, having reached as low as 35% at the bottom of the market in 1992." The primary causes for reductions in unit revenues per box, in real terms, continue to be overcapacity and gains in productivity inherent in intermodal containerization.

Historically, ocean shipping liner companies attempted to combat the ocean shipping overcapacity that had developed into "rate wars" by establishing shipping conferences to coordinate their practices and pricing policies. The first shipping conference was established in 1875, but it was not until 1916 that the Federal government reviewed the conference system. The Alexander Committee (named after the then-Chairman of the House Committee on Merchant Marine and Fisheries) recommended continuing the conference system in order to avoid ruinous "rate wars" and trade instability, but also determined that conference practices should be regulated to ensure that they did not adversely impact shippers. All other maritime nations allow shipping conferences to exist with immunity from the application of antitrust or competition laws.

U.S. regulation of the international ocean shipping industry began with the Shipping Act, 1916 (1916 Act). The 1916 Act provided conferences with immunity from U.S. antitrust laws, imposed certain requirements on conferences (such as free entry and exit of their members, or more commonly known as open conference requirements), and prohibited discriminatory rates or services. The 1916 Act also created a separate government agency, the United States Shipping Board, to enforce the 1916 Act.

In 1961, Congress amended the 1916 Act to address certain concerns about anticompetitive conduct by ocean carrier conferences. The 1961 Amendments mandated tariff filing, introduced a limited form of independent action, and established an independent agency, the Federal Maritime Commission (FMC), to regulate ocean shipping practices. Prior to the creation of the FMC, ocean shipping regulation was performed by the Federal Maritime Board as part of the Department of Commerce. The 1961 Amendments authorized the FMC to apply a public interest standard to the agency's review of ocean carrier agreements, strengthened the FMC's powers to investigate and punish ocean carrier transgressions, and authorized it to disapprove rates that were determined to be detrimental to the commerce of the United States.

After enactment of the 1961 Amendments, ocean carriers complained about delays in the FMC agreement approval process. The 1961 Amendments strengthened the agreement review process to incorporate public interest standards, and the injection of antitrust considerations after the Supreme Court decision in Federal Maritime Commission v. Aktiebolaget Svenska America Linien, 390 U.S. 238 (1968), severely delayed consideration and approval of carrier agreements.

The advances in ocean shipping productivity were dramatic in the 1960's and 1970's, but the general worldwide recession in the early 1970's tightened the need for shipping services. Foreign carriers crowded into the U.S. trades where the U.S. policy requiring conferences to be open guaranteed that they would be entitled to conference cargoes. Uncertainty as to the legality of ocean shipping agreements that contained land-side intermodal agreements, widespread illegal practices brought about by competitive pressures, and delays in approval for agreements that increased productivity by allowing and facilitating intermodal containerization, led to the call for reform of the 1916 Act.

Congress considered ocean shipping regulation throughout the 97th and 98th Congress, culminating in the enactment of the Shipping Act of 1984 (1984 Act). The 1984 Act overhauled the ocean carrier agreement review process, allowed greater flexibility in the type of discount-rate and contracts that could be offered by ocean carriers, recognized the increasing role of non-vessel-operating common carriers (NVOCCs) and shippers' associations in facilitating intermodal ocean transportation, and expanded the right of independent action to conference tariffs. While the 1984 Act allowed greater discrimination for service contracts than tariffs, it essentially preserved common carriage requirements for both types of transactions, and similarly situated shippers were afforded identical contract rights.

The 1984 Act also established an Advisory Commission on Conferences in Ocean Shipping (the Advisory Commission), effective five and one-half years after the date of enactment, to study the ocean shipping regulatory system and recommend changes to that system. The Advisory Commission report, submitted in April 1992, produced no consensus within either the Advisory Commission or the industry on recommended changes to the 1984 Act. The Advisory Commission report, however, identified several concerns of individual industry segments with certain aspects of the regulatory system:

Ocean carrier conferences: Many shippers expressed concern that conferences were able to wield excessive power to prevent competition under the 1984 Act. This concern was based on the FMC's limited ability to challenge anticompetitive ocean carrier agreements under section 6(g) of the 1984 Act, the increasing market share of conferences in most trade lanes, the use of trade stabilization agreements between conferences and non-conference ocean carriers, conference use of public tariff and service contract information and the independent action 10-day waiting period to restrict competition among conference carriers, and the absence of a mandatory right of independent action by conference carriers for service contracts. Ocean carriers contended that an unrestricted market would

result in a highly destructive market, and rapidly devolve into a market oligopoly.

Publication of tariff and service contract rates and terms: Many shippers, especially large volume shippers, expressed concern that the transparency of the U.S. system disadvantages U.S. shippers with respect to their foreign competitors in third markets. In general, foreign nations have not required transparency of rates or services, and their shippers' rates are not publicly accessible. Larger shippers also objected to the requirement that similarly situated shippers be allowed to access identical service contract rights, contending that it reduced their ability to negotiate competitive advantages, while smaller shippers contended that this right helped to counter competitive advantages. Many shippers also objected to conference provisions that restricted their rights to negotiate directly with individual conference carriers.

Shippers' associations, NVOCCs, and freight forwarders: Many shippers' associations and NVOCCs expressed concerns that conferences were not negotiating with them in good faith. Many freight forwarders wanted to increase the mandatory floor for freight forwarder compensation, which is only applicable to freight forwarders that are also customs brokers, to include those forwarders who do not also perform customs brokerage. These entities generally supported the 1984 Act's transparency and common carriage requirements, although some NVOCCs generally wanted relief from tariff filing requirements. Many NVOCCs also wanted the right to enter into service contracts with shippers as carriers to help them compete with ocean carriers. Smaller shippers also expressed concerns that reductions in contract transparency could facilitate carrier abuse of collective business authority, and would also ensure the benefit of larger shippers at the expense of smaller shippers.

Subsequent to the Advisory Commission report, Committee hearings and discussions with industry representatives have produced similar views as expressed in the report. One significant exception is the recent support of U.S. ocean carriers for relief from common carriage principles with respect to service contracts, including confidentiality of service contract terms. Since the Advisory Commission report, ocean carrier relationships have become increasingly diversified. As the need for intermodal shipping services becomes increasingly global, ocean carriers increasingly rely on complex partnerships with other ocean carriers to coordinate assets and services to meet this global requirement. These ocean carrier partnerships involve smaller carrier groups and more comprehensive coordination of intermodal and ocean shipping assets than typical conference activities, which are focused more on rate stability. Many U.S. ocean carriers participate in collective shipping arrangements and believe that these arrangements would produce maximum efficiency if carriers were allowed to engage in joint contracts for service. Shipper needs for global shipping alternatives will continue, and carrier flexibility to engage in tailored carrier-shipper contracts will increase.

While developing the reported bill, the Committee conducted two hearings and more than 100 meetings with affected industry and Federal agency representatives, spent in excess of 300 hours in dis-

cussion with these representatives, and developed a comprehensive understanding of the concerns of all of these affected parties. Attempts to balance the interests of all affected parties were difficult given the competing interests. Additionally, the Committee bill attempted to balance the need to deregulate the industry with the need to provide oversight of industry practices, given the immunity from the antitrust laws. The reported bill attempts to compromise the positions and interests of those who support complete deregulation of ocean shipping and those who support the status quo.

LEGISLATIVE HISTORY

On February 2, 1995, the House of Representatives Committee on Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation held a hearing on international ocean shipping. On August 1, 1995, Congressman Shuster, Chairman of the House Transportation and Infrastructure Committee introduced H.R. 2149, the Ocean Shipping Reform Act of 1995, with Congressmen Mineta, Coble, Traficant, and Oberstar as cosponsors. On August 2, 1995, the House Transportation and Infrastructure Committee ordered H.R. 2149 reported by voice vote.

On October 23, 1995, Senator Pressler, Chairman of this Committee, introduced S. 1356, the Ocean Shipping Reform Act of 1995, which was a companion bill to H.R. 2149, as reported. On November 1, 1995, the Committee held a hearing on S. 1356. Because of concerns about lack of oversight of carrier practices immune from the antitrust laws, the Committee worked to develop a compromise that would ensure a higher degree of review of carrier-shipper practices. Senator Pressler published amendments to S. 1356 in the Congressional Record on July 18, 1996 and September 30, 1996 for public comment. The Senate Commerce Committee took no further action on ocean shipping regulation in the 104th Congress.

On March 10, 1997, Senator Hutchison, Chairman of the Committee's Subcommittee on Surface Transportation and Merchant Marine, introduced S. 414. The bill was cosponsored by Senators Lott, Breaux, and Gorton. This bill included minor changes to the amendment to S. 1356 published on September 30, 1996. The Subcommittee held a hearing on S. 414 on March 20, 1997 (see Senate document S. Hrg. 105-57 for a record of the hearing). On May 1, 1997, the Committee considered and adopted an amendment in the nature of a substitute for S. 414 offered by Senator Hutchison, cosponsored by Senators Lott, Breaux, and Gorton. The Committee also adopted an amendment offered by Senator McCain that would prohibit ocean carriers that had violated certain U.S. shipping laws within the previous five years from receiving a shipbuilding loan guarantee under title XI of the Merchant Marine Act, 1936. The amended bill was ordered reported by the Committee.

SUMMARY OF MAJOR PROVISIONS

As reported, S. 414 would, for ocean liner shipping through U.S. ports:

1. Provide shippers and common carriers greater choice and flexibility in entering into contractual relationships with shippers for ocean transportation and intermodal services. The

most significant improvement is the right of members of ocean carrier agreements to negotiate and enter into service contracts with one or more shippers independent of the agreement.

2. Reduce the expense of the tariff filing system and privatize the function of publishing tariff information while maintaining current tariff enforcement and common carriage principles with regard to tariff shipments.

3. Protect U.S. exporters from disclosure to their foreign competitors of their contractual relationships with common carriers and proprietary business information, including targeted markets.

4. Specifically exempt new assembled motor vehicles from tariff and service contract requirements and provide the FMC with greater flexibility to grant general exemptions from provisions of the 1984 Act.

5. Reform the licensing and bonding requirements for ocean freight forwarders and NVOCCs and consolidate the definitions of those two entities under the term "ocean transportation intermediary."

6. Strengthen the provisions of the 1984 Act, the Foreign Shipping Practices Act of 1988, and section 19 of the Merchant Marine Act, 1920, that prohibit unfair foreign shipping practices to provide greater protection from certain discriminatory actions.

7. Provide for an orderly transition to this more deregulated ocean shipping environment.

8. Transfer the functions of the FMC to the Surface Transportation Board (STB), rename the STB as the Intermodal Transportation Board (ITB), and make appropriate changes in the qualifications of ITB members.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 13, 1997.

Hon. JOHN MCCAIN,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 414, the Ocean Shipping Reform Act of 1997.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Deborah Reis (for the federal costs); Karen McVey (for the state and local impact); and Lesley Frymier (for the private-sector impact).

Sincerely,

PAUL VAN DE WATER
For June E. O'Neill, (Director).

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 414—Ocean Shipping Reform Act of 1997

Summary: S. 414 would amend the Shipping Act of 1984 and other laws that govern the regulation of ocean shipping by the Federal Maritime Commission (FMC). The bill would authorize the appropriation of $15 million for the FMC for fiscal year 1998 while also providing for the subsequent termination of the agency and transfer of its responsibilities to the Surface Transportation Board (STB). Finally, the bill would extend eligibility for certain veterans' death benefits to cover merchant mariners who served between August 16, 1945, and December 31, 1946.

Assuming appropriation of the authorized amount, CBO estimates that the FMC would spend $15 million in 1998 to carry out routine duties as well as one-time activities to implement this legislation. Enacting the bill also would increase direct spending by between $0.2 million and $0.4 million annually. Finally, enacting S. 414 would increase federal revenues by about $1 million in 1998 and decrease revenues by roughly the same amount in each of the following years. Because the bill would affect direct spending and receipts (revenues), pay-as-you-go procedures apply.

S. 414 contains several provisions that would either eliminate existing requirements on the private sector or impose new private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA). S. 414 contains no intergovernmental mandates as defined in UMRA and would have no significant impact on state, local, or tribal governments.

Estimated cost to the Federal Government: CBO estimates that enacting S. 414 would increase discretionary spending in 1998 by $1 million over the current year's funding level, assuming appropriation of the authorized amount. In addition, the bill would affect both revenues and direct spending each year. These budgetary effects are summarized in the following table.

[By fiscal years, in millions of dollars]

	1997	1998	1999	2000	2001	2002
SPENDING SUBJECT TO APPROPRIATION						
FMC Spending Under Current Law:						
Budget Authority[1]	14	0	0	0	0	0
Estimated Outlays	14	1	0	0	0	0
Proposed Changes:						
Authorization Level	0	15	0	0	0	0
Estimated Outlays	0	14	1	0	0	0
FMC Spending Under S. 414:						
Authorization Level[1]	14	15	0	0	0	0
Estimated Outlays	14	15	1	0	0	0
CHANGES IN DIRECT SPENDING AND REVENUES						
Direct Spending:						
Estimated Budget Authority	0	(2)	(2)	(2)	(2)	(2)
Estimated Outlays	0	(2)	(2)	(2)	(2)	(2)
Revenues:						
Estimated Revenues	0	1	−1	−1	−1	−1

[1] The 1997 level is the amount appropriated for that year.
[2] Less than $500,000.

The costs of this legislation fall within budget function 400 (transportation).

Basis of estimate: For purposes of this estimate, CBO assumes that S. 414 will be enacted by the end of fiscal year 1997 and that all provisions will become effective at that time or as stated in the bill. We also assume that the entire amount authorized will be appropriated by the beginning of fiscal year 1998. Outlays for discretionary activities are estimated on the basis of historical spending patterns for the FMC. Estimates of discretionary costs, changes in federal revenues, and direct spending effects are based on information provided by the FMC, the U.S. Coast Guard, and the Office of Management and Budget.

Spending subject to appropriation

S. 414 would authorize the appropriation of $15 million for the FMC for fiscal year 1998. Assuming appropriation of the entire amount authorized, CBO estimates that the FMC would spend most of the increase on one-time activities to implement Titles I and II of the bill.

Title I would make significant changes in how the FMC regulates ocean shipping, particularly common carrier rates, and terms and conditions for services provided under tariff and/or contract. This title would amend the 1984 act to eliminate the existing requirement that ocean common carriers and conferences file their tariffs with the FMC. Common carriers and conferences (associations of carriers) would still have to make tariffs available electronically to the public for reasonable fees (or to federal agencies at no charge), but the tariffs would not require FMC approval before they become effective. Common carriers (of any type or combination) would still have to file all service contracts with the FMC and publish an abstract of the contract's essential terms, but they would no longer have to disclose rate information publicly. The FMC would still have to acquire and review published tariffs and suspend or prohibit the use of those found to violate federal shipping laws.

Title I would repeal 46 app. United States Code 1707a, which requires the FMC to collect and disseminate to the public all tariffs and other information through an automated tariff filing and information system (ATFI). The FMC would still be charged with ensuring the accessibility and accuracy of all private automated systems used to provide tariff information to the public. Other provisions of Title I would strengthen regulations on controlled carriers (which are common carriers owned or otherwise controlled by foreign governments) and would change licensing and financial security requirements imposed on non-vessel-operating common carriers (NVOCCs) to be more consistent with those on ocean freight forwarders (OFFs).

Title II of the bill would terminate the FMC and transfer all of the agency's functions and responsibilities to the STB, which would be renamed the Intermodal Transportation Board (ITB). These provisions of Title II would be effective on January 1, 1999.

Of the $15 million authorized, we estimate that the FMC would incur one-time costs of about $1 million in 1998 to implement the changes made by Titles I and II. The agency would use some of this money for rulemaking proceedings. For example, the agency would

have to promulgate regulations to implement the tariff filing changes made by section 106, including new guidelines on electronic tariff systems. Also, the termination of ATFI could result in costs of up to $0.2 million to relocate computer equipment owned by the FMC but located on a contractor's premises. Finally, the balance would be spent on activities associated with the agency's termination and the transfer of regulatory responsibilities to the ITB. One-time spending for these purposes would include minor rulemaking costs and severance payments to former employees. We expect that any reduction in personnel levels would be small, and that severance costs would therefore be minimal.

After the two regulatory bodies have merged, ongoing costs to carry out the new board's responsibilities would be about the same as those incurred by the FMC and the STB under current law. In addition to reviewing tariffs for potential violations of the law, the government would continue to undertake its other regulatory responsibilities, such as investigating complaints against carriers and others, overseeing conference agreements and activities, and taking actions against those who engage in prohibited acts.

Direct spending

Under Title IV, merchant mariners who served between August 16, 1945, and December 31, 1946, would be eligible for veterans' burial and funeral benefits. CBO estimates that these provisions would increase direct spending by $0.2 million in fiscal year 1998 and by gradually increasing amounts in subsequent years, up to $0.4 million annually by 2001.

CBO estimates that, to carry out Title IV, the Coast Guard would incur administrative costs of about $1.5 million in 1998 and $1 million in the following year. The increased spending in both years would be offset by fee collections provided for in the bill. Also beginning in 1998, the federal government would pay about $0.2 million in additional death benefits (including flags, headstones, burial allowances) to eligible seamen. This amount would grow to about $0.4 million annually by 2001.

Revenues

Several provisions of S. 414 would affect federal revenues. The most significant of these are sections 106 and 107, which would free carriers and conferences from having to file tariffs with the FMC and would terminate the agency's responsibility to make tariff information available electronically. As a result of these provisions, the Treasury would lose nearly all of the $0.8 million it collects annually from tariff filing fees, remote access charges, and sales of ATFI tapes. Such losses would be partially offset by increased collections of license application fees resulting from section 117, which would require NVOCCs to obtain licenses as ocean transportation intermediaries. We estimate that such revenues would be about $1.4 million in 1998 for initial applications and about $0.2 million annually thereafter for new applications and license amendments. Finally, the penalty provisions in section 113 also could result in additional revenues, but these are likely to be minimal. As shown in the preceding table, the net effect of all

changes in federal revenues would be an increase of about $1 million in 1998 and a loss of a similar amount each year thereafter.

Pay-as-you-go considerations: Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending or receipts through 1998. CBO estimates that S. 414 would have no significant effect on direct spending in fiscal year 1998 and would increase receipts in 1998 by about $1 million.

Estimated impact on State, local, and tribal governments: S. 414 contains no intergovernmental mandates as defined in UMRA. Title I of the bill would relieve operators of marine terminals, some of which are state or local governmental entitles, of two administrative requirements and provide them new legal protection in certain rate-setting actions. Based on information from operators of public marine terminals and ports, CBO estimates that any savings resulting from these provisions would be negligible.

Enactment of Title IV of the bill could result in additional costs for some state, local, and tribal governments to the extent that their retirement systems provide credit for military service. (For the purposes of certain state retirement benefits, this title would result in an extra sixteen months of service credit for merchant mariners because some states credit such service towards their governmental retirement systems.) Based on information from state retirement officials and the National Association of State Retirement Executives, CBO estimates such costs would not be significant.

Estimated impact on the private sector: S. 414 would eliminate existing mandates on common carriers, conferences, and marine terminal operators and impose new mandates on common carriers and conferences. Based on information provided by government and industry sources, CBO estimates that the net direct costs of these new mandates would not exceed the statutory threshold established in UMRA ($100 million in 1996, adjusted annually for inflation) in any year.

Section 104 would require conferences to prohibit agreements that require members to disclose terms of service contracts or that restrict member negotiations for service contracts. CBO believes that these requirements would weaken conferences' control over service contracts. The magnitude of the costs to conferences is unclear; however, any costs associated with these requirements would most likely be offset by benefits to shippers.

Section 106 would eliminate the existing mandate that common carriers and conferences file tariffs with the Federal Maritime Commission and replace it with a requirement that they make tariffs publicly available, according to regulations that would be issued by the FMC. Based on information provided by government and industry sources, CBO estimates that the costs of the new mandate, in aggregate, would most likely be less than or equal to the costs of the existing mandate.

Section 117 would replace the license requirement for ocean freight forwarders (OFFs) with a license requirement for ocean transportation intermediaries (OTIs), a new category that would include OFFs and non-vessel operating common carriers. Based on information provided by government sources, CBO believes that the

2000 OFFs that are already licensed (including 300 NVOCCs) would not need to be re-licensed. However, approximately 2000 NVOCCs would have to be licensed. Assuming license fees remain at the current level, the total cost to NVOCCs would be $1.4 million in fiscal year 1998. CBO also estimates a cost to NVOCCs of about $200,000 per year in fiscal years 1999–2002 in fees for new licenses and amendments to existing licenses.

To satisfy license requirements, NVOCCs also would be required to be bonded at an amount determined by the FMC. Currently, OFFs are bonded at $30,000, with an additional $10,000 requirement for every branch office. NVOCCs are bonded at $50,000. The NVOCC bond requirement would be repealed under S. 414. CBO has no basis for predicting the amount of the bonding requirement that would be established for OTIs. Depending on FMC regulations, bonding requirements could result in savings or impose greater costs on OFFs and NVOCCs.

Other sections of the bill would eliminate current mandates for common carriers, conferences, and operators of marine terminals.

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Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER OF PERSONS COVERED

This legislation does not significantly change the scope of entities or actions subject to the 1984 Act. The specific exclusion from tariff and service contract requirements of new assembled automobiles should result in a minor reduction in the number of persons subject to these regulations. The enhancement of the FMC's general exemption authority may result in further reductions in the area.

ECONOMIC IMPACT

The amendments to the 1984 Act are intended to increase competition in ocean shipping, which is not expected to have an inflationary impact on the Nation's economy.

Title II of the bill authorizes appropriations of $15 million for the FMC for fiscal year 1998. This funding level is not expected to have an inflationary impact on the Nation's economy. This title also transfers the functions of the FMC to the STB, which would be renamed the ITB. This consolidation is likely to result in minor cost savings to the Federal Government.

PRIVACY

This legislation will not have any adverse impact on the personal privacy of the individuals affected.

PAPERWORK

This legislation eliminates the filing of ocean shipping tariffs with the FMC and encourages the use of privately owned, publicly accessible, automated systems for the publication of a reduced volume of information. This legislation creates a new requirement to license NVOCCs in the United States. This legislation should result in no net increase in paperwork requirements.

SECTION-BY-SECTION ANALYSIS

Section 1.—Short title

This section cites the short title of the bill as the "Ocean Shipping Reform Act of 1997".

Section 2.—Effective date

This section provides that the amendments made by S. 414 take effect on March 1, 1998, unless otherwise expressly provided in S. 414.

TITLE I—AMENDMENTS TO THE SHIPPING ACT OF 1984

This title of the bill contains a number of amendments to the 1984 Act. Among the provisions considered for amendment was section 6(g). Although the reported bill does not change its provisions, a discussion of the Committee's evaluation of section 6(g) is warranted.

Although the bill retains the broad statutory language of section 6(g) of the 1984 Act, the Committee believes that the agency's interpretation and administration of the general standard must be revised to meet the dramatic changes that have taken place in the ocean liner shipping industry over the last decade. In response to those changes, and in keeping with the expanded policy goals of the bill, the Committee intends that this report shall guide the agency, and its successor, in the future exercise of its section 6(g) agreement review authority.

In doing so, the Committee wishes to point out that section 6(g) itself is not changed by the bill. This section continues the policy of removing any per se condemnation of concerted action as may be applied under antitrust laws, and there is no vague public interest standard to be applied to such agreements as existed before the 1984 Act. The 1984 Act continues to place the burden of proof on the agency. Ocean carrier agreements should be permitted unless the agency demonstrates that they are likely to produce unreasonable changes to transportation costs or services through reductions in competition.

Ocean carriers continue to be free to structure their own affairs, except when such structure violates specific statutory provisions or the section 6(g) standard. Ocean carriers should continue to have the benefit of regulatory certainty and prompt rulings from the agency. While the agency may continue to weigh reasonable and commercially proven alternative arrangements that have less anticompetitive impact, there is no intent to return to pre-1984 law under which agreement proponents may have been compelled to

show that no less anticompetitive alternative was available to obtain the benefits of the 1916 Act.

CHANGES IN COMPETITIVE CONDITIONS IN THE SHIPPING INDUSTRY.—Since the passage of the 1984 Act, the FMC has taken a narrow and restrictive view of its section 6(g) authority, based on the instructions set forth in the 1984 Act's Conference Report. In addressing the analytical approach to be taken in applying the general standard for agreement consideration, much of the commentary in that report focused on limiting the application of section 6(g); on granting proposed agreements any benefit of the doubt; and on establishing a heavy burden of proof with respect to FMC action. Given the current concerns with regulatory delay, unclear authority, and excessive government intervention and regulatory costs, that emphasis was not without merit. Moreover, at the time the legislation was introduced, debated, and passed (1978-1984), substantial independent competition existed in the form of new and expanding non- conference service. That competition, in addition to the new right of independent action on conference rates, appeared to limit the potential market power of liner conferences.

Today, however, the traditional distinction between conference and independent lines is eroding. Non-conference lines regularly cooperate with their conference rivals under the authority of so-called voluntary discussion agreements. Activities of those agreements have included capacity withholding schemes, coordinated general rate increases, collective action with respect to add-on charges, credit terms, and an assortment of other price-related tariff and contract elements. Although the bill includes pro-competitive reforms, such as prohibiting conferences from restricting a member's contracting authority or issuing mandatory rules with respect to contracts, it does not categorically bar carriers from reducing competition through trade-wide capacity control, rate discussion agreements, and voluntary cooperation on terms and procedures of individual contracts. The likelihood that carriers will continue to pursue such arrangements and other evolving forms of cooperation creates the need for careful agency oversight and policing under the general standard.

Furthermore, the recent trend toward greater operational coordination by means of global strategic alliances, and the merger-driven carrier consolidations now taking place, strongly suggest that international liner shipping is becoming a more concentrated industry. The Committee is concerned that trade- wide agreements established by the potential oligopoly of mega- carriers and global strategic alliances, composed of fewer and more homogeneous members than are today's agreements, may effectively dominate the major U.S. trade lanes in the near future. On the other hand, the Committee also recognizes that, because of ocean carrier alliances, there have actually been an increase in the number of competitors in some trades (e.g., in the North Atlantic), and there may have been fewer mergers than would have been the case in the absence of such alliances. Since global carriers and carrier alliances likely will have diversified their assets and operations across a range of trades, thereby reducing their reliance on revenues from any single trade, compromise on collective pricing activities could be easier and the likelihood of substantially anti-competitive activity could

well increase. The agency must be prepared and able to address and rectify such anti-competitive conditions before they take their toll on importers, exporters, and U.S. ocean borne trade.

ADMINISTRATION OF SECTION 6(g).—In administering the 1984 Act, as amended by the bill, the agency must balance a number of important and potentially conflicting policies and considerations. Foremost of these should be prompt agreement review, minimal government intervention, and continued flexibility in structuring agreements. In addition, however, the agency must remain mindful of many of the broad policies that underlay the 1984 Act. For example, the 1984 Act's declaration of policy, as amended by the bill, expresses the importance of competitive and efficient ocean transportation and placing a greater reliance on the marketplace. The need, in light of ongoing changes in the industry, to exercise vigilance with respect to the potential anti-competitive effects of industry concentration and possible reductions in independent competition in U.S. trade lanes also remains an important and worthwhile goal. In enforcing the 1984 Act, the agency should also continue to be mindful of the historical and international acceptance of conferences and carrier cooperation; however, such factors must be continuously evaluated in the context of evolving industry structure and commercial practices.

Section 6(g) sets forth a three-part test to be employed by the agency in assessing agreements. To warrant injunctive action, the agency must first find, as a threshold matter, that an agreement is likely to result in a "reduction in competition." Second, it must show that an agreement, through this reduction in competition, is likely to produce either a "reduction in transportation service" or an "increase in transportation cost." Third, the agency must determine that the likely reduction in transportation service or increase in transportation cost is "unreasonable."

As an initial matter, the Committee would point out that the word "likely" in the statute clearly indicates that the agency is expected to act prospectively to block substantially anti- competitive carrier plans before they result in adverse effects on shippers and foreign trade. The section contemplates the use of reasoned projections and forward-looking analyses by the agency, based on its substantial industry expertise. It appears that the FMC thus far has given the section a restrictive reading, suggesting that an injunction cannot be won without direct evidence of actual commercial harm suffered by shippers as a result of agreement activity. While evidence of shipper harm may indeed be relevant in certain cases, a blanket requirement for such evidence is not consistent with the text of the statute, and would undermine the agency's ability to take necessary preventive action. Indeed, the Committee directs the agency not to allow the disruption of ocean borne commerce while it seeks to quantify such disruption for evidentiary purposes.

In determining whether an agreement is likely to result in a reduction in competition, the agency must ascertain whether a collective activity or arrangement set forth in an agreement would, as a practical matter, reduce the level of competition (in terms of rates or range of services), either among agreement members or between agreement members and nonmembers. Some types of arrangements, such as rate agreements and capacity withholding, usually

result in a reduction in competition, and in fact have the easing of competitive pressures as the primary aim. For all types of cooperative or rationalization arrangements, the agency must closely examine the agreement authorities and the nature of the parties' operations to determine whether reduced competition is more likely than not. It is not the Committee's intention that the agency expend scarce enforcement resources pursuing insubstantial or de minimus reductions in competition.

The second part of the test is the showing of a likely "reduction in transportation service" or "increase in transportation cost." Of course, if an agreement is in effect and had already produced (or is in the process of producing) such a reduction or increase, evidence of this may be relied upon by the agency. However, if an agreement is not in effect, or is likely to have some future impact, agency action is not foreclosed. Given the agency's resources and expertise, it is capable of assessing and projecting the likely effects of a carrier agreement on transportation costs and service, based on an evaluation of factors such as: the nature of the collective action contemplated under the agreement; agreement members' share of the relevant trades; market concentration; rate levels and rate histories; capacity utilization levels, histories, and projections; ease of entry or exit; and the existence of other overlapping agreements.

Market share is relevant and is a factor in considering whether an agreement is likely to result in a reduction in transportation service or increase in transportation cost, and whether those changes are likely to be unreasonable, but it is only one factor. For example, because S. 414 guarantees a member of an agreement with pricing authority the right of independently negotiating and contracting with a shipper, the aggregated market share of an agreement's members does not by itself indicate a cohesive or coordinated contracting approach to the market. On the other hand, in an agreement to rationalize service and withdraw vessels from service, for example, the carrier's market share could be a substantial consideration. The agency may use economically reasonable projections and forward-looking analysis in determining whether an agreement is likely to result in a reduction in service or an increase in cost.

The third prong of the analysis is a determination as to whether the likely reduction in service or increase in cost is "unreasonable." No further definition of reasonableness is given in the statute, nor is there case law to serve as a guide. However, it is apparent from the context that the reasonableness requirement entails a balancing of the scope or magnitude of the cost increase or service decrease against the likely benefits to be derived from the carrier agreement. These benefits may include, for example, carriers' ability to improve efficiency, lower costs, and increase service options and quality. Other possible benefits include development of an economically sound and efficient U.S.-flag fleet, the prevention or forestalling of further competition-reducing concentration in the industry due to carrier mergers, and the promotion of comity with our trading partners. Enabling carriers to remedy identifiable conditions of rate instability or severe overcapacity may also be a potential agreement benefit, to the extent that such arrangements are in the long term interests of shippers and carriers. This is not to

say, however, that all collective efforts by carriers to increase rates or revenues or lower costs are deemed to be "reasonable" simply on the grounds that they contribute, in the general sense, to industry stability.

In general, the reasonableness requirement entails comparing short term "apples" to an array of medium-term and long-term "oranges." The test requires the weighing of a number of difficult-to-quantify costs and benefits to various segments of the industry.

In applying the general standard, the agency must consider whether the relevant competitive market includes more than just ocean common carriers providing direct service in a trade. The Committee intends that the agency consider the impact on shippers of an agreement not only in view of competition between ocean common carriers providing direct service in a trade, but also in view of other competitive means of transport. In some cases, alternative liner routings, bulk carriers, charter operators, or air freight carriers may provide competitive alternatives to the direct service provided by ocean common carriers. In considering these alternatives, the agency may gather relevant information from shippers, other carriers and third parties. Although the agency may use its information powers to request market information from the proponents of an agreement, such information must be relevant.

Another aspect of the reasonableness requirement is that the negative impact upon shippers may be offset by the benefits of an agreement. For example, the competitive harm ensuing from conferences, already diminished by the statutory limitations on conference activity, may be offset by the significant benefits of such activity. Also, the degree to which privately-owned ocean common carriers that service U.S. foreign commerce are subjected to competition from state-subsidized and controlled carriers is another consideration. A conference's ability to address problems of overcapacity and rate instability is an important benefit that the agency must weigh.

Another possible benefit to be considered by the agency is the impact of an agreement on U.S. foreign policy and international comity. The Committee agrees that the United States should act with sensitivity to the interests of its trading partners when administering shipping regulation.

Another important potential benefit to be considered is any efficiency-creating aspects of an agreement. Agreements involving significant carrier integration are, if properly limited to achieve such important benefits, to be favorably considered by the agency and the courts if these benefits are not outweighed by any competitive harm that is likely to result from such integration. Joint ventures and other cooperative agreements can enable carriers to raise necessary capital, attain economies of scale, and rationalize their services.

The Committee intends that ocean carriers be free to structure their own affairs, except when such structuring violates specific statutory provisions or the general standard. Even when an agreement raises potential issues under the general standard, the Committee believes that the procedural framework gives carriers sufficient flexibility. Carriers are able to obtain a prompt ruling from the agency under the provisions for expedited review. If the agency

objects to an agreement under the general standard, the filing party may withdraw it, modify it, or force the agency to make its showing in court.

The Committee would also clarify the range of injunctive remedies available from the district court. The court evaluating an agreement in a section 6(g) proceeding is not limited to the simple binary choice of enjoining or not enjoining an agreement in its entirety. As carrier arrangements grow increasingly complex and global in scope, a more surgical approach is warranted. Thus, upon a request by the agency, or upon its own motion, a court may tailor its injunction to bar certain agreement authorities or application to particular geographic ranges, while leaving other parts of the filed agreement intact.

Finally, the Committee notes that the bill does not adopt the FMC's suggestion that the 6(g) standard be incorporated into the prohibited acts section of the 1984 Act so that excessively anti-competitive agreements could be addressed and acted upon directly by the agency. The 1984 Act, as amended by the bill, continues to require the agency to seek to enjoin such agreements in the federal courts. However, the Committee would encourage the agency to allow shippers or others to contribute to the process of determining whether an injunction should be sought. At present, notices of agreement filings are published in the Federal Register and comments of interested parties are solicited. The agency could encourage even more participation by shippers and others potentially detrimentally affected by agreement authority by issuing notices of inquiry or conducting hearings on new agreement filings or existing agreements, the objective being to more fully apprise the agency of the likely or actual impact of the agreement prior to its seeking an injunction. These proceedings, however, should be held promptly and be of short duration. The Committee is mindful that it may be infeasible for intra-agency proceedings to occur before the agency goes to court, particularly in instances where time is of the essence. But, the Committee does not intend for such hearings to be protracted. The protracted hearings conducted under the pre-1984 Act regime are not favored under section 6(g).

Section 101.—Purpose

This section amends section 2 of the 1984 Act to expand the purpose of the 1984 Act to include the promotion of United States exports.

Section 102.—Definitions

This section adds, deletes, and amends several definitions described in section 3 of the 1984 Act. The most important of these changes are as follows:

Section 3(8) of the 1984 Act is amended to eliminate a loophole through which government owned or controlled ocean common carriers avoid controlled carrier restrictions by registering their vessels in other nations, including nations operating flag of convenience registries.

Section 3(9) of the 1984 Act is amended to redefine the term "deferred rebate" to apply to refunds of freight money tied to agreements to make further shipments with any common carrier. Re-

funds of freight money that are not tied to agreements to make further shipments must be made in accordance with the applicable tariff or service contract to avoid a violation of section 10(b)(2) of the 1984 Act, as amended by the reported bill.

Section 3(10) of the 1984 Act is deleted. The Committee considers the term "fighting ship" to be obsolete. The original definition of a "fighting ship" envisioned an individual ship that would follow a competitor's ship and offer predatory prices to drive the competitor from the trade. In today's marketplace, such predatory actions, taken with the intent of driving a carrier from the trade, would be attempted using multiple ship combinations. The substitute amendment would prohibit such predatory behavior under section 10(b) of the prohibited acts.

Section 3(10), as redesignated, of the 1984 Act is amended to clarify the definition of "forest products" and ensure that it reflects current technology developments that have occurred since 1984. The 1984 Act specifically states that the list of products found in section 3(10), as redesignated, is not exclusive, that forest products not specifically described therein can qualify for treatment as "forest products" under the 1984 Act. The Committee recognizes that current and emerging technology allows for the development of new products which can more efficiently utilize forest resources. The Committee intends that such new products be included within the "forest products" definition. Such products include liquid or granular by-products derived from pulping and papermaking. Also included, for example, is a class generally known as "engineered wood products." These are structural or panel wood products, produced at the mill, glued, or laminated.

Section 3(13), as redesignated, of the 1984 Act is amended to redefine the term "loyalty contract" to eliminate the application of the term to a contract that commits a fixed portion of cargo to a common carrier or an agreement among ocean common carriers, but that does not provide for a deferred rebate arrangement. Additionally, this change conforms to common law definitions which have allowed percentage-based contracts and output requirements contracts absent other devices that anticompetitively tie shippers and carriers. This change was made in response to requests by many shippers who simply are not certain of the volume of cargo they can commit over a fixed time period due to changing market conditions. These shippers believe renegotiating contracts shortly before their expiration date in order to increase the originally specified volume of cargo to match a greater than anticipated production schedule places them at a disadvantage with respect to the common carrier. The Committee understands that "portion" contracts have been viewed as potentially anticompetitive in an ocean transportation market where shippers were limited to dealing with a single large conference or a few small independent ocean carriers in each trade lane who would require shippers to ship all of their cargo for a given commodity or commodities with that carrier or conference. Given the changes made by the bill to provide such shippers with a competitive market for individual common carrier and multiple ocean common carrier service contracts, the Committee believes allowing shippers to enter into portion contracts will benefit shippers, not harm them. The Committee believes that

availability of competitive service contracting options and the prohibition against an unreasonable refusal to deal or negotiate by one or more common carriers in section 10(b)(10) of 1984 Act, as redesignated, provides sufficient protection for shippers from unreasonable portion contract requirements by common carriers.

Section 3(17), as redesignated, of the 1984 Act consolidates the definitions of "ocean freight forwarder" and "NVOCC" into a single definition of "ocean transportation intermediary." Since the bill would consolidate the licensing and bonding requirements for intermediaries under a single section, the Committee chose to use a single term throughout the 1984 Act, as amended by the bill, to cover both types of functions. The bill, as introduced, consolidated the same two definitions into the definition of "ocean freight forwarder." The Committee understands that ocean transportation arrangements are made through a diverse group of intermediaries. Some fit the description of either an ocean freight forwarder or an NVOCC; some perform both functions for different shipments. The Committee also recognizes that some countries use the term "freight forwarder" to include what the 1984 Act defines as NVOCC functions, while many U.S. NVOCCs prefer to be identified by that unique U.S. term. The substitute amendment changed this overarching term from "ocean freight forwarder" to "ocean transportation intermediary" in recognition of the above concerns. The new definition retains the terms "ocean freight forwarder" and "NVOCC" for commercial use by those entities who perform those narrow functions and prefer to be known by the existing terms for commercial business reasons, while providing a single, new term to describe entities who provide the wider variety of services.

Section 3(19), as redesignated, of the 1984 Act redefines the term "service contract" to provide shippers and common carriers with greater flexibility in entering into contractual arrangements. First, the new definition allows more than one shipper collectively to enter into a service contract. The Committee intends that the Department of Justice "safe-harbor" guidelines should apply to the collective activity of shippers with respect to a service contract. Second, the new definition allows NVOCCs to enter into service contracts as common carriers. Some U.S. ocean common carriers have expressed concern that this change conflicts with section 2(3) of the 1984 Act, which states that one of the purposes of the 1984 Act is to encourage the development of an economically sound and efficient United States-flag liner fleet. The Committee, however, believes that this change will provide a more competitive ocean transportation system, and which will ultimately help smaller shippers who often utilize NVOCCs to procure shipping services. The Committee also believes that U.S.-flag carriers provide quality service options, which should benefit from the increased regulatory flexibility provided by the bill. Third, the new definition allows agreements among ocean common carriers, in addition to a conference, to enter into service contracts. The Committee believes this change, coupled with the addition of new section 5(b)(9) of the 1984 Act, as amended by the bill, will substantially increase the competitive options available to shippers who wish to enter into service contracts with multiple ocean carriers. Recent shipping trends indicate a move away from larger carrier conference structure to smaller and

more integrated alliance agreements. Finally, the new definition allows shippers to commit to provide a certain portion of their cargo to a common carrier or agreement among ocean common carriers in a service contract. The rationale for this change is described in the analysis of section 3(13) above. Also, the new definition would clarify that a bill of lading or a receipt for a particular shipment may not be considered a service contract. The amendments to the 1984 Act made by the bill shall not affect the provisions of other laws governing the handling of, and the accessibility of information contained in, bills of lading, receipts, and similar documentation associated with shipments of cargo.

Section 3(21), as redesignated, of the 1984 Act would consolidate in a single location in the 1984 Act the circumstances in which a person is considered a shipper by the 1984 Act. The revised definition is intended only to clarify the meaning of the term "shipper," as it is defined in the 1984 Act, and interpreted by the FMC, not to change that definition.

Section 103.—Agreements within the scope of the act

This section amends section 4 of the 1984 Act in two areas:

First, the bill deletes the reference to NVOCCs in section 4(a)(5) of the 1984 Act. Section 4(a)(5) of the 1984 Act appears to allow agreements between ocean common carriers and NVOCCs to be filed in the same manner as ocean carrier conference agreements and be provided antitrust immunity. This provision is inconsistent with section 8 of the 1984 Act, which requires agreements between ocean common carriers and NVOCCs to be filed as service contracts subject to the antitrust laws. The FMC has decided that the treatment of these agreements pursuant to section 8 of the 1984 Act should prevail. The Committee agrees and eliminates the conflicting provision in section 4.

Second, the bill amends section 4(b) of the 1984 Act to assure that there is no gap in the coverage of agreements among marine terminal operators that operate facilities serving both the foreign and domestic commerce of the United States. For example, many marine terminal operators enter into agreements that discuss, fix, or regulate rates or other conditions of service that apply at terminals serving carriers that engage in both foreign and domestic commerce of the United States. The bill provides that such agreements are not removed from the scope of the 1984 Act, as amended by the bill, to the extent they involve ocean transportation in the domestic commerce of the United States, but rather are fully encompassed within the 1984 Act, as amended by the bill. Also, section 3(14) of the 1984 Act, as amended by the bill, is amended by section 102 of the bill to implement this intent by defining a marine terminal operator for the purposes of the 1984 Act to include a person that provides wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier that operates in the foreign and domestic commerce of the United States, as well as a carrier that operates in only the foreign commerce of the United States.

Marine terminal operator agreements within the scope of the 1984 Act, as amended by this section of the bill, and the activities conducted pursuant to these agreements, like all other agreements

under the Act, are exempt from the antitrust laws in accordance with section 7 of the 1984 Act.

Section 104.—Agreements

This section amends section 5 of the 1984 Act in three areas:

First, section 5(b)(8) of the 1984 is rewritten to shorten the notice period for independent action on a conference tariff from 10 calendar days to five calendar days and to eliminate a provision which some shippers contend could be interpreted to prevent independent action on unfiled conference tariffs for commodities excepted or exempted from tariff filing by section 8(a)(1) or 16 of the 1984 Act. The Committee intends that conference members have the right of independent action on all conference tariffs.

Second, a new section 5(b)(9) is added to the 1984 Act to provide a mandatory right of independent action on service contracts for members of all ocean common carrier agreements required to be filed under section 5(a), not only members of conference agreements. Ocean common carrier agreements would be: (1) required to allow their members to take independent action on agreement service contracts; (2) required to allow their members to negotiate those independent service contracts without disclosing to the other parties to the agreement the existence of that negotiation or the terms and conditions of a resulting service contract, other than those terms required to be published by new section 8(c)(3) of the 1984 Act, as amended by the bill; (3) prohibited from issuing mandatory rules or requirements affecting a member's right to negotiate and enter into service contracts; and (4) allowed to issue voluntary guidelines relating to the terms and procedures of agreement members' service contracts so long as the guidelines do not require agreement members to comply with the guidelines. The provisions in new section 5(b)(9) of the 1984 Act, as amended by the bill, do not extend to the discussion, agreement and adoption of voluntary guidelines by agreement members concerning their negotiation and use of individual service contracts. Thus, nothing in this Act is intended to preclude agreement members from promulgating voluntary guidelines relating to the terms and procedures of individual service contracts, as long as those guidelines make clear that there is no penalty associated with the failure of a member to follow any such guideline. Conference members may also similarly adopt voluntary guidelines for individual tariff matters. The adoption of voluntary guidelines by an agreement shall not result in an agreement member or agreement members being penalized or otherwise disciplined by the agreement for choosing to deviate from those guidelines. Amending the 1984 Act to provide agreement members with the right to contract individually is intended to foster intra-agreement competition, promote efficiencies, modernize ocean shipping arrangements, and encourage individual shippers and carriers to develop economic partnerships that better suit their business needs. The Committee believes that the right of individual and independent service contracts is the most important change made by the bill and is intended to develop an efficient and market-responsive ocean carrier industry.

Finally, a reference to the Intercoastal Shipping Act, 1933, is deleted. The Intercoastal Shipping Act, 1933, was repealed by the

Interstate Commerce Commission Termination Act of 1995 (Public Law 104–88).

The substitute amendment adopted by the Committee made several changes to the introduced bill's version of new section 5(b)(9) of the 1984 Act. The introduced bill applied the provisions of this section to conferences, but not to other types of ocean common carrier agreements, and limited this independent action to individual ocean common carrier service contracts. The introduced bill allowed conferences to require their members to disclose the existence of these members' individual service contracts or negotiations on individual service contracts when the conference entered into negotiations with the same shipper. The introduced bill also did not require that conference voluntary guidelines relating to the terms and procedures of conference members' service contracts be filed with the FMC. The net effect of the substitute amendment's changes to new section 5(b)(9) of the 1984 Act is to provide shippers with more options and a more competitive environment for negotiating service contracts with one or more ocean common carriers.

Section 105.—Exemption from antitrust laws

This section would amend section 7 of the 1984 Act to conform it with other amendments to the 1984 Act made by the bill. Under the 1984 Act, loyalty contracts, as currently defined, may be employed if in accordance with the antitrust laws and the FMC regulates their use. The bill would subject loyalty contracts, as redefined by the bill, to antitrust oversight by the Department of Justice. The FMC should provide the Department of Justice with copies of all loyalty contracts that are submitted to the FMC pursuant to section 8(a) of the 1984 Act.

Section 106.—Tariffs

This section would amend section 8 of the 1984 Act in several areas:

First, this section would add "new, assembled motor vehicles" to the list of commodities excepted from tariff and service contract publication requirements in section 8(a) of the 1984 Act. Most common carriage of automobiles is conducted by specialized roll-on, roll-off vessels, usually in very large quantity, single shipment lots pursuant to a service contract. This type of service more closely resembles unregulated contract carriage than common carriage regulated by the 1984 Act. Common carriers employing this method of shipment have in the past petitioned the FMC to exempt them from the publication requirements of section 8(c) of the 1984 Act. Common carriage requirements are intended to protect shipper interests, and to encourage nondiscriminatory shipping practices. The new, assembled automobile shipper market is very concentrated, it employs unique shipping practices, and the Committee believes that common carriage requirements are not necessary for this particular market.

Second, this section would eliminate the requirement in section 8(a) of the 1984 Act that common carrier tariffs be filed with the FMC. The FMC, or its successor, retains its authority pursuant to other sections of the 1984 Act, and other U.S. shipping laws, to

suspend or prohibit the use of tariffs found to violate the 1984 Act, or other U.S. shipping laws. Tariffs provide the shipping public with notice as to the price and service terms of tendered shipping services. The 1984 Act's requirement that common carrier tariffs be kept open to public inspection is retained. Instead of using the FMC's Automated Tariff Filing and Information System (ATFI) for this purpose, the bill would require that common carriers publish their tariffs electronically through private systems. Many common carriers have already developed electronic information publication systems, such as World Wide Web home pages, that are more advanced than ATFI and improve these common carriers' business processes with their customers. The Committee believes that this innovative private sector approach should be encouraged and that common carriers should be free to develop their own means of electronic publication either individually or collectively, including the use of third party information providers. This section authorizes the FMC to prescribe requirements for the accessibility and accuracy of automated tariff systems and review such systems from time to time for compliance with the 1984 Act, as amended by the bill. There should be no government constraints on the design of a private tariff publication system as long as that system assures the integrity of the common carrier's tariff and of the tariff system as a whole, and the system provides the appropriate level of public access to the common carrier's tariff information. However, the Committee believes that tariff information should be simplified and standardized.

Third, this section would make extensive changes to section 8(c) of the 1984 Act concerning service contracts. Consistent with the bill's amendment to the definition of "service contract," section 8(c)(1) would be amended to allow all common carriers, as defined by the 1984 Act, including NVOCCs, and ocean common carriers operating under all types of agreements, not only conference agreements, to enter into service contracts as common carriers with one or more shippers, including a shippers' association. Consistent with the bill's amendment to the 1984 Act's tariff publication requirements, service contracts dealing exclusively with new, assembled motor vehicles would no longer be filed with the FMC and service contract terms for new, assembled motor vehicles would not be required to be published. The FMC shall not accept for filing any service contract excepted or exempted by section 8(c)(2) or section 16 of the 1984 Act, as amended by the bill. The bill would retain the 1984 Act provision providing that the exclusive remedy for a breach of a service contract is an appropriate court, not the FMC. Parties to a service contract may still agree to use a private dispute resolution forum in lieu of a court, but in no case may the dispute resolution occur in a forum controlled by, or affiliated with, one of the parties to the contract. For example, a common carrier that is owned and controlled by a government would be prohibited from mandating in its service contracts that contract disputes be resolved in nationally run arbitration proceedings.

This section would substantially reduce the scope of service contract essential terms that are required to be made public. The Committee recognizes that U.S. exporters are engaged in competition with foreign-based companies who can offer into the world

market similar, if not identical, products. Those foreign-based companies do not currently publish, or otherwise disclose specific terms of the ocean shipping contracts they sign with ocean carriers. Currently, many U.S. exporters are disadvantaged in the world market because their foreign competitors are able to ascertain proprietary business information from their published service contract essential terms. The Committee seeks to eliminate this competitive disadvantage for U.S.-based exporters, and seeks to assure that U.S. exporters continue to produce domestically for world markets. At the same time, the Committee recognizes that the publication of certain service contract essential terms provides U.S. ports, longshore labor, ocean transportation intermediaries, and others useful information for determining cargo flows and facilitate strategic planning and marketing efforts, including the U.S. port range involved in handling shipments pursuant to a service contract. The Committee seeks to ensure that the FMC, its successor, and the shipping public continue to have access to the information necessary to enforce U.S. shipping laws. Additionally, the Committee recognizes that in retaining ocean carrier dispensation from the antitrust laws, while providing ocean carriers with greater discretion in contracting, this alternative regulatory structure must provide a mechanism to ensure that shipping malpractices are capable of being ascertained, and the shipping public may petition a Federal agency for relief. The bill balances these often conflicting requirements by requiring the confidential filing of all service contracts with the FMC, protecting U.S. exporters' most sensitive service contract information from public disclosure, and requiring common carriers and agreements among ocean common carriers to publish certain service contract information to assist U.S. ports, smaller shippers, shippers' associations, and ocean transportation intermediaries, and to ensure that antitrust immunity is not abused.

To achieve this balance, the substitute amendment would require the publication of only the commodity or commodities, the volume or portion of the commodity or commodities covered by the service contract, the duration of the service contract, and the U.S. port range through which the common carrier intends to provide the service covered by the contract. This publication requirement includes U.S. port ranges involved in the transshipment of cargo from one foreign destination to another foreign destination, to the extent that these service contracts are subject to the requirements of the 1984 Act, as amended by the bill. The bill requires common carriers and agreements among ocean common carriers to publish this information for each of their service contracts in tariff format through the same private electronic system they use to publish their tariffs.

This section also adds new sections 8(c)(4) and 8(c)(5) of the 1984 Act, which provide for a new procedure for the disclosure by the FMC, or its successor, of certain unpublished service contract essential terms to address certain collective-bargaining agreement disputes. These provisions do not require the agency to develop expertise in laws and regulations concerning collective-bargaining agreements. The Committee expects the agency to use its best judgment in determining which common carrier service contract

unpublished terms may be relevant as evidence in a collective bargaining dispute. The Committee directs the FMC, and its successor, to give petitions filed in accordance with section 8(c)(4) of the 1984 Act, as amended by the bill, its highest priority in processing and determination to facilitate the timely resolution of the associated collective-bargaining disputes.

This section adds a provision to section 8 of the 1984 Act which will permit marine terminal operators to establish and make available to the public, subject to section 10(d) of the 1984 Act, as amended by the bill, a schedule of rates, regulations, and practices, including limitation of liability for cargo loss or damage, pertaining to the receiving, delivering, handling or storing of property on the marine terminal. The limitations for cargo loss or damage must be consistent with domestic law and international conventions and agreements. Such schedules shall be enforceable by an appropriate court, not by the FMC, as an implied contract, without proof of actual knowledge of its provisions. If a marine terminal operator has an actual contract with a person covering the services rendered, such a schedule would not be enforceable as an implied contract with respect to that person. In the past, marine terminal operators established and filed tariffs with the FMC for their services pursuant to FMC regulations. This new provision is necessary to ensure that the operators of essential marine terminal transportation facilities are promptly and fairly compensated for the services they provide to waterborne commerce.

This section also would amend section 8 of the 1984 Act to authorize the FMC to prescribe regulations for the accessibility and accuracy of automated tariff systems and for the form and manner of marine terminal operator schedules authorized by that section. The agency also is authorized to prohibit the use of any automated tariff publication system it determines has failed to meet the requirements established under section 8 of the 1984 Act, as amended by the bill.

Finally, this section would amend section 8 of the 1984 Act in several places to conform this section with amendments made to other sections of the 1984 Act by the bill.

The substitute amendment constituted a significant shift in the bill sponsors' direction on increasing confidentiality for service contract essential terms. The introduced bill would have authorized complete confidentiality for service contracts signed by individual ocean carriers and retained current filing and publication requirements for service contracts signed by two or more ocean carriers or an agreement among ocean carriers.

The Committee found that the industry was divided over the question of whether current ocean carrier antitrust immunity should apply to ocean carrier discussions concerning individual ocean carrier service contracts. Ocean carriers and large volume shippers supported the extension of ocean carrier antitrust immunity to individual service contracts to enable ocean carrier agreements, such as the current "alliances," to jointly negotiate confidential service contracts with shippers. Many shippers' associations, NVOCCs, and ocean freight forwarders opposed the application of ocean carrier antitrust immunity to discussions or negotiations of individual service contracts based on their concern that this would

allow ocean carrier conferences to allocate confidential contracts among their members and allow conferences to subject these intermediaries to concerted, unfair discrimination under the protection of complete contract confidentiality. Also, smaller U.S. ocean carriers that depended on cooperative ventures with other conference members to compete with larger ocean carriers stated their need for individual ocean carrier and multiple ocean carrier service contracts to be treated the same with respect to confidentiality of service contract terms. To do otherwise, they argued, would provide an incentive for smaller carriers to merge with other carriers in order to remain competitive in the world market. In addition, the committee questioned whether individual ocean common carrier actions could legally be segregated from ocean common carrier actions which were authorized to be considered collectively, which could allow anticompetitive collective activity to occur under the guise of confidential individual contracts.

The Committee believed that the original proposal on contract confidentiality could produce undesirable results. Therefore, the Committee chose a different approach to address service contract confidentiality. The substitute amendment replaced the two-tiered system where individual ocean carrier service contracts were not filed and completely confidential, and multiple ocean carrier service contracts were filed and published, with a single system in which all contracts are filed, but substantially less service contract information is published. The substitute amendment attempts to balance competing considerations by shielding from public scrutiny certain contract terms that disclose sensitive business information, while providing the shipping public with certain terms for the purpose of monitoring shipping practices in order to petition for relief of unfair or predatory actions.

The substitute amendment also would retain the current statutory language of section 8(d) of the 1984 Act, which the bill as introduced would have amended; prohibit the use of a biased forum for the resolution of service contract disputes, which was not included in the introduced bill; and clarified the applicability of section 10 of the 1984 Act to the bill's new marine terminal operator schedule provision.

Section 107.—Automated tariff filing and information system

This section would repeal the authorization for the FMC's Automated Tariff Filing and Information System, since the function of providing tariff information would be delegated to private entities.

Section 108.—Controlled carriers

This section of the bill would amend section 9 of the 1984 Act in several places to increase the FMC's authority to prevent and address unjust or unreasonable actions by controlled carriers. This section would direct the FMC to take into account whether the constructive costs of a non-controlled carrier with similar service are met by the controlled carrier's challenged prices when the FMC is not able to accurately determine the actual costs of the controlled carrier; set the time period after the FMC's request for information in which the agency must make a determination on the controlled carrier's rates, charges, classifications, rules, or regulations; reduce

the notice period for FMC actions pursuant to section 9 of the 1984 Act from 60 days to 30 days; and eliminate three exceptions to this section of the 1984 Act. Also, this section would conform this section with other amendments made to the 1984 Act by the bill. The Committee is concerned about the aggressive growth of certain controlled carriers, and would hope that new authority under section 9 will allow the FMC, and its successor, to move forward aggressively to ensure that carriers controlled by foreign governments not be allowed to utilize the benefits of operating under the control of, and with the support of, a government to displace carriers operating under normal commercial considerations.

Section 109.—Prohibited acts

This section would make several amendments to section 10 of the 1984 Act:

Amendments to section 10(b) of the 1984 Act—

The prohibited acts described in section 10(b) of the 1984 Act would be substantially revised. Current sections 10(b)(1) through (3) of the 1984 Act, which are intended to maintain the integrity of the common carrier tariff and service contract systems, would be replaced by a single new section 10(b)(2), which is intended to accomplish the same purpose. Current sections 10(b)(4) and (5) would be redesignated as sections 10(b)(1) and (3), respectively. Current section 10(b)(6), to be redesignated as section 10(b)(4), would be amended to clarify that it applies only to service pursuant to a tariff and includes charges as well as rates. Current section 10(b)(7) of the 1984 Act, to be redesignated as section 10(b)(6), would be amended to replace the reference to "a fighting ship" with a description of the predatory behavior which the Committee believes should be prohibited by the 1984 Act. The amendment to section 10(b)(6), as redesignated, was included in the substitute amendment, but not the bill as introduced.

Current sections 10(b)(9) through (13) of the 1984 Act would be replaced with new sections 10(b)(5) and (8) through (10). New section 10(b)(5), combined with section 10(b)(4), as redesignated, would provide the necessary guidance with respect to common carrier discriminatory practices pursuant to tariffs and service contracts in place of current section 10(b)(10). New sections 10(b)(8) and (9) would provide the necessary guidance with respect to preference or advantage given, or prejudice or disadvantage imposed, by a common carrier pursuant to tariffs and service contracts in place of current sections 10(b)(11) and (12). New section 10(b)(10) would provide the necessary guidance with respect to a common carrier's refusal to deal or negotiate in place of current sections 10(b)(12) and (13). The Committee determined that the current prohibited acts in section 10(b), which are a combination of prohibited acts that were either originally enacted by the Shipping Act, 1916, or added by the 1984 Act, yielded an unclear, and possibly contradictory, set of guidelines for common carrier actions. In addition to providing common carriers and shippers greater flexibility to tailor service contracts to suit different shippers' requirements without collapsing the service contract rate structure, the Committee intended to revise section 10(b) to improve its overall clarity and consistency.

New sections 10(b)(4) and (8) retain the strong common carriage requirements of the tariff system. Differences in rates charged pursuant to common carrier tariffs must be fair and just for all users of the tariff system. Differences in services provided pursuant to common carrier tariffs must be reasonable for all users of the tariff system. These differences should be based on transportation-related factors in order to be fair and just or reasonable. The Committee expects the FMC, and its successor, to interpret the standards included in these new provisions in the same manner as those standards in the related current provisions of the 1984 Act have been interpreted.

New sections 10(b)(5) and (9) substantially increase the discretion given to common carriers to provide different service contract terms to similarly situated shippers. In addition to eliminating the current requirement in section 8(c) of the 1984 Act that ocean common carriers provide the same service contract terms to similarly situated shippers, the bill narrows the application of the prohibited acts with respect to service pursuant to common carrier service contracts. Sections 10(b)(5) and (9) of the 1984 Act, as amended by the bill, would restrict common carrier service contracting flexibility in only three, narrow, ways.

First, sections 10(b)(5) and (9) of the 1984 Act, as amended by the bill, would protect localities from unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracts. The Committee intends the application of these prohibitions to a locality to be limited to circumstances in which the prohibited actions are clearly targeted at the locality, not to circumstances where the actions are targeted at a particular shipper or ocean transportation intermediary which happens to be associated with that locality. An example of this would include a clear pattern of service contracting by a common carrier that imposes an unreasonable disadvantage on all shipments from a specific nation or region of a nation, including the United States. Second, the amendments made by this section would retain similar protections for ports from unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracts as currently exist under the 1984 Act through references to ports and localities. Third, the amendments made by this section would protect shippers and ocean transportation intermediaries from unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracts due to their status as shippers' associations or ocean transportation intermediaries.

The Committee intends the application of sections 10(b)(5) and (9) of the 1984 Act, as amended by the bill, with respect to protection for shippers' associations and ocean transportation intermediaries to be limited to circumstances in which the prohibited actions are clearly targeted at shippers' associations and ocean transportation intermediaries in general, not to circumstances where the actions are targeted at a particular shippers' association or ocean transportation intermediary. An example of such prohibited activity would include a clear pattern of unjustly discriminatory practices by a common carrier with respect to all shippers' as-

sociation service contracts. The Committee expects the amendments to the 1984 Act by the bill will result in a much more competitive environment for ocean transportation rates and services. This environment should provide shippers' associations and ocean transportation intermediaries with more options when shopping for ocean transportation services and free common carriers to compete with each other to obtain shippers' associations and ocean transportation intermediaries as customers. Therefore, the Committee believes that shippers' associations and ocean transportation intermediaries require less protection as individuals in this more competitive marketplace. The Committee intends that common carriers be afforded the maximum flexibility to differentiate their service contract terms and conditions with respect to individual shippers and ocean transportation intermediaries in this more competitive environment. The Committee directs the FMC, and its successor, to focus the efforts of its limited enforcement resources, with respect to common carrier service contracts, on the most egregious examples of unjust discrimination and undue or unreasonable preference, advantage, prejudice, or disadvantage as a result of common carrier service contracting.

This section also would conform section 10(b) of the 1984 Act with other amendments made by the bill.

The substitute amendment's changes to section 10(b) differ substantially from those of the introduced bill. The introduced bill continued the reference to "fighting ship" and amended current sections 10(b)(10) through (13) of the 1984 Act, redesignating them as new sections 10(b)(7) through (10) to consistently apply the service contract exception. The substitute amendment replaced current sections 10(b)(10) through (13) of the 1984 Act with new sections 10(b)(5) and 10(b)(8) through (10), as described above.

Amendments to section 10(c) of the 1984 Act—

This section would conform section 10(c)(5) of the 1984 Act with other amendments made by the bill.

Amendments to section 10(d) of the 1984 Act—

This section would amend section 10(d)(3) of the 1984 Act to revise the application of certain prohibited acts in section 10(b) to marine terminal operators, and add the application of section 10(b)(13) of the 1984 Act, as amended by the bill, to ocean freight forwarders. The bill would also conform section 10(d) of the 1984 Act with other amendments made by the bill. The application of section 10(b)(13) of the 1984 Act, as amended by the bill, to ocean freight forwarders was included in the substitute amendment, but not in the introduced bill.

Section 110.—Complaints, investigations, reports, and reparations

This section would conform section 11 of the 1984 Act with other amendments made by the bill.

Section 111.—Foreign Shipping Practices Act of 1988

This section would amend the Foreign Shipping Practices Act of 1988 to expand the authority of the FMC, and its successor, to take actions against foreign carrier service contracts, as well as tariffs and to conform the Foreign Shipping Practices Act of 1988 with other amendments made by the bill.

Section 112.—Penalties

This section would amend section 13 of the 1984 Act to provide the FMC, and its successor, with the authority to enforce penalties by providing authority to place a maritime lien on vessels operated by ocean common carriers, authorize an additional penalty to authorize the refusal or revocation of clearances to conduct business in U.S. ports, and conform section 13 with other amendments made by the bill. Some ocean common carriers have expressed concern that the authority provided to the FMC, and its successor, to authorize the refusal or revocation of clearances to conduct business in U.S. ports in response to an ocean common carrier's refusal to produce information required by a subpoena would deprive that carrier of the right to contest such a subpoena in court. The Committee notes that an ocean common carrier also has the right to contest the imposition of this new penalty in court in such a situation.

Section 113.—Reports and certificates

This section would amend section 15 of the 1984 Act to eliminate a requirement that the chief executive officer of each common carrier and other transportation companies provide periodic written certifications to the FMC as to the company's policy prohibiting the payment or receipt of unlawful rebates. The elimination of this provision is intended to remove an unnecessary paperwork burden from the ocean transportation industry, and should not be interpreted as relaxing the 1984 Act's prohibition against deferred rebates.

Section 114.—Exemptions

This section would amend section 16 of the 1984 Act to facilitate the exemption of classes of agreements between persons subject to the 1984 Act or any specified activities of those persons from any requirements of the 1984 Act by eliminating two of the four tests applied to applications for such exemptions. The policy underlying this change is that while Congress has been able to identify broad areas of ocean shipping commerce for which reduced regulation is clearly warranted, the FMC is more capable of examining through the administrative process specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress.

Section 115.—Agency Reports and Advisory Commission

This section would repeal section 18 of the 1984 Act. Section 18 authorized the establishment of an Advisory Commission in order to review the operation of the 1984 Act. The activities required or authorized by this section of the 1984 Act were completed several years ago.

Section 116.—Ocean freight forwarders

This section would amend section 19 of the 1984 Act in several areas:

First, this section would apply the provisions of section 19 of the 1984 Act to all ocean transportation intermediaries, including NVOCCs, not only to ocean freight forwarders. Under the 1984 Act,

NVOCCs are required to maintain a bond, proof of insurance, or other surety, but are not required to be licensed. This section would now require certain NVOCCs to be licensed.

Second, this section would apply the licensing requirements only to persons in the United States. The Committee directs the FMC to determine when foreign-based entities conducting business in the United States are to be considered persons in the United States for the purposes of this section.

Third, this section would require the bonding of all ocean transportation intermediaries as a means of insuring their financial responsibility and add an alternative process for resolving claims against such a bond. In determining the amount of the bond, the Committee directs the FMC to consider that the licensing requirements in subsection (a) on the fitness of the ocean transportation intermediary do not apply to certain foreign-based entities providing ocean transportation intermediary services in the United States, and to consider the difference in potential for claims against the bond between licensed and unlicensed intermediaries when developing bond requirements. The 1984 Act prescribes that a person pursuing a claim against an NVOCC bond must obtain a court judgment to collect on that claim. While the bill would provide for a similar process for claims against ocean transportation intermediary bonds, it would also allow the surety company to settle the claim with the consent of the insured ocean transportation intermediary or after the ocean transportation intermediary has failed to respond to adequate notice to address the validity of the claim. The Committee directs the FMC to establish the minimum time period which may be considered adequate notice for this purpose.

Damages which would be covered by the bond would include those suffered by ocean common carriers, shippers and others arising from any activities authorized or required by the 1984 Act, as amended by the bill, or referred to in the definition of "ocean transportation intermediary" in section 3(17) of the 1984 Act, as amended by the bill. This would include the activities of ocean freight forwarders as defined in section 3(17)(A), and the activities of NVOCCs as defined in section 3(17)(B), including liabilities related to service contract obligations. The bonds would cover judgments and valid claims resulting directly or indirectly from, for example, the loss or conversion of cargo by the bonded entity or from the negligence or complicity of the bonded entity, as well as from nonperformance of services. Once a judgment is entered against a bonded ocean transportation intermediary, the surety company would be expected to pay the judgment from the bond funds, without requiring further evidence of bills of lading or other documentation going to the validity, rather than the subject matter, of the claim. The Committee directs the FMC to prescribe regulations defining transportation-related activities of ocean transportation intermediaries which are subject to the financial responsibility requirements of section 19(b)(1) of the 1984 Act, as amended by the bill.

Due to the diversity of activities conducted by different ocean transportation intermediaries, the Committee directs the FMC to establish a range of licensing and financial responsibility require-

ments commensurate with the scope of activities conducted by different ocean transportation intermediaries, and the past fitness of the ocean transportation intermediary in the performance of intermediary services.

Fourth, this section would include in the 1984 Act a provision providing for reasonable ocean freight forwarder compensation by groups of ocean common carriers that is currently included in section 641(I) the Tariff Act of 1930. This section of the bill would remove the requirement in current law that the freight forwarder (section 3(17)(A) ocean transportation intermediary) also be a customs broker.

Finally, this section would conform section 19 of the 1984 Act with other amendments made by the bill. The substitute amendment changed the process included in the introduced bill for payment of a claim against an ocean transportation intermediary's bond.

Section 117.—Contracts, agreements, and licenses under prior shipping legislation

This section would amend section 20 of the 1984 Act which includes savings provisions for certain agreements and contracts in effect, suits filed, and regulations issued by the FMC prior to the effective date of the amendments to the 1984 Act made by the bill.

Section 118.—Surety for non-vessel-operating common carriers

This section would repeal section 23 of the 1984 Act. Provisions requiring a bond, proof of insurance, or other surety from NVOCCs have been included in section 19 of the 1984 Act, as amended by the bill.

Section 119.—Replacement of Federal Maritime Commission with Intermodal Transportation Board

This section would amend the 1984 Act to conform with the transfer of functions of the FMC to the ITB, effective January 1, 1999.

TITLE II—TRANSFER OF FUNCTIONS OF THE FEDERAL MARITIME COMMISSION TO THE INTERMODAL TRANSPORTATION BOARD

This title would rename the Surface Transportation Board as the Intermodal Transportation Board, transfer the functions of the FMC to the ITB, adjust the membership of the ITB to reflect the added maritime regulation responsibilities, and terminate the FMC on January 1, 1999. Because this title would transfer responsibility for administering the provisions of the 1984 Act, as amended by the bill, to the ITB after those amendments are effective, this title requires the FMC to consult with the STB during the development of the regulations implementing the amendments made by the bill. In amending the qualification requirements for ITB members, this title would prevent domination within the Board of a particular transportation mode (surface or maritime), sector (private or public), or political party by requiring the Board membership to be balanced in these three characteristics. This title also would authorize FMC appropriations in the amount of $15 million for fiscal year

1998. STB appropriations are currently authorized through fiscal year 1998. The bill does not authorize appropriations for the FMC, STB, or ITB for fiscal year 1999. The Committee expects to address fiscal year 1999 authorizations for these agencies at a later date.

TITLE III—AMENDMENTS TO OTHER SHIPPING AND MARITIME LAWS

Section 301.—Amendments to section 19 of the Merchant Marine Act, 1920

This section would amend section 19 of the Merchant Marine Act, 1920, to clarify that conditions unfavorable to shipping in the foreign trade include pricing practices employed by owners, operators, agents, or masters of vessels of a foreign country. The FMC has held that the term "practices employed by owners, operators, agents, or masters of vessels of a foreign country" in section 19 of the Merchant Marine Act, 1920, includes pricing practices. The Committee agrees, and would amend section 19 to clarify that such pricing practices are within the scope of that section. Section 301 of the bill would also clarify that service contracts of a common carrier are subject to actions by the agency under section 19 of the Merchant Marine Act, 1920, and conform section 19 with amendments made to the 1984 Act by the bill.

Section 302.—Technical corrections

This section would make technical corrections in several laws to conform with amendments made by the bill.

TITLE IV—MERCHANT MARINER BENEFITS

Section 401.—Merchant mariner benefits

This section would extend eligibility for veterans' burial benefits, funeral benefits, and related benefits for veterans of service in the United States Merchant Marine in support of U.S. Armed Forces from August 16, 1945 to December 31, 1946. Currently, the dates provided for veterans' benefits to U.S. merchant mariners for World War II service are December 7, 1941 to August 16, 1945.

The efforts of American merchant mariners to secure veterans' benefits pursuant to Public Law 95–202, have been long, and only partially successful, despite merit and clear eligibility under the statute. The casualty rate for the U.S. Merchant Marine during World War II was higher than the casualty rate for the U.S. Army, U.S. Navy, or U.S. Coast Guard, and only second to the U.S. Marine Corps. In all, 5662 merchant mariners lost their lives or were declared missing in action. Another 609 merchant mariners became prisoners of war and thousands were wounded. The Director of the Selective Service System at the time, General Lewis B. Hershey, wrote to local draft boards:

> Service in the merchant marine * * * is so closely allied to service in the armed forces that men found by the local board to be actively engaged at sea may be considered engaged in the defense of the country. Such service may be considered as tantamount to military service.

Yet, in 1980, when a group of merchant mariners filed an application for veterans' status pursuant to Public Law 95-202, it was denied by the Secretary of the Air Force, to whom such authority was delegated. The applicants sought judicial review of this adverse determination, and the Federal District Court held in 1987 that the Secretary abused his discretion under the statute in denying the application. As a consequence of the Court's decision, the Secretary reconsidered his denial and granted veterans' status to merchant mariners who served through V-J day, August 15, 1945, even though hostilities were not declared ended by President Truman until December 31, 1946 (the date that was applied to veterans' status for all branches of the U.S. Armed Forces). In addition, another group similarly situated to U.S. merchant mariners, the Guam Combat Patrol, was given veterans' status without a cutoff date (effectively through December 31, 1946) by the Secretary.

Numerous applications to the Secretary on behalf of remaining merchant mariners to extend the cutoff date to December 31, 1946, have been denied—despite the fact that between August 16, 1945 and December 31, 1946, ten U.S. Merchant Marine vessels operating in support of U.S. Armed Forces were damaged or lost and merchant marine casualties were sustained as a result of enemy instruments of war. The Committee agrees with the District Court that Public Law 95-202 gives the Secretary broad discretion to extend the cutoff date and rectify a blatant inequity. Frustrated by the failure of the Secretary to do so for nearly a decade, the Committee reluctantly concludes that a legislative solution is the only alternative.

TITLE V—CERTAIN LOAN GUARANTEES AND COMMITMENTS

Section 501.—Certain loan guarantees and commitments

This section would prohibit the Secretary of Transportation from issuing a guarantee or commitment to guarantee a loan for the construction, reconstruction, or reconditioning of a vessel under the authority of title XI of the Merchant Marine Act, 1936, until the FMC certifies that the operator of that vessel has not violated certain U.S. shipping laws within the previous five years and is not under formal investigation by the FMC for a violation of those shipping laws. This provision would apply to the operator of the vessel to be constructed, reconstructed, or reconditioned with the assistance of the title XI program, but not to any other affiliated vessel operators. This provision would apply to guarantees and commitments to guarantee made by the Secretary of Transportation after the date of enactment of the bill. This provision was included in an amendment by Senator McCain that was adopted by the Committee, and was not included in the introduced bill.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted

is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman) [1]:

Section 641, Tariff Act of 1930

[19 U.S.C. 1641]

§ 1641. Customs brokers

(a) DEFINITIONS.— As used in this section:

(1) The term "customs broker" means any person granted a customs broker's license by the Secretary under subsection (b).

(2) The term "customs business" means those activities involving transactions with the Customs Service concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges, assessed or collected by the Customs Service upon merchandise by reason of its importation, or the refund, rebate, or drawback thereof. It also includes the preparation of documents or forms in any format and the electronic transmission of documents, invoices, bills, or parts thereof, intended to be filed with the Customs Service in furtherance of such activities, whether or not signed or filed by the preparer, or activities relating to such preparation, but does not include the mere electronic transmission of data received for transmission to Customs.

(3) The term "Secretary" means the Secretary of the Treasury.

(b) CUSTOM BROKER'S LICENSES.—

(1) IN GENERAL.—No person may conduct customs business (other than solely on behalf of that person) unless that person holds a valid customs broker's license issued by the Secretary under paragraph (2) or (3).

(2) LICENSES FOR INDIVIDUALS.—The Secretary may grant an individual a customs broker's license only if that individual is a citizen of the United States. Before granting the license, the Secretary may require an applicant to show any facts deemed necessary to establish that the applicant is of good moral character and qualified to render valuable service to others in the conduct of customs business. In assessing the qualifications of an applicant, the Secretary may conduct an examination to determine the applicant's knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all others appropriate matters.

(3) LICENSES FOR CORPORATIONS, ETC.—The Secretary may grant a customs broker's license to any corporation, association, or partnership that is organized or existing under the laws of any of the several States of the United States if at least one officer of the corporation or association, or one member of the partnership, holds a valid customs broker's license granted under paragraph (2).

[1] In compliance with the last sentence of such paragraph, it is the opinion of the Committee that it is necessary to dispense with the requirements of this paragraph, as they apply to mere changes in references to the Surface Transportation Board in statutes not otherwise amended, in order to expedite the business of the Senate.

(4) DUTIES.—A customs broker shall exercise responsible supervision and control over the customs business that it conducts.

(5) LAPSE OF LICENSE.—The failure of a customs broker that is licensed as a corporation, association, or partnership under paragraph (3) to have, for any continuous period of 120 days, at least one officer of the corporation or association, or at least one member of the partnership, validly licensed under paragraph (2) shall, in addition to causing the broker to be subject to any other sanction under this section (including paragraph (6)) result in the revocation by operation of law of its license.

(6) PROHIBITED ACTS.—Any person who intentionally transacts customs business, other than solely on the behalf of that person, without holding a valid customs broker's license granted to that person under this subsection shall be liable to the United States for a monetary penalty not to exceed $10,000 for each such transaction as well as for each violation of any other provision of this section. This penalty shall be assessed in the same manner and under the same procedures as the monetary penalties provided for in subsection (d)(2)(A).

(c) CUSTOMS BROKER'S PERMITS.—

(1) IN GENERAL.—Each person granted a customs broker's license under subsection (b) shall be issued, in accordance with such regulations as the Secretary shall prescribe, either or both of the following:

(A) A national permit for the conduct of such customs business as the Secretary prescribes by regulation.

(B) A permit for each customs district in which that person conducts customs business and, except as provided in paragraph (2), regularly employs at least 1 individual who is licensed under subsection (b)(2) to exercise responsible supervision and control over the customs business conducted by that person in that district.

(2) EXCEPTION.—If a person granted a customs broker's license under subsection (b) can demonstrate to the satisfaction of the Secretary that—

(A) he regularly employs in the region in which that district is located at least one individual who is licensed under subsection (b)(2), and

(B) that sufficient procedures exist within the company for the person employed in that region to exercise responsible supervision and control over the customs business conducted by that person in that district,

the Secretary may waive the requirement in paragraph (1)(B).

(3) LAPSE OF PERMIT.—The failure of a customs broker granted a permit under paragraph (1) to employ, for any continuous period of 180 days, at least one individual who is licensed under subsection (b)(2) within the district or region (if paragraph (2) applies) for which a permit was issued shall, in addition to causing the broker to be subject to any other sanction under this section (including any in subsection (d)), result in the revocation by operation of law of the permit.

(4) APPOINTMENT OF SUBAGENTS.—Notwithstanding subsection (c)(1), upon the implementation by the Secretary under

section 413(b)(2) [19 U.S.C. 1413(b)(2)] of the component of the National Customs Automation Program referred to in section 411(a)(2)(B)[19 U.S.C. 1411(a)(2)(B)], a licensed broker may appoint another licensed broker holding a permit in a customs district to act on its behalf as its subagent in that district if such activity relates to the filing of information that is permitted by law or regulation to be filed electronically. A licensed broker appointing a subagent pursuant to this paragraph shall remain liable for any and all obligations arising under bond and any and all duties, taxes, and fees, as well as any other liabilities imposed by law, and shall be precluded from delegating to a subagent such liability.

(d) DISCIPLINARY PROCEEDINGS.—

(1) GENERAL RULE.—The Secretary may impose a monetary penalty in all cases with the exception of the infractions described in clause (iii) of subparagraph (B) of this subsection, or revoke or suspend a license or permit of any customs broker, if it is shown that the broker—

(A) has made or caused to be made in any application for any license or permit under this section, or report filed with the Customs Service, any statement which was, at the time and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which was required to be stated therein;

(B) has been convicted at any time after the filing of an application for license under subsection (b) of any felony or misdemeanor which the Secretary finds—

(i) involved the importation or exportation of merchandise;

(ii) arose out of the conduct of its customs business; or

(iii) involved larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds;

(C) has violated any provision of any law enforced by the Customs Service or the rules or regulations issued under any such provision;

(D) has counseled, commanded, induced, procured, or knowingly aided or abetted the violations by any other person of any provision of any law enforced by the Customs Service, or the rules or regulations issued under any such provision;

(E) has knowingly employed, or continues to employ, any person who has been convicted of a felony, without written approval of such employment from the Secretary; or

(F) has, in the course of its customs business, with intent to defraud, in any manner willfully and knowingly deceived, misled or threatened any client or prospective client.

(2) PROCEDURES.—

(A) MONETARY PENALTY.—Unless action has been taken under subparagraph (B), the appropriate customs officer shall serve notice in writing upon any customs broker to show cause why the broker should not be subject to a monetary penalty not to exceed $30,000 in total for a violation or violations of this section. The notice shall advise the customs broker of the allegations or complaints against him and shall explain that the broker has a right to respond to the allegations or complaints in writing within 30 days of the date of the notice. Before imposing a monetary penalty, the customs officer shall consider the allegations or complaints and any timely response made by the customs broker and issue a written decision. A customs broker against whom a monetary penalty has been issued under this section shall have a reasonable opportunity under section 618 [19 U.S.C. 1618] to make representations seeking remission or mitigation of the monetary penalty. Following the conclusion of any proceeding under section 618 [19 U.S.C. 1618], the appropriate customs officer shall provide to the customs broker a written statement which sets forth the final determination and the findings of fact and conclusions of law on which such determination is based.

(B) REVOCATION OR SUSPENSION.—The Customs Service may, for good and sufficient reason, serve notice in writing upon any customs broker to show cause why a license or permit issued under this section should not be revoked or suspended. The notice shall be in the form of a statement specifically setting forth the grounds of the complaint, and shall allow the customs broker 30 days to respond. If no response is filed, or the Customs Service determines that the revocation or suspension is still warranted, it shall notify the customs broker in writing of a hearing to be held within 30 days, or at a later date if the broker requests an extension and shows good cause therefor, before an administrative law judge appointed pursuant to section 3105 of title 5, United States Code, who shall serve as the hearing officer. If the customs broker waives the hearing, or the broker or his designated representative fails to appear at the appointed time and place, the hearing officer shall make findings and recommendations based on the record submitted by the parties. At the hearing, the customs broker may be represented by counsel, and all proceedings, including the proof of the charges and the response thereto shall be presented with testimony taken under oath and the right of cross-examination accorded to both parties. A transcript of the hearing shall be made and a copy will be provided to the Customs Service and the customs broker; which shall thereafter be provided reasonable opportunity to file a post-hearing brief. Following the conclusion of the hearing, the hearing officer shall transmit promptly the record of the hearing along with the findings of fact and recommendations to the Secretary for decision. The Secretary will issue a written decision, based solely on the

record, setting forth the findings of fact and the reasons for the decision. Such decision may provide for the sanction contained in the notice to show cause or any lesser sanction authorized by this subsection, including a monetary penalty not to exceed $30,000, than was contained in the notice to show cause.

(3) SETTLEMENT AND COMPROMISE.—The Secretary may settle and compromise any disciplinary proceeding which has been instituted under this subsection according to the terms and conditions agreed to by the parties, including but not limited to the reduction of any proposed suspension or revocation to a monetary penalty.

(4) LIMITATION OF ACTIONS.—Notwithstanding section 621 [19 U.S.C. 1621], no proceeding under this subsection or subsection (b) (6) shall be commenced unless such proceeding is instituted by the appropriate service of written notice within 5 years from the date the alleged violation was committed; except that if the alleged violation consists of fraud, the 5-year period of limitation shall commence running from the time such alleged violation was discovered.

(e) JUDICIAL APPEAL.—

(1) IN GENERAL.—A customs broker, applicant, or other person directly affected may appeal any decision of the Secretary denying or revoking a license or permit under subsection (b) or (c), or revoking or suspending a license or permit or imposing a monetary penalty in lieu thereof under subsection (d)(2)(B), by filing in the Court of International Trade, within 60 days after the issuance of the decision or order, a written petition requesting that the decision or order be modified or set aside in whole or in part. A copy of the petition shall be transmitted promptly by the clerk of the court to the Secretary or his designee. In cases involving revocation or suspension of a license or permit or imposition of a monetary penalty in lieu thereof under subsection (d)(2)(B), after receipt of the petition, the Secretary shall file in court the record upon which the decision or order complained of was entered, as provided in section 2635(d) of title 28, United States Code.

(2) CONSIDERATION OF OBJECTIONS.—The court shall not consider any objection to the decision or order of the Secretary, or to the introduction of evidence or testimony, unless that objection was raised before the hearing officer in suspension or revocation proceedings unless there were reasonable grounds for failure to do so.

(3) CONCLUSIVENESS OF FINDINGS.—The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

(4) ADDITIONAL EVIDENCE.—If any party applies to the court for leave to present additional evidence and the court is satisfied that the additional evidence is material and that reasonable grounds existed for the failure to present the evidence in the proceedings before the hearing officer, the court may order the additional evidence to be taken before the hearing officer and to be presented in a manner and upon the terms and conditions prescribed by the court. The Secretary may modify the

findings of facts on the basis of the additional evidence presented. The Secretary shall then file with the court any new or modified findings of fact which shall be conclusive of supported by substantial evidence, together with a recommendation, if any, for the modification or setting aside of the original decision or order.

(5) EFFECT OF PROCEEDINGS.—The commencement of proceedings under this subsection shall, unless specifically ordered by the court, operate as a stay of the decision of the Secretary except in the case of a denial of a license or permit.

(6) FAILURE TO APPEAL.—If an appeal is not filed within the time limits specified in this section, the decision by the Secretary shall be final and conclusive. In the case of a monetary penalty imposed under subsection (d)(2)(B) of this section, if the amount is not tendered within 60 days after the decision becomes final, the license shall automatically be suspended until payment is made to the Customs Service.

(f) REGULATIONS BY THE SECRETARY.—The Secretary may prescribe such rules and regulations relating to the customs business of customs brokers as the Secretary considers necessary to protect importers and the revenue of the United States, and to carry out the provisions of this section, including rules and regulations governing the licensing of or issuance of permits to customs brokers, the keeping of books, accounts, and records by customs brokers, and documents and correspondence, and the furnishing by customs brokers of any other information relating to their customs business to and duly accredited officer or employee of the Customs Service. The Secretary may not prohibit customs brokers from limiting their liability to other persons in the conduct of customs business. For purposes of this subsection or any other provision of this Act pertaining to recordkeeping, all data required to be retained by a customs broker may be kept on microfilm, optical disc, magnetic tapes, disks or drums, video files or any other electrically generated medium. Pursuant to such regulations as the Secretary shall prescribe, the conversion of data to such storage medium may be accomplished at any time subsequent to the relevant customs transaction and the data may be retained in a centralized basis according to such broker's business system.

(g) TRIENNIAL REPORTS BY CUSTOMS BROKERS.—

(1) IN GENERAL.—On February 1, 1985, and on February 1 of each third year thereafter, each person who is licensed under subsection (b) shall file with the Secretary of the Treasury a report as to—

(A) whether such person is actively engaged in business as a customs broker; and

(B) the name under, and the address at, which such business is being transacted.

(2) SUSPENSION AND REVOCATION.—If a person licensed under subsection (b) fails to file the required report by March 1 of the reporting year, the license is suspended, and may be thereafter revoked subject to the following procedures:

(A) The Secretary shall transmit written notice of suspension to the licensee no later than March 31 of the reporting year.

(B) If the licensee files the required report within 60 days of receipt of the Secretary's notice, the license shall be reinstated.

(C) In the event the required report is not filed within the 60-day period, the license shall be revoked without prejudice to the filing of an application for a new license.

(h) FEES AND CHARGES.—The Secretary may prescribe reasonable fees and charges to defray the costs of the Customs Service in carrying out the provisions of this section, including, but not limited to, a fee for licenses issued under subsection (b) and fees for any test administered by him or under his direction; except that no separate fees shall be imposed to defray the costs of an individual audit or of individual disciplinary proceedings of any nature.

[(i) COMPENSATION OF OCEAN FREIGHT FORWARDERS.—

[(1) IN GENERAL.—Notwithstanding any other provision of law, no conference or group of two or more ocean common carriers in the foreign commerce of the United States that is authorized to agree upon the level of compensation paid to ocean freight forwarders may—

[(A) deny to any member of such conference or group the right, upon notice of not more than 10 calendar days, to take independent action on any level of compensation paid to an ocean freight forwarder who is also a customs broker, and

[(B) agree to limit the payment of compensation to an ocean freight forwarder who is also a customs broker to less than 1.25 percent of the aggregate of all rates and charges applicable under the tariff assessed against the cargo on which the forwarding services are provided.

[(2) ADMINISTRATION.—The provisions of this subsection shall be enforced by the agency responsible for administration of the Shipping Act of 1984 (46 U.S.C. 1701, et seq.).

[(3) REMEDIES.—Any person injured by reason of a violation of paragraph (1) may, in addition to any other remedy, file a complaint for reparation as provided in section 11 of the Shipping Act of 1984 (46 U.S.C. 1710), which may be enforced pursuant to section 14 of such Act (46 U.S.C. 1713).

[(4) DEFINITIONS.—For purposes of this subsection, the terms "conference", "ocean common carrier", and "ocean freight forwarder" have the respective meaning given to such terms by section 3 of the Shipping Act of 1984 (46 U.S.C. 1702).]

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART VI. PARTICULAR PROCEEDINGS

CHAPTER 158. ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2341. Definitions

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, ⟦the Federal Maritime Commission,⟧ or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture or the Secretary of Transportation;

(C) the Administration, when the order was entered by the Maritime Administration;

(D) the Secretary, when the order is under section 812 of the Fair Housing Act [42 U.S.C. 3612]; and

(E) the Board, when the order was entered by the ⟦Surface⟧ *Intermodal* Transportation Board.

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7 [7 U.S.C. 181 et seq. and 501 et seq.], except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

⟦(3) all rules, regulations, or final orders of—

⟦(A) the Secretary of Transportation issued pursuant to section 2, 9, 37, or 41 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839[, and 841a]) or pursuant to part B or C of subtitle IV of title 49 [49 U.S.C. 13101 et seq. or 15101 et seq.]; and

⟦(B) the Federal Maritime Commission issued pursuant to—

⟦(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876) ;

⟦(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

⟦(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d) [)];

⟦(iv), (v) [Redesignated]⟧

(3) all rules, regulations, or final orders of the Secretary of Transportation issued pursuant to section 2, 9, 37, 41, or 43 of the Shipping Act, 1916 (46 U.S.C. App. 802, 803, 808, 835, 839, or 841a) or pursuant to part B or C of subtitle IV of title 49 (49 U.S.C. 13101 et seq. or 15101 et seq.);

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

[(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;]

(5) all rules, regulations, or final orders of the Intermodal Transportation Board—

(A) made reviewable by section 2321 of this title; or

(B) pursuant to—

(i) section 19 of the Merchant Marine Act, 1920 (46 U.S.C. App. 876);

(ii) section 14 or 17 of the Shipping Act of 1984 (46 U.S.C. App. 1713 or 1716); or

(iii) section 2(d) or 3(d) of the Act of November 6, 1966 (46 U.S.C. App. 817d(d) or 817e(d));

(6) all final orders under section 812 of the Fair Housing Act [42 U.S.C. 3612]; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

TITLE 46—UNITED STATES CODE

* * * * * * *

CHAPTER 112—MERCHANT MARINER BENEFITS

§ 11201. Qualified service

For purposes of this chapter, a person engaged in qualified service if, between August 16, 1945, and December 31, 1946, the person—

(1) was a member of the United States merchant marine (including the Army Transport Service and the Naval Transportation Service) serving as a crewmember of a vessel that was—

(A) operated by the War Shipping Administration or the Office of Defense Transportation (or an agent of the Administration or Office);

(B) operated in waters other than inland waters, the Great Lakes, other lakes, bays, and harbors of the United States;

(C) under contract or charter to, or property of, the Government of the United States; and

(D) serving the Armed Forces; and

(2) while so serving, was licensed or otherwise documented for service as a crewmember of such a vessel by an officer or employee of the United States authorized to license or document the person for such service.

§ 11202. Documentation of qualified service

(a) RECORD OF SERVICE.—The Secretary shall, upon application—

(1) issue a certificate of honorable discharge to a person who, as determined by the Secretary, engaged in qualified service of a nature and duration that warrants issuance of the certificate; and

(2) correct, or request the appropriate official of the Federal government to correct, the service records of the person to the extent necessary to reflect the qualified service and the issuance of the certificate of honorable discharge.

(b) TIMING OF DOCUMENTATION.—The Secretary shall take action on an application under subsection (a) not later than one year after the Secretary receives the application.

(c) STANDARDS RELATING TO SERVICE.—In making a determination under subsection (a)(1), the Secretary shall apply the same standards relating to the nature and duration of service that apply to the issuance of honorable discharges under section 401(a)(1)(b) of the GI Bill Improvement Act of 1977 (38 U.S.C. 106 note).

(d) CORRECTION OF RECORDS.—An official of the Federal government who is requested to correct service records under subsection (a)(2) shall do so.

§ 11203. Eligibility for certain veterans' benefits

(a) ELIGIBILITY.—

(1) IN GENERAL.—The qualified service of an individual referred to in paragraph (2) is deemed to be active duty in the armed forces during a period of war for purposes of eligibility for benefits under chapters 23 and 24 of title 38.

(2) COVERED INDIVIDUALS.—Paragraph (1) applies to an individual who—

(A) receives an honorable discharge certificate under section 11202 of this title; and

(B) is not eligible under any other provision of law for benefits under laws administered by the Secretary of Veterans Affairs.

(b) REIMBURSEMENT FOR BENEFITS PROVIDED.—The Secretary shall reimburse the Secretary of Veterans Affairs for the value of benefits that the Secretary of Veterans Affairs provides for an individual by reason of eligibility under this section.

(c) PROSPECTIVE APPLICABILITY.—An individual is not entitled to receive, and may not receive, benefits under this chapter for any period before the date of enactment of this chapter.

§ 11204. Processing fees

(a) COLLECTION OF FEES.—The Secretary shall collect a fee of $30 from each applicant for processing an application submitted under section 11202(a) of this title.

(b) TREATMENT OF FEES COLLECTED.—Amounts received by the Secretary under this section shall be credited to appropriations available to the secretary for carrying out this chapter.

Section 2, Public Law 89-777

[46 U.S.C. App. 817d]

§ 817d. Financial responsibility of owners and charterers for death or injury to passengers or other persons

(a) AMOUNT; METHOD OF ESTABLISHMENT.—Each owner or charterer of an American or foreign vessel having berth or stateroom accommodations for fifty or more passengers, and embarking passengers at United States ports, shall establish, under regulations prescribed by the [Federal Maritime Commission] *Intermodal Transportation Board,* his financial responsibility to meet any liability he may incur for death or injury to passengers or other persons on voyages to or from United States ports, in an amount based upon the number of passenger accommodations aboard the vessel, calculated as follows: $20,000 for each passenger accommodation up to and including five hundred; plus $15,000 for each additional passenger accommodation between five hundred and one and one thousand; plus $10,000 for each additional passenger accommodation between one thousand and one and one thousand five hundred; plus $5,000 for each passenger accommodation in excess of one thousand five hundred: *Provided, however,* That if such owner or charterer is operating more than one vessel subject to this section, the foregoing amount shall be based upon the number of passenger accommodations on the vessel being so operated which has the largest number of passenger accommodations. This amount shall be available to pay any judgment for damages, whether an amount less than or more than $20,000 for death or injury occurring on such voyages to any passenger or other person. Such financial responsibility may be established by any one of, or a combination of, the following methods which is acceptable to the [Commission:] *Board:* (1) policies of insurance, (2) surety bonds, (3) qualifications as a self-insurer, or (4) other evidence of financial responsibility.

(b) ISSUANCE OF BOND WHEN FILED WITH [COMMISSION] *BOARD.*—If a bond is filed with the [Commission,] *Board* then such bond shall be issued by a bonding company authorized to do business in the United States or any State thereof or the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, or any territory or possession of the United States.

(c) CIVIL PENALTIES FOR VIOLATIONS; REMISSION OR MITIGATION OF PENALTIES.—Any person who shall violate this section shall be subject to a civil penalty of not more than $5,000 in addition to a civil penalty of $200 for each passage sold, such penalties to be assessed by the [Federal Maritime Commission.] *Intermodal Transportation Board.* These penalties may be remitted or mitigated by the [Federal Maritime Commission] *Intermodal Transportation Board* upon such terms as it in its discretion shall deem proper.

(d) RULES AND REGULATIONS.—The [Federal Maritime Commission] *Intermodal Transportation Board* is authorized to prescribe such regulations as may be necessary to carry out the provisions of this section. The provisions of the Shipping Act of 1984 shall

apply with respect to proceedings conducted by the [Commission] *Board* under this section.

(e) REFUSAL OF DEPARTURE CLEARANCE.—At the port or place of departure from the United States of any vessel described in subsection (a) of this section, the Customs Service shall refuse the clearance required by section 4197 of the Revised Statutes (46 U.S.C. 91) to any such vessel which does not have evidence furnished by the [Federal Maritime Commission] *Intermodal Transportation Board* that the provisions of this section have been complied with.

Section 3, Public Law 89–777

[46 U.S.C. App. 817e]

§ 817e. Financial responsibility for indemnification of passengers for nonperformance of transportation

(a) FILING OF INFORMATION OR BOND WITH [COMMISSION] *Board*.—No person in the United States shall arrange, offer, advertise, or provide passage on a vessel having berth or stateroom accommodations for fifty or more passengers and which is to embark passengers at United States ports without there first having been filed with the [Federal Maritime Commission] *Intermodal Transportation Board* such information as the [Commission] *Board* may deem necessary to establish the financial responsibility of the person arranging, offering, advertising, or providing such transportation, or in lieu thereof a copy of a bond or other security, in such form as the [Commission,] *Board,* by rule or regulation, may require and accept, for indemnification of passengers for nonperformance of the transportation.

(b) ISSUANCE OF BOND WHEN FILED WITH [COMMISSION;] *Board;* Amount of Bond.—If a bond is filed with the [Commission,] *Board,* such bond shall be issued by a bonding company authorized to do business in the United States or any State thereof, or the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States.

(c) CIVIL PENALTIES FOR VIOLATIONS; REMISSION OR MITIGATION OF PENALTIES.—Any person who shall violate this section shall be subject to a civil penalty of not more than $5,000 in addition to a civil penalty of $200 for each passage sold, such penalties to be assessed by the [Federal Maritime Commission] *Intermodal Transportation Board.* These penalties may be remitted or mitigated by the [Federal Maritime Commission] *Intermodal Transportation Board* upon such terms as it in its discretion shall deem proper.

(d) RULES AND REGULATIONS.—The [Federal Maritime Commission] *Intermodal Transportation Board* is authorized to prescribe such regulations as may be necessary to carry out the provisions of this section. The provisions of the Shipping Act of 1984 shall apply with respect to proceedings conducted by the [Commission] *Board* under this section.

(e) REFUSAL OF DEPARTURE CLEARANCE.—At the port or place of departure from the United States of any vessel described in subsection (a) of this section, the Customs Service shall refuse the

clearance required by section 4197 of the Revised Statutes (46 U.S.C. 91) [46 U.S.C. Appx. 91] to any such vessel which does not have evidence furnished by the [Federal Maritime Commission] *Intermodal Transporation Board* that the provisions of this section have been complied with.

Section 19, Merchant Marine Act, 1920

[46 U.S.C. App. 876]

§ 876. Power of Secretary and [Commission] *Board* to make rules and regulations

[(1)] *(a)* The Secretary of Transportation is authorized and directed in aid of the accomplishment of the purposes of this Act—

[(a)] *(1)* To make all necessary rules and regulations to carry out the provisions of this Act;

And the [Federal Maritime Commission] *Intermodal Transportation Board* is authorized and directed in aid of the accomplishment of the purposes of this Act:

[(b)] *(2)* To make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, including intermodal movements, terminal operations, cargo solicitation, [forwarding and] agency services, [non-vessel-operating common carrier operations,] *ocean transportation intermediary services and operations,* and other activities and services integral to transportation systems, and which arise out of or result from foreign laws, rules, or regulations or from competitive [methods or practices] *methods, pricing practices, or other practices* employed by owners, operators, agents, or masters of vessels of a foreign country; and

[(c)] *(3)* To request the head of any department, board, bureau, or agency of the Government to suspend, modify, or annul rules or regulations which have been established by such department, board, bureau, or agency, or to make new rules or regulations affecting shipping in the foreign trade other than such rules or regulations relating to the Public Health Service, the Consular Service, and the Steamboat Inspection Service.

[(2)] *(b)* No rule or regulation shall be established by any department, board, bureau, or agency of the Government which affect [affects] shipping in the foreign trade, except rules or regulations affecting the Public Health Service, the Consular Service, and the Steamboat Inspection Service, until such rule or regulation has been submitted to the board for its approval and final action has been taken thereon by the board or the President.

[(3)] *(c)* Whenever the head of any department, board, bureau, or agency of the Government refuses to suspend, modify, or annul any rule or regulation, or make a new rule or regulation upon request of the board, as provided in [subdivision (c) of paragraph (1)] *subsection (a)(3)* of this section, or objects to the decision of the board in respect to the approval of any rule or regulation, as provided in [paragraph (2)] *subsection (d)* of this section, either the

board or the head of the department, board, bureau, or agency which has established or is attempting to establish the rule or regulation in question may submit the facts to the President, who is hereby authorized to establish or suspend, modify, or annul such rule or regulation.

[(4)] *(d)* No rule or regulation shall be established which in any manner gives vessels owned by the United States any preference or favor over those vessels documented under the laws of the United States and owned by persons who are citizens of the United States.

[(5)] *(e)* The [Commission] *Board* may initiate a rule or regulation under [paragraph (1)(b)] *subsection (a)(2)* of this section either on its own motion or pursuant to a petition. Any person, including a common carrier, tramp operator, bulk operator, shipper, shippers' association, ocean [freight forwarder,] *transportation intermediary,* marine terminal operator, or any component of the Government of the United States, may file a petition for relief under [paragraph (1)(b) of this section] *that subsection.*

[(6)] *(f)* In furtherance of the purposes of [paragraph (1)(b)] *subsection (a)(2)* of this section—

[(a)] *(1)* the [Commission] *Board* may, by order, require any person (including any common carrier, tramp operator, bulk operator, shipper, shippers' association, ocean [freight forwarder,] *transporation intermediary,* or marine terminal operator, or an officer, receiver, trustee, lessee, agent, or employee thereof) to file with the [Commission] *Board* a report, answers to questions, documentary material, or other information which the [Commission] *Board* considers necessary or appropriate;

[(b)] *(2)* the [Commission] *Board* may require a report or answers to questions to be made under oath;

[(c)] *(3)* the [Commission] *Board* may prescribe the form and the time for response to a report and answers to questions; and

[(d)] *(4)* a person who fails to file a report, answer, documentary material, or other information required under this paragraph shall be liable to the United States Government for a civil penalty of not more than $5,000 for each day that the information is not provided.

[(7)] *(g)* In proceedings under [paragraph (1)(b)] *subsection (a)(2)* of this section—

[(a)] *(1)* the [Commission] *Board* may authorize a party to use depositions, written interrogatories, and discovery procedures that, to the extent practicable, are in conformity with the rules applicable in civil proceedings in the district courts of the United States;

[(b)] *(2)* the [Commission] *Board* may by subpoena compel the attendance of witnesses and production of books, papers, documents, and other evidence;

[(c)] *(3)* subject to funds being provided by appropriations Acts, witnesses are, unless otherwise prohibited by law, entitled to the same fees and mileage as in the courts of the United States;

[(d)] *(4)* for failure to supply information ordered to be produced or compelled by subpoena under subdivision (b), the [Commission] *Board* may—

[(i)] *(A)* after notice and an opportunity for hearing, suspend [tariffs of a common carrier] *tariffs and service contracts of a common carrier* or that common carrier's right to [use the tariffs of conferences] *use tariffs of conferences and service contracts of agreements* of which it is a member, or

[(ii)] (B) assess a civil penalty of not more than $5,000 for each day that the information is not provided; and

[(e)] *(5)* when a person violates an order of the [Commission] *Board* or fails to comply with a subpoena, the [Commission] *Board* may seek enforcement by a United States district court having jurisdiction over the parties, and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce the order by an appropriate injunction or other process, mandatory or otherwise.

[(8)] *(h)* Notwithstanding any other law, the [Commission] *Board* may refuse to disclose to the public a response or other information provided under the terms of this section.

[(9)] *(i)* If the [Commission] *Board* finds that conditions that are unfavorable to shipping under [paragraph (1)(b)] *subsection (a)(2)* of this section exist, the [Commission] *Board* may—

[(a)] *(1)* limit sailings to and from United States ports or the amount or type of cargo carried;

[(b)] *(2)* suspend, in whole or in part, [tariffs filed with the [Commission] *Board*] *tariffs and service contracts* for carriage to or from United States ports, including a common carrier's right to [use the tariffs of conferences] *use tariffs of conferences and service contracts of agreements* in United States trades of which it is a member for any period the [Commission] Board specifies;

[(c)] *(3)* suspend, in whole or in part, an ocean common carrier's right to operate under an agreement filed with the [Commission] *Board*, including any agreement authorizing preferential treatment at terminals, preferential terminal leases, space chartering, or pooling of cargoes or revenue with other ocean common carriers;

[(d)] *(4)* impose a fee, not to exceed $1,000,000 per voyage; or

[(e)] *(5)* take any other action the [Commission] *Board* finds necessary and appropriate to adjust or meet any condition unfavorable to shipping in the foreign trade of the United States.

[(10)] *(j)* Upon request by the [Commission] *Board*—

[(a)] *(1)* the collector of customs at the port or place of destination in the United States shall refuse the clearance required by section 4197 of the Revised Statutes (46 App. U.S.C. 91) to a vessel of a country that is named in a rule or regulation issued by the [Commission] *Board* under [paragraph (1)(b)] *subsection (a)(2)* of this section, and shall collect any fees imposed by the [Commission] *Board* under [paragraph (9)(d)] *subsection (i)(4)* of this section; and

[(b)] *(2)* the Secretary of the department in which the Coast Guard is operating shall deny entry for purpose of oceanborne trade, of a vessel of a country that is named in a rule or regulation issued by the [Commission] *Board* under [paragraph (1)(b)] *subsection (a)(2)* of this section, to any port or place in the United States or the navigable waters of the United States, or shall detain that vessel at the port or place in the United States from which it is about to depart for another port or place in the United States.

[(11)] *(k)* A common carrier that accepts or handles cargo for carriage under a [tariff] *tariff or service contract* that has been suspended under [paragraph (7) (d) or (9) (b)] SUBSECTION (G)(4) OR (I)(2) of this section, or after its right to use another [tariff] *tariff or service contract* has been suspended under those [paragraphs,] *subsections* is subject to a civil penalty of not more than $50,000 for each day that it is found to be operating under a suspended [tariff] *tariff or service contract*.

[(12)] *(l)* The [Commission] *Board* may consult with, seek the cooperation of, or make recommendations to other appropriate Government agencies prior to taking any action under this section.

Section 2, Shipping Act of 1984

[46 U.S.C. App. 1701]

§ 1701. Declaration of policy

The purposes of this Act are—

(1) to establish a nondiscriminatory regulatory process for the common carriage of goods by water in the foreign commerce of the United States with a minimum of government intervention and regulatory costs;

(2) to provide an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices; [and]

(3) to encourage the development of an economically sound and efficient United States-flag liner fleet capable of meeting national security [needs.] *needs; and*

(4) to promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.

Section 3, Shipping Act of 1984

[46 U.S.C. App. 1702]

§ 1702. Definitions

As used in this Act—

(1) "agreement" means an understanding, arrangement, or association (written or oral) and any modification or cancellation thereof; but the term does not include a maritime labor agreement.

(2) "antitrust laws" means the Act of July 2, 1890 (ch. 647, 26 Stat. 209), as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), as amended; the Federal Trade Commission Act (38 Stat. 717) [15 U.S.C. 41 et seq.], as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570) [15 U.S.C. 8, 9], as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), as amended; the Antitrust Civil Process Act (76 Stat. 548) [15 U.S.C. 1311 et seq.], as amended; and amendments and Acts supplementary thereto.

(3) "assessment agreement" means an agreement, whether part of a collective-bargaining agreement or negotiated separately, to the extent that it provides for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized.

(4) "Board" means the Intermodal Transportation Board.

[(4)**]** *(5)* "bulk cargo" means cargo that is loaded and carried in bulk without mark or count.

[(5) "Commission" means the Federal Maritime Commission.**]**

(6) "common carrier" means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that—

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

(B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker. As used in this paragraph, "chemical parcel-tanker" means a vessel whose cargo-carrying capability consists of individual cargo tanks for bulk chemicals that are a permanent part of the vessel, that have segregation capability with piping systems to permit simultaneous carriage of several bulk chemical cargoes with minimum risk of cross-contamination, and that has a valid certificate of fitness under the International Maritime Organization Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk.

(7) "conference" means an association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff; but the term does not include a joint service, consortium, pooling, sailing, or transshipment arrangement.

(8) "controlled carrier" means an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by **[**the government under whose registry the vessels of the carrier operate;**]** *a government;* ownership or control by a government shall be deemed to exist with respect to any carrier if—

(A) a majority portion of the interest in the carrier is owned or controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(B) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer, or the chief executive officer of the carrier.

[(9) "deferred rebate" means a return by a common carrier of any portion of the freight money to a shipper as a consideration for that shipper giving all, or any portion, of its shipments to that or any other common carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.]

(9) "deferred rebate" means a return by a common carrier of any portion of freight money to a shipper as a consideration for that shipper giving all, or any portion, of its shipments to that or any other common carrier over a fixed period of time, the payment of which is deferred beyond the completion of service for which it is paid, and is made only if the shipper has agreed to make a further shipment or shipments with that or any other common carrier.

[(10) "fighting ship" means a vessel used in a particular trade by an ocean common carrier or group of such carriers for the purpose of excluding, preventing, or reducing competition by driving another ocean common carrier out of that trade.]

[(11)] *(10)* "forest products" means forest products [in an unfinished or semifinished state that require special handling moving in lot sizes too large for a container,] including, but not limited to lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, [paper board in rolls, and paper in rolls.] *paper and paper board in rolls or in pallet or skid-sized sheets.*

[(12)] *(11)* "inland division" means the amount paid by a common carrier to an inland carrier for the inland portion of through transportation offered to the public by the common carrier.

[(13)] *(12)* "inland portion" means the charge to the public by a common carrier for the nonocean portion of through transportation.

[(14)] *(13)* "loyalty contract" means a contract with an ocean common carrier or [conference, other than a service contract or contract based upon time-volume rates,] *agreement* by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or [conference.] *agreement and the contract provides for a deferred rebate arrangement.*

[(15)] *(14)* "marine terminal operator" means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection

with a common [carrier.] *carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49, United States Code.*

[(16)] *(15)* "maritime labor agreement" means a collective-bargaining agreement between an employer subject to this Act, or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or an agreement preparatory to such a collective-bargaining agreement among members of a multiemployer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing, or administration of a multiemployer bargaining group; but the term does not include an assessment agreement.

[(17) "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.]

[(18)] *(16)* "ocean common carrier" means a vessel-operating common carrier.

[(19) "ocean freight forwarder" means a person in the United States that—

[(A) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and

[(B) processes the documentation or performs related activities incident to those shipments.]

(17) "ocean transportation intermediary" means an ocean freight forwarder or a non-vessel-operating common carrier. For purposes of this paragraph, the term

(A) "ocean freight forwarder" means a person that—

(i) in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) processes the documentation or performs related activities incident to those shipments; and

(B) "non-vessel-operating common carrier" means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

[(20)] *(18)* "person" includes individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country.

[(21) "service contract" means a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.]

(19) "service contract" means a written contract, other than a bill of lading or a receipt, between one or more shippers and an

individual common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of any party.

[(22)**]** *(20)* "shipment" means all of the cargo carried under the terms of a single bill of lading.

[(23) "shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.**]**

(21) "shipper" means—

(A) a cargo owner;

(B) the person for whose account the ocean transportation is provided;

(C) the person to whom delivery is to be made;

(D) a shippers' association; or

(E) an ocean transportation intermediary, as defined in paragraph (17)(B) of this section, that accepts responsibility for payment of all charges applicable under the tariff or service contract.

[(24)**]** *(22)* "shippers' association" means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

[(25)**]** *(23)* "through rate" means the single amount charged by a common carrier in connection with through transportation.

[(26)**]** *(24)* "through transportation" means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port.

[(27)**]** *(25)* "United States" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Marianas, and all other United States territories and possessions.

Section 4, Shipping Act of 1984

[46 U.S.C. App. 1703]

§ 1703. Agreements within scope of [the Act] 46 U.S.C. App. 1701 et seq.

(a) OCEAN COMMON CARRIERS.—This Act applies to agreements by or among ocean common carriers to—

(1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(2) pool or apportion traffic, revenues, earnings, or losses;

(3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal [operators or non-vessel-operating common carriers;] *operators;*

(6) control, regulate, or prevent competition in international ocean transportation; [and] *or*

(7) regulate or prohibit their use of service contracts.

(b) MARINE TERMINAL OPERATORS.—This Act applies to agreements [(to the extent the agreements involve ocean transportation in the foreign commerce of the United States)] among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to—

(1) discuss, fix, or regulate rates or other conditions of service; and

(2) engage in exclusive, preferential, or cooperative working [arrangements.] *arrangements, to the extent that such agreements involve ocean transportation in the foreign commerce of the United States.*

(c) ACQUISITIONS.—This Act does not apply to an acquisition by any person, directly or indirectly, of any voting security or assets of any other person.

Section 5, Shipping Act of 1984

[46 U.S.C. App. 1704]

§ 1704. Agreements

(a) FILING REQUIREMENTS.—A true copy of every agreement entered into with respect to an activity described in section 4 (a) or (b) of this Act [46 U.S.C. App. 1703 (a) or (b)] shall be filed with the [Commission] *Board*, except agreements related to transportation to be performed within or between foreign countries and agreements among common carriers to establish, operate, or maintain a marine terminal in the United States. In the case of an oral agreement, a complete memorandum specifying in detail the substance of the agreement shall be filed. The [Commission] *Board* may by regulation prescribe the form and manner in which an agreement shall be filed and the additional information and documents necessary to evaluate the agreement.

(b) CONFERENCE AGREEMENTS.—Each conference agreement must—

(1) state its purpose;

(2) provide reasonable and equal terms and conditions for admission and readmission to conference membership for any ocean common carrier willing to serve the particular trade or route;

(3) permit any member to withdraw from conference membership upon reasonable notice without penalty;

(4) at the request of any member, require an independent neutral body to police fully the obligations of the conference and its members;

(5) prohibit the conference from engaging in conduct prohibited by section 10(c) (1) or (3) of this Act [46 U.S.C. App. 1709(c) (1), (3)];

(6) provide for a consultation process designed to promote—

(A) commercial resolution of disputes, and

(B) cooperation with shippers in preventing and eliminating malpractices;

(7) establish procedures for promptly and fairly considering shippers' requests and complaints; **[**and**]**

[(8) provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of this Act [46 U.S.C. App. 1707(a)] upon not more than 10 calendar days' notice to the conference and that the conference will include the new rate or service item in its tariff for use by that member, effective no later than 10 calendar days after receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing conference tariff provision for that rate or service item.**]**

(8) provide that any member of the conference may take independent action on any rate or service item upon not more than 5 calendar days' notice to the conference and that, except for exempt commodities not published in the conference tariff, the conference will include the new rate or service item in its tariff for use by that member, effective no later than 5 calendar days after receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing conference tariff provision for that rate or service item; and

(9) prohibit the agreement from—

(A) prohibiting or restricting the members of the agreement from engaging in negotiations for service contracts with 1 or more shippers;

(B) requiring a member of the agreement to disclose a negotiation on a service contract, or the terms and conditions of a service contract, other than those specified by section 8(c)(3) of this Act; and

(C) issuing mandatory rules or requirements affecting an agreement member's right to negotiate and enter into service contracts.

An agreement may issue voluntary guidelines relating to the terms and procedures of agreement members' service contracts if the guidelines explicitly state the right of members of the agreement not to follow the guidelines and the guidelines are filed with the agreement.

(c) INTERCONFERENCE AGREEMENTS.—Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier. Each agreement between conferences must provide the right of independent action for each conference.

(d) ASSESSMENT AGREEMENTS.—Assessment agreements shall be filed with the [Commission] *Board* and become effective on filing. The [Commission] *Board* shall thereafter, upon complaint filed within 2 years of the date of the agreement, disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports. The [Commission] *Board* shall issue its final decision in any such proceeding within 1 year of the date of filing of the complaint. To the extent that an assessment or charge is found in the proceeding to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the [Commission] *Board* shall remedy the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. These adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. Except for this subsection and section 7(a) of this Act [46 U.S.C. App. 1706(a)], [this Act, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933,] *this Act and the Shipping Act, 1916* do not apply to assessment agreements.

(e) MARITIME LABOR AGREEMENTS.—This Act and the Shipping Act, 1916 do not apply to maritime labor agreements. This subsection does not exempt from this Act or the Shipping Act, 1916 any rates, charges, regulations, or practices of a common carrier that are required to be set forth in a tariff, whether or not those rates, charges, regulations, or practices arise out of, or are otherwise related to, a maritime labor agreement.

Section 6, Shipping Act of 1984

[46 U.S.C. App. 1705]

§ 1705. Action on agreements

(a) NOTICE.—Within 7 days after an agreement is filed, the [Commission] *Board* shall transmit a notice of its filing to the Federal Register for publication.

(b) REVIEW STANDARD.—The [Commission] *Board* shall reject any agreement filed under section 5(a) of this Act [46 U.S.C. App. 1704(a)] that, after preliminary review, it finds does not meet the requirements of section 5 [46 U.S.C. App. 1704]. The [Commission] *Board* shall notify in writing the person filing the agreement of the reason for rejection of the agreement.

(c) REVIEW AND EFFECTIVE DATE.—Unless rejected by the [Commission] *Board* under subsection (b) , agreements, other than assessment agreements, shall become effective—

(1) on the 45th day after filing, or on the 30th day after notice of the filing is published in the Federal Register, whichever day is later; or

(2) if additional information or documentary material is requested under subsection (d) , on the 45th day after the [Commission] *Board* receives—

(A) all the additional information and documentary material requested; or

(B) if the request is not fully complied with, the information and documentary material submitted and a statement of the reasons for noncompliance with the request. The period specified in paragraph (2) may be extended only by the United States District Court for the District of Columbia upon an application of the [Commission] *Board* under subsection (i).

(d) ADDITIONAL INFORMATION.—Before the expiration of the period specified in subsection (c) (1) , the [Commission] *Board* may request from the person filing the agreement any additional information and documentary material it deems necessary to make the determinations required by this section.

(e) REQUEST FOR EXPEDITED APPROVAL.—The [Commission] *Board* may, upon request of the filing party, shorten the review period specified in subsection (c) , but in no event to a date less than 14 days after notice of the filing of the agreement is published in the Federal Register.

(f) TERM OF AGREEMENTS.—The [Commission] *Board* may not limit the effectiveness of an agreement to a fixed term.

(g) SUBSTANTIALLY ANTICOMPETITIVE AGREEMENTS.—If, at any time after the filing or effective date of an agreement, the [Commission] *Board* determines that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, it may, after notice to the person filing the agreement, seek appropriate injunctive relief under subsection (h) .

(h) INJUNCTIVE RELIEF.—The [Commission] *Board* may, upon making the determination specified in subsection (g) , bring suit in the United States District Court for the District of Columbia to enjoin operation of the agreement. The court may issue a temporary restraining order or preliminary injunction and, upon a showing that the agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, may enter a permanent injunction. In a suit under this subsection, the burden of proof is on the [Commission] *Board*. The court may not allow a third party to intervene with respect to a claim under this subsection.

(i) COMPLIANCE WITH INFORMATIONAL NEEDS.—If a person filing an agreement, or an officer, director, partner, agent, or employee thereof, fails substantially to comply with a request for the submission of additional information or documentary material within the period specified in subsection (c), the United States District Court for the District of Columbia, at the request of the [Commission] *Board*—

(1) may order compliance;

(2) shall extend the period specified in subsection (c)(2) until there has been substantial compliance; and

(3) may grant such other equitable relief as the court in its discretion determines necessary or appropriate.

(j) NONDISCLOSURE OF SUBMITTED MATERIAL.—Except for an agreement filed under section 5 of this Act [46 U.S.C. App. 1704], information and documentary material filed with the [Commis-

sion] *Board* under section 5 or 6 [46 U.S.C. App. 1704 and this section] is exempt from disclosure under section 552 of title 5, United States Code [5 U.S.C. 552] and may not be made public except as may be relevant to an administrative or judicial action or proceeding. This section does not prevent disclosure to either body of Congress or to a duly authorized committee or subcommittee of Congress.

(k) REPRESENTATION.—Upon notice to the Attorney General, the [Commission] *Board* may represent itself in district court proceedings under subsections (h) and (i) of this section and section 11(h) of this Act [46 U.S.C. App. 1710(h)]. With the approval of the Attorney General, the [Commission] *Board* may represent itself in proceedings in the United States Courts of Appeal under subsections (h) and (i) of this section and section 11(h) of this Act [46 U.S.C. App. 1710(h)].

Section 7, Shipping Act of 1984

[46 U.S.C. App. 1706]

§ 1706. Exemption from antitrust laws

(a) IN GENERAL.—The antitrust laws do not apply to—

(1) any agreement that has been filed under section 5 of this Act [46 U.S.C. App. 1704] and is effective under section 5(d) or section 6 [46 U.S.C. App. 1704(d) , 1705], or is exempt under section 16 of this Act [46 U.S.C. App. 1715] from any requirement of this Act;

(2) any activity or agreement within the scope of this Act, whether permitted under or prohibited by this Act, undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the [Commission] *Board* and in effect when the activity took place, or (B) it is exempt under section 16 of this Act [46 U.S.C. App. 1715] from any filing *or publication* requirement of this Act;

(3) any agreement or activity that relates to transportation services within or between foreign countries, whether or not via the United States, unless that agreement or activity has a direct, substantial, and reasonably foreseeable effect on the commerce of the United States;

(4) any agreement or activity concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade;

(5) any agreement or activity to provide or furnish wharfage, dock, warehouse, or other terminal facilities outside the United States; or

(6) subject to section 20(e)(2) of this Act [46 U.S.C. App. 1719(e)(2)], any agreement, modification, or cancellation approved by the *Federal Maritime* Commission before the effective date of this Act under section 15 of the Shipping Act, 1916 [46 U.S.C. App. 814], or permitted under section 14b thereof, and any properly published tariff, rate, fare, or charge, classification, rule, or regulation explanatory thereof implementing that agreement, modification, or cancellation.

(b) EXCEPTIONS.—This Act does not extend antitrust immunity—

(1) to any agreement with or among air carriers, rail carriers, motor carriers, or common carriers by water not subject to this Act with respect to transportation within the United States;

(2) to any discussion or agreement among common carriers that are subject to this Act regarding the inland divisions (as opposed to the inland portions) of through rates within the United States; [or]

(3) to any agreement among common carriers subject to this Act to establish, operate, or maintain a marine terminal in the United [States.] *States; or*

(4) to any loyalty contract.

(c) LIMITATIONS.—

(1) Any determination by an agency or court that results in the denial or removal of the immunity to the antitrust laws set forth in subsection (a) shall not remove or alter the antitrust immunity for the period before the determination.

(2) No person may recover damages under section 4 of the Clayton Act (15 U.S.C. 15) [15 U.S.C. 15], or obtain injunctive relief under section 16 of that Act (15 U.S.C. 26) [15 U.S.C. 26], for conduct prohibited by this Act.

Section 8, Shipping Act of 1984

[46 U.S.C. App. 1707]

§ 1707. Tariffs

(a) IN GENERAL.—

(1) Except with regard to bulk cargo, forest products, recycled metal scrap, *new assembled motor vehicles,* waste paper, and paper waste, each common carrier and conference shall [file with the Commission, and] keep open to public [inspection,] *inspection in an automated tariff system,* tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, common carriers shall not be required to state separately or otherwise reveal in [tariff filings] *tariffs* the inland divisions of a through rate. Tariffs shall—

(A) state the places between which cargo will be carried;

(B) list each classification of cargo in use;

(C) state the level of ocean freight forwarder compensation, if any, by a carrier or conference;

(D) state separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules or regulations that in any way change, affect, or determine any part or the aggregate of the rates or charges; [and]

(E) include sample copies of any [loyalty contract,] bill of lading, contract of affreightment, or other document evidencing the transportation [agreement.] *agreement; and*

(F) include copies of any loyalty contract, omitting the shipper's name.

[(2) Copies of tariffs shall be made available to any person, and a reasonable charge may be assessed for them.]

(2) Tariffs shall be made available electronically to any person, without time, quantity, or other limitation, through appropriate access from remote locations, and a reasonable charge may be assessed for such access. No charge may be assessed a Federal agency for such access.

(b) TIME-VOLUME RATES.—Rates shown in tariffs filed under subsection (a) may vary with the volume of cargo offered over a specified period of time.

[(c) SERVICE CONTRACTS.—An ocean common carrier or conference may enter into a service contract with a shipper or shippers' association subject to the requirements of this Act. Except for service contracts dealing with bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, each contract entered into under this subsection shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include—

[(1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;

[(2) the commodity or commodities involved;

[(3) the minimum volume;

[(4) the line-haul rate;

[(5) the duration;

[(6) service commitments; and

[(7) the liquidated damages for nonperformance, if any.

[The exclusive remedy for a breach of a contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree.]

(c) SERVICE CONTRACTS.—

(1) IN GENERAL.—An individual common carrier or an agreement between or among ocean common carriers may enter into a service contract with one or more shippers subject to the requirements of this Act. The exclusive remedy for a breach of a contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree. In no case may the contract dispute resolution forum be affiliated with, or controlled by, any party to the contract.

(2) FILING REQUIREMENTS.—Except for service contracts dealing with bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, waste paper, or paper waste, each contract entered into under this subsection by an individual common carrier or an agreement shall be filed confidentially with the [Commission] Board. Each service contract shall include the following essential terms—

(A) the origin and destination port ranges;

(B) the origin and destination geographic areas, in the case of through inter modal movements;

(C) the commodity or commodities involved;
(D) the minimum volume or portion;
(E) the line-haul rate;
(F) the duration;
(G) service commitments; and
(H) the liquidated damages for nonperformance, if any.

(3) PUBLICATION OF CERTAIN ESSENTIAL TERMS.—When a service contract is filed confidentially with the [Commission] Board, a concise statement of the terms described in paragraphs (2)(C), (D), and (F) and the United States port range shall be published and made available to the public in tariff format.

(4) DISCLOSURE OF CERTAIN UNPUBLISHED TERMS.—A party to a collective-bargaining agreement may petition the [Commission] Board for the disclosure of any service contract terms not required to be published by paragraph (3) which that party considers to be in violation of that agreement. The petition shall include evidence demonstrating that

(A) a specific ocean common carrier is a party to a collective-bargaining agreement with the petitioner;

(B) the ocean common carrier may be violating the terms and conditions of that agreement; and

(C) the alleged violation involves the moment of cargo subject to this Act.

(5) ACTION BY [Commission] Board.—The [Commission] Board, after reviewing a petition under paragraph (4) , the evidence provided with the petition, and the filed service contracts of the carrier named in the petition, may disclose to the petitioner only such unpublished terms of that carrier's service contracts that the [Commission] Board reasonably believes may constitute a violation of the collective-bargaining agreement. The [Commission] Board may not disclose any unpublished service contract terms with respect to a collective-bargaining agreement term or condition determined by the [Commission] Board to be in violation of this Act.

(d) RATES.—No new or initial rate or change in an existing rate that results in an increased cost to the shipper may become effective earlier than [30 days after filing with the Commission.] *30 calendar days after publication.* The [Commission] *Board*, for good cause, may allow such a new or initial rate or change to become effective in less than 30 calendar days. A change in an existing rate that results in a decreased cost to the shipper may become effective upon [publication and filing with the Commission.] *publication.*

[(e) REFUNDS.—The Commission may, upon application of a carrier or shipper, permit a common carrier or conference to refund a portion of freight charges collected from a shipper or to waive the collection of a portion of the charges from a shipper if—

[(1) there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and the refund will not result in discrimination among shippers, ports, or carriers;

[(2) the common carrier or conference has, prior to filing an application for authority to make a refund, filed a new tariff with the Board that sets forth the rate on which the refund or waiver would be based;

[(3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Commission may require that give notice of the rate on which the refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; and

[(4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.]

(e) MARINE TERMINAL OPERATOR SCHEDULES.—A marine terminal operator may make available to the public, subject to section 10(d) of this Act, a schedule of rates, regulations, and practices pertaining to receiving, delivering, handling, or storing property at its marine terminal. Any such schedule made available to the public shall be enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions.

[(f) FORM.—The Commission may by regulation prescribe the form and manner in which the tariffs required by this section shall be published and filed. The Commission may reject a tariff that is not filed in conformity with this section and its regulations. Upon rejection by the Commission, the tariff is void and its use is unlawful.]

(f) REGULATIONS.—The [Commission] Board shall by regulation prescribe the requirements for the accessibility and accuracy of automated tariff systems established under this section. The [Commission] Board may, after periodic review, prohibit the use of any automated tariff system that fails to meet therequirements established under this section. The [Commission] Board may not require a common carrier to provide a remote terminal for access under subsection (a) (2) . The [Commission] Board shall by regulation prescribe the form and manner in which marine terminal operator schedules authorized by this section shall be published.

Section 502, High Seas Driftnet Fisheries Enforcement Act

[§ 1707a. Automated tariff filing and information system

[(a) DEFINITIONS.—In this section, the following definitions apply:

[(1) Commission. The term "Commission" means the Federal Maritime Commission.

[(2) COMMON CARRIER.—The term "common carrier" means a common carrier under section 3 of the Shipping Act of 1984 (46 App. U.S.C. 1702), a common carrier by water in interstate commerce under the Shipping Act, 1916 (46 App. U.S.C. 801 et seq.), or a common carrier by water in intercoastal commerce under the Intercoastal Shipping Act, 1933 (46 App. U.S.C. 843 et seq.).

[(3) CONFERENCE.—The term "conference" has the meaning given that term under section 3 of the Shipping Act of 1984 (46 App. U.S.C. 1702).

[(4) ESSENTIAL TERMS OF SERVICE CONTRACTS.—The term "essential terms of service contracts" means the essential terms that are required to be filed with the Commission and made available under section 8(c) of the Shipping Act of 1984 (46 App. U.S.C. 1707(c)).

[(5) TARIFF.—The term "tariff" means a tariff of rates, charges, classifications, rules, and practices required to be filed by a common carrier or conference under section 8 of the Shipping Act of 1984 (46 App. U.S.C. 1707), or a rate, fare, charge, classification, rule, or regulation required to be filed by a common carrier or conference under the Shipping Act, 1916 (46 U.S.C. 801 et seq.), or the Intercoastal Shipping Act, 1933 (46 App. U.S.C. 843 et seq.).

[(b) TARIFF FORM AND AVAILABILITY.—

[(1) Requirement to file. Notwithstanding any other law, each common carrier and conference shall, in accordance with subsection (c), file electronically with the Commission all tariffs, and all essential terms of service contracts, required to be filed by that common carrier or conference under the Shipping Act of 1984 (46 App. U.S.C. 1701 et seq.), the Shipping Act, 1916 (46 App. U.S.C. 801 et seq.), and the Intercoastal Shipping Act, 1933 (46 App. U.S.C. 843 et seq.).

[(2) Availability of information. The Commission shall make available electronically to any person, without time, quantity, or other limitation, both at the Commission headquarters and through appropriate access from remote terminals—

[(A) all tariff information, and all essential terms of service contracts, filed in the Commission's Automated Tariff Filing and Information System database; and

[(B) all tariff information in the System enhanced electronically by the Commission at any time.

[(c) FILING SCHEDULE.—New tariffs and new essential terms of service contracts shall be filed electronically not later than July 1, 1992. All other tariffs, amendments to tariffs, and essential terms of service contracts shall be filed not later than September 1, 1992.

[(d) FEES.—

[(1) Amount of fee. The Commission shall charge, beginning July 1 of fiscal year 1992 and in fiscal years 1993, 1994, and 1995—

[(A) a fee of 46 cents for each minute of remote computer access by any individual of the information available electronically under this section; and

[(B) (i) for electronic copies of the Automated Tariff Filing and Information System database (in bulk), or any portion of the database, a fee reflecting the cost of providing those copies, including the cost of duplication, distribution, and user-dedicated equipment; and

[(ii) for a person operating or maintaining information in a database that has multiple tariff or service contract information obtained directly or indirectly from the Commission, a fee of 46 cents for each minute that database is subsequently accessed by computer by any individual.

[(2) Exemption for Federal agencies. A Federal agency is exempt from paying a fee under this subsection.

[(e) ENFORCEMENT.—The Commission shall use systems controls or other appropriate methods to enforce subsection (d).

[(f) PENALTIES.—

[(1) Civil penalties. A person failing to pay a fee established under subsection (d) is liable to the United States Government for a civil penalty of not more than $5,000 for each violation.

[(2) Criminal penalties. A person that willfully fails to pay a fee established under subsection (d) commits a class A misdemeanor.

[(g) AUTOMATIC FILING IMPLEMENTATION.—

[(1) CERTIFICATION OF SOFTWARE.—Software that provides for the electronic filing of data in the Automated Tariff Filing and Information System shall be submitted to the Commission for certification. Not later than fourteen days after a person submits software to the Commission for certification, the Commission shall—

[(A) certify the software if it provides for the electronic filing of data; and

[(B) publish in the Federal Register notice of that certification.

[(2) REPAYABLE ADVANCE.—

[(A) Availability and use of advance. Upon the date of enactment of this Act [enacted Nov. 2, 1992], the Secretary of the Treasury shall make available to the Commission, as a repayable advance, not more than $4,000,000, to remain available until expended. The Commission shall spend these funds to complete and upgrade the capacity of the Automated Tariff Filing and Information System to provide access to information under this section.

[(B) REQUIREMENT TO REPAY.—

[(i) IN GENERAL.—Any advance made to the Commission under subparagraph (A) shall be repaid, with interest, to the general fund of the Treasury not later than September 30, 1995.

[(ii) INTEREST.—Interest on any advance made to the Commission under subparagraph (A) —

[(I) shall be at a rate determined by the Secretary of the Treasury, as of the close of the calendar month preceding the month in which the advance is made, to be equal to the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the anticipated period during which the advance will be outstanding; and

[(II) shall be compounded annually.

[(3) USE OF RETAINED AMOUNTS.—Out of amounts collected by the Commission under this section, amounts shall be retained and expended by the Commission for each fiscal year, without fiscal year limitation, to carry out this section and pay back the Secretary of the Treasury for the advance made available under paragraph (2).

[(4) DEPOSIT IN TREASURY.—Except for the amounts retained by the Commission under paragraph (3), fees collected under

this section shall be deposited in the general fund of the Treasury as offsetting receipts.

[(h) RESTRICTION.—No fee may be collected under this section after fiscal year 1995.

[(i) CONFORMING AMENDMENT.—Section 2 of the Act of August 16, 1989 (46 App. U.S.C. 1111c), is repealed.]

Section 9, Shipping Act of 1984

[46 U.S.C. App. 1708]

§ 1708. Controlled carriers

(a) CONTROLLED CARRIER RATES.—No controlled carrier subject to this section may maintain rates or charges in its tariffs or [service contracts filed with the Commission] *service contracts, or charge or assess rates,* that are below a level that is just and reasonable, nor may any such carrier establish [or maintain] *maintain, or enforce* unjust or unreasonable classifications, rules, or regulations in those tariffs or service contracts. An unjust or unreasonable classification, rule, or regulation means one that results or is likely to result in the carriage or handling of cargo at rates or charges that are below a just and reasonable level. The [Commission] *Board* may, at any time after notice and hearing, [disapprove] *prohibit the publication or use of* any rates, charges, classifications, rules, or regulations that the controlled carrier has failed to demonstrate to be just and reasonable. In a proceeding under this subsection, the burden of proof is on the controlled carrier to demonstrate that its rates, charges, classifications, rules, or regulations are just and reasonable. Rates, charges, classifications, rules, or regulations [filed by a controlled carrier that have been rejected, suspended, or disapproved by the Commission] *that have been suspended or prohibited by the [Commission] Board* are void and their use is unlawful.

(b) RATE STANDARDS.—For the purpose of this section, in determining whether rates, charges, classifications, rules, or regulations by a controlled carrier are just and reasonable, the [Commission] *Board* [may take into account appropriate factors including, but not limited to, whether—] *shall take into account whether the rates or charges which have been published or assessed or which would result from the pertinent classifications, rules, or regulations are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon its constructive costs. For purposes of the preceding sentence, the term 'constructive costs' means the costs of another carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade. The [Commission] Board may also take into account other appropriate factors, including but not limited to, whether—*

[(1) the rates or charges which have been filed or which would result from the pertinent classifications, rules, or regulations are below a level which is fully compensatory to the controlled carrier based upon that carrier's actual costs or upon its constructive costs, which are hereby defined as the costs of an-

other carrier, other than a controlled carrier, operating similar vessels and equipment in the same or a similar trade;]

[(2)] *(1)* the rates, charges, classifications, rules, or regulations are the same as or similar to those [filed] *published or assessed* or assessed by other carriers in the same trade;

[(3)] *(2)* the rates, charges, classifications, rules, or regulations are required to assure movement of particular cargo in the trade; or

[(4)] *(3)* the rates, charges, classifications, rules, or regulations are required to maintain acceptable continuity, level, or quality of common carrier service to or from affected ports.

(c) EFFECTIVE DATE OF RATES.—Notwithstanding section 8(d) of this Act [46 U.S.C. App. 1707(d)] and except for service contracts, the rates, charges, classifications, rules, or regulations of controlled carriers may not, without special permission of the [Commission] *Board*, become effective sooner than the 30th day after the date of [filing with the Commission.] *publication.* Each controlled carrier shall, upon the request of the [Commission] *Board*, file, within 20 days of request (with respect to its existing or proposed rates, charges, classifications, rules, or regulations), a statement of justification that sufficiently details the controlled carrier's need and purpose for such rates, charges, classifications, rules, or regulations upon which the [Commission] *Board* may reasonably base its determination of the lawfulness thereof.

(d) [DISAPPROVAL OF RATES.—] *PROHIBITION OF RATES.—Within 120 days after the receipt of information requested by the [Commission] Board under this section, the [Commission] Board shall determine whether the rates, charges, classifications, rules, or regulations of a controlled carrier may be unjust and unreasonable.* Whenever the [Commission] *Board* is of the opinion that the rates, charges, classifications, rules, or regulations [filed] *published or assessed* by a controlled carrier may be unjust and unreasonable, the [Commission] *Board* [may issue] *shall issue* an order to the controlled carrier to show cause why those rates, charges, classifications, rules, or regulations should not be [disapproved.] *prohibited.* Pending a determination as to their lawfulness in such a proceeding, the [Commission] *Board* may suspend the rates, charges, classifications, rules, or regulations at any time before their effective date. In the case of rates, charges, classifications, rules, or regulations that have already become effective, the [Commission] *Board* may, upon the issuance of an order to show cause, suspend those rates, charges, classifications, rules, or regulations on not less than [60] *30* days' notice to the controlled carrier. No period of suspension under this subsection may be greater than 180 days. Whenever the [Commission] *Board* has suspended any rates, charges, classifications, rules, or regulations under this subsection, the affected *controlled* carrier may [file] *publish* new rates, charges, classifications, rules, or regulations to take effect immediately during the suspension period in lieu of the suspended rates, charges, classifications, rules, or regulations—except that the [Commission] *Board* may reject the new rates, charges, classifications, rules, or regulations if it is of the opinion that they are unjust and unreasonable.

(e) PRESIDENTIAL REVIEW.—Concurrently with the publication thereof, the [Commission] *Board* shall transmit to the President each order of suspension or final order of [disapproval] *prohibition* of rates, charges, classifications, rules, or regulations of a controlled carrier subject to this section. Within 10 days after the receipt or the effective date of the [Commission] *Board* order, the President may request the [Commission] *Board* in writing to stay the effect of the [Commission's] *Board's* order if the President finds that the stay is required for reasons of national defense or foreign policy, which reasons shall be specified in the report. Notwithstanding any other law, the [Commission] *Board* shall immediately grant the request by the issuance of an order in which the President's request shall be described. During any such stay, the President shall, whenever practicable, attempt to resolve the matter in controversy by negotiation with representatives of the applicable foreign governments.

(f) EXCEPTIONS.—This section does not apply to—

(1) a controlled carrier of a state whose vessels are entitled by a treaty of the United States to receive national or most-favored-nation treatment; *or*

[(2) a controlled carrier of a state which, on the effective date of this section [see the Effective date of section note to this section], has subscribed to the statement of shipping policy contained in note 1 to annex A of the Code of Liberalization of Current Invisible Operations, adopted by the Council of the Organization for Economic Cooperation and Development;

[(3) rates, charges, classifications, rules, or regulations of a controlled carrier in any particular trade that are covered by an agreement effective under section 6 of this Act [46 U.S.C. App. 1705], other than an agreement in which all of the members are controlled carriers not otherwise excluded from the provisions of this subsection;

[(4) rates, charges, classifications, rules, or regulations governing the transportation of cargo by a controlled carrier between the country by whose government it is owned or controlled, as defined herein and the United States; or]

[(5)] *(2)* a trade served exclusively by controlled carriers.

Section 10, Shipping Act of 1984

[46 U.S.C. App. 1709]

1709. Prohibited acts

(a) IN GENERAL.—No person may—

(1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable;

(2) operate under an agreement required to be filed under section 5 of this Act [46 U.S.C. App. 1704] that has not become

effective under section 6 [46 U.S.C. App. 1705], or that has been rejected, disapproved, or canceled; or

(3) operate under an agreement required to be filed under section 5 of this Act [46 U.S.C. App. 1704] except in accordance with the terms of the agreement or any modifications made by the [Commission] *Board* to the agreement.

(b) COMMON CARRIERS.—No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—

[(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts;

[(2) rebate, refund, or remit in any manner, or by any device, any portion of its rates except in accordance with its tariffs or service contracts;

[(3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs or service contracts;]

[(4)] (1) allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means;

(2) provide services, facilities, or privileges, other than in accordance with the rates or terms in its tariffs or service contracts in effect when the service was provided;

[(5)] *(3)* retaliate against any shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason;

[(6)] *(4)* [except for service contracts,] *for service pursuant to a tariff,* engage in any unfair or unjustly discriminatory practice in the matter of—

(A) [rates;] *rates or charges;*

(B) cargo classifications;

(C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;

(D) the loading and landing of freight; or

(E) the adjustment and settlement of claims;

(5) for service pursuant to a service contract, engage in any unfair or unjustly discriminatory practice in the matter of rates or charges with respect to any location, port, class or type of shipper or ocean transportation intermediary, or description of traffic;

[(7) employ any fighting ship;]

(6) use a vessel in a particular trade to drive another ocean common carrier out of that trade;

[(8)] *(7)* offer or pay any deferred rebates;

[(9) use a loyalty contract, except in conformity with the antitrust laws;

[(10) demand, charge, or collect any rate or charge that is unjustly discriminatory between shippers or ports;

[(11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;

[(12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever;

[(13) refuse to negotiate with a shippers' association;]

(8) for service pursuant to a tariff, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage;

(9) for service pursuant to a service contract, give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any location, port, class or type of shipper or ocean transportation intermediary, or description of traffic;

(10) unreasonably refuse to deal or negotiate;

[(14)] *(11)* knowingly and willfully accept cargo from or transport cargo for the account of [a non-vessel-operating common carrier] *an ocean transportation intermediary* that does not have a tariff and a bond, insurance, or other surety as required by [sections 8 and 23] *sections 8 and 19* of this Act [46 U.S.C. App. 1707 and 1721];

[(15)] *(12)* knowingly and willfully enter into a service contract with [a non-vessel-operating common carrier] *an ocean transportation intermediary* [or in which a non-vessel-operating common carrier is listed as an affiliate] that does not have a tariff and a bond, insurance, or other surety as required by [sections 8 and 23] *sections 8 and 19* of this [Act;] *Act,* [46 U.S.C. App. 1707 and 1721] *or with an affiliate of such ocean transportation intermediary;* or

[(16)] *(13)* knowingly disclose, offer, solicit, or receive any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to a common carrier without the consent of the shipper or consignee if that information—

(A) may be used to the detriment or prejudice of the shipper or consignee;

(B) may improperly disclose its business transaction to a competitor; or

(C) may be used to the detriment or prejudice of any common carrier.

Nothing in [paragraph (16)] *paragraph (13)* shall be construed to prevent providing such information, in response to legal process, to the United States, *the [Commission] Board*, or to an independent neutral body operating within the scope of its authority to fulfill the policing obligations of the parties to an agreement effective under this Act. Nor shall it be prohibited for any ocean common carrier that is a party to a conference agreement approved under this Act, or any receiver, trustee, lessee, agent, or employee of that carrier, or any other person authorized by that carrier to receive information, to give information to the conference or any person, firm, corporation, or agency designated by the conference, or to prevent the

conference or its designee from soliciting or receiving information for the purpose of determining whether a shipper or consignee has breached an agreement with the conference or its member lines or for the purpose of determining whether a member of the conference has breached the conference agreement, or for the purpose of compiling statistics of cargo movement, but the use of such information for any other purpose prohibited by this Act or any other Act is prohibited.

(c) CONCERTED ACTION.—No conference or group of two or more common carriers may—

(1) boycott or take any other concerted action resulting in an unreasonable refusal to deal;

(2) engage in conduct that unreasonably restricts the use of intermodal services or technological innovations;

(3) engage in any predatory practice designed to eliminate the participation, or deny the entry, in a particular trade of a common carrier not a member of the conference, a group of common carriers, an ocean tramp, or a bulk carrier;

(4) negotiate with a nonocean carrier or group of nonocean carriers (for example, truck, rail, or air operators) on any matter relating to rates or services provided to ocean common carriers within the United States by those nonocean carriers: Provided, That this paragraph does not prohibit the setting and publishing of a joint through rate by a conference, joint venture, or an association of ocean common carriers;

(5) deny in the export foreign commerce of the United States compensation to an ocean [freight forwarder] *transportation intermediary, as defined by section 3(17)(A) of this Act,* or limit that compensation to less than a reasonable amount; or

(6) allocate shippers among specific carriers that are parties to the agreement or prohibit a carrier that is a party to the agreement from soliciting cargo from a particular shipper, except as otherwise required by the law of the United States or the importing or exporting country, or as agreed to by a shipper in a service contract.

(d) COMMON CARRIERS, OCEAN [FREIGHT FORWARDERS,] *Transportation Intermediaries, and Marine Terminal Operators.*—

(1) No common carrier, ocean [freight forwarder,] *transportation intermediary,* or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

(2) No marine terminal operator may agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, any common carrier or ocean tramp.

(3) The prohibitions in [subsection (b) (11), (12), and (16)] *subsections (b) (8), (9), (10), and (13)* of this section apply to marine terminal operators.

(4) The prohibition in subsection (b)(13) of this section applies to ocean transportation intermediaries, as defined in section 3(17)(A) of this Act.

(e) JOINT VENTURES.—For purposes of this section, a joint venture or consortium of two or more common carriers but operated as a single entity shall be treated as a single common carrier.

Section 11, Shipping Act of 1984

[46 U.S.C. App. 1710]

§ 1710. Complaints, investigations, reports, and reparations [Section 11, Shipping Act of 1984]

(a) FILING OF COMPLAINTS.—Any person may file with the [Commission] *Board* a sworn complaint alleging a violation of this Act, other than section 6(g) [46 U.S.C. App. 1705(g)], and may seek reparation for any injury caused to the complainant by that violation.

(b) SATISFACTION OR INVESTIGATION OF COMPLAINTS.—The [Commission] *Board* shall furnish a copy of a complaint filed pursuant to subsection (a) of this section to the person named therein who shall, within a reasonable time specified by the [Commission] *Board*, satisfy the complaint or answer it in writing. If the complaint is not satisfied, the [Commission] *Board* shall investigate it in an appropriate manner and make an appropriate order.

(c) [COMMISSION] *BOARD* INVESTIGATIONS.—The [Commission] *Board*, upon complaint or upon its own motion, may investigate any conduct or agreement that it believes may be in violation of this Act. Except in the case of an injunction granted under subsection (h) of this section, each agreement under investigation under this section remains in effect until the [Commission] *Board* issues an order under this subsection. The [Commission] *Board* may by order disapprove, cancel, or modify any agreement filed under section 5(a) of this Act [46 U.S.C. App. 1704(a)] that operates in violation of this Act. With respect to agreements inconsistent with section 6(g) of this Act [46 U.S.C. App. 1705(g)], the [Commission's] *Board's* sole remedy is under section 6(h) [46 U.S.C. App. 1705(h)].

(d) CONDUCT OF INVESTIGATION.—Within 10 days after the initiation of a proceeding under this section, the [Commission] *Board* shall set a date on or before which its final decision will be issued. This date may be extended for good cause by order of the [Commission] *Board*.

(e) UNDUE DELAYS.—If, within the time period specified in subsection (d), the [Commission] *Board* determines that it is unable to issue a final decision because of undue delays caused by a party to the proceedings, the [Commission] *Board* may impose sanctions, including entering a decision adverse to the delaying party.

(f) REPORTS.—The [Commission] *Board* shall make a written report of every investigation made under this Act in which a hearing was held stating its conclusions, decisions, findings of fact, and order. A copy of this report shall be furnished to all parties. The [Commission] *Board* shall publish each report for public information, and the published report shall be competent evidence in all courts of the United States.

(g) REPARATIONS.—For any complaint filed within 3 years after the cause of action accrued, the [Commission] *Board* shall, upon

petition of the complainant and after notice and hearing, direct payment of reparations to the complainant for actual injury (which, for purposes of this subsection, also includes the loss of interest at commercial rates compounded from the date of injury) caused by a violation of this Act plus reasonable attorney's fees. Upon a showing that the injury was caused by activity that is prohibited by ⟦section 10(b) (5) or (7) [46 U.S.C. App. 1709(b) (5), (7)]⟧ *section 10(b) (3) or (6)* or section 10(c) (1) or (3) of this Act [46 U.S.C. App. 1709(c) (1), (3)], or that violates section 10(a) (2) or (3) [46 U.S.C. App. 1709(a) (2), (3)], the ⟦Commission⟧ *Board* may direct the payment of additional amounts; but the total recovery of a complainant may not exceed twice the amount of the actual injury. In the case of injury caused by an activity that is prohibited by ⟦section 10(b) (6) (A) or (B)⟧ *section 10(b)(4) (A) or (B)* of this Act [46 U.S.C. App. 1709(b)(6) (A), (B)], the amount of the injury shall be the difference between the rate paid by the injured shipper and the most favorable rate paid by another shipper.

(h) INJUNCTION.—

(1) In connection with any investigation conducted under this section, the ⟦Commission⟧ *Board* may bring suit in a district court of the United States to enjoin conduct in violation of this Act. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the ⟦Commission⟧ *Board* has issued an order disposing of the issues under investigation. Any such suit shall be brought in a district in which the defendant resides or transacts business.

(2) After filing a complaint with the ⟦Commission⟧ *Board* under subsection (a), the complainant may file suit in a district court of the United States to enjoin conduct in violation of this Act. Upon a showing that standards for granting injunctive relief by courts of equity are met and after notice to the defendant, the court may grant a temporary restraining order or preliminary injunction for a period not to exceed 10 days after the ⟦Commission⟧ *Board* has issued an order disposing of the complaint. Any such suit shall be brought in the district in which the defendant has been sued by the ⟦Commission⟧ *Board* under paragraph (1); or, if no suit has been filed, in a district in which the defendant resides or transacts business. A defendant that prevails in a suit under this paragraph shall be allowed reasonable attorney's fees to be assessed and collected as part of the costs of the suit.

Section 10002, Foreign Shipping Practices Act of 1988

[46 U.S.C. App. 1710a]

§ 1710a. Foreign laws and practices

(a) DEFINITIONS.—For purposes of this section—

(1) "common carrier", "marine terminal operator", [**"non-vessel-operating common carrier",**] *"ocean transportation intermediary",* "ocean common carrier", "person", "shipper", "shippers' association", and "United States" have the meanings given each such term, respectively, in section 3 of the Shipping Act of 1984 (46 App. U.S.C. 1702) ;

(2) "foreign carrier" means an ocean common carrier a majority of whose vessels are documented under the laws of a country other than the United States;

(3) "maritime services" means port-to-port carriage of cargo by the vessels operated by ocean common carriers;

(4) "maritime-related services" means intermodal operations, terminal operations, cargo solicitation, [**forwarding and**] agency services, [**non-vessel-operating common carrier**] *ocean transportation intermediary services and* operations, and all other activities and services integral to total transportation systems of ocean common carriers and their foreign domiciled affiliates on their own and others' behalf;

(5) "United States carrier" means an ocean common carrier which operates vessels documented under the laws of the United States; and

(6) "United States oceanborne trade" means the carriage of cargo between the United States and a foreign country, whether direct or indirect, by an ocean common carrier.

(b) AUTHORITY TO CONDUCT INVESTIGATIONS.—The [**Federal Maritime Commission**] *Intermodal Transportation Board* shall investigate whether any laws, rules, regulations, policies, or practices of foreign governments, or any practices of foreign carriers or other persons providing maritime or maritime-related services in a foreign country result in the existence of conditions that—

(1) adversely affect the operations of United States carriers in United States oceanborne trade; and

(2) do not exist for foreign carriers of that country in the United States under the laws of the United States or as a result of acts of United States carriers or other persons providing maritime or maritime-related services in the United States.

(c) INVESTIGATIONS.—

(1) Investigations under subsection (b) of this section may be initiated by the [**Commission**] *Board* on its own motion or on the petition of any person, including any common carrier, shipper, shippers' association, ocean [**freight forwarder,**] *transportation intermediary,* or marine terminal operator, or any branch, department, agency, or other component of the Government of the United States.

(2) The [**Commission**] *Board* shall complete any such investigation and render a decision within 120 days after it is initiated, except that the [**Commission**] *Board* may extend such 120-day period for an additional 90 days if the [**Commission**] *Board* is unable to obtain sufficient information to determine whether a condition specified in subsection (b) of this section exists. Any notice providing such an extension shall clearly state the reasons for such extension.

(d) INFORMATION REQUESTS.—

(1) In order to further the purposes of subsection (b) of this section, the [Commission] *Board* may, by order, require any person (including any common carrier, shipper, shippers' association, ocean [freight forwarder,] *transportation intermediary* or marine terminal operator, or any officer, receiver, trustee, lessee, agent or employee thereof) to file with the [Commission] *Board* any periodic or special report, answers to questions, documentary material, or other information which the [Commission] *Board* considers necessary or appropriate. The [Commission] *Board* may require that the response to any such order shall be made under oath. Such response shall be furnished in the form and within the time prescribed by the [Commission] *Board*.

(2) In an investigation under subsection (b) of this section, the [Commission] *Board* may issue subpoenas to compel the attendance and testimony of witnesses and the production of records or other evidence.

(3) Notwithstanding any other provision of law, the [Commission] *Board* may, in its discretion, determine that any information submitted to it in response to a request under this subsection, or otherwise, shall not be disclosed to the public.

(e) ACTION AGAINST FOREIGN CARRIERS.—

(1) Whenever, after notice and opportunity for comment or hearing, the [Commission] *Board* determines that the conditions specified in subsection (b) of this section exist, the [Commission] *Board* shall take such action as it considers necessary and appropriate against any foreign carrier that is a contributing cause to, or whose government is a contributing cause to, such conditions, in order to offset such conditions. Such action may include—

(A) limitations on sailings to and from United States ports or on the amount or type of cargo carried;

(B) suspension, in whole or in part, of any or all tariffs [filed with the Commission,] *and service contracts,* including the right of an ocean common carrier to use any or all tariffs *and service contracts* of conferences in United States trades of which it is a member for such period as the [Commission] *Board* specifies;

(C) suspension, in whole or in part, of the right of an ocean common carrier to operate under any agreement filed with the [Commission] *Board*, including agreements authorizing preferential treatment at terminals, preferential terminal leases, space chartering, or pooling of cargo or revenues with other ocean common carriers; and

(D) a fee, not to exceed $1,000,000 per voyage.

(2) The [Commission] *Board* may consult with, seek the cooperation of, or make recommendations to other appropriate Government agencies prior to taking any action under this subsection.

(3) Before a determination under this subsection becomes effective or a request is made under subsection (f) of this section, the determination shall be submitted immediately to the President who may, within 10 days after receiving such determination, disapprove the determination in writing, setting forth the

reasons for the disapproval, if the President finds that disapproval is required for reasons of the national defense or the foreign policy of the United States.

(f) ACTIONS UPON REQUEST OF THE [COMMISSION] *Board*.—Whenever the conditions specified in subsection (b) of this section are found by the [Commission] *Board* to exist, upon the request of the [Commission] *Board*—

(1) the collector of customs at any port or place of destination in the United States shall refuse the clearance required by section 4197 of the Revised Statutes (46 App. U.S.C. 91) to any vessel of a foreign carrier that is identified by the [Commission] *Board* under subsection (e) of this section; and

(2) the Secretary of the department in which the Coast Guard is operating shall deny entry, for purposes of oceanborne trade, of any vessel of a foreign carrier that is identified by the [Commission] *Board* under subsection (e) of this section to any port or place in the United States or the navigable waters of the United States, or shall detain any such vessel at the port or place in the United States from which it is about to depart for any other port or place in the United States.

(g) REPORT.—The [Commission] *Board* shall include in its annual report to Congress—

(1) a list of the twenty foreign countries which generated the largest volume of oceanborne liner cargo for the most recent calendar year in bilateral trade with the United States;

(2) an analysis of conditions described in subsection (b) of this section being investigated or found to exist in foreign countries;

(3) any actions being taken by the [Commission] *Board* to offset such conditions;

(4) any recommendations for additional legislation to offset such conditions; and

(5) a list of petitions filed under subsection (c) of this section that the [Commission] *Board* rejected, and the reasons for each such rejection.

(h) The actions against foreign carriers authorized in subsections (e) and (f) of this section may be used in the administration and enforcement of section 13[(b)(5)]*(b)(6)* of the Shipping Act of 1984 (46 App. U.S.C. 1712[(b)(5)]*(b)(6)*) or section 19(1)(b) of the Merchant Marine Act, 1920 (46 App. U.S.C. 876).

(i) Any rule, regulation or final order of the [Commission] *Board* issued under this section shall be reviewable exclusively in the same forum and in the same manner as provided in section [2342(3)(B)] *2342(5)(B)* of title 28, United States Code.

Section 13, Shipping Act of 1984

[46 U.S.C. App. 1712]

§ 1712. Penalties

(a) ASSESSMENT OF PENALTY.—Whoever violates a provision of this Act, a regulation issued thereunder, or a [Commission] *Board* order is liable to the United States for a civil penalty. The amount

of the civil penalty, unless otherwise provided in this Act, may not exceed $5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed $25,000 for each violation. Each day of a continuing violation constitutes a separate offense. *The amount of any penalty imposed upon a common carrier under this subsection shall constitute a lien upon the vessels of the common carrier and any such vessel may be libeled therefore in the district court of the United States for the district in which it may be found.*

(b) ADDITIONAL PENALTIES.—

(1) For a violation of [section 10(b) (1), (2), (3), (4), or (8)] *section 10(b) (1), (2), or (7)* of this Act [46 U.S.C. App. 1709(b) (1), (2), (7)], the [Commission] *Board* may suspend any or all tariffs of the common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member, for a period not to exceed 12 months.

(2) For failure to supply information ordered to be produced or compelled by subpena under section 12 of this Act [46 U.S.C. App. 1711], the [Commission] *Board* may, after notice and an opportunity for hearing, suspend any or all tariffs of a common carrier, or that common carrier's right to use any or all tariffs of conferences of which it is a member.

(3) A common carrier that accepts or handles cargo for carriage under a tariff that has been suspended or after its right to utilize that tariff has been suspended is subject to a civil penalty of not more than $50,000 for each shipment.

(4) If the [Commission] Board finds, after notice and an opportunity for a hearing, that a common carrier has failed to supply information ordered to be produced or compelled by subpoena under section 12 of this Act, the [Commission] Board may request that the Secretary of the Treasury refuse or revoke any clearance required for a vessel operated by that common carrier. Upon request by the [Commission] Board, the Secretary of the Treasury shall, with respect to the vessel concerned, refuse or revoke any clearance required by section 4197 of the Revised Statutes of the United States (46 U.S.C. App. 91).

[(4)] *(5)* If, in defense of its failure to comply with a subpena or discovery order, a common carrier alleges that documents or information located in a foreign country cannot be produced because of the laws of that country, the [Commission] *Board* shall immediately notify the Secretary of State of the failure to comply and of the allegation relating to foreign laws. Upon receiving the notification, the Secretary of State shall promptly consult with the government of the nation within which the documents or information are alleged to be located for the purpose of assisting the [Commission] *Board* in obtaining the documents or information sought.

[(5)] *(6)* If, after notice and hearing, the [Commission] *Board* finds that the action of a common carrier, acting alone or in concert with any person, or a foreign government has unduly impaired access of a vessel documented under the laws of the United States to ocean trade between foreign ports, the [Commission] *Board* shall take action that it finds appropriate, including the imposition of any of the penalties author-

ized under [paragraphs (1), (2), and (3)] *paragraphs (1), (2), (3), and (4)* of this subsection.

[(6)] *(7)* Before an order under this subsection becomes effective, it shall be immediately submitted to the President who may, within 10 days after receiving it, disapprove the order if the President finds that disapproval is required for reasons of the national defense or the foreign policy of the United States.

(c) ASSESSMENT PROCEDURES.—Until a matter is referred to the Attorney General, the [Commission] *Board* may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. In determining the amount of the penalty, the [Commission] *Board* shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require. The [Commission] *Board* may compromise, modify, or remit, with or without conditions, any civil penalty.

(d) REVIEW OF CIVIL PENALTY.—A person against whom a civil penalty is assessed under this section may obtain review thereof under chapter 158 of title 28, United States Code [28 U.S.C. 2341 et seq.].

(e) FAILURE TO PAY ASSESSMENT.—If a person fails to pay an assessment of a civil penalty after it has become final or after the appropriate court has entered final judgment in favor of the [Commission] *Board*, the Attorney General at the request of the [Commission] *Board* may seek to recover the amount assessed in an appropriate district court of the United States. In such an action, the court shall enforce the [Commission's] *Board's* order unless it finds that the order was not regularly made or duly issued.

(f) LIMITATIONS.—

(1) No penalty may be imposed on any person for conspiracy to violate section 10(a)(1), (b)(1), [or (b)(4)] *or (b)(2)* of this Act [46 U.S.C. App. 1709(a)(1), [(b)(1), (4)] *(b)(1), (2)*], or to defraud the [Commission] *Board* by concealment of such a violation.

(2) Each proceeding to assess a civil penalty under this section shall be commenced within 5 years from the date the violation occurred.

Section 15, Shipping Act of 1984

46 U.S.C. App. 1714]

§ 1714. Reports [and certificates]

[(a) REPORTS.—]The [Commission] *Board* may require any common carrier, or any officer, receiver, trustee, lessee, agent, or employee thereof, to file with it any periodical or special report or any account, record, rate, or charge, or memorandum of any facts and transactions appertaining to the business of that common carrier. The report, account, record, rate, charge, or memorandum shall be made under oath whenever the [Commission] *Board* so requires, and shall be furnished in the form and within the time prescribed by the [Commission] *Board* Conference minutes required to be

filed with the [Commission] *Board* under this section shall not be released to third parties or published by the [Commission] *Board*.

[(b) CERTIFICATION.—The Commission shall require the chief executive officer of each common carrier and, to the extent it deems feasible, may require any shipper, shippers' association, marine terminal operator, ocean freight forwarder, or broker to file a periodic written certification made under oath with the Commission attesting to—

[(1) a policy prohibiting the payment, solicitation, or receipt of any rebate that is unlawful under the provisions of this Act;

[(2) the fact that this policy has been promulgated recently to each owner, officer, employee, and agent thereof;

[(3) the details of the efforts made within the company or otherwise to prevent or correct illegal rebating; and

[(4) a policy of full cooperation with the Commission in its efforts to end those illegal practices.

[Whoever fails to file a certificate required by the Commission under this subsection is liable to the United States for a civil penalty of not more than $5,000 for each day the violation continues.]

Section 16, Shipping Act of 1984

[46 U.S.C. App. 1715]

§ 1715. Exemptions

The [Commission] *Board*, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this Act or any specified activity of those persons from any requirement of this Act if it finds that the exemption will not [substantially impair effective regulation by the Commission, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce.] *result in a substantial reduction in competition or be detrimental to commerce.* The [Commission] *Board* may attach conditions to any exemption and may, by order, revoke any exemption. No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States.

Section 18, Shipping Act of 1984

§ 46 U.S.C. App. 1717

[§ 1717. Agency reports and Advisory Commission]

[(a) COLLECTION OF DATA.—For a period of 5 years following the enactment of this Act [enacted Mar. 20, 1984], the Commission shall collect and analyze information concerning the impact of this Act upon the international ocean shipping industry, including data on:

[(1) increases or decreases in the level of tariffs;

[(2) changes in the frequency or type of common carrier services available to specific ports or geographic regions;

[(3) the number and strength of independent carriers in various trades; and

[(4) the length of time, frequency, and cost of major types of regulatory proceedings before the Commission.

[(b) CONSULTATION WITH OTHER DEPARTMENTS AND AGENCIES.—The Commission shall consult with the Department of Transportation, the Department of Justice, and the Federal Trade Commission annually concerning data collection. The Department of Transportation, the Department of Justice, and the Federal Trade Commission shall at all times have access to the data collected under this section to enable them to provide comments concerning data collection.

[(c) AGENCY REPORTS.—

[(1) Within 6 months after expiration of the 5-year period specified in subsection (a), the Commission shall report the information, with an analysis of the impact of this Act, to Congress, to the Advisory Commission on Conferences in Ocean Shipping established in subsection (d), and to the Department of Transportation, the Department of Justice, and the Federal Trade Commission.

[(2) Within 60 days after the Commission submits its report, the Department of Transportation, the Department of Justice, and the Federal Trade Commission shall furnish an analysis of the impact of this Act to Congress and to the Advisory Commission on Conferences in Ocean Shipping.

[(3) The reports required by this subsection shall specifically address the following topics:

[(A) the advisability of adopting a system of tariffs based on volume and mass of shipment;

[(B) the need for antitrust immunity for ports and marine terminals; and

[(C) the continuing need for the statutory requirement that tariffs be filed with and enforced by the Commission.

[(d) ESTABLISHMENT AND COMPOSITION OF ADVISORY COMMISSION.—

[(1) Effective 5½ years after the date of enactment of this Act [enacted Mar. 20, 1984], there is established the Advisory Commission on Conferences in Ocean Shipping (hereinafter referred to as the "Advisory Commission") .

[(2) The Advisory Commission shall be composed of 17 members as follows:

[(A) a cabinet level official appointed by the President;

[(B) 4 members from the United States Senate appointed by the President pro tempore of the Senate, 2 from the membership of the Committee on Commerce, Science, and Transportation and 2 from the membership of the Committee on the Judiciary;

[(C) 4 members from the United States House of Representatives appointed by the Speaker of the House, 2 from the membership of the Committee on Merchant Marine and Fisheries, and 2 from the membership of the Committee on the Judiciary; and

[(D) 8 members from the private sector appointed by the President.

[(3) The President shall designate the chairman of the Advisory Commission.

[(4) The term of office for members shall be for the term of the Advisory Commission.

[(5) A vacancy in the Advisory Commission shall not affect its powers, and shall be filled in the same manner in which the original appointment was made.

[(6) Nine members of the Advisory Commission shall constitute a quorum, but the Advisory Commission may permit as few as 2 members to hold hearings.

[(e) COMPENSATION OF MEMBERS OF THE ADVISORY COMMISSION.—

[(1) Officials of the United States Government and Members of Congress who are members of the Advisory Commission shall serve without compensation in addition to that received for their services as officials and Members, but they shall be reimbursed for reasonable travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the Advisory Commission.

[(2) Members of the Advisory Commission appointed from the private sector shall each receive compensation not exceeding the maximum per diem rate of pay for grade 18 of the General Schedule under section 5332 of title 5, United States Code [5 U.S.C. 5332], when engaged in the performance of the duties vested in the Advisory Commission, plus reimbursement for reasonable travel, subsistence, and other necessary expenses incurred by them in the performance of those duties, notwithstanding the limitations in sections 5701 through 5733 of title 5, United States Code [5 U.S.C. 5701–5733].

[(3) Members of the Advisory Commission appointed from the private sector are not subject to section 208 of title 18, United States Code [18 U.S.C. 208]. Before commencing service, these members shall file with the Advisory Commission a statement disclosing their financial interests and business and former relationships involving or relating to ocean transportation. These statements shall be available for public inspection at the Advisory Commission's offices.

[(f) ADVISORY COMMISSION FUNCTIONS.—The Advisory Commission shall conduct a comprehensive study of, and make recommendations concerning, conferences in ocean shipping. The study shall specifically address whether the Nation would be best served by prohibiting conferences, or by closed or open conferences.

[(g) POWERS OF THE ADVISORY COMMISSION.—

[(1) The Advisory Commission may, for the purpose of carrying out its functions, hold such hearings and sit and act at such times and places, administer such oaths, and require, by subpena or otherwise, the attendance and testimony of such witnesses, and the production of such books, records, correspondence, memorandums, papers, and documents as the Advisory Commission may deem advisable. Subpenas may be issued to any person within the jurisdiction of the United States courts, under the signature of the chairman, or any duly designated member, and may be served by any person designated by the chairman, or that member. In case of contumacy by, or

refusal to obey a subpena to, any person, the Advisory Commission may advise the Attorney General who shall invoke the aid of any court of the United States within the jurisdiction of which the Advisory Commission's proceedings are carried on, or where that person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, and documents; and the court may issue an order requiring that person to appear before the Advisory Commission, there to produce records, if so ordered, or to give testimony. A failure to obey such an order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in the judicial district whereof the person is an inhabitant or may be found.

[(2) Each department, agency, and instrumentality of the executive branch of the Government, including independent agencies, shall furnish to the Advisory Commission, upon request made by the chairman, such information as the Advisory Commission deems necessary to carry out its functions.

[(3) Upon request of the chairman, the Department of Justice, the Department of Transportation, the Federal Maritime Commission, and the Federal Trade Commission shall detail staff personnel as necessary to assist the Advisory Commission.

[(4) The chairman may rent office space for the Advisory Commission, may utilize the services and facilities of other Federal agencies with or without reimbursement, may accept voluntary services notwithstanding section 1342 of title 31, United States Code [31 U.S.C. 1342], may accept, hold, and administer gifts from other Federal agencies, and may enter into contracts with any public or private person or entity for reports, research, or surveys in furtherance of the work of the Advisory Commission.

[(h) FINAL REPORT.—The Advisory Commission shall, within 1 year after all of its members have been duly appointed, submit to the President and to the Congress a final report containing a statement of the findings and conclusions of the Advisory Commission resulting from the study undertaken under subsection (f) , including recommendations for such administrative, judicial, and legislative action as it deems advisable. Each recommendation made by the Advisory Commission to the President and to the Congress must have the majority vote of the Advisory Commission present and voting.

[(i) EXPIRATION OF THE COMMISSION.—The Advisory Commission shall cease to exist 30 days after the submission of its final report.

[(j) AUTHORIZATION OF APPROPRIATION.—There is authorized to be appropriated $500,000 to carry out the activities of the Advisory Commission.]

Section 19, Shipping Act of 1984

[46 U.S.C. App. 1718]

§ 1718. Ocean [freight forwarders] *transportation intermediaries*

[(a) LICENSE.—No person may act as an ocean freight forwarder unless that person holds a license issued by the Commission. The Commission shall issue a forwarder's license to any person that—

[(1) the Commission determines to be qualified by experience and character to render forwarding services; and

[(2) furnishes a bond in a form and amount determined by the Commission to insure financial responsibility that is issued by a surety company found acceptable by the Secretary of the Treasury.]

(a) LICENSE.—No person in the United States may act as an ocean transportation intermediary unless that person holds a license issued by the [Commission] Board. The [Commission] Board shall issue an intermediary's license to any person that the [Commission] Board determines to be qualified by experience and character to act as an ocean transportation intermediary.

(b) FINANCIAL RESPONSIBILITY.—

(1) No person may act as an ocean transportation intermediary unless that person furnishes a bond, proof of insurance, or other surety in a form and amount determined by the [Commission] Board to insure financial responsibility that is issued by a surety company found acceptable by the Secretary of the Treasury.

(2) A bond, insurance, or other surety obtained pursuant to this section—

(A) shall be available to pay any judgment for damages against an ocean transportation intermediary arising from its transportation-related activities described in section 3(17) of this Act, or any order for reparation issued pursuant to section 11 or 14 of this Act, or any penalty assessed pursuant to section 13 of this Act; and

(B) may be available to pay any claim against an ocean transportation intermediary arising from its transportation-related activities described in section 3(17) of this Act with the consent of the insured ocean transportation intermediary, or when the claim is deemed valid by the surety company after the ocean transportation intermediary has failed to respond to adequate notice to address the validity of the claim.

(3) An ocean transportation intermediary not domiciled in the United States shall designate a resident agent in the United States for receipt of service of judicial and administrative process, including subpoenas.

[(b)] *(c)* SUSPENSION OR REVOCATION.—The [Commission] *Board* shall, after notice and hearing, suspend of [or] revoke a license if it finds that the ocean [freight forwarder] *transportation intermediary* is not qualified to render [forwarding] *intermediary* services or that it willfully failed to comply with a provision of this

Act or with a lawful order, rule, or regulation of the [Commission] *Board*. The [Commission] *Board* may also revoke an intermediary's license for failure to maintain [a bond in accordance with subsection (a)(2).] *a bond, proof of insurance, or other surety in accordance with subsection (b) (1).*

[(c)] *(d)* EXCEPTION.—A person whose primary business is the sale of merchandise may forward shipments of the merchandise for its own account without a license.

[(d)] *(e)* COMPENSATION OF [FORWARDERS] *INTERMEDIARIES* BY CARRIERS.—

(1) A common carrier may compensate an ocean [freight forwarder] *transportation intermediary, as defined in section 3(17)(A) of this Act,* in connection with a shipment dispatched on behalf of others only when the ocean [freight forwarder] *transportation intermediary* has certified in writing that it holds a valid [license] license, if required by subsection (a), and has performed the following services:

(A) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space.

(B) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to the shipment.

(2) No common carrier may pay compensation for services described in paragraph (1) more than once on the same shipment.

[(3) No compensation may be paid to an ocean freight forwarder except in accordance with the tariff requirements of this Act.]

[(4)] *(3)* No ocean [freight forwarder] *transportation intermediary* may receive compensation from a common carrier with respect to a shipment in which the [forwarder] *intermediary* has a direct or indirect beneficial interest nor shall a common carrier knowingly pay compensation on that shipment.

(4) No conference or group of 2 or more ocean common carriers in the foreign commerce of the United States that is authorized to agree upon the level of compensation paid to an ocean transportation intermediary, as defined in section 3(17)(A) of this Act, may—

(A) deny to any member of the conference or group the right, upon notice of not more than 5 calendar days, to take independent action on any level of compensation paid to an ocean transportation intermediary, as so defined; or

(B) agree to limit the payment of compensation to an ocean transportation intermediary, as so defined, to less than 1.25 percent of the aggregate of all rates and charges which are applicable under a tariff and which are assessed against the cargo on which the intermediary services are provided.

Section 20, Shipping Act of 1984

[46 U.S.C. App. 1719]

§ 1719. Contracts, agreements, and licenses under prior shipping legislation

(a)—(c) [Omitted]

[(d) EFFECTS ON CERTAIN AGREEMENTS AND CONTRACTS.—All agreements, contracts, modifications, and exemptions previously approved or licenses previously issued by the [Commission] *Board* shall continue in force and effect as if approved or issued under this Act; and all new agreements, contracts, and modifications to existing, pending, or new contracts or agreements shall be considered under this Act.]

(d) EFFECTS ON CERTAIN AGREEMENTS AND CONTRACTS.—All agreements, contracts, modifications, and exemptions previously issued, approved, or effective under the Shipping Act, 1916, or the Shipping Act of 1984 shall continue in force and effect as if issued or effective under this Act, as amended by the Ocean Shipping Reform Act of 1997, and all new agreements, contracts, and modifications to existing, pending, or new contracts or agreements shall be considered under this Act, as amended by the Ocean Shipping Reform Act of 1997.

(e) SAVINGS PROVISIONS.—

(1) Each service contract entered into by a shipper and an ocean common carrier or conference before the date of enactment of this Act [enacted Mar. 20, 1984] may remain in full force and effect and need not comply with the requirements of section 8(c) of this Act [46 U.S.C. App. 1707(c)] until 15 months after the date of enactment of this Act [enacted Mar. 20, 1984].

(2) This Act and the amendments made by it shall not affect any suit—

(A) filed before the date of enactment of this Act [enacted Mar. 20, 1984], or

(B) with respect to claims arising out of conduct engaged in before the date of enactment of this Act [enacted Mar. 20, 1984] filed within 1 year after the date of enactment of this Act [enacted Mar. 20, 1984].

(3) The Ocean Shipping Reform Act of 1997 shall not affect any suit—

(A) filed before the effective date of that Act; or

(B) with respect to claims arising out of conduct engaged in before the effective date of that Act filed within 1 year after the effective date of that Act.

(4) Regulations issued by the Federal Maritime Commission shall remain in force and effect where not inconsistent with this Act, as amended by the Ocean Shipping Reform Act of 1997.

Section 23, Shipping Act of 1984

[46 U.S.C. App. 1721]

[§ 1721. Surety for non-vessel-operating common carriers [Section 23, Shipping Act of 1984]

[(a) SURETY.—Each non-vessel-operating common carrier shall furnish to the Commission a bond, proof of insurance, or such other surety, as the Commission may require, in a form and an amount determined by the Commission to be satisfactory to insure the financial responsibility of that carrier. Any bond submitted pursuant to this section shall be issued by a surety company found acceptable by the Secretary of the Treasury.

[(b) CLAIMS AGAINST SURETY.—A bond, insurance, or other surety obtained pursuant to this section shall be available to pay any judgment for damages against a non-vessel-operating common carrier arising from its transportation-related activities under this Act or order for reparations issued pursuant to section 11 of this Act [46 U.S.C. App. 1710] or any penalty assessed against a non-vessel-operating carrier pursuant to section 13 of this Act [46 U.S.C. App. 1712].

[(c) RESIDENT AGENT.—A non-vessel-operating common carrier not domiciled in the United States shall designate a resident agent in the United States for receipt of service of judicial and administrative process, including subpoenas.

[(d) TARIFFS.—The Commission may suspend or cancel any or all tariffs of a non-vessel-operating common carrier for failure to maintain the bond, insurance, or other surety required by subsection (a) of this section or to designate an agent as required by subsection (c) of this section or for a violation of section 10(a) (1) of this Act [46 U.S.C. App. 1709(a) (1)].]

TITLE 49. TRANSPORTATION

SUBTITLE I. DEPARTMENT OF TRANSPORTATION

CHAPTER 7. [SURFACE] *INTERMODAL* TRANSPORTATION BOARD

SUBCHAPTER I. ESTABLISHMENT

§ 701. Establishment of Board

(a) ESTABLISHMENT.—There is hereby established within the Department of Transportation the [Surface] *Intermodal* Transportation Board.

(b) MEMBERSHIP.—

(1) The Board shall consist of [3 members,] *5 members,* to be appointed by the President, by and with the advice and consent of the Senate. Not more than [2 members] *3 members* may be appointed from the same political party.

[(2) At any given time, at least 2 members of the Board shall be individuals with professional standing and demonstrated knowledge in the fields of transportation or transportation reg-

ulation, and at least one member shall be an individual with professional or business experience (including agriculture) in the private sector.]

(2) At any given time, at least 3 members of the Board shall be individuals with professional standing and demonstrated knowledge in the fields of surface or maritime transportation or their regulation, and at least 2 members shall be individuals with professional or business experience (including agriculture, surface or maritime transportation, or marine terminal or port operation) in the private sector. At any given time, at least 2 members of the Board shall be individuals with professional standing and demonstrated knowledge in maritime transportation or its regulation or professional or business experience in maritime transportation or marine terminal or port operation in the private sector, and at least 2 members of the Board shall be individuals with professional standing and demonstrated knowledge in surface transportation or its regulation or professional or business experience in agriculture or surface transportation in the private sector. Neither of the 2 individuals appointed as surface transportation members under the preceding sentence, and neither of the 2 individuals appointed as maritime transportation members under that sentence, may be members of the same political party.

(3) The term of each member of the Board shall be 5 years and shall begin when the term of the predecessor of that member ends. An individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, shall be appointed for the remainder of that term. When the term of office of a member ends, the member may continue to serve until a successor is appointed and qualified, but for a period not to exceed one year. The President may remove a member for inefficiency, neglect of duty, or malfeasance in office.

(4) On January 1, 1996, the members of the Interstate Commerce Commission serving unexpired terms on December 29, 1995, shall become members of the Board, to serve for a period of time equal to the remainder of the term for which they were originally appointed to the Interstate Commerce Commission. Any member of the Interstate Commerce Commission whose term expires on December 31, 1995, shall become a member of the Board, subject to paragraph (3).

(5) No individual may serve as a member of the Board for more than 2 terms. In the case of an individual who becomes a member of the Board pursuant to paragraph (4) , or an individual appointed to fill a vacancy occurring before the expiration of the term for which the predecessor of that individual was appointed, such individual may not be appointed for more than one additional term.

(6) A member of the Board may not have a pecuniary interest in, hold an official relation to, or own stock in or bonds of, a carrier providing transportation by any mode and may not engage in another business, vocation, or employment.

(7) A vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the

powers of the Board. The Board may designate a member to act as Chairman during any period in which there is no Chairman designated by the President.

(c) CHAIRMAN.—

(1) There shall be at the head of the Board a Chairman, who shall be designated by the President from among the members of the Board. The Chairman shall receive compensation at the rate prescribed for level III of the Executive Schedule under section 5314 of title 5.

(2) Subject to the general policies, decisions, findings, and determinations of the Board, the Chairman shall be responsible for administering the Board. The Chairman may delegate the powers granted under this paragraph to an officer, employee, or office of the Board. The Chairman shall—

(A) appoint and supervise, other than regular and full-time employees in the immediate offices of another member, the officers and employees of the Board, including attorneys to provide legal aid and service to the Board and its members, and to represent the Board in any case in court;

(B) appoint the heads of offices with the approval of the Board;

(C) distribute Board business among officers and employees and offices of the Board;

(D) prepare requests for appropriations for the Board and submit those requests to the President and Congress with the prior approval of the Board; and

(E) supervise the expenditure of funds allocated by the Board for major programs and purposes.

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