

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

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**Docket No. 13-07**

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**GLOBAL LINK LOGISTICS, INC.,  
COMPLAINANT**

**V.**

**HAPAG-LLOYD AG,  
RESPONDENT.**

**BRIEF OF THE WORLD SHIPPING COUNCIL  
*AS AMICUS CURIAE*  
IN SUPPORT OF RESPONDENT**

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The World Shipping Council (“WSC” or the “Council”) represents the international liner shipping industry on regulatory and public policy issues of importance to its members. The Council’s twenty-nine members represent over 90% of global container shipping capacity. Because the Complainant, Global Link, has invited the Commission to adopt an interpretation of the Shipping Act that is contrary to the language and the intent of the Ocean Shipping Reform Act of 1998 (OSRA), the case has potential implications for the entire industry. WSC submits this brief for the purpose of assisting the Commission in its analysis of that statutory issue.

This case can be narrowly decided by upholding the Administrative Law Judge’s dismissal on the grounds argued by Respondent Hapag-Lloyd and set forth in the ALJ’s Initial Decision (“I.D.”). The Council encourages the Commission to uphold the Initial Decision on those grounds.

If the Commission chooses to consider the novel argument proffered by Global Link that the performance of individual service contracts must be adjudicated on the basis of an alleged industry-wide “course of dealing,” then it is important that the Commission give full consideration to the statutory, policy, and practical implications of that argument.

We address first (Section A) the straightforward application of the three statutory sections of the Shipping Act relied upon by Global Link, viewed in the factual light most favorable to Global Link as is required for consideration of a motion to dismiss. As the discussion below demonstrates, Global Link does not seriously argue that Hapag Lloyd’s actions (or more accurately inactions) constitute a direct violation of the three Shipping Act sections cited by Global Link. Global Link’s real argument is that the contract performance must be measured against an industry-wide “course of dealing,” and the balance of the Council’s brief (Section B) discusses why that argument must be rejected as being flatly contrary to the language of the Shipping Act and the intent of Congress in enacting OSRA.

**A. The Case Can and Should Be Decided on the Basis of the Application of the Language of the Shipping Act and the Commission’s Regulations to the Facts Alleged**

Respondent Hapag-Lloyd has persuasively briefed the statutory arguments that mandate dismissal of Global Link’s claims, and the Administrative Law Judge’s Initial Decision provides clear and correct grounds for dismissal of the complaint for failure to state a claim under the Shipping Act. Those sources provide an ample legal basis for the Commission to uphold dismissal of the complaint when the Commission conducts its *de novo* review of Complainant’s exceptions. For the purpose of emphasizing the point that this case can and

should be dismissed on the basis of a plain reading of the statute as applied to the alleged facts, we offer the following brief points.

**1. *Global Link Fails to State a Claim that Hapag-Lloyd Violated 46 U.S.C. § 41102(c)***

46 U.S.C. § 41102(c) (formerly section 10(d)(1)) of the Shipping Act, states:

*Practices in Handling Property.* A common carrier, marine terminal operator, or ocean transportation intermediary may not fail to establish, observe, or enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Global Link contends that Hapag-Lloyd violated this provision because the service contract between Hapag-Lloyd and Global Link allegedly failed to include a “certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features” as described in the Shipping Act’s definition of “service contract” at 46 U.S.C. § 40102(20)(B). Exceptions at 32.

As an initial matter, Global Link has failed to explain how an alleged failure of its service contract to meet the Act’s definition of “service contract,” even if proven, would translate into a violation by Hapag-Lloyd of section 41102(c)’s prohibition on failing to “establish, observe or enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” The challenged activity – which essentially consists of Hapag-Lloyd’s declining to amend Global Link’s contract after it was signed – does not on its face fit within the prohibition of section 41102(c). However, it is not necessary for the Commission in this case to decide whether an alleged failure of a service contract to meet the statutory definition of that term could constitute a violation of section 41102(c), because it is

clear that the service contract at issue here does meet the definition of a “service contract” under the Act.

Global Link argues that the “certain rate or rate schedule” provision in the service contract definition was not met because the service contract expressly allowed Hapag-Lloyd to apply to the contract certain rate increases such as general rate increases and peak season surcharges that Hapag-Lloyd published in its applicable tariffs. Such increases applied to all shippers to which such tariff provisions applied either directly or pursuant to the terms of their respective contracts.

Global Link argues that the “defined service level” provision of the service contract definition was not met because the contract provides different remedies to Global Link for Hapag-Lloyd’s failure to meet its service commitments than the contract provides to Hapag-Lloyd for Global Link’s failure to meet its minimum quantity commitments. Global Link also contends that this provision was violated because the service contract allowed Hapag-Lloyd to adjust its services during the term of the service contract. Based on these alleged shortcomings, Global Link argues that Hapag-Lloyd has violated section 41102(c). All of these bases for Global Link’s section 41102(c) argument fail to state a claim.

*a. Incorporation of tariffs in the service contract*

With respect to Global Link’s claim that the service contract provision allowing Hapag-Lloyd to apply tariff charges to the contract violates 41102(c), the simple answer is that the Commission’s regulations plainly permit the incorporation of tariff provisions in service contracts, a fact that Global Link concedes. In its Opposition to Respondent’s Motion to Dismiss

(p. 19), Global Link states that “it is undisputed that the Commission’s regulations permit carriers to cross reference their tariff publications. . . .”

Notwithstanding that necessary concession, Global Link nevertheless goes on to argue that the fact that the Commission’s regulations allow service contracts to cross-reference tariffs does not mean that such a cross-referenced tariff provision meets the statutory requirement that service contract terms be “certain.” That secondary argument also fails, however, because the applicable regulations at 46 C.F.R. § 530.8(c)<sup>1</sup> were adopted *specifically* to address the question of which practices would fulfill the statutory requirement for certainty in service contracts. Indeed, the heading for that subsection of the Commission’s regulations is “*Certainty of terms.*”<sup>2</sup>

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<sup>1</sup> 46 C.F.R. § 530.8(c)(2) provides that service terms may not “[m]ake reference to terms not explicitly contained in the service contract itself unless those terms are readily available to the parties and the Commission.” That broad standard, at least since the Commission’s rulemakings implementing OSRA, has included tariffs as being material that may permissibly be referenced in service contracts. In its “Confirmation of interim final rule with changes,” in its rulemaking on *Service Contracts Subject to the Shipping Act of 1984*, the Commission stated:

Finally, because tariffs are published and widely available, cross-referencing to those publications in service contracts does not appear to pose any new issues. The Commission notes, therefore, that a tariff published pursuant to part 520 of the Commission’s regulations will be considered ‘a publication widely available and well known within the industry’ for the purposes of cross-referencing in service contracts.

64 Fed. Reg. 23782, 23788 (May 4, 1999)(emphasis added).

<sup>2</sup> See also *Certainty of Terms of Service Contracts and NVOCC Service Arrangements*, Notice of Proposed Rulemaking, 76 Fed. Reg. 63581 (October 13, 2011). There, the Commission made reference to its rulemaking implementing the OSRA changes to service contract regulation, noting: “When adopting the rules for ‘[c]ertainty of terms’ of service contracts, the Commission recognized that through the Ocean Shipping Reform Act of 1998, Congress intended, by lifting the requirements that tariffs be filed with the Commission, to allow parties more freedom and flexibility in their commercial arrangements.” It is noteworthy that Global Link does not allege that the separate tariff terms being incorporated here are vague or uncertain. It contends that incorporation renders the contract terms uncertain *per se*, which is clearly incorrect.

Because the Commission's long-standing regulations directly refute the argument that incorporation of tariff terms in a service contract does not satisfy the Shipping Act's definitional requirement that service contract rates be "certain," what Global Link is really arguing is that the Commission should ignore its own regulations. That is something that the Commission may not do, for as the courts have repeatedly held, agencies "may not violate their own rules and regulations to the prejudice of others." *Battle v. FAA*, 393 F.3d 1330, 1336 (D.C. Cir. 2005), citing *Accardi v. Shaughnessy*, 347 U.S. 260, 266 (1954). See also, *Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1524 (D.C. Cir. 1994)(an agency's failure to follow its own regulations is fatal to the deviant action).

*b. Defined level of service*

Global Link's second definitional attack on the service contract at issue here is that the contract does not provide a "defined level of service," and thereby violates section 41102(c). As with the rate certainty argument discussed above, Global Link here also makes a necessary concession that greatly limits the scope of its argument. Specifically, Global Link admits that "on its face, the Service Contract at issue imposed an obligation on Hapag-Lloyd to provide a defined service level . . . ." Complaint at 9. Nevertheless, Global Link goes on to argue that the service level is "illusory" because the consequences for Hapag-Lloyd's failure to meet its service commitment are not the same as the consequences of Global Link's failure to meet its minimum quantity commitment. Exceptions at 35-36.

The ALJ properly rejected this argument, noting: "The Act does not require that liquidated damages provisions be equal for the shipper and the carrier." I.D. at 3. Although Global Link in its Exceptions (pages 3-4) restated its allegation from the Complaint on this point,

it did not take exception to the ALJ's legal conclusion quoted above, and therefore no exception is before the Commission on this point.

In addition to the fact that Global Link has not objected to the ALJ's finding with respect to liquidated damages, both the Shipping Act and the Commission's regulations regarding liquidated damages reflect the flexibility that the Act and the regulations leave to the parties on that issue, stating that service contracts filed with the Commission must include "the liquidated damages for non-performance, if any. . . ." 46 U.S.C. § 40502(c)(8); 46 C.F.R. § 530.8(a)(7) (emphasis added). A finding that the Act requires liquidated damages to be equal for both parties could subject such damages to a legal challenge under principles of contract law, which require such damages to be a reasonable estimate of actual damages, since having the same damages for each party may not be an accurate estimate of the damages suffered by one or the other.

On the point of the parties' respective remedies for breach under the service contract, although it is not necessary for the disposition of the case, it is worth noting that Global Link – in each instance in which it discusses Section 11.2 of the service contract – has failed to note that the contract allows the shipper to terminate the contract if it becomes eligible for a discount on 10% of the Minimum Quantity Commitment on the grounds that the carrier failed to carry tendered cargo. It appears that Global Link never sought to invoke that provision, a situation that provides some perspective on Global Link's vague suggestions that Hapag-Lloyd failed to carry cargo that Global Link tendered.

Finally, Global Link argues, without much conviction, that the carrier's ability to adjust its services during the term of the service contract violates the provision in the Shipping Act's

definition of “service contract” relating to a “defined service level.” Exceptions at 34. The argument ignores reality. A containership will, on any given voyage, carry cargo for hundreds of different shippers. Carriers can and do adjust their services from time to time in response to market forces and operational variables. Providing the most cost-effective service to the greatest number of shippers requires ocean carriers to possess the flexibility to adjust their services. Global Link’s argument, if accepted, would seem to require vessel operators to obtain the consent of all contract shippers before, for example, changing the port calls on a particular service. There is nothing in the Shipping Act that requires that or that limits or restricts the right of an ocean carrier to modify its service offerings.

In sum, the service contract does not violate the Act’s requirements that service contracts contain certain rates and defined service levels, and thus those alleged (but nonexistent) shortcomings cannot be the basis of an argument that the Respondent has violated 46 U.S.C. § 41102(c).

**2. *Global Link Fails to State a Claim that Hapag-Lloyd has Violated 46 U.S.C. § 41104(10)***

Global Link’s second claim is that Hapag-Lloyd “unreasonably refuse[d] to deal or negotiate” in contravention of 46 U.S.C. § 41104(10) (former section 10(b)(10)) because Hapag-Lloyd, after entering into a service contract with Global Link, declined to change the terms of that contract in order to make Global Link better able to attract customers to its NVOCC business. Complaint at 11-12. The short answer here – as found by the ALJ at page 21 of the Initial Decision – is that there is no duty on the part of a carrier to re-negotiate a service contract upon which the parties have already agreed.

As with the claims discussed above, here too Global Link introduces its Exceptions by making a fundamental concession that eliminates the basis for its claim:

Global Link does not argue that any section of the Shipping Act ‘requires a carrier to renegotiate an existing service contract whenever a shipper demands.’ Global Link’s argument is that a carrier may not contravene a normal and customary practice in the industry that shippers’ rates, in particular those of NVOCC shippers, will be kept at or near the market rates so that an NVOCC can attract enough cargo from its customers to fulfill the MQC.

Exceptions at 10-11 (emphasis added).

Thus, rather than arguing that there is anything in the Shipping Act that directly supports its claim that Hapag-Lloyd was required to change its contract rates, Global Link is arguing that the Shipping Act requires carriers to conform to some undefined and elusive “normal and customary practice” under which vessel operating common carriers must adjust service contract rates to ensure that NVOCC customers have a sufficient “spread” between their “buy” and “sell” rates to be able to attract customers and make a profit. Global Link offers no textual or precedential support for this highly original assertion, and there is none.

What Global Link emphasizes most on this point, in both its Opposition to Hapag-Lloyd’s Motion to Dismiss and in its Exceptions, is that Global Link should be granted the opportunity to engage in extensive discovery in an attempt to find facts to support its claim. See Global Link Opposition at 21-21; Exceptions at 9-10. Here, though, the problem is not that Global Link doesn’t have enough facts; the problem is that there is no plausible legal basis upon which it could prevail even if it could prove that it is a common practice in the industry for carriers to amend their service contracts to keep their NVOCC shippers in a favorable commercial position. To the extent that such actions occur, they are the result of commercial agreements that service contract parties implement because they find that it is in their mutual commercial

interest to do so. The Shipping Act, however, has never been held to require such activity, and there is absolutely no basis in the Act or the Commission's regulations for such an interpretation. We discuss this "common industry practice" argument in greater detail in Section B, below.

**3. Global Link Fails to State a Claim that Hapag-Lloyd has Violated 46 U.S.C. § 41104(3)**

46 U.S.C. § 41104(3) (former 1984 Act section 10(b)(5) and former OSRA section 10(b)(3)) provides that:

A common carrier . . . may not . . . (3) 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 filed a complaint, or for any other reason. . . .

The Commission ruled in *California Shipping Line, Inc. v. Yangming Marine Transp.*, 25 S.R.R. 1213 (1990), that a violation of what was section 10(b)(5) pre-OSRA requires a retaliatory purpose that goes beyond simple discrimination. The Commission there explained its reasoning this way:

If 10(b)(5) were applied to any act of discriminatory conduct, as was done by the ALJ, it could render other provisions of the Act prohibiting discrimination superfluous. It should also be noted that the other prohibited acts for which excess damages can be awarded constitute the most egregious forms of carrier or conference conduct: fighting ships (10(b)(7)), boycotts or unreasonable refusals to deal (10(c)(1)) and predatory practices against nonconference competition (10(c)(2)). Making conduct prohibited by 10(b)(5) also subject to double damages under 11(g) would appear to reflect a Congressional understanding that it applies to more than traditional discriminatory conduct and requires proof of a more serious retaliatory motive or intent.

We conclude, therefore, 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. *Id.* at 1225.

The Commission's *California Shipping* analysis of what is now 46 U.S.C. § 41104(3) is even more compelling following OSRA's repeal of the prohibition on discrimination in service contracts and the related repeal of the "me-too" right of a similarly situated shipper to demand access to the terms in another shipper's service contract. We discuss these OSRA changes in greater detail below. For the immediate purpose, however, it is plain that Global Link has not pled facts that even come close to meeting the "retaliation" standard presented by section 41104(3), and the allegation must be dismissed on that basis alone.

**B. Global Link's Theory of the Case is Fundamentally at Odds with the Changes that Congress Made to the Shipping Act in the Ocean Shipping Reform Act of 1998**

In order to properly adjudicate Global Link's claim, it is important to understand exactly what Global Link is asserting. It is just as important to understand what Global Link is not asserting. We begin with the latter.

First, Global Link has made it clear that it does not claim that Hapag-Lloyd violated the Shipping Act because Hapag-Lloyd declined to accept Global Link's requests to provide lower rates after the contract had been executed. At page 10 of its Exceptions, Global Link states that:

Global Link does not argue that any section of the Shipping Act 'requires a carrier to renegotiate an existing service contract whenever a shipper demands.'

Second, Global Link does not claim that Hapag-Lloyd's ability to apply tariff-based rate changes to the contract when the relevant tariffs were clearly incorporated into the service contract violated the Act:

[i]t is undisputed that the Commission's regulations permit carriers to cross reference their tariff publications. . . . (Global Link Opposition to Motion to Dismiss at 19.)

Third, Global Link does not claim that Hapag-Lloyd violated the Shipping Act by charging the rates set forth in the service contract:

2. Global Link takes exception to the following statement on page 2 of the I.D.:

Briefly summarized, Global Link contends that by charging the rates set forth in the 2012 Service Contract, Hapag-Lloyd violated three sections of the Act.

This statement mischaracterizes the Complaint.

Exceptions at 5 (emphasis added).

As discussed above, Global Link does not allege that Hapag-Lloyd has violated any part of the Shipping Act by entering into a contract that incorporates the carrier's tariffs (including changes made to those tariffs over the life of the contract), by charging the rates in the service contract, or by declining to change the rates in the service contract after it was agreed by both parties.<sup>3</sup>

Instead, Global Link's allegation that it has a colorable Shipping Act claim is based entirely on facts and circumstances that are unrelated to the terms of the contract that it

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<sup>3</sup> Global Link also does not allege that Hapag-Lloyd is in breach of its service contract with Global Link, for which the Shipping Act provides that the exclusive remedy is an action in an appropriate court, unless the parties otherwise agree, as they did in this case.

signed. Specifically, Global Link claims that, although Hapag-Lloyd's actions in administering the service contract, standing alone, would not violate any part of the Shipping Act, that same behavior does violate the Shipping Act when viewed in the context of an alleged "course of dealing" or "industry practice" that exists entirely separate from the terms of the service contract at issue. Global Link puts the argument this way:

Global Link's complaint is that the rates charged by Hapag-Lloyd were higher than the market rates, which were the rates that it would take for Global Link to attract the cargo to ship under the service contracts. Pursuant to common practices in the Transpacific shipping trades, carriers work with their service contract partners to keep rates at market levels. During the 2012 Service Contract term, Global Link informed Hapag-Lloyd of what those market terms were; and requested that Hapag-Lloyd put those rates in the service contract, but Hapag-Lloyd refused to do so. Having refused to provide its services at market rates, Hapag-Lloyd should not be permitted to impose onerous penalties upon Global Link when Global Link's customers refused to use Hapag-Lloyd's over-priced services. (Exceptions at 6; emphasis added.)

Keeping in mind that Global Link has expressly disavowed any claim that Hapag-Lloyd violated the Act by charging the rates specified in the contract or by declining to change those rates, the only aspect of the claim that Global Link has not itself excluded involves the alleged failure of Hapag-Lloyd to follow "common practices" in the trade by declining to amend the contract to match "market rates."<sup>4</sup> That this is the sole basis of Global Link's claim is confirmed by numerous other statements in Global Link's pleadings. At page 5 of its Exceptions, for example, Global Link states:

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<sup>4</sup> As a logical and a legal matter, WSC does not understand how Global Link can admit (as it must) that the Shipping Act does not require Hapag-Lloyd to amend its service contract with Global Link, but still argue that, because of an alleged "common practice" in the industry, that same conduct does constitute a Shipping Act violation. It is WSC's position that Global Link's necessary concession simply and completely forecloses its Shipping Act claims under any theory. We address the "industry practice" or "course of dealing" argument simply in the interest of completeness, and to highlight how removed from the language and intent of OSRA Global Link's arguments are.

Global Link's contention is that Hapag-Lloyd failed to follow a procedure and practice that was not only previously established between Global Link and Hapag-Lloyd but that is the usual and customary practice of most carriers with respect to service contracts and, in particular, contracts between ocean common carriers and NVOCCs. These normal customary practices consisted of (a) agreeing to adjust the contract rates during the term of the contract to keep them at or close to market levels to enable the NVOCC customer to attract sufficient cargo to meet the MQC; and (b) agreeing, if the shipper was unable to meet the MQC, to adjust the MQC downwards to the amount of cargo shipped or extend the contract for another year and roll the MQC into the extended contract. By failing and refusing to follow these normal and customary practices, Hapag-Lloyd unreasonably refused to deal or negotiate with Global Link in violation of Section 41104(10) of the Shipping Act; discriminated against Global Link in violation of Section 41104(3) of the Act; and failed to observe just and reasonable practices in violation of Section 41102(c) of the Act. (emphasis added)

Perhaps most succinctly stated, Global Link describes its argument this way at page 23

of its Exceptions:

As the emphasized language clearly states, there are normal and customary practices between Hapag-Lloyd and Global Link, as well as in the ocean transportation industry in general, to (a) keep rates in service contracts at or close to the market level, and (b) reduce or roll over the MQC rather than enforce a liquidated damages penalty. Stated in its most simplified form, Global Link's allegations in its Complaint are that Hapag-Lloyd's failure to observe and enforce these normal and customary practices has resulted in violations of Sections 41104(10), 41104(3), and 41102(c) of the Shipping Act. (emphasis added)

**1. OSRA Eliminated the "me-too" Right for Service Contract Shippers**

Taking as true (as the Commission must for purposes of a motion to dismiss) the factual statement that many carriers provide rate and/or MQC relief to their NVOCC shippers through contract amendments as the market changes during the term of a service contract, what Global Link is asking for is simply to be treated in the same manner as those other shippers. If that concept of similar treatment for similarly situated shippers sounds familiar, it is with good

reason: it was the law until 1998. What is fatal to Global Link's claim, however, is the fact that it is most emphatically not the law today.

Prior to the effective date of the Ocean Shipping Reform Act of 1998 (OSRA), section 8(c) provided in relevant part with respect to service contracts that:

a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. (emphasis added)

The underlined language, which provided shippers a right to "me-too" or demand the same contract terms as had been provided to a similarly situated shipper, was repealed by OSRA. Along with substantial limitations on how carrier agreements may influence service contracts, the abolition of the "me-too" right and the associated new protections for confidential, individual service contracts were among the most central reforms made by OSRA. Those reforms were intended by Congress to implement a much more market-based regulatory regime; one in which shippers and carriers were free to structure their individual commercial relationships without reference to the relationships that those parties might have with other shippers or other carriers, as the case may be. *See, e.g.* 46 U.S.C. § 40101(4), added by OSRA, which states that it is the purpose of the statute to "promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace." (emphasis added)

There is, and can be, no disagreement on the point that the right of a shipper to "me-too" a service contract was abolished by OSRA. The Commission noted that fundamental fact in its service contract regulations adopted immediately after OSRA was enacted, stating:

First, with regard to eligibility periods for ‘me-too’ rights, it is clear that OSRA completely eliminates ‘me-tooing’ of service contracts. OSRA is effective May 1, 1999, and therefore, no shipper can assert ‘me-too’ rights after May 1, 1999, regardless of what the eligibility period of the service contract may have been under the Act prior to OSRA’s effective date.

*Service Contracts Subject to the Shipping Act of 1984*, Confirmation of interim final rule with changes, 85 Fed. Reg. 23782, 23790 (May 4, 1999). The ALJ’s Initial Decision at 26-27 cites to numerous other Congressional and Commission statements that describe the abolition of “me-too” rights by OSRA.

Despite the fact that the “me-too” right was clearly and intentionally eliminated by OSRA sixteen years ago, Global Link’s claim, stated in its own words (quoted above), is in substance nothing more – and nothing less – than a plea for the Commission to require Hapag-Lloyd to give Global Link a deal that Global Link claims Hapag-Lloyd has given to other NVOCCs. In other words, a “me-too.” That is neither a right nor a remedy that the Shipping Act any longer provides.

It is worth noting that, despite the ALJ’s substantial discussion of the fact that there is no longer a “me-too” right under the Shipping Act (I.D. at 26-28), and that a claim to such a right is effectively the basis of Global Link’s complaint, Global Link does not once in its Exceptions acknowledge the fundamental changes that OSRA made to the law of service contracting, and it nowhere discusses the “me-too” aspect of those changes. That omission is telling. Instead of addressing the ALJ’s finding that Congress’ repeal of the “me-too” right in OSRA forecloses Global Link’s claim, Global Link instead cites to and discusses numerous congressional and agency materials that pre-date OSRA. On page 13, Global Link cites to cases from 1934, 1965, 1968, and 1981. On page 25, Global Link quotes a 1983 House of

Representatives Report. On page 26, Global Link cites cases from 1944, 1965, 1968, and 1981. On page 27, it cites to cases from 1932 and 1952. The pattern continues on pages 28 and 32.

The point here is not that old precedent regarding statutory interpretation cannot be instructive; it can be, but only if the underlying statute has not changed. Here, the most relevant part of the Shipping Act – the provision that previously granted shippers the right to “me-too” service contracts – was repealed in 1998 with the express purpose of replacing a service contract regime based on transparency and common carriage non-discrimination principles with a system based on confidential, individual contracting and reliance on commercial negotiation. Perhaps Global Link would have had a claim in 1998 under the facts alleged here, but it most certainly does not have a claim under the Shipping Act after a decade and a half under OSRA.

In sum, Global Link has made it clear that it is not challenging the contract as written. Instead, its challenge depends entirely on the notion that Hapag-Lloyd has failed to conform to a “normal and customary practice” in the industry of constantly amending rates and relieving shippers of unmet MQCs through amendments. Global Link alleges that Hapag-Lloyd and other carriers do this for other NVOCCs, but for the service contract in question, Hapag-Lloyd declined to agree to such amendments for Global Link. Thus, the essential nature of the complaint is that Global Link is entitled to a deal that other shippers have received. That claim is, in other words, a request for “me-too” relief – a form of relief that Congress has unquestionably abolished. The nature of the complaint and the nature of the relief sought, therefore, make it clear that, accepting all facts as pled by Global Link, the Complainant as a matter of law fails to state a claim upon which relief can be granted, and the ALJ properly dismissed the complaint.

That conclusion is reinforced by two other changes in the Act made by OSRA. First, prior to 1999, the public essential terms of service contracts included the rates payable by the shipper. OSRA permitted carriers and shippers to agree that the rates contained in a service contract would be kept confidential. Thus, whereas prior to 1999 a shipper seeking a “me-too” contract would specify a complete set of essential terms, including rates, that it wished to access, here Global Link is claiming to be entitled to some amorphous, unspecified “market rate.” As noted above this is no longer the law; as discussed below, it is not workable. Second, OSRA greatly restricted the application of the anti-discrimination provisions of the Act to individual service contracts so that they protected only ports, not shippers. See Section 41104(5) and (9). Global Link’s case is in large part an effort to circumvent the changes made to the Act by OSRA by cloaking its barred “me-too” and discrimination claims in terms of other statutory provisions that it stretches beyond the breaking point in an effort to bolster its novel and flawed position.

***2. The Necessary Legal Outcome is Reinforced by the Policy and Practical Implications of Global Link’s Theory***

The amendments made to the Shipping Act by Congress when it enacted OSRA conclusively foreclose Global Link’s claim. However, in the interest of assisting the Commission’s deliberations, the Council wishes to touch briefly on several related practical and policy issues that reinforce the necessary legal outcome.

First, although obvious, the OSRA elimination of the “me-too” right and the other changes made to the Shipping Act in 1998 were not intended by Congress to be minor adjustments to the Act. Instead, the service contract changes reflected a major policy shift through which Congress brought the Shipping Act more in line with the de-regulatory changes

that had already been made to the statutes governing other transportation modes such as truck, rail, and air. Congress recognized that those changes, which reflected a policy change supported by both shippers and carriers, would result in contract rates (and changes in contract rates) that would be solely a matter of contractual agreement between a shipper and carrier, and would result in different rates for different shippers, even when “similarly situated,” in different contracts. Congress clearly intended that the marketplace, with its unpredictability and risk, would largely replace regulation for service contract shipments. The Commission, as well as those who would invoke the Commission’s jurisdiction in service contract disputes, must respect that Congressional decision.

Second, Global Link’s proposition that the Shipping Act requires that a carrier must ensure that “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” is stunning in its audacity and scope. The assertion is as it appears – that vessel operating common carriers have a duty to modify the contracted rate that their NVOCC customers have agreed to, and that the Commission must enforce that duty. This assertion goes far beyond the already audacious claim that the “me-too” right survived OSRA. In addition to that assertion that shippers must be treated similarly, Global Link would add an additional requirement that such similar treatment must ensure that an NVOCC’s “buy” and “sell” rates have a sufficient spread that the NVOCC can operate profitably.

The argument is outlandish. Such a requirement would make the Commission a rate regulator, which it does not have the statutory authority to be. It would also make the Commission a regulator of what rate differentials provide adequate arbitrage opportunities for

NVOCCs to be successful. Congress has never authorized the Commission to interject itself in the market in such a manner, and the Commission has never claimed such authority. The Shipping Act does not require shipping rates to ensure any regulated entity a profitable operation, whether that entity is an ocean carrier, an NVOCC, or a shipper.

Finally, beyond the extreme disconnect between statutory reality and the basis for Global Link's claim, the practical implications of entertaining this novel argument would overwhelm the Commission. If every service contract had to conform to some "common industry practice" with respect to amending rate levels to "be kept near the market rates," and failure to do so could support an action for reparations before the Commission, how would the Commission adjudicate such complaints?

How would the Commission decide what the "market rate" was? Would it be set for each carrier, or would such a figure be derived from the rates of all carriers? How would rates be weighted for volume, port pairs, and commodity shipped? How would the Commission account for the non-rate service contract terms that form part of the bargain between the two parties and that might influence the final rate? How would the Commission decide what "near" or "close to" market rates means? How would reparations for violations of the asserted carrier duty be calculated? How would service contract confidentiality be preserved if a carrier's rate could be part of every shipper's reparation action under Global Link's new cause of action? If the FMC were to require ocean carriers to amend their contracts in a downward rate market to the benefit of NVOCCs, would it require NVOCCs to amend their contracts with ocean carriers in an upward rate market? Would the principle of requiring contract amendments to follow

market trends also apply to service contracts between ocean carriers and beneficial cargo owners?

These questions are obviously unanswerable, but they (and more) would just as obviously be presented if the Commission were to do anything other than uphold the ALJ's dismissal of this case for failure to state a claim.

**C. Conclusion**

Global Link has not argued that Hapag-Lloyd is in breach of its contract obligations. Global Link has conceded, as it must, that Hapag-Lloyd did not violate the Shipping Act by charging the rates agreed by the parties in their service contract, by declining to amend the service contract during its term, or by incorporating its tariffs into the service contract. Despite those necessary concessions, Global Link nevertheless contends that those same actions or inactions by Hapag-Lloyd violate the Shipping Act when viewed in the context of a claimed "industry practice"<sup>5</sup> under which carriers adjust rates and minimum quantity commitments in NVOCC service contracts in order to make those NVOCC customers more competitive.

Global Link's argument that the Shipping Act requires Hapag-Lloyd to do for Global Link what Hapag-Lloyd or other carriers may have done for other NVOCCs is in substance a claim for a "me-too" service contract right that was conclusively extinguished by OSRA. Acceptance of Global Link's flawed argument would render service contracts essentially meaningless, because

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<sup>5</sup> Global Link also describes this "industry practice" as a "course of dealing." *See, e.g.*, Exceptions at 7, 8, 9. As the I.D. properly states, the concept of "course of dealing" is a contract doctrine that is well developed outside of the context of the Shipping Act. *See* I.D. at 23-24. In light of the fact that there is no viable Shipping Act issue before the Commission, the issue of whether the proper administration of the contract is affected by an alleged "course of dealing" is one for the arbitrator as agreed by the parties and as recognized by section 8(c) of the Shipping Act, 46 U.S.C. § 40502(f), and the Commission's decisions construing that subsection.

they would become subject to reopening by the Commission on terms that the parties could not predict. Acceptance of Global Link's re-write of the Shipping Act could also provide a disincentive for carriers to offer favorable terms in service contracts or amendments, because to do so could trigger a duty to offer the same terms to other parties.

Global Link seeks a result that is prohibited by the Shipping Act and that, if granted, would be impossible to define or administer. The World Shipping Council urges the Commission to uphold the ALJ's dismissal as the only course that is consistent with the governing statute.

Respectfully submitted,

A handwritten signature in cursive script that reads "John W. Butler". The signature is written in black ink and is positioned above a horizontal line.

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