

BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 13-07

GLOBAL LINK LOGISTICS, INC.,

COMPLAINANT,

v.

HAPAG-LLOYD AG,

RESPONDENT.

**GLOBAL LINK LOGISTICS, INC.'S OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS**

Hapag-Lloyd, AG (“Hapag”) asserts that an arbitrator rather than the Federal Maritime Commission (the “Commission”) has the exclusive jurisdiction to address the merits of the Complaint filed by Global Link Logistics, Inc. (“Global Link”). Thus, Hapag asserts that an arbitrator, rather than the Commission, must decide whether Hapag violated the Shipping Act by: 1) drafting and executing a Service Contract that fails to comply with the Shipping Act’s statutory requirements in regard to certain rates and a defined service level; 2) failing to establish just and reasonable practices by engaging in a course of conduct whereby it normally reduced minimum quantity commitments (MQCs) to the amount shipped, but then arbitrarily refusing to do so in this instance, even after having made assurances that such an adjustment would be forthcoming and after having reduced Global Link’s allocation under the Service Contract; 3) unreasonably refusing to deal or negotiate; and 4) resorting to unfair or unjust discriminatory methods when it sought to drive Global Link out of business. Hapag’s assertions lack merit as all of the issues identified fall exclusively within the Commission’s expertise and within its broadly delegated

authority to enforce the Shipping Act. Further, assuming as true the allegations in the Verified Complaint, which the Presiding Judge must do in the context of a motion to dismiss, the claims asserted clearly state valid causes of action under the Shipping Act.

Summary of Argument

1. The Commission Has Exclusive Authority to Enforce the Shipping Act

Hapag asserts that the Commission lacks subject matter jurisdiction to determine whether service contracts satisfy the requirements specified in the Shipping Act and that instead, such a determination must be made by an arbitrator. Hapag similarly asserts that the Commission lacks jurisdiction to hear Global Link's claims asserting that Hapag failed to establish just and reasonable practices in regard to the Service Contract, unreasonably refused to deal or negotiate, and resorted to unfair or unjust discriminatory practices under 46 U.S.C §§ 41102(c), 41104(3) and 41104(10), because they merely consist of breach of contract claims. These assertions are devoid of merit. The Commission has been afforded a broad and exclusive mandate to construe and enforce the Shipping Act. Indeed, if the Commission lacks authority to determine whether statutory provisions of the Shipping Act defining service contracts have been satisfied, and to determine what constitute unjust and unreasonable practices under the Act, it is difficult to imagine what role, if any, the Commission has in enforcing the Shipping Act.

The Complaint asserts that the Service Contract at issue failed to comply with the statutory requirements that service contracts under 46 U.S.C. § 40102(20) contain certain rate or rate schedules and a defined service level because the contract afforded Hapag unfettered discretion to increase those rates during the life of the contract. *See* Complaint at IV (G). Further, while the Service Contract contained a comprehensive liquidated damages provision if Global Link failed to satisfy the MQC, it imposed no meaningful service commitment obligation

on Hapag. *Id.* at IV (KK). Clearly, the Commission, rather than an arbitrator wholly unfamiliar with the Shipping Act, is charged with interpreting in the first instance whether a service contract satisfies the statutory requirements set forth in 46 U.S.C. § 40102(20). Further, Hapag's argument that the Commission's regulatory authority over service contracts is narrowly confined is belied by the plain language of the relevant statutory provisions. Hapag's argument also ignores the fact that the Commission previously not only has issued decisions confirming its jurisdiction over service contracts, it also has issued a Circular Letter specifically addressing the need for service contracts to have real mutual commitments and defined service levels. For Hapag to now argue that the Commission's orders and the Commission Circular Letter exceeded its jurisdictional mandate, is baseless.

Hapag's contention that 46 U.S.C. § 40502(f) precludes the Commission from exercising jurisdiction over Global Link's Complaint because the Complaint solely states a claim for breach of contract similarly is without merit. Global Link's Complaint clearly states claims for violations of 46 U.S.C. §§ 41102(c), 41104(3) and 41104(10) of the Shipping Act. Any argument that the Commission lacks authority to hear such claims is belied by the Supreme Court authority, as well as the Commission's holdings to the contrary in *Cargo One* and *Anchor Shipping*. Hapag's attempted reliance upon one bankruptcy court decision to the contrary, in which the bankruptcy court held that the Commission lacks exclusive, primary jurisdiction over Shipping Act claims, and that resolution of such matters did not require any particular expertise, is misplaced. Accordingly, Hapag's contention that the Commission lacks authority to construe Shipping Act provisions and to enforce the Act's prohibitions must be denied.

2. Global Link's Complaint Asserts Valid Claims

In addition to challenging the scope of the Commission's jurisdiction, Hapag moves to dismiss on the grounds that Global Link's Complaint fails to state plausible causes of action, and that the Shipping Act does not recognize the causes of action asserted. These contentions cannot withstand scrutiny.

Accepting as true all well-plead allegations in Global Link's Complaint, dismissal is warranted only if it clearly appears that Global Link cannot recover on any viable theory. Thus, Global Link's Complaint can only be dismissed if, after indulging all reasonable inferences from the allegations in favor of Global Link, no plausible cause of action can be stated. Here, Global Link's Verified Complaint easily satisfies that minimal standard.

Ignoring well established federal court and Commission authority to the contrary, Hapag asserts that Global Link cannot state a claim under 46 U.S.C. § 41102(c) predicated upon Hapag's failure to establish, observe and enforce, just and reasonable regulations or practices relating to or connected with receiving, handling, storing or delivering property because that provision is limited to the physical handling of cargo and does not apply to service contracts. This argument is wholly lacking in merit. Indeed, Hapag's argument ignores Supreme Court and Commission precedent expressly holding that the Shipping Act's provisions barring unjust and unreasonable practices are not limited to the physical handling of cargo. Moreover, such an artificially constrained reading of Section 41102(c) would be contrary to Supreme Court and Commission precedent recognizing that the Commission has been delegated broad authority to enforce the Shipping Act and that a narrow construction of what constitutes a "reasonable practice" would be wholly inconsistent with that delegation.

In addition, the Complaint alleges that Hapag's course of conduct in having reduced the MQC in prior service contracts to the amount shipped, in accordance with well-established industry practice, and refusing to do so in this instance, was not a just and reasonable practice. Compl. at IV (NN). Further, the Complaint asserts that Hapag failed to observe just and reasonable practices by engaging in a bait and switch by suggesting that the MQC would be reduced and then refusing to do so after it was impossible for Global Link to ship the amount specified in the Service Contract, particularly when Hapag was refusing to provide market rates. *Id.* at IV (NN). The Complaint further alleges that it was not a just and reasonable practice to reduce Global Link's allocation of space on its vessels, clearly preventing Global Link from being able to ship the MQC, and then to still seek recovery under a liquidated damages clause as if no such reduction in allocation had occurred. *Id.* at IV (OO). Accepting these allegations as true, Hapag has clearly violated the Shipping Act.

Hapag's argument that Global Link fails to state a claim under Section 41104(10) because Global Link has failed to establish that Hapag's refusal to deal was not objectively unreasonable ignores both the allegations in the Complaint and the present posture of the case. The Complaint asserts that Hapag consistently refused to negotiate in regard to rates on shipping lanes and that its refusal to do so did not comport with marketplace reality and quite simply did not "make sense." Compl. at IV (Q). It further alleges that rather than offer competitive rates, Hapag purported to offer "new rates," which were, in fact unchanged from the uncompetitive rates already in existence. *Id.* at IV (AA). These allegations of chicanery state a claim for unreasonable refusal to deal or negotiate. Further, the Complaint asserts that Hapag unilaterally raised rates during the term of the Service Contract, at a time when other carriers were implementing rate reductions. *Id.* at IV (Y). Such allegations constitute valid claims of an unreasonable refusal to deal or negotiate.

The Commission has uniformly recognized that claims asserting a refusal to deal or negotiate are fact-driven inquiries. Indeed, the very case that Hapag cites found that there was no violation of Section 41104(10) only after an extensive discovery process involving “around-the-world depositions and thousands of pages of documents,” as well as a lengthy hearing. Such a fact-driven determination does not justify dismissal of Global Link’s claim without the opportunity to obtain discovery and present evidence in support of its claim.

Hapag’s effort to dismiss Global Link’ claim under 46 U.S.C. § 41104(3) suffers from the same procedural defect. As is the case with claims arising under Section 41104(10), the merits of a claim asserting that Hapag retaliated against Global Link by resorting to unfair or unjustly discriminatory practices is a fact intensive inquiry. Here, the Complaint alleges that through the use of “Named Account” rates, Hapag was able to manipulate rates such that Hapag could favor one NVOCC over another when they were handling the same customer’s shipments. *Id.* at IV (L). In this regard, Hapag knowingly sought to squeeze Global Link out of the market by quoting it rates at higher than rates provided to other shippers. Such an unconscionable practice constitutes a clear violation of the Shipping Act.

Argument

I. Congress Delegated Broad Authority to the Commission to Enforce the Shipping Act

A. The Shipping Act

The Shipping Act establishes a comprehensive and detailed program to regulate all aspects of United States ocean transportation involving foreign commerce. 46 U.S.C. §§ 40101-41309. In addition to stating the prerequisites for enforceable tariffs and service contracts, the Shipping Act prohibits certain conduct by carriers, including unjust and unreasonable practices. 46 U.S.C. § 41102(c). Congress created the Commission as the agency to develop and maintain expertise in

the international ocean shipping industry in order to administer and enforce compliance with the Shipping Act. See 46 CFR § 501.2(a).

Liberal, purpose driven readings of the Shipping Act are justified and desirable where a particular provision is broadly written, thus signifying an intent by Congress that Commission jurisdiction should not be narrowly construed. *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 273-75 (1968); *Plaquemines Port, Harbor and Terminal District v. FMC*, 838 F.2d 536, 542-43 (D.C. Cir. 1968). The Shipping Acts of 1916 and 1984 have long been recognized as remedial statutes. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B. 308, 311-12 (1934); *Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 56, 69 (1965). When a statute is recognized as remedial, it is to be broadly construed so as to “suppress the evil and advance the remedy.” Norman J. Singer, Statute and Statutory Construction, Section 60:1 (6th Ed. 2001). The policy that a remedial statute such as the Shipping Act should be construed so as to effectuate its intended remedial purpose is firmly established. *California v. United States*, 320 U.S. 577, 584 (1944); *Nepera Chemical, Inc. v. FMC*, 662 F.2d 18, 22 (D.C. Cir. 1981). Thus, even where there is ambiguity in a remedial statute, it should be construed to address the problems that are within the purpose of the law. *Nepera Chemical*, 662 F.2d. at 22.

B. The Commission’s Delegation of Authority is Broad and Exclusive

As the exclusive federal agency required to enforce compliance with the Shipping Act’s provisions, the Commission’s delegated authority includes the responsibility to conduct investigations on its own or to receive and remedy complaints that allege Shipping Act violations. 46 U.S.C. § 41301 *et seq.* In *U.S. Navigation Co., Inc. v. Cunard S.S. Co.*, 284 U.S. 474 (1932), the Supreme Court concluded that the Commission’s predecessor had exclusive jurisdiction over the Shipping Act because it was a comprehensive statute governing common carriers by water.

Id. at 480-81. The Court expressly recognized that the Shipping Act's goal of consistent enforcement of its mandate could not be achieved unless the Commission first determined whether or not a rate, rule or practice was unreasonable or unjustly discriminatory. *Id.* at 482. As the Court stated: "Preliminary resort to the Commission is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission." *Id.*

In reaching its conclusion, the Supreme Court held that a specialized agency like the Commission, with its comprehensive knowledge of the peculiar context and circumstances in which the Shipping Act operates, was a more appropriate body than a court to resolve questions about the interpretation and application of this highly specialized law. *Id.* at 485.

Subsequently, in *Far East Conference v. United States*, 342 U.S. 570 (1952), the Supreme Court reached the same conclusion, recognizing that the Commission is best qualified to address matters involving ocean transportation. "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." 342 U.S. at 574-75. Further, the Court reasoned that "[u]niformity and consistency in the regulation of business entrusted to a particular agency are secured . . . by preliminary resort for ascertaining and interpreting the circumstances to underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience and by more flexible procedure." *Id.*

In *California v. United States*, 320 U.S. 577, 584 (1944), the Supreme Court similarly recognized that the Commission had been delegated broad and exclusive authority to enforce the Shipping Act. While in that instance, the Commission was not delegated rate-making powers

over the parties at issue, it had been delegated broad authority to ensure that those subject to the Shipping Act “establish, observe and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storage, or delivery of property.” This overarching conferral of authority permitted the Commission to take all steps necessary to ensure that those governed by the Shipping Act did not engage in unjust and unreasonable practices.

[T]he withholding of rate-making power for service other than water-carriage does not qualify the unlimited grant to the Commission of the power to stop effectively all unjust and unreasonable practices in receiving, handling, storing or delivering property. Finding a wrong which it is duty-bound to remedy, the Maritime Commission, as the expert body established by Congress for safeguarding this specialized aspect of the national interest, may, within the general framework of the Shipping Act, fashion the tools for so doing.

Id.; see also, *Government of Guam v. American President Lines*, 28 F.3d 142 (D.C. Cir. 1994) (private complainant may not bring court action regarding alleged violation of Shipping Act because FMC’s jurisdiction over such alleged violations is exclusive); *DSW International Inc., v. Commonwealth Shipping, Inc., Abou Merhi Lines, LLC and Abou Merhi Lines, SAL*, 2011 WL 7144019 at *9 (ALJ 2011)(regulatory scheme created by the Shipping Act requires that Commission make original determination as to whether Act has been violated regardless of whether action initiated by private complaint or by Commission investigation).

C. The Service Contract at Issue is Subject to Comprehensive Regulation by the Shipping Act, Over Which the Commission Has Jurisdiction

The Service Contract at issue is governed by and subject to the terms of the Shipping Act. See 46 U.S.C. § 40502. As such, Hapag, as carrier, and Global Link, as shipper, are obligated, respectively, to make available definite service at certain rates and to provide a certain volume of cargo as set forth in 46 U.S.C. § 40102(20). The Shipping Act expressly governs service contracts, 46 U.S.C. § 40502 (titled “Service Contracts”), and all service contracts are “subject to the requirements” of the Shipping Act. 46 U.S.C. § 40502(a). These requirements include filing

such agreements with the Commission, 46 U.S.C. § 40502(b)(1), the inclusion of certain “Essential Terms,” 46 U.S.C. § 40502(c), and publication of those terms. 46 U.S.C. § 40502(d). *See also* 41105(5)-(8) (both prohibiting common carrier agreements from impairing service contracts); 46 U.S.C. § 40701 (requiring certain carriers to maintain just and reasonable rates in service contracts).

Although service contracts are between private parties, the Commission regulates the content as well as the conduct under the contracts. In *Cargo One v. Cosco Container Lines Co. Ltd.*, 28 S.R.R. 1635 (2000), the Commission considered the very question presented here, *i.e.*, whether an arbitration provision in a service contract warranted dismissal of a complaint filed with the Commission alleging violations of the Shipping Act. There, the Commission revisited its decision in *Vinmar*¹ and concluded that the Commission is the appropriate forum for resolving allegations of violations of Section 10 of the Act even if they arise from transportation governed by a service contract. “To find otherwise would give little or no meaning to those provisions of Section 10, as well as to the right to file a complaint seeking reparations under Section 11.” *Id.* at 1644. Thus, the Commission recognized that the appropriate test in regard to its jurisdiction is whether the claim asserted constitutes a simple breach of contract claim or whether it involves elements peculiar to the Shipping Act. *Id.* Where the Complaint alleges unfair or unjustly discriminatory practices, and involves unjust and unreasonable regulations and practices, that are inherently related to Shipping Act prohibitions, the Commission is the appropriate venue for resolution of the claim. *Id.* at 1645.

Cargo One, therefore, makes clear that while 46 U.S.C. § 40502(f) provides that the exclusive remedy for a breach of a service contract shall be an action in an appropriate court, the

¹ *Vinmar Inc. v. China Ocean Shipping Co.*, 26 S.R.R. 420 (1992).

Commission's congressionally delegated authority requires it to investigate and adjudicate Shipping Act violations that arise pursuant to service contracts, particularly as to the Prohibited Acts under Section 10 of the Shipping Act, 46 U.S.C. § 41101, *et seq.* *Id.* at 1643.

In *Anchor Shipping Co. v. Alianca Navegacao e Logistica Ltda.*, 30 S.R.R. 991, 998 (2006), the Commission again considered the same issue and reached an identical result. There, the Commission determined that it had a responsibility to hear a Complaint alleging violations of the Shipping Act arising from a service contract notwithstanding that the parties to the contract had already received an arbitration decision concerning the same contract. In so doing, the Commission explained that its interest outweighs the intentions of the private parties, as set forth in the arbitration clause of their service contract. "While Section 8(c) provides that parties to a service contract may agree to arbitrate breach of contract issues, it was not Congress' intent that the Commission be barred from adjudicating whether the parties' conduct violates the Shipping Act and Commission regulations." *Id.* at 999. Thus, the arbitration provision in the Service Contract at issue did not divest the Commission of its jurisdiction.

Here, the Complaint alleges that Hapag engaged in a number of unreasonable practices that constitute violations of the Shipping Act. Specifically, the Complaint alleges that Hapag 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. As reflected above, the Commission has previously found that complaints of "unfair or unjustly discriminatory practices, undue or unreasonable preferences, undue or unreasonable prejudice or disadvantage, and just and reasonable regulations and practices, are inherently related to Shipping Act

prohibitions and are therefore appropriately brought before the Commission.” *Cargo One, Inc. v. Cosco Container Lines Company, Ltd.*, 28 S.R.R. 1635, 1644 (2000); *Streak Products, Inc. v. UTi, United States, Inc.*, Docket No. 13-04 (ALJ October 23, 2013).²

In addition, with regard to the validity of service contracts, the Commission has held: The regulation of service contracts is akin to the regulation of agreements, because the Commission is the regulatory body charged with administering the Shipping Act and, therefore, must ensure that service contracts and agreements are filed and implemented pursuant to the statutory requirements and Commission regulations.

Anchor Shipping Co. v. Alianca Navegacao e Logistica Ltda., 30 S.R.R. 991, 998 (2006).

In *Cargo One* and *Anchor Shipping*, the Commission further recognized that it has a statutory mandate to ensure that service contracts comply with the Shipping Act and the Commission’s regulations, so that it can be certain that the public and the shipping industry are protected, which interest outweighs the intentions of the private parties. Here, those same policy considerations come into play. Thus, for those same reasons, the Commission here should determine whether the Service Contracts at issue are valid and whether Hapag violated the Shipping Act by its actions pursuant to the Service Contracts, rather than to allow such decisions to be made by an arbitrator with no knowledge or expertise in regard to the Shipping Act.

Hapag’s Contention That the Commission Has Limited Authority in Regard to Service Contracts is Simply False

In light of the authority cited above, Hapag’s contention that the Commission’s jurisdictional mandate over service contracts is limited to status based discrimination actions, unjust discrimination against ports, and undue prejudice regarding localities is baseless. *See* Hapag Motion at 16-17. First, Hapag’s reliance upon 1998 revisions to the Shipping Act relating

² The Motion to Dismiss incorrectly suggests that the burden is on a party alleging a Shipping Act violation in a service contract case to overcome the presumption that it is merely a breach of contract claim. *See* Hapag Motion at 19. In fact, in *Cargo One*, the Commission held that “where the alleged violation raises issues beyond contractual obligations, the Commission will likely presume, unless the facts as proven do not support such a claim, that the matter is properly before the agency.” *Id.* at 1645.

to Sections 10(b)(5) and (9) as somehow limiting Global Link' right to assert a Section 10(d)(1) violation is misplaced. *See* Hapag Brief at section 3, pp. 15-19, addressing Global Link's claims under Section 41102(c). Such an assertion is fallacious as the revisions at issue do not even apply to Section 41102(c). Moreover, if the Commission's sole authority in regard to service contracts was so limited, the Commission would have so noted in the *Cargo One* and *Anchor Shipping* orders.

Finally, in exercising its congressionally delegated authority to enforce the Shipping Act, the Commission explicitly has recognized not only that consideration is required in order to render a service contract valid and enforceable but that a real and binding commitment as to a carrier's obligation to transport cargo is required in order to create a valid service contract under the Shipping Act. Until 1984, United States law required common carriers by water to publish tariffs setting forth the rates and changes applicable to the transportation services they offered. The Shipping Act of 1984, however, permits carriers to deviate from this obligation in instances when a carrier and shipper enter into a service contract pursuant to which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period and the carrier commits to a certain rate or rate schedule "as well as a defined service level – such as, assured space, transit time, port rotation, or similar service features" 46 U.S.C. § 40102(20); *See* FMC Circular Letter No. 1-89, "Service and Cargo Commitments and Service Contracts" (April 12, 1989), 54 FR 15256-01, 1989 WL 278436, attached as Exhibit A.

In Circular Letter No. 1-89 the FMC emphasized that:

Meaningful minimum quantities of cargo over a fixed time period and rate and defined service level commitments between a carrier and a shipper are the legislative quid pro quo for departing from the published tariff rates of the carrier that would otherwise apply. The failure of the contact parties to fulfill the basic requirements of this quid pro quo not only offend the legislative scheme crafted

by Congress, but also could, as noted above, make the service contract but a device to evade the carriers' tariff rates in violation of section 10(a)(1) of the 1984 Act. We believe that the Commission is not only empowered but also has the responsibility to take whatever regulatory action may be necessary and appropriate to ensure against this result.

Id. at *1526.

If the Commission lacked authority to construe and enforce Shipping Act provisions relating to service contracts, there would have been no need for it to analyze whether contracts without a legitimate quid pro quo in terms of a carriers' obligation to meet definitive service level commitments complied with Section 10(a)(1) of the Act. In light of all of these considerations, Hapag's contention that the Commission lacks jurisdiction to determine what constitutes a service contract, and whether the Shipping Act's statutory provisions in that regard have been satisfied, is baseless.

II. Global Link's Complaint Asserts Valid Claims

Pursuant to Federal Rule of Civil Procedure Rule 8,³ a complaint must merely contain, *inter alia*, a short and plain statement of the claim showing that the pleader is entitled to relief. Here, Global Link's Complaint easily satisfies that standard, as well as the low bar set by *Iqbal* and *Twombly*, that a claim merely be plausible on its face.

Although the Commission's Rules of Practice and Procedure, 46 C.F.R. Part 502, do not explicitly provide for a motion to dismiss for lack of subject matter jurisdiction or a motion to dismiss for failure to state a claim, Rule 12 of the Commission's Rules state that the Federal Rules of Civil Procedure will apply in instances that are not covered by the Commission's Rules, to the extent that the applicable Federal Rule is consistent with sound administrative practice.

³ Unless the Commission has promulgated a specific rule governing the matter, actions before the Commission are governed by the Federal Rules of Civil Procedure. 46 C.F.R. 502.12. Because the Commission has not done so, Rule 8 of the Federal Rules of Civil Procedure governs here.

See, Streak Products, Inc. v. UTi, United States, Inc., Docket No. 13-04 (ALJ October 23, 2013). Federal Rules 12(b)(1) and 12(b)(6) apply under these circumstances. *Id.*

A court may not dismiss a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) unless it clearly appears according to the facts alleged that the plaintiffs cannot recover on any viable theory. *Berezin v. Regency Sav. Bank*, 234 F.3d 68, 70 (1st Cir. 2000). If the factual allegations either directly or inferentially set forth material elements necessary to sustain recovery under some actionable legal authority, dismissal cannot be granted. *Roth v. United States*, 952 F.2d 611, 613 (1st Cir. 1991); *McLaughlin v. Boston Harbor Cruise Lines, Inc.*, 419 F.3d 47, 50 (1st Cir. 2005)(court must indulge all reasonable inferences from the allegations in favor of the plaintiff). The court must accept as true plaintiffs' well-pled factual averments and draw "all inferences reasonably extractable from the pleaded facts in the manner most congenial to the plaintiff's theory." *New England Surfaces v. E.I. DuPont de Nemours and Co.*, 460 F. Supp. 2d 153, 156 (D. Me. 2006); *Streak Products, Inc.*, Docket No. 13-04, at 5 (under Rule 12(b)(1) and 12(b)(6) court construes complaint in light most favorable to the plaintiff and accepts all well-pled facts alleged as true). Thus, the court may only grant a motion to dismiss if "it appears beyond doubt that the plaintiffs can prove no set of facts in support of his claim which would entitle him to relief." *Fitzer v. Security Dynamics Technologies, Inc.*, 119 F. Supp. 2d 12, 17 (D. Mass 2000)(citations omitted).

Under the Supreme Court's holding in *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007), a complaint merely has to contain a sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. 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. *Aschroft v. Iqbal*, 556 U.S. 662, 677 (2009). Thus, the

complaint need only give the defendant fair notice of the claim and the grounds upon which it rests. *Twombly*, 555 U.S. at 555.

Here, the Verified Complaint easily satisfies that minimal standard. The Complaint asserts in much greater detail than is required pursuant to Federal Rule of Civil Procedure 8, the factual basis for the relief sought and such assertions state a plausible claim for relief.

Global Link Asserts a Valid Claim for Relief Pursuant to 46 U.S.C. § 41102(c)

Global Link asserts a valid claim for relief based upon Hapag's failure to establish, observe, and enforce just and reasonable regulations and practices relating to the receiving, handling, storing or delivering of property in violation of 46 U.S.C. § 40012(c). Global Link alleges, *inter alia*, that Hapag drafted and executed a service contract that does not commit it to a certain rate or rate schedule, and a defined service level, as required by 46 U.S.C. § 40102(20). Specifically, the Complaint alleges that the Service Contract gave Hapag the unfettered discretion to charge higher rates and fees during the life of the Service Contract. *See* Compl. at IV (II). Thus, the net effect of the various provisions in Hapag's Service Contract was 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. The Complaint further alleges that 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. *Id.* at IV (JJ). The Complaint also alleges that Hapag's Service Contract does not satisfy the Shipping Act's requirement that a carrier commit to a defined service level, because the obligation set forth therein as to Hapag is illusory. *Id.* at IV (KK).

In addition, the Complaint alleges that Hapag's course of conduct in having reduced the MQC in prior service contracts to the amount shipped, in accordance with industry practice, and

then refusing to do so in this instance, was not a just and reasonable practice. IV (NN). Further, Hapag failed to observe just and reasonable practices by engaging in a bait and switch by suggesting that the Global Link MQC would be reduced and then refusing to do so after it was impossible for Global Link to ship the amount specified in the Service Contract, particularly when Hapag was seeking to impose above market rates. *Id.* at IV (NN). It was also not a just and reasonable practice 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, thereby eliminating any opportunity for Global Link to ship the MQC, and then to seek recovery under a liquidated damages clause as if no such reduction in allocation had occurred. *Id.* at IV (OO).⁴

In the face of these detailed and specific allegations, Hapag baldly asserts that Global Link impermissibly relies on legal conclusions and fails to include factual allegations. Hapag Motion to Dismiss at 3. Such an assertion is flatly wrong.

Alternatively, Hapag asserts that Global Link cannot assert a claim because: 1) the statutory provision prohibiting unreasonable regulations and practices is limited to acts related to or connected with receiving, handling, storing or delivering property and the Service Contract purportedly is unrelated to these activities; 2) the Commission's regulations permit service contracts to cross reference tariff terms; and 3) 1998 revisions to the Shipping Act in regard to unjust discrimination *sub silentio* nullified Section 41102(c). Hapag's assertions all lack merit.

First, Hapag repeatedly asserts that Global Link's Section 41102(c) claim fails because it is not related to or connected with "receiving, handling, storing or delivering of property." Thus, Hapag argues that Section 41102(c)'s prohibition against unreasonable regulations and practices

⁴ The original allocation of 48 TEU's weekly would have allowed Global Link to ship almost enough (48 x 52 = 2496 TEUs) to meet the 2500 TEU MQC. The reduced allocation of 13 TEUs per week did not permit Global Link to even come close to meeting the MQC (13 x 52 = 676 TEUs). That Hapag instituted this reduction only two months into the contract is clear evidence of its plan to put the squeeze on Global Link.

does not apply here because the claim arises pursuant to a service contract rather than the physical handling of cargo.

Hapag's argument is analogous to the one considered and rejected by the Commission as part of a rulemaking, which ruling was subsequently affirmed by the District of Columbia Circuit in *National Customers Brokers & Freight Forwarders Ass'n v. United States*, 883 F.2d 93 (D.C. Cir. 1989). There, freight forwarders tried the same argument that Hapag makes here, arguing that the Act's prohibitions against unjust and unreasonable regulations and practices under section 10(d)(1) did not apply to them because they were not directly involved in the "receiving, handling, storing or delivering of property." Specifically, they argued that Section 10(d)(1) could not apply to fee arrangements. In upholding the Commission's rejection of this argument, the D.C. Circuit looked to the Supreme Court's holding in *United States v. American Union Transport*, 327 U.S. 437 (1946), where the Court had upheld the Commission's broad authority to regulate forwarders and recognized that they were sufficiently connected with "receiving, handling, storing or delivering of property, to fall within the scope of 10(d)(1)'s prohibition." 883 F.2d at 99. Thus, the court concluded that "[t]o confine reasonable practice jurisdiction to physical cargo handling services performed at the terminal, the FMC indicated would be inconsistent with *American Union Transport*; such an interpretation, in large measure, would place freight forwarders outside the statute because forwarders (unlike carriers and terminal operators – the other entities covered by Section 10(d)) traditionally do not operate at terminals. . . . We are satisfied that the Commission has fairly and reasonably construed Section 10(d)(1)'s scope" *Id.* Thus, the D.C. Circuit concluded that Section 10(d)(1)'s unjust practices prohibition reasonably could be construed to apply to freight forwarder's billing of their customers. *Id.* at 100; *see also, Puerto Rico Ports Authority v. Federal Maritime Commission*,

919 F.2d. 799 (1st Cir. 1990)(activities that do not involve the physical handling of cargo are subject to reach of the Shipping Act when performed by entities subject to Act's provisions).

The Commission's Order, and the D.C. Circuit's decision upholding that order, as well as other federal circuit court authority are fully consistent with the Supreme Court's decision in *California v. United States*, 320 U.S. 577, 584 (1944), where the Court recognized that the Shipping Act's prohibition against unjust and unreasonable regulations and practices in relating to or connected with "receiving, handling, storing or delivering of property" applied to terminal operators' imposition of demurrage charges.⁵ In light of these holdings, Hapag's argument that Section 10(d)(1)'s prohibition does not apply to service contracts is patently incorrect.⁶

Hapag next argues that because the Commission's regulations permit service contracts to cross-reference tariff terms its service contract cannot run afoul of the Shipping Act. This argument is specious.

The fact that the tariff provisions incorporated into Hapag's Service Contract allow it to unilaterally change its rates at its discretion, does not alter the fact that 46 U.S.C. § 40102(20) requires service contracts to have a certain rate and a defined service schedule. Thus, while it is undisputed that the Commission's regulations permit carriers to cross-reference their tariff publications, nowhere do Commission regulations reflect that such a provision somehow negates the statutory requirement explicitly set forth in 46 U.S.C. § 40102(20). Notably, Hapag cites no

⁵ In so holding, the Court expressly rejected the dissenting opinion's argument that imposition of a rate or charge did not fall within the scope of a regulation or practice respecting receiving, handling, storage or delivery of property. *Id.* at 589.

⁶ In *Petchem Inc. v. Canaveral Port Authority*, 23 S.R.R. 974 (1986), the Commission recognized that Section 10(d)(1) contemplated regulatory authority over actions that had a "discernible effect" on the commercial relationship between shippers and carriers. *Id.* at 986; citing *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal District*, 21 S.R.R. 1072, 1079 (1982). The Service Contract at issue clearly satisfies that minimal standard.

authority for such a dubious proposition because none exists.⁷

Finally, as set forth above, Hapag's argument that Section 41102(c)'s prohibition against unjust and unreasonable regulations and practices is no longer operative after enactment of the Ocean Shipping Reform Act of 1998, has no articulable basis. The 1998 reforms to the Act do not even address Section 41102(c). Thus, Hapag's argument in this regard is baseless.

Global Link States a Claim for Unreasonable Refusal to Deal or Negotiate

Hapag's argument that Global Link fails to state a claim under Section 41104(10) fares no better than its other arguments. In this regard, Hapag asserts that Global Link has failed to establish either that Hapag refused to deal or that its failure to do so was objectively unreasonable. In so arguing, however, it ignores both the allegations of the Complaint and the fact that this is before the Presiding Judge in the context of a motion to dismiss. The Complaint explicitly asserts that Hapag time and time again refused to negotiate rates despite the fact that its rates were inconsistent with those in the marketplace and in fact, raised its rates when the rest of the marketplace was reducing theirs. *See* Compl. at IV (N)(O)(P)(Q)(R)(S)(T)(Y)(Z)(AA)(BB)(CC), V (QQ). In the face of these explicit allegations, which must be accepted as true in this context, Hapag asserts that Global Link's argument is belied by the fact that it asserts that the parties had a course of dealing over the course of years and under various service contracts pursuant to which they had negotiated reasonable rates. Hapag Motion at 6. Obviously, however, the fact that Hapag negotiated on prior contracts does not excuse its failure to do so in regard to the Service Contract at issue.

⁷ The FMC study cited, *The Impact of the Ocean Shipping Reform Act of 1998*, certainly does not constitute a binding decision of the Commission in this regard. Further, the fact that some other service contracts may also run afoul of the explicit provisions of 46 U.S.C. § 40102(20) does not mean that Section 40102(20) has been repealed and no longer has the force of law.

Alternatively, Hapag asserts that the fact that it responded to and rejected repeated emails from Global Link requesting that Hapag adjust its rates to reflect the marketplace should be construed as meaning Hapag must have negotiated in that regard. No such inference is warranted, however, particularly not in the context of a motion to dismiss where all reasonable inferences are drawn in favor of the Complainant.

Finally, Hapag cites *Seacon Terminal Inc. v. Port of Seattle*, 26 S.R.R. 886 (1993), as support for its argument that Global Link must make a showing that Hapag's refusal to deal was unreasonable and unrelated to legitimate transportation considerations. Hapag Motion at 7-8. *Seacon Terminal*, however, is procedurally inapposite. There, the Commission began its analysis by holding that it had jurisdictional authority to review the negotiation and decision making practice of a port in order to determine whether its actions might be unjustly discriminatory or otherwise violate Section 10 of the 1984 Act. *Id.* at 898. The Commission also held that it had jurisdiction to determine whether the Port's leasing agreements satisfied its statutory obligation to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property. *Id.* Even more significantly, however, there the Commission reached its determination that there was not an unreasonable refusal to deal or negotiate only after "an extensive discovery process (which included around-the-world depositions and thousands of pages of documents and a lengthy hearing)" *Id.* at 897. Thus, far from establishing that allegations of a refusal to deal or negotiate should be dismissed at the pleading stage, the Commission's Order in *Seacon Terminal* reflects that such determinations require a careful review of the facts supporting such assertions.⁸

⁸ Hapag cites and quotes from *Petchem v. FMC* at page 7 of its Motion for the proposition that the Commission must, in ruling on a refusal to deal allegation, determine whether "the refusal was unreasonable or whether it may have been justified by particular circumstance in effect." Hapag miscites the case as it appears at 853 F.2d 958, not at 853

Similarly, in *Canaveral Port Authority - Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436, 1449 (2003), the Commission recognized that “[r]efusals to deal or negotiate are factually driven and determined on a case-by-case basis.” Thus, the Commission’s review required it to determine whether the terminal operator gave actual consideration to the effort to negotiate or whether it, in fact, failed to meaningfully consider offers made. *Id.* at 1450. Indeed, in *Agreement No. 2011 58 - Docking and Leasing Agreement By and Between City of Portland, Maine and Scotia Prince Cruise Limited*, 30 S.R.R. 377, 379 (2004) upon which Hapag purportedly relies in support of its position, the Commission recognized that an evidentiary investigation was necessary to determine whether violations of 10(b)(10), and 10(d)(1) had occurred. Similarly, in *New Orleans Stevedoring Company v. Board of Commissioners of the Port of New Orleans*, 29 S.R.R. 345, 352 (2001), the ALJ recognized that a finding of reasonableness in the context of an alleged refusal to deal or negotiate is a fact dependent determination. *See also, Carolina Marine Handling, Inc. v. South Carolina State Ports Authority*, 28 S.R.R. 1436, 1457 (2000)(to allow respondent to escape liability for actions allegedly in violation of the Shipping Act before the onset of discovery and presentation of evidence would defeat one of the principal purposes of the Act).

Quite simply, here Global Link alleges that despite continued requests to Hapag to negotiate reasonable rates and terms to its Service Contract, Hapag flatly refused to do so and instead reduced Global Link’s weekly space allocation and then opted to attempt to collect the MQC penalty when Global Link was unable to find shippers willing to pay out of market freight

F.2d 558. Further, Global Link has been unable to locate where in the decision that quote is located. Nonetheless, the decision does make clear that the Commission’s determination was made after development of “an extensive evidentiary record.” 858 F.2d at 963.

rates to Hapag. Because such allegations assert a claim under Section 10(b)(10), Hapag's Motion to Dismiss must be denied.

Global Link States a Claim for Unfair or Unjust Discrimination

Hapag's effort to dismiss Global Link's claim under 46 U.S.C. § 41104(3) suffers from the same procedural defect as its effort to dismiss the refusal to deal claim. As is the case with claims arising under Section 41104(10), the merits of a claim asserting that the carrier resorted to unfair or unjustly discriminatory practices is a fact driven inquiry. *See, Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R. at 897. Here, the Complaint alleges that through the use of "Named Account" rates, Hapag was able to manipulate rates such that Hapag could favor one NVOCC over another when they were handling the same customer's shipments. Compl. at IV (L). In this regard, Hapag sought to squeeze Global Link out of the market by quoting it rates at higher than rates provided to other shippers. Global Link is entitled to obtain discovery to substantiate its claims in this regard. Thus, Hapag's Motion to Dismiss must be denied.

CONCLUSION

The Commission and the Supreme Court have repeatedly recognized that the Commission cannot defer to the courts (or in this case to arbitrators) on matters which are intricately involved with its oversight responsibilities under the Shipping Act. *See, e.g., Pacific Maritime Assn. – Cooperative Working Arrangement*, 14 S.R.R. 1447, 1451 (1975), *aff'd, Federal Maritime Commission v. Pacific Maritime Assn.*, 435 U.S. 40 (1978). Here, because the questions of what constitutes a service contract and whether a contract so designated satisfies the requirements set forth in the Act are central to the Commission's mission, it cannot defer to an arbitrator to make such a determination. It also cannot defer to an arbitrator to decide whether Hapag failed to establish just and reasonable practices in regard to the Service Contract, unreasonably refused to

deal or negotiate, and resorted to unfair or unjust discriminatory practices under 46 U.S.C §§ 41102(c), 41104(3) and 41104(10).

Hapag's assertion that Global Link's Verified Complaint fails to states valid causes of action also fails. Accepting as true the assertions contained therein, which the Presiding Judge must do in the context of a motion to dismiss, Global Link asserts cognizable claims based upon Hapag's failure to establish just and reasonable practices in regard to the Service Contract, unreasonable refusal to deal or negotiate, and unfair or unjust discriminatory practices.

Respectfully submitted,



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DATE: November 1, 2013

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document was delivered to the following addressees at the addresses stated by depositing same in the United State mail, first class postage prepaid, and/or by electronic transmission, this 1st day of November 2013:

Matthew Thomas
Reed Smith
1301 K Street, NW
Suite 1100- East Tower
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EXHIBIT A

54 FR 15256-01, 1989 WL 278436 (F.R.)

NOTICES

FEDERAL MARITIME COMMISSION

[Circular Letter No. 1-89]

Ocean Common Carriers, Conferences of Such Carriers, Shippers, and Shippers' Associations in the Foreign Commerce of the United States; Service and Cargo Commitments in Service Contracts

Monday, April 17, 1989

***15256** Section 8(c) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. App. 1707(c), requires service contracts between shippers or shippers' associations and ocean common carriers or conferences to meet certain statutory requirements and to be filed with the Federal Maritime Commission. Section 3(21) of the 1984 Act, 46 U.S.C. App. 1702(21), defines a "service contract" as:

a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level—such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

The Commission has received service contracts which do not appear to contain mutually binding commitments by the contract parties sufficient to meet the definition of "service contract" contained in the 1984 Act.

In addressing the matter of service contract commitments, generally, the Commission noted in Docket No. 88-7, Service Contracts—Most-Favored-Shipper Provisions ("Docket No. 88-7") that:

Meaningful minimum quantities of cargo over a fixed time period and rate and defined service level commitments between a carrier and a shipper are the legislative quid pro quo for departing from the published tariff rates of the carrier that would otherwise apply. The failure of the contract parties to fulfill the basic requirements of this quid pro quo not only offends the legislative scheme crafted by Congress but also could, as noted above, make the service contract but a device to evade the carrier's tariff rates in violation of section 10(a)(1) of the 1984 Act. We believe that the Commission is not only empowered but also * * * has the responsibility to take whatever regulatory action may be necessary and appropriate to ensure against this result.

Accordingly, it is the stated policy of the Commission to require meaningful rate and volume commitments on the part of the shipper and meaningful service commitments on the part of the carrier in all service contracts entered into under the authority of section 8(c) of the 1984 Act. The Commission will scrutinize contracts carefully at the time of filing to ensure that they contain such commitments, pursuant to the requirements of 46 CFR 581.1(n). Failure to comply with the requirements of 46 CFR 581.1(n), as herein interpreted, will result in the rejection of the contract pursuant to 46 CFR 581.8 or other appropriate Commission action.

Docket No. 88-7, Proposed Rule, slip op. at 31, 32

In essence, service contracts must, by statute, contain certain definite commitments by both the carrier and the shipper. Moreover, these commitments must be meaningful, i.e., the contract parties must undertake real obligations. Service contracts that are indefinite or contain illusory undertakings simply do not meet the definition of "service contract" under the 1984 Act. A service contract that lacks definite and mutual consideration not only fails to meet the statutory definition but may also be invalid and unenforceable at common law.

With respect to carrier or conference commitments in a service contract, the Commission believes that contract provisions that provide for "regular" or "frequent" service do not meet the 1984 Act's requirement that the carrier or conference commit to a "defined service level." Although the Act does not specifically define the term "service level," it does provide several examples (e.g., assured space, transit time, etc.) sufficient to indicate the scope of the concept. A mere recitation of a common carrier's obligation under common law is not adequate.

Moreover, the Commission is aware of some contracts where a carrier agrees in one provision to specific service commitments (such as assured space), but in another provision vitiates that commitment by stating that a shipper's exclusive remedy in the event of a breach of the carrier's commitment is a reduction in the shipper's minimum cargo commitment. Under such an arrangement, the carrier is in effect committing to nothing. Congress expected both parties to a service contract to make mutual, binding commitments and anything less is not acceptable.

Similarly, the Commission believes that a service contract that allows a shipper to default on its cargo commitment while only paying de minimis damages to the carrier may not be a bona fide contract. For example, some service contracts establishing rate levels of over \$2,000 per container provide for liquidated damages of only \$40 or \$50 per container in the event the shipper fails to meet its minimum cargo commitment. Such damages provisions do not appear to bear a reasonable relationship to the cargo commitment, the contract rate, or the effects of the loss of cargo to the carrier. Service contracts embodying de minimis liquidated damages provisions may thus render the shipper's cargo commitment meaningless, and, therefore, result in a contract that fails to meet the statutory definition. The Commission previously noted

* * * that although it lacks the authority to directly regulate the use of liquidated damages provisions [this] does not necessarily mean that the Commission is without authority to preclude service contract liquidated damages provisions which may permit evasion of the otherwise applicable tariff rate contrary to the 1984 Act and the policies underlying it, regardless of whether both parties to the contract willingly or unwillingly agree to those provisions.

Docket No. 88-7, Proposed Rule, slip op. at 28, 29. In keeping with this admonition, the Commission will closely scrutinize the levels of liquidated damages for breach of the shipper's cargo commitment and will take appropriate action against service contracts containing damages provisions considered de minimis.

The Commission recognizes that liquidated damages provisions in service contracts are permissive and not mandatory under the 1984 Act. Nonetheless, when the parties to a service contract choose to agree on liquidated damages for the breach of a shipper's minimum cargo commitment, that amount must bear some reasonable relation to the actual damages that will otherwise be incurred by a carrier and for which the shipper would be liable absent a liquidated damages provision. Liquidated damages provisions should be legitimate and not be used to give a shipper an unfair benefit even though it did not meet its commitment under the contract.

Ocean common carriers, conferences of such carriers, shippers, and shippers' associations are hereby advised that the Commission expects service contracts to conform to the definitional requirements for service contracts under the 1984 Act. Accordingly, the Commission will begin to take action against any contract filed 45 days after the date of this Circular Letter that does not meet statutory requirements.

April 12, 1989.

Edward P. Walsh,

Managing Director.

[FR Doc. 89-9079 Filed 4-14-89; 8:45 am]

BILLING CODE 6730-01-M

54 FR 15256-01, 1989 WL 278436 (F.R.)
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