

FEDERAL MARITIME COMMISSION

DOCKET NO. 13-07

GLOBAL LINK LOGISTICS, INC.

v.

HAPAG-LLOYD AG

INITIAL DECISION GRANTING RESPONDENT'S MOTION TO DISMISS¹

I. INTRODUCTION.

Complainant Global Link Logistics, Inc. (Global Link) is a Delaware corporation that is licensed by the Commission as a non-vessel-operating common carrier (NVOCC). Respondent Hapag-Lloyd AG (Hapag-Lloyd) is a vessel-operating common carrier registered with the Commission. Global Link and Hapag-Lloyd entered into six service contracts, one each year from 2007 through 2012. Each service contract ran from the beginning of May of one year to April 30 of the following year. Each contract established rates that Global Link agreed to pay for transportation of cargo between points in a foreign country and points in the United States. The contracts also established a minimum quantity commitment (MQC); that is, a minimum number of twenty-foot equivalent units (TEUs) that Global Link was required to ship with Hapag-Lloyd and that Hapag-Lloyd was required to transport for Global Link during the life of the contract.

According to its Complaint, Global Link's problems began after the parties signed their 2012 Service Contract, in effect through April 30, 2013. After they signed the contract, Global Link alleges that shipping rates decreased, but Hapag-Lloyd would not adjust the rates in the contract. On September 10, 2013, Global Link commenced this proceeding by filing a Verified Complaint with the Secretary pursuant to 46 U.S.C. § 41301(a) alleging that Hapag-Lloyd violated the Shipping

¹ The initial decision will become the decision of the Commission in the absence of review by the Commission. Any party may file exceptions to this decision within twenty-two days of the date of service. 46 C.F.R. § 502.227.

Act of 1984 in its relationship with Global Link pursuant to the 2012 Service Contract. On October 17, 2013, Hapag-Lloyd filed a motion to dismiss, contending that Global Link's Complaint fails to state a claim that Hapag-Lloyd violated any section of the Act. Global Link filed an opposition to the motion, and Hapag-Lloyd filed a reply.

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. I conclude that Hapag-Lloyd has not violated any of these sections.

1. Hapag-Lloyd unreasonably refused to deal or negotiate with Global Link in violation of section 41104(10) because Hapag-Lloyd would not reduce the service contract rates when market shipping rates declined during the life of the contract.

Facts alleged in Global Link's Complaint demonstrate that Hapag-Lloyd negotiated with Global Link and entered into a service contract establishing rates for transportation of Global Link's cargo for the period from May 2012 through April 2013. The Act does not require a common carrier to renegotiate terms of an existing service contract when a shipper becomes dissatisfied with its terms. Therefore, I conclude that Hapag-Lloyd's refusal to renegotiate existing contract rates during the life of the contract when market rates declined is not a refusal to deal or negotiate within the meaning of section 41104(10).

2. Hapag-Lloyd discriminated against Global Link in violation of section 41104(3) because the rates charged to Global Link pursuant to the service contract were higher than the rates Hapag-Lloyd charged to other shippers and the rates other ocean common carriers charged their shippers.

Facts alleged in Global Link's Complaint demonstrate that the rates established in the service contract that Hapag-Lloyd charged Global Link are higher than rates Hapag-Lloyd charged to other shippers. The Act permits a common carrier to charge different rates to similarly situated shippers in service contracts. Therefore, I conclude that Hapag-Lloyd did not discriminate against Global Link in violation of section 41104(3) by charging higher rates.

3. Hapag-Lloyd failed to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property in violation of section 41102(c) because: (a) the service contract permitted Hapag-Lloyd to increase rates during the life of the service contract by amending its general tariffs; and (b) the service contract imposed greater liquidated damages on Global Link for its failure to perform than it imposed on Hapag-Lloyd for its failure to perform.

Facts alleged in Global Link's Complaint demonstrate that the service contract incorporated tariffs and accessorial charges from Hapag-Lloyd's general tariffs into the total rates charged pursuant to the service contract and that those tariffs and accessorial charges could increase during the life of the service contract. The Act and Commission regulations permit a common carrier to

incorporate these charges and increases in these charges into its service contracts. Facts alleged in Global Link's Complaint demonstrate that the service contract provides for a greater liquidated damages provision for breach by Global Link than for breach by Hapag-Lloyd. The Act does not require that liquidated damages provisions be equal for the shipper and the carrier. Therefore, I conclude that Hapag-Lloyd did not establish unjust or unreasonable regulations or practices in violation of section 41102(c).

I conclude that the Complaint fails to state a claim of violation of the Shipping Act. Therefore, the Complaint is dismissed with prejudice.

II. FACTS.²

A. The 2012 Service Contract.

Global Link alleges that Hapag-Lloyd "entered into a purported^[3] Service Contract with Global Link without committing to a certain rate or rate schedule and a defined service level. [Hapag-Lloyd] also resorted to unfair or unjustly discriminatory methods against Global Link and unreasonably failed to deal or negotiate in regard to the Service Contract." (Complaint ¶ III.B.)

The Complaint alleges that the parties' course of dealing between the parties in the first five contracts imposed a duty on Hapag-Lloyd to reduce or "roll[] over" the MQC to the following year's contract if Global Link was unable to meet the MQC specified in a service contract. For example, the 2011 service contract (running from May 1, 2011, to April 30, 2012) contained an MQC of 4000 TEUs. When it became apparent that Global Link would not be able to meet the MQC for the 2011 contract, the MQC was reduced from 4000 TEUs to 2768 TEUs, the number of TEUs that Global Link actually shipped under the 2011 contract.

In early May 2012, Global Link, identified as the shipper, and Hapag-Lloyd, identified as the carrier, entered into the 2012 Service Contract that is the subject of this proceeding. (2012 Service Contract, Essential Terms (2012 Serv. K. E.T.) Appendix A.)⁴ The contract established a minimum

² The facts are derived from the allegations in Parts IV and V of the Complaint and from the 2012 Service Contract. Facts alleged in the Complaint are taken as true when considering this motion to dismiss. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009).

³ Prior to commencing this proceeding, Global Link contended that the 2012 Service Contract was void *ab initio*. (Motion to Dismiss at 2 n.2; Motion to Dismiss Attachment B.) Global Link does not make this claim in its Complaint or its opposition to the motion to dismiss.

⁴ At the request of the undersigned, on March 12, 2014, Hapag-Lloyd filed a copy of the 2012 Service Contract with a request that it remain confidential. After an April 7, 2014, telephone conference discussing confidentiality, Hapag-Lloyd filed a public version on April 11, 2014. In response to a question from the undersigned, in an email dated April 16, 2014, Hapag-Lloyd

quantity of 2500 TEUs for Global Link to ship (2012 Serv. K. E.T. ¶ 4) and Hapag-Lloyd to transport (*id.* ¶ 5) and established specific rates to be charged for transportation of specified commodities between specific places of origin in Asia and specific destinations in North America (*id.* ¶ 6; Annex B), with the possibility of more annexes adding additional cargo, places of origin, and destinations during the life of the contract. (*Id.* ¶ 6.) By its terms, the contract ran from May 2, 2012, to April 30, 2013. (*Id.* ¶ 8.)

The contract provides: “Except as otherwise specified in this Term, and subject to Article 6 of the Boiler Plate, rates charged for the carriage of commodities under this contract shall be those set forth in this Term, Annex A, B, C, D, E, etc.” (*Id.* ¶ 6.1.)⁵ It further provides:

Unless otherwise specified in this Contract, all cargoes moving hereunder shall be subject to

(a) All other tariff charges, including charges, surcharges, Currency Adjustment Factors, Bunker/Fuel Surcharges, Arbitraries, Origin and Destination delivery charges, Charges/Taxes imposed by Government or other legal authorities including Port Authorities, add-ons and other additional charges (collectively extra charges) at such levels as are applicable in the governing tariff(s) applicable at the time of shipment, and

(b) All rules in the governing tariff(s) applicable at the time of shipment.

* * *

(d) Notwithstanding any provision to the contrary in this Service Contract or any governing publication, including any limitation or restriction on the application of new surcharges during the term of this Contract, the parties agree that the following charges shall apply to the extent published in a publication governing this contract at any time during the term of the Contract:

1. Any charge or surcharge relating to the costs incurred in connection with newly-established security requirements (whether established by law, statute, regulation, or by a service provider to Carrier) applicable to or relating to any portion of the transportation and related services provided under this contract.

identified additional portions of the General Rate Notes in Annex B that could be made public. This decision quotes portions of the service contract that are public.

⁵ Annex B is the only annex attached to the contract.

(*Id.* ¶ 6.2.) “This Contract is subject to the Terms and Conditions of Hapag-Lloyd AG’s Boiler Plate: E.T. PUBLICATION 014, Rule 121 AND SUB-RULES.” (*Id.* ¶ 10.) The contract incorporates specific Hapag-Lloyd tariffs of general applicability, including rules and regulations, ocean rates and surcharge tariffs, and inland tariffs. (*Id.* ¶ 11.) “All other extra charges published in the governing tariff(s) apply at the time of shipment, such as the Peak Season Charge.” (Annex B, General Rate Notes, Note 1.)

Except as otherwise specified in this Article, and subject to Term 8 of Appendix A hereto, the rates charged for the carriage of commodities under this Contract shall be those set forth in Term 6 of Appendix A hereto. All rates and charges for transportation under this Contract shall be for the account of the Shipper. The Shipper shall be named as the ‘Shipper’ or ‘Consignee’ on all bills of lading covering transportation of cargo shipped under this Contract.

If, at any time during the life of this contract, the Carrier implements a General Rate Increase (GRI) or a Revenue Recovery Increase (RRI) in its governing tariffs, the rates in this Contract shall be increased on the same date by the amount indicated in the governing tariffs. Shipper’s consent to such filings shall be implied and given hereby and such consent does not need to be signed by Shipper separately. Any increases in assessorial charges⁶ that are implemented by the Carrier in its Governing Tariff during the life of this contract shall also be applicable to the rates in this contract on the same date as the corresponding increase in the Tariff. Shipper’s consent to such filings shall be implied and given hereby and such consent does not need to be signed by Shipper separately.

(Hapag-Lloyd AG Boiler Plate, E.T. Publication 014, Rule 121 (Hapag-Lloyd Boiler Plate) ¶ 6.)

⁶ In its regulations governing Carrier Automated Tariffs, the Commission defines “*assessorial* charge” as “the amount that is added to the basic ocean freight rate.” 46 C.F.R. § 520.2. In its regulations governing Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984, the Commission defines “rate” as “both the basic price paid by a shipper to an ocean common carrier for a specified level of transportation service for a stated quantity of a particular commodity, from origin to destination, on or after a stated effective date or within a defined time frame, and also any *accessorial* charges or allowances that increase or decrease the total transportation cost to the shipper.” 46 C.F.R. § 535.104(z). *See also* Commission Glossary at <http://www.fmc.gov/questions/glossary.aspx> (last visited Apr. 14, 2014) (“*Accessorial* charges: Charges in addition to the base tariff rate or base contract rate, e.g., bunkers, container, currency, destination/delivery.”) (emphasis added). In its regulations in effect before the Ocean Shipping Reform Act of 1998, Pub. L. 105-258, 112 Stat. 1902 (1998) (OSRA), Commission regulations equated “accessorial” and “assessorial.” *See* 46 C.F.R. §§ 514.2 and 514.10(d) (1998). For the purposes of this decision, I assume that “accessorial” and “assessorial” are synonymous.

Recognizing that damages resulting from a breach of the MQC by the shipper or of the service commitment by the carrier would be difficult to calculate, the contract contained a liquidated damages clause. Hapag-Lloyd's Boiler Plate required Global Link to pay \$250 per TEU for Global Link's failure to tender the MQC. (*Id.* ¶ 11.1.) If Hapag-Lloyd failed to fulfill its service commitment, Global Link could reduce the MQC by the quantity of cargo tendered but not carried. If the MGC were reduced by more than 10%, Global Link would receive a discount of \$50/\$100 per TEU/FEU for each unit the MGC was reduced in excess of 10%. If Global Link received a discount on more than 10% of the MQC, Global Link could terminate the contract. (*Id.* ¶ 11.2.)

The 2012 contract contained rates for several named accounts. A "named account" rate is one in which the NVOCC's customer is specifically identified in the contract and the carrier's rates are limited to services provided by the NVOCC for the named NVOCC customer. One of the purposes of named account rates is to give a carrier such as Hapag-Lloyd transparency into the NVOCC's customer base, thus giving the carrier the opportunity to manage the NVOCC market through adjustments to rates in NVOCC service contracts. Global Link claims that with this knowledge and pricing power, a carrier can substantially affect an NVOCC's ability to increase volumes for named account customers and, if the carrier has two or more NVOCC customers with the same named accounts, to prefer one NVOCC customer over the other through manipulation of Named Account rates, by giving a favored NVOCC lower rates for that named account while refusing to provide equivalent rates for the disfavored NVOCC.

Hapag-Lloyd's Boiler Plate included an arbitration provision: "[A]ny and all disputes arising out of or in connection with the Contract, including any failure by Shipper to pay or by Carrier to perform as required by the Contract, shall be resolved by arbitration." (*Id.* ¶ 15.)

B. Hapag-Lloyd Actions Alleged to Violate the Act.

As characterized by Global Link, although the 2012 Service Contract specified certain rates for transportation between specific points, the contract expressly afforded Hapag-Lloyd "the option to increase those rates at its discretion. Thus, if at any time during the life of the Contract, Hapag implemented a [GRI] or [an RRI] in its tariff, Global Link's rates were automatically increased by that amount. Such increases did not require the consent of Global Link." (Complaint ¶ IV.G.) The contract allowed Hapag-Lloyd to increase accessorial charges by publishing them in its tariff during the life of the contract. These charges automatically went into effect the day they were published. These increases did not require Global Link's consent. (Complaint ¶ IV.H.)

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

Shortly thereafter, Global Link informed Hapag-Lloyd that another carrier was offering rates \$450 lower than the rates Hapag-Lloyd was offering and requested that Hapag-Lloyd lower its rates to promote more business. Hapag-Lloyd refused to lower its rates. (Complaint ¶¶ IV.M-P.)

Global Link “expressed exasperation,” noting that Hapag-Lloyd used to be Global Link’s best St. Louis carrier but now Global Link had other carriers that were cheaper by several hundred dollars and that it “[d]oesn’t make sense.” (Complaint ¶ IV.Q.) In June 2012, Global Link informed Hapag-Lloyd that because its rates were too high, Global Link had lost DMI as a customer, which meant that Hapag-Lloyd had lost this business as well. Global Link told Hapag-Lloyd that it needed Hapag-Lloyd’s assistance in the form of a rate reduction in order to regain DMI as a customer. (Complaint ¶ IV.R.) Hapag-Lloyd’s representative stated that Hapag-Lloyd could not lower its rates: “I am sorry we are not able to get closer to what you need to keep this biz [business].” (Complaint ¶ IV.S.) Global Link claims that on several occasions during the term of the 2012 contract, it told Hapag-Lloyd of specific rates needed to maintain customers or attract new customers and Hapag-Lloyd refused to provide those rates. (Complaint ¶ IV.T.)

The Complaint alleges that Hapag-Lloyd was unable to administer the 2012 contract properly. Hapag-Lloyd repeatedly failed to prepare and submit amendments to the contract in a timely manner, and when amendments ultimately were submitted, they frequently contained errors. Hapag-Lloyd’s inability to administer the contract properly was evident from the time the contract was first executed. In May 2012, Global Link experienced service issues in regard to the PAX service that should have been available to Global Link out of Yantian, China. When the service from the port was changed, Hapag-Lloyd’s internal confusion in regard to the replacement service significantly impaired Global Link’s ability to book its cargo on Hapag-Lloyd vessels out of this port. (Complaint ¶¶ IV.U-V.)

In July 2012, Hapag-Lloyd wrote to Global Link stating that it wanted to reduce the allocation under the 2012 contract from 48 TEUs weekly to 13 TEUs weekly. Hapag-Lloyd also wrote that “[i]f the situation changes and our rates become more competitive, then we will readdress.” (Complaint ¶ IV.W.) In September 2012, Hapag-Lloyd inquired why Global Link was not shipping more cargo with Hapag-Lloyd. Global Link informed Hapag-Lloyd that the reduction in volume was due to Hapag-Lloyd not providing competitive rates for the majority of the contract season. Global Link also stated that due to administrative errors and untimely corrections from Hapag-Lloyd’s contract processing center, Global Link had been unable to book with Hapag-Lloyd at times due to service contract mistakes and delays, which made it physically impossible to book with Hapag-Lloyd. (Complaint ¶ IV.X.)

In October 2012, Hapag-Lloyd implemented a Peak Season Surcharge (PSS) increase. Hapag-Lloyd was the only carrier that implemented a PSS increase in October. Other carriers were passing along rate reductions at the same time for shipments to the United States. Global Link informed Hapag-Lloyd that if it implemented the PSS increase, Global Link would not be able to book cargo at those rates. Hapag-Lloyd, nonetheless, implemented the increase. (Complaint ¶¶ IV.Y-Z.)

In November 2012, Hapag-Lloyd wrote to Global Link proposing new rates for shipments Global Link was handling on behalf of DMI Furniture in order to secure additional business. Global Link responded with confusion, noting that the “new” rates being offered were the rates already in effect for DMI furniture. In November 2012, Hapag-Lloyd wrote to Global Link lamenting the continued downward spiral in rates, and stating that if it did not stop, carriers would start going out of business. Hapag-Lloyd’s representative also indicated that she was checking internally to see about rate reductions by Hapag-Lloyd. No significant rate reductions went into effect. (Complaint ¶¶ IV.AA-CC.)

Throughout the remainder of calendar year 2012, Global Link continued to attempt to ship more of its customers’ goods with Hapag-Lloyd, but Hapag-Lloyd’s administrative errors and its high rates made these efforts extremely difficult. In January 2013, Global Link wrote to Hapag-Lloyd noting that there would need to be an MQC adjustment in the service contract. Hapag-Lloyd’s primary contact with Global Link wrote that she “would mark my calendar to address the MQC shortfall and position/adjustment toward the end of March? i.e, before I go out on maternity leave.” (Complaint ¶ IV.FF.)

Global Link contends that:

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

(Complaint ¶ IV.GG.) Hapag-Lloyd demanded arbitration. (*Id.* ¶ IV.HH.)

Global Link contends that Hapag-Lloyd has violated three sections of the Act:

- (1) “Hapag failed to establish, observe, and enforce just and reasonable regulations and practices relating to the receiving, handling, storing or delivering property in violation of 46 U.S.C. § 41102(c), by entering into a Service Contract with Global Link that does not comport with the Shipping Act’s definition of a service contract.” (Complaint ¶ V.II; *see* Complaint ¶¶ V.II-OO.)
- (2) Hapag-Lloyd unreasonably refused to deal or negotiate in violation of 46 U.S.C. § 41104(10) by declining to reduce the rates established by the 2012 Service Contract when ocean transportation rates dropped in the latter part of 2012 and 2013. (Complaint ¶¶ V.PP-QQ.)

- (3) Hapag-Lloyd resorted to unfair or unjustly discriminatory methods in violation of 46 U.S.C. § 41104(3) by quoting Global Link rates that could not move the cargo and then seeking to impose MQC penalties on Global Link when Global Link was unable to find customers willing to pay out of market rates. (Complaint ¶¶ V.RR-TT.)

Global Link contends that it suffered actual injury as a result of Hapag-Lloyd's violations.

III. STATUTORY FRAMEWORK.

Global Link filed its Complaint pursuant to section 11 of the Act.

A person may file with the Federal Maritime Commission a sworn complaint alleging a violation of this part, except section 41307(b)(1). If the complaint is filed within 3 years after the claim accrues, the complainant may seek reparations for an injury to the complainant caused by the violation.

46 U.S.C. § 41301(a). The Complaint alleges that Hapag-Lloyd is an ocean common carrier within the meaning of the Act. "The term 'ocean common carrier' means a vessel-operating common carrier." 46 U.S.C. § 40102(17). *See also* 46 C.F.R. § 520.2 ("*Ocean common carrier* means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . .").

The term "common carrier" – (A) means a person that – (i) holds itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation; (ii) assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and (iii) uses, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. § 40102(6). I take official notice of Commission records indicating that Hapag-Lloyd is registered with the Commission as a vessel-operating common carrier with Organization Number 005980. *See* Vessel Operating Common Carriers, <https://www2.fmc.gov/FMC1Users/scripts/ExtReports.asp?tariffClass=vocc> (last visited Apr. 14, 2014).

The term "shipper" means – (A) a cargo owner; (B) the person for whose account the ocean transportation of cargo is provided; (C) the person to whom delivery is to be made; (D) a shipper's association; or (E) a non-vessel-operating common carrier that accepts responsibility for payment of all charges applicable under the tariff or service contract.

46 U.S.C. § 40102(22). *See also* 46 C.F.R. § 530.3(r). I take official notice of Commission records indicating that Global Link is registered with the Commission as a non-vessel-operating

common carrier with License Number 018415. *See* Ocean Transportation Intermediaries – NVOCC List, <http://www2.fmc.gov/oti/NVOCC.aspx> (last visited Apr. 14, 2014). Global Link is a shipper within the meaning of the Act and as defined by the 2012 Service Contract.

The Act sets forth requirements and prohibitions on common carriers. The Complaint alleges that Hapag-Lloyd violated three sections of the Act.

1. “A common carrier . . . may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.” 46 U.S.C. § 41102(c).
- 2 & 3. “A common carrier, either alone or in conjunction with any other person, directly or indirectly, 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 has filed a complaint, or for any other reason; . . . (10) unreasonably refuse to deal or negotiate.” 46 U.S.C. § 41104.

The Complaint alleges that Hapag-Lloyd and Global Link have entered into six service contracts – one each year from 2007 through 2012.

The term “service contract” means a written contract, other than a bill of lading or receipt, between one or more shippers, on the one hand, and an individual ocean common carrier or an agreement between or among ocean common carriers, on the other, in which – (A) the shipper or shippers commit to providing a certain volume or portion of cargo over a fixed time period; and (B) the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features.

46 U.S.C. § 40102(20). The Act sets forth requirements for service contracts.

(a) *In general.* – An individual ocean common carrier or an agreement between or among ocean common carriers may enter into a service contract with one or more shippers subject to the requirements of this part.

(b) *Filing requirements.* – (1) In general. Each service contract entered into under this section by an individual ocean common carrier or an agreement shall be filed confidentially with the . . . Commission. . . .

(c) *Essential terms.* – Each service contract shall include (1) the origin and destination port ranges; (2) the origin and destination geographic areas in the case of through intermodal movements; (3) the commodities involved; (4) the minimum

volume or portion; (5) the line-haul rate; (6) the duration; (7) service commitments; and (8) the liquidated damages for nonperformance, if any.

(d) *Publication of certain terms.* – When a service contract is filed confidentially with the Commission, a concise statement of the essential terms specified in paragraphs (1), (3), (4), and (6) of subsection (c) shall be published and made available to the general public in tariff format.

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(f) *Remedy for breach.* – Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court. . . .

46 U.S.C. § 40502. The Commission’s regulation implementing section 40502 states:

(b) Every service contract filed with the Commission shall include the complete terms of the service contract including, but not limited to, the following:

(1) The origin port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements;

(2) The destination port ranges in the case of port-to-port movements and geographic areas in the case of through intermodal movements;

(3) The commodity or commodities involved;

(4) The minimum volume or portion;

(5) The service commitments;

(6) The line-haul rate;

(7) Liquidated damages for non-performance (if any);

(8) Duration, including the (i) Effective date; and (ii) Expiration date;

(9) The legal names and business addresses of the contract parties; the legal names of affiliates entitled to access the contract; the names, titles and addresses of the representatives signing the contract for the parties; and the date upon which the service contract was signed, except that in the case of a contract entered under the authority of an agreement or by a shippers’ association, individual members need not be named unless the contract includes or excludes specific members. . . .

(10) A certification of shipper status;

(11) A description of the shipment records which will be maintained to support the service contract and the address, telephone number, and title of the person who will respond to a request by making shipment records available to the Commission for inspection under § 530.15 of this part; and

(12) All other provisions of the contract.

(c) *Certainty of terms.* The terms described in paragraph (b) of this section may not:

(1) Be uncertain, vague or ambiguous; or

(2) Make reference to terms not explicitly contained in the service contract itself unless those terms are readily available to the parties and the Commission.

46 C.F.R. § 530.8.

The violations alleged in the Complaint concern the service contract the parties executed in 2012. The Complaint alleges that Global Link was injured by Hapag-Lloyd's alleged violations of the Act and seeks a reparation award for its actual injuries. The Act defines actual injury.

(a) *Definition.* – In this section, the term “actual injury” includes the loss of interest at commercial rates compounded from the date of injury.

(b) *Basic amount.* – If the complaint was filed within the period specified in section 41301(a) of this title, the . . . Commission shall direct the payment of reparations to the complainant for actual injury caused by a violation of this part, plus reasonable attorney fees.

46 U.S.C. § 41305.

IV. COMMISSION RULES OF PRACTICE AND PROCEDURE PERMIT CONSIDERATION OF A MOTION TO DISMISS.

Hapag-Lloyd moves to dismiss the Complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). 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. As stated by the Commission:

Rule 12 of the Commission's Rules of Practice and Procedure (the Rules) states that the Federal Rules of Civil Procedure will be followed in instances that are not covered by the Commission's Rules, to the extent that application of the Federal

Rules is consistent with sound administrative practice. 46 C.F.R. § 502.12. As the Commission's Rules do not address motions to dismiss for lack of subject matter jurisdiction or failure to state a claim, Federal Rules 12(b)(1) and 12(b)(6) apply in this case. *See, e.g., The Lake Charles Harbor and Terminal District v. West Cameron Port, Harbor and Terminal District*, 2007 WL 2468431 (F.M.C.).

Rule 12(b)(1) permits a party to raise by motion lack of subject matter jurisdiction, and Rule 12(b)(6) permits a party to raise by motion failure to state a claim. With regard to motions to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1), such motions may assert either a factual attack or a facial attack to jurisdiction. . . . A factual attack challenges “the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered.” . . . In a facial attack, on the other hand, the court examines whether the complaint has sufficiently alleged subject matter jurisdiction. As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged . . . in the complaint as true.

Sinaltrainal v. Coca-Cola Company, 578 F.3d 1252, 1260 (11th Cir. 2009).

To survive motions to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim “has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, [556 U.S. 662, 677] (2009). The complaint must be sufficient to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Civ.* § 1215 (3d ed. 2010) (“[T]he test of a complaint’s sufficiency simply is whether the document’s allegations are detailed and informative enough to enable the defendant to respond.”).

Mitsui O.S.K. Lines Ltd. v. Global Link Logistics, Inc., FMC No. 09-01, Order at 19-20 (FMC Aug. 1, 2011) (Order Denying Appeal, etc.).

[A] plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, *see Papasan v. Allain*, 478 U.S. 265, 286 . . . (1986)

(on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”).

Bell Atlantic Corp. v. Twombly, 550 U.S. at 555.

The Act provides that unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court. 46 U.S.C. § 40502(f). In the 2012 Service Contract, Global Link and Hapag-Lloyd agreed that disputes about the contract would be handled through arbitration. (Hapag Lloyd Boiler Plate ¶ 15.) Section 40502(f) does not deprive the Commission of jurisdiction over all disputes about service contracts, however.

[T]he . . . appropriate test is whether a complainant’s allegations are inherently a breach of contract claim, or whether they also involve elements peculiar to the Shipping Act. We find that as a general matter, allegations essentially comprising contract law claims should be dismissed unless the party alleging the violation successfully rebuts the presumption that the claim is no more than a simple contract breach claim. In contrast, 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 appropriately before the agency.

Cargo One, Inc. v. COSCO Container Lines Co., Ltd., 28 S.R.R. 1635, 1645 (FMC 2000) (footnote omitted).

Global Link’s Complaint is based on the 2012 Service Contract between Global Link and Hapag. Because of this and the many references to the contract in the Complaint, *see* Verified Complaint ¶¶ IV.G-L, the contract is an integral part of the Complaint. Global Link did not attach a copy of the contract to the Complaint, however. Therefore, the parties were asked to provide a copy. *Global Link Logistics, Inc. v. Hapag-Lloyd AG*, FMC No. 13-07 (ALJ Mar. 6, 2014) (Notice to Parties Regarding 2012 Service Contract). On March 12, 2014, Hapag-Lloyd filed a response to the request attaching a copy of the contract with a request that “the Commission protect the service contract from disclosure to the full extent allowed by law. . . .” (Response to Notice to Parties Regarding 2012 Service Contract). *See* n.4, *supra*.

This proceeding is currently before me on Hapag-Lloyd’s motion to dismiss under Federal Rule 12(b)(6). Federal Rule 12(d) provides:

If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

Fed. R. Civ. P. 12(d). Although Global Link did not attach the 2012 Service Contract to the Complaint, Rule 12(d) does not require conversion of this motion to dismiss to a motion for summary judgment in order to consider the contract.

Under the “incorporation by reference” doctrine in this Circuit, “a court may look beyond the pleadings without converting the Rule 12(b)(6) motion into one for summary judgment.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). Specifically, courts may take into account “documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff’s] pleading.” [*Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005)] (alteration in original) (internal citation and quotation marks omitted). A court “may treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” [*United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)].

Davis v. HSBC Bank, 691 F.3d 1152, 1160 (9th Cir. 2012). See also *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 196 (2d Cir. 2005) (“We are not limited solely to the allegations in the complaint, however. Where a plaintiff has ‘relied on the terms and effect of a document in drafting the complaint,’ and that document is thus ‘integral to the complaint,’ we may consider its contents even if it is not formally incorporated by reference. Insofar as the complaint relies on the terms of Cablevision’s customer agreement, therefore, we need not accept its description of those terms, but may look to the agreement itself.”) (citation omitted); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (“[W]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a [document] upon which it solely relies and which is integral to the complaint, the defendant may produce the [document] when attacking the complaint for its failure to state a claim, because plaintiff should not so easily be allowed to escape the consequences of its own failure.”), *cert. denied*, 503 U.S. 960 (1992).

Global Link “relied on the terms and effect of [the 2012 Service Contract] in drafting the complaint” (see Complaint ¶¶ IV.G-L) and the contract is integral to Global Link’s Complaint. Therefore, the contract may be taken into account without requiring conversion of the motion to dismiss into a motion for summary judgment.

Global Link contends that the motion to dismiss should not be granted because the reasonableness or unreasonableness of Hapag-Lloyd’s actions can only be determined after extensive discovery. (Global Link Opp. at 5-6; 21-22.) The issue of reasonableness does not arise in this proceeding, however. The facts alleged in the Complaint demonstrate that Hapag-Lloyd not only negotiated with Global Link, but entered into a service contract with it. The Act does not require a common carrier to *renegotiate* the terms of the contract when a shipper claims dissatisfaction with the terms. The Act permits a common carrier to charge different rates to similarly situated shippers in its service contracts and to include incorporate terms from its general tariff into its service contract. When the shipper has agreed to these terms, whether the carrier acting reasonably when

it incorporated the terms in the contract is not at issue. Therefore, no discovery is needed into Hapag-Lloyd's reasons.

V. THE COMMISSION HAS JURISDICTION OVER GLOBAL LINK'S COMPLAINT.

Hapag-Lloyd did not move to dismiss the Complaint for lack of either subject matter or personal jurisdiction. Nevertheless, a significant portion of Global Link's opposition to the motion addresses jurisdictional issues. (See Global Link Opposition at 2-3, 6-14.) Therefore, a brief discussion of the Commission's jurisdiction over this proceeding is warranted.

The Complaint alleges that while operating as a common carrier within the meaning of the Act, Hapag-Lloyd violated three sections of the Act that require or prohibit certain activities by a common carrier. Hapag-Lloyd is registered with the Commission as an ocean common carrier. The allegations pertain to the 2012 Service Contract between Global Link and Hapag-Lloyd. The contract identifies Global Link as the "shipper party" and Hapag-Lloyd as the "carrier party." (Appendix A Term 9(B).) The contract governs the parties' relationship for transportation of cargo by water between ports or points in Asia and ports or points in the United States (2012 Service Contract Annex B), transportation for which Hapag-Lloyd would operate as a common carrier and Global Link a shipper within the meaning of the Act. Some of the alleged violations alleged in the Complaint "involve elements peculiar to the Shipping Act." *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. at 1645. Therefore, the Commission has jurisdiction over Hapag-Lloyd and the Complaint alleging that Hapag-Lloyd, a common carrier, violated sections 41104(10), 41104(3), and 41102(c) of the Shipping Act.

VI. THE COMPLAINT FAILS TO STATE A CLAIM THAT HAPAG-LLOYD UNREASONABLY REFUSED TO DEAL OR NEGOTIATE WITH GLOBAL LINK IN VIOLATION OF SECTION 41104(10).

Global Link contends that Hapag-Lloyd violated section 41104(10), which prohibits a common carrier from unreasonably refusing to deal or negotiate with a shipper. The Complaint alleges the following facts related to this claim.

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

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

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

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

Q. Global Link expressed exasperation in this regard, noting that Hapag-Lloyd used to be Global Link's best St. Louis carrier but now Global Link had other carriers that were several hundred dollars cheaper and that it "[d]oesn't make sense."

R. In June of 2012, Global Link informed Hapag-Lloyd that, because its rates were too high, Global Link had lost DMI as a customer, which meant that Hapag-Lloyd had lost this business as well, unless Hapag-Lloyd was soliciting DMI for its own account or receiving DMI shipments from another NVOCC customer of Hapag-Lloyd. It informed Hapag-Lloyd that it needed Hapag-Lloyd's assistance in the form of a rate reduction in order to regain DMI as a customer.

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

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

(Verified Complaint Part IV.) Global Link contends that Hapag-Lloyd's acts violate section 41104(10).

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

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

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

(Verified Complaint Part V.)

A. The Parties' Arguments.

Hapag-Lloyd moves to dismiss the section 41104(10) claim, arguing that it "fails to allege facts that support its claim . . . for refusal to deal, and fails to address the Commission's long-established elements of a violation under this section." (Motion to Dismiss at 5.) Hapag-Lloyd argues:

Global Link . . . does not allege any facts that support this legal conclusion. To the contrary, Global Link acknowledges that the parties had a "course of dealing" for "many years" during which they negotiated and performed under "various Service Contracts," shipping thousands of TEUs of cargo. Compl. ¶¶ A-F, PP. Furthermore, Global Link acknowledges that the parties exchanged "repeated emails" in which Global Link "request[ed] specific rates" and to which "Hapag-Lloyd time and again responded." Compl. ¶ QQ. Therefore, the factual allegations in the Complaint effectively concede that Hapag-Lloyd did not refuse to deal or negotiate with Global Link.

(*Id.* at 6.)

Hapag-Lloyd argues that even if the alleged facts sufficiently plead a refusal to deal, "Global Link has alleged no facts that establish an *unreasonable* refusal to deal or negotiate." (*Id.* at 7 (emphasis added).)

At a minimum, therefore, to state a claim under Section 41104(10), a party must allege facts that, if proven true, would establish a refusal to deal that was made without "good faith consideration" and "unrelated to legitimate transportation considerations." The Global Link Complaint, however, fails utterly to satisfy this pleading requirement. Although the Complaint refers to the parties' lengthy course of dealing and numerous emails on the subject of Global Link's demand for lower rates, the Complaint contains no allegations to the effect that Hapag-Lloyd failed to give its demands good faith consideration. Nor does the Complaint allege that

Hapag-Lloyd rejected Global Link's demands for reasons that were unrelated to legitimate transportation considerations. While the parties clearly entered into a contract with pricing provisions applicable to the whole term of the contract, the Complaint contains no factual allegations that suggest Hapag-Lloyd acted unreasonably or otherwise outside of its legitimate business discretion when it decided to maintain those terms, perform in accordance with the contract, and expect its counterparty to do likewise.

(*Id.* at 8.)

Global Link argues that Hapag-Lloyd "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" (Global Link Opp. at 20) and that "the fact that Hapag-Lloyd negotiated on prior contracts does not excuse its failure to do so in regard to the Service Contract at issue." (*Id.*) The fact that Hapag-Lloyd responded to and rejected Global Link's requests does not warrant an inference that Hapag-Lloyd negotiated as required by the Act, particularly "in the context of a motion to dismiss where all reasonable inferences are drawn in favor of the Complainant." (*Id.* at 21.) Global Link contends that the fact that refusals to deal or negotiate are fact-driven inquiries means that extensive discovery must be permitted into those facts. (*Id.* at 21-22.)

Quite simply, here Global Link alleges that despite continued requests to Hapag-Lloyd to negotiate reasonable rates and terms to its Service Contract, Hapag-Lloyd 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 rates to Hapag-Lloyd. Because such allegations assert a claim under [section 41104(10)], Hapag-Lloyd's Motion to Dismiss must be denied.

(*Id.* at 22-23.)

In its reply, Hapag-Lloyd argues:

Complainant concedes that Hapag-Lloyd was actively dealing with Global Link (under a Service Contract to which Global Link agreed) during the relevant period. As a matter of law, therefore, Complainant has not stated a claim for refusal to deal under Section 41104(10). . . . Complainant, . . . erroneously equates a refusal to "negotiate in regard to the rates [Hapag-Lloyd] was charging under its Service Contract" with a *per se* refusal to deal. Even if we assume Complainant's allegation is true "that Hapag-Lloyd time and time again refused to negotiate rates" under the Service Contract then in effect, the Commission has made clear that a refusal to provide "specific terms" in a contract does not constitute a "refusal to deal."

(Hapag-Lloyd Reply at 4 (citations to Complaint omitted).) Hapag-Lloyd argues that “Global Link has failed to identify any facts in the Complaint that, if true, would satisfy the second element of Section 41104(10) – that the purported refusal to deal was ‘for reasons having no relation to legitimate transportation-related factors.’” (*Id.* at 4-5.)

B. Controlling substantive law.

To prove a violation of section 41104(10), first, a complainant must establish that the respondent is a common carrier within the meaning of the Act. Second, a complainant must establish that the common carrier unreasonably refused to deal or negotiate with the complainant. “This requires a two-part inquiry: whether [the common carrier] refused to deal or negotiate, and, if so, whether its refusal was unreasonable.” *Canaveral Port Auth. – Possible Violations of Section 10(b)(10), Unreasonable Refusal to Deal or Negotiate*, 29 S.R.R. 1436, 1448 (FMC 2003).

A refusal to deal or negotiate is not on its own a violation of the Shipping Act. We must also determine whether the refusal was unreasonable. *Cf., Petchem, Inc. v. Federal Maritime Comm’n*, 853 F.2d [958, 963] (D.C. Cir. 1988) (“The Shipping Act clearly contemplates the existence of permissible preferences or prejudices.”).

Id. “Refusals to deal or negotiate are factually driven and determined on a case-by-case basis.” *Id.* at 1449.

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

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

C. Discussion.

1. The Complaint does not contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.

According to the facts alleged in the Complaint, taken as true for this motion, every year from 2007 to 2012 Hapag-Lloyd engaged in negotiations with Global Link and every year they reached a deal and entered into a service contract pursuant to which Hapag-Lloyd would transport cargo for Global Link. (Complaint ¶¶ IV.A-B.) As a result of their negotiations in 2012, Global Link and Hapag-Lloyd agreed to a service contract for May 2012 through April 2013. (Complaint ¶ IV.G.)

The Complaint does not allege that Hapag-Lloyd refused to deal or negotiate with Global Link in violation of section 41104(10) during the period from 2007 through the execution of the

2012 Service Contract. To the extent Global Link intends to claim that Hapag-Lloyd refused to deal or negotiate in the period, that claim is contradicted by the facts alleged in the Complaint. As demonstrated by those allegations and the contracts themselves, Hapag-Lloyd did negotiate and deal with Global Link, and entered into service contracts every year.

Global Link’s allegations and claims of violations of the Act focus on the period after the 2012 Service Contract went into effect. Global Link alleges that market shipping rates dropped significantly. (*Id.* ¶ IV.M.) Global Link learned that another ocean common carrier was offering rates \$450 lower than Global Link’s 2012 contract with Hapag-Lloyd. (*Id.* ¶ IV.O.)⁷ Global Link conveyed this information to Hapag-Lloyd with a request that Hapag-Lloyd reduce the contract rates, but Hapag-Lloyd would not grant any “significant rate reductions.” (*Id.* ¶ CC.)⁸ The Complaint alleges that “despite repeated emails from Global Link describing market conditions in detail and requesting specific rates from Hapag for use by both named account customers and other customers, Hapag time and again responded that it would not provide the rates Global Link needed to move the traffic.” (Complaint ¶ V.QQ.) It is clear that at some point after the 2012 Service Contract went into effect, Global Link was no longer satisfied with the bargain the parties had struck during their 2012 negotiations – the rates established by the contract.

Focusing on Global Link’s claim that Hapag-Lloyd unreasonably refused to deal or negotiate on Global Link’s request to reduce the 2012 Service Contract rates, the question in this proceeding becomes: When an ocean common carrier has negotiated with a shipper and entered into a service contract, does that carrier unreasonably refuse to deal or negotiate with the shipper in violation of section 41104(10) if the carrier will not *renegotiate* the terms of the exiting service contract when the shipper so demands? In other words, when a shipper states it is no longer satisfied with the terms of an existing contract – in this case, by claiming that the rates set forth in the service contract are too high because market shipping rates declined after the parties signed the contract and the shipper wants to renegotiate for lower rates – does section 41104(10) require the carrier to abandon its rights established by the contract and agree to lower rates? I conclude that the answer is no.

A few examples demonstrate the problem with Global Link’s argument that section 41104(10) of the Act requires a carrier to renegotiate an existing service contract whenever a shipper demands. First, a shipper and carrier could invest significant time negotiating a service contract, each giving up desired terms on some provisions in return for better terms on other provisions. The

⁷ It is not clear from this allegation whether Global Link alleges the lower rates were on the Songkhla, Thailand to St. Louis, lane for which Global Link also alleges Hapag-Lloyd’s rates were “low” (Complaint ¶ IV.N) or some other shipping lane. Whichever meaning Global Link intended, resolution of the motion to dismiss is the same.

⁸ It is not clear from this allegation whether Global Link alleges that Hapag-Lloyd was not offering *any* rate reductions or Hapag-Lloyd was offering rate reductions, but the reductions were not *significant*. Whichever meaning Global Link intended, resolution of the motion to dismiss is the same.

day after the agreement goes into effect, invoking the threat of a Commission complaint alleging a section 41104(10) violation, the shipper could demand additional negotiations on the provisions on which it conceded to induce the carrier to concede on other terms without a concurrent right for the carrier to renegotiate on the terms on which it conceded. Second, without engaging in any negotiations at all, a shipper could accept a service contract as first proposed by the carrier, guaranteeing the carrier's commitment to transport the shipper's goods. Then, once the contract goes into effect, the shipper could demand negotiations on any and all provisions it believes to be disadvantageous. Third, in a case such as this one, a shipper could demand renegotiation of rates if rates drop, but the Act does not impose a corresponding requirement on a shipper to renegotiate if the rates then rise back to their original level. I conclude that section 41104(10) does not require a common carrier to renegotiate existing rates during the life of a service contract.

Even if Global Link is correct and section 41104(10) requires a carrier to renegotiate provisions in an existing service contract, the facts alleged in the Complaint show Hapag-Lloyd did negotiate. The Complaint alleges that "despite repeated emails from Global Link describing market conditions in detail and requesting specific rates from Hapag for use by both named account customers and other customers, Hapag time and again responded that it would not provide the rates Global Link [claims it] needed to move the traffic." (Complaint ¶ V.QQ.) This allegation describes a course of negotiation. Global Link is dissatisfied with the results of its effort to renegotiate existing rates established by the contract, but "[t]he Act does not guarantee the right to enter into a contract, much less a contract with any specific terms All that is required is that common carriers . . . refrain from 'shutting out' any person for reasons having no relation to legitimate transportation-related factors." *New Orleans Stevedoring Co. v. Bd. of Commissioners of the Port of New Orleans*, 29 S.R.R. at 351. Section 41104(10) does not guarantee Global Link a right to lower rates when it believes it needs lower rates to move the traffic. Hapag-Lloyd's refusal to lower the contract rates did not have the effect of "shutting out" Global Link. Global Link had full access to transportation by Hapag-Lloyd of the number of TEUs at the rates to which Global Link agreed in the 2012 Service Contract.

In its opposition to the motion to dismiss, Global Link states that Hapag-Lloyd "raised its rates when the rest of the marketplace was reducing theirs." (Global Link Opp. at 20.) This contention refers to the following allegations.

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

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

(Complaint Part IV.) The contract permits Hapag-Lloyd to impose a surcharge, however. (*See* 2012 Serv. K. E.T. ¶ 6.2(a) (cargoes moving under the contract are subject to all other tariff charges, including surcharges applicable in the governing tariffs applicable at the time of shipment); *id.* ¶ 11 (identifying applicable surcharge tariffs); Hapag Lloyd Boiler Plate ¶ 2 (defining governing tariffs to include surcharges); *id.* ¶ 6 (shipper consent to increases in surcharges). When a carrier exercises its right under a service contract to impose a surcharge through its tariff, it is not unreasonably refusing to deal or negotiate in violation of section 41104(10).

Global Link alleges that another common carrier offered rates \$450 lower than Global Link's 2012 Service Contract with Hapag-Lloyd. Global Link does not cite to any authority holding that a common carrier violates section 41104(10) when its service contract rates are higher than the rates of other common carriers.

I conclude that section 41104(10) does not require a common carrier to renegotiate terms of an existing service contract when demanded by its shipper. Accepting as true Global Link's allegation that Hapag-Lloyd refused to renegotiate the rates established by the 2012 Service Contract when market shipping rates declined, the Complaint fails to state a claim that Hapag-Lloyd violated section 41104(10). Accordingly, Global Link's claim that Hapag-Lloyd violated section 41104(10) is dismissed.

2. The Commission does not have jurisdiction over claims that Hapag-Lloyd violated the service contract.

Global Link claims that under the service contracts in prior years, the parties developed an "expectation" that Hapag-Lloyd would provide competitive rates and that "the course of dealing between the parties, and in the ocean transportation industry in general, was that rates provided for in the Service Contract would be adjusted upward and downward as necessary in order to remain competitive in the frequently fluctuating ocean transportation market." (Complaint ¶ V.PP.) "[T]he course of dealing between the parties, and the ocean transportation industry in general, was that Hapag-Lloyd would reduce its rates to reflect actual market conditions. Rather than do so, however Hapag-Lloyd instead chose to continue to seek out of market rates from Global Link and its customers." (*Id.* ¶ QQ.) Despite Global Link's request, Hapag-Lloyd did not provide rate relief. (*Id.*)

"Course of dealing" has a specific meaning:

"Course of dealing" denotes "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." U.C.C. § 1-205(1) (1994).¹⁹¹ Thus, course of dealing concerns some aspects of the portion

⁹ "The U.C.C. is often used as a source for the federal common law." *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 94 n.6 (D.C. Cir. 2001).

of a total course of conduct which might happen to have existed previous to or contemporaneous with initial contract formation (a course of conduct may conceivably extend from a time previous to initial contract formation to a time subsequent to contract formation). *Cf.* U.C.C. § 2-309 cmt. 5 (1994). “Course of dealing” and “course of performance” are defined with reference to the moment of initial contract formation, and thus they cannot overlap with each other but can overlap with the course of conduct. Of course, when there is a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein, courts must generally look to see if state law forbids having such terms “contradicted by evidence of any prior agreement or of a contemporaneous oral agreement.” *Cf.* U.C.C. § 2-202 (1994). The parol evidence rule concerns attempts to modify, alter, or supplement a written contract, using evidence of operative facts in existence before or during contract formation. With many types of contracts the course of dealing may be considered even when the parol evidence rule is found to apply. U.C.C. § 2-202(a) (1994).

Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co., 210 F.3d 672, 686 n.15 (6th Cir. 2000). Whether the parties’ course of dealing or that of the ocean transportation industry in general imposed a requirement on Hapag-Lloyd to reduce rates established by the 2012 Service Contract is a question for the trier of fact. *See IAP Worldwide Servs. v. UTi United States, Inc.*, Civ. No. 04-4218, 2006 U.S. Dist. LEXIS 4766, at *29 (E.D. Pa. Feb. 8, 2006) (“The parties’ course of conduct creates a jury question regarding whether the parties intended that the T&C was limited to the territory.”).

The questions of whether Global Link and Hapag-Lloyd, through their course of dealing in the earlier service contracts, intended “that rates provided for in the Service Contract would be adjusted upward and downward as necessary in order to remain competitive in the frequently fluctuating ocean transportation market” and, if so, whether Hapag-Lloyd breached its duty to reduce the rates, do not “involve elements peculiar to the Shipping Act,” *Cargo One, Inc. v. COSCO Container Lines Co., Ltd.*, 28 S.R.R. at 1645, but are inherently contract claims – questions of fact and interpretations of the service contract – that the Act and the 2012 Service Contract require to be answered by an arbitrator. 46 U.S.C. § 40502; Hapag-Lloyd Boiler Plate ¶ 15. The other issues raised in the Complaint (*i.e.*, “due to administrative errors and untimely corrections from Hapag’s contract processing center, Global Link had been unable to book with Hapag at times due to service contract mistakes and delays, which made it physically impossible to book with Hapag” (Complaint ¶ IV.X); alleged failure to provide adequate administrative support, alleged reduction under the service contract, alleged failure to address the MQC shortfall under the service contract, *see* Complaint ¶ IV.GG) are also inherently contract claims reserved for the arbitrator and are not within the Commission’s jurisdiction to decide.

VII. THE COMPLAINT DOES NOT STATE A CLAIM THAT HAPAG-LLOYD ENGAGED IN UNFAIR AND UNJUST DISCRIMINATORY METHODS IN VIOLATION OF SECTION 41104(3).

Section 41104(3) provides that a common carrier may not “retaliate against a shipper by refusing, or threatening to refuse, cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper has patronized another carrier, or has filed a complaint, or for any other reason.” 46 U.S.C. § 41104(3).

A. Global Link’s Complaint.

Although the Complaint alleges that “Hapag wrote to Global Link stating that it wanted to reduce the allocation under its Service Contract for Global Link from 48 TEUs weekly to 13 TEUs weekly” (Complaint ¶ IV.W), the Complaint does not allege that Hapag-Lloyd at any time refused or threatened to refuse cargo space accommodations when available, and in fact, alleges that “Hapag inquired why Global Link was not shipping more cargo with Hapag.” (Complaint ¶ IV.X.) The Complaint does not allege that Hapag-Lloyd took any action in retaliation for Global Link patronizing another carrier or for filing a complaint. Removing these elements leaves a prohibition that a common carrier may not “resort to other unfair or unjustly discriminatory methods . . . for any other reason.”

Global Link alleges that Hapag-Lloyd quoted rates to Global Link that were higher than rates provided to other shippers (Complaint ¶ IV.RR.)

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

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

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

(Complaint Part V.)

B. The Shipping Act Permits a Carrier to Charge Different Rates in Service Contracts with Similarly Situated Shippers.

The rates that Hapag-Lloyd quoted during the life of the 2012 Service Contract were the rates set forth in the contract. Global Link's alleges that Hapag-Lloyd discriminated in violation of section 41104(3) because the rates in Global Link's service contract were higher than the rates of other shippers, including NVOCCs that were competitors of Global Link. For the purposes of this decision, I assume that Global Link means Hapag-Lloyd's rates for Global Link were higher than *Hapag-Lloyd's* rates for other similarly situated shippers that are competitors of Global Link.

Prior to enactment of OSRA, the Shipping Act barred a carrier from charging different rates to similarly situated shippers.

[E]ach [service] contract entered into under this subsection shall be filed confidentially with the Commission, and at the same time, 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^[10] shall be available to all shippers similarly situated.

46 U.S.C. app. 1707(c) (1997) (emphasis added). OSRA deleted the clauses in italics and required public disclosure of only four essential terms, not including the line-haul rate:

(2) FILING REQUIREMENTS – . . . [E]ach contract entered into under this subsection by an individual ocean common carrier or an agreement shall be filed confidentially with the Commission. Each service contract shall include the following essential terms –

- (A) the origin and destination port ranges;
- (B) the origin and destination geographic areas in the case of through intermodal movements;
- (C) the commodity or commodities involved;
- (D) the minimum volume or portion;
- (E) the line-haul rate;
- (F) the duration;
- (G) service commitments; and
- (H) the liquidated damages for nonperformance, if any.

(3) PUBLICATION OF CERTAIN TERMS. – When a service contract is filed confidentially with the Commission, a concise statement of the essential terms described in paragraphs 2(A), (C), (D), and (F) shall be published and made available to the general public in tariff format.

¹⁰ “Essential terms” included the line-haul rate. 46 U.S.C. app. 1707(c)(4) (1997).

OSRA, Pub. L. 105-258, 112 Stat. 1902, 1906 (1998), codified at 46 U.S.C. app. § 1707(c)(2) (1999). *See also* 46 U.S.C. § 40502 (quoted above). In her remarks explaining some of the key provisions of OSRA, Senator Kay Bailey Hutchison, the lead OSRA sponsor, stated: “[OSRA] eliminates the requirement that similarly situated shippers be given the same service contract rates and service conditions. It eliminates the current restrictions on individual common carriers engaging in discriminatory, preferential, or advantageous treatment of shippers and ocean transportation intermediaries in service contracts” 144 Cong. Rec. S3306, S3319 (daily ed. Apr. 21, 1998) (statement of Sen. Hutchinson), available at <http://www.gpo.gov/fdsys/pkg/CREC-1998-04-21/html/CREC-1998-04-21-pt1-PgS3306.htm> (last visited Apr. 14, 2014). The language in the bill at the time Senator Hutchinson made this statement is identical to the language in OSRA as enacted. *Compare* 112 Stat. at 1906 *with* 144 Cong. Rec. at S3314.

When the Commission issued a notice of proposed rulemaking (NPR) to promulgate regulations implementing OSRA, it noted that “OSRA remove[d] the requirement that carriers . . . provide ‘me-too’ rights to similarly situated shippers on their service contracts.” *Service Contracts Subject to the Shipping Act of 1984*, 63 Fed. Reg. 71062, 71064 (Dec. 23, 1998) (Notice of Proposed Rulemaking) (*OSRA Regs. – NPR*). The Commission repeated this fact in subsequent preambles as it promulgated these regulations. *Service Contracts Subject to the Shipping Act of 1984; Interim final rule*, 64 Fed. Reg. 11186, 11196 (Mar. 8, 1999) (*OSRA Regs. – Interim Rule*) (“me-too rights have been eliminated by OSRA”); *Service Contracts Subject to the Shipping Act of 1984: Confirmation of interim final rule with changes*, 64 Fed. Reg. 23782, 23790 (May 4, 1999) (*OSRA Regs. – Conf. Interim Rule*) (“[I]t 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”). *See also The Impact of the Ocean Shipping Reform Act of 1998*, at 8 (FMC Sept. 2001), available at http://www.fmc.gov/assets/1/Page/OSRA_Study.pdf (last visited Apr. 14, 2014) (“Under OSRA, fewer service contract essential terms and no rates are made public. Shippers no longer have ‘me-too’ rights to obtain the same essential terms as similarly situated shippers”). Therefore, the Act does not prohibit common carriers from charging different rates to similarly situated shippers for transportation service pursuant to service contracts. Using the words of section 41104(3), when entering into service contracts, as a matter of law it is not unfair or unjustly discriminatory in violation of section 41104(3) for a common carrier to charge different shippers different rates for the same transportation services.¹¹

As noted above, Global Link claims that Hapag-Lloyd “raised its rates when the rest of the marketplace was reducing theirs” when it imposed a Peak Season Surcharge. (Global Link Opp. at 20; *see also* Complaint ¶¶ Y-Z.) To the extent Global Link contends this discriminated against Global Link in violation of section 41104(3), Hapag-Lloyd imposed the surcharge in a tariff applicable to all of its shippers, not just Global Link; therefore, it was not discriminating against any of its shippers. The fact that other carriers may not have imposed a Peak Season Surcharge does not

¹¹ In contrast, for service pursuant to a *tariff*, a common carrier may not “engage in any unfair or unjustly discriminatory practice in the matter of – (A) rates or charges.” 46 U.S.C. § 41104(4).

establish that Hapag-Lloyd discriminated against Global Link (or any of its shippers) by imposing the surcharge.

Accepting as true Global Link's allegation that Hapag-Lloyd quoted and charged higher rates in Global Link's 2012 Service Contract than it charged in its service contracts with other shippers and Hapag-Lloyd charged higher rates than other ocean common carriers, the Complaint fails to state a claim that Hapag-Lloyd violated section 41104(3). Accordingly, Global Link's claim that Hapag-Lloyd violated section 41104(3) is dismissed.

VIII. THE COMPLAINT DOES NOT STATE A CLAIM THAT HAPAG-LLOYD FAILED TO ESTABLISH AND ENFORCE JUST AND REASONABLE PRACTICES IN VIOLATION OF SECTION 41102(c).

The Act provides that a common carrier "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." 46 U.S.C. § 41102(c). The Commission recently discussed the elements of a section 41102(c) violation.

As the conjunctive "and" is used, all three elements that a common carrier . . . may not fail to "establish, observe, and enforce" just and reasonable regulations and practices must be performed by the common carrier It would be a violation of section 10(d)(1) if a common carrier . . . either (1) fails to "establish" just and reasonable regulations and practices, (2) fails to "observe" just and reasonable regulations and practice, or (3) fails to "enforce" just and reasonable regulations and practices.

We note that the relevant framework in analyzing the Commission's jurisprudence is common carriage. In a common carriage context, a common carrier . . . provides services to the general public. When analyzing whether a common carrier's . . . regulations and practices are just and reasonable, it is relevant to consider the usual course of conduct of the common carrier . . . and also the course of conduct of other common carriers . . . under similar circumstances. When examining, however, whether a common carrier . . . failed to "observe and enforce" the established just and reasonable regulations and practices, one must inevitably consider whether there has been a failure or failures to observe and enforce the established regulations and practices with respect to particular shippers or specific transactions. If a common carrier . . . failed to establish just and reasonable regulations and practices or the established regulations and practices are unjust or unreasonable, section 10(d)(1) analysis may end there, as failing to establish just and reasonable regulations and practices itself would constitute a violation of the section. If a common carrier . . . has in fact established just and reasonable regulations and practices, the relevant question then becomes whether it has observed and enforced the regulations and practices.

Yakov Kobel and Victor Berkovich v. Hapag-Lloyd A.G., Hapag-Lloyd America, Inc., Limco Logistics, Inc., and International TLC, Inc., FMC No. 10-06, Order at 17-18 (FMC July 12, 2013) (Order Vacating Initial Decision in Part and Remanding for Further Proceedings) (*Kobel v. Hapag-Lloyd*).

A. Rate Increases and Liquidated Damages Provisions Incorporated in the 2012 Service Contract Do Not Violate Section 41102(c).

1. Global Link's Complaint.

Global Link contends that Hapag-Lloyd violated section 41102(c) by the following acts.

II. Hapag failed to establish, observe, and enforce just and reasonable regulations and practices relating to the receiving, handling, storing or delivering property in violation of 46 U.S.C. [§ 41102(c)], by entering into a Service Contract with Global Link that does not comport with the Shipping Act's definition of a service contract. 46 U.S.C. § 40102(20) defines a service contract as one in which, *inter alia*, the carrier commits to a certain rate or rate schedule, and a defined service level. Here, the contract that Hapag drafted and executed does not satisfy either of those requirements. Although the Hapag Service Contract specified a minimum rate that the shipper must pay for specific trade routes, it gave Hapag unfettered discretion to charge higher rates and fees. Thus, pursuant to the express terms of its Service Contract, Hapag could at any time during the life of the Contract increase its rates simply by implementing a General Rate Increase (GRI) or a Revenue Recovery Increase (RRI) in its tariff. *See* Service Contract, Hapag Boiler Plate, Term 6. Such an increase automatically went into effect without the consent of the shipper. In addition, Hapag was given free rein to impose additional extra charges, such as Peak Season Surcharges, through the simple expedient of publishing them in its tariff. *See* Service Contract, General Rate Notes, Term 1. The Service Contract also allowed Hapag to increase assessorial charges simply by publishing them in its tariff during the life of the Contract. Hapag Boiler Plate, Term 6. Again, such charges automatically went into effect the day they are published. *Id.*^[12]

JJ. The net effect of these provisions is that while the shipper was bound to pay a certain fixed minimum amount for transportation services, the carrier was free to increase the rates in its sole and unfettered discretion. Such a provision does not comply with the Shipping Act's explicit definition of a service contract, which requires the carrier to commit to a certain rate or rate schedule. Such a one-sided

¹² The Act provides: "A new or initial rate or change in an existing rate [in a tariff] that results in an increased cost to a shipper may not become effective earlier than 30 days after publication. However, for good cause, the . . . Commission may allow the rate to become effective sooner." 46 U.S.C. § 40501(e).

contract in which one party is bound but the other party is not, does not constitute a just and reasonable practice, as is required pursuant to 46 U.S.C. § 41102(c).

KK. Hapag's Service Contract also does not satisfy the Shipping Act's requirement that a carrier commit to a defined service level. Although on its face, the Service Contract at issue imposed an obligation on Hapag to provide a defined service level, this obligation was not real. The illusory nature of the obligation is readily apparent by comparing the penalty resulting from non-performance by Global Link versus Hapag. If Global Link failed to satisfy 100% of its MQC, it was obligated immediately to pay Hapag in \$250 cash for each TEU that it fell short of the specified MQC. In contrast, if Hapag failed to provide a specified level of service, it suffered no consequences whatsoever unless the percentage it failed to provide exceeded 10%. Thus, by way of example, if Global Link fell short of the MQC by 10%, it had to pay Hapag \$62,500. In contrast, if Hapag failed to meet its service commitment by 10%, it suffered no penalty whatsoever. Further, even after the 10% threshold was exceeded, it is apparent that any penalty imposed upon Hapag is a sham. Again, an example graphically reveals the one-sided nature of the obligation. If Global Link met 50% of the MQC obligation, it was penalized in the amount of \$312,500. In contrast, if Hapag provided 50% of its purported commitment level, it merely had to provide a \$50,000 credit to Global Link for future service. Given that Hapag had the unfettered discretion to raise its rates and service charges at any time, it could easily recoup that amount simply by raising the rates it charged Global Link under the Service Contract. Again, enforcement of a contract containing such an illusory and one-sided obligation does not constitute a just and reasonable regulation and practice, as is required pursuant to 46 U.S.C. § 41102(c).

(Complaint Part V.) The Complaint does not identify any Global Link shipment on which Hapag-Lloyd failed "to observe and enforce the established regulations and practices with respect to . . . specific transactions." *Kobel v. Hapag-Lloyd*, Order at 18. (See Complaint Part IV; Complaint ¶¶ V.II-OO.)¹³ Global Link's claim of violation of section 41102(c) attacks the service contract itself – because the contract includes a provision that permits Hapag-Lloyd to increase the rates by amending its tariff and a provision with unequal liquidated damages provisions, Hapag-Lloyd has "established regulations and practices [that] are unjust or unreasonable." *Kobel v. Hapag-Lloyd*, Order at 18.

2. The parties' arguments.

Hapag-Lloyd argues that "the Commission's rules expressly authorize carriers to cross reference tariff terms in their service contracts" (Motion to Dismiss at 13) as long as they are not uncertain, vague, or ambiguous and, if not explicitly set forth in the contract itself, "are contained

¹³ The Complaint does not state whether Hapag-Lloyd transported *any* cargo for Global Link pursuant to the 2012 Service Contract.

in a publication widely available to the public and well known within the industry.” *Id.*, citing *OSRA Regs. – Interim Rule*, 64 Fed. Reg. at 11186 and 46 C.F.R. § 530.8(c).

Global Link argues that permitting a carrier to increase the rates set forth in a service contracts conflicts with the definition “service contract” set forth in section 40102.

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 46U.S.C. § 40102(20). Notably, Hapag cites no authority for such a dubious proposition because none exists.

(Global Link Opp. at 19.)

3. Discussion.

Global Link argues that because the contract permits Hapag-Lloyd to increase its rates by publishing increases in its tariff that are incorporated by the service contract (Hapag-Lloyd Boiler Plate ¶ 6), Hapag-Lloyd’s commitment to charge a certain rate is “illusory.” (Complaint ¶ 4.KK.) Therefore, Global Link argues, its service contract with Hapag-Lloyd does not meet the Act’s definition of service contract in section 40102(20) that requires service contracts to have a certain rate and a defined service schedule.

The Commission addressed cross-referencing of general tariff terms in service contracts when it promulgated new regulations implementing OSRA.

Presently, most filed service contracts contain re-occurring terms common to all of a carrier’s or conference’s service contracts (including matters such as free time and demurrage, bunkering rates, currency matters, etc.) the complete text of which would be very cumbersome for the carrier party to file with the service contract. Therefore, service contracts almost always make cross-reference to terms contained in that carrier’s or conference’s tariff or an essential terms publication.

The Commission recognizes that it was Congress’ intent, by lifting the requirement that tariffs be filed with the Commission, to allow parties to service contracts more freedom and flexibility in their commercial arrangements. The proposed rule, § 530.9(c)(2), thus permits filed service contracts to refer to terms outside the four corners of the filed service contract, but only if they are contained in the carrier’s or conference’s tariff publication.

OSRA Regs. – NPR, 63 Fed. Reg. at 71066. The Commission proposed a rule that would permit service contracts to reference terms in the carrier’s tariff: “The [essential] terms described in paragraph (b)(1) - (8) of this section may not: . . . (2) Make reference to terms not explicitly detailed in the service contract filing itself, unless those terms are contained in a tariff publication in accordance with the requirements of 46 CFR part 520.” *Id.* at 71070 (proposed section 530.9(c)).

The Commission received comments on the proposed rule that caused it to expand the universe of publications that a service contract could cross-reference.

The Commission, in an effort to make filing less burdensome for carriers, but while ensuring that it had the entire contents of, or access to, the service contract terms, proposed that carriers may “cross-reference” their own tariff publications or their conference tariff publications in their filed service contracts. This provision was intended to allow carriers to refer to rules of general applicability (free time and demurrage, bunkering rates, currency matters, etc.) for the “boilerplate” or terms which appear in all their contracts. Further, the Commission recognized that it was Congress’ intent, by lifting the requirement that tariffs be filed with the Commission, to allow parties to service contracts more freedom and flexibility in their commercial arrangements. For those reasons, the proposed rule, originally numbered Sec. 530.9(c)(2), was drafted to permit filed service contracts to refer to terms outside the four corners of the filed service contract, but only if they are contained in the carrier’s or conference’s tariff publication. . . .

[I]n response to comments that allowing cross-referencing only to published tariff matter would unduly stifle the parties’ contract terms, the Commission has decided to allow cross-reference to a “publication widely available to the public and well known within the industry.” Sec. 530.8(c)(2) [renumbered from section 530.9(c)(2)]. The Commission wishes to stress, however, that exact terms of the contract must be determinable and certain, in keeping with the requirements of the Act.

OSRA Regs. – Interim Rule, 64 Fed. Reg. at 11196. In the interim final rule, section 508.8(c) stated: “The terms described in paragraph (b) of this section may not: . . . (2) Make reference to terms not explicitly contained in the service contract filing itself, unless those terms are contained in a publication widely available to the public and well known within the industry.” *Id.* at 11209.

The Commission received additional comments before it published the confirmation of the interim rules.

[B]ecause 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.

The Commission therefore revises Sec. 530.8(c) to clarify its approach to cross-referencing, particularly references to “service contract register” filings.

OSRA Regs. – Conf. Interim Rule, 64 Fed. Reg. at 23788. In the confirmation, section 530.8(c) was revised to read:

The [essential] terms . . . may not: . . . (2) Make reference to terms not explicitly contained in the service contract itself unless: (i) Those terms are contained in a publication widely available to the public and well known within the industry; or (ii) Those terms are contained in a service contract register filing duly filed in the Commission’s dial-up filing system and are available to all parties to the service contract. Service contract register filings are subject to the same requirements of this part as service contracts and amendments.

Id. at 23793. Therefore, Commission regulations permit a service contract to cross-reference and incorporate terms set forth in the carrier’s general tariff. *See also* Commission’s Questions, Answers, and Helpful Information, <http://www.fmc.gov/questions/#397> (last visited Apr. 14, 2014) (“Q: May service contracts cross reference other material, specifically a published tariff? A: Service contracts may refer to any widely available published material which is well known in the industry. . . . Such cross-referencing may also include reference to the carrier party’s general rules tariff.”).

In *Kobel*, the Commission stated: “When analyzing whether a common carrier’s . . . regulations and practices are just and reasonable, it is relevant to consider the usual course of conduct of the common carrier . . . and also the course of conduct of other common carriers . . . under similar circumstances.” *Kobel v. Hapag-Lloyd*, Order at 17. The Commission’s regulations permit all common carriers to incorporate rates set in their general tariffs into their service contracts, thereby establishing a usual course of conduct for common carriers. When the Commission’s regulations permit a common carrier to include a provision in its service contracts, it is not unjust or unreasonable within the meaning of section 41102(c) to include that provision in the service contracts.

Global Link seems to claim that because the service contract permits Hapag-Lloyd to change the rate by amending its tariff, it has not committed to a “certain rate.”

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).

(Global Link Opp. at 16.) In effect, Global Link contends that "certain rate" in section 40102(2) means "unchangeable rate" – Hapag-Lloyd is locked into the rates stated in Annex B plus "Currency Adjustment Factors, Bunker/Fuel Surcharges, Arbitraries, Origin and Destination delivery charges, Charges/Taxes imposed by Government or other legal authorities including Port Authorities, add-ons and other additional charges" (2012 Serv. K. E.T.6.2(a)) set forth in its tariffs on the effective date of the contract. In other words, for transportation pursuant to a tariff (46 C.F.R. Part 520) a common carrier is permitted to account for increases in fuel costs, terminal services, canal tolls, costs incurred with newly-established security requirements, and other costs not under the control of the carrier by filing a new tariff. For transportation pursuant to a service contract (46 C.F.R. Part 530) a common carrier must absorb increases in these costs for the life of the contract. Global Link does not cite to any legislative history, Commission decision, or other authority that supports that contention.

When Hapag-Lloyd entered in the 2012 Service Contract, it committed to the "certain rate" that section 40102(2) requires. The total rate is the sum of two amounts from two sources clearly identified in the contract. The first source is the rate or schedule set forth in Annex B to the contract. (2012 Serv. K. E.T. ¶ 6.1.) The second source is "[a]ll other tariff charges . . . at such levels as are applicable to the governing tariff(s) applicable at the time of shipment." (2012 Serv. K. E.T. ¶ 6.2.) Global Link's Complaint fails to state a claim that Hapag-Lloyd violated section 41102(c) of the Act by including a provision in the Global Link 2012 Service Contract that incorporates tariffs that can be changed during the life of the contract.

It is unclear whether Global Link contends that because the rates established by the service contract are higher for Global Link than for other Hapag-Lloyd shippers, Hapag-Lloyd has violated section 41102(c) by establishing a regulation or practice that is unjust or unreasonable. As discussed above, the rates set forth in the Hapag-Lloyd tariffs that are incorporated in the 2012 Service Contract are permitted by section 41104(10). When the rates are permitted by section 41104(10), they cannot be unreasonable pursuant to 41102(c).

Commission regulations provide that "[t]he [service] contract may also specify provisions in the event of nonperformance on the part of any party." 46 C.F.R. § 502.3(q). Global Link contends that because the 2012 Service Contract imposes lower liquidated damages provisions on Hapag-Lloyd than Global Link, the 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)." (Global Link Opp. at 16.) Therefore, it argues, the liquidated damages provision is not just and reasonable pursuant to section 41104(c). Global Link does not cite any authority supporting this contention in opposition to the motion to dismiss.

The Act, 46 U.S.C. § 40502(c)(8), and Commission regulations, 46 C.F.R. §§ 530.3(q) and 530.8(b)(7), permit a carrier to incorporate liquidated damages provisions in its service contracts. Nothing in the Act prohibits a carrier and a shipper from agreeing to a service contract where the liquidated damages provisions are not balanced, and unbalanced liquidated damages provisions do not mean that the carrier's commitment to a defined service level is illusory. Global Link's Complaint fails to state a claim that the 2012 Service Contract violates section 41102(c) of the Act.

Accepting as true Global Link's allegation that Hapag-Lloyd included a provision in the 2012 Service Contract that incorporates its general tariff into the rates charged Global Link resulting in increased rates during the life of the contract, and accepting as true Global Link's allegation that Hapag-Lloyd included a provision in the 2012 Service Contract that incorporates unbalanced liquidated damages provisions, the Complaint fails to state a claim that Hapag-Lloyd violated section 41102(c). Accordingly, Global Link's claim that Hapag-Lloyd violated section 41102(c) is dismissed.

B. The Commission Does Not Have Jurisdiction over Claims That Hapag-Lloyd Violated the 2012 Service Contract.

Global Link again raises its contentions that Hapag-Lloyd violated the service contract itself, alleging that the parties' course of dealing established by the prior service contracts created an expectation that if Global Link failed to satisfy the minimum quantity commitment, Hapag-Lloyd would reduce it to the amount shipped, a standard industry-wide practice. Global Link contends that it is not a just and reasonable practice for Hapag-Lloyd to lead Global Link to believe that the MQC would be reduced, but instead seek to impose punitive liquidated damages provisions once the term of the contract has expired.

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

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

NN. It is not a just and reasonable practice to lead parties through a course of conduct, and through written representations, to believe that an MQC will be reduced or rolled over and then to instead seek to impose punitive liquidated damages provisions once the term of the contract has expired. This conclusion is bolstered by the fact that when Global Link explicitly raised the issue of an MQC adjustment because Hapag's contract rates being offered Global Link were not competitive,

Hapag made it appear that such an adjustment would be forthcoming as it had in years past. Such a bait and switch tactic is not a just and reasonable practice.

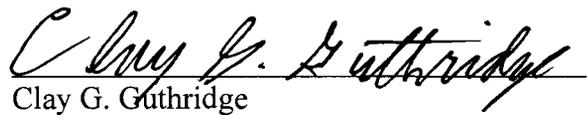
OO. It is not a just and reasonable practice for Hapag to reduce Global Link's allocation of space on its vessels, in recognition of the fact that its rates were not competitive for Global Link's customers, and then to seek to recover under a liquidated damages clause as if no such reduction in allocation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

(Complaint Part V.) For the reasons stated in Part VI.C.(2) above, I find that these are inherently contract issues reserved for the arbitrator.

ORDER

Upon consideration of the Motion to Dismiss filed by respondent Hapag-Lloyd AG, the opposition thereto, and the record herein, and for the reasons stated above, it is hereby

ORDERED that the Motion to Dismiss be **GRANTED**. The Complaint is dismissed with prejudice for failure to state a claim upon which relief can be granted.


Clay G. Guthridge
Chief Administrative Law Judge