

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No.

GLOBAL LINK LOGISTICS INC.,

COMPLAINANT,

v.

HAPAG-LLOYD AG

RESPONDENT.

VERIFIED COMPLAINT

I. Complainant

A. Complainant, Global Link Logistics, Inc. (“Global Link”) is a Delaware corporation, licensed (No. 018415N) by the Federal Maritime Commission (“Commission”), that operates as a non-vessel operating common carrier (“NVOCC”). As such, it is an ocean transportation intermediary (“OTI”).

B. Global Link’s principal place of business is at 1990 Lakeside Parkway, Suite 300, Tucker, Georgia.

II. Respondent

A. Respondent, Hapag-Lloyd, AG (“Hapag”) is an ocean common carrier.

B. Hapag’s principal place of business is at Ballindamm 25, D-20095 Hamburg, Germany. Hapag’s United States affiliate who executed the Service Contract at issue as agent for Hapag is Stuart Rattray, Senior Vice President, 245 Townpark Drive, Suite 300, Kennesaw, GA 30144, Stuart.Rattray@hlag.com.

III. Jurisdiction

A. This Complaint is being filed pursuant to Section 11(a) of the Shipping Act, 46 U.S.C. § 41301. Global Link seeks reparations and indemnification for the injuries caused it by Hapag as a result of its violation of 46 U.S.C. §§ 41102(c), 41104(3), and (10).

B. As more particularly alleged below, the Respondent entered into a purported Service Contract with Global Link without committing to a certain rate or rate schedule and a defined service level. The Respondent also resorted to unfair or unjustly discriminatory methods against Global Link and unreasonably failed to deal or negotiate in regard to the Service Contract.

C. Although there is an arbitration clause in the 2012 Service Contract between Hapag and Global Link, the law is clear that such a clause cannot divest the Commission of jurisdiction to hear and determine complaints alleging violations of the Shipping Act. *See, e.g., A/S Ivarans Rederi v. United States*, 895 F.2d 1441, 1445 (D.C. Cir. 1990) (“private regulated parties cannot agree to waive the subject matter jurisdiction of agency charged with the statutory responsibility to insure that parties implement agreement as approved by and filed with that agency”); *Anchor Shipping Co. v. Alianca Navegacao e Logistica Ltda.*, 30 S.R.R. 991, 1000-1001 (FMC 2006) (arbitration clause in service contract does not outweigh Commission’s duty to protect the public by ensuring that service contracts are implemented in accordance with the Shipping Act).

IV. Statement of Facts

Course of Dealing Between Hapag and Global Link

A. Global Link and Hapag first entered into a Service Contract in May of 2007.

B. Since May of 2007, Hapag has entered into 5 additional Service Contracts with Global Link.

C. During the time Hapag and Global Link were performing under these Service Contracts, the parties' expectations were that Hapag would provide competitive rates so that Global Link could continue to attract customers for its NVOCC services, which would enable Global Link to tender shipments to Hapag under the Service Contracts. Thus, the course of dealing between the parties, and in the ocean transportation industry in general, was that rates provided for in the Service Contract would be adjusted upward and downward as necessary in order to remain competitive in the frequently fluctuating ocean transportation market.

D. The course of dealing between the parties, and the ocean transportation industry in general, was also that if Global Link was unable to meet the minimum quantity commitment (MQC) specified in the Service Contract, the MQC would be reduced or "rolled over" to the following year's Service Contract.

E. Service Contracts normally run from May 1st of one year to April 30th the following year.

F. The 2011 Service Contract (which ran from May 1, 2011 to April 30, 2012) between Hapag and Global Link contained an MQC of 4,000 TEUs (twenty foot equivalent units.) When it became apparent that Global Link would not be able to meet the MQC for the 2011 Service Contract, the MQC was reduced from 4,000 TEUs to 2,768 TEUs, the amount of TEUs actually shipped under the 2011 Service Contract.

2012 Service Contract

G. In early May of 2012, Global Link and Hapag entered into a new Service Contract. Although the Service Contract specified certain rates, the Contract expressly afforded Hapag the option to increase those rates at its discretion. Thus, if at any time during the life of the Contract, Hapag implemented a General Rate Increase (GRI) or a Revenue Recovery

Increase (RRI) in its tariff, Global Link's rates were automatically increased by that amount. *See* Service Contract, Hapag Boiler Plate, Term 6. Such increases did not require the consent of Global Link.

H. The Service Contract also allowed Hapag to increase assessorial charges by publishing them in its tariff during the life of the Contract. *Id.* Such charges automatically went into effect the day they were published. *Id.* These increases also did not require Global Link's consent.

I. The Service Contract contained a liquidated damages provision, providing that if Hapag failed to fulfill its service commitment, the MQC would be reduced by up to 10% with Hapag having no further obligation to Global Link. *Id.* at Term 11.2. If Hapag failed to fulfill its service commitment by in excess of 10%, Hapag incurred no monetary penalty, but would provide a credit of \$50 per TEU on shipments from Global Link up to 90% of the MQC. *Id.*

J. In contrast to that liquidated damage provision, Hapag's Boiler Plate provided that Global Link had to pay \$250 per TEU (5 times the credit given to Global Link) for Global Link's failure to tender the MQC. *Id.* at Term 11.3.

K. Hapag's Boiler Plate also included an arbitration provision. *Id.* at Term 15.

Hapag's Failure to Negotiate Reasonable Rates Under 2012 Service Contract

L. The Service Contract contained a significant number of "Named Account" rates. A "Named Account" rate is one in which the NVOCC's customer is specifically identified in the contract and the carrier's rates are limited to services provided by the NVOCC for the named NVOCC customer. One of the purposes of Named Account rates is to give a carrier such as Hapag transparency into the NVOCC's customer base, thus giving the carrier the opportunity to manage the NVOCC market through adjustments to rates in NVOCC service contracts. With

this knowledge and pricing power, the carrier can substantially effect an NVOCC's ability to increase volumes for Named Account customers and, if the carrier has two or more NVOCC customers with the same named accounts, to prefer one NVOCC customer over the other through manipulation of Named Account rates, by giving a favored NVOCC lower rates for that named account while refusing to provide equivalent rates for the disfavored NVOCC.

M. During the term of the 2012 Service Contract, shipping rates dropped significantly.

N. Historically, Global Link had provided NVOCC services for, among others, DMI Furniture, using Hapag as its carrier, a fact of which Hapag was fully aware because DMI was one of Global Link's named accounts in the Service Contract. In May of 2012, Global Link wrote to Hapag stating that it was looking for more shipping lanes to partner with Hapag. It specifically noted that while Hapag's rates for one lane, from Songkhla, Thailand to St. Louis, were low, that was the only DMI lane where Hapag's rates were competitive.

O. Shortly thereafter, Global Link informed Hapag that another shipping line was offering rates \$450 lower than the rates Hapag was offering and requested that Hapag lower its rates so as to promote more business.

P. Hapag refused to lower its rates to make them competitive.

Q. Global Link expressed exasperation in this regard, noting 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 and that it "[d]oesn't make sense."

R. In June of 2012, Global Link informed Hapag that, because its rates were too high, Global Link had lost DMI as a customer, which meant that Hapag had lost this business as well, unless Hapag was soliciting DMI for its own account or receiving DMI shipments from

another NVOCC customer of Hapag. It informed Hapag that it needed Hapag's assistance in the form of a rate reduction in order to regain DMI as a customer.

S. Once again, Hapag refused to lower its rates, stating "I am sorry we are not able to get closer to what you need to keep this biz [business])."

T. This same scenario of Global Link informing Hapag of specific rates needed to maintain customers or attract new customers and Hapag refusing to provide those rates was repeated time and again throughout the term of the 2012 Service Contract.

U. In addition to its refusal to provide competitive rates under the Service Contract, Hapag was unable to properly administer the Contract. Hapag repeatedly failed to timely prepare and submit amendments to the Service Contract. Further, when such amendments ultimately were submitted, they frequently contained errors that rendered the Service Contract unusable by Global Link.

V. Hapag's inability to properly administer the Service Contract was evident from the time the Contract was first executed. In May of 2012, Global Link experienced service issues in regard to the PAX service that should have been available to Global Link out of Yantian, China. When the service from the port was changed, Hapag's internal confusion in regard to the replacement service significantly impaired Global Link's ability to book its cargo on Hapag vessels out of this port.

W. In July of 2012, Hapag wrote to Global Link stating that it wanted to reduce the allocation under its Service Contract for Global Link from 48 TEUs weekly to 13 TEUs weekly. Hapag also wrote that "[i]f the situation changes and our rates become more competitive, then we will readdress."

X. In September of 2012, Hapag inquired why Global Link was not shipping more

cargo with Hapag. Global Link informed Hapag that the reduction in volume was due to Hapag not providing competitive rates for the majority of the contract season. Global Link also stated that due to administrative errors and untimely corrections from Hapag's contract processing center, Global Link had been unable to book with Hapag at times due to service contract mistakes and delays, which made it physically impossible to book with Hapag.

Y. In October of 2012, Hapag implemented a Peak Season Surcharge (PSS) increase. Hapag was the only carrier that implemented such an increase in October. Indeed, other carriers were passing along rate reductions at the same time for shipments to the United States.

Z. Global Link informed Hapag that if it implemented the PSS increase, Global Link would not be able to book cargo at those rates. Hapag, nonetheless, implemented the increase.

AA. In November of 2012, Hapag wrote to Global Link proposing new rates for shipments Global Link was handling on behalf of DMI Furniture in order to secure additional business. Global Link responded with confusion, noting that the "new" rates being offered were the rates already in existence for DMI furniture.

BB. In November of 2012, Hapag wrote to Global Link lamenting the continued downward spiral in rates, and stating that if it did not stop, carriers would start going out of business. Hapag's representative also indicated that she was checking internally to see about rate reductions by Hapag.

CC. Unfortunately, no significant rate reductions were forthcoming.

DD. Throughout the remainder of the calendar year 2012, Global Link continued to attempt to ship more of its customers' goods with Hapag but Hapag's administrative errors and its artificially high rates made such efforts extremely difficult.

EE. In January of 2013, Global Link wrote to Hapag noting that there would need to

be an MQC adjustment in the Service Contract.

FF. Hapag's primary contact with Global Link wrote that she "would mark my calendar to address the MQC shortfall and position/adjustment toward the end of March? i.e., before I go out on maternity leave."

GG. Despite Hapag having: 1) a course of dealing of reducing MQC's in its Service Contracts with Global Link to reflect the actual volume of goods shipped; 2) failed to provide competitive rates that allowed Global Link to service its customers through Hapag; 3) provided inadequate administrative support, thus causing errors and untimely corrections in its rates and thereby preventing Global Link from booking with Hapag; 4) reduced Global Link's allocation under the Service Contract by more than two-thirds; and 5) agreed to address the MQC short fall in the Service Contract, Hapag instead demanded payment from Global Link of \$535,500, which is the amount of the liquidated damages it purports it is owed under the 2012 Service Contract.

HH. Hapag also demanded arbitration.

V. **Violations of the Shipping Act of 1984**

Failure to Establish and Enforce Just and Reasonable Practices

II. Hapag failed to establish, observe, and enforce just and reasonable regulations and practices relating to the receiving, handling, storing or delivering property in violation of 46 U.S.C. §§ 41102(c), by entering into a Service Contract with Global Link that does not comport with the Shipping Act's definition of a service contract. 46 U.S.C. § 40102(20) defines a service contract as one in which, *inter alia*, the carrier commits to a certain rate or rate schedule, and a defined service level. Here, the contract that Hapag drafted and executed does not satisfy either of those requirements. Although the Hapag Service Contract specified a minimum rate that the shipper must pay for specific trade routes, it gave Hapag unfettered discretion to charge higher

rates and fees. Thus, pursuant to the express terms of its Service Contract, Hapag could at any time during the life of the Contract increase its rates simply by implementing a General Rate Increase (GRI) or a Revenue Recovery Increase (RRI) in its tariff. *See* Service Contract, Hapag Boiler Plate, Term 6. Such an increase automatically went into effect without the consent of the shipper. In addition, Hapag was given free rein to impose additional extra charges, such as Peak Season Surcharges, through the simple expedient of publishing them in its tariff. *See* Service Contract, General Rate Notes, Term 1. The Service Contract also allowed Hapag to increase assessorial charges simply by publishing them in its tariff during the life of the Contract. Hapag Boiler Plate, Term 6. Again, such charges automatically went into effect the day they are published. *Id.*

JJ. The net effect of these provisions is that while the shipper was bound to pay a certain fixed minimum amount for transportation services, the carrier was free to increase the rates in its sole and unfettered discretion. Such a provision does not comply with the Shipping Act's explicit definition of a service contract, which requires the carrier to commit to a certain rate or rate schedule. Such a one-sided contract in which one party is bound but the other party is not, does not constitute a just and reasonable practice, as is required pursuant to 46 U.S.C. § 41102(c).

KK. Hapag's Service Contract also does not satisfy the Shipping Act's requirement that a carrier commit to a defined service level. Although on its face, the Service Contract at issue imposed an obligation on Hapag to provide a defined service level, this obligation was not real. The illusory nature of the obligation is readily apparent by comparing the penalty resulting from non-performance by Global Link versus Hapag. If Global Link failed to satisfy 100% of its MQC, it was obligated immediately to pay Hapag in \$250 cash for each TEU that it fell short of

the specified MQC. In contrast, if Hapag failed to provide a specified level of service, it suffered no consequences whatsoever unless the percentage it failed to provide exceeded 10%. Thus, by way of example, if Global Link fell short of the MQC by 10%, it had to pay Hapag \$62,500. In contrast, if Hapag failed to meet its service commitment by 10%, it suffered no penalty whatsoever. Further, even after the 10% threshold was exceeded, it is apparent that any penalty imposed upon Hapag is a sham. Again, an example graphically reveals the one-sided nature of the obligation. If Global Link met 50% of the MQC obligation, it was penalized in the amount of \$312,500. In contrast, if Hapag provided 50% of its purported commitment level, it merely had to provide a \$50,000 credit to Global Link for future service. Given that Hapag had the unfettered discretion to raise its rates and service charges at any time, it could easily recoup that amount simply by raising the rates it charged Global Link under the Service Contract. Again, enforcement of a contract containing such an illusory and one-sided obligation does not constitute a just and reasonable regulation and practice, as is required pursuant to 46 U.S.C. § 41102(c).

LL. The course of dealing between Hapag and Global Link during the six years in which they had entered into a series of Service Contracts was that if the shipper failed to satisfy the MQC, the MQC obligation would be reduced to the amount shipped. Thus, for example, in the 2011 Service Contract between Hapag and Global Link, the MQC was 4,000 TEUs. At the end of the contract term, the MQC was reduced from 4,000 TEUs to the 2,768 TEUs actually shipped under the contract.

MM. This practice of reducing MQCs to reflect the volume of cargo actually shipped is consistent with the industry-wide practice in the ocean transportation industry.

NN. It is not a just and reasonable practice to lead parties through a course of conduct,

and through written representations, to believe that an MQC will be reduced or rolled over and then to instead seek to impose punitive liquidated damages provisions once the term of the contract has expired. This conclusion is bolstered by the fact that when Global Link explicitly raised the issue of an MQC adjustment because Hapag's contract rates being offered Global Link were not competitive, Hapag made it appear that such an adjustment would be forthcoming as it had in years past. Such a bait and switch tactic is not a just and reasonable practice.

OO. It is not a just and reasonable practice for Hapag to reduce Global Link's allocation of space on its vessels, in recognition of the fact that its rates were not competitive for Global Link's customers, and then to seek to recover under a liquidated damages clause as if no such reduction in allocation had occurred.

Unreasonable Refusal to Deal or Negotiate

PP. During the many years that Hapag and Global Link were performing under the various Service Contracts they executed, the parties' expectation was that Hapag would provide competitive rates so that Global Link could continue to attract customers for its NVOCC services and whose shipments would be tendered to Hapag under the Service Contract. Indeed, the course of dealing between the parties, and in the ocean transportation industry in general, was that rates provided for in the Service Contract would be adjusted upward and downward as necessary in order to remain competitive in the frequently fluctuating ocean transportation market.

QQ. Here, when ocean transportation rates dropped, and continued to drop, during the latter part of 2012 and 2013, the course of dealing between the parties, and the ocean transportation industry in general, was that Hapag would reduce its rates to reflect actual market conditions. Rather than do so, however Hapag instead chose to continue to seek out of market

rates from Global Link and its customers. Thus, despite repeated emails from Global Link describing market conditions in detail and requesting specific rates from Hapag for use by both named account customers and other customers, Hapag time and again responded that it would not provide the rates Global Link needed to move the traffic. It was not a reasonable practice for Hapag to insist that Global Link meet Hapag's MQC by trying to convince its customers to pay rates far in excess of rates that they could obtain from other NVOCC's whose service contract rates were being adjusted by their carrier partners to meet market conditions. Hapag acted in violation of 46 U.S.C. § 41104 (10) in unreasonably refusing to deal or negotiate in regard to the rates it was charging under its Service Contract.

Unfair or Unjustly Discriminatory Practice

RR. Hapag continued throughout the term of the 2012 Service Contract to quote rates that were higher than market rates for such transportation. Upon information and belief, Hapag also quoted Global Link rates that were higher than rates provided to other shippers, including NVOCCs that were competitors of Global Link.

SS. Hapag resorted to unfair or unjustly discriminatory methods by deciding to squeeze Global Link out of the market by quoting Global Link rates that could not move the cargo and then cynically seeking to impose MQC penalties on Global Link for its inability to find customers willing to pay out of market rates.

TT. In resorting to unfair or unjustly discriminatory methods, Hapag acted in violation of 46 U.S.C. § 41104(3).

VI. Injury to Global Link

Global Link suffered harm as a result of Hapag's actions and is, therefore, entitled to reparations for its losses.

VII. Prayer for Relief

WHEREFORE, Global Link prays that Hapag be required to answer the charges in this Complaint; that after due hearing and investigation an order be made commanding Hapag to pay Global Link reparations for violations of the Shipping Act, plus interest, costs and attorney's fees, and any other damages to be determined; and that such other and further relief be granted as the Commission determines to be proper, fair and just under the circumstances.

Respectfully submitted,



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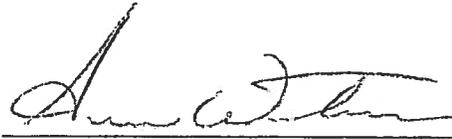
Dated: September 10, 2013

VERIFICATION

Gene Winters declares and states that he is the President of Global Link Logistics, Inc., Complainant in this proceeding, and that the foregoing Verified Complaint is true to the best of his information and belief; and that the grounds of his belief as to all matters not upon his own personal knowledge is information which has otherwise been provided to Complainant and believes to be true.

I declare and state under penalty of perjury that the foregoing is true and correct.

Executed on September 9, 2013

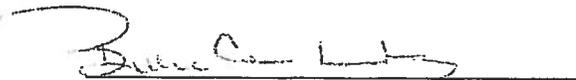
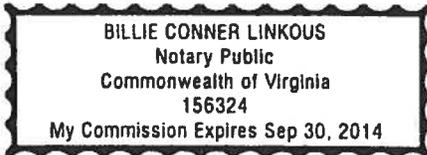


Gene Winters

STATE OF ~~Georgia~~ ^{Virginia})
COUNTY OF ~~Dekalb~~ ^{Spotsylvania})

Sworn to and subscribed before me this 9th day of Sept, 2013, by

Gene Winters.


Notary Public

My commission expires 9/30/2014