BEFORE THE
FEDERAL MARITIME COMMISSION

GLOBAL LINK LOGISTICS INC.	)	
Complainant,	)	
v.	)	**Docket No. 13-07**
HAPAG-LLOYD AG,	)	
Respondent.	)	

RESPONDENT'S REPLY TO EXCEPTIONS

Respondent Hapag-Lloyd AG hereby replies to the Exceptions to the Initial Decision filed May 27, 2014, by Complainant Global Link Logistics, Inc. ("Global Link") requesting that the Commission overturn the April 17, 2014, Initial Decision Granting Respondent's Motion to Dismiss for failure to state a claim for which relief can be granted.

The Initial Decision was correctly decided. Global Link's September 10, 2013, complaint ("Complaint") fails to set forth sufficient factual allegations, accepted as true, to state a claim for which relief can be granted under any of the three subsections of the Shipping Act of 1984 that Global Link cites. Hapag-Lloyd respectfully requests that the Exceptions be rejected, the Initial Decision be adopted by the Commission, and this proceeding be dismissed.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 3

A. The Presiding Officer Applied the Correct Pleading Standard 3

B. Global Link Misstates the Statutes on Which it Relies 5

C. The Shipping Act Does Not Apply a Broad "Reasonableness" Standard to Service Contract Terms or Services 7

D. The Shipping Act Does Not Require Service Contract Rates and Terms to Meet "Normal and Customary" or "Course of Dealing" Standards. 13

E. The Initial Decision Correctly Held That Global Link Failed to State a Claim for an Unreasonable Refusal to Deal or Negotiate 15

F. The Presiding Officer Correctly Held That Global Link Failed to State a Claim Pursuant to § 41104(3), Barring Retaliation 19

G. The Presiding Officer Correctly Held That Global Link Failed to State a Claim For a Violation of § 41102(c) For Cross Referencing Tariff Charges. 20

1. Global Link Makes A Policy Argument To Fundamentally Alter Service Contract Rules For Industry as a Whole. 20

2. The Complaint Does Not Allege Unreasonable Regulations or Practices Relating to Receiving, Handling, Storing or Delivering Property. 22

3. The Commission's Regulations and Policy Expressly Authorize Cross Referencing of Tariff Terms. 23

H. Global Link's Efforts To Supplement the Record Are Improper. 25

I. Global Link's Arguments Are Contract Law Issues Appropriate for Decision By the Arbitrator. 26

III. CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

CASES

Anchor Shipping Co. v. Alianca,
300 S.R.R. 998 (2006) 4, 5

Anyangwe v. Nedlloyd Lines,
909 F. Supp. 315 (D. Md. 1995) 27

Ashcroft v. Iqbal,
556 U.S. 3

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 3, 4

Asia N. Amer. Eastbound Rate Agreement v. Pacific Champion Serv. Corp.,
864 F.Supp. 195 (D.D.C. 1994) 29

Austasia Intermodal Lines, Ltd. v. FMC,
580 F.2d 642 (D.C.Cir.1978) 28

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) ..... passim

California Shipping Line, Inc. v. Yangming Marine Transp.,
25 S.R.R. 1213 (1990) 20

Canaveral Port Auth. – Possible Violations of Sec. 10(b)(10), Unreasonable Refusal to Deal or Negotiate,
29 S.R.R. 1436 (2003) 15

Cargo One, Inc. v. COSCO,
28 S.R.R. 1635 (2000) 4, 5

Castillo v. Ocwen Loan Servicing, L.L.C.,
No. 13-50195, 2013 WL 4840494 (5th Cir. 2013) 3

Conley v. Gibson,
355 U.S. 41 (1957) 4

Crowley Liner Services, Inc., v. Stuart Rags, Inc.,
SMA 3833 (2004), 2004 WL 5658882 29

Equal Employment Opportunity Comm'n v. St. Francis Xavier Parochial School,
117 F.3d 621 (D.C. Cir. 1997) 26

Fitzer v. Security Dynamics Technologies. Inc.,
119 F. Supp. 2d. 12 (D.Mass. 2000) 4

Gamma–10 Plastics, Inc. v. Am. President Lines, Ltd.,
32 F.3d 1244 (8th Cir.1994) 27

Hong Kong Islands Line America S.A. v. Distribution Services, Ltd.,
795 F. Supp. 983 (C.D. Cal. 1991) 29

Mori Seiki USA, Inc. v. M/V Alligator Triumph,
990 F.2d 444 (9th Cir.1993) 28

New Orleans Stevedoring Co. v. Bd. Of Commissioners of the Port of New Orleans,
29 S.R.R. 345 (ALJ 2001), *aff'd*, 29 S.R.R. 1066 (FMC 2002).....15

Oceanconnect.com, Inc. v. Chemoil Corp.,
CIV.A. H-07-1053, 2008 WL 194360 (S.D. Tex. Jan. 23, 2008).....27

P & O Containers Ltd. v. American Motorists Ins. Co.,
1998 WL 146229 (S.D.N.Y.March 25, 1998) 29

P & O Containers v. American Motorists Ins. Co.,
1998 U.S. Dist. LEXIS 3655 (S.D.N.Y. 1998).....29

Papasan v. Allain,
478 U.S. 265 (1986).....4

Petchem, Inc. v. Federal Maritime Commission,
853 F.2d 558 (D.C. Cir. 1988).....18

Seacon Terminals, Inc. v. Port of Seattle,
26 S.R.R. 886 (1993) 15, 18

The "8900" Lines Rate Agreement v. Gulf American Line,
SMA 3635 (2000), 2000 WL 35733809.....29

Trans-Tec Asia v. M/V HARMONY CONTAINER,
435 F. Supp. 2d 1015 (C.D. Cal. 2005) *aff'd*, 518 F.3d 1120 (9th Cir. 2008) 27

Transpacific Westbound Rate Agreement v. Federal Maritime Comm'n,
951 F.2d 950 (9th Cir.1991). 28

Yakov Kobel and Victor Berkovich v. Hapag-Lloyd A.G., Hapag-Lloyd-America, Inc., Limco Logistics, Inc., and International TLC, Inc.,
32 S.R.R. 1720 (FMC July 12, 2013) 14, 15

Yangming Marine Transport Corp. v. Formost Int'l, Inc.,
1990 U.S. Dist. LEXIS 1675 (S.D.N.Y. 1990).....29

Zim Israel Navigation Co. v. Indonesian Exports Dev. Corp.,
1993 U.S. Dist. LEXIS 3513 (S.D.N.Y. 1993) 29

Zim Israel Navigation Co. v. Worldwide Shippers Ass'ns,
1993 U.S. Dist. LEXIS 5210 (S.D.N.Y. 1993) 29

STATUTES

46 U.S.C. § 40102(6) 28

46 U.S.C. § 40502 26

46 U.S.C. § 40502(c)(8) 25

46 U.S.C. § 40502(f) 29, 30

46 U.S.C. § 41102(c) ..... passim

46 U.S.C. § 41104(3) 5, 6, 19, 20

46 U.S.C. § 40102(20) 21, 24

Uniform Commercial Code § 1-303 27

OTHER AUTHORITIES

46 C.F.R. § 502.227 26

46 C.F.R. §§ 530.3(q) and 530.8(b)(7) 25

46 C.F.R. § 530.8(c) 23

46 C.F.R §525.1(c)(10) 14

144 Cong. Rec. S3306 13

Fed. R. Civ. P. 12(b)(6) 3

H. Rep. 111-126 (2010) 24

S. Rep. 105-61 (1997) 11

Service Contracts Subject to the Shipping Act of 1984 - Interim Final Rule, 64 FR 11186 ..... 23, 25

Service Contracts Subject to the Shipping Act of 1984 – Proposed Rule, 63 FR 71062 ..... 23, 29

I. INTRODUCTION

The Initial Decision granting Respondent's motion to dismiss was correctly decided. While criticized by Complainant as "rote," the Presiding Officer's thorough legal analysis of the Complaint was the only proper response to a motion to dismiss for failure to state a claim. Exceptions at 13. Finding jurisdiction over what Complainant asserted to be Shipping Act violations, the Presiding Officer correctly laid out the pleading standard applicable in formal proceedings before the Commission, and then applied that standard systematically to each alleged statutory violation set out in the Complaint. Looking at each required element of each alleged violation, the Presiding Officer recognized that (even taking all of Complainants' factual allegations as true) Complainant failed to allege facts sufficient in the Complaint to satisfy those elements, and thus failed to state a claim for which relief can be granted.

Global Link, in contrast, has submitted Exceptions grounded in its own narrow policy interests, which would have the Commission embark on an extraordinary and extra-statutory re-regulation of the liner shipping industry. It urges the Commission to fashion new causes of action and remedies under the Shipping Act to prescribe service contract rates, terms and practices, even though such broad authorities were withheld and withdrawn by Congress in the Ocean Shipping Reform Act of 1998 (OSRA). Ignoring OSRA's mandate to foster marketplace flexibility (indeed, ignoring OSRA altogether) Global Link asks the Commission to declare that service contract rates, terms and practices that deviate from customary industry practices, or that are not "fair and truly bilateral," are unlawful. Exceptions at 19. Under this reasoning, carriers would be compelled to capitulate to non-vessel-operating common carrier (NVOCC) demands to adjust contract rates to spot market levels, waive minimum quantity commitments, and extend contracts when volumes are not met. It asks the Commission to conclude that a carrier's request for arbitration over a breach of contract, a right set forth in the text of the Shipping Act itself, is a

violation of that Act. Global Link's position would effect a wholesale shift of market and pricing risk from NVOCCs to ocean common carriers like Hapag-Lloyd that invest in operating the U.S.-flag and foreign-flag vessels needed to carry U.S. foreign trade.

Global Link does not shy away from the fact that it is seeking fundamental, industry-wide changes to the regulation of service contracts, stressing that the contract at issue in this docket is similar to the vast majority of contracts in the trans-Pacific trade. Exceptions at 40. With no apparent sense of irony, Global Link argues that governmental intervention is necessary to compel carrier adherence to Global Link's view of market rates and customary market practices. Global Link's proposals would invalidate various service contract terms and compel renegotiation of others, effecting a sweeping shift of spot market rate declines and other commercial risks to carriers, and freeing NVOCCs from contractual commitments on prices and volumes. Such moves would make service contracts practically unenforceable, at least without years-long regulatory proceedings to adjudicate the perceived fairness of individual terms.

Global Link's calls for sweeping changes to the current service contract regulatory landscape are not properly directed to the Commission, however, as the agency's powers are limited under the Shipping Act. OSRA clearly has worked as Congress intended, particularly in terms of fostering competition, growth and investment in U.S.-foreign liner shipping. Calls for the systematic changes Global Link seeks, mandating more attractive commercial terms for resellers of ocean shipping services, would have to be taken up by Congress rather than the Commission.

Ultimately, as the Presiding Officer concluded, Global Link fails to set forth a case under which relief can be granted under the Shipping Act. Global Link is not, as it asserts, left with "no recourse," however. Exceptions at 17. The objections it raises to its contract with Hapag-Lloyd – that its performance was purportedly impossible, that the terms were modified by the

parties' course of dealing, or that it was a "contract of adhesion" – are black-letter contract law principles, not Shipping Act causes of action. Courts and maritime arbitrators apply these doctrines to maritime contract disputes regularly, and are fully imbued with the legal authority and competence to assess Global Link's claims and defenses in the context of a breach of contract action. Global Link should not be permitted to use the Commission's adjudication procedures to delay or derail the proper disposition of what is a straightforward commercial contractual dispute.

II. ARGUMENT

A. The Presiding Officer Applied the Correct Pleading Standard

The Presiding Officer correctly applied the pleading standard applicable in FMC cases and in federal district court. Complainant misstates the applicable pleading standard, suggesting that it should survive a motion to dismiss even when its Complaint fails to allege sufficient facts to make out the elements of a Shipping Act violation.

As the Initial Decision indicated, to survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim "has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). To meet this threshold, a complaint meet "the basic requirement that the facts plausibly establish *each required element* for each legal claim." *Castillo v. Ocwen Loan Servicing, L.L.C.*, No. 13-50195, 2013 WL 4840494, at *2 (5th Cir. 2013)(citing *Iqbal*, 556 U.S. at 682–83) (emphasis added).

The crux of the *Twombly* test is that a complainant must allege some actual facts to satisfy each element of the violation it is alleging, a test that Global Link fails badly. "A

pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). A complaint should be dismissed if it does not "contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *See* C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235–236 (3d ed. 2004). Moreover, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). "While legal conclusions can provide the complaint's framework, they *must* be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. 662, 664 (2009) (emphasis added).

In its Exceptions, Global Link presses its theory, rejected by the Presiding Officer, that its Complaint need only give a respondent fair notice of the claim and the grounds upon which it rests, *see* Exceptions at 22, and thus dismissal is permitted only "if 'it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim. . . .'" *Id.* (citing *Fitzer v. Security Dynamics Technologies. Inc*., 119 F. Supp. 2d. 12, 17 (D.Mass. 2000). This is the pleading standard that was articulated in *Conley v. Gibson*, 355 U.S. 41 (1957). However, the U.S. Supreme Court has since made clear that "*Twombly* retired the *Conley* no-set-of-facts test." *Iqbal,* 556 U.S. at 670.

As it did unsuccessfully before the Presiding Officer, Global Link tries to confuse and dilute the proper pleading standard by citing Commission cases dealing with subject matter jurisdiction, *e.g.*, *Anchor Shipping Co. v. Alianca*, 30 S.R.R. 991 (2006) and *Cargo One, Inc. v. COSCO*, 28 S.R.R. 1635 (2000). Exceptions at 29-31. In those cases, the Commission confirmed that it has jurisdiction to adjudicate alleged violations of the Shipping Act, even if a contract contains an arbitration clause; however, that point that is not at issue in this docket. The

Presiding Officer correctly took note of those cases, found jurisdiction over the Complaint, and carefully reviewed the Complaint to ascertain whether it contained actual factual allegations sufficient to make out violations of the sections cited. Nothing in *Anchor Shipping* or *Cargo One* diminishes or waives the *Twombly* pleading standard to state a claim, and nothing in those decisions suggests that a complainant like Global Link can survive a motion to dismiss simply by citing many sections of the Shipping Act and referencing "unreasonableness" copiously throughout its filings.[1]

The significance of the pleading standard is not an academic one. The Complaint failed to allege any facts at all to satisfy the key elements of the Shipping Act sections it invokes. For example, the Complaint's factual deficiencies include:

- No alleged facts suggesting unreasonable practices in "receiving, handling, storing or delivering property," as required to make out a violation of § 41102(c);
- No facts evidencing an actual refusal to negotiate or deal with Global Link, plus no allegations of reasons why Hapag-Lloyd's alleged refusal had "no relation to legitimate transportation-related factors," to show a violation of § 41104(10);
- No alleged facts evidencing of any manner of retaliation under § 41104(3).

Applying the correct pleading standard, the Initial Decision should be upheld and the Complaint dismissed. It is inconsistent with sound Commission and federal practice to allow Global Link to proceed with discovery and a hearing in the hopes that it might devise allegations to fill these fundamental gaps in its claims at some point in the future.

B. Global Link Misstates the Statutes on Which it Relies.

As a preliminary matter, it is important to recap the text of the statutes Global Link invokes. The Initial Decision explained in detail the three provisions Hapag-Lloyd is accused of

[1] Similarly, Global Link argues at length that the Commission has broad and exclusive subject matter jurisdiction to adjudicate Shipping Act violations. See Exceptions 26-29. None of the cases cited are relevant to the legal issue currently before the Commission, i.e., whether Global Link's complaint met the relevant pleading standard to state a claim for which relief can be granted under the Shipping Act as it currently exists, i.e., as modified by OSRA. None of the cases authorize the Commission to extend its authorities beyond that set out in the statute, or require the agency to conduct discovery and hearings with regard to complaints that fail to plead the necessary elements of Shipping Act violations.

violating, § 41104(3), § 41104(10), and § 41102(c), identifying elements required to make out a violation of each, and recognizing the Global Link failed to plead facts to meet those elements.

Global Link, in contrast, continues to misstate the statutory standards at issue in this docket, omitting key words and phrases, and applying them in ways contrary to the statutory text and precedent. For example, it argues:

> Here, the Complaint alleges that Hapag-Lloyd engaged in a number of unreasonable practices that constitute violations of the Shipping Act. Specifically, the Complaint alleges that Hapag-Lloyd violated 46 U.S.C. § 41102(c) by failing to establish, observe, and enforce just and reasonable regulations and practices; Section 41104(3) by resorting to unfair or unjustly discriminatory methods; and Section 41104(10) by its unreasonable refusal to deal or negotiate.

Exceptions at 31.

The text of 46 U.S.C. § 41104(3) does not, however, set forth a blanket prohibition on "unfair or unjustly discriminatory methods." Instead, it directs that a carrier may not "retaliate against a 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." Because the Complaint did not, and cannot, plead any facts satisfying the retaliation element which is at the core of this section, Complainant simply omits that statutory text from its argument.

Similarly, § 41102(c) does not broadly bar all unfair or unjustly discriminatory methods, as Global Link claims. Rather, it states: "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." Global Link does not even make a perfunctory effort to plead facts to satisfy the "relating to or connected with receiving, handling, storing, or delivering property" test in its Complaint, simply ignoring that part of the text.

C. The Shipping Act Does Not Apply a Broad "Reasonableness" Standard to Service Contract Terms or Services

Carrying on with its expansive misreading of § 41104(3), § 41104(10), and § 41102(c), Global Link incorrectly asserts that the Shipping Act authorizes and requires the Commission to impose fairness and reasonableness standards on service contracts. Global Link argues thus: "To regulate fairly a system of common carriage with respect to service contracts as Congress has directed, the Commission must either require - as the Shipping Act commands - that service contract be fair and truly bilateral with meaningful commitments by both parties or it must enforce the reasonable and market driven customary practices the carriers have developed to ameliorate the harshness of their service contract terms and conditions." Exceptions at 19. With one stroke, Global Link would have the Commission subject service contracts to new subjective regulatory requirements to be "fair," "truly bilateral," "meaningful," "reasonable," and consistent with "market driven customary practices." The result would be an unprecedented level of governmental control of service contract service that would defy Congress' deregulatory direction and intent in OSRA.

Nothing in the cited sections of the Act authorizes the regulation of service contract terms and services on "reasonableness" grounds, and Global Link fails to identify any Commission or judicial decisions indicating otherwise. Global Link would have the Commission to reinterpret and reimagine the cited prohibitions (dealing with retaliation, unreasonable refusals to deal, and cargo loading, handling, storing and delivering practices) as a basis to spontaneously recreate the broad "reasonableness" prohibitions Congress abolished in OSRA. Such an approach, however, would have the Commission ignore judicial principles of statutory construction and flout the direction of its congressional authorizing committees.

To properly delineate the scope of the Commission's authority in this area, it can be instructive to examine the changes to the Shipping Act made by OSRA. Before 1998, the

Shipping Act of 1984 included provisions – particularly the former section 10(b)(10-12) – that broadly barred all carrier unjustly discriminatory rates, undue or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage, including in connection with service contracts. For example, section 10(b), pre-1998, used to state: "Common carriers. No common carrier, either alone or in conjunction with any other person, directly or indirectly, may. . . (12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal <u>or any undue or unreasonable prejudice or disadvantage in any respect whatsoever</u>."

This robust authority to bar unreasonable of service contract terms and practices was eliminated from the Shipping Act in 1998. OSRA bifurcated the reasonableness and anti-discrimination prohibitions into separate subsections for tariff service (with very broad prohibitions) on one hand, and service contract service (with very narrow prohibitions reaching only port-, locality-, and "status"-based discrimination) on the other. The textual changes in the relevant sections of the law are set out at Figure 1, below.

FIGURE 1: How Did OSRA Change the Section 10(b) "Prohibited Acts"?

Section 10. Prohibited acts

* * *

(b) Common carriers. No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—

* * *

(3)~~(5)~~ 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;

(4)~~(6) except for service contracts,~~ for service pursuant to a tariff, engage in any unfair or unjustly discriminatory practice in the matter of--

(A) 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 unjustly discriminatory practice in the matter of rates or charges with respect to any port;

(6)~~(7) employ a fighting ship;~~ use a vessel or vessels in a particular trade for the purpose of excluding, preventing, or reducing competition, by driving another ocean common carrier out of that trade;

(7)~~(8)~~ 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 port;

(10) unreasonably refuse to deal or negotiate;

* * *

Under OSRA, the Commission's authority to regulate service contracting was sharply limited to three prohibitions, none of which have been pled by Global Link: (1) status-based discrimination against ocean transportation intermediaries; (2) unjust discrimination against ports; and (3) undue prejudice regarding localities. The post-OSRA Shipping Act provides no provision on which Global Link can construct its claims of unreasonable practices or discrimination in connection with its individual service contract rates, volumes, or services.

The Senate Report that accompanied OSRA explains how application of the Prohibited Acts to service contracts is limited:

> 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 <u>narrows the application of the prohibited acts with respect to service pursuant to common carrier service contracts</u>. Sections 10(b)(5) and (9) of the 1984 Act, as amended by the bill, would restrict common carrier service contracting flexibility <u>in only three, narrow, ways</u>.
>
> 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. . . . 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, <u>not to circumstances where the actions are targeted at a particular shippers' association or ocean transportation intermediary</u>. An example of such

> prohibited activity would include a clear pattern of unjustly discriminatory practices by a common carrier with respect to all shippers' association 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.

S. Rep. 105-61 (1997) (emphasis added). It is clear from this legislative history that Congress sharply limited the Commission's authority to regulate service contracts, and did not authorize the Commission to recreate new causes of action under the Shipping Act to adjudicate alleged unreasonable or discriminatory individual service contract terms or practices "targeted at a particular . . . ocean transportation intermediary."

At the time OSRA was under consideration, the Commission clearly understood that OSRA's legislative changes would expressly "authorize carriers . . . to discriminate in unjust or unreasonable ways in their contracting" – and, in fact, the Commission suggested that Congress reconsider. In March 1997, then-Chairman Creel testified before the Subcommittee on Surface Transportation and Merchant Marine of the Senate Committee on Commerce, Science, and Transportation:

> Section 10(b)(9) would also allow carriers and conferences to subject shippers, forwarders, ports and others to "undue or unreasonable prejudice or disadvantage." These prohibited acts formerly applied to all service contracts. Under the bill they apply to none.

> While I appreciate that service contracts are inherently "discriminatory" in that the signatories get better deals than non-signatories, these prohibited acts proscribe unjust discrimination and unreasonable prejudice. There is no reason to authorize carriers and conferences to discriminate in unjust or unreasonable ways in their contracting. For example, a foreign carrier should not discriminate against a U.S. shipper in order to promote a fellow national. Nor should ports be lawfully subjected to unduly, unreasonably prejudicial preferences. I would therefore urge that Congress carefully consider whether carte blanche authority for carriers and conferences to unjustly and unreasonably disadvantage shippers, ports and forwarders is truly in the best interest of the United States.

Remarks of Commissioner Harold J. Creel Jr., March 20, 1997.[2] The Senate Committee did accept some of the Commission's suggestions (*i.e.*, to restore reasonableness protections to protect ports, and to regulate multi-carrier contracts) in the final OSRA bill. However, it did not restore in OSRA the Commission's power to regulate the reasonableness of individual service contracts and service pursuant thereto.

On Tuesday, April 21, 1998, lead OSRA sponsor Senator Kay Bailey Hutchison took to the Senate floor and laid out how and why OSRA changed the regulatory scheme, allowing carriers more market flexibility and eliminating prohibitions on discriminatory treatment of shippers and ocean transportation intermediaries in individual service contracts. Senator Hutchison stated:

> Mr. President, for the record, I now want to explain some of the key provisions of S. 414.
>
> The most significant benefit of S. 414 is that it will provide shippers and common carriers with greater choice and flexibility in entering into contractual relationships for ocean transportation and intermodal services. It accomplishes this through seven specific changes to the Shipping Act of 1984. It allows multiple shippers to be parties to the same service contract. It allows service contracts to specify either a percentage or quantity of the shipper's cargo subject to the service contract. It prohibits multiple-ocean common carrier cartels from restricting cartel members from contracting with shippers of their choice independent of the cartel. It allows service contract origin and destination geographic areas, rates, service commitments, and liquidated damages to remain confidential. **It eliminates the requirement that similarly situated shippers be given the same service contract rates and service conditions. It eliminates the**

[2] http://www.fmc.gov/news/default.aspx?Archive=y&F_All=y&ArticleId=417

> **current restrictions on individual common carriers engaging in discriminatory, preferential, or advantageous treatment of shippers and ocean transportation intermediaries in service contracts** (while retaining those restrictions for groups of common carriers and strengthening prohibitions against refusals to deal or negotiate by individual common carriers). It allows groups of ocean common carriers to jointly negotiate inland transportation rates, subject to the antitrust laws and consistent with the purposes of the 1984 Act.

144 Cong. Rec. S3306, Ocean Shipping Reform Act Of 1997 (emphasis supplied).

Global Link's efforts to imaginatively reengineer the Shipping Act to mandate service contract fairness, reasonableness, bilateralness, conformity with market rates and industry practices would countermand clear directions provided by Congress. Global Link urges the Commission to follow its lead in ignoring the retaliation and "receiving, handling, storing and delivering" requirements of §§ 41104(3) and 41104(c), and by expanding the prohibition on refusals to deal to require rate reductions on demand. Citing a string of Shipping Act, 1916, caselaw, Global Link asserts that the Shipping Act is a "remedial statute," and thus "even where there is ambiguity . . . it should be construed to address the problems that are within the purpose of the law." Exceptions at 13. In the area of service contract regulation, however, the text of the 1998 statutory changes are explicit, and the accompanying statements of congressional intent to maximize commercial flexibility are entirely unambiguous. The remedies Global Link seeks are statutorily out-of-bounds.

D. The Shipping Act Does Not Require Service Contract Rates and Terms to Meet "Normal and Customary" or "Course of Dealing" Standards.

Throughout its Exceptions, Global Link repeatedly asserts that Hapag-Lloyd violated the Shipping Act by failing to conform to an alleged "usual and customary practice" whereby carriers agree to reduce contract rates when market rates move, and when NVOCCs fail to meet minimum quantity commitments their contracts are extended and such volumes are reduced to

the amount shipped and rolled over to the next year.[3] However, the Shipping Act creates no such obligation.

Global Link provides little legal support for its claim that adherence to "customary practices" are required. It does, however, cite to *Yakov Kobel and Victor Berkovich v. Hapag-Lloyd A.G., Hapag-Lloyd-America, Inc., Limco Logistics, Inc., and International TLC, Inc.*, 32 S.R.R. 1720, 1730 (FMC July 12, 2013) for the principle that "when analyzing whether a common carrier's ... regulations and practices are just and reasonable, it is relevant to consider the usual course of conduct of the common carrier . . . and also the course of conduct of other common carriers . . . under similar circumstances." Exceptions at 24. *Kobel* does not, however, stand for the principle that service contract rates or terms must conform to any sort of "usual course" requirement.

In *Kobel*, the Commission considered whether parties violated 46 U.S.C. 41102(c) when certain containers were liquidated to satisfy claimed storage charges, instead of being delivered to the shipper, and whether the carrier failed to observe and enforce a reasonable practice by loading a damaged container. *Kobel* has no relevance for the instant case, however. Unlike in *Kobel*, in this docket Global Link has failed to allege any facts whatsoever in its Complaint to connect the practices it contests in any way to receiving, handling,[4] storing, or delivering property as required by section 41102(c). The practices at issue in this proceeding plainly involve service contract terms and practices such as the rate levels, the cross-referencing of tariffs, the alleged decisions to decline to reduce minimum volumes and adjust rate levels to meet purported market rates, and the decision to ask for arbitration to obtain a ruling on the apparent

[3] See Exceptions at 40-43.
[4] "Handling" is defined in Commission rules as 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. 46 CFR §525.1(c)(10).

contract breach, none of which have anything to do with the sort of cargo storage, loading, handling and delivery issues that were pled in *Kobel*.

E. The Initial Decision Correctly Held That Global Link Failed to State a Claim for an Unreasonable Refusal to Deal or Negotiate

The Presiding Officer correctly concluded that Global Link failed to state a claim for a refusal to deal under § 41104(10) and the two-prong test in *Canaveral Port Auth. – Possible Violations of Sec. 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436 (2003). Section 41104(10) requires that carriers (1) "refrain from 'shutting out' a person," (2) "for reasons having no relation to legitimate transportation-related factors."

> The Act does not guarantee the right to enter into a contract, much less a contract with any specific terms; such a right has not existed either before or since the passage of OSRA. All that is required is that common carriers ... refrain from "shutting out" any person for reasons having no relation to legitimate transportation-related factors.

New Orleans Stevedoring Co. v. Bd. Of Commissioners of the Port of New Orleans, 29 S.R.R. 345, 351 (ALJ 2001), *aff'd*, 29 S.R.R. 1066, 1070 (FMC 2002).

Once a carrier has considered a bona fide offer, the carrier's rejection of the offer cannot be equated with a refusal to deal or negotiate. *See Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. 886 (1993). In *Seacon Terminals*, Seacon alleged that the Port of Seattle unlawfully excluded it from the port by refusing to deal and negotiate a new lease. *Id*. at 899. The Commission found that the port negotiated with Seacon for over a year, and because no new lease was signed with Seacon, the port's negotiation and eventual agreement for a lease with another company was a reasonable exercise of its business discretion. *Id*.

The Presiding Officer correctly recognized that the factual allegation in the Complaint contradicted, rather than supported, Global Link's claim for a refusal to deal. The Complaint indicates that the parties had a course of dealing from 2007-2012 during which they negotiated and performed under various Service Contracts, shipping thousands of TEUs of cargo. Compl. ¶¶

A-F, PP. Furthermore, with regard to the disputed 2012 contract year, Global Link acknowledges that the parties exchanged "repeated emails" in which Global Link "request[ed] specific rates" and to which "Hapag time and again responded." Compl. ¶ QQ. Therefore, the I.D. concluded that Hapag-Lloyd did not refuse to deal or negotiate with Global Link.

The I.D. also correctly held that a carrier does not violate section 41104(10) if the carrier will not renegotiate the terms of the exiting service contract "when a shipper states it is no longer satisfied with the terms of an existing contract - in this case, by claiming that the rates set forth in the service contract are too high because market shipping rates declined." I.D. at 21-22. Global Link takes exception to the Presiding Officer's findings, stating:

> Global Link's argument is that a carrier may not contravene a normal and customary practice in the shipping industry that shippers' rates, in particular those of NVOCC shippers, will be kept at or near the market rates so the NVOCC can attract enough cargo from its customers to fulfill the MQC. This is a far cry from demanding that a carrier renegotiate an existing service contract rate whenever a shipper demands it. It also betrays a fundamental misunderstanding of how the ocean shipping market works and the fact that rates fluctuate throughout any service contract term, sometimes to a significant extent, which requires a constant re-analysis and rebalancing of service contract rates to keep them current with the market. Again, Global Link is prepared, and entitled, to present expert testimony and other evidence to this effect.

Exceptions at 10-11.

Based on this explanation, it is clear that Global Link unabashedly seeks to repurpose Section 41104(10) as a mechanism for rate regulation. Under Global Link's reasoning, a carrier unlawfully "refuses to deal" when it refuses to adjust long-term service contract rates to reflect changes (or at least reductions) in spot market rates. Under this view, Section 41104(10) would become a device for rewriting service contracts, shifting the risk of a declining market to the ocean common carrier, and saving NVOCCs from the consequences of their own commercial decisions and commitments. In effect, Global Link's approach would create a legal right of profitability for NVOCCs, ensuring that the rates they pay for space from shipping lines remain

below the market rates the NVOCCs charge their own customers, regardless of what rate levels were committed to in the annual contract.

Along the same lines, Global Link asserts that "Hapag-Lloyd squeezed it out of the market." Exceptions at 10. However, this unsubstantiated assertion is contradicted by the specific factual allegations in the Complaint. In the Complaint, Global Link states that it informed Hapag Lloyd that another shipping line was offering rates $450 lower than Hapag-Lloyd, and that "Hapag used to be Global Link's best St. Louis carrier but now Global Link had other carriers that were several hundred dollars cheaper." Compl. At ¶¶ O-Q. With these other carrier options that Global Link describes in its Complaint, there is no basis in the Complaint to support or explain how Hapag-Lloyd's individual pricing decisions could have "squeezed" Global Link out of the shipping market, as it claims.

Regardless, however, nothing in the Act provides any guarantee that Global Link as an NVOCC will be able to mark up and resell vessel operators' services profitably. Moreover, the notion of using the Act to shift contractual risk of falling rates from NVOCCs to vessel operators runs contrary to Congress' objective of incentivizing investment in vessel capacity to serve U.S. trades.[5]

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[5] Prior to final passage the late Rep. Jim Oberstar, a key leader in securing the OSRA legislative compromise, underscored the significance of carrier investment to Congress' adoption of the Act's service contract regulatory scheme:

> Mr. Speaker, the changes made by S. 414 will profoundly change international shipping by increasing competition among carriers and by allowing carriers to offer a broader array of services to their customers.
> Not everyone is totally happy with S. 414. Under the bill, only the person operating the vessel on which the goods are actually carried can enter into a confidential service contract with a shipper. The basis for this is simple: these people have invested millions of dollars in the vessel and pay for its operating cost. Why should they be treated the same as someone who has not invested any money in the vessel on which the goods are transported? This bill attempts to give an incentive for capital investment in these ships.

Congressional Record 144, Number 108 (Tuesday, August 4, 1998), H7011-H7019.

As the Commission's decision in *Seacon Terminals* illustrates, when parties are already dealing and negotiating with each other, a carrier's rejection of a given offer or demand does not constitute a refusal to deal or negotiate. This is all the more clear in the context of rates charged under a service contract where the parties are actively dealing with each other. Since 1984, the Commission has had no authority to regulate the level of carrier rates; Global Link's tortured reading of § 41104(10) cannot now afford the agency that power.

While not expressly decided in the Initial Decision below, dismissal of Complainant's Section 41104(10) claim also is warranted because Global Link has failed to plead any facts in the Complaint that, if true, would satisfy the second element of Section 41104(10)—that any purported refusal to deal was "for reasons having no relation to legitimate transportation-related factors." *See Petchem, Inc. v. Federal Maritime Commission*, 853 F.2d 558, 563 (D.C. Cir. 1988); *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R 886 (1993); *Docking and Lease Agreement by and between City of Portland, Main and Scotia Prince Cruises, Ltd*., 2004 WL 1895827, *3 (FMC: Served Aug. 23, 2004). The Complaint contains no allegations of fact to suggest that Hapag-Lloyd's pricing decisions were not attributable to "legitimate transportation-related factors." Simply reciting that an alleged refusal to deal was "done in violation of the Shipping Act, i.e., that Hapag-Lloyd was not relying on legitimate transportation-related factors" (as Global Link argues, Exceptions at 10), is not sufficient to satisfy the *Twombly* requirement that specific facts be pled in the Complaint to satisfy the second prong of the "unreasonable refusal to deal" test. At a minimum, to state a claim under Section 41104(10), a party must allege facts that if proven true would establish a refusal to deal that was "unrelated to legitimate transportation considerations." Simply reciting formulaic legal conclusions is not sufficient to satisfy the pleading standard and avoid a motion to dismiss.

F. The Presiding Officer Correctly Held That Global Link Failed to State a Claim Pursuant to § 41104(3), Barring Retaliation

In its Complaint, Global Link alleged that Hapag-Lloyd violated 46 U.S.C. § 41104(3), which states that a common carrier may not "retaliate against a 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."

Global Link alleged that Hapag-Lloyd violated this section by quoting Global Link rates that were higher than purported market rates and rates charged to other shippers, by "deciding to squeeze Global Link out of the market by quoting Global Link rates that could not move the cargo," and by seeking to impose liquidated damages for Global Link's failure to tender the minimum quantity called for in the contract.

The Initial Decision correctly rejects this claim. Noting the deregulatory changes effected by OSRA, and particularly the elimination of "me-too" rights for service contracts of similarly situated shippers, the Presiding Officer correctly held that "the Act does not prohibit common carriers from charging different rates to similarly situated shippers for transportation service pursuant to service contracts. The Presiding Officer correctly concluded as a matter of law it is not unfair or unjustly discriminatory in violation of section 41104(3) for a common carrier to charge different shippers different rates for the same transportation services." I.D. at 27.

The Commission could also dismiss this count on the basis that section 41104(3) does not – as Global Link argues – impose a general reasonableness standard on service contract service. In 1998, Congress purposefully abolished the broad reasonableness and non-discrimination standards applicable to service contracts (e.g., the former 10(b)(10-12), as discussed above).

Section 41104(3) cannot now be reinterpreted expansively to restore the authorities that Congress removed for the Shipping Act.

Section 41104(3), deals expressly with acts a carrier might take to retaliate against a shipper in response to acts such as "patroniz[ing] another carrier" or "fil[ing] a complaint." Accordingly, to maintain a claim under Section 41104(3) (*i.e.*, section 10(b)(3), which was designated 10(b)(5) pre-OSRA), a plaintiff must allege sufficient facts that, if proven true, would demonstrate the carrier actually "retaliate[d]" or "resort[ed] to other unfair or unjustly discriminatory methods *because* the [Plaintiff] shipper . . . patronized another carrier, or . . . filed a complaint, or for any other reason." In *California Shipping Line, Inc. v. Yangming Marine Transp*., 25 S.R.R. 1213, 1225-25 (1990), the Commission rejected an argument that section 10(b)(5) can apply "without retaliating against anybody" and concluded that "10(b)(5) of the 1984 Act applies *solely to retaliatory acts* of a carrier against a shipper who has sought the services of another carrier, including retaliatory practices designed to stifle outside competition." Indeed, as the FMC explained, if this section "were applied to any act of discriminatory conduct . . . it could render other provisions of the Act prohibiting discrimination superfluous." *Id*.

Global Link does not allege a single fact that suggests Hapag retaliated against Global Link. In fact, Global Link does not allege in even a conclusory fashion that Hapag acted in a retaliatory fashion; in the terms of *Twombly*, it does not even attempt a "formulaic recitation of the elements of a cause of action." Accordingly, the Complaint fails to state a claim for which relief can be granted.

G. The Presiding Officer Correctly Held That Global Link Failed to State a Claim For a Violation of § 41102(c) For Cross Referencing Tariff Charges.

1. Global Link Makes A Policy Argument To Fundamentally Alter Service Contract Rules For Industry as a Whole.

The Initial Decision correctly held that Global Link failed to state a claim for a violation of §41102(c) for cross referencing tariff charges. That section states: "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." Global Link argued that this section was violated because the contract to which it agreed does not to meet the definition of "service contract" in the Shipping Act, in 46 U.S.C. § 40102(20),[6] given that it incorporates surcharges and other terms from the tariff which may change over time.

Global Link does not dispute that these sorts of contract provisions are expressly authorized by FMC rules, and readily admits that such contract terms are ubiquitous in the industry. Exceptions at 16-19, 40-43. Rather, it devotes a substantial portion of brief (supported by an improperly submitted Expert Witness Report of Wayne R. Schmitt, Exceptions Exhibit 2) to a one-sided policy discussion regarding what it sees as the established practice and custom in the industry, and perceived general unfairness in the current system. In Global Link's opinion, because "carriers continue to draft service contract terms and conditions that are wholly one-sided in their favor and do not contain meaningful service or rate commitments," the Commission must compel ocean common carriers to "follow the customary practice of cooperating with Global Link to ensure that its rates were close to the market for the commodities it shipped" and the customary practice of amending Global Link's MQC down or rolling it over into a new contract." *Id*. at 42-43. There is no legal basis or authority to support this position, however. It is clear that Global Link is seeking to use this docket to overturn past

[6] Under 46 U.S.C. § 40102 (20), the term "service contract" means a written contract, other than a bill of lading or receipt, between one or more shippers, on the one hand, and an individual ocean common carrier or an agreement between or among ocean common carriers, on the other, in which—(A) the shipper or shippers commit to providing a certain volume or portion of cargo over a fixed time period; and (B) the ocean 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.

rulemakings authorizing cross-referencing of tariff terms, and to impose new substantive standards for service contract terms, services and performance, all while avoiding the industry and public notice and comment that clearly would be warranted for such far-flung policy proposals.

There are multiple grounds on which the Commission can dismiss this count for failure to state a claim for which relief can be granted. The Presiding Officer correctly dismissed this claim on the basis that the contracting practice about which Complainant complains – that is, the cross-referencing to the carrier's tariff – is plainly authorized under the Commission's rules. I.D. 31-34. This claim also can be dismissed on the grounds that Complainant fails to allege the existence of any unreasonable "regulations and practices relating to receiving, handling, storing or delivering property" as section 41102(c) contemplates.

2. The Complaint Does Not Allege Unreasonable Regulations or Practices Relating to Receiving, Handling, Storing or Delivering Property.

The Complaint fails to meet the *Twombly* pleading threshold with regard to its challenge to the service contract's validity, as it does not allege any facts linking the contested service contract terms to "receiving, handling, storing or delivering property," as required to make out a violation of Section 41102(c). Rather than plead facts to address the required statutory elements, Global Link lays out unprecedented legal arguments suggesting that certain clauses in its service contract are inadequate to meet the statutory definition of "service contract," suggesting that such cross-referencing was inconsistent with the requirement that service contracts include a "certain rate or rate schedule." It further asserts that the carrier service obligation set forth in the service contract was "one-sided" and was therefore not a "defined service level" as that phrase is used in the definition of "service contract." Compl. ¶ JJ. Specifically, Global Link argues that "[a]lthough on its face, the Service Contract at issue imposed an obligation on Hapag to provide

a defined service level, this obligation was not real," because the penalties for failure to perform were less than those imposed on Global Link for nonperformance, and involved only credit for future service. There is no Commission precedent under Section 41102(c) to underpin this legal theory. Section 41102(c) is narrow and specific in the scope, and cannot be distorted to accommodate Global Link's attempt to impose new "reasonableness" standards onto the content of service contract rates and service commitments.

3. The Commission's Regulations and Policy Expressly Authorize Cross Referencing of Tariff Terms.

The Presiding Officer correctly held that the Commission's rules expressly authorize carriers to cross reference tariff terms in service contracts, and thus as a matter of law such practices cannot make out a violation of Section 41102(c). I.D. at 31-34. Under 46 C.F.R. § 530.8(c) service contract terms "may not: (1) Be uncertain, vague or ambiguous; or (2) Make reference to terms not explicitly contained in the service contract itself unless those terms are contained in a publication widely available to the public and well known within the industry." As shown in detail in the Initial Decision, the Commission has examined this issue closely, and adopted the current rules mindful of Congress' instructions to afford carriers flexibility in contracting.

In the supplementary material in the OSRA service contract rulemaking Docket 98-30, *Service Contracts Subject to the Shipping Act of 1984*,[7] the Commission held that cross-referencing to tariff terms is permitted under 46 C.F.R. § 530.8(c). In that rulemaking, the Commission explained that carriers may cross-reference their own tariff publications or conference tariff publications in their filed service contracts. This provision was intended to

[7] See Docket 98-30, *Service Contracts Subject to the Shipping Act of 1984 – Proposed Rule*, 63 FR 71062; *Service Contracts Subject to the Shipping Act of 1984 - Interim Final Rule*, 64 FR 11186.

allow carriers to refer to rules of general applicability (free time and demurrage, bunkering rates, currency matters, etc.) for the boilerplate or terms which appear in all their contracts.

In addition, as the Exceptions confirm, this practice of linking tariff rules to service contracts is commonplace in the carrier industry. Exceptions at 40. Global Link makes no attempt, however, to logically reconcile this attack on a standard industry practice with its insistence elsewhere in argument that the Shipping Act requires carriers to conform their operations to customary industry practices. It is clear in any event that granting Global Link the relief it seeks would have widespread impacts, potentially impacting most contractual relationships in the Trans-Pacific trade.[8]

Global Link also continues to assert a similar claim that it entered into an "illusory" contract with Hapag, because the contract allegedly lacks a "defined service level" as that term is used in 46 U.S.C. § 40102(20). The Presiding Officer understood that Global Link was not arguing that the contract literally lacked a service commitment; rather, the nature of Global

[8] *See also* H. Rep. 111-126, *Update On Federal Maritime Commission's Examination Of Vessel Capacity*, June 30, 2010, in which Commissioner Lidinsky and Commissioner Dye provided the House Transportation and Infrastructure Committee with an update on vessel capacity matters and related issues. On the matter of linking tariff surcharges, then-Chairman Lidinsky explained that carriers and shippers need to protect their own commercial interests through negotiations over service contract terms: "Now, when the service contract is formed, the shippers have an opportunity to protect themselves against certain surcharge increases and unfortunately a lot of times they don't. So the carriers, in an attempt to make up lost revenue, have imposed additional surcharges to bring them back to where they wanted to be from two years ago. But the core of the issue remains this, that service contracts have been around for about a dozen years now in their present form. Nobody doubts they have been a success in terms of numbers. There are over two million of them on file today, individual deals between the importer-exporter and the carriers. Both sides are responsible for the state of being where they have not fully taken advantage of these opportunities in the service contract to negotiate provisions to insulate against surcharges, or for carriers to protect themselves against phantom bookings by shippers." *Id*. A bill introduced in the weeks after the hearing, H.R. 6167, would have provided the Commission with regulatory authority over certain service contract disputes and practices, but the proposal did not go forward in Congress.

Link's complaint was that the damages for carrier nonperformance were allegedly less than onerous than the liquidated damages faced by the shipper. The I.D. correctly concluded:

> The Act, 46 U.S.C. § 40502(c)(8), and Commission regulations, 46 C.F.R. §§ 530.3(q) and 530.8(b)(7), permit a carrier to incorporate liquidated damages provisions in its service contracts. Nothing in the Act prohibits a carrier and a shipper from agreeing to a service contract where the liquidated damages provisions are not balanced, and unbalanced liquidated damages provisions do not mean that the carrier's commitment to a defined service level is illusory.

I.D. at 35. Indeed, imposing an extra-statutory requirement to make various contract terms seem more fair or balanced would run counter to Congress' intent to maximize commercial flexibility in contracting.

It is difficult to grasp what benefit Global Link seeks in trying to persuade the Commission that it (and purportedly a broad cross-section of carriers and NVOCCs in the Trans-Pacific trade) have signed and moved cargo under service contracts that are illusory and unenforceable. Such a finding would presumably give rise to a chaotic level of uncertainty regarding the validity of Global Link's contracts and many others, and expose Global Link and other NVOCCs to undercharge claims for the difference between their "illusory" contract rates and applicable tariff rates.[9] The I.D. was correct to reject such a legally unfounded and potentially damaging position.

H. Global Link's Efforts To Supplement the Record Are Improper.

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[9] The Commission has indicated that when a contract is found to be "illusory," the cargo should be re-rated at the applicable tariff rate:

> The limitation of section 13(f)(1) [barring undercharge collections] was not intended to allow shippers and carriers to use service contracts as an ''unfair or unjust means or device'' to avoid the application of the ''otherwise applicable rate'' contrary to other provisions in the Act. If there are no provisions which anticipate the shipper's failure to meet the minimum cargo requirements of the service contract and the cargo is not subject to re-rating, the contract would appear to be illusory. Allowing the parties to take advantage of an illusory contract would be contrary to the prohibitions of section 10 and the intent of the Act.

Service Contracts Subject to the Shipping Act of 1984 - Interim Final Rule, 64 FR 11186.

Global Link, having been made aware by the Initial Decision of the significant shortcomings in its Complaint, seeks to fill some of these gaps with the submission of witness statements and purported expert testimony, adding new and different factual allegations to those in the complaint. Rule 227 of the Commission's Rules of Practice and Procedure does not allow for the reopening of the record below and submission of evidence with the filing of exceptions, however. 46 C.F.R. § 502.227. The record currently before the Commission on exceptions is limited to the "transcript of testimony and exhibits, together with all papers and requests filed in the [ALJ] proceeding," § 502.169, and Global Link has failed to seek leave to permit the submission of evidence and expert testimony on Exceptions.

Here, Global Link's attempt to supplement the record with affidavits and press reports is improper. Because the affidavits lie outside the record of decision, the Commission should not consider the new arguments or augmented record on appeal. In deciding a 12(b)(6) motion, an adjudicating body "may only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the [adjudicating body] may take judicial notice." *Equal Employment Opportunity Comm'n v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997). By seeking to expand the record in this manner, Global Link only adds credence to the Presiding Officer's conclusion that its Complaint fails to meet the applicable pleading standard required to survive a motion to dismiss.

I. Global Link's Arguments Are Contract Law Issues Appropriate for Decision By the Arbitrator.

The Presiding Officer correctly concluded that Global Link fails to set forth a case under which relief can be granted under the Shipping Act. Global Link is not left without recourse, as it asserts, however. Exceptions at 17. The Presiding Officer correctly recognized that the core of several of Global Link's arguments, while clearly not Shipping Act claims, are instead all borrowed from ordinary black-letter contract law doctrines, and thus appropriately directed to the

arbitrator, not the Commission, pursuant to 46 U.S.C. § 40502. I.D. at 23-24. Global Link takes exception to the Initial Decision in this regard, but cannot cite any supporting authority for its position. Exceptions at 11-12.

Global Link bases much of its argument seeking to persuade the Commission to recognize a new cause of action enforcing requiring conformity with standard industry contracting practices. This clearly is an effort to manufacture a new Shipping Act claim by cloning fundamental contract law principles. *See, e.g.,* Uniform Commercial Code § 1-303 (Course of Performance, Course of Dealing, and Usage of Trade). While the Shipping Act offers no such cause of action, courts adjudicating maritime contract disputes have frequently looked to the issue of standard industry practices. *See, e.g., Anyangwe v. Nedlloyd Lines*, 909 F. Supp. 315, 321 (D. Md. 1995) (in an action where cargo was delayed because of unscheduled port calls, the court found that the carrier did not deviate from the contract despite stopping at intermediate ports not contemplated in the original contract because such stops followed the "customs and usages of the maritime trade.") Similarly, courts in maritime contract disputes also look to the course of dealing between parties. *See Trans-Tec Asia v. M/V Harmony Container*, 435 F. Supp. 2d 1015, 1029-30 (C.D. Cal. 2005) *aff'd,* 518 F.3d 1120 (9th Cir. 2008); *Oceanconnect.com, Inc. v. Chemoil Corp.*, CIV.A. H-07-1053, 2008 WL 194360 (S.D. Tex. 2008). In those cases, courts looked to course of dealing between the parties to determine application of choice of forum and arbitration provisions.

Similarly, Global Link raises the issue in its Exceptions that its service contracts are adhesion contracts. Exceptions at 15-18. While the Shipping Act does not prohibit or prescribe particular requirements for contracts of adhesion, courts adjudicating admiralty and maritime contract disputes consider arguments and defenses regarding adhesion contract doctrines regularly (especially bill of lading contexts), often finding such contracts to be construed against

the drafter. See, e.g., *Gamma–10 Plastics, Inc. v. Am. President Lines, Ltd.*, 32 F.3d 1244, 1253 (8th Cir.1994); *Mori Seiki USA, Inc. v. M/V Alligator Triumph*, 990 F.2d 444, 448 (9th Cir.1993).

The Presiding Officer also correctly concluded that the non-specific assertions in the Complaint regarding contract administration and performance, i.e., that Global Link experienced "service issues," "internal confusion," "mistakes" and "delays" are inherently contract claims. I.D. at 24. The Complaint lacks any sort of factual allegations that would satisfy the elements of a Shipping Act claim, but Global Link's assertions do seem more akin to traditional contract law defenses of frustration or impossibility.

As noted above, Global Link improperly seeks to introduce new factual allegations (via the Declaration of Bianca Hollander, Exceptions Ex. A) to supplement the insufficient factual allegations in its Complaint. Given the procedural irregularity, it is not appropriate to rely on this material for the purpose of avoiding a motion to dismiss. The assertions in the Declaration do, however, provide another illustration of why arbitration, rather than a Commission proceeding, is the appropriate forum for service contract performance disputes such as this. The Declaration makes clear that the alleged service issues obliquely raised in the Complaint actually related to the discontinuation of Hapag-Lloyd's service from Yantian, China to Memphis <u>via Vancouver, B.C.</u> Exceptions Ex. A at ¶¶ 20-22. This clarification highlights the important point that Commission jurisdiction over service contracts is limited not just substantively, but geographically as well: the Commission has no regulatory authority at all over liner services moving cargo via Canadian ports.[10] Only an appropriate court or arbitrator has the geographic

[10] *See* 46 U.S.C. § 40102(6) ("common carrier" means a person that . . . 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; . . . ."); *Transpacific Westbound Rate Agreement v. Federal Maritime Comm'n*, 951 F.2d 950 (9th Cir.1991); *Austasia Intermodal Lines, Ltd. v. FMC*, 580 F.2d 642, 646 (D.C.Cir.1978).

and subject matter competence to adjudicate service contract disputes that involve services via Canadian ports.[11]

In its Exceptions, Global Link misinforms the Commission that litigation or arbitration to enforce minimum quantity commitments is not consistent with industry practice, creating the misimpression that that courts and arbitrators are not empowered or equipped to adjudicate such disputes. Exceptions at 13-14, 26-31. This clearly is incorrect. While most maritime contract disputes are resolved on a commercial basis without formal litigation, there are many examples in which demands for liquidated damages have led to formal litigation or arbitral proceedings, including several that were seen through to a final decision and published opinion.[12]

The Shipping Act states that unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court. 46 U.S.C. § 40502(f). The

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[11] Docket No. 98-30, *Service Contracts Subject to the Shipping Act of 1984*,63 Fed.Reg 71062 (Notice of Proposed Rulemaking) ("Another question raised . . . was whether filing of global contracts would somehow extend other provisions of the Act, such as the prohibited acts in section 10, to the foreign-to-foreign legs. It is clear, however, that there would be no authority for the Commission to spontaneously extend its jurisdiction in this manner.")

[12] See, e.g., *P & O Containers Ltd. v. American Motorists Ins. Co.*, 1998 WL 146229, *5 (S.D.N.Y.March 25, 1998), *Yangming Marine Transport Corp. v. Formost Int'l, Inc.*, 1990 U.S. Dist. LEXIS 1675 (S.D.N.Y. 1990); *P & O Containers v. American Motorists Ins. Co.*, 1998 U.S. Dist. LEXIS 3655 (S.D.N.Y. 1998); *see also Zim Israel Navigation Co. v. Worldwide Shippers Ass'ns*, 1993 U.S. Dist. LEXIS 5210 (S.D.N.Y. 1993) (finding shipper was liable for damages pursuant to the liquidated damages provision for its failure to ship the MQC under the service contract); *Zim Israel Navigation Co. v. Indonesian Exports Dev. Corp.*, 1993 U.S. Dist. LEXIS 3513 (S.D.N.Y. 1993) (finding plaintiff entitled to damages pursuant to liquidated damages provision for shippers failure to meet the MQC in service contract); *Asia N. Amer. Eastbound Rate Agreement v. Pacific Champion Serv. Corp.*, 864 F.Supp. 195 (D.D.C. 1994) (confirming arbitration decision enforcing liquidated damages provision in service contract); *Hong Kong Islands Line America S.A. v. Distribution Services, Ltd.*, 795 F. Supp. 983, 990 (C.D. Cal. 1991) (holding liquidated damages provision is valid and enforceable). With regard to SMA arbitration proceedings, *see Crowley Liner Services, Inc., v. Stuart Rags, Inc.*, SMA 3833 (2004), 2004 WL 5658882 (S.M.A.A.S) (awarding liquidated damages pursuant to the service contract); *The "8900" Lines Rate Agreement v. Gulf American Line*, SMA 3635 (2000), 2000 WL 35733809 (S.M.A.A.S) (damages of $500 per TEU awarded pursuant to liquidated damages provisions in service contract); *West Coast of South America Rate Agreement, et al., v. Omni Fibers, Inc.*, SMA 3406 (1998) (awarding carrier liquidated damages pursuant to service contract); *Accord Asia North America Eastbound Rate Agreement, et al. v. Jefferson Trading Company*, SMA 3115 (1994); *Yangming Marine Transport Corporation v. American Playtime Corp.*, SMA 3061 (1994); *Asia North America Eastbound Rate Agreement, et al. v. DNS Industries, Ltd.*, SMA 3003 (1993); *Asia North America Eastbound Rate Agreement, et al. v. Sun Lee, Inc.*, SMA 2932 (1993); *Asia North America Eastbound Rate Agreement, et al. v. Mercantum (U.S.) Corporation*, SMA 2921 (1992); *Asia North America Eastbound Rate Agreement, et al. v. Worldwide Shippers Association*, SMA 2916 (1992); *Asia North America Eastbound Rate Agreement, et al. v. Far East Furniture Galleries*, SMA 2913 (1992); *Asia North America Eastbound Rate Agreement, et al. v. Albin Marine Inc.*, SMA 2906 (1992); *Asia North America Eastbound Rate Agreement, et al. v. YMR Fashions*, SMA 2905 (1992).

federal courts and the Society of Maritime Arbitrators clearly are capable and authorized to adjudicate maritime contract disputes, with decades of experience. Nevertheless, Global Link would effectively make 46 U.S.C. § 40502(f) a dead letter, as the enforceability of any service contract term or condition would give rise to an exhaustive Commission proceeding with lengthy discovery to consider whether those service contract terms were reasonable, customary, fair or balanced, and whether the decision to chose arbitration over capitulation was reasonable. This approach would undermine the statutory scheme, and plunge the broader industry into uncertainty regarding what, if any, contracts were legally enforceable or valid at all. The Presiding Officer was correct to reject Global Link's approach.

III. CONCLUSION

Global Link's efforts in this docket represent an effort to forestall and frustrate arbitration in a straightforward breach of contract dispute. The Commission should not indulge such efforts. There is no legal basis for the Commission to intervene in enforcing adherence to market rates and customary practices, or to refashion contract law principles into newly-formed Shipping Act "reasonableness" claims. The approach Global Link urges would have widespread disruptive impacts, not just for the parties but for the industry as a whole, and would threaten to undermine the flexible and market-based approach in OSRA which has served U.S. foreign trade remarkably well for over 15 years. Based on the foregoing, we respectfully request that the Commission affirm the Initial Decision and dismiss the Complaint.

Respectfully submitted,

Matthew J. Thomas
Blank Rome LLP
Watergate
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 772-5971
mthomas@blankrome.com

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Reply to Exceptions to be served July 7, 2014, via e-mail and mail upon the following:

David Street
Brendan Collins
GKG LAW, PC
1054 Thirty-First Street, N.W., Suite 200
Washington, D.C. 20007
bcollins@gkglaw.com

Matthew J. Thomas

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Matthew J. Thomas
Blank Rome LLP
Watergate
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 772-5971
mthomas@blankrome.com