

S E R V E D

November 13, 2008  
FEDERAL MARITIME COMMISSION

**FEDERAL MARITIME COMMISSION**

**WASHINGTON, D.C.**

**INFORMAL DOCKET NO. 1880(F)**

**CLUTCH AUTO, LTD.**

**v.**

**INTERNATIONAL TOUCH CONSOLIDATOR, INC.  
MacANDREWS AND COMPANY, LTD.,  
ROSMARINE SHIPPING PRIVATE, LIMITED, and  
HITOS LINER AGENCY PRIVATE, LIMITED**

**INFORMAL DOCKET NO. 1885(F)**

**D&W CLUTCH AND BRAKE**

**v.**

**INTERNATIONAL TOUCH CONSOLIDATOR, INC.,  
MacANDREWS AND COMPANY, LTD., AND  
ROSMARINE SHIPPING PRIVATE, LIMITED**

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**INITIAL DECISION<sup>1</sup> BY PAUL B. LANG,  
ADMINISTRATIVE LAW JUDGE**

**Statement of the Case**

Informal Docket No. 1880(F)

Clutch Auto Ltd. ("Clutch") filed a Complaint on or about June 14, 2006; service was completed on all Respondents by on or about April 3, 2007. In its Complaint

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<sup>1</sup> This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 C.F.R. §502.227).

Clutch alleged that the Respondents acted jointly or individually to effect the wrongful detention of a shipment of automotive parts which Clutch had sold to D&W Clutch and Brake (“D&W”) and had arranged to ship from India to Baltimore, Maryland. Each of the Respondents, other than Hitos Liner Agency Private, Limited (“Hitos”) filed answers denying liability. On September 18, 2006, Respondent MacAndrews and Company, Ltd. (“MacAndrews”) filed an opposition to the informal procedure; accordingly, the case was transferred to the Office of Administrative Law Judges for formal adjudication as a small claim pursuant to Rule 311 of the Rules of Practice and Procedure of the Commission (“Rules”), 46 CFR §502.311.

Informal Docket No. 1885(F)

On or about September 6, 2006, D&W filed a Complaint containing allegations substantially identical to those of Clutch. Unlike Clutch, which did not include statutory citations in its Complaint, D&W alleged that Respondent International Touch Consolidator, Inc. (“ITC”) violated section 10(b)(3) of the Shipping Act by refusing to deliver the shipment in question. D&W further alleged that Respondent MacAndrews and Company, Ltd. (“MacAndrews”) violated section 10(d)(1) of the Shipping Act by failing to establish and observe just and reasonable regulations and practices in the performance of its function as a common carrier. Service was completed on each of the Respondents by May 10, 2007. On April 24, 2007, MacAndrews filed an objection to the informal procedure and the case was transferred to the Office of Administrative Law Judges for formal adjudication as a small claim pursuant to Rule 311, 46 CFR §502.311.

By Order of April 10, 2007, by Acting Chief Administrative Law Judge Guthridge, who was then the presiding officer<sup>2</sup>, Informal Docket Nos. 1880(F) and 1885(F) were consolidated.

For the reasons stated below I have concluded that Clutch and D&W have not met their burden of showing that the Respondents violated the Shipping Act. Consequently, I will order that the Complaints be dismissed.

**Findings of Fact**

On July 26, 2007, Judge Guthridge issued an Order to Supplement the Record<sup>3</sup> in which he directed Clutch, Rosmarine Shipping Private, Limited (“Rosmarine”) and D&W to submit additional evidence and memoranda, including a copy of the check with which Clutch allegedly paid Rosmarine for all charges related to the shipment which is the subject of this case, details of the pertinent subledger concerning the check which was

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<sup>2</sup> Judge Guthridge reassigned the case to me on September 29, 2008.

<sup>3</sup> Rule 314, 46 CFR §502.314, empowers the Administrative Law Judge to require the submission of additional affidavits, documents or memoranda by the parties in cases involving small claims.

cited by Rosmarine, and details of payments from D&W to Clutch. The responses of Clutch and Rosmarine were, at best, incomplete.

On October 4, 2007, Judge Guthridge made tentative findings of fact based upon a review of the evidence and memoranda submitted by the parties. In a Procedural Order of the same date he directed the parties to state their respective positions on each of the tentative findings of fact by November 7, 2007, and, for each tentative finding that was disputed, to submit documents and affidavits in support of their positions. He further directed the parties to submit proposed supplemental findings of fact, if any, by November 7, 2007, along with supporting evidence. Each of the parties was directed to respond to the proposed supplemental findings of fact of the other parties by December 12, 2007, along with evidence to support their opposition to any such findings. All parties other than Hitos and D&W submitted responses.

On October 27, 2008, I issued an Invitation to Submit Additional Evidence which was to some degree duplicative of Judge Guthridge's Order of July 26, 2007, although narrower in scope. Clutch and Rosmarine have submitted responses. Clutch has also submitted a statement in opposition to Rosmarine's response.

The following Findings of Fact are largely derived from Judge Guthridge's tentative findings of fact, most of which are uncontested.<sup>4</sup>

#### The Parties

1. Complainant Clutch, incorporated in India, is a manufacturer and exporter of clutch assembly and clutch kits for commercial vehicles, automotive applications, agricultural tractors and off-highway vehicles (Clutch Complaint ¶1).
2. Complainant D&W, incorporated in the United States and with a principal office in Baltimore, Maryland, is a distributor of clutch assemblies, clutch components, clutch kits, and brake systems for commercial vehicles, automotive applications, agricultural tractors and off-highway vehicles (D&W Complaint ¶1).
3. Respondent International Touch Consolidator, Inc. ("ITC"), FMC Organization No. 014239, FMC License No. 014239N, incorporated in New York, is a non-vessel-operating common carrier and ocean freight forwarder (Clutch Complaint ¶2; FMC OTI List, [http://www2.fmc.gov/oti/nvos\\_listing.aspx](http://www2.fmc.gov/oti/nvos_listing.aspx), accessed October 29, 2008).<sup>5</sup>

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<sup>4</sup> I have not maintained the numerical order of the Tentative Findings of Fact and have made stylistic changes to the wording of some of those findings.

<sup>5</sup> Official notice may be taken, not only of public records and generally accepted facts, but also of matters within an agency's area of special expertise, *Union Electric Co. v. F.E.R.C.*, 890 F.2d 1193, 1202 (D.C. Cir. 1989); Rule 226(a), 46 C.F.R. §502.226(a). The public records of the Commission fall squarely within the scope of official notice.

4. Clutch entered into a contract with Respondent Rosmarine, which is incorporated in India, whereby Rosmarine was to arrange for the transportation of the shipment of automotive parts which is the subject of this case from India to Baltimore for delivery to D&W (ITC's Response to Proposed Supplemental Findings of Fact of Other Parties and to Tentative Findings of Fact dated December 13, 2007).

5. Respondent MacAndrews & Company, Ltd. ("MacAndrews") was, at all times pertinent to this case, a vessel-operating common carrier, FMC Organization No. 019093 (Clutch Complaint ¶2; FMC links to Tariffs, <https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=vocc>, accessed October 4, 2007).<sup>6</sup>

6. Respondent Hitos is an agent in India for MacAndrews. (Clutch Complaint, Annexure I; MacAndrews Bill of Lading MCAWDELORF00157 (ALJ App. 38)).<sup>7</sup>

#### The Sale and Shipment of the Merchandise

7. On or about June 22, 2005, Clutch sold an assortment of automotive parts to D&W (D&W Complaint ¶2; Clutch Invoice No. EX/2005-2006/72 (ALJ App. 58)).

8. Clutch charged D&W 34,014.84 USD for the automotive parts (Clutch Invoice No. EX/2005-2006/72 (ALJ App. 58); Clutch Response to Order to Supplement the Record dated July 27, 2007, Ans. 3.a (ALJ App. 60)).

9. The automotive parts were packaged in 300 cartons (Clutch Invoice No. EX/2005-2006/72 (ALJ App. 58)).

10. The invoice indicated that the automotive parts were to be shipped from Mumbai, India, to Baltimore, Maryland (Clutch Invoice No. EX/2005-2006/72 (ALJ App. 58)).

11. On December 13, 2005, India Customs issued Shipping Bill for Export No. 1554103, thereby authorizing the export of the automotive parts sold by Clutch to D&W pursuant to Clutch Invoice No. EX/2005-2006/72. Clutch is named as the exporter and D&W as the consignee Clutch Invoice No. EX/2005-2006/72 (Shipping Bill for Export No. 1554103 at 1 (ALJ App. 64)).

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<sup>6</sup> Reference to the Commission website, [www.fmc.gov](http://www.fmc.gov), on October 29, 2008, revealed that MacAndrews was listed in FMC records as an inactive vessel-operating common carrier. The subsequent change to MacAndrews' status is of no consequence in this case.

<sup>7</sup>The appendices refer to those of Attachment A to Tentative Findings of Fact which also was issued on October 4, 2007.

12. Pursuant to its contract with ITC, Rosmarine issued ITC Bill of Lading No. RSPL/DEL/BAL/05151 on December 14, 2005 (ITC Bill of Lading No. RSPL/DEL/BAL/05151 (ALJ App. 1, 17); Reply on Behalf of Rosmarine, received May 1, 2007, Annexure IV (email dated Feb. 25, 2006 from [Raymond.Wu@itcny.com](mailto:Raymond.Wu@itcny.com) to [VKM@CLUTCHAUTO.COM](mailto:VKM@CLUTCHAUTO.COM) and others) (ALJ App. 34); Fax cover sheet dated August 10, 2006, from Wesley Leung of ITC to Venetia D. Bell, FMC Settlement Officer (ALJ App. 37)).

13. ITC Bill of Lading No. RSPL/DEL/BAL/05151 has the following entries:

- a. The shipment is described as 300 cartons of automotive parts packed on twenty pallets "as per invoice No. EX/2005-2006/72 DTD: June 22, 2005."
- b. The shipment is contained in one twenty-foot container, FCL/FCL container no. IPXU-3304500/20.
- c. Clutch is identified as the exporter.
- d. The shipment is consigned "To Order."
- e. D&W is to be notified when the shipment arrives.
- f. The export carrier is C P KANHA, voyage 5151.
- g. A notation that "freight prepaid at Delhi, subject to realization."
- h. A notation that origin inland hauling charges are prepaid.

(ITC Bill of Lading No. RSPL/DEL/BAL/05151 (ALJ App. 17)).

14. MacAndrews contracted with ITC to provide the vessel for the transportation of the shipment from India to Baltimore. On December 26, 2005, Hitos, as agent for MacAndrews, issued MacAndrews ocean Bill of Lading MCAWDELORF00157 ("MacAndrews B/L"). (MacAndrews Bill of Lading MCAWDELORF00157 (ALJ App. 38)).

15. The MacAndrews B/L contains the following notations:

- a. The shipment is identified as container no. IPXU-3304500/20, which is identical to the description in the ITC bill of lading.
- b. Rosmarine is the shipper.
- c. ITC is the consignee.

- d. APL ALEXANDRITE is the vessel carrying the shipment.
- e. The contents of the container are described as 300 cartons of automotive parts packed on twenty pallets, which is again identical to the description in the ITC bill of lading.
- f. The packages are marked "D&W Baltimore."
- g. Norfolk is identified as the port of discharge.
- h. Baltimore (ramp) is identified as the place of delivery<sup>8</sup>.

(MacAndrews Bill of Lading MCAWDELORF00157 (ALJ App. 38)).

16. On December 22, 2005, ITC issued an Arrival Notice/Remarks for House B/L No. RSPL/DEL/BAL/05151, MS HB/L No. MCAWDELORF00157A, and Ocean Bill of Lading No. MCAWDELORF00157. The ITC Arrival Notice/Remarks contains the following notations:

- a. The vessel is identified as APL ALEXANDRIT [*sic*]/5152W.
- b. The Port of Loading was India.
- c. The ETD (presumably estimated time of departure) for the shipment is December 27, 2005.
- d. Discharge is to take place at Norfolk on January 16, 2006.
- e. The final destination is to be Baltimore on January 24, 2006.

(ITC Arrival Notice/Remarks (ALJ App. 68)).

17. On or about January 24, 2006, ITC added the following remarks by typeface to its Arrival Notice: "Remarks: Be advised, please not[e] that this container ha[s] been place[d] on hold by S. Line due to charges at origin. Please contact your shipper at origin A.S.A.P. Last free day at ramp [January 27, 2006]." (ITC Arrival Notice/Remarks (ALJ App. 68)).

18. On or about February 3, 2006, ITC added the following remarks by hand to its Arrival Notice: "Shipment still on hold. . . ." (ITC Arrival Notice/Remarks (ALJ App. 68)).

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<sup>8</sup> The record contains no further evidence concerning the transshipment of the cargo from Norfolk to Baltimore.

19. When container No. IPXU-3304500/20 arrived at Baltimore, it was in the custody of MacAndrews. (ITC Answer to Clutch Complaint ¶5 (ALJ App. 43)).

20. D&W surrendered ITC Bill of Lading No. RSPL/DEL/BAL/05151 to ITC at some time after the shipment arrived in Baltimore (D&W Complaint ¶2 (ALJ App. 9)).

21. MacAndrews refuses to release the shipment, which is now in Baltimore, until it receives MacAndrews Bill of Lading MCAWDELORF00157. (Affidavit of Raymond Wu in Support of ITC Motion for Summary Judgment ¶¶7, 9 (ALJ App. 70); Affidavit of Rajesh Bhatia in Support of Motion for Summary Judgment ¶¶7, 9 (ALJ App. 73)).

22. Rosmarine refuses to surrender the MacAndrews bill of lading because it contends that Clutch has never paid the outstanding charges related to the shipment (Supplemental Affidavit of Rajesh Bhatia dated September 12, 2007, in support of Rosmarine's Motion for Summary Judgment; Rosmarine Response of November 3, 2008).

#### Payment for the Shipment of the Merchandise

There is a factual dispute over whether Clutch ever paid Rosmarine for the ocean freight and related charges pertaining to the shipment of the automotive parts to D&W. Clutch maintains that it tendered a check to Rosmarine for an amount in excess of the amount of the ocean freight and charges with instructions to first apply the payment to the cost of the shipment and the remainder toward an unrelated open account. Rosmarine admits that it received the payment, but denies that Clutch gave any instructions as to its allocation other than that it was on account. In any event, the following findings are undisputed:

23. On December 15, 2005, Rosmarine issued Debit Note (or invoice) ROS/DEL490 to Clutch Auto for B/L RSPL/DEL/BAL/05151 for 130,158 Indian Rupees ("INR"). (Rosmarine Debit Note ROS/DEL490 (ALJ App. 75)).

24. According to Debit Note ROS/DEL490, the following charges applied: ocean freight 102,740 INR; B/L charges 750 INR; IHC 25500 INR; ACD-20' 1168 INR (Rosmarine Debit Note ROS/DEL490 (ALJ App. 75)).

25. At some time between December 15, 2005, and January 15, 2006, Clutch issued check number 954571, dated January 15, 2006, and drawn on Canara Bank on account number DGGA000010007, in the amount of 150,000 INR, payable to the order of Rosmarine (Clutch Complaint ¶3; (ALJ App. 76); affidavit of Rajesh Bhatia dated September 12, 2007).

26. Clutch check number 954571 was dishonored for insufficient funds when first presented for payment (Rosmarine Reply of April 27, 2007 ¶2 (ALJ App. 19) and Annexure I.B. ¶5 (ALJ App. 31)).

27. On January 21, 2006, Canara Bank honored check number 954571 and debited Clutch account number DGGA000010007 in the amount of 150,000 INR (statement of Canara Bank dated May 28, 2007 (ALJ App. 77)).

Clutch maintains that it directed the application of check No. 954571 as follows: 130,158 Indian Rupees for Rosmarine Invoice No. 490; 19,842 INR as “add. bal. on A/C payment.” Clutch further alleges that it communicated its instructions to Rosmarine by virtue of a Cheque Payment Voucher which accompanied check no. 954571 (Clutch Auto Limited Cheque Payment Voucher dated December 15, 2005 (ALJ App. 76); Clutch Auto Response Order to Supplement the Record dated July 27, 2007, Ans. 1.b (ALJ App. 60)).

Rosmarine denies Clutch’s allegation, maintains that it never received the Cheque Payment Voucher and claims that Clutch created the voucher after the shipment had arrived in Baltimore. In support of its position, Rosmarine relies upon a page from Clutch’s own accounting records which apparently were submitted by Clutch to the High Court of New Delhi, India in connection with a law suit which Rosmarine and ITC had instituted against Clutch in an attempt to recover unpaid charges arising out of the shipment of automotive parts<sup>9</sup> (ITC Response of October 29, 2008; Bhatia affidavit of September 12, 2007).

The excerpt from the records of the High Court of New Delhi is numbered 46 and is marked as page 8. The page bears the heading:

Clutch Auto, Limited, Faridabad Main From 1-Apr-2005  
Rosmarine Shipping Pvt, Ltd Ledger Account – 1-Apr-2005 to 31-Mar-  
2006

Among the entries on the page is a notation showing the issuance of check No. 954571 for 150,000 INR “On Account”. There is no mention of the Rosmarine invoice, nor is there any other reference to the cost of the shipping of the automotive parts from India to Baltimore. The omission of such a reference is especially significant in view of other entries on the same page which indicate that certain other checks were issued as payment of specific charges on other matters; some of those entries include references to invoice numbers.

Clutch has not challenged the authenticity of the ledger sheet but, in its rebuttal to Rosmarine’s Response (inaccurately labeled as a rebuttal to ITC’s response), maintains

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<sup>9</sup> Clutch submitted the ruling of the High Court in an apparent attempt to attack the credibility of Rosmarine and ITC (Clutch Response, October 14, 2008). The Court dismissed the suit because of the apparent forgery and alteration of documentary evidence but specifically declined to rule on the underlying merits of the conflicting claims of Rosmarine, ITC and Clutch.

that the ledger sheet is incomplete because it includes the notation "Brought Forward".<sup>10</sup> In its response of November 3, 2008, Clutch has also alleged that it paid Rosmarine for the cost of the shipment (presumably by some other means which it has not stated) before it arrived in Baltimore. Clutch further argues that Rosmarine should have known that check no. 954571 was intended to cover the cost of the shipment in question because its other account with Rosmarine was disputed. Yet, Clutch does not deny that it was aware of the other account and has not challenged the proposition, as set forth in Rosmarine's response of November 3, 2008, that Rosmarine maintained that Clutch owed a total of 5,588,163 INR, an amount far in excess of Clutch's check. According to Clutch's ledger sheet, it issued five checks to Rosmarine on account prior to the issuance of check no. 954571, those checks were for a total of 950,000 INR. Clutch issued another check to Rosmarine on account in the amount of 200,000 INR on or after the date on which it issued check no. 954571. In view of its knowledge of Rosmarine's position and its submission of multiple payments on account, at least one of which occurred on or after the date when check no. 954571 was issued, it is disingenuous of Clutch to insist that, even in the absence of written instructions as to allocation, Rosmarine should have known of its unexpressed intent to apply check no. 954571 to the cost of the shipment in question.

It is interesting to speculate as to why Clutch did not direct Rosmarine to apply the proceeds of check no. 954571 to the payment of the costs of the shipment. One possibility is that it was a simple oversight; another is that, at the time the check was issued, D&W had not paid the purchase price for the automotive parts. In any event, the clear weight of the evidence is that Clutch either gave no instructions as to the allocation of the check or instructed Rosmarine to apply the check to its open account.

In view of the foregoing evidence I find as a fact that:

28. At the time that Clutch issued check no. 954571 it was aware of Rosmarine's contention that Clutch owed more than the amount of the check on a pre-existing account which was unrelated to the shipment in question.

29. Clutch issued check no. 954571 to Rosmarine without instructing Rosmarine that the check was to be initially allocated to the payment of charges invoiced by Rosmarine for the shipment of the automotive parts to D&W in Baltimore.

### **DISCUSSION AND ANALYSIS**

In weighing the evidence and applying the pertinent law, I am guided by the principle, as set forth in Rule 155, 46 C.F.R. §502.155, that Clutch and D&W have the

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<sup>10</sup> Clutch maintains that the Bhatia affidavit should not be considered because it was not sent to Clutch when it was submitted to the Commission. If that were so, the omission was corrected on or before November 5, 2008. Clutch has not explained how it was prejudiced by a procedural error that was subsequently corrected.

burden of showing that they are entitled to relief. The applicable standard of proof is the preponderance of the evidence or, stated otherwise, that the existence of a fact is more probable than not, *Petition of South Carolina State Ports Authority for Declaratory Order*, 27 S.R.R. 1137, 1161 (1997).

Although Clutch has made melodramatic allegations of conspiracy among the Respondents to deprive it and D&W of the automotive parts<sup>11</sup>, it is apparent that the shipment is being held in Baltimore by MacAndrews pending the surrender of its bill of lading as well as the payment of demurrage and other charges (Finding of Fact 21)<sup>12</sup> and that Rosmarine refuses to surrender the MacAndrews bill of lading until it receives payment from Clutch for the charges related to the shipment in question (Finding of Fact 27).

Clutch and D&W will only be entitled to relief if they show that they are entitled to possession of the shipment of automotive parts. The resolution of that issue hinges on whether Clutch tendered payment to Rosmarine of the charges related to the shipment. Since Clutch failed to allocate its payment to the expenses of the shipment to D&W (Findings of Fact 28 and 29), Rosmarine was within its rights to apply the payment to a pre-existing debt. When a debtor fails to direct the application of a payment to a particular debt, the creditor may apply the payment as it chooses, *In re Zersen*, 189 B.R. 732 (W.D. Wis. 1995). Accordingly, Clutch did not pay the costs of the shipment.

In view of Clutch's failure to pay shipping costs, neither it nor D&W was entitled to obtain possession of the automotive parts.<sup>13</sup> Under United States law<sup>14</sup>, a possessory maritime lien arose over the cargo under which neither Clutch nor D&W would be entitled to the MacAndrews bill of lading which was necessary for them to acquire possession of the cargo, *Hawsphere Shipping Co., Ltd. v. Intamex, S.A., et al.*, 330 F.3d 225, 233 (4<sup>th</sup> Cir. 2003). Clutch has emphasized that D&W offered MacAndrews a "bank

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<sup>11</sup> Clutch has not explained the purpose of an alleged conspiracy which has resulted in the detention of the shipment at MacAndrews' facility in Baltimore and the accrual of demurrage and other charges in an amount which apparently is in excess of the value of the cargo.

<sup>12</sup> MacAndrews has given notice that it intends to sell or otherwise dispose of the cargo to satisfy those charges. This Initial Decision should not be construed as a determination of MacAndrews' entitlement to do so or of the adequacy of the notice.

<sup>13</sup> This Initial Decision should not be construed as a ruling as to the merits of any claims or controversies that may arise between Clutch and D&W.

<sup>14</sup> Since the transaction between Clutch and Rosmarine took place in India, it is likely that it would be governed by Indian law, which was invoked by Rosmarine and ITC in their suit against Clutch in the High Court of New Delhi. Nevertheless, the jurisdiction of the Commission is limited to the enforcement of the Shipping Act and other statutes of the United States, all of which must be construed according to the laws of the United States.

guarantee”<sup>15</sup> for the amount of its charges. However, even if that were equivalent to payment of its charges, MacAndrews understandably insisted on the surrender of its bill of lading before it would release the cargo. Under United States law an ocean carrier is required to issue a bill of lading on demand upon receipt of cargo. That bill of lading is "prima facie evidence of receipt of the goods described", 46 U.S.C. §30703(a) and (c).<sup>16</sup> For MacAndrews to release the shipment without requiring the surrender of the bill of lading would be to expose itself to the risk of a claim for non-delivery by the holder of the bill of lading. MacAndrews' position is both prudent and customary.

Clutch has repeatedly emphasized the differences in the bills of lading of ITC and MacAndrews (Findings of Fact 13 and 15) as evidence of collusion between MacAndrews and other Respondents to misappropriate the shipment of automotive parts. I disagree. Rosmarine, which dealt with Clutch as its customer, arranged for its agent ITC to name Clutch as the exporter or shipper.<sup>17</sup> MacAndrews was presumably instructed by ITC to name Rosmarine as the shipper and ITC as the consignee. The descriptions of the cargo were identical in both bills of lading and both bills of lading identified D&W as the party with the ultimate interest in the cargo upon its arrival in Baltimore. The designation of a different vessel by MacAndrews is of no consequence and could easily have been a reaction to a change in operating schedules or in available cargo space. In any event, there is no evidence that the change in vessels caused the shipment to be diverted or delayed. Simply stated, the differences in the language of the bills of lading reflect nothing more than the mechanics of the arrangements for the transportation of the shipment from India to Baltimore and are not suggestive of misconduct on the part of any of the Respondents.

Since neither Clutch nor D&W have shown that they are entitled to possession of the shipment that is the subject of this case, they have failed in their burden of proof that they were the victims of violations of the Shipping Act by the Respondents.

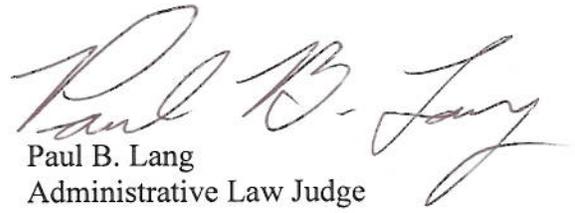
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<sup>15</sup> Even if MacAndrews were obligated to release the cargo without the surrender of its bill of lading, neither Clutch nor D&W has explained the meaning of the bank guarantee or the conditions under which MacAndrews could have invoked the guarantee to secure payment.

<sup>16</sup> This provision applies to any carrier engaged in the carriage of goods to or from any port in the United States, 46 U.S.C. §30702(a).

<sup>17</sup> It is unclear whether ITC issued a negotiable, or “to order”, bill of lading in response to instructions from Rosmarine or as a matter of course. In any event, neither Clutch nor D&W have alleged that this action was wrongful. I take official notice that the issuance of negotiable bills of lading is a common practice in ocean transportation.

It is hereby **ORDERED** that the Complaints of Clutch Auto, Ltd. and D&W Clutch and Brake be, and hereby are, **DISMISSED**.

  
Paul B. Lang  
Administrative Law Judge